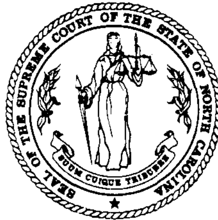
NORTH CAROLINA REPORTS

VOLUME 298

SUPREME COURT OF NORTH CAROLINA



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THE SUPREME COURT
OF
NORTH CAROLINA

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J. PHIL CARLTON

Retired Chief Justices

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PRESTON CORNELIUS[2]	Troutman

EMERGENCY JUDGES

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HAMILTON H. HOBGOOD[3]	Louisburg

1. Appointed 11 January 1980.
2. Appointed 19 January 1980 to succeed Robert L. Gavin who retired 18 January 1980.
3. Retired as Resident Judge Ninth Judicial District and constituted Emergency Judge 31 December 1979.

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EMERGENCY JUDGE

JUDGE	ADDRESS
P. B. BEACHUM, JR.[8]	Charlotte

1. Appointed 12 October 1979.
2. Appointed 1 February 1980 to succeed Ben H. Neville who retired 31 January 1980.
3. Appointed 16 January 1980.
4. Appointed 18 January 1980.
5. Appointed 19 January 1980 to succeed Preston Cornelius who was appointed Special Superior Court Judge 19 January 1980.
6. Appointed 1 November 1979.
7. Appointed 15 February 1980.
8. Retired as 26th District Judge and constituted Emergency Judge 1 February 1980.

ATTORNEY GENERAL OF NORTH CAROLINA

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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 by comity on the dates indicated:

On November 8, 1979, the following individuals were admitted:

THEODORE EDMUND RAST .... Charlotte, applied from Ohio
EUGENE PHILLIP WHETZEL .... Winston-Salem, applied from Ohio
SAMUEL GARDNER WELLMAN .... Winston-Salem, applied from Ohio
WILLIAM I. STODDARD .... Tryon, applied from New York
R. ANTHONY WELCH .... Charlotte, applied from West Virginia

On November 26, 1979, the following individual was admitted:

ALLEN GLENWOOD ROBERTS .... Durham, applied from Virginia

On December 14, 1979, the following individuals were admitted:

MATTHEW J. ARMSTRONG .... Wilmington, applied from New York
JOSEPH HENRY STALLINGS .... New Bern, applied from New York
CHRISTOPHER NICHOLS KNIGHT .... Durham, applied from Wisconsin

Given under my hand and seal, this the 17th day of December, 1979.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1979

STATE OF NORTH CAROLINA v. BUCK JUNIOR GOODMAN

No. 46

(Filed 4 September 1979)

1. **Homicide § 28.6— defense of intoxication—instruction not required**

   The trial court in a first degree murder case was not required to charge the jury upon the defense of intoxication, though there was evidence that defendant had been drinking prior to commission of the crime, since there was no evidence which showed that defendant's capacity to think and plan was affected by drunkenness.

2. **Homicide §§ 25, 31— first degree murder—issues of premeditation and deliberation and felony-murder—requiring jury to specify basis of verdict—use of written verdict proper**

   Where an indictment for murder and the evidence at trial would support a guilty verdict upon the theory of premeditation and deliberation or upon the application of the felony-murder rule, it was appropriate for the trial court to require the jury to specify in its verdict the theory upon which they found defendant guilty of first degree murder so that defendant could be properly sentenced; moreover, G.S. 15A-1237 authorizes the use of a written verdict setting out the permissible verdicts recited by the judge in his instructions, in this case, guilty by reason of the felony-murder rule or guilty by reason of premeditation and deliberation, and by using this procedure the trial court did not confuse the jury or inadvertently express an opinion as to defendant's guilt.

3. **Criminal Law § 126.2— inquiry to clarify jury's verdict—no coercion of verdict**

   The trial court in a first degree murder case did not err in questioning the jury about their verdict for purposes of clarity rather than sending them back for further deliberations, and the court's questions to the jury did not

suggest a desired verdict where the clerk asked the jury whether defendant was guilty of first degree murder by premeditation and deliberation or guilty of first degree murder by the felony-murder rule; the jury foreman answered yes; and the court's questions were asked simply to resolve that ambiguity and to determine the basis for the verdict.

4. **Criminal Law § 138.4; Homicide § 31.1— first degree murder—premeditation and deliberation and felony-murder rule as basis—separate punishment for underlying felonies proper**

Where defendant was found guilty of first degree murder based upon premeditation and deliberation and the felony-murder rule, the trial court could disregard the felony-murder basis of the homicide verdict and impose additional punishment upon defendant for the underlying crimes of armed robbery and kidnapping.

5. **Criminal Law § 135.4— first degree murder—sentencing hearing—aggravating circumstance of prior felony conviction**

In order for the trial court to instruct the jury during the sentencing phase of trial on the aggravating circumstance of G.S. 15A-2000(e)(3),there must be evidence that defendant had been convicted of a felony, the felony for which he was convicted involved the "use or threat of violence to the person," and the conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose.

6. **Criminal Law § 135.4— first degree murder—sentencing hearing—aggravating circumstance of robbery or kidnapping**

Instruction during the sentencing phase of trial on the aggravating circumstance of G.S. 15A-2000(e)(5), that the capital felony "was committed while the defendant was engaged . . . in the commission of . . . any robbery . . . [or] kidnapping" or other enumerated felony, is appropriate only when defendant is convicted of first degree murder upon the theory of premeditation and deliberation.

7. **Criminal Law § 135.4— first degree murder—sentencing hearing—aggravating circumstance of especially heinous, atrocious or cruel crime**

In order for the trial court to instruct the jury during the sentencing phase of trial on the aggravating circumstance of G.S. 15A-2000(e)(9), that the "capital felony was especially heinous, atrocious, or cruel," there must be evidence that the brutality involved in the murder in question exceeded that normally present in any killing. The trial court properly instructed on this circumstance where the evidence revealed that decedent was shot several times and then cut repeatedly with a knife; still living, he was placed in the trunk of a car where he remained for several hours; his struggle to escape from the trunk could be heard; decedent, still in the trunk, was then driven into another county where he was taken from the car; and he was placed upon the ground with his head resting upon a rock and then shot twice through the head.

8. **Criminal Law § 135.4— first degree murder—sentencing hearing—aggravating circumstance of eliminating witness**

In order for the trial court to instruct the jury during the sentencing phase of trial on the aggravating circumstance of G.S. 15A-2000(e)(4), there

must be evidence from which the jury can infer that at least one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for his crime, and the mere fact of death is not enough to invoke this factor. Evidence in this case was sufficient for the jury to infer that defendant killed his victim to avoid or prevent his arrest where there was testimony that after the victim was shot and cut, but before he was killed, defendant stated that he "was afraid if the police found Lester that he would tell what had been done to him . . ."; defendant and his companion in crime then planned to bury the victim; and at some later point they decided to shoot him and place him on a railroad track where his body would be mangled by a passing train.

9. Criminal Law § 135.4— first degree murder—sentencing hearing—two aggravating circumstances submitted on same evidence—error

The trial court in a first degree murder prosecution erred in instructing the jury during the sentencing phase on aggravating circumstances pursuant to G.S. 15A-2000(e)(4)—that the felony was committed for the purpose of avoiding or preventing a lawful arrest—*and* pursuant to G.S. 15A-2000(e)(7)—that the felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, since the court submitted the two issues on the same evidence; and such error was prejudicial to defendant in light of the highly questionable quality and credibility of the State's primary evidence.

10. Criminal Law §§ 86.1, 135.4— illegally seized bullets—admissibility for impeachment purposes

The trial court erred in allowing the State to introduce illegally seized .380 caliber bullets at the sentencing hearing for the purpose of impeaching defendant since there was no proper foundation laid for introduction of the evidence.

11. Criminal Law § 135.4— first degree murder—sentencing hearing—intoxication as mitigating factor

When a criminal defendant contends that his faculties were impaired by intoxication, such intoxication must be to a degree that it affects defendant's ability to understand and control his actions before the court is required to instruct on such intoxication as a mitigating factor pursuant to G.S. 15A-2000(f)(6).

12. Criminal Law § 135.4— first degree murder—sentencing hearing—mitigating factors—duty of court to point out

G.S. 15A-2000(f)(9) providing that the jury may consider as a mitigating factor "any other circumstance arising from the evidence which the jury deems to have mitigating value" does not require the court to point to every factor arising from the evidence which might conceivably be considered by the jury under that provision.

13. Criminal Law § 135— death sentence—discretion of jury

There was no merit to defendant's contention that the trial court erred in failing to instruct the jury that they might recommend a sentence of life im-

prisonment even though they found the aggravating circumstances outweighed those in mitigation, since such an instruction would permit the jury to disregard the procedure outlined by the legislature and impose the sanction of death at their own whim.

14. Criminal Law § 138— severity of sentence—consideration on appeal

Though G.S. 15A-2000(d)(2) gives the Supreme Court the authority to review a sentence to determine if it is disproportionate to the sentences imposed in similar cases, such review function should be employed only in cases where both phases of the trial of a defendant have been found to be without error.

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

Justice HUSKINS concurring and joins in the concurring opinion of Justice CARLTON.

Justice CARLTON concurring.

APPEAL by defendant from *Braswell, J.*, 9 October 1978 Regular Criminal Session, CUMBERLAND Superior Court.

Upon pleas of not guilty defendant was tried on bills of indictment charging him with (1) murder, (2) armed robbery and (3) kidnapping. The alleged victim of all three offenses was Lester Collins.

Principal evidence against defendant was provided by Annie Lois Goins Shamback (Lois) who testified under a grant of immunity pursuant to G.S. 15A-1052. In return for her "truthful testimony" against Charles D. Goins and defendant, the state agreed to dismiss charges against her relating to the murder, robbery and kidnapping of Lester Collins. (Charles D. Goins was tried prior to the date of defendant's trial.) Her testimony is summarized in pertinent part as follows:

At the time of defendant's trial (October 1978) she was 23 years of age and had been married approximately six months. She had two children that were born prior to her marriage. Charles Goins (Charles) was her brother and Collins was married to her sister. On 2 July 1977 her sister was a patient at Dorothea Dix Hospital.

On 2 July 1977 she and her young son lived with defendant at Lumberton, N.C. She and defendant were not married to each other but had lived together for approximately 18 months prior to

said date. Charles had been staying with them for about a week, his home being near Fayetteville.

Late in the afternoon of said date she, defendant and Charles went to Fayetteville in her white 1968 Ford Fairlane. Their destination was Charles' home but they stopped at a bar in East Fayetteville, went in, and defendant and Charles "had a few beers". When they returned to the car they discovered that a C.B. and scanner belonging to defendant had been taken from the car while they were in the bar. Defendant had reason to believe that Magaline Tyler's brother was one of the persons who stole the C.B. and scanner and insisted on going to her house which was not far from the bar.

When defendant, Lois and Charles left the bar, defendant was driving. After driving a short distance in the neighborhood, defendant and Charles got out of the car and told Lois to circle the area while they looked for the person or persons who stole the equipment from the car. After circling for some 30 minutes, Lois drove the car to Magaline Tyler's home. Defendant came out of the house and Collins was following him, asking defendant to take him home. At first, defendant refused, but Collins kept on asking and eventually defendant said he would take him home. Collins had been drinking.

Defendant got under the wheel, Collins got in the backseat and Lois and Charles rode on the front seat. Defendant was quite angry about his C.B. and scanner being stolen and was also angry with Lois for circling so long.

Defendant then drove the car down Cedar Creek Road east of Fayetteville to Lois' mother's home which was also Charles' home. When they arrived there, Charles went into the house to get some clothes. Collins remained in the backseat of the car and wanted defendant to carry him back to Fayetteville.

The four of them left the Goins home and were situated in the car in the same positions as when they arrived there. They proceeded to drive down Cedar Creek Road and while riding Charles leaned over and whispered something to defendant. Defendant then turned the automobile down a dirt road, went to the end of it and turned around in the direction of Cedar Creek Road. It was then "way after dark".

Defendant stopped the car on the dirt road and got out. He told Collins to get out. Defendant had a gun and as Collins got out of the car, defendant hit Collins on the side of his head with the gun. Collins told defendant he hadn't done anything, but defendant hit him again with the gun, bringing blood from Collins' face. Charles and Lois remained in the car while defendant and Collins went behind the car.

When the two men reached the rear of the car, Lois saw Collins advancing on defendant and then heard three shots fired. Before the shots were fired, Lois could not see what Collins was doing to defendant, "just his body going toward" defendant.

After the shots were fired, Charles got out of the car and went to the back of it. Lois could hear "moaning" and saw that Collins was on the ground. She got out of the car and saw Charles and defendant standing beside Collins who was on the ground a short distance from the trunk of the car. She could tell that Collins' clothing was wet. Defendant and Charles then took Collins and put him in the trunk of the car. They then discussed what to do with Collins.

Defendant said that he knew a place where they could bury Collins and it would take a long time for the police to find him. Collins was alive at that time. Defendant then told Lois to drive the car because he was cut on his left side.

At defendant's instruction, Lois drove the car to Lumberton to defendant's home. Collins was still in the trunk and was "begging for his life". All of the occupants of the car except Collins got out and went into defendant's home. There was a pool of blood on the driver's side of the car. Lois got a washrag and washed the blood off the car. While she was doing that, defendant was looking for a shovel with which to carry out defendant's and Charles' plan to bury Collins.

When Collins begged defendant to let him out of the trunk, defendant and Charles both told him that he might as well shut up because he was going to die anyway. At defendant's request Lois cleaned up his wound and placed a bandage on it. His shirt had blood on it and he took it off after which Lois washed blood off the back of his pants.

While at defendant's home Charles wiped blood off of a knife that he had. After staying at the home for about thirty minutes, they all left with Lois driving and Collins remaining in the trunk. After Lois drove some distance into Robeson County, defendant decided that he would drive. He stated that he had changed his mind about burying Collins and knew where he wanted to carry him.

With defendant driving they proceeded to the village of Buie in Robeson County. At that point defendant drove on to a service road adjacent to the Seaboard Coastline Railroad and proceeded north. After travelling on that road for a reasonable distance, defendant turned the car around and stopped. Defendant got out and opened the trunk of the car after which Charles and Lois got out. Defendant cursed Collins and told him to get out. Defendant and Charles then took Collins out of the trunk and laid him on some rocks. Defendant had a gun which he then pointed down at Collins' head and fired two shots. Lois had reentered the car at the time the shots were fired but immediately got out and Charles had the gun at that time. Charles also had Collins' billfold.

Defendant and Charles then took Collins by his arms and dragged him onto the railroad track. Defendant stated that a train would come along and "do away with him where the police would have a hard time recognizing who he was".

Thereafter, defendant, Lois and Charles got back into the car with defendant driving. Charles had the gun and said that "it was a good shooting little gun". Defendant stated that he shot Collins between his eyes and that Charles shot him in the back of his head.

Defendant, Lois and Charles then proceeded to ride around in Robeson County, and as soon as it was light they went to the home of some of defendant's relatives where they cleaned blood from the trunk of the car. Thereafter they went to bed at a relative's home and later in the day returned to Fayetteville.

On cross-examination Lois testified that defendant worked until noon on 2 July 1977. When he came home after work she noticed that he had been drinking. Defendant and another man brought a six-pack of beer to the home. Defendant, Charles, and

the other man drank the beer. Defendant drank more beer at the bar in East Fayetteville and consumed some more a little later.

Other evidence presented by the state tended to show:

On 2 July 1977 Collins lived and worked on the farm of Henry Clark approximately 1.5 miles from Fayetteville on Cedar Creek Road. At around 1:00 p.m. on that day, Mr. Clark paid Collins $95 or $97 for work which he had done.

At around 11:30 that night two women saw a pool of blood on a dirt road some 300 feet from Cedar Creek Road. The next morning police were notified about the blood. Upon arrival at the scene, in addition to the blood, they found three spent casings, two spent bullets, a knife and a box of matches in or near the blood. The knife was identified as one belonging to, or similar to one belonging to, Collins. The home of Leon Goins, father of Lois and Charles, was located in the general area where the blood was found.

At around 3:00 a.m. on 3 July 1977 Miller Maynor was driving his car on the service road adjacent to the railroad north of Buie. He passed a light colored economy car occupied by three persons and shortly thereafter he observed a human body on the railroad track. Knowing that an Amtrak train was due to pass at about that hour, he went to the body. Upon determining that the person was dead, he dragged the body off the track. He then went to the police station in Pembroke, reported what he had found and then returned to the scene where he was met by Deputy Sheriff Garth Locklear.

A rescue unit removed the body to Southeastern General Hospital in Lumberton where Dr. Bob Andrews, a pathologist, performed an autopsy later that morning. Dr. Andrews discovered extensive cuts to Collins' forehead, face, neck, back, chest, thigh, arms and hands. He also found gunshot wounds in Collins' neck, groin, leg and thigh. He removed a bullet from the victim's neck and another one from his brain. In Dr. Andrews' opinion, death was caused by the shot to the victim's head but either shot could have caused death. It was his further opinion that if the victim had not been shot, he could have died from the cuts. A test of the victim's blood revealed 140 milligrams of alcohol per hundred milliliters of blood, the equivalent of .14 on a breathalyzer machine.

Defendant's evidence consisted of the testimony of Charles Goins. Charles' testimony is substantially consistent with the version of events testified to by Lois with one major exception. He stated that he was the person who shot and cut Collins; that he did so because Collins mistreated his sister; and that defendant had nothing to do with the murder, "wasn't with" him and Lois when the killing occurred and "hadn't done nothing".

On cross-examination Charles testified that he had been convicted for breaking and entering, larceny, assault with a deadly weapon, driving under the influence, escaping from prison, driving while license permanently revoked and assault inflicting serious injury. He further testified that "I carry a knife and keep it pretty sharp. If somebody messes with me, I will cut them. It don't take much for me to cut somebody."

The jury returned a verdict finding defendant guilty of first-degree murder by premeditation and deliberation and by the felony murder rule. They also found him guilty of armed robbery and kidnapping.

The court then recessed the trial until the following Monday when proceedings were resumed before the same jury pursuant to G.S. 15A-2000 et seq. to determine if defendant's sentence on the murder conviction would be death or life imprisonment. The state presented evidence summarized as follows:

Gertrude Tyler testified that she was at the Tyler home on the evening of 2 July 1977; that while there she saw Collins, Charles, Lois and defendant; that Collins had been drinking wine and he asked defendant to "run him home"; that defendant appeared not to hear Collins and later he asked him again; that defendant then told Collins "Yeah, I'll run you home. I'll run you to hell, too, while I'm at it"; and that Collins then got into the car with defendant and they rode away. Counsel for defendant stipulated that on 31 January 1967 defendant was convicted in the Superior Court for Robeson County of three counts of armed robbery resulting from a single occurrence on 4 January 1966.

Defendant testified as a witness for himself at the sentencing phase of the trial. His version of the events occurring on 2 July 1977 combines elements of the testimony of Lois and Charles. The gist of defendant's testimony is that he was in the car with them

when the shooting and cutting of Collins took place, but that he did not participate in the killing and attempted unsuccessfully to prevent Charles from hurting Collins.

Defendant also introduced into evidence a court docket showing that prior to defendant's trial Charles Goins was allowed to plead guilty, and did plead guilty, to the offense of accessory after the fact of murder "in these cases" and received a prison sentence of six years.

By way of rebuttal, the state presented a police officer who testified that on 5 July 1977 he searched the automobile in question and in the glove compartment found a box of Remington-Peters .380 ammunition—29 unfired bullets.

Issues as to punishment were submitted to and answered by the jury as follows:

1. Do you find beyond a reasonable doubt the presence of one or more of the following aggravated circumstances?

   a. The defendant had been previously convicted of a felony involving the use or threat of violence to the person, to-wit: three counts of the felony of armed robbery in Robeson County Superior Court on January 31, 1967, for offenses committed on January 4, 1966.

      ANSWER: YES

   b. The capital felony of murder in the first degree was committed for the purpose of avoiding or preventing a lawful arrest.

      ANSWER: YES

   c. The capital felony was committed while the Defendant was engaged in the commission of or attempt to commit a robbery or kidnapping, either or both.

      ANSWER: YES

   d. The capital felony was committed to disrupt or hinder the lawful exercise of the enforcement of the criminal law, to-wit: the arrest of the Defendant for the offense of robbery or kidnapping, either or both.

      ANSWER: YES

e. The capital felony was especially heinous, atrocious, or cruel.

ANSWER: YES

2. Do you find that one or more of the following mitigating circumstances existed at the time the murder was committed?

a. The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

ANSWER: NO

b. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

ANSWER: NO

c. Do you find any other circumstance arising from the evidence which the jury deems to have mitigating value.

ANSWER: YES

3. Do you find beyond a reasonable doubt that the mitigating circumstances are insufficient to outweigh the aggravating circumstance?

ANSWER: YES

4. Do you find beyond a reasonable doubt that the aggravating circumstance is sufficiently substantial to call for the imposition of the death penalty?

ANSWER: YES

The jury recommended that a sentence of death be imposed on the defendant. Pursuant thereto the court imposed the death sentence.

As to the armed robbery and kidnapping charges, the court imposed a life sentence in each case, the sentence in the kidnapping case to begin at expiration of sentence in the armed robbery case.

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

Harold D. Downing for defendant-appellant.

BRITT, Justice.

Pursuant to G.S. 15A-2000 *et seq.*, this case was tried in two phases: (1) to determine the guilt or innocence of defendant and (2) to determine his sentence for first-degree murder following his conviction of that charge. We will discuss the errors assigned under each phase.

PHASE I – GUILT DETERMINATION

[1] By his first assignment of error defendant contends that, in connection with the charge of first-degree murder, the court erred in failing to instruct the jury concerning the effect of voluntary intoxication upon the elements of intent, premeditation and deliberation. We find no merit in this assignment.

"It is well settled that voluntary drunkenness is not a legal excuse for crime; but where a specific intent, or premeditation and deliberation, is essential to constitute a crime or a degree of a crime, the fact of intoxication may negative its existence. Thus, while voluntary drunkenness is not, per se, an excuse for a criminal act, it may be sufficient in degree to prevent and, therefore, disprove the existence of a specific intent, such as the intent to kill." 4 Strong's N.C. Index 3d, Criminal Law § 6, p. 43, and cases cited therein. To reduce first-degree murder to second-degree murder the defendant's intoxication must be so great that he is "utterly unable" to form a deliberate and premeditated purpose to kill. *State v. Propst*, 274 N.C. 62, 72, 161 S.E. 2d 560, 567 (1968); *see also, State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975), *death sentence vacated*, 428 U.S. 903, 96 S.Ct. 3206, 49 L.Ed. 2d 1208 (1976); *State v. Bunn*, 283 N.C. 444, 196 S.E. 2d 777 (1973); *State v. Wilson*, 280 N.C. 674, 187 S.E. 2d 22 (1972).

Whether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions; no inference of the absence of deliberation and premeditation arises as a matter of law from intoxication. *State v. Hamby*, 276 N.C. 674, 174 S.E. 2d 385 (1970), *vacated on other grounds*, 408

U.S. 937, 92 S.Ct. 2862, 33 L.Ed. 2d 754 (1972). Ordinarily, then, the degree of intoxication and its effect upon the elements of premeditation and deliberation is an issue for the jury unless the evidence is insufficient to warrant submission of the issue to them. *Id.* the evidence offered at the first phase of the trial in this case was, however, insufficient to raise the issue of intoxication to a degree precluding premeditation and deliberation, and the trial court did not err in refusing to charge thereon. *State v. McLaughlin, supra*; *State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974), *vacated on other grounds*, 428 U.S. 904, 96 S.Ct. 3212, 49 L.Ed. 2d 1212 (1976); *State v. Cureton*, 218 N.C. 491, 11 S.E. 2d 469 (1940).

In *McLaughlin* there was ample evidence that the defendant had been drinking, but four witnesses who testified that defendant had been drinking prior to and at the time of the incident in question also testified that defendant was not drunk. In upholding the trial court's refusal to instruct on intoxication as a defense, the court said that there was no "evidence that defendant's mind was so intoxicated and his reason so overthrown that defendant could not form a specific intent to kill." 286 N.C. 597 at 609.

In *Fowler* the court again upheld the trial court's refusal to instruct on the defense of intoxication, noting that there was evidence of defendant's drinking but that the only evidence of drunkenness was his own exculpatory statement.

In *Cureton* there was evidence that defendant was drinking at the time of the incident, but the record was "devoid of any suggestion that defendant's mental processes were deranged." 218 N.C. 491 at 496. Holding that absent such testimony there was no duty to instruct on the defense of intoxication, the court said, "there must be some evidence tending to show that the defendant's mental processes were so overcome by the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan." *Id.* at 495.

We believe that the decision on this point in this case is controlled by the cases which we have cited and discussed. Admittedly, there is evidence in this record which tends to establish that defendant had been drinking. Lois testified that defendant had been drinking when he came home from work, but that she did not know how much, that he shared a six-pack of beer with two

other men on the afternoon of the murder, and that he had "some beer" at a bar at which they stopped for less than thirty minutes before decedent got into the car with them. She also testified that there was beer in the car when she, her brother, defendant and the victim were riding together, but that she did "not remember if Buck [defendant] was drinking while he was driving." Her testimony fails to show that defendant's mental capacities were affected in any way by the beer which he consumed. To the contrary, her testimony shows that defendant was capable of driving, gave her directions when she drove, led the group on a search through a neighborhood looking for a CB and scanner stolen from his car, and participated in planning a scheme for disposing of the victim's body. Her testimony tends to show that defendant, despite the fact that he had been drinking, was capable of premeditation and deliberation and could form the specific intent to kill which is an essential element of first-degree murder.

The other state's witness who made reference to defendant's drinking clearly stated that defendant was "not in a drunken condition." Defendant himself presented no evidence at the first phase of the trial which tended to show that he was intoxicated. The only witness presented in his behalf testified that he did not see defendant on the day which the murder occurred. On this evidence we hold that the court was not required to charge the jury upon the defense of intoxication. There was no evidence which showed that defendant's capacity to think and plan was affected by drunkenness.

By his second assignment of error defendant contends the court improperly required the jury to specify in its verdict the legal theory upon which they found defendant guilty of first-degree murder. He argues that the trial judge, by the manner in which he explained this procedure to the jury, inadvertently expressed an opinion as to defendant's guilt. Further, he argues that instructing on both the theory of premeditation and deliberation and the theory of felony-murder was confusing to the jury.

[2] Before examining the specific charge given the jury, we think it appropriate to restate two principles which clarify the rationale underlying the trial court's decision to require that the jury specify in its verdict the theory upon which they found defendant guilty of first-degree murder. (1) Where the conviction

of a defendant for first-degree murder is based upon the felony-murder rule and there is no proof of malice, premeditation and deliberation, proof that the murder was committed in the perpetration of the felony is an "essential and indispensable element in the state's proof," and a verdict of guilty on the underlying felony *cannot* provide a basis for additional punishment. *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). (2) Where the conviction of a defendant for first-degree murder is based upon proof of malice, premeditation and deliberation, proof of an underlying felony—although that felony be part of the same continuous transaction—is *not* an essential element of the state's homicide case, and the defendant *may* therefore be sentenced upon both the murder conviction and the felony conviction. *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976).

In the case at hand defendant was indicted for murder, armed robbery, and kidnapping. The murder indictment was drawn in the manner prescribed by G.S. 15-144 and would support a guilty verdict based upon the theory of premeditation and deliberation or upon the application of the felony-murder rule. *State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333, *death sentence vacated*, 429 U.S. 809, 97 S.Ct. 46, 50 L.Ed. 2d 69 (1976); *State v. Moore*, 284 N.C. 485, 202 S.E. 2d 169 (1974); *State v. Thompson*, *supra*. The evidence at trial was sufficient to justify submission of the charge of first-degree murder under either theory. There was also sufficient evidence to submit to the jury the issue of defendant's guilt or innocence of the armed robbery and kidnapping charges. If defendant were found guilty of first-degree murder solely by virtue of the felony-murder rule, the court would be precluded from imposing upon him additional punishment for the underlying felony; if defendant were found guilty of first-degree murder pursuant to premeditation and deliberation, and if the jury also found him guilty on one or more other felony charges, the court would not be so precluded. Thus, it was appropriate that the court determine the basis of the jury's verdict so that defendant might be properly sentenced.

In addition, G.S. 15A-1237 authorizes the use of a written verdict. The jury's verdict "must be in writing, signed by the foreman, and made a part of the record of the case." G.S. 15A-1237(a). This section is intended to aid the trial court in avoiding the taking of verdicts which are flawed by the inadver-

tent omission of some essential element of the verdict itself. "It is contemplated that the jury will be given a verdict form setting out the permissible verdicts recited by the judge in his instructions." Official Commentary, G.S. 15A-1237. As the court in this case explained to the jury, there were two permissible guilty verdicts to the charge of first-degree murder, guilty by reason of the felony-murder rule or guilty by reason of premeditation and deliberation. If the jury's verdict were general, not specifying the theory upon which guilt was found, the court would have no way of knowing what theory the jury used and would not have proper basis for passing judgment. If, as the court required in this case, the jury's verdict specified the theory, the court could sentence appropriately. We believe the required use of a specific written verdict in this case is consistent with the intent of G.S. 15A-1237 and that it enabled the trial court to avoid the difficulty which that provision seeks to alleviate.

Having decided that the procedure used by the trial court was appropriate and that there was good reason for its use, the remaining question is whether the court, in using this procedure, confused the jury or inadvertently expressed an opinion as to defendant's guilt. We have carefully scrutinized this aspect of the court's instructions to the jury, and we perceive no prejudicial error.

Defendant has assigned error to the following excerpt from the charge:

> Members of the jury, I instruct you that if you should find the defendant guilty of murder in the first degree, we also require you in this case, because there are two theories and two applications of the law, to write down that of which you have found the defendant guilty. If it should be that you have found him guilty beyond a reasonable doubt of both murder in the first degree by premeditation and deliberation and guilty of murder in the first degree by the felony murder rule, we would request that you so write in both of those as your verdict. Remembering all of the while there can only be one charge and one ultimate conviction, if any, of murder in the first degree. There are not two separate verdicts of murder in the first degree, but your return of a verdict in this elaborated form, if he be guilty at all, would then as a

> matter of law let all know your particulars of your specific verdict. By having so instructed you, I do not mean to infer in any manner, whatsoever, what your verdict should be to this charge or to any of the other charges in the case. Below the space for your verdict is a space for the date and a line for the foreman of the jury to sign. Since the first of July of this year, it is the requirement of our law that jury verdicts shall be in writing and shall be signed by the foreman of the jury. The other members of the jury are not required to sign.

Apparently, his argument is that by linking the two theories with the word "and" rather than "or," the court implied that defendant was guilty of first-degree murder. This argument finds no support when this portion of the charge is examined in context with the remainder.

When the judge began his instruction on the murder charge, he said:

> Under the law and the evidence in this case on this charge, it is your duty to return one of the following three verdicts: that is to say, guilty of murder in the first degree or guilty of murder in the second degree or not guilty. Now, as you come to consider whether or not he is guilty or not guilty of murder in the first degree, there are two separate theories upon which the State has proceeded and under which evidence has been offered; and those theories are whether or not the defendant be guilty of murder in the first degree by premeditation and deliberation or whether or not he be guilty of murder in the first degree by the felony murder rule or any lesser included offense or not guilty. I will discuss this aspect of it with you further as I come at the close of the trial to discuss with you your actual return of a written verdict and the form which will be handed to you.

The judge then charged on each of the two theories, making it clear that, "[i]n the alternative," the jury might find defendant guilty upon either of them alone or both of them together. We do not believe this instruction confused the jury, nor do we find any expression of opinion by the court in the charge. Twice during this portion of the instructions the judge told the jury that they were not to infer from the instruction, "in any manner, what-

soever," what their verdict should be. This assignment of error is overruled.

[3] By his third assignment of error defendant contends the court improperly accepted an incomplete jury verdict at the conclusion of the first phase of the trial. He argues that the trial court asked questions of the jury which suggested a desired verdict to them. His contention is that the court should have reinstructed the jury upon the issues submitted to them and required them to return to the jury room for further deliberations. We do not agree.

When the jury concluded its deliberations and reconvened in open court to render the verdict, the following exchange occurred:

> CLERK: Members of the jury, look upon the defendant. You say Buck Junior Goodman is guilty of murder in the first degree by premeditation and deliberation, or guilty of murder in the first degree by the felony murder rule. Is that your verdict?
>
> FOREMAN: Yes.
>
> CLERK: So say you all?
>
> THE JURY ANSWERS AFFIRMATIVE.
>
> COURT: For clarity, members of the jury, are you saying that you are returning as your verdict that he is guilty of murder by both of those propositions of law?
>
> FOREMAN: Murder in the first degree.
>
> COURT: By premeditation and deliberation, and guilty of murder in the first degree by the felony murder rule under both principles of law? Is that the verdict of the jury?
>
> FOREMAN: It was murder in the first degree by premeditation, and it was our understanding that you also wanted us to put that other in there also.
>
> COURT: If that was what you found beyond a reasonable doubt.
>
> FOREMAN: If we reached premeditation, which we did.

COURT: For clarity, am I to understand that the verdict of the jury in this charge is that the defendant is guilty of murder in the first degree by premeditation and deliberation?

FOREMAN: Yes sir.

COURT: For clarity, am I to understand that the verdict of the jury is guilty of murder in the first degree by the felony murder rule in addition to your finding of guilty of murder in the first degree by premeditation and deliberation?

FOREMAN: Yes.

COURT: Is that the verdict of the jury on this charge so say you all?

JURY: Yes.

The record also discloses the following:

THE CLERK POLLS THE JURY IF THE VERDICT OF GUILTY OF MURDER IN THE FIRST DEGREE BY PREMEDITATION AND DELIBERATION AND GUILTY OF MURDER IN THE FIRST DEGREE BY THE FELONY MURDER RULE IS THEIR OWN INDIVIDUAL VERDICT AND IF EACH JUROR STILL ASSENTS THERETO. ALL JURORS ANSWER IN THE AFFIRMATIVE.

We hold that this exchange was not improper and that the court was not required to return the jury to the jury room for additional deliberation. The court may make inquiry of the jury to ascertain the meaning of its verdict, thereby eliminating any ambiguity or uncertainty. *Davis v. State*, 273 N.C. 533, 160 S.E. 2d 697 (1968). In doing so the judge must not suggest to the jury what he believes to be the proper verdict. *State v. Godwin*, 260 N.C. 580, 133 S.E. 2d 166 (1963); *State v. Gatlin*, 241 N.C. 175, 84 S.E. 2d 880 (1954).

In this case the court was attempting to dispel the ambiguity which was created by the jury foreman's response to the clerk's first question. The judge made certain that the jury understood that his questions were asked "for clarity" and that they were not to respond affirmatively to any question he asked unless the issue about which he questioned them was one which they had themselves already resolved beyond a reasonable doubt. There was no need to return them to the jury room for further deliberation as they had already indicated that they found defendant guilty of

first-degree murder. The thrust of the court's questions was directed at determining the basis for the verdict, a necessary determination upon which we have already commented. This assignment of error is overruled.

[4] By his ninth assignment of error defendant contends that he was improperly sentenced for the offenses of kidnapping and armed robbery as those offenses merged with the murder conviction. As we have already said, no merger of the felony occurs when the homicide conviction is based upon the theory of premeditation and deliberation. *State v. Thompson, supra.* Defendant was found guilty by virtue of premeditation and deliberation as well as by application of the felony-murder rule. Thus, the court could disregard the felony-murder basis of the homicide verdict and impose additional punishment upon defendant for the crimes of armed robbery and kidnapping. *State v. Tatum, supra.* This assignment of error is overruled.

For the reasons stated, we find no error in the guilt determination phase of defendant's trial and the judgments entered on the kidnapping and armed robbery charges.

PHASE II – SENTENCE DETERMINATION

By his fourth assignment of error defendant contends that Article 100 of G.S. Chapter 15A (G.S. 15A-2000 et seq.) is unconstitutional. In accord with a well-established precept of appellate review, this court refrains from deciding constitutional questions when there is an alternative basis upon which a case may properly be decided. *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979); *State v. Crabtree*, 286 N.C. 541, 212 S.E. 2d 103 (1975); *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129 (1955). Because of our decision in the sentence determination phase of this case, it is not necessary that we rule upon the constitutionality of G.S. 15A-2000 et seq. at this time. We conclude that there was error in the instructions given to the jury at the sentencing phase of the trial.

The general scheme of our death penalty statute enacted by the 1977 General Assembly is: Upon conviction or adjudication of guilt of a defendant of a capital felony, the court conducts a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. G.S. 15A-2000(a)(1). Instructions determined by the trial judge to be warranted by the evidence are given in his charge to the jury

prior to its deliberation in determining the sentence. The judge should instruct that the jury must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances enumerated in G.S. 15A-2000(e) and (f) which are supported by the evidence, and he should furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances. After hearing the evidence, arguments of counsel and instructions of the court, the jury must deliberate and render a sentence recommendation based upon (1) whether any sufficient aggravating circumstance or circumstances as enumerated in the statute exist, (2) whether any sufficient mitigating circumstance or circumstances as enumerated in the statute which outweigh the aggravating circumstance or circumstances found, exist, and (3) based on these considerations, whether the defendant should be sentenced to death or to life imprisonment. G.S. 15A-2000(b).

G.S. 15A-2000(d) provides:

(d) Review of Judgment and Sentence.—

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases

until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

Read together, G.S. 15A-2000(d)(1) and (d)(3) empower this court to review errors assigned in the trial and sentencing phases. When prejudicial error is found, the court must order a new sentencing hearing.

In the case at hand, after evidence and arguments were presented at the sentencing phase, the court submitted issues upon the aggravating circumstances enumerated in G.S. 15A-2000 (e)(3), (e)(4), (e)(5), (e)(7), and (e)(9). We think the court erred in submitting issues under both subsections (e)(4) and (e)(7) and that because thereof defendant should receive a new sentencing hearing. We will examine the various provisions on which issues of aggravating circumstances were submitted.

1.

[5] G.S. 15A-2000(e)(3) states that one of the aggravating factors which may justify the imposition of the death penalty is the fact that the "defendant had been previously convicted of a felony involving the use or threat of violence to the person." This section requires that there be evidence that (1) defendant had been convicted of a felony, that (2) the felony for which he was convicted involved the "use or threat of violence to the person," and that (3) the conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose. If there is no such evidence, it would be improper for the court to instruct the jury on this subsection.

In *State v. Rust*, 197 Neb. 528, 250 N.W. 2d 867, *cert. denied*, 434 U.S. 912, 98 S.Ct. 313, 54 L.Ed. 2d 198 (1977), defendant contended that the sentencing authority's finding that he had previously been convicted of a felony "involving the use or threat of violence to the person" was inconsistent with a finding that

this factor was not present in the case of *State v. Ell*, 196 Neb. 800, 246 N.W. 2d 594 (1976). In *Rust* the state offered as evidence a record of defendant's 1969 felony conviction for assault with intent to do great bodily harm; in *Ell* the state's evidence showed only that defendant had been charged with a similar offense. Overruling Rust's contention, the Nebraska court held that the state must present "proof of actual guilt" to sustain a finding that this aggravating circumstance was present. When the state's evidence showed only that a defendant had been charged with a felony as opposed to a conviction for that crime, it was not inconsistent to find that the aggravating factor set out in this provision had not been shown to exist. "Clearly the language of that subsection excludes the possibility of considering mere arrests or accusations as factors in aggravation." *Provence v. State*, 337 So. 2d 783 (Fla. 1976) *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed. 2d 1065 (1977). It is improper to instruct the jury upon the factor enumerated in subsection (e)(3) when there is no evidence which tends to show a felony conviction. Also, the felony for which the defendant has been convicted must be one involving threat or use of violence to the person. It cannot, under this provision, be a crime against property.

Finally, we believe that the "previously convicted" language used by the legislature in subsection (e)(3) refers to "criminal activity conducted prior to the events out of which the charge of murder arose." *State v. Stewart*, 197 Neb. 497, 250 N.W. 2d 849 (1977); *see also, State v. Rust, supra*; *State v. Holtan*, 197 Neb. 544, 250 N.W. 2d 876, *cert. denied*, 434 U.S. 912, 98 S.Ct. 313, 54 L.Ed. 2d 198 (1977). To decide otherwise would lead to unnecessary duplication within the statute, for G.S. 15A-2000(e)(5) enumerates those felonies which occur simultaneously with the capital felony which the legislature deems worthy of consideration by the jury. It would be improper, therefore, to instruct the jury that this subsection encompassed conduct which occurred contemporaneously with or after the capital felony with which the defendant is charged.

In the case *sub judice* defendant stipulated at the sentencing phase that he had been convicted on 31 January 1967 of three counts of armed robbery arising from a single incident which occurred on 4 January 1966. Armed robbery, by definition, involves the use or threat of violence to the person of the victim. Defend-

ant was convicted of this crime, and the conduct upon which his conviction was based did not arise out of the incident upon which the capital felony was charged. The trial court properly refrained from instructing the jury that they might consider under this enumeration the convictions of defendant for armed robbery and kidnapping, which convictions were based upon the same events culminating in the murder of Lester Collins. The evidence in this case was clearly sufficient to justify instruction upon this subsection, and the court properly instructed the jury thereon.

2.

[6] G.S. 15A-2000(e)(5) states that the jury may consider as an aggravating circumstance justifying the death penalty the fact that the capital felony "was committed *while* the defendant was engaged . . . in the commission of . . . any robbery . . . [or] kidnapping . . ." (emphasis added) or other enumerated felony. In *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), we have limited the application of this subsection in felony murder cases. This section needs only brief additional comment, for it is otherwise reasonably free from ambiguity. This subsection differs from (e)(3), which we previously discussed, in that it guides the jury's deliberation upon criminal conduct of the defendant which takes place "while" or during the same transaction as the one in which the capital felony occurs. The previous section, as we have already said, deals with prior conduct. Under the rule set forth in *Cherry*, instruction on this provision is appropriate only when the defendant is convicted for first-degree murder upon the theory of premeditation and deliberation.

In instant case, defendant was found guilty upon the theory of premeditation and deliberation as well as by virtue of the felony murder rule. There was ample evidence that Lester Collins was murdered during the course of a kidnapping and armed robbery, and the court was therefore correct in submitting to the jury the aggravating circumstance defined in subsection (e)(5).

3.

[7] G.S. 15A-2000(e)(9) states that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the "capital felony was especially heinous, atrocious, or cruel." While we recognize that every murder is, at

least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word "especially" the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. *State v. Stewart, supra*; *State v. Rust, supra*; *State v. Simants*, 197 Neb. 549, 250 N.W. 2d 881, *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed. 2d 158 (1977).

The Florida provision concerning this aggravating factor is identical to ours. Florida's Supreme Court has said that this provision is directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974); *see also*, *State v. Alford*, 307 So. 2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed. 2d 1221 (1976). Nebraska has also adopted the Florida construction of this subsection. Both Florida and Nebraska have limited the application of this subsection to acts done to the victim during the commission of the capital felony itself. *State v. Rust, supra*; *Riley v. State*, 366 So. 2d 19 (Fla. 1979). We too believe that this is an appropriate construction of the language of this provision. Under this construction, subsection (e)(9) will not become a "catch all" provision which can always be employed in cases where there is no evidence of other aggravating circumstances. *Harris v. State*, 237 Ga. 718, 230 S.E. 2d 1 (1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed. 2d 251 (1977).

In the case before us the court instructed as follows in his discussion of G.S. 15A-2000(e)(9):

> You are instructed that the words "especially heinous, atrocious or cruel" means extremely or especially or particularly heinous or atrocious or cruel. You're instructed that "heinous" means extremely wicked or shockingly evil. Atrocious means marked by or given to extreme wickedness, brutality or cruelty, marked by extreme violence or savagely fierce. It means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain, utterly indifferent to or enjoyment of the suffering of others.

We hold that this instruction is in accord with the construction of this subsection which we have adopted and that its submission to the jury was proper in light of the evidence in this case. The evidence reveals that decedent was shot several times and then cut repeatedly with a knife. Still living, he was placed in the trunk of a car where he remained for several hours. His struggle to escape from the trunk could be heard. Decedent, still in the trunk, was then driven into another county where he was taken from the car. He was placed upon the ground with his head resting upon a rock and then shot twice through the head. This murder is marked by extremely vicious brutality.

4.

[8] G.S. 15A-2000(e)(4) states that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. . . ." This provision, on its face, is unambiguous, but it must also be construed properly so that instructions on this aggravating circumstance will only be given the jury in appropriate cases. In a broad sense every murder silences the victim, thus having the effect of aiding the criminal in the avoidance or prevention of his arrest. It is not accurate to say, however, that in every case this "purpose" motivates the killing.

This provision in the Florida statute, which is identical to North Carolina's statute in this respect, was examined in *Riley v. State, supra,* a case in which the defendant in the course of an armed robbery at his place of employment shot a witness to the crime who was not a police officer. The Florida court gave this analysis of the provision:

> Appellant urges us to limit this factor to cases where a police officer or other apprehending official is killed. He suggests that unless we do so, every murder could be characterized as an attempt to eliminate a witness, causing another automatic cumulation of factors. The state argues more narrowly, from the evidence in this case, that the only possible motive for the killing was to eliminate an identification witness.

> The record supports the state's view, as the facts admit of only one interpretation. The victim, who well knew and could identify appellant, was immobilized and rendered helpless. He was then executed *after one of the perpetrators expressed a concern for subsequent identification.* Plainly appellant killed to avoid identification and arrest. Appellant concedes this view of the evidence in his brief.
>
> Since the facts show this to be an execution-type killing to avoid lawful arrest, we necessarily reach the broader issue of whether the language of the applicable provision encompasses the murder of a witness to a crime as well as law enforcement personnel. We hold that it does. We caution, however, that the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases. Here, of course, it was. 366 So. 2d 19 at 22. (Notes and citations omitted, emphasis added.)

We believe that the construction given this subsection by the Florida court is substantially correct. We add, by way of caution, that even the killing of a police officer or other law enforcement official will not automatically trigger this provision. If, for example, a deranged person began randomly firing a weapon into a crowd of people and fortuitously killed a law officer, it would not necessarily be true that this factor was present. Absent the existence of other evidence supporting instruction thereon, it would be improper to instruct the jury that they might find that one of the purposes for which the officer was killed under these circumstances was to avoid or prevent the defendant's arrest. Before the trial court can instruct the jury on this aggravating circumstance there must be evidence from which the jury can infer that at least one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for his crime. We repeat that "the mere fact of a death is not enough to invoke this factor." *Id.*

In this case there was evidence from which the jury could infer that defendant killed Lester Collins to avoid or prevent his arrest. There was testimony that after Collins was shot and cut, but before he was killed, defendant stated that he "was afraid if the

police found Lester that he would tell what had been done to him. . . ." Defendant and Charles Goins then planned to bury Collins. At some later point they decided to shoot him and place him on a railroad track where his body would be mangled by a passing train. On this factual basis the court was correct in instructing the jury upon subsection (e)(4).

5.

[9] Finally, we direct our attention to G.S. 15A-2000(e)(7). This subsection provides that the jury may consider as an aggravating circumstance the fact that the "capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." This subsection, like subsection (e)(4), might be broadly construed so that its application would be proper in any homicide found to have been committed against a public official, for the purpose of avoiding or preventing a lawful arrest, or for the purpose of escaping from custody. *See State v. Rust, supra* at p. 875.

We can envision the difficulty this court is going to encounter in construing and applying subsections (e)(4) and (e)(7). We can also envision the difficulty the trial courts are having and will have in deciding which of the subsections would be applicable to the evidence in a particular case. Suffice it to say for the purposes of the case at hand, the trial court erred in submitting issues of aggravating circumstances pursuant to *both* subsections.

In submitting the issue under (e)(4), the court reviewed the evidence tending to show that on the night in question while defendant, Lois, Charles and Collins were on Rural Paved Road 2007 in Cumberland County, that Collins was shot and received some cuts to his body; that defendant and Charles then made statements to the effect that they did not want to be arrested for anything; and that they therefore proposed to take Collins to Robeson County so that he could not tell on them. The court then instructed the jury that if they found those to be the facts beyond a reasonable doubt, and believed that to be an aggravating circumstance, then they should answer the issue "yes".

In submitting the issue under (e)(7), the trial court reviewed substantially the same evidence. The court then instructed the jury that if they found those to be the facts beyond a reasonable

doubt and believed that to be an aggravating circumstance, then they should answer the issue "yes".

We think the submission of the two issues on the same evidence was improper. This amounted to an unnecessary duplication of the circumstances enumerated in the statute, resulting in an automatic cumulation of aggravating circumstances against the defendant. We now address the question whether the error was prejudicial.

Due to the brief time the statute in question has been in effect, we have no precedent of this court to guide us in answering the question. However, on the question of admitting incompetent evidence, we have held that the test of harmless error is whether there is a *reasonable possibility* that the evidence complained of might have contributed to the conviction. *State v. Thacker*, 291 N.C. 447, 189 S.E. 2d 145 (1972); *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971).

We believe a similar test should be applied when one of the aggravating circumstances listed in G.S. 15A-2000(e) is erroneously submitted by the court and answered by the jury against the defendant. It follows that in cases coming before us presenting this question we must answer the question based on the evidence in the particular case.

Of course, we have no way of *knowing* if submission of the erroneous issue in the case at hand tipped the scales in favor of the jury finding that the aggravating circumstances were "sufficiently substantial" to justify imposition of the death penalty. We note that the jury answered the issues submitted on five aggravating circumstances against defendant and only one issue on mitigating circumstances in his favor. Ordinarily, this might cause us to conclude that erroneous submission of one of the issues on aggravating circumstances could not have influenced the jury's ultimate decision that defendant should receive the death penalty.

However, due to the highly questionable quality and credibility of the state's primary evidence, we think there is a reasonable possibility that submission of the erroneous issue may have made the difference in the jury's decision. Obviously, the terrible crimes in question were committed by defendant, Charles Goins or Lois Goins or a combination of two or all of them. Through

plea bargaining Lois became the key witness for the state and gave testimony damaging to defendant and favorable to her brother Charles. Her character was impeached and Charles' record was shown to be no better than defendant's. Having already received his six-year sentence for participation in the crimes, Charles testified for defendant and stated that he was the chief culprit. Certainly there was more reason for Charles to kill Collins: there was animosity by the Goins family against Collins because of his alleged mistreatment of his wife who was also Charles' sister.

Considering all of the evidence in the case, and in particular the low quality and credibility of Lois' testimony, we hold that submission of the erroneous issue was prejudicial. Therefore, defendant should have a new trial on the sentencing phase.

Before leaving this assignment of error we think that one additional comment needs to be made. We do not intend to imply that the aggravating circumstances enumerated in G.S. 15A-2000 (e) can never overlap or that more than one of them can never arise from a single incident. We realize that in some cases the same evidence will support inferences from which the jury might find that more than one of the enumerated aggravating circumstances is present. This duality will normally occur where the defendant's motive is being examined rather than where the state relies upon a specific factual element of aggravation. In such cases it will be difficult for the trial court to decide which factors should be presented to the jury for their consideration. We believe that error in cases in which a person's life is at stake, if there be any, should be made in the defendant's favor, and that the jury should not be instructed upon one of the statutory circumstances in a doubtful case.

* * *

In view of the fact that, for the reason aforestated, there must be a retrial of the sentencing phase of this case, we will comment but briefly on defendant's remaining assignments of error.

[10] By his fifth assignment defendant contends the court erred in allowing the state to introduce illegally seized .380 caliber bullets at the sentencing hearing for the purpose of impeaching him. Defendant acknowledges that the rules set forth in *Harris v.*

New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971), and *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), permit the admission of illegally seized evidence for impeachment purposes. He contends that the evidence admitted in this case did not impeach his testimony and was therefore improperly admitted.

It is clear from the record that defendant responded to a question from the prosecutor on cross-examination that he "never had any bullets for a .38." It is not clear that the .380 Winchester-Western ammunition subsequently introduced by the state is ammunition which can be used in a .38 pistol. Absent such foundation for the introduction of this testimony, this evidence does not impeach defendant's response to the prior question. The state argues that defendant not only denied having .38 bullets, but that he also denied having *any* bullets whatsoever. Under the state's argument proof that defendant had any type of ammunition would impeach this broad denial. The state's interpretation of defendant's testimony finds only slight support in the record and is in direct conflict with defendant's statement that he "did not say that [he] never had any bullets for any type of weapon."

On the record before us we do not believe there was adequate foundation to support the introduction of the .380 caliber bullets into evidence to impeach defendant's testimony. Because we have already determined, for other reasons, that there must be a retrial of the sentencing phase, it is not necessary that we decide whether this error alone would be so prejudicial as to require a new hearing.

By his sixth assignment of error defendant contends that the court erred in two respects in instructing the jury upon intoxication as a mitigating factor. Defendant's first argument is that the court limited a finding of mitigation under G.S. 15A-2000(f)(6) by requiring the jury to find that defendant was drunk before finding this circumstance present. Defendant's second argument hereunder is that the court failed to instruct the jury that any intoxication, however slight, might be considered as a mitigating circumstance under G.S. 15A-2000(f)(9). We shall address these arguments separately.

[11] G.S. 15A-2000(f)(6) provides that the jury may consider as a mitigating factor the fact that the "capacity of the defendant to

appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." With reference to this provision the court instructed the jury as follows:

> . . . [Y]ou shall take up 2.b. which reads: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired." I instruct you that the defendant has offered evidence which tends to show that he drank approximately eight or more beers from the time he got home from work on that Saturday, July 2, 1977, until approximately 3 a.m. on the Sunday morning of July 3, when he was out on the road by the railroad tracks in Robeson County. The defendant contends that from his drinking beer, he became drunk or intoxicated and that this condition impaired him from having the mental or physical capacity to appreciate the criminality of his conduct or to conform to the requirements of the law.
>
> The State contends that the defendant knew what he was doing and that his capacity was not impaired.
>
> Generally, voluntary intoxication is not a legal excuse for crime. However, if you believe that he had been drinking and was drunk or intoxicated and that this impaired his mental and physical capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, then you should answer this question 2.b. "yes". On the other hand if you do not so find it would be your duty to answer 2.b. "no".

We think the instruction adequately explains subsection (f)(6) in context with the evidence in this case.

Because there are a great many factors which might impair the defendant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law, the language of this subsection is necessarily broad. Adequate instruction under this provision must be linked to the impairing factor or factors raised by the evidence. In instant case the only such factor was defendant's consumption of alcohol. We do not think that the legislature intended, under this subsection, that the jury might find intoxication, however slight, to be a mitigating circumstance. If this were true, every murderer, conceivably, would consume

strong drink before taking his victim's life. Nor is the degree of intoxication so great that it precludes the defendant from being found guilty of crime. When the defendant contends that his faculties were impaired by intoxication, such intoxication must be to a degree that it affects defendant's ability to understand and control his actions before subsection (f)(6) is applicable. We think the instruction now under consideration makes it clear that this state of intoxication is required.

[12] G.S. 15A-2000(f)(9) provides that the jury may consider as a mitigating factor "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value." We are mindful that a death penalty statute may not restrict the jury's consideration of *any* factor relevant to the circumstances of the crime or the character of the defendant. *Lockett v. Ohio*, --- U.S. ---, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978). Even so, we do not believe the court is required to point to every factor arising from the evidence which might conceivably be considered by the jury under this provision. In the instant case the court instructed as follows:

> Again, regardless of how you shall find as to 2.b., you would go and take up 2.c. which reads: "Do you find any other circumstance arising from the evidence which the jury deems to have mitigating value?" The defendant contends that at least you should find the following circumstances to have mitigating value.
>
> First, he contends that the evidence that Charles Goins received a sentence of six years for the offense of accessory after the fact of murder in the first degree is a mitigating circumstance. On the other hand, the State contends that the evidence shows that Charles Goins pled guilty to the offense of accessory after the fact of murder in the first degree by Buck Junior Goodman, and that this was the offense charged against Charles Goins in the bill of information which was the charging instrument against Charles Goins and upon which he entered his plea of guilty.
>
> Second, the defendant contends that he has a limited education and experience and that he stopped school in the 6th grade without completing the same.

Third, he contends that he was attempting to protect the girl he loved, to wit: Annie Lois Goins, who was the mother of one of his children; and

Fourth, he contends that any other circumstance which you, the jury, find from the evidence is a mitigating value and circumstance ought to be considered by you.

If you simply believe that there are other mitigating circumstances in this case which have mitigating value, then you would answer 2.c. "yes". On the other hand, if you are not so satisfied, it would be your duty to answer 2.c. "no".

This instruction highlights some elements of the evidence which might not have been clearly brought to the attention of the jury. Although the court did not refer to defendant's intoxication, the instruction in no way prevents the jury from considering that circumstance. For this reason we believe the charge is adequate. The court is not required to sift through the evidence and search out every possible circumstance which the jury might find to have mitigating value.

[13] By his seventh assignment of error defendant contends the trial court erred in failing to instruct the jury that they might recommend a sentence of life imprisonment even though they found the aggravating circumstances outweighed those in mitigation. His argument is that without such instruction the jury will mathematically balance the two types of factors against each other and will impose the death penalty whenever aggravating circumstances outnumber mitigating ones. We do not agree that this is the manner in which a jury will reach its decision on this important question or that the instruction for which defendant contends is required by our statute.

It must be emphasized that the deliberative process of the jury envisioned by G.S. 15A-2000 is not a mere counting process. *State v. Dixon, supra*; *State v. Stewart, supra.* The jury is charged with the heavy responsibility of subjectively, within the parameters set out by the statute, assessing the appropriateness of imposing the death penalty upon a particular defendant for a particular crime. Nuances of character and circumstance cannot be weighed in a precise mathematical formula.

At the same time, we believe that it would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of *Furman* and the cases which have followed it. For these reasons defendant's seventh assignment of error is overruled.

[14] By his final assignment of error defendant contends that this court should review the sentence in this case to determine if it is disproportionate to the sentences imposed in similar cases. We recognize that this authority is given to us by G.S. 15A-2000 (d)(2). However, we believe that this review function should be employed only in cases where both phases of the trial of a defendant have been found to be without error. Only then can we have before us the true decision of the jury to which we feel great deference should be accorded. For this reason we express no opinion upon the propriety of any sentence in this case.

In connection with one of his assignments of error, defendant criticizes the wording of the third issue, namely: Do you find beyond a reasonable doubt that the mitigating circumstances are insufficient to outweigh the aggravating circumstances? Since a new trial on the sentencing phase is being awarded on other grounds, we do not pass upon the validity of defendant's criticism. Suffice it to say, the able trial judge followed the statute in forming this issue.

Nevertheless, at the retrial, we believe the following wording would be more appropriate: Do you find beyond a reasonable doubt that the aggravating circumstances found by you outweigh the mitigating circumstances found by you?

For the reasons stated, the verdict rendered at the sentencing phase of defendant's trial, and the judgment of death predicated thereon, are vacated, and this cause is remanded to the superior court for a new trial on the sentencing phase.

New trial on sentencing phase.

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

Justice HUSKINS concurring.

I support the majority opinion in *Goodman, Cherry* and *Johnson*. At the same time, I join in the concurring opinion of Justice Carlton which correctly, I think, analyzes the results reached in these three cases.

Justice CARLTON concurring.

The Court today hands down three decisions involving the interpretation of our death penalty statutes, this case, *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979) and *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979). In light of my late participation in the consideration of these cases—a participation requested by the other members of the Court—, the gravity of the issues addressed, and my concern lest these decisions be interpreted too broadly, I think it worthwhile to add this concurrence.

After carefully reading the records and briefs submitted by counsel, and listening to the oral arguments on tape, I conclude once again that in the world of criminal justice, there is no more delicate nor difficult issue than that of capital punishment. Sincere and intelligent people disagree strongly on the question of the death penalty. All three branches of both state and federal government have struggled with it for centuries. The United States Supreme Court has at times equivocated about the issue, creating uncertainty and confusion in the lower courts. Our legislature, in response to its constituency and numerous court decisions, has amended our capital punishment law on several occasions. Prosecutors, defense attorneys, and trial judges wrestle daily with the resulting uncertainty each revision brings. It is unfortunate, albeit inevitable, that the course charted by legislative and judicial action is an uncertain one on an issue which touches the deepest human emotions. The beneficial result of this uncertainty, however, is that in deciding whether the State shall take a human life, we proceed with the greatest possible care.

Of this we can be certain: North Carolina law presently provides for the death penalty in certain aggravated cases of first degree murder. The United States Supreme Court has ruled that

capital punishment statutes similar to ours pass constitutional muster. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976). The three decisions filed today are our first interpretations of the most recently enacted capital punishment statutes in North Carolina. G.S. 15A-2000, *et seq*. My concern is that the collective result of these decisions may be seen as a step by this Court to indirectly abolish capital punishment in North Carolina. I do not consider that to be our purpose. We should not attempt to usurp the legislative process. I write this footnote to the excellent opinions of the majority primarily to highlight the narrow results reached by the three opinions filed today. Also, I think an overview of the three opinions will provide a helpful guide to the lower courts.

I. *State v. Goodman*

A.

In *Goodman*, defendant was found guilty of first degree murder by premeditation and deliberation *and* by the felony-murder rule. He was also found guilty of armed robbery and kidnapping. At the sentencing stage, the jury found beyond a reasonable doubt these statutory aggravating circumstances:

(1) Defendant had been previously convicted of a felony involving the use or threat of violence to the person. G.S. 15A-2000(e)(3).

(2) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. G.S. 15A-2000(e)(4).

(3) The capital felony was committed while the defendant was engaged in the commission of or attempt to commit a robbery or kidnapping. G.S. 15A-2000(e)(5).

(4) The capital felony was committed to disrupt or hinder the lawful exercise of the enforcement of laws (arrest of defendant for the robbery or kidnapping offenses). G.S. 15A-2000(e)(7).

(5) The capital felony was especially heinous, atrocious, or cruel. G.S. 15A-2000(e)(9).

With respect to mitigating factors, the jury did *not* find:

(1) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor. G.S. 15A-2000(f)(4).

(2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was impaired. G.S. 15A-2000(f)(6).

The jury did deem:

(3) Other circumstances arising from the evidence had mitigating value. G.S. 15A-2000(f)(9).

The jury then found beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the latter were sufficiently substantial to call for the imposition of the death penalty.

B.

As I read it, the majority opinion in *Goodman* presents one narrow holding: A new sentencing hearing must be granted when the trial court improperly submits an aggravating circumstance to the jury in a sentencing hearing conducted pursuant to G.S. 15A-2000, and the jury finds that circumstance present *to the prejudice of the defendant.*

Specifically, the majority holds that, under the facts of this case, the aggravating circumstances contemplated by G.S. 15A-2000(e)(7) and (e)(4) should not both be submitted to the jury. I would simply add that I can think of few situations in which the jury would *not* find, pursuant to G.S. 15A-2000(e)(7), that the "capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law" if that circumstance were submitted to them. In order to prevent an automatic accumulation of aggravating circumstances, which our legislature obviously did not intend, I should think that trial judges would rarely submit this circumstance to the jury.

As I understand it, the majority today also attempts to establish the following guidelines:

(1) *Based on the facts of the particular case*, prejudicial error in submitting an aggravating circumstance to the jury occurs when (a) the submission is erroneous, (b) the jury finds that cir-

cumstance to exist, and (c) there is a *reasonable possibility* the erroneously submitted circumstance might have contributed to the decision.

(2) The aggravating circumstance provided by G.S. 15A-2000(e)(3), which provides for aggravation where "defendant had been previously convicted of a felony involving . . . violence to the person" contemplates that (a) defendant shall have been *convicted*, not merely charged or indicted, of a felony as a result of conduct occurring *prior to* the events out of which the capital felony charge arose and (b) the felony for which defendant was convicted involved the "use or threat of violence to the person," *i.e.*, conviction for a crime against property may not be submitted under this subsection.

(3) The aggravating circumstance contemplated by G.S. 15A-2000(e)(5), which provides that "the capital felony was committed . . . in the commission of, or an attempt to commit, . . . any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing . . . of a destructive device or bomb," may be appropriately submitted to the jury only when the defendant is convicted of first degree murder upon the theory of premeditation and deliberation. Put another way, if the defendant is convicted only on the basis of the felony-murder rule, this circumstance may not be submitted to the jury as an aggravating circumstance.

(4) In order to avoid the aggravating circumstance contemplated by G.S. 15A-2000(e)(9), which provides for a crime "especially heinous, atrocious, or cruel," from becoming a "catch-all" division which could always be employed in cases where there is no evidence of other aggravating circumstances, the trial judge must explain that the expression "heinous, atrocious, or cruel" anticipates an *especially* brutal murder where the brutality exceeds that normally present in any killing. Such brutality shall be limited to acts done to the victim during the commission of the capital felony itself. Here, the majority expressly approved the instructions of the trial judge with respect to this aggravating circumstance and quoted the Florida court's definition as the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So. 2d 1, 9 (Fla., 1973). *See also Proffitt v. Florida*, *supra* at 255-56.

(5) The aggravating circumstance provided by G.S. 15A-2000 (e)(4), a capital felony committed to avoid a lawful arrest, contemplates more than merely killing the victim. Before this aggravating circumstance may be submitted to the jury, the evidence must establish that at least one of the *motivating factors* leading to the killing was defendant's desire to avoid apprehension for his crime. Put another way, the mere fact of the victim's death will not alone invoke this factor. There must be some evidence of a manifest intent to avoid arrest and detection.

(6) The legislature did not intend, in providing the mitigating circumstance contemplated by G.S. 15A-2000(f)(6), where defendant's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired," that intoxication, however slight, should be a mitigating circumstance. When the defendant contends that his faculties are impaired by intoxication, the intoxication must be to such a degree that it affects defendant's ability to understand and control his actions.

(7) Under G.S. 15A-2000(f)(9), which provides for "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value," there can be no restriction on the jury's consideration of any factor relevant to the circumstances of the crime or the character of the defendant. However, in instructing the jury, the trial judge "is not required to sift through the evidence and search out every possible circumstance which the jury might find to have mitigating value." *State v. Goodman, supra* at 34, 257 S.E. 2d 569, 590 (1979).

(8) The trial court should *not* instruct the jury that the jury might recommend a sentence of life imprisonment *even though* it finds aggravating circumstances to outweigh those in mitigation. To allow such discretion would be a return to the unfettered days prior to *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972).

(9) The review function given to this Court by G.S. 15A-2000 (d)(2) is to be employed only in those cases where both phases of the trial of a defendant have been found to be without error.

While the majority has addressed the guidelines enumerated above, we are remanding for a new sentencing hearing here

because of *one error* by the trial judge with respect to the submission of *one* of the aggravating circumstances found present by the jury. The Court found that error was not harmless. With this portion of the Court's holding, I do not fully agree. Practically, I consider the error a harmless one. The jury found four other aggravating circumstances present including a finding that this capital felony was especially heinous, atrocious, or cruel. It found only one mitigating circumstance. I would ordinarily in a situation like this probably find that the assigned error was harmless beyond a reasonable doubt. However, in these first cases interpreting our death statutes and in more than an abundance of caution, I join the majority on the basis of the facts presented by this case.

II. *State v. Cherry*

A.

In *Cherry*, defendant was found guilty of first degree murder under the felony-murder rule. The evidence established that he was in the process of robbing a store when the murder was committed. At the sentencing stage, the jury found these statutory aggravating circumstances:

(1) Defendant had been previously convicted of a felony involving the use or threat of violence to the person. G.S. 15A-2000(e)(3).

(2) The capital felony was committed while the defendant was engaged in the commission of robbery. G.S. 15A-2000 (e)(5).

(3) The murder was committed for pecuniary gain. G.S. 15A-2000(e)(6).

The jury answered negatively the following questions posed with respect to aggravating circumstances:

(1) Was the murder especially heinous, atrocious, or cruel? G.S. 15A-2000(e)(9).

(2) Did the defendant knowingly create a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person? G.S. 15A-2000(e)(10).

The jury found none of the four submitted mitigating circumstances:

(1) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance. G.S. 15A-2000(f)(2).

(2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. G.S. 15A-2000(f)(6).

(3) The age of the defendant at the time of the crime. G.S. 15A-2000(f)(7).

(4) Any other circumstance arising from the evidence which the jury deems to have mitigating value. G.S. 15A-2000(f)(9).

Again, the holding in *Cherry* is narrow. Specifically, the majority holds that a new sentencing hearing is necessary when the trial court erroneously submits to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony pursuant to G.S. 15A-2000(e)(5), when that underlying felony has already been used to establish the offense as a capital felony at the guilt phase of trial. The rule would not apply, of course, as in *Goodman*, when the defendant is convicted of first degree murder as a result of premeditation and deliberation as well as the felony-murder rule. This formalizes the guideline presented in *Goodman* discussed *supra.*

With respect to whether the assigned error was harmless, I join the majority for the limited reasons stated in the discussion of Goodman, *supra.* However, and also for the same reasons stated in *Goodman,* I am unwilling to say that such error will always constitute prejudicial error. Here, the jury found two other aggravating circumstances and no mitigating circumstances.

I join with the majority in finding that the underlying felony should not be considered as an *aggravating circumstance* at the sentencing stage for the felony murder. However, I am concerned that this holding might be construed too broadly. We are not holding that the jury is to ignore the crime for which the defendant was convicted. Obviously, the underlying felony may be, and should be, considered by the jury in the sentencing phase. G.S.

15A-2000(a)(3) provides in part that it is unnecessary to resubmit evidence at the sentencing stage which was presented during the guilt determination phase unless a new jury is impaneled, "*but all such evidence is competent for the jury's consideration in passing on punishment.*" (Emphasis added.) It is clear, therefore, that the jury may consider the underlying robbery or other felony in the sentencing phase. What our holding here prohibits is simply that the underlying felony cannot be submitted to the jury as an *aggravating circumstance*. This is so for the reasons clearly explained in the majority opinion: It would be patently unfair for a defendant convicted of first degree murder by virtue of the felony-murder rule to start with one aggravating circumstance against him while a defendant convicted on the basis of premeditation and deliberation would start with no aggravating circumstances against him. Again, however, we ought to note that the legislature has attached special significance to murder committed in the course of commission of robbery and other felonies and the jury is surely allowed to consider that fact in making their sentencing recommendation.

III. *State v. Johnson*

A.

In *Johnson*, defendant pleaded guilty to murder in the first degree which was committed in the course of a rape. The majority opinion notes that there was ample evidence of premeditation and deliberation. The jury found, beyond a reasonable doubt, the following aggravating circumstances:

(1) The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, rape. G.S. 15A-2000(e)(5).

(2) The capital felony was especially heinous, atrocious, or cruel. G.S. 15A-2000(e)(9).

The jury then found that the following mitigating circumstances existed:

(1) The defendant had no significant history of prior criminal activity. G.S. 15A-2000(f)(1).

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance. G.S. 15A-2000(f)(2).

The jury did *not* find the following mitigating circumstances which were submitted to it:

(1) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. G.S. 15A-2000(f)(6).

(2) Any other circumstances arising from the evidence which the jury deems to have mitigating value. G.S. 15A-2000(f)(9).

The jury then found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and, beyond a reasonable doubt, that the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty.

B.

The majority opinion establishes the following:

(1) In some cases in which the defendant relies on the mitigating circumstance contemplated by G.S. 15A-2000(f)(6), the trial judge must include in his instructions to the jury on this statute the following:

a. An explanation of the difference between defendant's capacity to *know* right from wrong and the *impairment* of his capacity to appreciate the criminality of his conduct. That is, while defendant might have known that his conduct was wrong, he might not have been able to appreciate, *i.e.*, to fully comprehend, or be fully sensible of its wrongfulness. Moreover, while his capacity to so appreciate the wrongfulness of his conduct might not have been totally obliterated, it might have been impaired, *i.e.*, lessened or diminished.

b. An explanation that the jury should find this mitigating factor if it believed that defendant's capacity to conform his conduct to the law, *i.e.*, his capacity to refrain from illegal conduct, was impaired. This does not mean that defendant must wholly lack all capacity to conform. It means only that such capacity as

he might otherwise have had in the absence of his mental defect is lessened or diminished because of the defect.

I do not believe that these instructions are required in those instances in which the defendant attempts to invoke the mitigating circumstance provided by G.S. 15A-2000(f)(6) on the basis of defendant's intoxication. As I understand it, this holding is applicable only to mental impairments and diseases such as schizophrenia, conditions not readily understood by the average layman.

(2) If a defendant makes a timely request for a listing in writing of any mitigating circumstances pursuant to G.S. 15A-2000(f)(9) which are supported by the evidence and if these circumstances are such that the jury could reasonably deem them to have mitigating value, the trial judge must put such circumstances on the written list submitted to the jury. It will not be prejudicial error for the judge to fail to do so, however, if the defendant fails to request the judge to submit them.

(3) The burden of persuading the jury on the issue of the existence of any mitigating circumstance is upon the defendant and the standard of proof shall be by a preponderance of the evidence. Where, however, all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance. In order to be entitled to such an instruction, however, defendant must timely request it.

(4) The State and the defendant may not enter into a plea bargain whereby the defendant may plead guilty to first degree murder in return for a life sentence and thus avoid a potential death sentence imposed by a jury convened under G.S. 15A-2000.

(5) If the defendant requests it, the trial court, in addition to other approved instructions with respect to the aggravating circumstance contemplated by G.S. 15A-2000(f)(9), should instruct the jury that not every murder is *necessarily* "especially heinous, atrocious, or cruel" in the sense these words are used in the statute.

In summary, the majority opinion remands for a new sentencing hearing because of the trial court's failure to fully explain one of the mitigating circumstances enumerated in G.S. 15A-2000(f). I

can think of no more difficult instruction required of a trial judge than explaining a statute dealing with the human mind. In the absence of any guidance, perhaps this able trial judge felt more confident to rely on the legislative language. I can appreciate the problem with which he was confronted. However, it is abundantly clear that our legislature has mandated that the state of the mind of the defendant shall be given serious consideration by the jury in determining whether the death penalty should be imposed. It therefore becomes incumbent upon this Court to devise for the trial judges' guidance an understandable explanation for jurors of the legislative intent. Justice Exum has presented an excellent analysis of this subsection in the majority opinion and it should be a workable guide for our trial courts in the future.

Some may justifiably consider impaired capacity to be the most important subsection in our death penalty statutes. I frankly doubt that our society could uphold the concept of capital punishment without it. While North Carolina chooses not to consider mere mental impairment with respect to determining a defendant's guilt, in a punishment so final, we must ensure that the jury give proper consideration to defendant's mental condition as presented by the evidence. The Court's holding today in *Johnson* goes a long way toward guaranteeing that consideration.

CONCLUSION

Each decision handed down today is, as has been repeatedly stated, based on its own particular facts. One decision is based on erroneous trial court instructions with respect to a mitigating circumstance which was properly submitted and two are based on the improper submission of an aggravating circumstance. These are narrow holdings. However, when viewed collectively, as I have attempted to do here, we find numerous guidelines, particularly in *Goodman*, which range far beyond the narrow results reached. While I formally concur with the narrow holding in *Goodman* and generally support the further enumerated guidelines, I must caution that I believe some of the latter are not necessary to the decision in this case. I therefore view today's interpretations of G.S. 15A-2000 which go beyond the narrow holdings required as tentative formats only, subject to closer investigation in the appropriate factual circumstance.

STATE OF NORTH CAROLINA v. NORMAN DALE JOHNSON

No. 63

(Filed 4 September 1979)

1. **Criminal Law § 135.4— first degree murder—sentencing hearing—instructions on "impaired capacity" mitigating circumstance**

In a sentencing hearing in a first degree murder case in which defendant relied heavily on the "impaired capacity" mitigating circumstance of G.S. 15A-2000(f)(6) and presented expert testimony that he suffered from schizophrenia, he was under the influence of a mental or emotional disturbance at the time of the murder, his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired at that time, and he knew the difference between right and wrong at the time of the murder, defendant is entitled to a new sentencing hearing because of the court's failure (1) to explain the difference between defendant's capacity to know right from wrong and the *impairment* of his capacity to appreciate the criminality of his conduct, and (2) to explain that even if there was no impairment of defendant's capacity to appreciate the criminality of his conduct, the jury should nevertheless find the existence of the impaired capacity mitigating factor if it believed that defendant's capacity to conform his conduct to the law, *i.e.*, his capacity to refrain from illegal conduct, was impaired.

2. **Criminal Law § 135.4— capital case—sentencing hearing—lack of history of criminal activity as mitigating circumstance—good character**

The trial judge's reference in a capital case to a defendant's lack of "significant history of prior criminal activity," G.S. 15A-2000(f)(1), does not encompass defendant's contention regarding the mitigating circumstance of good character, since good character imports more than simply the absence of criminal convictions.

3. **Criminal Law § 135.4— capital case—sentencing hearing—instruction on other mitigating circumstances—request for instructions on particular items**

In the absence of a timely request by defendant that the court at the sentencing hearing in a capital case instruct on specified "other circumstances" which defendant contends the jury should consider in mitigation, failure of the court to mention any particular item as a possible mitigating factor, including good character, will not be held for error so long as the court instructs that the jury may consider any circumstance which it finds to have mitigating value pursuant to G.S. 15A-2000(f)(9).

4. **Criminal Law § 135.4— capital case—sentencing hearing—submission of written mitigating circumstances—necessity for submitting requested factors supported by evidence**

If mitigating circumstances in a capital case which are expressly mentioned in G.S. 15A-2000(f) are submitted to the jury in writing, which is the preferred procedure, any other relevant circumstance proferred by the defendant as having mitigating value which is supported by the evidence and which the jury

may reasonably deem to have mitigating value must, upon defendant's timely request, also be submitted in writing.

5. **Criminal Law § 135.4— capital case—sentencing hearing—mitigating circumstances—burden and standard of proof—peremptory instruction**

The burden of persuading the jury on the issue of the existence of any mitigating circumstance is upon the defendant, and the standard of proof is by a preponderance of the evidence. Where, however, all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance if he makes a timely request for such an instruction.

6. **Criminal Law § 135.4— capital case—sentencing hearing—impaired capacity mitigating circumstance—no right to peremptory instruction**

Defendant was not entitled to a peremptory instruction on the mitigating circumstance of impaired capacity where a medical expert's testimony would have supported a jury finding that defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired, but the testimony of a lay witness who observed and conversed with defendant around the time of the murder in question would have supported a contrary finding.

7. **Criminal Law § 135.4; Homicide §§ 13, 31.1— first degree murder—plea bargain for sentence of life imprisonment prohibited**

A defendant may not plead guilty to first degree murder and by prearrangement with the State be sentenced to life imprisonment without the intervention of a jury.

8. **Criminal Law § 135.4— capital case—sentencing hearing—authority of State to recommend life imprisonment—effect of evidence of aggravating circumstance**

G.S. 15A-2000 does not permit the State in a capital case to recommend to the jury during the sentencing hearing a sentence of life imprisonment when the State has evidence from which the jury could find at least one aggravating circumstance listed in G.S. 15A-2000(e). However, in a case in which the State has no evidence of an aggravating circumstance, the State may so announce to the court and jury at the sentencing hearing, and the court may proceed to pronounce a sentence of life imprisonment without the intervention of the jury.

9. **Criminal Law § 135.4— first degree murder—sentencing hearing—aggravating circumstance—heinous, atrocious or cruel—instructions**

Upon request by defendant, the trial court, when instructing on the aggravating circumstance of G.S. 15A-2000(e)(9) that the murder was "especially heinous, atrocious, or cruel," should instruct the jury that not every murder is necessarily especially heinous, atrocious or cruel in the sense those words are used in the statute.

10. **Criminal Law § 135.4— first degree murder—sentencing hearing—submission of issue as to whether crime was heinous, atrocious or cruel**

The trial court properly submitted to the jury the aggravating circumstance as to whether the murder in question was "especially heinous, atrocious or cruel" where the evidence tended to show that defendant first tried to strangle his victim to death with a fish stringer; upon rendering her unconscious he sexually molested her; and then, realizing she was not dead, he stabbed her to death.

11. **Criminal Law § 135.4— first degree murder—premeditation and deliberation—rape as aggravating circumstance**

There was no merit in defendant's contention that the State relied on the separate felony of rape as an essential element of the capital offense of first degree murder and also relied on such rape as an aggravating circumstance to support the imposition of the death penalty, since defendant pled guilty to first degree murder and there was evidence of premeditation and deliberation.

12. **Constitutional Law § 40— first degree murder case—indigent defendant—failure to appoint associate counsel**

An indigent defendant was not prejudiced by failure of the court to appoint an associate counsel to assist his counsel in a first degree murder case in which defendant entered a plea of guilty and the crucial trial proceedings centered around the sentencing hearing.

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

Justice HUSKINS concurring and joins the concurring opinion of Justice CARLTON.

Justice CARLTON concurring.

BEFORE *Judge Collier* at the 20 March 1978 Special Criminal Session of CLEVELAND Superior Court, defendant entered a plea of guilty to first degree murder. He was sentenced to death. He appeals pursuant to G.S. 7A-27(a). This case was docketed and argued as No. 55 at the Fall Term 1978.

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

H. Houston Groome, Jr., Attorney for defendant appellant.

EXUM, Justice.

This appeal presents a number of questions arising under our death penalty statute, G.S. 15A-2000, *et seq.* Of principal importance is the meaning and application here of the impaired

capacity mitigating circumstance.[1] For error in the trial court's instructions concerning it, defendant is entitled to a new sentencing hearing. Other questions raised and decided relate to (1) procedural requirements for submitting to the jury mitigating circumstances under G.S. 15A-2000(f); (2) the power of the state and defendant to enter into sentence negotiations in a capital case; (3) adequacy of the evidence and the instructions on whether this capital felony was "especially heinous, atrocious, or cruel";[2] and (4) whether the trial court should have appointed an associate counsel.

I

On 20 October 1977 Mabel Bowman Sherrill, the 65-year old wife of Bruce Sherrill, left their home to go to a familiar fishing area on a lake in Caldwell County approximately one mile away. Sometime in the early afternoon of that day she was found near the lake apparently murdered. An investigation ensued involving both the Caldwell County Sheriff's Department and the State Bureau of Investigation.

By 31 October 1977 defendant had become a suspect in the investigation.[3] On that date at approximately 9:00 p.m. defendant was located by Captain Robert Webster and Detective Roger Hutchings, both of the Caldwell County Sheriff's Department, at "The Snack Bar" in Hickory. At their request he agreed to accompany them to Lenoir in Caldwell County. Captain Webster testified that defendant at this point was not under arrest "but he was being detained for questioning regarding the homicide of Mabel Bowman Sherrill."[4]

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1. Under G.S. 15A-2000(f)(6) the jury, in determining whether to impose the death penalty is to consider as a mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or *to conform his conduct to the requirements of law*" was impaired.

2. This is an aggravating circumstance to be weighed by the jury in determining whether to impose the death penalty. G.S. 15A-2000(e)(9).

3. What the investigation had revealed to cause defendant to be a suspect at this time does not appear in the record.

4. We are aware of a possible issue arising under *Dunaway v. New York*, --- U.S. ---, 60 L.Ed. 2d 824 (1979). The United States Supreme Court held in *Dunaway* that a custodial detention for purposes of questioning is a Fourth Amendment seizure and must be based on no less than probable cause to make an arrest. Any arrest not based on probable cause is unlawful, and evidence obtained as a result thereof must be suppressed. Whether, in fact, police had probable cause to arrest defendant on 31 October 1977 is a question left unresolved on this record. Defendant does not raise this point on appeal, nor are we, because of the state of the record, in a position to pass on the question *sua sponte*. Defendant did move to suppress all out-of-court statements made to investigators as well as the .38 caliber pistol recovered from his brother. His motion was based entirely on *Miranda* grounds. Judge Collier, after hearing evidence, found that defendant had duly waived his right to remain silent and his right to counsel and denied this motion. Defendant takes no exception

During the ride from Hickory to Lenoir defendant was questioned by Captain Webster regarding various firearms which defendant owned. Defendant admitted owning four firearms, one of which was a .38 caliber Smith & Wesson revolver which defendant said he had recently acquired. Defendant told Captain Webster that he had sold this pistol to his brother, Robert Johnson, who lived in Icard. After Captain Webster and defendant arrived in Lenoir defendant agreed to take Captain Webster and Detective Hutchings to his brother's home. The three went there and retrieved the .38 caliber pistol. This pistol was later identified as being in the possession of the deceased when she left home on 20 October 1977.

After the pistol was retrieved, defendant was returned to the Caldwell County Sheriff's Department where, after questioning, he confessed in the early morning hours of 1 November 1977 to the murder of Mabel Bowman Sherrill. He was immediately charged formally with the murder and ultimately indicted by the Caldwell County Grand Jury during the November, 1977, Session of Caldwell Superior Court. On 2 November 1977 Mr. Houston Groome was appointed counsel for defendant.

In November, 1977, defendant moved in writing for the appointment of an associate counsel, change of venue, and the appointment of an expert medical witness. He also moved to be found lacking in the capacity to proceed and gave notice that his defense would be insanity. In response to these motions Judge Ervin ordered a change of venue to Cleveland County. Judge Ervin also ordered that defendant be medically examined at Dorothea Dix Hospital for the purpose of determining his capacity to proceed and his mental capacity at the time of the alleged offense. In February, 1978, Judge Ervin appointed Dr. Richard J. Proctor, Chairman of the Department of Psychiatry at Bowman Gray School of Medicine, Winston-Salem, for the purpose of examining the defendant "to determine his mental capacity and competence to understand . . . the nature and consequences of his actions and the allegations . . . which gave rise to the charges pending against him and to understand, know and appreciate any

to this ruling on appeal. We have reviewed the findings of the trial court. They are supported by the evidence. Furthermore, defendant, by not excepting to the order denying his motion to suppress and not assigning it as error on appeal, has, in view of his guilty plea, waived his *Miranda* and *Dunaway* objections at least as to the guilt phase of the proceeding.

pretrial constitutional rights which he may have . . . and to determine his ability to assist his counsel in the defense of this case."

Defendant came to trial before Judge Collier. Defendant moved for a finding that he was incapable of proceeding by reason of insanity and lack of mental capacity to proceed. At that point, Judge Collier conducted a hearing, as required by G.S. 15A-1002(b)(3), to determine defendant's capacity to proceed. The only witness at this hearing was Dr. James Groce, a physician at Dorothea Dix Hospital who was qualified as an expert in forensic psychiatry. Dr. Groce had examined defendant to determine his mental capacity to stand trial. In his opinion defendant suffered from "latent schizophrenia" and had "trouble controlling his thoughts and emotions"; however, he considered defendant competent to understand the nature and consequences of the proceedings against him, to assist his counsel and, therefore, to stand trial. Judge Collier so found and the case proceeded.

Defendant was then arraigned and entered a plea of guilty to first degree murder[5] which was accepted by the trial court.[6] A jury of twelve and two alternates was selected and empaneled for the purpose of determining, pursuant to G.S. 15A-2000, whether defendant should be sentenced to death or life imprisonment.

The state's evidence on the sentencing phase tended to show that Mabel Bowman Sherrill was found dead in the early afternoon of 20 October 1977 near a lake in Caldwell County where she had been fishing. An autopsy revealed two stab wounds in her chest which, in the opinion of the forensic pathologist performing the autopsy, caused death. "Ligature marks . . . typically pro-

5. Such a plea is expressly authorized by G.S. 15A-2001. Before the enactment of this statute defendant would not have been permitted to enter a plea of guilty to a crime for which the punishment might be death. *State v. Watkins*, 283 N.C. 17, 194 S.E. 2d 800, *cert. denied*, 414 U.S. 1000 (1973).

6. Before accepting the plea, the trial court questioned defendant under oath. Defendant stated that he was not under the influence of any alcohol, drugs, medicine, pills or any other intoxicants, that he had discussed his case fully with his attorney and was satisfied with his attorney's services, and that he understood that he was pleading guilty to the felony of first degree murder. He said the charges had been explained to him; he understood their nature; and he knew he could be imprisoned for life or sentenced to death on the basis of his plea. He understood that he had the right to plead not guilty, be tried by a jury and confronted with witnesses against him, but by his plea he relinquished these and other constitutional rights relating to trial by jury. He stated that he was in fact guilty and that his plea of guilty was not entered as a part of any plea bargain. He said further that his plea was entered on his own free will and understanding and that he had no questions about it. He related that he was 26 years old and had completed the 11th grade. The trial court then conducted an extensive hearing to determine whether there was a factual basis for the plea. At this hearing testimony was offered, consisting essentially of defendant's confession and possession of the victim's .38 caliber pistol. The trial court found there was a sufficient factual basis for the plea and, on the basis of this finding and its earlier finding that the plea as made was "the informed choice of the defendant" and was made "freely, voluntarily and understandingly," the court accepted the plea.

duced by a constricting band or ligature cord, applied with pressure around an area of skin, so as to compress the skin" were found around her neck. Cuts were found on her labia. There was, however, no evidence of internal trauma to her vagina; and upon examination of vaginal smears for spermatozoa, none was discovered.

A .38 caliber pistol was offered in evidence as State's Exhibit No. 2. It was identified by Mr. Bruce Sherrill as being a pistol which his wife had taken with her when she left to go fishing on the day of her death. This pistol was also identified by investigating officers as being that which they recovered from the possession of defendant's brother to whom defendant admitted he sold it. Other witnesses for the state also testified that they had observed a pistol similar to State's Exhibit No. 2 in defendant's possession.

The state relied primarily at the sentencing hearing upon defendant's confession made in the early morning hours of 1 November 1977 after he had been detained for questioning. According to investigators defendant stated to them that he had gone to the "Gunpowder Boat Access Area" sometime around 11:00 a.m. on 20 October 1977 to fish after having fished at three other locations in the area. He recognized Mrs. Sherrill whom he had seen there before. She was leaving the area, and he helped her put her boat motor in the back of her car. As she began to tie up her boat he came at her from behind, wrapped a fish stringer around her neck and began to strangle her. She apparently lost consciousness; and he pulled her up on the bank, tore open her blouse and fondled her breasts. Being unable to loosen her underclothing, he took out a knife with which he "cut the tip portion of the corset open and pulled back the panty hose and panties and cut those open. Then he raped her. He stated that he did not get an erection, but he did manage to penetrate slightly. He also stated that he did not have an orgasm . . . ." Realizing that she was not dead and being afraid that she would scream, he stabbed her in the heart with the knife.

Evidence for defendant at the sentencing hearing tended to show as follows: He was, according to investigators, "fully cooperative" with them. He had written a letter while in jail to Mrs. Ed Foster, the operator of Bethlehem Marina on Lake

Hickory, where defendant had purchased the fish stringer which he apparently used to strangle Mrs. Sherrill. The letter apologized "for any inconvenience or embarrassment which [Mrs. Foster] might have suffered" arising from his involvement in Mrs. Sherrill's death. Defendant had been active at Grace Baptist Church and, after the murder, expressed "sorrow, remorse and grief" to the pastor of that church. Defendant had a reputation for good character in his community. He was a dependable employee, thought of by his employer as honest, punctual, and hard working. His fellow workers considered him to be "a good fellow and a good worker" who "got along well with all of the others." They had never known him to harm, embarrass, be offensive or abusive to anyone. He was considered by a number of witnesses to be "an easy going, friendly normal individual." His jailer testified that, as a prisoner, he was "quiet . . . and never caused any trouble" and that he "was a model prisoner." He told the jail chaplain that he had attempted to write a letter to Mr. Sherrill apologizing for the death of Mrs. Sherrill "but could not put his words on paper."

Dr. Richard Proctor, who on order of the court had examined defendant, testified that he suffered from schizophrenia, "a disorder where there is an extremely strong genetic component, and it is the opinion of most experts that the disorder is the result of certain chemical changes that take place in the central nervous system or in the brain." Defendant's childhood showed a history of suicide attempts at ages 12, 14 "and again in the 11th Grade." As a child defendant had few friends, tended to "bottle up" his feelings, particularly his feelings of "hostility, anger, frustration." His siblings and his schoolmates made fun of him. In Dr. Proctor's opinion defendant was in the throes of a "mental or emotional disturbance at the time of the murder of Mabel Bowman Sherrill" and "the capacity of [defendant] to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time he killed Mabel Bowman Sherrill." Dr. Proctor did feel, however, that defendant understood the position he was in and its legal consequences and that he knew the difference between right and wrong at the time of the incident "even though he was suffering from a mental defect or disease."

The state and defendant stipulated that defendant had no prior criminal record with the exception of one occasion where he received a ticket for fishing without a license.

After arguments of counsel the court instructed the jurors generally upon their duties and specifically with regard to the application of G.S. 15A-2000. The court submitted the following written "Issues and Recommendation as to Punishment," which issues and recommendation the jury ultimately returned as follows (Defendant's exceptions thereto are also noted.):

"1. Do you find beyond a reasonable doubt the presence of one or more—aggravating circumstances from the following list?

ANSWER: Yes.

Check those aggravating circumstances that you have found beyond a reasonable doubt:

_X_ The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, rape. Rape is forcible sexual intercourse with a woman against her will.

_X_ The capital felony was especially heinous, atrocious or cruel.

EXCEPTION NO. 33

2. Do you find that one or more of the following mitigating circumstances existed?

ANSWER: Yes

_X_ (a) The defendant has no significant history of prior criminal activity.

_X_ (b) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(c) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(d) Any other circumstance arising from the evidence which the jury deems to have mitigating value.

EXCEPTION NOS. 34 and 38

3. Do you find that the mitigating circumstances are insufficient to outweigh the aggravating circumstances?

ANSWER: Yes

EXCEPTION NOS. 35 and 36

4. Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances are sufficiently substantial to call for the imposition of the death penalty?

ANSWER: Yes"

Upon the jury's recommendation that defendant be sentenced to death, the court entered judgment accordingly.

II

In order to deal with defendant's contentions regarding the application to him of specific provisions of our death penalty statute it is necessary to consider it from the perspective of the legal history leading to its enactment. This is so notwithstanding that because of the result we reach we need not decide whether defendant could be constitutionally sentenced to death under our statute. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). We must *construe* important provisions of the statute. The first maxim of statutory construction is to ascertain the intent of the legislature. To do this this Court should consider the statute as a whole, the spirit of the statute, the evils it was designed to remedy, and what the statute seeks to accomplish. *See generally In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977); *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975); *Domestic Electric Service, Inc. v. Rocky Mount*, 20 N.C. App. 347, 201 S.E. 2d 508, *aff'd* 285 N.C. 135, 203 S.E. 2d 838 (1974). In the context of this statute, proper weight can be given these factors only after an understanding of the legal milieu in which it was enacted.

The legal history which ultimately gave birth to the statute began with *Furman v. Georgia*, 408 U.S. 238 (1972) in which five

justices of the United States Supreme Court concurred in a per curiam opinion holding that the imposition of the death penalty in cases arising from Georgia and Texas constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Each of the five majority justices wrote a separate concurring opinion, two (Justices Brennan and Marshall) on the ground that the death penalty was cruel and unusual *per se* and could not be carried out under any circumstances. The glue which seemed to hold two others (Justices Stewart and White) to the majority position was that the statutes under which petitioners were sentenced delegated "to judges or juries the decision as to those [capital] cases, if any, in which the penalty will be utilized" in such a way as to provide "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not," *id.* at 311, 313 (White, J., concurring), thereby permitting "this unique penalty to be . . . wantonly and . . . freakishly imposed." *Id.* at 310 (Stewart, J., concurring). Justice Douglas felt that the statutes in question were "pregnant with discrimination." *Id.* at 257.

Four members of the Court later acknowledged in *Lockett v. Ohio*, 438 U.S. 586, 599-600 (1978):

> "Predictably, the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment. Some states responded to what was thought to be the command of *Furman* by adopting mandatory death penalties for a limited category of specific crimes thus eliminating all discretion from the sentencing process in capital cases. Other states attempted to continue the practice of individually assessing the culpability of each individual defendant convicted of a capital offense and, at the same time, to comply with *Furman*, by providing standards to guide the sentencing decision."

North Carolina followed the former course. A majority of this Court in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973), interpreted *Furman* to mean not the abolition of capital punishment *per se* but rather the prohibition of its infliction "if either judge or jury is permitted to impose that sentence as a matter of discretion." *Id.* at 439, 194 S.E. 2d at 25. The majority in *Waddell* con-

cluded that our death penalty statutes, all of which contained a proviso that a jury by its recommendation could fix the punishment at life imprisonment[7] were severable. This Court read *Furman,* then, only to invalidate the discretionary provisos leaving death as the mandatory punishment for capital crimes in this state. On 8 April 1974 the legislature, by enactment of Chapter 1201 of 1973 Session Laws, rewrote G.S. 14-17 and G.S. 14-21 to make death the mandatory sentence for first degree murder and the newly created crime of first degree rape. By this same enactment it rewrote G.S. 14-52 and G.S. 14-58 to provide that life imprisonment would be the mandatory penalty for first degree burglary and arson, respectively. *See State v. Woodson,* 287 N.C. 578, 215 S.E. 2d 607 (1975). *Woodson* was the first case reaching this Court in which a defendant was sentenced to death under the new death penalty enactment. We unanimously affirmed both the convictions and the sentences of death imposed in that case.

The *Woodson* case reached the United States Supreme Court at about the same time as capital cases arising from Georgia, Florida, Texas and Louisiana. Decision in all cases was rendered on 2 July 1976. The mandatory death penalty statutes in North Carolina, *Woodson v. North Carolina,* 428 U.S. 280, and Louisiana, *Roberts v. Louisiana,* 428 U.S. 325, were nullified as being violative of the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments. Death sentences imposed under the statutes of Georgia, *Gregg v. Georgia,* 428 U.S. 153, Florida, *Proffitt v. Florida,* 428 U.S. 242, and Texas, *Jurek v. Texas,* 428 U.S. 262, were sustained. This quintet of cases, *Gregg, Proffitt, Jurek, Woodson,* and *Roberts,* made clear that neither unbridled, unguided discretion nor the absence of all discretion in the imposition of the death penalty is constitutionally permissible. The plurality opinion in *Woodson* stated that North Carolina had failed "to provide a constitutionally tolerable response to *Furman's* rejection of unbridled jury discretion in the imposition of capital sentences" and that North Carolina had failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." 428 U.S. at 302-03.

7. G.S. 14-17 (Murder); G.S. 14-21 (Rape); G.S. 14-52 (Burglary); G.S. 14-58 (Arson) (1B N.C. Gen. Stat., 1969 Replacement Volume).

Furman was read in the controlling opinions of these cases as mandating "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia, supra,* 428 U.S. at 189. The statutes of Georgia, Florida, and Texas were found to provide both this necessary direction and sufficient limitation on the sentencing authorities' discretion in death cases.

In *Gregg, Proffitt* and *Jurek* petitioners argued that the standards designed to guide the sentencer were so vague, overbroad, and inconclusive as to permit, in practice if not in theory, the same kind of unbridled discretion found impermissible in *Furman.* Petitioners argued that the legislation was "no more than cosmetic in nature and [had] in fact not eliminated the arbitrariness and caprice of the system" condemned in *Furman. Jurek v. Texas, supra,* 428 U.S. at 274. The Supreme Court, in meeting this argument and sustaining the challenged statutes, relied heavily on several factors. One was that the state courts from which the cases arose had, themselves, carefully considered and construed specific provisions so as to bring the statutes within constitutional ambit.[8] Secondly, the Supreme Court stressed the importance of careful jury instructions when the jury is the sentencing authority.[9] Finally, the Supreme Court placed

8. Texas, for example, had construed certain of its statutory provisions, not otherwise clear on the point, to permit a defendant to bring to the jury's attention mitigating circumstances. *Jurek v. Texas, supra,* 428 U.S. at 272. Without this construction Texas' statute would have been found constitutionally wanting. *See Lockett v. Ohio,* 438 U.S. 586 (1978). Florida had construed one of the aggravating circumstances, *i.e.,* that the murder was "especially heinous, atrocious, or cruel" so as to make this phrase more than a catchall aggravating circumstance applicable to any murder. It narrowed the definition so that it applied only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Proffitt v. Florida, supra,* 428 U.S. at 255. This Court has adopted this construction in *State v. Goodman, supra,* decided today.

9. The Court said in *Gregg v. Georgia, supra,* 428 U.S. at 192-93:

"But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. *See* American Bar Association Project on Standards for Criminal Justice Sentencing Alternatives and Procedures, § 1.1(b), Commentary, pp 46-47 (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, Task Force Report: The Courts 26 (1967). To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision.

"The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to allow any other course in a legal system that has traditionally operated by following prior precedence and fixed rules of law. (Citations omitted.) When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."

much emphasis on the "safeguard of meaningful appellate review." *Gregg v. Georgia, supra,* 428 U.S. at 195.[10]

Over a decade before *Furman* was decided, the drafters of the Model Penal Code,[11] working under the auspices of the American Law Institute, saw the difficulties in the then prevalent method of death penalty imposition—unbridled discretion in the sentencing authority to impose or not to impose death. They proposed in response a more finely tuned system for death penalty imposition in murder cases. MPC § 201.6, pp. 59-80 (Tent. Draft No. 9, 1959); MPC § 210.6, pp. 128-33. A comparison of current death penalty statutes in Georgia, Florida, and North Carolina with the MPC demonstate that all three states drew heavily on MPC § 210.6.[12] In broad outline this section provides: (1) A sentence of life imprisonment shall be imposed by the court if it is satisfied that certain factors exist. (2) If none of these factors exist, the question of sentence shall be left either to a court or jury, depending on who determined defendant's guilt, in a separate sentencing procedure. (3) The sentencer is directed to consider at the sentencing hearing any matter deemed "relevant . . . including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physicial condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this section." (4) The sentencer is directed not to impose or recommend death "unless it finds one of the aggravating circumstances enumerated in Section (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency."[13]

10. The Court noted that the Supreme Court of Georgia had taken its review responsibilities quite seriously citing a number of Georgia Supreme Court cases setting out standards to be followed by that Court in reviewing a death penalty and noting several cases in which the Court had set aside death penalties in favor of life imprisonment. *Gregg v. Georiga, supra,* 428 U.S. at 204-06. It is also noted that the Florida Supreme Court had vacated eight of the twenty-one death sentences that it had reviewed. *Proffitt v. Florida, supra,* 428 U.S. at 253.

11. The Model Penal Code is hereinafter cited as "MPC." All references, unless otherwise indicated are to the Proposed Official Draft published in 1962. This draft was adopted, with minor revision, at the 39th Annual Meeting of the American Law Institute. *See* Proceedings, 39th Annual Meeting, The American Law Institute 120-34, 226-27 (1962).

12. *See* G.S. 15A-2000; Fla. Stat. Ann. § 921.141; Ga. Code Ann. § 27-2534.1.

13. The aggravating and mitigating circumstances listed in § 210.6(3) and (4) are as follows:

"(3) *Aggravating Circumstances.*

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

The MPC's proposals were based on unusually prescient observations of the Reporter as noted in the Comments to MPC § 201.6 (Tent. Draft No. 9, 1959). The notion that various kinds of specified murders should be automatically punished by death was rejected, saying, *id.* at 68:

> "The reason is that we are thoroughly convinced that neither premeditation and deliberation nor the fact that the homicide occurred in the commission of a felony included in the typical enumeration provide criteria which include all homicides that arguably should be dealt with by the highest sanction or exclude all homicides that should not be. The delimitation therefore is unsatisfactory. It is at once too narrow and too broad.
>
> "It is too broad, as we have said, insofar as felony-murder includes unintentional homicides caused by conduct which creates small risk of fatal injury or which are even truly accidental. We do not think there is a case for a death sentence unless a homicide has been committed purposely or

(c) At the time murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) *Mitigating Circumstances.*

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) *At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.*

(h) The youth of the defendant at the time of the crime." (Emphasis supplied.)

knowingly or with recklessness so great as to manifest extreme or callous indifference to the value of human life. On the other hand, the present delimitation is, in our view, too narrow insofar as it excludes cases of wholly wanton recklessness not involving an enumerated felony, such as derailing of a train without purpose to kill; cases of homicide on momentary impulse without any reasonable cause, which may manifest exceptional depravity; and cases where the aggravation inheres mainly in the actor's background or situation, as when he is a convict or has a record of resort to violence."

The drafters of the MPC "reflected a strong sentiment in favor of tighter controls on the discretionary judgment [and called for] proof of at least one of the enumerated aggravations to justify capital sentence." *Id.* at 71. Finally the MPC proposed that the aggravating and mitigating circumstances be weighed against each other.[14]

Against this legal background the North Carolina General Assembly enacted our present death penalty statute which we are, for the first time, considering in this and the other capital cases decided today. The North Carolina statute follows both in broad outline and in detail the MPC even more closely than did the statutes of Georgia and Florida.[15] This is appropriate inasmuch as the concerns to which the MPC was addressed were the same as those considered controlling in the leading opinions

14. The Comments include these statements, *id.* at 71-72:

"[W]e agree, however, with the Royal Commission on Capital Punishment that 'there are not in fact two classes of murder but an infinite variety of offenses which shade off by degrees from the most atrocious to the most excusable' and that 'the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula. . . .' (Citation omitted.) We think, however, that it is within the realm of possibility to point to the main circumstances of aggravation and mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case. Such circumstances are enumerated in Subsection (1)(e) and Subsections (3) and (4).

. . . .

"[W]hat is rationally necessary is, as we have said, the balancing of any aggravations against any mitigations that appear. The object sought is better attained, in our view, by requiring a finding that an aggravating circumstance has been established *and* a finding that there are no substantial mitigating circumstances." (Emphasis original.)

15. The North Carolina legislature did not, however, follow MPC § 210.6(1) providing, in part, that if certain mitigating factors existed, *e.g.*, the young age of the defendant, the death penalty could not be imposed.

of the United States Supreme Court in the cases discussed above.[16]

In summary, there are a number of controlling factors governing the interpretation of our death penalty statute. Unbridled discretion in the imposition of the sentence is not permitted. On the other hand, sentencing juries must have some discretion to determine in a rational and consistent manner those cases in which the death penalty should be imposed. Juries are to be guided in this process by a carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused. Thorough jury instructions, which incorporate and reflect the definitions accorded to these criteria and which are fully applied to the facts of each case, must be given. In each case the process must be directed toward the jury's having a full understanding of both the relevant aggravating and mitigating factors and the necessity of balancing them against each other in determining whether to impose the death penalty. Lastly, any imposition of the death penalty by the jury should be searchingly reviewed by the appellate courts to insure the absence of unfairness, arbitrariness or caprice in the result.

With this legal background in mind, then, we proceed to examine defendant's contentions regarding the application of specific provisions of our death penalty statute in this case.

III

[1] Defendant contends the trial court failed adequately to define the mitigating circumstance set out in G.S. 15A-2000(f)(6).[17] As to this circumstance the jury was told:

16. Indeed the plurality opinion in *Gregg* expressly endorsed the MPC approach, saying:

"While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded 'that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case.' ALI, Model Penal Code § 201.6, Comment 3, p 71 (Tent Draft No. 9, 1959) (emphasis in original). While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." 428 U.S. at 193-94.

17. *See* note 1, *supra*.

> "The third mitigating circumstance listed is: The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. That means his capacity to recognize what he was doing was a criminal act or his capacity to follow the law was lessened by reason of an impairment of his capacity in those respects."[18]

Defendant argues, with some force, that this instruction is tantamount to telling the jury that defendant's capacity was impaired if the jury found his capacity was impaired. We agree that in the context of the evidence and defendant's contentions based thereon, this instruction was prejudicially inadequate.

General Statute 15A-2000(f)(6) is copied largely from MPC § 210.6(4)(g),[19] which rests in turn on MPC § 4.02(2) which provides:

> "Whenever the jury or the Court is authorized to determine or to recommend whether or not the defendant shall be sentenced to death or imprisonment upon conviction, evidence that the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect is admissible in favor of sentence of imprisonment."

Section 4.02(2) has its basis in MPC § 4.01, which states:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."

While MPC §§ 210.6(4)(g) and 4.02(2) are versions of a mitigating circumstance in a capital case, § 4.01 represents the MPC's

18. Later in his instructions the trial judge called the jury's attention to the testimony of Dr. Proctor and his diagnosis of schizophrenia as bearing on this mitigating factor, but he never defined the terms used in the statute beyond that given in the text.

19. *See* note 13, *supra.*

recommendation for a definition of legal insanity constituting a complete defense to a charge of criminal conduct.[20]

The phrases "to appreciate the criminality of his conduct" and "to conform his conduct to the requirements of law" are identical in all MPC provisions and in the mitigating circumstances defined by our legislature in G.S. 15A-2000(f)(6). The difference between the MPC's test for legal insanity and its mitigating circumstance provisions is that in the former a defendant must lack "substantial capacity" whereas in the latter his capacity need only be "impaired." In this respect the mitigating circumstance in our statute is identical to the MPC. Our statute differs, however, from MPC § 210.6(4)(g) in that under it the impairment is not expressly limited to that caused by "a mental disease or defect or intoxication."

In both our statute and the MPC's mitigating provisions, a defendant's impaired capacity does not absolve him of guilt. It is, rather, a mitigating circumstance which does not control but is only to be considered on the question of punishment. As pointed out in the Comment to MPC § 4.02, it embodies the view that impaired capacity,

> "even though insufficient in degree to establish irresponsibility, should be regarded as a factor favorable to mitigation of capital punishment . . . . While the provision is advanced here as a supplement to relaxation of the responsibility criteria, it should be added that there is an even greater need for such basis of mitigation in any jurisdiction where the strict *M'Naghten* rule survives." MPC § 4.02, p. 193 (Tent. Draft No. 4, 1955).

The definition of legal insanity in MPC § 4.01 was advanced in response to criticisms of the traditional *M'Naghten* test.[21] The *M'Naghten* test as a definition of legal insanity continues to be the law in this state. It was first laid down in M'Naghten's Case, 10 Clark & Fin. 200, 210 [8 Eng. Reps. 718, 722] (1843). It is stated in our cases as follows: "[A]n accused is legally insane and exempt

20. As such it was recently adopted in California in *People v. Drew*, 149 Cal. Rptr. 275, 583 P. 2d 1318 (1978). A majority of the California Supreme Court noted that this test "has won widespread acceptance, having been adopted by every federal circuit except for the first circuit and by 15 states." Supporting citations appear in 149 Cal. Rptr. at 281, 583 P. 2d at 1324-25 nn. 9, 10.

21. *See* MPC § 4.01, Comments (Tent. Draft No. 4, 1955).

from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act." *State v. Swink*, 229 N.C. 123, 125, 47 S.E. 2d 852, 853 (1948); *accord*, *State v. Potter*, 285 N.C. 238, 249, 204 S.E. 2d 649, 656-57 (1974), and cases therein cited. Under this test if a defendant, at the time of his conduct under investigation, *knows* the difference between right and wrong and that his conduct is wrong and *knows* the nature and quality of the act he committed, he is legally sane and criminally responsible.

The criticisms of this test addressed by the MPC are adequately summarized in the Comments to MPC § 4.01, *see* note 21, *supra*, and in *People v. Drew*, *supra* note 20, 149 Cal. Rptr. 275, 583 P. 2d 1318. First the *M'Naghten* test fails to recognize what was thought to be well-established in psychiatry—that a person may often know the nature and quality of his act and that it is wrong, yet because of a mental disease nevertheless be unable to refrain from committing it. As the California court pointed out in *People v. Drew*, *supra*, 149 Cal. Rptr. at 279, 583 P. 2d at 1322:

> "Current psychiatric opinion . . . holds that mental illness often leaves the individual's intellectual understanding relatively unimpaired, but so affects his emotions or reason that he is unable to prevent himself from committing the act. (Citation omitted.) '[I]nsanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, and yet commit it as a result of the mental disease.' (Rep. Royal Com. on Capital Punishment, 1949-1953, p. 80)."

Second, the *M'Naghten* test rests on an "all or nothing" concept. A defendant either *knows* right from wrong in relation to the act committed in which case he is legally responsible, or he *does not*, in which case he is absolved from responsibility. The

test recognizes no degrees of incapacity. *People v. Drew, supra,* 149 Cal. Rptr. at 279, 583 P. 2d at 1322.[22]

The MPC attempts to meet these criticisms by avoiding the all or nothing approach of the *M'Naghten* test and referring instead to lack of "substantial capacity" rather than lack of all capacity. Second, it incorporates a volitional aspect, similar to but not the same as the irresistible impulse test, by providing that lack of "substantial capacity" of a defendant "to conform his conduct to the requirements of law" shall constitute legal insanity.[23] Finally, instead of relying on a defendant's "knowledge" of the moral quality of his act it uses the word "appreciate." Under this language even though a defendant may know that his act is wrong he may, nevertheless, lack substantial capacity to "appreciate" its wrongfulness or criminality. *See People v. Drew, supra,* 149 Cal. Rptr. at 282, 583 P. 2d at 1325. The word "appreciate" was obviously carefully chosen. Appreciate means "to judge or evaluate the worth, merit, quality, or significance of: comprehend with knowledge, judgment, and discrimination . . . to judge with heightened perception or understanding . . . to be fully sensible of . . . ." Webster's Third New International Dictionary 105 (1971).

Neither the North Carolina General Assembly nor this Court has chosen to depart from the *M'Naghten* test when the issue is whether legal insanity constitutes a complete defense in a

22. The Comments to MPC § 4.01 make the point as follows:

"One further problem must be faced. In addressing itself to impairment of the cognitive capacity, *M'Naghten* demands that impairment be complete: the actor must *not* know. So, too, the irresistible impulse criterion presupposes a complete impairment of capacity for self-control. The extremity of these conceptions is, we think, the point that poses largest difficulty to psychiatrists when called upon to aid in their administration. The schizophrenic, for example, is disoriented from reality; the disorientation is extreme; but it is rarely total. Most psychotics will respond to a command of someone in authority within the mental hospital; they thus have some capacity to conform to a norm. But this is very different from the question whether they have the capacity to conform to requirements that are not thus immediately symbolized by an attendant or policeman at the elbow. Nothing makes the inquiry into responsibility more unreal for the psychiatrist than limitation of the issue to some ultimate extreme of total incapacity, when clinical experience reveals only a graded scale with marks along the way. (Citation omitted.)

"We think this difficulty can and must be met. The law must recognize that when there is no black and white it must content itself with different shades of gray. The draft, accordingly, does not demand *complete* impairment of capacity. It asks instead for *substantial* impairment. This is all, we think, that candid witnesses, called on to infer the nature of the situation at a time that they did not observe, can ever confidently say, even when they know that a disorder was extreme." MPC § 4.01, p. 158 (Tent. Draft No. 4, 1955). (Emphasis original.)

23. In North Carolina, of course, the irresistible impulse doctrine, adopted in many states as an adjunct to the *M'Naghten* rule, has been rejected as a test for legal insanity absolving the defendant of all criminal responsibility. *State v. Wetmore,* 287 N.C. 344, 357, 215 S.E. 2d 51, 58-59 (1975); *State v. Humphrey,* 283 N.C. 570, 574, 196 S.E. 2d 516, 519 (1973).

criminal case. *Nothing we say here is intended to be our criticism of that test for this purpose; nor is it to be thought a suggestion that the test as a guage for legal insanity in criminal cases be modified.* The legislature, though, by enacting G.S. 15A-2000(f)(6) has determined to depart from the *M'Naghten* test and to adopt the MPC test for mental capacity as a mitigating circumstance to be considered on the question of punishment in capital cases. This mitigating circumstance may exist even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to know the nature and quality of that act. It would exist even under these circumstances if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished).

In the context of the evidence and contentions in this case it was incumbent upon the trial judge to explain fully this mitigating circumstance to the jury. The only testimony at the sentencing hearing relative to defendant's mental disease was that given by Dr. Richard Proctor, although Dr. Groce, testifying at an earlier hearing, agreed with Dr. Proctor's diagnosis that defendant suffered from schizophrenia. Both doctors described it as "latent." The "latent" quality of the disease was described by Dr. Proctor as follows:

> "Schizophrenia once it appears may be episodic. . . . [T]here are many times when it is completely under control, but as an example, an individual who has diabetes can have their diabetic condition under control through the use of diet and insulin but they still have the diabetes . . . .
>
> "At this time, I would consider the defendant a latent schizophrenic. It does change—he does go from latent to active schizophrenic.
>
> . . . .
>
> "The defendant's schizophrenia is difficult to grade. I would grade his schizophrenic disease as moderate. In his grade of schizophrenia, it would not be likely over the course of his lifetime for people that have known him real well to

> have noticed episodes of bizarre or at least unusual behavior. There wouldn't be any inkling from people who knew him that he was suffering from this disease or had this problem."

Dr. Proctor expressed three crucial opinions. These were: (1) defendant was under the influence of a mental or emotional disturbance at the time of the murder; (2) defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was impaired at that time; and (3) defendant knew then the difference between right and wrong even though he was suffering from a mental defect or disease.

Defendant conceded at trial through his plea of guilty that he was legally sane; and his counsel admitted on oral argument that he had no evidence of defendant's legal insanity as defined under the *M'Naghten* test. During oral argument the Court pursued this point at length. Defendant's counsel stated that had Dr. Proctor been of the opinion that defendant did not know the difference between right and wrong, a plea of not guilty, bottomed on an insanity defense, would have been tendered. Not, therefore, being able to rely on an insanity defense under the law of North Carolina in the guilt phase of the trial, defendant heavily relied upon the mitigating circumstance set out in G.S. 15A-2000(f)(6) to persuade the jury that he should be sentenced to life imprisonment rather than death. It is fair to say that this mitigating circumstance was almost "the whole case" so far as defendant was concerned on the question of punishment.

On this state of the record, then, the trial court's cryptic reference to this mitigating circumstance in the definitional portion of his instructions was prejudicially insufficient. Defendant was entitled to a fuller treatment of the issue. The trial court should have explained the difference between defendant's capacity to know right from wrong which defendant conceded he possessed, and the *impairment* of his capacity to appreciate the criminality of his conduct from which his evidence indicated and he contends he suffered. While defendant might have known that his conduct was wrong, he might not have been able to appreciate, *i.e.*, to fully comprehend, or be fully sensible, of its wrongfulness. Further while his capacity to so appreciate the wrongfulness of his conduct might not have been totally obliterated, it might have been impaired, *i.e.*, lessened or

diminished. The trial court should also have more carefully explained that even if there was no impairment of defendant's capacity to appreciate the criminality of his conduct, the jury should nevertheless find the existence of this mitigating factor if it believed that defendant's capacity to conform his conduct to the law, *i.e.*, his capacity to refrain from illegal conduct, was impaired. Again, this does not mean that defendant must wholly lack all capacity to conform. It means only that such capacity as he might otherwise have had in the absence of his mental defect is lessened or diminished because of the defect.

For failure of the trial court to so instruct the jury in the context of the evidence and contentions in this case defendant is entitled to a new hearing on the question of his sentence.

On this point this case is distinguishable from *State v. Goodman, supra,* 298 N.C. 1, 257 S.E. 2d 569. We there held the instruction explaining G.S. 15A-2000(f)(6) to be sufficient. *Goodman* involved alcoholic intoxication, a condition much better understood by the average layman than such a mental disease as schizophrenia, with which we are here concerned. The real question in *Goodman*, furthermore, was whether defendant's alcoholic intoxication had progressed to such an extent as even to impair his faculties. On this issue the instruction as given in *Goodman* was sufficient. The issue here is much more complex, and the inadequacy of the instruction given the jury is clearly prejudicial.

IV

A

Defendant contends the trial court erred in failing to submit various "other" mitigating circumstances *in writing.* G.S. 15A-2000(f) lists eight mitigating circumstances which might arise, but it specifically provides that consideration shall not be limited to these eight. Subsection (f)(9) authorizes the jury to consider "any other circumstance arising from the evidence which the jury deems to have mitigating value." In this case the trial court submitted a written list of mitigating circumstances which included only those expressly set out in the statute.[24] Included on the list

24. Submission in writing of possible mitigating factors was approved in *State v. Goodman, supra.* G.S. 15A-2000(c) *requires* that aggravating circumstances and other findings prerequisite to the imposition of the death penalty be in writing.

was the catchall, "any other circumstance . . . ." As to this the jury was instructed as follows:

> "The legislature has not provided any further listing of what those circumstances may be, but leaves it to the jury to determine from the evidence whether you deem other circumstances to exist, which would have mitigating value. You might consider such things as his cooperation with the law enforcement officer; his full confession to this crime, to which he has entered this plea of guilty; his help in producing evidence to the State of this crime; the fact that he's been a model prisoner since shortly after he was incarcerated in this crime in late October or early November in 1977, are some things that you might consider as other mitigating circumstances in this case."

Defendant argues that at least these circumstances mentioned by the trial court should have been included on the written list submitted to the jury. Further defendant contends the trial judge erred in failing to mention defendant's good character as a mitigating circumstance. Much of defendant's evidence during the sentencing hearing was devoted to proving that defendant's character and reputation in his community was good. A number of character witnesses testified to this effect.

We held in *State v. Goodman, supra*, that an instruction which failed to include defendant's intoxication *per se* as a mitigating circumstance was nevertheless adequate in that it did not preclude the jury from considering it and "the court is not required to sift through the evidence and search out every possible circumstance which the jury might find to have mitigating value." 298 N.C. at 34, 257 S.E. 2d at 590. We note, in addition, that when a defendant pleads not guilty in a criminal case and offers evidence of his good character he is entitled to have the jury consider such evidence both as bearing upon his credibility as a witness, if he testifies in his own behalf, and as substantive evidence on the issue of guilt. *State v. Bridgers*, 233 N.C. 577, 64 S.E. 2d 867 (1951). Failure to so instruct the jury, however, will not be held for error unless the defendant specifically requests such an instruction. *State v. Burell*, 252 N.C. 115, 113 S.E. 2d 16 (1960).

[2] The trial court may have considered that the mitigating circumstance which refers to a defendant's lack of "significant

history of prior criminal activity"[25] encompassed defendant's contention regarding his good character. Such, of course, should not be the case. Good character imports more than simply the absence of criminal convictions.

> "[Good moral character] is something more than the absence of bad character. It is the good name which [a person] 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." *In re Rogers*, 297 N.C. 48, 58, 253 S.E. 2d 912, 918 (1979), *quoting In re Applicants for License*, 191 N.C. 235, 238, 131 S.E. 661, 663 (1926).

[3] Frequently, however, there may be a number of things including good character, which a defendant contends the jury should consider in mitigation. In order to insure that the trial judge mentions these to the jury in his instructions the defendant must file a timely request. Otherwise failure of the court to mention any particular item as a possible mitigating factor will not be held for error so long as the trial judge instructs that the jury may consider any circumstance which it finds to have mitigating value pursuant to G.S. 15A-2000(f)(9). The trial court so instructed the jury in this case. That defendant here made no timely request that additional mitigating factors be submitted to the jury *in writing* is, likewise, a complete answer to the trial judge's failure to do so.

[4] If, however, a defendant makes a timely request for a listing in writing of possible mitigating circumstances, supported by the evidence, and if these circumstances are such that the jury could reasonably deem them to have mitigating value, we are of the opinion that the trial judge must put such circumstances on the written list.

The legislature did not intend to give those mitigating circumstances expressly mentioned in the statute primacy over

25. *See* G.S. 15A-2000(f)(1).

others which might be included in the "any other circumstance" provision. Such an intent, if it existed, might run afoul of *Lockett v. Ohio, supra,* 438 U.S. 586. In *Lockett* Ohio's death penalty statute was found unconstitutional under the Eighth and Fourteenth Amendments because the Ohio sentencing authority could consider only three mitigating factors and none other. The Supreme Court concluded, *id.* at 604-05, 608:

> "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death . . . . The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases . . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.
>
> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.
>
> . . . .
>
> "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." (Emphasis original.)

A footnote to the quoted sections of *Lockett* provides, "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's

character, prior record or the circumstances of his offense." *Id.* at 604 n. 12.

Under *Lockett* a legislature would be free to provide that the existence of certain mitigating factors would preclude the imposition of the death penalty, while the existence of others should simply be considered, but not as controlling, on the question.[26] A death penalty sentencing statute, however, which by its terms or the manner in which it is applied, puts some mitigating circumstances in writing and leaves others to the jury's recollection might be constitutionally impermissible under the reasoning of *Lockett.* For if the sentencing authority cannot be precluded from considering any relevant mitigating circumstance supported by the evidence neither should such circumstances be submitted to it in a manner which makes some seemingly less worthy of consideration than others.

Thus we are satisfied that our legislature intended that all mitigating circumstances, both those expressly mentioned in the statute and others which might be submitted under G.S. 15A-2000(f)(9), be on equal footing before the jury. If those which are expressly mentioned are submitted in writing, as we believe they should be, then any other relevant circumstance proffered by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, also be submitted in writing.

Since, however, defendant made no specific request to include possible "other mitigating circumstances" on the written verdict form submitted to the jury[27] and, likewise, made no timely request to include defendant's good character as a mitigating circumstance, we find no error in the actions of the trial judge in failing to do these things.

B

Defendant next contends the trial judge should have peremptorily instructed the jury to find that his capacity to appreciate

26. *See, e.g.*, MPC § 210.6(1), discussed in note 15 *supra*.

27. Defendant did timely request that *all* the jury instructions be put in writing and delivered to the jury for use in their deliberation. This request does not suffice as a request to list all mitigating factors on the written verdict form.

the criminality of his conduct or to conform his conduct to the requirements of law was impaired. "When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner . . . . A peremptory instruction does not deprive the jury of its right to reject the evidence because of a lack of faith in its credibility." *Chisolm v. Hall*, 255 N.C. 374, 376, 121 S.E. 2d 726, 728 (1961). A peremptory instruction may be given in favor of the party having the burden of proof on the issue. *Flintall v. Insurance Co.*, 259 N.C. 666, 131 S.E. 2d 312 (1963).

While our death penalty statute does not expressly allocate the burden of proof with regard to mitigating circumstances, this burden must be borne by either the state or the defendant. On every factual issue, one side or the other must have the burden of proof. The statute makes it clear that the state must bear the burden of proving aggravating circumstances beyond a reasonable doubt. G.S. 15A-2000(c)(1). The state must also prove beyond a reasonable doubt that the statutory aggravating circumstances found to exist are sufficiently substantial to call for the imposition of the death penalty and that the aggravating circumstances outweigh whatever mitigating circumstances the jury finds. G.S. 15A-2000(c)(2)(3); *State v. Goodman, supra*, 298 N.C. 1, 257 S.E. 2d 569; *State v. Cherry, supra*, 298 N.C. 86, 257 S.E. 2d 551.

It is the defendant in these cases who will be asserting the existence of mitigating circumstances and urging the jury to consider them. Logically the defendant should have the burden of persuading the jury that the mitigating circumstances upon which he relies do in fact exist. We recently held in *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978), that the defendant in a kidnapping case had the burden to persuade the jury by a preponderance of the evidence of the existence of mitigating factors listed in the kidnapping statute, G.S. 14-39. After careful review of the controlling authorities,[28] we concluded in *Williams* that it was not a violation of constitutional due process to place upon the defendant the burden of persuasion on factors which

28. *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970); *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds sub nom. Hankerson v. North Carolina*, 432 U.S. 233 (1977).

mitigated his offense. Our reasoning in *Williams* is equally applicable here. Neither aggravating nor mitigating circumstances are elements of the crime of first degree murder. They are circumstances which the jury considers in determining the sentence to be imposed for that crime.[29]

[5] We hold, therefore, that the burden of persuading the jury on the issue of the existence of any mitigating circumstance is upon the defendant and that the standard of proof is by a preponderance of the evidence. Where, however, all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance.

[6] Here the only expert witness to testify as to defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was Dr. Proctor. He stated that in his opinion defendant's capacity was impaired in both respects.

There was also, however, testimony before the jury from Mrs. Ed Foster. She saw defendant twice on 20 October 1977. That morning he bought some minnows and a fish stringer. He came back early in the afternoon and asked to use the bathroom to wash up. Afterwards he asked Mrs. Foster if he had lost a knife there. They looked for the knife and were unable to find it. Defendant then asked Mrs. Foster and her husband if he could leave a gun at the store, and her husband said no. Mrs. Foster described defendant's demeanor that day in the following terms:

> "Based on my observation of the defendant during the time I have known him, I would say that his speech and mannerisms on the 20th were normal. I would describe Dale as being . . . shy and just a quiet person."

Mrs. Foster's observations of and conversations with defendant on 20 October 1977 were roughly contemporaneous with the murder of Mrs. Sherrill. It was her opinion that he was acting normally at that time. Her description of his conduct tends to sup-

29. Ohio placed the burden of proving mitigating circumstances by a preponderance of the evidence on the defendant by clear implication in its death penalty statute. Ohio Rev. Code Annot. §§ 2929.03(E), 2929.04(B). This was noted by the United States Supreme Court in *Lockett v. Ohio*, *supra*, 438 U.S. at 607. It was not the subject of comment. The Ohio statute was found unconstitutional on other grounds as noted in text above.

port that conclusion. "Generally, lay witness testimony concerning a person's mental capacity and condition is admissible as long as the witness has had a reasonable opportunity to observe the person and form an opinion satisfactory to himself on this issue." *State v. Hedrick*, 289 N.C. 232, 237, 221 S.E. 2d 350, 354 (1976). Mrs. Foster's opinion that defendant was "normal" on 20 October 1977 satisfied all the requirements of this rule and was properly admitted. It was competent evidence for the jury to consider on the issue of impaired capacity.

Dr. Proctor's testimony would have supported a jury finding in defendant's favor on the impaired capacity mitigating circumstance. Mrs. Foster's testimony would have supported a contrary finding. A peremptory instruction is inappropriate when there is conflicting evidence on an issue. *Perry v. Trust Co.*, 226 N.C. 667, 40 S.E. 2d 116 (1946). The trial judge did not, therefore, err in failing to give one here.

[5] Furthermore, just as the trial judge should not on his own be required to sift the evidence for every possible mitigating circumstance which the jury might find, neither should he be required to determine on his own which mitigating circumstance is deserving of a peremptory instruction in defendant's favor. In order to be entitled to such an instruction defendant must timely request it. If so requested and if defendant is otherwise entitled to it, it will be error for the trial judge not to give it. Failure of defendant here to make a request for such an instruction is an additional reason for concluding that no error was committed by the trial judge in failing to give it.

V

Defendant contends the trial court erred in ruling that it could not approve a plea bargain whereby defendant would plead guilty to first degree murder and the state would recommend a life sentence. At the outset of the proceedings the state and defendant inquired whether Judge Collier would approve such a plea bargain. Judge Collier stated his opinion that he could not do so in a capital case because the statute did not provide for it. Thereafter, according to affidavits of Judge Collier and Mr. Donald E. Greene, District Attorney for the Twenty-Fifth Judicial District, "No further discussion occurred between the State and the defendant regarding plea bargaining" and no plea bargain was

entered into. Defendant stated at his arraignment that he had not entered his plea as a part of a plea bargain. It is not clear from the record whether it was contemplated that any recommendation the state might make pursuant to a plea bargain would be made to a jury at the sentencing hearing or to the court, which would then sentence defendant without the intervention of a jury.

A short answer to this contention is that no bargain was ever made or formally submitted to Judge Collier for his approval. To meet, however, defendant's contention that such a bargain might have been struck had Judge Collier not indicated in advance that he would not approve it, we choose to discuss the merits of the argument.

[7] The question raised is whether a defendant may plead guilty to first degree murder and by prearrangement with the state be sentenced to life imprisonment without the intervention of a jury. The answer is no. It is true that the statute does not expressly prohibit such an arrangement. We are satisfied, however, that the plain language of its provisions demonstrates the legislature never intended such a procedure to be available. G.S. 15A-2000(a)(1) provides: "Upon conviction or adjudication of guilt of a defendant of a capital felony, the court *shall* conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment." (Emphasis supplied.) The remaining portions of G.S. 15A-2000 describe the manner in which the "separate sentencing proceeding" shall be conducted. G.S. 15A-2001 provides: "Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may sentence such person to life imprisonment or to death *pursuant to the procedures of G.S. 15A-2000.* Before sentencing the defendant, the presiding judge *shall* empanel a jury for the limited purpose of hearing evidence and determining a sentence recommendation as to the appropriate sentence pursuant to G.S. 15A-2000. The jury's sentence recommendation in cases where the defendant pleads guilty shall be determined under the same procedure of G.S. 15A-2000 applicable to defendants who have been tried and found guilty by a jury." (Emphasis supplied.)

[8] We do not see how the legislature could have expressed in plainer language its intent that the question of sentence in a capital case be determined in the same manner whether a defendant pleads guilty to the capital offense or is found guilty by a jury. Neither does the statute permit the state to recommend to the jury during the sentencing hearing a sentence of life imprisonment when the state has evidence from which a jury could find at least one aggravating circumstance beyond a reasonable doubt. Again we rely on the MPC for help in so interpreting our statute. The MPC expressly recommends that in cases where "the defendant, with the consent of the prosecuting attorney and the approval of the Court, [pleads] guilty to [first degree] murder" the Court shall impose what in North Carolina would be life imprisonment. MPC § 210.6(1)(c). Our legislature chose not to include such a provision in our statute although it utilized many of the MPC's other suggestions.

Such a provision, moreover, might make the statute unconstitutional under *United States v. Jackson*, 390 U.S. 570 (1968). In *Jackson* the Court construed the Federal Kidnapping Act to permit the imposition of the death penalty only upon recommendation of the jury that determined defendant's guilt. A defendant who pled guilty could not, under any circumstances, be sentenced to death. The Court held that the death penalty could not be imposed under a statute such as this which imposed "an impermissible burden upon the exercise of a constitutional right," *id.* at 572, in that "the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous to seek a jury acquittal stands the risk that if the jury finds him guilty and does not wish to spare his life, he will die." *Id.* at 581. Mr. Justice Blackmun believed that the Ohio death penalty statute declared unconstitutional on other grounds in the Court's opinion in *Lockett v. Ohio, supra,* 438 U.S. 586, was also unconstitutional on *Jackson* grounds because an Ohio rule of criminal procedure permitted the sentencing court in its "full discretion to prevent imposition of a capital sentence 'in the interests of justice' *if* a defendant pleads guilty or no contest, but wholly lacks such discretion if the defendant goes to trial." *Id.* at 618 (Blackmun, J., concurring). (Emphasis original.)

[8] In a case in which the state has no evidence of an aggravating circumstance we see nothing in the statute which

would prohibit the state from so announcing to the court and jury at the sentencing hearing. Such an announcement must be based on a genuine lack of evidence to support the submission to the jury of any of the aggravating circumstances listed in G.S. 15A-2000(e). Upon such an announcement being made and upon failure of the state to offer evidence of any aggravating circumstance the judge may proceed to pronounce a sentence of life imprisonment without the intervention of the jury. This is so because a jury cannot return a sentence of death unless it finds, among other things, beyond a reasonable doubt, the existence of at least one aggravating circumstance which is supported by the evidence. G.S. 15A-2000(c) & (d).

This construction is supported by the Comment to MPC § 201.6, p. 72 (Tent. Draft No. 9, 1959):

> "Under Subsection (1)(a) the Court is directed to sentence for a first degree felony, without conducting any further proceeding, if it is satisfied that none of the aggravating circumstances was established by the evidence at the trial or will be established if a further proceeding on the issue of the death sentence should be initiated. Thus if no aggravating circumstance appears in the evidence and the prosecuting attorney does not propose to prove one in the subsequent proceeding, sentence of imprisonment will be imposed."

Here, there was evidence tending to show the existence of two aggravating factors, *i.e.*, that the murder occurred in the course of a rape or attempted rape and that the murder was especially heinous, atrocious and cruel. *See* G.S. 15A-2000(e)(5), (9); Parts VI & VII, *infra*. The issue whether the death penalty should be imposed was thus necessarily one for the jury. It was not error for the trial court to refuse to sanction the proposed plea negotiation.

VI

Defendant contends the evidence does not support the jury's finding that the murder was especially heinous, atrocious or cruel and that, even if it did, the court's instructions on this point were prejudicially inadequate and that the court further erred in not giving an instruction as requested by defendant. The instructions on this aggravating circumstance to which defendant takes exception were:

"Now, to give you a further definition of some of the words contained in this second subparagraph on this issue, members of the jury, beginning with the word 'especially,' I would instruct you that 'especially' used in this context means extremely, that is, extremely heinous, atrocious or cruel. Heinous means hateful, odious or gravely reprehensible. Atrocious may be defined as being extremely or shockingly wicked or cruel. It is also sometimes a synonym for heinous. Cruel means disposed to inflict suffering or indifference to or taking pleasure in pain or distress of another or hardhearted or pitiless. For a killing to be especially heinous, atrocious or cruel, it must have been done without conscience and pitiless and unusually torturous to the victim."

We held in *State v. Goodman, supra,* 298 N.C. 1, 257 S.E. 2d 569, that the aggravating circumstance listed in G.S. 15A-2000(e)(9)[30] was not intended to be a "'catchall' provision which can always be employed in cases where there is no evidence of other aggravating circumstances" and that "this subsection is [not] intended to apply to every homicide." We adopted in *Goodman* Florida's construction of a similar provision in its death penalty statute.[31] By interpreting its comparable section to be directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim," *State v. Dickson,* 283 So. 2d 1, 9 (Fla. 1973), *cert. denied,* 416 U.S. 943 (1974), the Florida Supreme Court provided a construction which enabled the United States Supreme Court to hold that the provision, as construed, was not unconstitutionally vague or overbroad and gave sufficient "guidance to those charged with the duty of recommending or imposing sentences in capital cases." *Proffitt v. Florida, supra,* 428 U.S. at 256. The trial judge defined this aggravating circumstance precisely in accord with definitions approved by the Florida Supreme Court in *Dickson,* the United States Supreme Court in *Profitt,* and this Court in *Goodman.*

[9] Defendant did, however, specifically request, in connection with this aggravating circumstance, that the trial court instruct "that murder is not *per se* heinous, atrocious or cruel . . . ." We said in *Goodman*:

30. "The capital felony was especially heinous, atrocious, or cruel."

31. The Florida provision is: "The capital felony was especially heinous, atrocious, or cruel, manifesting exceptional depravity." Fla. Stat. Annot. § 921.141(3)(h).

> "While we recogize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word 'especially' the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection." 298 N.C. at 24-25, 257 S.E. 2d at 585.

The trial court, in addition to its other instructions, should have told the jury that not every murder is necessarily especially heinous, atrocious, or cruel in the sense these words are used in the statute inasmuch as such an instruction was specifically requested and was a correct statement of the law. Since we are granting defendant a new sentencing hearing on other grounds, we need not determine whether this error, standing alone, would have warranted a new sentencing hearing.

[10] We are satisfied that the submission of this aggravated circumstance was proper in light of evidence. It tended to show that defendant first tried to strangle his victim to death with a fish stringer. Upon rendering her unconscious he sexually molested her. Then, realizing she was not dead, he stabbed her to death. Defendant's actions could have been found by the jury to be "especially heinous, atrocious or cruel" within the meaning of the statute as we have construed it.

VII

[11] Defendant brings forward the contention that since his conviction of murder in the first degree was based on the theory of felony murder, *i.e.*, murder committed in the course of rape, the state should not be entitled to rely on the aggravating circumstance that the "capital felony was committed while the defendant was engaged . . . in the commission of . . . [a] rape," to support the imposition of the death penalty. *See* G.S. 15A-2000(e)(5). This argument is simply not supported by the record. Defendant entered a plea of guilty as charged to murder in the first degree on an indictment in the statutory form. *See* G.S. 15-144. After hearing testimony on the plea the trial court found as a fact beyond a reasonable doubt "that there is a factual basis for the plea entered in this case." Evidence adduced to provide a factual basis for the plea would have supported the plea on

the theory of premeditation and deliberation.[32] Since defendant pled guilty and there was evidence of premeditation and deliberation, we need not address the issue whether the state could rely solely on a separate felony as an essential element of the capital offense of first degree murder, so that without the separate felony there would be no capital offense, and then rely on that same felony as an aggravating circumstance under G.S. 15A-2000(e)(5).

VIII

[12] Finally defendant argues that the trial court erred in failing to allow his motion for an associate counsel to assist Mr. Groome. Mr. C. A. Horn was appointed to assist Mr. Groome but only for the purpose of selecting the jury. Because of the grave consequences inherent in any capital case the North Carolina State Bar has adopted amendments to its regulations relating to appointment of counsel for indigent defendants which address specifically the appointment of counsel in capital cases. These amendments were duly adopted by the Council of the North Carolina State Bar on 22 May 1978 and approved by the Chief Justice on 26 May 1978. They are found at 294 N.C. 750-51. The rules provide:

> "Section 4.8. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, an indigent defendant charged with a capital offense shall be entitled to be represented by one counsel provided in appropriate cases in the discretion of the Court one additional assistant counsel at either the trial or appellate level, or both, may be appointed.
>
> "Section 4.9. Notwithstanding any other provisions of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed

32. The evidence showed that defendant came at his victim from behind, strangled her until she was unconscious and then tried to sexually assault her. When she began to regain consciousness, he feared she might scream and stabbed her. The tests for premeditation and deliberation have been set out in our cases as follows:

> "Premeditation means thought beforehand for some length of time, however short. (Citations omitted.)
>
> "Deliberation does not require brooding or reflection for any appreciable length of time, but imports the execution of an intent to kill in a cool state of blood without legal provocation, and in furtherance of a fixed design." *State v. Britt*, 285 N.C. 256, 262, 204 S.E. 2d 817, 822 (1974).

Defendant's conduct here clearly satisfies both these tests.

to represent at the trial level any indigent defendant charged with a capital crime in a district which does not have a public defender:

(a) Who does not have a minimum of five years experience in the general practice of law, provided that the Court may in its discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the court appointing him to have a demonstrated proficiency in the field of criminal trial practice.

"For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

"Section 4.10. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime in a district which does not have a public defender:

(a) Who does not have a minimum of five years experience in the general practice of law, provided, that the Court may in its discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the trial judge to have a demonstrated proficiency in the field of appellate practice.

"For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

"Unless good cause is shown an attorney representing the indigent defendant at the trial level shall represent him at the appellate level if the attorney is otherwise qualified under the provisions of this section."

These proceedings were conducted before the adoption of the foregoing rules which authorize the appointment of associate counsel. At that time this Court had indicated a preference that "only *one* competent attorney [be] appointed to represent" an in-

digent defendant even in a capital case. *State v. Hardy*, 293 N.C. 105, 131, 235 S.E. 2d 828, 844 (1977). (Emphasis original.) Defendant here entered a plea of guilty to the capital felony. The crucial trial proceedings, therefore, centered around the sentencing hearing itself. The record reveals that Mr. Groome conscientiously and ably represented this defendant. His diligence is revealed at the pretrial, trial, and appellate stages of this proceeding. Defendant has not shown that he was prejudiced by failure to appoint associate counsel to assist Mr. Groome throughout the proceedings. We find no error in the trial judge's handling of this motion.

For error in the sentencing phase of the trial, this case is remanded for a new sentencing hearing pursuant to G.S. 15A-2000(d)(3).

In the guilt determination phase of the trial—No error.

In the sentencing phase of the trial—New trial.

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

Justice HUSKINS, concurring.

I support the majority opinion in *Johnson, Goodman* and *Cherry*. At the same time, I join in the concurring opinion of Justice CARLTON which correctly, I think, analyzes the results reached in these three cases.

Justice CARLTON concurs for the reasons stated in his concurring opinion filed this date in *State v. Goodman*, 298 N.C. 1, 36, 257 S.E. 2d 569, 591 (1979).

STATE OF NORTH CAROLINA v. JOHNNY CHERRY, ALIAS RAEFORD CHERRY

No. 47

(Filed 4 September 1979)

1. **Searches and Seizures § 7— seizure as incident of lawful arrest—plain view—pistol under rug**

A pistol was lawfully seized from defendant's motel room as an incident to his lawful arrest and under the plain view doctrine where officers went to the motel room to arrest defendant pursuant to an arrest warrant; another occupant fled from the room and told the officers that defendant had a pistol; defendant did not respond to the officers' continued demands that he come out of the room for about thirty minutes; defendant finally stuck his hands out the door and officers handcuffed him, entered the room and seated defendant in a chair; an officer observed a lump in the rug in the corner of the room and stated, "There is your gun"; and the rug was pulled back and the pistol was seized.

2. **Criminal Law § 135.4— first degree murder—sentencing hearing—inadmissibility of affidavits concerning death penalty**

In a sentencing hearing in a first degree murder case, the trial court did not unduly limit the jury's consideration of mitigating factors in violation of G.S. 15A-2000(f)(9) by his exclusion of (1) an affidavit of a convicted murderer who had been sentenced to death and then received a sentence of life imprisonment at a retrial that he had been rehabilitated, released, and holds a responsible government position; (2) an affidavit that the death penalty is counterproductive as a deterrent to crime; (3) an affidavit of a newspaper reporter that he believed innocent persons are executed from time to time; and (4) affidavits from several ministers expressing their opposition to the death penalty on religious grounds, since such evidence was in no way connected with defendant, his character, his record or the circumstances of the charged offense and was, therefore, irrelevant and of no probative value as mitigating evidence. Nor did the exclusion of such affidavits violate rights guaranteed to defendant by the Eighth and Fourteenth Amendments to the U. S. Constitution.

3. **Criminal Law § 126.3— jurors' impeachment of verdict**

After a verdict has been rendered and received by the court and the jury has been discharged, jurors will not be allowed to attack or overthrow their verdict, nor will evidence be received from them for such purpose, and this rule cannot be circumvented by the testimony of another as to what the juror said.

4. **Criminal Law §§ 126.3, 135.4— first degree murder—death penalty—juror's impeachment of verdict—knowledge of parole possibility for life sentence**

In a sentencing hearing in a first degree murder case, the possibility that jurors knew that defendant might be eligible for parole in 20 years if the jury recommended life imprisonment would not permit a juror to attack and im-

peach his verdict recommending the death sentence after it was received by the court, especially where there was neither argument by the State nor instruction by the court on the question of parole eligibility.

5. **Criminal Law § 126.3— first degree murder—death penalty—juror's impeachment of verdict—knowledge of parole possibility for life sentence—effect of G.S. 15A-1240(c)(1)**

Testimony by a newspaper reporter that a juror told her the jury had recommended the death sentence for defendant because the jurors knew defendant would be eligible for parole in 20 years if he was sentenced to life imprisonment was not rendered admissible to impeach the verdict by G.S. 15A-1240(c)(1), since a juror's knowledge that there is a possibility of parole for a defendant would not "violate the defendant's constitutional right to confront the witnesses against him."

6. **Constitutional Law § 80; Criminal Law § 135.1— constitutionality of death penalty—unbridled discretion of district attorney to calendar cases**

The trial court did not err in refusing to permit the defendant to present evidence that the district attorney abused his discretion in the calendaring of cases to support his contention that the N. C. death penalty unconstitutionally denies a defendant due process by permitting the district attorney to "calendar cases when he chooses in front of whatever judge he chooses," where there was no allegation or intimation that the district attorney deliberately employed any "unjustifiable standard such as race, religion or other arbitrary classification" in setting this or any other case involving the death penalty. Furthermore, even if the district attorney had exercised unbridled discretion in setting cases before judges of his choice, such action would not be relevant to the constitutionality of the death penalty, since under G.S. 15A-2000 *et seq.* the jury has the sentencing power and the trial judge is bound by the jury's sentencing recommendation.

7. **Criminal Law § 135.3; Jury § 7.11— first degree murder trial—exclusion of jurors for death penalty views during guilt phase**

The trial court did not err in excluding for cause during the guilt phase of a bifurcated trial for first degree murder potential jurors who indicated that they could not recommend the imposition of the death penalty under any circumstances and would automatically vote against the imposition of the death penalty without regard to the evidence, since Art. 100 of G.S. Ch. 15A contemplates that the same jury shall hear both phases of the trial unless the original jury is "unable to reconvene," G.S. 15A-2000(2), and the U. S. Supreme Court has approved the bifurcated trial procedure in which the same jurors hear both phases of the trial.

8. **Constitutional Law § 43; Criminal Law § 66.5— right to counsel—counsel excluded from conference with witnesses before lineup**

Defendant was not denied his right to counsel at a crucial stage of the proceedings because his counsel was not permitted to be present when an assistant district attorney talked with State's witnesses prior to a lineup procedure. Furthermore, even if there was a violation of defendant's Sixth Amendment rights because of the exclusion of his counsel from the conference

between the prosecution and the State's witnesses, such error would be harmless beyond a reasonable doubt since defendant does not contend that there was any impermissible suggestiveness in the lineup procedure.

9. **Criminal Law § 34.7— evidence of other crimes—competency to show motive**

In this prosecution for a murder committed during the perpetration of an armed robbery of a Jiffy Market, testimony that, on the same day as the robbery-murder, defendant told two witnesses that he planned to rob a Jiffy Mart but was unable to do so because there were people nearby, that he planned to rob a washerette but did not do so because it was too crowded, and that he robbed a Frito Lay delivery man earlier that day, and testimony that defendant used proceeds from both of the robberies which he committed to buy heroin and cocaine which he and the two witnesses "shot up," *held* competent to show that defendant's motive in committing the robbery in question was to obtain money to buy drugs.

10. **Criminal Law § 135.4— conviction under felony-murder rule—underlying felony not aggravating circumstance**

When a defendant is convicted of first degree murder under the felony-murder rule, the trial judge may not submit to the jury at the sentencing phase of the trial the aggravating circumstance of the underlying felony found in G.S. 15A-2000(e)(5).

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

Justice HUSKINS concurring and joins in the concurring opinion of Justice CARLTON.

Justice CARLTON concurring.

APPEAL by defendant from *Thornburg, J.*, 6 March 1978 Schedule "B" Session of MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the first degree murder of Eugene Howard.

Upon defendant's affidavit of indigency, the public defender was appointed to represent defendant.

Pursuant to motion of counsel, defendant was on 7 December 1977 committed to Dorothea Dix Hospital for observation and treatment to determine, inter alia, if he was competent to proceed to trial. By letter dated 15 December 1977, the court was advised that the medical staff of Dorothea Dix Hospital had completed their examination of defendant and "found him competent to proceed."

At the guilt determination phase of the trial, the State offered evidence tending to show that on 15 September 1977 be-

tween the hours of 6:00 and 7:00 p.m. defendant, armed with a pistol, entered Tony's Jiffy Market located on North Church Street in Charlotte, North Carolina. By the threatened use of the pistol, he first took a .38 Colt Special pistol from the person of Delton Wilkinson, who was standing in the store, and then by the threatened use of the weapon forced Wilkinson, Eugene Howard, an employee of the market, Ervin Gene Holloway, a part-time employee of the market, and Dickson Bailiff into the store's refrigerated room or "cooler." Defendant then took Mr. Howard to the cash register and ordered him to open it. When Mr. Howard refused, a struggle ensued during which Howard temporarily seized possession of the pistol. However, defendant retrieved the pistol and struck Howard three or four times before returning him to the cooler. After defendant opened the cash register, Howard Oberg entered the store and he was also forced into the cooler. While defendant was closing the cooler door, Fred Patton entered the building and he also was ordered into the cooler. At that point, Mr. Howard and others attempted to hold the door closed, but defendant pulled the door open and shot into the cooler striking the refrigeration compressor. After ordering everyone to take their hands off the door, defendant opened the door and inquired about a money pouch and was told that there was no more money.

According to the State's witness Holloway:

> . . . The next thing that happened was when Mr. Howard grabbed the door and shut it. Cherry opened the door again and after the door was opened, I saw the gun come in. The gun went off and shot Mr. Howard in the face, and he fell to the floor.

We note that this same witness testified on voir dire as follows:

> . . . Mr. Howard told him that the only money was in the cash register. Mr. Howard *then grabbed the gun, and the gun went off.* The shot hit Mr. Howard in the face. . . . [Emphasis added.]

The witnesses Wilkinson and Holloway made pretrial identifications and positive in-court identifications of defendant as the perpetrator of the armed robbery and killing. The witness Wilkin-

son also identified State's Exhibit 15 as a pistol taken from him by defendant during the robbery. This exhibit was seized in a motel room occupied by defendant at the time of his arrest.

Valaria Spencer in essence testified that she had known defendant for a short time and had only known him by the name of "Blue." She stated that when she awakened on 15 September 1977, defendant was asleep in another bed in her bedroom. When he left at about 1:00 p.m., he told her that he was going to rob a woman at the "Jiffy Mart." He returned in about ten minutes and said that there were some people on the porch next to the store, and he did not get a chance to commit the robbery. Later in the afternoon, she observed him going toward a Frito-Lay truck and at that time she went home. About ten minutes later, defendant came to her home with about $100 which he said he had gotten from the "Frito" man. Later in the afternoon, defendant purchased and used both heroin and cocaine. He also obtained a pistol from a man called "Red." Defendant then left her home and returned in about an hour with $300 or $400 and at that time took a pistol from his shirt. This was not the same pistol he had obtained from "Red." The witness identified State's Exhibit 15 as the pistol that defendant produced from his shirt. Shortly thereafter, defendant purchased more cocaine and heroin which he, the witness and her sister "shot into their arms." Later in the evening, defendant told her sister that he had shot a man.

State's witness Billy Ray Frye, Jr., a route salesman for Frito-Lay, testified that on the afternoon of 15 September 1977 at around 3:00 o'clock, he was robbed of about $35 or $40 by a black male who was about six feet tall. The robbery occurred in front of the Little General Grocery at the corner of Davidson and Charlotte Streets in Charlotte, North Carolina. He was unable to see this person well enough to identify him.

Defendant offered no evidence on the innocence-guilt phase of the trial. The jury returned a verdict of guilty of first degree murder.

On the penalty phase of the trial, the State offered a stipulation that defendant was convicted on the 26th of January, 1973, of the offense of armed robbery.

On this phase of the trial, defendant offered testimony by his father and mother which tended to show that during the time defendant lived with his parents he was obedient, attended church and never gave his parents any kind of trouble. He left his parents' home and dropped out of school when he was sixteen years old.

Richard Alsop, an employee of Duke Power Company, testified that he was associated with defendant while defendant was a prisoner on a project which permitted defendant to work outside the confines of the prison. He stated that he found defendant to be alert, cooperative and dependable. The witness surmised that defendant obeyed prison rules since he was permitted to work outside.

Betty Cherry, defendant's wife, testified that she married defendant in February, 1976, and that he worked regularly and was good to her children until he returned to North Carolina in August, 1977.

Randy Wright, a boyhood friend, said that he introduced defendant to drugs in the summer of 1977 and that prior to that time defendant was not a user of drugs.

The jury returned its sentence recommendation that defendant's punishment be death.

Rufus L. Edmisten, Attorney General, by Thomas F. Moffitt, Assistant Attorney General, and Joan H. Byers, Assistant Attorney General, for the State.

Fritz Y. Mercer, Jr., Public Defender, and Donna Chu, Assistant Public Defender, of Counsel for defendant appellant.

Mraz and Meacham, P.A., by Mark A. Michael, for defendant appellant.

Wade M. Smith and Roger W. Smith, of Counsel for defendant appellant.

BRANCH, Justice.

[1] Did the trial judge err by admitting into evidence a pistol seized without a search warrant from a motel room occupied by defendant at the time of his arrest?

Unreasonable searches and seizures are prohibited by the fourth amendment to the United States Constitution, and all evidence seized in violation of the Constitution is inadmissible in a State court as a matter of constitutional law. *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied*, 393 U.S. 1087. However, it must be borne in mind that only *unreasonable* searches and seizures are prohibited by the Constitution. *Carroll v. United States*, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925). An unreasonable search has been defined as "an examination or inspection without authority of law of one's premises or person, with a view to the discovery of . . . some evidence of guilt to be used in the prosecution of a criminal action." *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969). The protection against unreasonable searches and seizures is "the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There he is protected from unwarranted governmental intrusion." *Hoffa v. United States*, 385 U.S. 293, 301, 17 L.Ed. 2d 374, 87 S.Ct. 408 (1966). It is basic that, subject to a few specifically established exceptions, searches conducted without a properly issued search warrant are *per se* unreasonable under the fourth amendment, *Katz v. United States*, 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967), and the best assurance of reasonableness lies in obtaining a properly issued search warrant. Two of the recognized exceptions, pertinent to decision of this assignment of error, are search incident to a lawful arrest, *Harris v. United States*, 331 U.S. 145, 91 L.Ed. 1399, 67 S.Ct. 1098 (1947); *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973), and seizure of items falling within the plain view doctrine, *Harris v. United States*, 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968); *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976), *death sentence vacated*, 429 U.S. 809. The United States Supreme Court has limited the scope of reasonable search when made incident to an arrest to the area from which the arrested person might have obtained a weapon or some item that could have been used as evidence against him. *Chimel v. California*, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969); *Shipley v. California*, 395 U.S. 818, 23 L.Ed. 2d 732, 89 S.Ct. 2053 (1969). Even so this seemingly stringent rule has been subject to interpretation by other courts particularly in connection with the well-established rule that whether a search and seizure is unreasonable must be determined upon

the facts and circumstances surrounding each individual case. *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968). We find it helpful to review some of these decisions.

In *State v. Quinn,* 565 S.W. 2d 665 (Mo. Ct. App. 1978), the defendant challenged the admission of a gun into evidence on the basis that it was the product of an illegal search and seizure. In *Quinn* there had been an armed robbery, and the victim had described his assailants to the police. The police officers having these descriptions saw defendant and a Miss Sullivan, who fit the descriptions furnished the police, sitting on the steps of a building. Defendant had a brown bag 18 by 24 inches in size in his hand, and when the police officers called him to their car, he handed the bag to Miss Sullivan. When she was also summoned to the automobile, she placed the bag on the step of the building. Thereupon, one of the officers picked up the bag because he "presumed it was their property." Although he could not see the gun, he "felt" it when he picked up the bag. The Court of Appeals of Missouri, upon viewing the totality of the circumstances, found no violation of defendant's fourth amendment rights and in so holding, in part, reasoned:

> . . .[T]here was not an unreasonable "seizure"—the ultimate test under the Fourth Amendment—in retrieving the bag and "seizing" the gun. The officer saw two people on the porch, not in a home, with a bag. The officer could reasonably anticipate that it belonged to one or the other or both. The appellant does not question that the officer had probable cause to stop and arrest the appellant. When he placed appellant in the cruiser, he was in effect arrested. A robbery had just occurred; the bag was left on the step; the officer was going to take the two into custody. If the officer did not retrieve the bag on the step, he may well have been subject to criticism or at worst legal action. To wait on the street and "stand over" the bag until a search warrant could be obtained would be impractical. The test is not whether it is reasonable to obtain a warrant but whether the seizure of the bag under these circumstances was reasonable. *See Mulligan v. United States,* 358 F. 2d 604, 607 (8th Cir. 1966). The Fourth Amendment does not require that the police blindly ignore evidence which is left under such circumstances. *See Brewer,* 540 S.W. 2d at 231. The practical

> and reasonable action was to retrieve the bag, and, upon taking possession of the bag, the officer was justified in taking the gun found in the fold. . . .
>
> * * *
>
> . . .[T]he retrieval of the bag came within the "plain view" exception to the warrant requirement although the contents of the bag were not readily perceived. "Plain view" alone is not sufficient to justify a warrantless seizure. It is also necessary that (1) the evidence be observed in plain view while the officer is in a place where he has a right to be, (2) the discovery of the evidence is inadvertent and (3) it is apparent to the police that they have evidence before them. *Collett*, 542 S.W. 2d at 786; *Coolidge*, 91 S.Ct. at 2037. These requirements are met here. . . .

The Supreme Court of the United States in *United States v. Chadwick*, 433 U.S. 1, 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1977), again approved a warrantless search when made incident to a lawful arrest in the following language:

> Such searches may be conducted without a warrant, and they may also be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in all custodial arrests makes warrantless searches of items within the "immediate control" area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved. . . .

State v. Austin, 584 P. 2d 853 (Utah 1978), is a case strikingly similar to the case before us for decision. There defendant was convicted of aggravated robbery, and at trial moved to suppress certain charred papers found in a waste basket in his hotel room and a roll of nickels found on a chair in the hotel room where he was arrested. The trial judge denied defendant's motion to suppress, and in affirming that ruling, the Supreme Court of Utah stated:

> Appellant does not challenge the legality of his arrest but maintains that because he was handcuffed, he had no "control" over the area; therefore, the search cannot be justified under the *Chimel* standard. . . .

* * *

The effect of putting handcuffs on the person under arrest has not been held to negate the existing circumstances surrounding a search but is considered to be only one factor in determining the necessity for the search. Several jurisdictions have addressed this specific issue. In *State v. Cox* [294 Minn. 252, 200 N.W. 2d 305 (1972)] a search was made after handcuffing the defendant. The Minnesota Court held as follows:

> . . . that the search was valid to the extent that the officers stayed within the bedroom, the area within the defendant's immediate control. The fact that defendant may have been handcuffed at the time the police searched that limited area is not alone a sufficient factor to distinguish this case from other cases in which we have approved the search involved as being limited to the area within the arrestee's immediate control. . . .

In *People v. Floyd* the New York Court said at page 563, 312 N.Y.S. 2d at page 196, 260 N.E. 2d at page 817:

> . . . It suffices that it is not at all clear that the 'grabbing distance' authorization in the *Chimel* case is conditioned upon the arrested person's continued capacity 'to grab.'

It thus appears that the defendant in custody need not be physically able to move about in order to justify a search within a limited area once an arrest has been made. This same position was affirmed in *People v. Fitzpatrick* [32 N.Y. 2d 499, 346 N.Y.S. 2d 793, 300 N.E. 2d 139 (1973), *cert. denied*, 414 U.S. 1033]:

> . . . And the fact that the police had handcuffed the defendant did not render the closet search [where he was found and removed from] unauthorized.

In the instant matter, the police went to the hotel and knocked on the door. They were admitted into the room where they proceeded to arrest the appellant. Any subsequent search of the immediate area, whether to find concealed weapons or to preserve evidence that was in danger of being destroyed, was proper as incident to a valid arrest. No

warrant was required as long as the search was properly confined to a limited area within the appellant's control. Here, the search was restricted to a single room where the defendant was arrested and held in custody. He was present during the search. Under the foregoing authorities, we hold that a search so limited is valid without a warrant.

In *United States v. Wright*, 577 F. 2d 378 (6th Cir. 1978), the United States Court of Appeals (6th Cir.), in considering a contention that there was an illegal search and seizure succinctly stated:

> . . . It is the law of this Circuit that once the right to search attaches, it is not lost when the arrested person is handcuffed and unable to reach areas otherwise within his or her "immediate control" . . . .

In instant case, the evidence before the Court tends to show that a man registered at Orvin Inn under the name of Luther Davis. At approximately 11:45 a.m. on 16 September 1977, Charlotte police officers armed with a valid warrant for the arrest of defendant came to the motel premises and asked the manager for a key to Room 270. The manager furnished the key stating, "Do what you got to do." Thereupon, the officers knocked on the door to Room 270, identified themselves as police officers and demanded that the door be opened. A short time later, a scantily clad woman ran from the room and informed the officers that defendant Cherry was in the room and that he had a pistol. Defendant did not respond to the officers' continued demands that he come out of the room for a period of about thirty minutes. Finally, he came to the door and stuck his hands out. He was handcuffed, and the officers entered the room and seated defendant in a chair. The room was approximately nine feet by twelve feet in size, and there were several police officers in the room. One of the policemen observed a lump in the rug in the corner of the room and said, "There is your gun." The rug was pulled back and a .38 caliber pistol introduced at trial as State's Exhibit 15 was seized.

Defendant does not contend that his arrest was illegal. The officers handcuffed defendant and entered the motel room to effect defendant's arrest and did not make entry for the purpose of making a general search for evidence of defendant's guilt. Thus, the officers were in a place where they had a right to be and in-

advertently observed the lump in the rug which was in plain view. The nine by twelve foot motel room was an area under defendant's immediate control, and the officers saw the lump in the rug with the knowledge that defendant had a gun in the area which was under his immediate control. Thus, it was proper and reasonable for the officers to examine the suspicious lump in the rug which was in plain view and to seize the weapon from this area. The fact that defendant was handcuffed did not affect the lawfulness of the seizure. Further, to have required the officers to obtain a search warrant under these conditions would be to refute the test of reasonableness required by the fourth amendment to the United States Constitution.

We hold that there was no unreasonable search and seizure and that the trial judge correctly denied defendant's motion to suppress.

[2] Defendant assigns as error the ruling of the trial judge excluding certain evidence at the sentencing phase of the trial. The evidence excluded was:

(1) Affidavit of one Lloyd McClendon that he had been convicted of felony murder in New Mexico and received a sentence of death; that he received a new trial and upon his second trial received a sentence of life imprisonment; that he has been released from prison, is successfully rehabilitated and now holds a responsible government position in the State of Ohio.

(2) Affidavit of Dr. William Bowers that the death penalty is counterproductive as a deterrent to crime.

(3) Affidavit of a newspaper reporter to the effect that he believed innocent persons are executed from time to time.

(4) Affidavits from several ministers expressing their opposition to the death penalty on religious grounds.

Defendant initially argues that the trial judge unduly limited the jury's consideration of mitigating evidence in violation of the provisions of G.S. 15A-2000(f)(9). That statute in pertinent part provides that at the sentencing phase of the bifurcated trial, the jury may consider "any other circumstance arising from the evidence which the jury deems to have mitigating value." G.S.

15A-2000(a)(3) provides in part that, "Evidence may be presented as to any matter that the court deems relevant to sentence . . . or . . . to have probative value."

The language of this statute does not alter the usual rules of evidence or impair the trial judge's power to rule on the *admissibility* of evidence. However, defendant argues that our North Carolina case law mandates the admission of this evidence. We do not agree. Our examination of the cases cited by defendant in support of this position discloses that the factors to be considered in sentencing are the *defendant's* age, character, education, environment, habits, mentality, propensities and record. *State v. Stafford*, 274 N.C. 519, 164 S.E. 2d 371 (1968); *State v. Dye*, 268 N.C. 362, 150 S.E. 2d 507 (1966); *State v. Cooper*, 238 N.C. 241, 77 S.E. 2d 695 (1953). Such matters are obviously relevant in considering mitigation of punishment.

Generally, evidence is relevant and admissible when it tends to shed any light on the matter at issue. Evidence which has no such tendency is inadmissible. 1 Stansbury, North Carolina Evidence, section 77 (Brandis rev. 1973). The evidence here offered and excluded by the trial judge was in no way connected to defendant, his character, his record or the circumstances of the charged offense. It was, therefore, irrelevant and of no probative value as mitigating evidence in the sentencing procedure of defendant's trial. Thus, the trial judge's ruling excluding this evidence did not unduly limit the jury's consideration of mitigating factors in violation of G.S. 15A-2000(f)(9).

Even so, defendant further argues that the trial judge's failure to admit this evidence limited the jury's consideration of mitigating factors so as to violate his rights guaranteed by the eighth and fourteenth amendments to the United States Constitution. In support of this argument, defendant relies upon the case of *Lockett v. Ohio*, --- U.S. ---, 57 L.Ed. 2d 973, 98 S.Ct. 2954 (1978). In *Lockett* the defendant attacked the constitutionality of the Ohio death statute on the grounds that the statute narrowly limited the sentencer's discretion. The statute provided that once a person is convicted of aggravated murder with at least one of seven specified aggravating circumstances the death penalty must be imposed unless the sentencing judge determined that at least one of the following mitigating circumstances is established

by a preponderance of the evidence: "(1) The victim of the offense induced or facilitated it. (2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation. (3) The offense was primarily the product of the offender's psychosis or mental deficiency . . . ." Holding that the Ohio statute was unconstitutional in that it limited consideration of mitigating factors, the Supreme Court in an opinion delivered by Chief Justice Burger, in part, stated:

> We are now faced with those questions and we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . .
>
> * * *
>
> The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

We note that *Lockett* and our older North Carolina cases are in accord in holding that the matters which cannot be excluded are *relevant* mitigating factors, *i.e.*, any aspect of defendant's character or record and any circumstances of the charged offense offered by a defendant in mitigation. Although there was no attack upon the constitutionality of the North Carolina statute, under this assignment of error, we note that our statute is not as limited or restrictive as was the Ohio statute considered in *Lockett*.

We hold that this patently irrelevant evidence was correctly excluded by the trial judge.

Defendant assigns as error the failure of the trial judge to set aside the jury's sentencing recommendation on the ground that the jurors considered matters dehors the record in reaching their recommendation.

After the jury had returned its recommendation that defendant's punishment be death, defense counsel moved that the recommendation be set aside. In support of his motion, he offered the testimony of Marilyn Mather, a reporter for the Charlotte Observer, to the effect that on the day after the trial she spoke with Mrs. Ralph Emery who was one of the jurors who returned the sentencing recommendation and that Mrs. Emery stated to the witness that, "The main reason that they voted for death was because they were all aware that if they voted for life, John Cherry would be eligible for parole in 20 years." The witness further testified that the jurors were aware of this because of another first degree case entitled *State v. James Allen Connors*, which was being tried the same week in the same courthouse and in which the defendant received a life sentence. The witness also stated that she had written stories about the *Connors* case in which it was related that Connors would be eligible for parole in twenty years and that Mrs. Emery had told her that all of the jurors were well aware of the *Connors* case.

The record further reflects that the Assistant Public Defender indicated to the trial judge that he would like to subpoena all the jurors and question them individually as to whether they considered any matters which were not included in the court's charge. The trial judge refused to permit such testimony. In denying defendant's motion, the court specifically declined to hear from any juror concerning the subject matter referred to in defendant's motion.

[3] It is well settled in North Carolina that after a verdict has been rendered and received by the court, and jurors have been discharged, jurors will not be allowed to attack or overthrow their verdict, nor will evidence from them be received for such purpose. *Selph v. Selph*, 267 N.C. 635, 148 S.E. 2d 574 (1966); *State v. Hollingsworth*, 263 N.C. 158, 139 S.E. 2d 235 (1964); *In re Will of Hall*, 252 N.C. 70, 113 S.E. 2d 1 (1960). This rule cannot be circumvented by the testimony of another as to what the juror has said. *Lambert v. Caronna*, 206 N.C. 616, 175 S.E. 303 (1934); *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922).

This Court has held that a juror cannot impeach his verdict by stating the *reasons* upon which the verdict was reached. *See*, *State v. Royal*, 90 N.C. 755 (1884). In *State v. Brittain*, 89 N.C. 481

(1883), a juror was not allowed to impeach his verdict because the deputy sheriff in charge of the jury made a statement in the presence of some of the jurors that, "The prisoner's counsel has about given up this case, and there was a good deal of anxiety about the case."

In *State v. Hollingsworth, supra*, the Court stated the rationale of this rule in the following quotation:

> In *McDonald v. Pless and Winbourne*, 238 U.S. 264, 59 L.Ed. 1300, the Court held that jurors may not, in the Federal courts, impeach their own verdict by testimony that it was a quotient verdict. In its opinion the Court said:
>
> > "[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference."

[4] We recognize that a defendant's eligibility for parole is not a proper matter for consideration by the jury. *See, State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976). Nevertheless, a possibility that such knowledge might have been possessed by jurors will not permit a juror to attack and impeach his own verdict after it has been received by the court. This is particularly so in instant case in view of the fact that there was neither argument by the State nor instructions by the court on the question of parole eligibility. Further, we see little prejudice to defendant since the possibility of parole or executive clemency is a matter of common knowledge among most adult persons.

[5] Defendant, however, argues that G.S. 15A-1240, effective 1 July 1978, mandated the reception of this evidence. G.S. 15A-1240 provides:

> *Impeachment of the verdict.*—(a) Upon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.
>
> (b) The limitations in subsection (a) do not bar evidence concerning whether the verdict was reached by lot.
>
> (c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:
>
> (1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him; or
>
> (2) Bribery, intimidation, or attempted bribery or intimidation of a juror.

In our opinion, subsection (a) of this statute amounts to legislative recognition of the existing case law. Defendant's reliance, therefore, must be upon subsection (c)(1) of the statute. This reliance is misplaced. A juror's knowledge that there is a possibility of parole for a defendant would not "violate the defendant's constitutional right to confront the witnesses against him."

For reasons stated, this assignment of error is overruled.

[6] Defendant assigns as error the court's ruling which precluded him from offering proof that the district attorney abused his discretion in the calendaring of cases. It is defendant's position that his offered proof would have supported his contention that the North Carolina death penalty statute is unconstitutional in that it denies a defendant due process by permitting the district attorney to "calendar cases when he chooses, in front of whatever judge he chooses." We disagree.

It is the district attorney's statutory duty to prepare the trial docket and prosecute criminal actions in the name of the State. G.S. 7A-61. In order to properly perform this duty, he must exercise selectivity in preparing the trial calendar.

Our courts have recognized that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon "an unjustifiable standard such as race, religion or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 7 L.Ed. 2d 446, 82 S.Ct. 501 (1962). *See also, State v. Woodson*, 287 N.C. 578, 215 S.E. 2d 607 (1975), *rev'd on other grounds*, 428 U.S. 280. Here there is no allegation or even intimation that the district attorney had deliberately employed any "unjustifiable standard" in calendaring this or any other case involving the death penalty. Further, we note that defendant's proposed offer of proof did not purport to contain any evidence relative to any cases involving the death penalty. Even so, assuming arguendo, that the district attorney had exercised unbridled discretion in setting cases before judges of his choice, we cannot perceive how such action would be relevant to the constitutionality of the death penalty. Under Article 100 of Chapter 15A of the General Statutes of North Carolina, the jury has the sentencing power and the trial judge is bound by the jury's sentence recommendation.

[7] Defendant contends that jurors were erroneously excused from the guilt-innocence phase of the trial for cause because of their views on capital punishment. On voir dire, twenty-one jurors were excused by the court for cause because of their beliefs concerning capital punishment. The questions propounded by the district attorney and the answers given by prospective juror Parker are representative of the questions and answers propounded and answered by all jurors who were successfully challenged for cause because of their views concerning capital punishment. The pertinent portions of the voir dire of Mr. Parker are as follows:

> Q. Mr. Parker, if I might, please, sir, let me ask the questions that I have asked, or at least some of the questions that I have asked the other members. Mr. Parker, I take it from your answer and the way that you gave it, that you would not vote, and could not ever, vote to impose the death penalty, is that a fair statement?
>
> MR. PARKER: That's right, sir.

Q. May I also take it as true that you would refuse to even consider its imposition in this case?

MR. PARKER: That's right.

Q. And finally, may I take it as true, sir, that you would automatically vote against the imposition of the death penalty in this case, without regard to any evidence that might be developed in this trial?

MR. PARKER: That's right, sir.

Q. Thank you, Mr. Parker. Your Honor, we would tender Mr. Parker for cause.

MR. MERCER: OBJECT and ask the Court to instruct the prospective juror as to what his responsibilities are in the terms of the life or death matter.

COURT: Show the motion denied. Objection overruled. Note the exception. Stand aside.

In the landmark case of *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), jurors were excluded who voiced general objection to capital punishment or expressed religious or conscientious scruples against imposition of the death penalty. In finding error, the United States Supreme Court stated:

> . . . [W]e hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. [391 U.S. 510, 522-523.]

Footnote 21 of *Witherspoon* contained, inter alia, the following language:

> . . . The most that can be demanded of a venireman in this regard is that he be willing to CONSIDER [emphasis is the Court's] all of the penalties provided by state law, and that HE NOT BE IRREVOCABLY COMMITTED, BEFORE THE TRIAL HAS BEGUN, TO VOTE AGAINST THE PENALTY OF DEATH REGARDLESS OF THE FACTS AND CIRCUMSTANCES THAT MIGHT EMERGE IN

> THE COURSE OF THE PROCEEDINGS. [Emphasis added]. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion. See nn. 5 and 9, *supra.*
>
> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would AUTOMATICALLY vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's GUILT. Nor does the decision in this case affect the validity of any sentence OTHER than one of death. Nor, finally, does today's holding render invalid the CONVICTION, as opposed to the SENTENCE, in this or any other case. [391 U.S. 510, 522-523.]

See also, State v. Britt, 288 N.C. 699, 220 S.E. 2d 283 (1975); *State v. Ward,* 286 N.C. 304, 210 S.E. 2d 407 (1974), *death sentence vacated,* 428 U.S. 903; *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974), *death sentence vacated,* 428 U.S. 903.

In instant case, the successfully challenged jurors indicated that they could not recommend the imposition of the death penalty under any circumstances and that they would automatically vote against the imposition of the death penalty without regard to the evidence that might be developed at the trial. Thus, the trial judge correctly allowed the challenges for cause. Nevertheless, defendant argues that the beliefs of the jurors concerning capital punishment have no place in the innocence-guilt phase of the bifurcated trial pursuant to Article 100 of Chapter 15A of the General Statutes of North Carolina. Defendant's position in this regard is that a bifurcated trial pursuant to Article 100 of Chapter 15A should be abolished and the two phases of the trial should be heard by two separate and distinct juries. We do not agree. The United States Supreme Court has approved the bifurcated trial procedure in which the same jurors heard both phases

of the trial. *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859, 96 S.Ct. 2909 (1976); *Jurek v. Texas*, 428 U.S. 262, 49 L.Ed. 2d 929, 96 S.Ct. 2950 (1976). Further, in *Witherspoon* the Court expressly noted that there was no error in exclusion for cause of jurors who made it clear that their attitudes toward the death penalty would prevent them from making an impartial decision as to defendant's *guilt*.

Under Article 100 of Chapter 15A of the General Statutes of North Carolina, it is contemplated that the same jury shall hear both phases of the trial unless the original jury is "unable to reconvene." G.S. 15A-2000(2). We are, therefore, of the opinion that the trial judge acted pursuant to the mandate of the statute and within the rationale of *Witherspoon*.

Defendant's argument that the exclusion of jurors for cause because of their beliefs concerning capital punishment resulted in his being tried by a prosecution prone jury is without merit. This contention was answered adversely to defendant in *Witherspoon* when the Court concluded:

> . . . We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. [*Id.* at 517-518.]

We hold that the trial judge properly excused the jurors for cause because of their views concerning capital punishment.

[8] Defendant contends that he was denied his right to counsel at a crucial stage of the proceedings because his counsel was not permitted to be present when an Assistant District Attorney talked with State's witnesses prior to a lineup procedure.

In *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975), *death sentence vacated*, 428 U.S. 904, we reviewed certain recognized rules of law pertinent to decision of this assignment of error, to wit:

> It is well settled that lineup procedures which are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" violate due process and are constitutionally unacceptable. *Simmons v.*

United States, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967; *State v. Smith*, 278 N.C. 476, 180 S.E. 2d 7; *State v. Austin*, 276 N.C. 391, 172 S.E. 2d 507. It is also established by decisions of this Court and the federal courts that an accused must be warned of his right to counsel during such confrontation and unless presence of counsel is understandingly waived testimony concerning the lineup must be excluded in absence of counsel's attendance. Further, if there be objection to an in-court identification by a witness who participated in an illegal lineup procedure, such evidence must be excluded unless it be determined on *voir dire* that the in-court identification is of independent origin and therefore not tainted by the illegal lineup. *Gilbert v. California*, 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951; *United States v. Wade*, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926; *State v. Smith*, *supra*.

In the landmark cases of *United States v. Wade*, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967), and *Gilbert v. California*, 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967), the United States Supreme Court formulated the rule that the right to counsel arises where there is a pretrial *confrontation* in a trial-like atmosphere with the State aligned against the accused. The Federal decisions which have followed *Gilbert* and *Wade* clarify the scope of those decisions.

The Fourth Circuit Court of Appeals held in *United States v. Wilcox*, 507 F. 2d 364 (4th Cir. 1974), *cert. denied*, 420 U.S. 979, that an accused's rights under the sixth amendment were not violated because his counsel was excluded from a conference between the prosecutor and State's witnesses after a pretrial lineup, reasoning that the sixth amendment right to counsel applies only to personal confrontations between the State and the accused.

In *United States v. Cunningham*, 423 F. 2d 1269 (4th Cir. 1970), the Fourth Circuit Court of Appeals in rejecting defendant's claim that he was denied his constitutional right to counsel because a State's witness was interrogated in absence of the defendant's counsel stated:

> While *Wade* and *Gilbert* both hold that under the Sixth Amendment an accused is entitled to the aid of counsel at

> the lineup, we cannot read the scope of the holding to extend beyond the actual confrontation between the accused and the victim or witnesses to a crime from whom identification evidence is sought to be elicited. . . .
>
> . . . It is not claimed that to date the Supreme Court has required the presence of counsel during the interrogation of all witnesses, and we will not so require with regard to the interrogation of identification witnesses once the actual confrontation has been completed.

See also, United States v. Bennett, 409 F. 2d 888 (2d Cir. 1969), *cert. denied*, 396 U.S. 852; 402 U.S. 984; *United States v. Ash*, 413 U.S. 300, 37 L.Ed. 2d 619, 93 S.Ct. 2568 (1973).

Furthermore, assuming, arguendo, that there was a violation of defendant's sixth amendment rights because his counsel was excluded from the interrogation or conference between the prosecution and the State's witnesses, such error would be harmless error beyond a reasonable doubt since defendant does not contend that there was any impermissible suggestiveness in the lineup procedure. *See, Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967). *Gilbert v. California, supra*, recognized the possibility of harmless constitutional error in the admission of lineup testimony. *Accord*: *United States v. Cunningham, supra.*

We hold that defendant was not denied his constitutional right to counsel at a crucial stage of the proceedings.

[9] Defendant next contends that the trial court erred in allowing into evidence testimony of other crimes allegedly attempted or committed by defendant on the same day as the murder for which he was convicted. The testimony to which defendant objects concerned statements he made to two of the State's witnesses that he planned to rob and sexually assault the employee of a Jiffy Mart but was unable to do so because there were people nearby; that he planned to rob a washerette but did not because it was too crowded; that he had robbed the Frito Lay delivery man earlier that day; and that he bought some heroin and cocaine with which he and the two witnesses "shot up." The Frito Lay delivery man testified that he had, in fact, been robbed on the day in question but he was unable to identify defendant as

the man who robbed him. Defendant argues that this evidence was irrelevant and highly prejudicial.

It is well settled in North Carolina that the State cannot offer evidence of other crimes committed by the defendant where the only relevancy of such evidence is its tendency to show the defendant's disposition to commit a crime of the nature of the one for which he is on trial. *State v. Shrader*, 290 N.C. 253, 225 S.E. 2d 522 (1976); *State v. Carey*, 288 N.C. 254, 218 S.E. 2d 387 (1975), *death sentence vacated*, 428 U.S. 904; *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). If such evidence tends to prove any other relevant fact, however, it will not be excluded merely because it also shows defendant to have been guilty of an independent crime. *State v. Carey, supra*; *State v. McClain, supra*. Where evidence tends to prove a motive on the defendant's part to commit the crime charged, it is admissible even though it discloses the commission of another offense by the defendant. *State v. McClain, supra*. Moreover, it is competent to show the motive for the commission of a crime even though motive does not constitute an element of the offense charged. *See, State v. Adams*, 245 N.C. 344, 95 S.E. 2d 902 (1957); *State v. Coffey*, 228 N.C. 119, 44 S.E. 2d 886 (1947).

Applying these rules to instant case, we think it is clear that the evidence objected to was admissible. The record shows that defendant was a regular drug user. It further shows that on the day in question, defendant, having neither drugs nor money with which to obtain them, was determined to get some money, with which to buy drugs. According to his statement to one of the witnesses, he robbed the Frito Lay delivery man and used the money to buy heroin and cocaine. Thereafter, he killed Eugene Howard during the robbery at Tony's Jiffy Market. With the money thus obtained, he bought more heroin and cocaine with which he "shot up" that night. We think the evidence leaves no doubt that defendant was motivated by a desire to obtain money, by robbery if necessary, in order to buy and use drugs. The challenged evidence was, therefore, admissible to show defendant's motive. This assignment of error is overruled.

By his last assignment of error, defendant challenges the constitutionality of our capital punishment procedure. We do not deem it necessary to address the constitutional questions raised

for reasons which will be discussed below. We do think it appropriate, however, to summarize the sentencing procedure, established by G.S. 15A-2000, to be followed in capital cases.

Upon a defendant's plea of not guilty in a first-degree murder case, the issue of guilt-innocence is determined by a jury during the first phase of the bifurcated trial. If the jury returns a verdict of guilty, the second phase of the trial, a sentencing proceeding, is conducted in order for the same jury to determine whether the defendant should be sentenced to death or life imprisonment. During the sentencing phase of the trial, the jury may consider any evidence which was introduced at the guilt determination phase as well as any new evidence which the court deems relevant to sentence or to have probative value. The statute requires the trial judge to instruct the jury on any of ten aggravating circumstances and eight mitigating circumstances, specified in the statute, which may be supported by the evidence. In addition to the mitigating circumstances specified, the jury may consider any other circumstance arising from the evidence which it deems to have mitigating value.

After hearing the evidence, argument of counsel, and instructions of the court, the jury after deliberation recommends to the court the sentence to be imposed based upon (1) whether any sufficient aggravating circumstance or circumstances exist; (2) whether any sufficient mitigating circumstance or circumstances which outweigh the aggravating circumstance(s) found, exist; and (3) whether, based on these considerations the defendant should be sentenced to death or life imprisonment. A sentence recommendation of death must be agreed upon by a unanimous vote of the twelve jurors. In such case, the jury must show in writing: (1) the statutory aggravating circumstance or circumstances it finds beyond a reasonable doubt; (2) that the aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and (3) that the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found. The jury's sentence recommendation is binding upon the trial judge.

A judgment of conviction and sentence of death are subject to automatic review by this Court for consideration of the penalty

imposed as well as any errors assigned on appeal. The sentence of death shall be overturned and a sentence of life imprisonment imposed in its stead upon a finding by the Supreme Court that: (1) the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death; or (2) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

If judgment and sentence of death are reversed for error in the sentencing phase of the trial, we are required to remand for a new sentencing hearing, to be conducted pursuant to the same provisions as the original sentencing hearing.

In instant case, the trial judge submitted five aggravating circumstances to the jury which it answered as follows:

> 1. Has the defendant been previously convicted of a felony involving the use or threat of violence to the person? Yes.
>
> 2. Was the murder committed while the defendant was engaged in the commission of robbery with a firearm? Yes.
>
> 3. Was the murder committed for pecuniary gain? Yes.
>
> 4. Was the murder especially heinous, atrocious, or cruel? No.
>
> 5. Did the defendant knowingly create a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person? No.

The jury thereupon made the following sentence recommendation:

> Based upon those answers to the issues submitted as found from the evidence in the case and the law given by the Court, the jury unanimously determines that the aggravating circumstances found by the jury beyond a reasonable doubt are sufficiently substantial to call for the imposition of the death penalty; that the mitigating circumstances are insuffi-

cient to outweigh the aggravating circumstances found and therefore recommends that punishment of the defendant shall be death.

The crucial problem which we perceive in this case concerning the aggravating circumstances submitted to the jury was not raised by defendant. Defendant was convicted under the felony murder rule. The trial judge did not mention premeditation and deliberation in his jury instructions.

G.S. 14-17 clearly states that a murder which is committed in the perpetration or attempted perpetration of any robbery, rape, arson, kidnapping, burglary or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree and shall be punishable by death or life imprisonment pursuant to the provisions of G.S. 15A-2000. Thus, the Legislature has left no doubt that the death penalty is available upon a felony murder conviction. One of the aggravating circumstances which may be considered by the jury is found in G.S. 15A-2000(e)(5), which provides:

> The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Clearly, this circumstance would be supported by the evidence in a felony murder conviction since the felony murder, by definition, must have occurred during the commission or attempted commission of one of the enumerated felonies. The problem here presented arises because this circumstance is inherent in, and a necessary element of, the capital felony, to wit, felony murder.

No element of a first degree murder which is committed with premeditation and deliberation is included in the list of aggravating circumstances found in G.S. 15A-2000(e). A defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance "pending" for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against

him. This is highly incongruous, particularly in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition, intentional and preconceived.

It is well settled in this jurisdiction that when the State, in the trial of a charge of murder, uses evidence that the murder occurred in the perpetration of another felony so as to establish that the murder was murder in the first degree, the underlying felony becomes a part of the murder charge to the extent of preventing a further prosecution of the defendant for, or a further sentence of the defendant for, commission of the underlying felony. *State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563 (1977), *cert. denied*, 434 U.S. 998; *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). Although designed to prevent double jeopardy, a problem with which we are not here confronted, we think the merger rule sheds light on the question before us. Once the underlying felony has been used to obtain a conviction of first degree murder, it has become an element of that crime and may not thereafter be the basis for additional prosecution or sentence. Neither do we think the underlying felony should be submitted to the jury as an aggravating circumstance in the sentencing phase when it was the basis for, and an element of, a capital felony conviction.

[10] We are of the opinion that, nothing else appearing, the possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to the "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the statute, we hold that when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony.

Nothing we have said herein should be construed to foreclose consideration of the aggravating circumstance found in G.S. 15A-2000(e)(5) when a murder occurred during the commission of one of the enumerated felonies but where the defendant was convicted of first degree murder on the basis of his premeditation and deliberation. In such case, the jury should properly consider that aggravating circumstance in determining sentence.

In instant case, the jury found as an aggravating circumstance that the murder was committed while defendant was engaged in the commission of robbery with a firearm. As a result of our decision precluding consideration of the underlying felony as an aggravating circumstance, we are of the opinion that the trial judge erred in submitting that circumstance to the jury.

We must now determine whether submission of that aggravating circumstance requires a new sentencing proceeding.

G.S. 15A-2000 provides that the jury's sentence recommendation is binding on the trial judge. If the jury recommends a sentence of death, it must show in writing:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

We are unable to say that under the circumstances of this particular case the trial judge's submission of the issue concerning the underlying felony constituted harmless error. Had the jury not considered the underlying felony as an aggravating circumstance, it may well have decided that the remaining aggravating circumstances were not sufficiently substantial to call for imposition of the death penalty.

For error in the sentencing phase of the trial, this case is remanded for a new sentencing hearing pursuant to G.S. 15A-2000(d)(3).

In the guilt determination phase of the trial, no error.

In the sentencing phase of the trial, new trial.

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

Justice HUSKINS concurring.

I support the majority opinion in *Cherry, Goodman* and *Johnson.* At the same time, I join in the concurring opinion of Justice Carlton which correctly, I think, analyzes the results reached in these three cases.

Justice CARLTON concurs for the reasons stated in his concurring opinion filed this date in *State v. Goodman,* 298 N.C. 1, 36, 257 S.E. 2d 569, 591 (1979).

C. CAPERS SMITH, PLAINTIFF v. STATE OF NORTH CAROLINA, JAMES HOLSHOUSER, GOVERNOR; JOE K. BYRD, CHAIRMAN, STATE BOARD OF MENTAL HEALTH; RALPH SCOTT, CHAIRMAN, ADVISORY BUDGET COMMISSION; DAVID T. FLAHERTY, INDIVIDUALLY AND AS SECRETARY OF HUMAN RESOURCES; N. P. ZARZAR, INDIVIDUALLY AND AS COMMISSIONER, DEPARTMENT OF MENTAL HEALTH; TREVOR WILLIAMS, INDIVIDUALLY AND AS SUPERINTENDENT OF BROUGHTON HOSPITAL, DEFENDANTS

No. 61

(Filed 4 September 1979)

1. **Master and Servant § 10.2; State § 12— superintendent of State hospital—discharge by Secretary of Human Resources proper**

When a State government agency is transferred to a new department by a "type II transfer," G.S. 143A-6(b) provides that the management function of the agency, which includes staffing pursuant to G.S. 143A-6(c), shall be performed not only under the "supervision" but also the "direction" of the head of the principal department; therefore, the Secretary of Human Resources had the authority to dismiss plaintiff as superintendent of Broughton Hospital before his six year term expired, and it was not required that he be dismissed by the State Board of Mental Health. Furthermore, the transfer of the power to dismiss from the State Board to the Department of Human Resources did not impair plaintiff's contract since his contract was not with the agency which appointed him but was with the State, and the transfer made no changes in either the obligations of the parties or the remedies available to plaintiff in enforcing his agreement.

2. **Master and Servant § 10.2; State § 12; Evidence § 14— superintendent of State hospital— superior's order to produce tape—disobedience as cause for dismissal—physician-patient privilege inapplicable**

In an action by plaintiff to recover damages for wrongful discharge from his position as superintendent of Broughton Hospital, plaintiff's refusal to comply with a lawful and reasonable order of his superior to turn over a tape of a

meeting of the Credentials Committee of the Hospital constituted "cause" for plaintiff's dismissal, and the information contained on the tape did not come within the protection of the doctor-patient privilege established by G.S. 8-53 and G.S. 122-8.1, since the information on the tape did not pertain to treatment of the patients but related basically the facts included in the death certificates of the patients which were a matter of public record; G.S. 122-8.1 was not intended to allow a superintendent of a State hospital to refuse to turn over information to his superiors in the Department of Human Resources attempting to investigate complaints of improprieties or neglect on the part of members of the hospital medical staff; and the physician-patient privilege does not extend to information gathered by observations made after the patient's death.

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

APPEAL by the State of North Carolina under G.S. 30(2) from the decision of the Court of Appeals, reported in 36 N.C. App. 307, 244 S.E. 2d 161 (1978), which reversed the judgment of *Snepp, J.*, granting the State's motion for a directed verdict at the 14 February 1977 session of the Superior Court of Burke, docketed and argued as Case No. 41 at the Fall Term 1978.

Action for damages for wrongful discharge.

On 1 October 1970 plaintiff, Dr. C. Capers Smith, a medical doctor trained in psychiatry, was duly appointed Superintendent of Broughton Hospital (Broughton), one of the State's hospitals for the mentally disordered. The appointment, made pursuant to G.S. 122-25 (repealed by 1973 N.C. Sess. Laws, ch. 476, § 133), was for six years. On 30 April 1973, under circumstances to be discussed later, plaintiff was dismissed as Superintendent. On 4 May 1973, pursuant to G.S. 122-1.1 (repealed by 1973 Sess. Laws, ch. 476, § 133), plaintiff served upon the Governor and the Chairman of the Advisory Budget Commission a claim for severance pay. In the claim plaintiff stated he would consider their failure to honor his demand by a given date "as a rejection and denial of this claim by all parties." When no action was taken on the claim, plaintiff filed this action for damages. Had he been permitted to serve the remainder of his term as Superintendent, plaintiff would have received compensation totaling $169,455.59.

When the case was called for trial, plaintiff took a voluntary dismissal without prejudice as to defendant Joe K. Byrd.

Plaintiff's evidence consisted of his own testimony, that of Doctors Robert S. Dawson and Trevor G. Williams, and a number

of exhibits, including the transcript of a tape recording of the meeting of the Broughton Credentials Committee held on 16 April 1973 (Plaintiff's Exhibit 4). This evidence—summarized except when quoted—is stated below as chronologically as possible.

The controversy which led to Dr. Smith's dismissal began with the failure of Dr. M. J. Short, the staff doctor on call, to come to the hospital to certify the deaths of two patients, Virginia Evans and William Henry Ward, after being notified of their deaths by the nurse on duty. Evans died during the early morning hours of 10 February 1973; Ward, about 3:00 a.m. on 11 February 1973. Dr. Smith learned of these two incidents on Monday, 12 February 1973, when he received reports detailing the happenings of the previous weekend from Mrs. Virl Lester and Mrs. Ruby Setzer, the head nurses on the respective wards. These reports are not in the record, but Mrs. Lester later gave the following version of the events which occurred after Ward's death:

At 3:15 a.m. on February 11th while Mrs. Lester was on "C" ward, she was informed that a patient, William Ward, had been found in another unit "slumped in the bathroom not breathing." When she arrived at the other unit around 3:30 a.m., she determined that Ward was dead and began searching for his family's telephone number. It was customary for the nurses to locate the number before calling the doctor on duty so that he could notify the family without having to wait at the hospital or make an additional trip.

After searching unsuccessfully for the telephone number of Ward's family, Mrs. Lester called Dr. Short at 4:10 a.m. She informed him of the situation and he instructed her to place the body on a bed in a single room and told her he would "see him in the morning." She was "so startled by that statement that [she] figured [she] had not really awakened him . . . so [she] said, 'Dr. Short, did you hear me say that this patient expired at 3:05 a.m. and now it is only 4:10 a.m. and you ordered the man be placed on a bed and not in the morgue?' . . . [Dr. Short] replied, 'That is right, I'll see him in the morning.' "

Following Dr. Short's instructions, Mrs. Lester helped attendants carry the body to a single room. She then wrote up the incident in the report book on "U" ward and later reported it to her

supervisor. When she completed her shift at 7:15 a.m., Dr. Short had still not seen the patient.

On the night before Dr. Short have given substantially identical instructions to the nurse who called to inform him of the death of Virginia Evans.

Dr. Smith received the nurses' reports on the two deaths in a staff meeting on February 12th at which Dr. Short was present. Dr. Smith informed the staff of the manner in which the doctor on duty had responded to the nurse's call and emphasized that this was not the way he would have expected any doctor at Broughton to have responded. He told the staff that in the future whenever a doctor on duty was notified of a death, he was "to come." Dr. Smith said he spoke generally without mentioning Dr. Short's name "so there would not be any direct confrontation." Having done so, he felt he had "adequately addressed the problem."

Sometime before February 10th, "hot lines" were installed connecting Broughton and the State's other mental institutions with the office of the Secretary of Human Resources so that employees "who had problems" could contact the Secretary's office directly. The Secretary had given notice that no employee who used the line was to be "harassed, fired, or demoted, or in any way intimidated because of the use of that telephone service."

After receiving several hot-line calls from hospital employees about the manner in which the deaths of Evans and Ward had been handled, Secretary Flaherty sent his representative, Mr. Bill White, to Broughton to investigate. White arrived at the hospital about 8:00 p.m. on 13 April 1973. Bob Cox, a hospital policeman, recognized him as an assistant to Secretary Flaherty and, at his request, escorted him through the alcoholic and neuroscience wards, including "U" ward. White spoke casually and generally with the patients until Johnny Wilson, an attendant, called him aside for a private talk.

Cox later informed his superior, Chief of Police Berryhill, of White's visit. Berryhill then told Dr. Smith someone from Secretary Flaherty's office had "come in the night" to check on the deaths which had occurred on February 10th and 11th.

Dr. Smith decided that if Dr. Short's professional conduct was to be questioned "outside," it should first be appraised by the hospital's Credentials Committee, a standing committee appointed by the Superintendent from Broughton's active medical staff. One of the duties of this Committee was to investigate any reported breach of ethics. After discussing the matter with Dr. Short, plaintiff asked Dr. McCall, the chairman of the Committee, to call a meeting. When he refused, Dr. Smith called the meeting himself.

The Committee met in plaintiff's office on the morning of 16 April 1973. Present were Dr. Mike McCall, Dr. Norman Boyer, Dr. Robert Darrow, Mrs. John Reece, Dr. S. M. Shah-Khan, Dr. Smith and his secretary, Mrs. Hubbard. Ordinarily, Mrs. Hubbard took the minutes in shorthand, but on this occasion Dr. McCall "brought [a] tape recorder and put it in the middle of the table." As the morning progressed, discussions "became very heated." One person "reached over several times and turned off the tape and asked that he not be recorded." When the secretary later attemped to transcribe the tape, she found portions of it unintelligible.

In brief summary, the tape as transcribed tended to show:

Dr. Smith first reviewed the events leading up to the meeting. He then told the six Committee members present that he believed Dr. Short's failure to repond to the nurse's call to come to the hospital on the nights of February 10th and 11th would soon be questioned officially. If so, he thought that "the medical staff should be of one thought" about the matter. He stated that the purpose of the meeting was to determine whether Dr. Short's conduct had met professional standards. Dr. Smith said he had no idea who was responsible for the investigation, but he did know that Broughton had again been "put on the spot by the Secretary of Human Resource's night riders, as he had come to call them." Then, after praising Dr. Short's work on behalf of Broughton during the preceding two years, he asked Dr. Short "to explain the situation as it existed at that time."

Dr. Short said that when the nurse called him at 4:00 a.m., she told him Ward had been found dead at 3:05 a.m. and that they had been searching unsuccessfully since then for information as to the whereabouts of his family. Relying upon "the nurse's com-

petence in recognizing a dead person," he decided to wait until relatives had been found before pronouncing the patient dead. None were found until sometime the next day. As to the patient Evans, all Dr. Short could recall was that he had to go to the morgue to pronounce her dead. Dr. Short expressed considerable resentment that he should be called upon to justify his professional conduct because of Mr. White's visit and suggested that if this is "an example of the supervision administration that will be coming to Broughton [it would be] an untenable place to practice." He also warned that there "were other harassments coming through the same channels."

Dr. Short's comments caused Dr. McCall to say that he was "very much concerned" lest they lose Dr. Short. Dr. Shah-Khan suspected that there were "informers on the staff of Broughton Hospital" who were harming professional reputations by innuendo. The Committee members also expressed resentment that an investigation of a staff doctor should be instigated without the knowledge of the superintendent.

After much discussion as to just how soon a physician should respond to a call to pronounce a patient dead, the consensus seemed to be that he should respond as quickly as *in his judgment* was feasible. It was also noted that since Dr. Smith had talked to the staff on February 12th, no doctor on call had failed to respond promptly. Eventually, a "resolution" was assembled piecemeal from the floor. It provided approximately as follows:

The deaths of Virginia Evans and William Henry Ward were due to natural causes to which no negligence on the part of any Broughton doctor contributed. No one suffered any injury, loss, damage, or hurt feelings because of the delay in certifying their deaths. The attending physician, Dr. M. J. Short, handled all problems properly; and there is no evidence of neglect on his part.

This resolution was passed unanimously.

Immediately thereafter Dr. McCall asked if the Committee wanted to hear what he knew about the Evans case. Dr. Smith replied that they did. Dr. McCall then reported that on the night of Virginia Evans' death the ward nurse had telephoned him at home to say that when she called Dr. Short he had told her to leave the body on the ward; that she was reluctant to do so

because the shift would soon change and they were not accustomed to leaving bodies on the wards; that this patient had an interested family, who had left the ward only 45 minutes before; and that she was uncertain what to do. Dr. McCall told her to call Dr. Shannon and see if he would respond; that if she could not reach him, she should either move the body to the morgue or call him back. Dr. McCall said she did not call him back and that he next heard about the incident when Dr. Smith reported the matter at the staff meeting the next morning.

After Dr. McCall's statement the Committee renewed its discussion of whether Broughton had "a stated rule that physicians go and examine the body of a person thought to be dead or dying," and—if not—whether there should be one. Dr. Smith said he thought there should be such a rule. In the midst of a heated discussion Dr. Robert Darrow produced the Hospital Procedure Book which contained this directive: "When a patient stops breathing, notify the supervisor and doctor. . . . The doctor should pronounce the patient dead within a short time after breathing has ceased, fill out the ward card and death package, giving information as requested on the outside of the package."

The discussion which this find engendered was terminated by the need to call the witnesses whom Dr. Smith had instructed to be present and who were waiting outside—Mrs. Setzer and Mrs. Lester, ward nurses, John Wilson and Faye Poteat, attendants, Mrs. Boyles, a telephone operator, and Bobby Cox, security officer. Although the record discloses that all these persons attended the inquiry on April 16th and were questioned, the transcript introduced in evidence (Exhibit 4) contains only the statements of Cox and Lester.

Cox gave the Committee the same information he had reported to Chief Berryhill. He was then confronted with such questions as "Do you not think it was improper conduct on your part to have taken somebody to the patients' bedroom in the middle of the night? Did you think you were in charge of the hospital at that particular time? Why did you take it upon yourself to admit somebody without asking permission from the Superintendent or your supervisor? Don't you think this was improper conduct on your part? Was any question asked or any statement made by

any attendant, patient or by Mr. White which referred to any physician on our staff?"

The substance of Cox's answers was that he escorted Mr. White to the wards at 8:00 p.m.—not in the middle of the night; that he recognized Mr. White as Secretary Flaherty's assistant and therefore he didn't think his conduct was improper; and that he had heard no reference that night to any hospital physician.

After Mrs. Lester gave the Committee her version of the call to Dr. Short, she was asked if she had talked to anybody outside the hospital about the incident. When she answered NO, the Committee wanted to know how such "confidential information" became known. Mrs. Lester replied that she understood the "word went over the town through the funeral home." Several of the doctors then suggested that she had been guilty of "very poor nursing practice" in permitting Ward's body to remain in the bathroom while she hunted for telephone numbers, and that she had applied a "double standard" in criticizing Dr. Short for leaving the body on the bed for four hours. Mrs. Lester left the meeting in tears, and Dr. Smith went out to console her.*

After receiving information that certain employees "had been harassed and intimidated" at the meeting of the Credentials Committee, Dr. Trevor Williams, the Western Regional Commissioner of Mental Health and plaintiff's immediate superior, visited him on April 19th and asked for the tapes of the meeting. He explained that they needed the tapes (1) to ascertain the circumstances surrounding the deaths of Evans and Ward, and (2) to determine whether hospital employees appearing before the Committee had been harassed. Plaintiff refused to turn over the tapes on the ground that information therein was protected by the doctor-patient privilege. Dr. Williams told Dr. Smith his refusal would be "considered as insubordinate action."

On April 25th Dr. Williams went to plaintiff's office again. He informed Dr. Smith that Dr. Zarzar, acting Commissioner of Mental Health, had sent him for the tapes, and that plaintiff could either deliver them or submit his resignation. Plaintiff again refused to deliver the tapes and claimed that Dr. Zarzar had no

*In a deposition filed in the summary-judgment hearings, Mrs. Lester said that at no time did Dr. Smith ever harass or intimidate her; and that "he was his usual kind, gracious self."

authority to dismiss him. On April 27th Dr. Williams advised plaintiff by letter that because of his refusal to release the tapes he was dismissed as of 11 May 1973. On April 30th the Secretary of Human Resources sent plaintiff a telegram dismissing him as of that day.

At the conclusion of plaintiff's evidence, the trial court granted defendants' motion for a directed verdict. The Court of Appeals reversed as to the State of North Carolina, and the State appealed.

Hatcher, Sitton, Powell & Settlemyer by Claude S. Sitton, and James J. Booker, for plaintiff.

Rufus L. Edmisten, Attorney General, and William F. O'Connell, Special Deputy Attorney General, for the State.

SHARP, Chief Justice.[1]

This is the second time this case has come before this Court for review. *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976). Plaintiff's original complaint was filed 24 July 1973 in Burke County Superior Court. Defendants moved to dismiss the action pursuant to G.S. 1A-1, Rule 12(b) on the grounds that sovereign immunity barred the suit against the State and also against the individual defendants acting in their official capacities. The trial judge denied the motion and defendants appealed. We held that the doctrine of sovereign immunity was not a bar to an action against the State for breach of a duly authorized State contract, but noted that any judgment would be uncollectible in the absence of a legislative appropriation. In our first decision we carefully pointed out that we were expressing no opinion as to the merits of the controversy between Dr. Smith and the State. 289 N.C. at 322, 222 S.E. 2d at 424.

The merits of that dispute are now before us. Plaintiff's amended complaint was filed 6 May 1976. As his first claim for relief plaintiff alleges that the State of North Carolina breached his contract of employment by dismissing him without cause or authority. As damages he asks for the balance of the salary to which he would have been entitled under the contract. In his sec-

1. This opinion was written in accordance with the Court's decision made prior to Chief Justice Sharp's retirement and was adopted by the Court and ordered filed after she retired.

ond claim for relief plaintiff alleges that the individual defendants—David Flaherty, N. P. Zarzar, and Trevor Williams—caused him to be discharged in a manner "designed to embarrass and humiliate him" and which defamed him in his profession. He also alleged that these defendants knew it would be "impossible for the plaintiff to obtain other employment of [a] comparable nature" because of his age and physical condition. Finally, plaintiff alleges that the actions of defendant Flaherty were "motivated by malicious and corrupt intent" thus entitling him to punitive damages.

At the conclusion of plaintiff's evidence the trial judge allowed motions (1) by defendants James Holshouser and Ralph Scott for judgment on the pleadings under Rule 12(c) and (2) by all other defendants for a directed verdict under Rule 50(a). He also denied plaintiff's motion for summary judgment, which, along with defendants' motion for summary judgment, had been filed and heard at length prior to trial. The facts disclosed by the deposition and exhibits which the court considered on these motions do not differ materially from the evidence plaintiff adduced at trial. Plaintiff took no exceptions to the dismissal of his action against Holshouser and Scott. His appeal to the Court of Appeals was from the trial court's denial of his motion for summary judgment and its grant of a directed verdict in favor of the other defendants.

The Court of Appeals concluded that only the State Board of Mental Health had the authority to dismiss plaintiff from his job. Because all the evidence showed that plaintiff was discharged by the Secretary of Human Resources and not by the Board of Mental Health, the Court held that the trial judge should have allowed plaintiff's motion for summary judgment against the State. Plaintiff's exception to the allowance of a directed verdict in favor of the individual defendants was deemed abandoned for failure to argue the assignment of error on appeal. *Smith v. State*, 36 N.C. App. 307, 244 S.E. 2d 161 (1978).

The State's right to a directed verdict at the close of plaintiff's evidence turns on two questions of law: (1) Was the Secretary of the Department of Human Resources authorized by statute to dismiss plaintiff and (2) did cause to dismiss plaintiff exist as a matter of law? The trial court's entry of a directed ver-

dict for the State can be sustained only if the answer to both of these questions is YES. If a directed verdict in the State's favor was proper, it follows that the trial court was also correct in denying plaintiff's motion for summary judgment since the evidence he presented at trial tended to show substantially the same facts disclosed by the depositions the court considered at the hearing upon the motions for summary judgment.

Plaintiff was employed by the State in 1970 pursuant to G.S. 122-25 (repealed by 1973 N.C. Sess. Laws ch. 467, § 133), which authorized the Commissioner of Mental Health to appoint a medical superintendent for each State hospital for a term of six years. Under G.S. 122-1.1, also in effect at that time, the State Board of Mental Health by and with the approval of the Governor could terminate "for cause" the services of any employee appointed for a specific length of time.

[1] We consider first plaintiff's contention that even if there was cause for his dismissal, it was improper because he was discharged by the Secretary of Human Resources.

As part of a reorganization of State government in 1971, the State Board of Mental Health was transferred to the Department of Human Resources. The vehicle for this change was the Executive Organization Act of 1971 which incorporated the Board of Mental Health into the Department of Human Resources by means of a "type II transfer." The relevant statute reads as follows:

> § 143A-6. Types of transfers.—(a) Under this Chapter, a type I transfer means the transferring of all or part of an existing agency to a principal department established by this Chapter. When all or part of an agency is transferred to a principal department under a type I transfer, its statutory authority, powers, duties, and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and purchasing, are transferred to the principal department.
>
> When any agency, or part thereof, is transferred by a type I transfer to a principal department under the provisions of this Chapter, all its prescribed powers, duties, and functions, including but not limited to rule making, regula-

tion, licensing, and promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications are transferred to the head of the principal department into which the agency, or part thereof, has been transferred.

(b) Under this Chapter, a type II transfer means the transferring intact of an existing agency, or part thereof, to a principal department established by this Chapter. When any agency, or part thereof, is transferred to a principal department under a type II transfer, that agency, or part thereof, shall be administered under the direction and supervision of that principal department, but shall exercise all its prescribed statutory powers independently of the head of the principal department, except that under a type II transfer the management functions of any transferred agency, or part thereof, shall be performed under the direction and supervision of the head of the principal department.

(c) Whenever the term "management functions" is used it shall mean planning, organizing, staffing, directing, coordinating, reporting and budgeting.

Plaintiff argues that this statute leaves untouched the power of the State Board of Mental Health to fire employees hired for a term, and points out that the statute makes no specific mention of the power to dismiss. The State contends that the power to fire a disobedient employee is implicit in the meaning of the term "management functions" as used in G.S. 143A-6, and notes that the Secretary is explicitly given control over "staffing." The Court of Appeals attempted to strike a balance between these two positions. As it interpreted G.S. 143A-6(b), the State Board of Mental Health kept all of its statutory powers after the transfer, including hiring and firing, and the Secretary of Human Resources was only given the power to *supervise* the Board's exercise of those functions. *Smith v. State*, 36 N.C. App. at 310-11, 244 S.E. 2d at 163.

We reject the Court of Appeals' construction as being inconsistent with both the language and purpose of the statute. When an agency is transferred to a new department by a "type II transfer," G.S. 143A-6(b) provides that the management functions of the agency shall be performed not only under the "supervision"

but also the "direction" of the head of the principal department. The word "direction" refers to the "act of governing; management; superintendence; a guiding or authoritative instruction." Black's Law Dictionary (Rev. 4th ed. 1968). Clearly, the legislature intended for the head of the Department of Human Resources to have final authority over all management functions, not merely "supervisory" power. To hold that a transferred agency could exercise all of its former powers after the reorganization, subject only to some undefined supervision by the head of the new department, would treat the transfer as merely a change in name, thus defeating the purpose of the Organization Act.

G.S. 143A-6(c) defines the term "management functions" to mean "planning, organizing, staffing, directing, coordinating, reporting and budgeting." Even if this definition was intended to be inclusive, an issue we need not now decide, the power to fire clearly falls within its scope since the Act expressly gives the head of the principal department power over "staffing."

This construction is supported by the Act's legislative history. On 3 November 1970 the electorate approved a constitutional amendment to reduce the number of the State's principal administrative departments to not more than twenty-five by 1 July 1975. N.C. Const. art. 3, § 11. This process began with the enactment of the Executive Organization Act of 1971, N.C. Gen. Stat. ch. 143A (1978), and continued with passage of the Executive Organization Act of 1973. N.C. Gen. Stat. ch. 143B (1978).

In May 1970 the Governor appointed a Committee on State Government Reorganization to Review the work of a 1969 study commission and to make proposals for implementing the amendment to the 1971 General Assembly. Report of the Governor's Committee on State Government Reorganization at 4 (1971) [hereinafter Report]. Because of the time limitations imposed on the Committee, it recognized that major statutory revisions would be impractical. Report at 5. It therefore proposed that some agencies be transferred to the newly created departments with part of their statutory powers intact. Report at 12.

Under one type of transfer, which the Committee labeled a "type I transfer," all of the agency's powers and functions would be transferred to the new department. Report at 12. The Committee suggested that a "second type of transfer (type 2) . . . be used

to transfer agencies which have policy making boards and commissions. The principal department [would have] the authority to direct and supervise all *budgeting, purchasing and related management functions*, but the agency [would] continue to exercise independently some of its primary statutory functions pending subsequent review and legislation." Report at 12. (Emphasis added.) The substance of this proposal was adopted by the legislature and is now codified as G.S. 143A-6.

In providing for a "type II transfer," the legislature clearly intended to distinguish between the rule-making or policy functions of a transferred agency and its management functions. Under the statutory scheme established by the Act, the former functions were to remain in control of the transferred agency while the latter were to become the sole province of the heads of the principal departments. This would allow the new departments to gain administrative experience and expertise pending the ultimate transfer of policy-making powers.[2] Report at 11. With this distinction in mind it is clear that the power to fire a disobedient employee must be considered an aspect of management rather than an aspect of policy-making.

Plaintiff also argues that a transfer of the power to dismiss him from the Board to another agency would constitute an impairment of his contract. He cites no authority in support of this contention other than the provision of the United States Constitution which prohibits a state from passing any law "impairing the obligations of contracts." U.S. Const. art I, § 10.

It has long been established that the Contract Clause limits the power of the states to modify their own contracts as well as to regulate those between private parties, and that rights under such contracts cannot be defeated by subsequent legislation. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, 52 L.Ed. 2d 92, 106, 97 S.Ct. 1505, 1515 (1977); *Hans v. Louisiana*, 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504 (1890); *Oglesby v. Adams*, 268 N.C. 272, 150 S.E. 2d 383 (1966). Not every modification of a contractual promise, however, impairs the obligation of contract. *El Paso v. Simmons*, 379 U.S. 497, 506-07, 13 L.Ed. 2d 446, 453-54, 85 S.Ct. 577, 582-83 (1965).

2. *See, e.g.*, G.S. 143B-138(b)(8) which transferred to the Department of Human Resources all the "powers, duties and obligations" previously vested in the State Board of Mental Health. This statute became effective 1 July 1973.

The transfer of the power to dismiss from the State Board to the Department of Human Resources makes no change in either the obligations of the parties or the remedies available to plaintiff in enforcing his agreement. Plaintiff's contract of employment was not with the agency which appointed him but with the State. *Smith v. State*, 289 N.C. at 332, 222 S.E. 2d at 431. The essential terms of that contract—duration, dismissal for cause, and salary —remain unaffected by any shift of the power to fire from one agency of the State to another.

Having determined that the Executive Organization Act of 1971 transferred the power to dismiss Dr. Smith to the Secretary of Human Resources and that this change did not constitute an "impairment" of his contract, the next question is whether there was "cause" for his dismissal. Because the material facts are undisputed, that issue is a question of law for the court. *Craig v. Thompson*, 244 S.W. 2d 37, 41 (Mo. 1951).

[2] On 25 April 1973 Dr. Trevor Williams, a licensed physician and plaintiff's immediate superior, ordered him to turn over the tapes of the Credentials Committee meeting or be dismissed. Dr. Williams explained that he required the tapes in his investigation of the circumstances surrounding the two deaths at Broughton Hospital. This was the third such order plaintiff had received from his superiors. Plaintiff again refused and was subsequently dismissed.

In every contract of employment it is implied that the employee will obey the rules, orders, and instructions of his employer so long as those orders are lawful and reasonable. *Joseph E. Seagram & Sons, Inc. v. Bynum*, 191 F. 2d 5, 17 (8th Cir. 1951); *NLRB v. Montgomery Ward & Co.*, 157 F. 2d 486, 496 (8th Cir. 1946); *Craig v. Thompson*, 244 S.W. 2d 37, 41 (Mo. 1951); *Borden v. Day*, 197 Okl. 110, 111, 168 P. 2d 646, 648 (1946); 53 Am. Jur. 2d *Master and Servant* §§ 54, 98 (1970). *See also, Ivey v. Cotton Mills*, 143 N.C. 189, 195, 55 S.E. 613, 615 (1906). When an employee intentionally disobeys an employer's lawful instructions, his actions constitute "cause" for his dismissal. *Chemvet Laboratories, Inc. v. NLRB*, 497 F. 2d 445, 452 (8th Cir. 1974); *NLRB v. Consolidated Diesel Electric Co.*, 469 F. 2d 1016, 1025 (4th Cir. 1972); *Avondale Mills v. Burnett*, 268 Ala. 82, 86, 106 So. 2d 885, 888 (1958); *Craig v. Thompson*, 244 S.W. 2d 37, 41 (Mo.

1951); *Porter v. Pepsi-Cola Bottling Co.*, 247 S.C. 370, 375, 147 S.E. 2d 620, 622, *cert. denied*, 385 U.S. 827, 17 L.Ed. 2d 63, 87 S.Ct. 61 (1966). *See also, Haynes v. Railway*, 252 N.C. 391, 398, 113 S.E. 2d 906, 911 (1960).

Plaintiff admits that he disobeyed a direct order from a superior. He argues, however, that the order was unlawful and unreasonable in that it required him to violate the doctor-patient privilege.

The transcript of the tape which recorded the meeting of the Credentials Committee was introduced in evidence at the trial and included in the record on appeal. As indicated in the preliminary statement of facts, the discussion centered at first on the circumstances under which the two bodies were discovered and the response of hospital personnel to the deaths. Later, when the Committee interviewed Mrs. Lester and the security guard, its attention seemed directed towards transferring blame for Dr. Short's failure to respond to the ward nurse and attempting to discover who had used the hot line to report the incidents to the Secretary's office. We note that the tape contains no discussion of the psychiatric or medical treatment the two deceased patients received at Broughton or of the conditions which led to their admission. It does mention the patients' names and contains Dr. Short's observation that Evans probably died of "myocardial infarction."

The doctor-patient privilege did not exist at common law. It is solely a creature of statute. The statute upon which plaintiff relies is G.S. 122-8.1. This statute applies specifically to physicians and other employees working in State hospitals. In 1973 it read in pertinent part as follows:

> § 122-8.1. Disclosure of information, records, etc.—No psychiatrist or any other officer, agent or employee of any of the institutions or hospitals under the management, control and supervision of the Department of Human Resources shall be required to disclose any information, record, report, case history or memorandum which may have been acquired, made or compiled in attending or treating an inmate or patient of said institutions or hospitals in a professional character, and which information, records, reports, case histories and memorandums were necessary in order to

prescribe for or to treat said inmate or patient or to do any act for him in a professional capacity unless a court of competent jurisdiction shall issue an order compelling such disclosure.

A similarly worded statute, G.S. 8-53,[3] sets out a privilege applicable to all physicians, whether privately or publicly employed. The accepted construction of G.S. 8-53, which is equally applicable to G.S. 122-8.1, is that it extends not only to information orally communicated by the patient but also to knowledge obtained by the physician through his own observation or examination while attending the patient in a professional capacity. *Sims v. Insurance Co.*, 257 N.C. 32, 37, 125 S.E. 2d 326, 330 (1962). Notwithstanding, the information contained on the tape of the Credentials Committee meeting does not come within the protection of the doctor-patient privilege established by G.S. 8-53 and 122-8.1.

Information acquired in the course of attending a patient is privileged only if it is "necessary in order to prescribe for or treat [the] inmate or patient or to do any act for him in a professional capacity." G.S. 122-8.1. After Evans and Ward died neither prescription nor treatment could be of any avail. The only "act in a professional capacity" performed for the patients after their deaths was the verification of death and the preparation of the medical certification as to cause of death required by G.S. 130-46(c). Pursuant to G.S. 130-46(b), this certificate is incorporated in the death certificate which is then filed as a public record in the office of the register of deeds. G.S. 130-64. The information which the physician is required to list on the medical certification—*i.e.*, the patient's name, the name of the attending physician, and the time, date and cause of death—does not differ materially from the information revealed about the two deceased patients at the meeting of the Credentials Committee. It is axiomatic that no privilege of confidentiality can attach to information which is already public.

Furthermore, we do not believe that G.S. 122-8.1 was intended to allow a superintendent of a State hospital to refuse to turn

3. At the time plaintiff was discharged from employment, G.S. 8-53 read as follows:

"No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: Provided, that the court, either at the trial or prior thereto, may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice."

over information to his superiors in the Department of Human Resources attempting to investigate complaints of improprieties or neglect on the part of members of the hospital medical staff. While a patient may legitimately expect that confidential information will not be disclosed to the general public or to hospital personnel unconcerned with his treatment, his expectation of privacy does not extend to hospital administrators or employees who need the information in order to facilitate the patient's treatment or properly administer the hospital in accordance with approved standards.

That issue was addressed directly in *Klinge v. Lutheran Medical Center*, 518 S.W. 2d 157 (Mo. App. 1974). Plaintiff, a staff physician at a private hospital, brought an action to enjoin a staff committee at the hospital from examining the medical records of his patients to determine his competency to practice. Plaintiff argued that the physician-patient privilege prohibited the committee from examining the patients' records without their consent.

Construing a statute similar to our own, the court rejected these arguments. In holding that the doctor-patient privilege did not bar the staff committee from examining the patients' records, the court said:

> First, the policy behind the statute to encourage a patient to make full disclosure of his condition to his physician without fear of having the information used against him at a later date is not violated. The public's interest in the disclosure of the information to the internal staff of the hospital and in assuring proper medical and hospital care outweighs the patient's interest in concealment. It is doubtful if the privilege established by the statute was ever intended to apply to internal staff responsible for the welfare and health of the patients admitted to the hospital. This was at least recognized in *Benoit*, supra: "Hospital records are seen and copied by staff members and employees. The element of strict secrecy cannot be present under these circumstances." 431 S.W. at 109. . . .
>
> [A]n internal staff examination of patients' records of a staff physician under [these] circumstances . . . assures to the individual patient that degree of professional treatment to which he is entitled and is to the benefit and welfare of the

> public that the hospital is conducted at a highly professional level. 518 S.W. 2d at 166-67.

See also, Hyman v. Jewish Chronic Disease Hospital, 15 N.Y. 2d 317, 206 N.E. 2d 338, 258 N.Y.S. 2d 397 (1965) (director of hospital corporation entitled to inspect patient records to investigate charges of improper experimentation on patients).

We further note that many jurisdictions have refused to extend the doctor-patient privilege to information gathered by observations made after the patient's death. *Gardner v. Meyers,* 491 F. 2d 1184 (8th Cir. 1974); *Travelers' Insurance Co. v. Bergeron,* 25 F. 2d 680 (8th Cir.), *cert. denied,* 278 U.S. 638, 73 L.Ed. 553, 49 S.Ct. 33 (1928) (autopsy not privileged); *Ferguson v. Quaker City Life Insurance Co.,* 146 A. 2d 580 (D.C. 1958); *Sprouse v. Magee,* 46 Idaho 622, 269 P. 993 (1928) (evidence obtained from an autopsy not privileged when capable of being segregated from information received as an attending physician); *Cross v. Equitable Life Assurance Society,* 228 Iowa 800, 293 N.W. 464 (1940).

The reason for this rule is aptly stated in *Travelers' Insurance Co. v. Bergeron,* supra: "A deceased body is not a patient. . . . To hold that facts discovered through an autopsy are privileged communications within the meaning of the statute will not effectuate what we conceive to be its manifest purpose, namely, to obtain full disclosure to the physician in order to enable him to properly treat the patient. Treatment cannot avail after death." 25 F. 2d at 683.

From the foregoing discussion it is quite clear that the controversial tape contained no confidential information about Evans and Ward, the two deceased patients, and that its delivery to Dr. Williams, Dr. Zarzar, or Commissioner Flaherty would have been neither unlawful nor a breach of medical ethics. It is equally apparent, however, that the tape did reveal certain embarrassing facts: (1) A doctor on call, in disregard of a well established procedure at Broughton, had twice declined to respond to a nurse's call to come to the hospital to verify the death of a patient. (2) Upon learning that the Secretary of Human Resources was investigating this omission of duty the Credentials Committee had hastened to absolve its colleague by a unanimous resolution finding that Dr. Short had handled all problems properly and that

there was no evidence of neglect of duty on his part. (3) Despite the policy against harassing employees who used the "hot line," the Credentials Committee gave both Mrs. Lester and Bobby Cox, employees suspected of having reported Dr. Short to Raleigh, "a hard time."

The tape also disclosed unanimous resentment against the hot line established by the Department of Human Resources for hospital employees to voice complaints and against the "grant of immunity" to those who used it.

Thus, it is all too apparent that the reason Dr. Smith withheld the tape was not to protect the doctor-patient relationship but to protect Dr. Short and other members of the hospital staff from embarrassing disclosures. This, of course, was not a legitimate reason for withholding the tape. To have done so was an unfortunate error of judgment for, as plaintiff conceded on cross-examination, all he had to do on 25 April 1973 to remain Superintendent of Broughton Hospital was to get the tape from his attorney and give it to Dr. Williams.

We hold that Dr. Williams' order to plaintiff to turn over the tape was both lawful and reasonable and that plaintiff's refusal to comply with that order constituted "cause" for his dismissal. The trial judge was therefore correct when he granted the State's motion for a directed verdict in plaintiff's action for breach of contract, and the Court of Appeals was in error when it held that plaintiff was entitled to summary judgment against the State.

As to the trial court's entry of directed verdicts in favor of the individual defendants in plaintiff's action for "professional defamation," the Court of Appeals correctly ruled that plaintiff abandoned his assignment of error to this ruling by failing to argue it or cite any authority supporting it in his brief filed in that Court. Rule 28(a), North Carolina Rules of Appellate Procedure.

The decision of the Court of Appeals directing the entry of summary judgment in favor of plaintiff in his action against the State is reversed, and the judgment of the Superior Court of Burke County is affirmed.

Reversed.

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

STATE OF NORTH CAROLINA v. ERVIN RUSSELL ALLISON

No. 70

(Filed 4 September 1979)

1. **Searches and Seizures § 33— items in plain view in dwelling**

The seizure of suspicious items in plain view inside a dwelling is lawful if the officer possesses legal authority to be on the premises.

2. **Searches and Seizures § 10— warrantless search—probable cause—exigent circumstances**

A warrantless search is not unconstitutional when (1) probable cause to search exists and (2) the government satisfies its burden of demonstrating that the exigencies of the situation made search without a warrant imperative.

3. **Arrest and Bail § 5.2; Searches and Seizures § 10— warrantless entry into dwelling to make arrest**

An officer's warrantless entry into defendant's trailer dwelling for the purpose of arresting defendant for murder was lawful where the first officer who arrived on the scene observed the victim's body lying on the ground near her son's trailer; the victim's son told the officer that defendant had shot his mother and, when asked where defendant was, pointed toward defendant's trailer located some 150 feet away; the first officer directed another officer to go to defendant's trailer to apprehend him; the second officer went to the trailer, knocked on the door and, when no one answered, went in; the officer took into custody a rifle which was in plain view on a couch in the trailer; the officer then looked through the trailer, found no one, and left. Consequently, the officer had legal authority to be in defendant's trailer, and his seizure of the rifle was lawful.

4. **Searches and Seizures § 41— failure of officer to announce purpose and authority before entry—seizure of rifle—reason to believe notice would present danger to life—no substantial violation of statute**

Where an officer had been informed that the person who shot the deceased was in a nearby trailer, the officer went to the trailer and, after knocking, opened an unlocked door, instantly saw and seized a rifle on the sofa near the door, and then announced his purpose and authority to an empty trailer, the officer's failure to announce his purpose and authority before entering the trailer did not require the exclusion of the seized rifle under G.S. 15A-401(e)(1)c since (1) the officer might reasonably have believed that giving

notice of his authority and purpose to arrest defendant "would present a clear danger" to his life within the meaning of that statute, and (2) his conduct, if error, was not a substantial violation of the statute.

5. **Bills of Discovery § 6— defendant's statement not provided—motion to exclude or to grant continuance—prosecutor unaware of statement until trial—opportunity to interview officer**

The trial court did not abuse its discretion in the denial of defendant's motion to exclude an inculpatory statement made by him to the arresting officer or to grant a continuance because the State had failed to provide such statement pursuant to defendant's request for discovery where the district attorney first learned of defendant's statement during the lunch hour of the day the statement was offered in evidence, and as soon as the statement came to his attention he notified defense counsel and arranged for him to interview the arresting officer prior to the reconvening of the afternoon court session.

6. **Homicide § 4.1— first degree murder—lying in wait**

When G.S. 14-17 speaks of murder perpetrated by lying in wait, it refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim. However, it is not necessary that the assassin be actually concealed in order to lie in wait.

7. **Homicide §§ 4.1; 25.2— instructions on lying in wait**

The State's evidence in this first degree murder case supported the court's instructions on lying in wait where it tended to show that defendant was parked facing the highway by which the victim would return to her son's trailer; as the victim passed by defendant, he pulled in behind her car, and when she pulled into the trailer lot, defendant, who had been right on her bumper, sped past her toward his own nearby trailer; while the victim carried packages into her son's trailer, defendant stationed himself beside or behind a tree 150 feet away on higher ground; and when the victim went back outside to get her pocketbook from the fender of the car, defendant called to her and immediately fired a single lethal shot.

8. **Homicide § 30.1— murder by lying in wait—failure to submit second degree murder**

The trial court did not err in restricting the jury to the two possible verdicts of guilty of murder in the first degree or not guilty where all the evidence shows that the murder was committed by lying in wait, and the controverted question was the identity of defendant as the murderer.

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

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Martin (Harry), J.*, 20 June 1977 Session of the Superior Court of MCDOWELL County, docketed and argued as Case No. 15 at the Spring Term 1978.

Defendant was tried upon an indictment, drawn under G.S. 15-144, which charged that on 3 March 1977 he murdered his wife, Rose Evelyn Allison. He appeals a judgment of life imprisonment imposed upon the jury's verdict of guilty of first degree murder.

The State's evidence tended to show:

At approximately 1:30 p.m. on 3 March 1977 defendant's wife and her son, Joseph Whittaker, defendant's stepson, were driving to Joseph Whittaker's house trailer in McDowell County. About a half mile from their destination they saw defendant parked alongside the road facing the highway in his white Buick. As they passed, defendant "cranked up" and pulled in behind their car. When Joseph turned in at his trailer, defendant—who had been right on his bumper—sped past them toward his own mobile home located approximately 254 feet away on a slight hill. After Joseph parked, he and his mother took some articles from the car and started toward the Whittaker trailer. At that time Joseph saw defendant come around the corner of his trailer. He was "kind of hunkering down and peeking down there at us" from his trailer. Joseph, who had previously received a leg injury, thought defendant was looking at him because of his crutches. Joseph went into the trailer, and Mrs. Allison went back outside to retrieve her purse which she had left on the fender of the car.

While Joseph was still inside the trailer, he heard someone holler "Hey." Immediately thereafter he heard a rifle shot. As quickly as he could, he went to the door and from there he saw his mother lying out in the yard. Looking up the hill toward defendant's trailer, he observed defendant "either knelt or hunkered down" with a rifle against a pine tree. He held the rifle still aimed at Mrs. Allison. Seeing no one else anywhere around, Joseph went into the rear bedroom, got a pistol, and went outside. From up on the hill he heard a car door slam, an engine crank, and a car drive away. When defendant did not come back down the hill after a few seconds, Joseph went to his mother. Upon opening her blouse and seeing a bullet hole in her chest, he knew she was dead.

Joseph drove to a neighbor's house, told him defendant had shot his mother, and asked him to call the police. He then went to the front of defendant's trailer, saw no car, and returned home.

Deputy Sheriff Eddie Smith arrived first at Whittaker's trailer. He testified that when he asked Joe Whittaker what had happened, all Joe told him was that defendant had shot his mother. When Deputy Smith asked him "where?", Joseph pointed toward the trailer near the tree about 150-200 feet away. At this time Deputy Mack Autrey drove up. Smith, who had not been told that Joseph had heard a car door slam or that he had been to defendant's trailer, instructed Autrey "to check the trailer to see if Ervin Allison was in there." Smith then went to the pine tree near defendant's trailer and measured the distance from that tree to Mrs. Allison's body. It was 254 feet. He found bark from the tree lying around its base and footprints facing the Whittaker trailer.

Deputy Autrey testified that when he arrived at the scene about 3:00 p.m. in response to a call, there was a body lying in the yard. Deputy Smith met him in the Whittaker driveway, told him he had been informed "that there was a subject in the trailer that just shot this woman and he asked [him] to go to the trailer." In consequence, Autrey went to the trailer on the hill. After knocking on the door and getting no response, he tested the door. It was unlocked, and he went in. On a couch to the right of the door the deputy immediately saw a .22 caliber rifle, State's Exhibit No. 1. Autrey seized the rifle, announced his presence and authority, and proceeded to search the trailer for the defendant. No one was there. Autrey had neither an arrest nor a search warrant when he entered the trailer.

The testimony of State Highway Patrolman T. C. Maye tended to show that on 3 March 1977, shortly after 3:00 p.m., he observed a white Buick traveling very slowly north on U.S. 19-23, north of Asheville. It matched the description of defendant's car he had received over the police radio. After following it approximately a mile, Maye stopped defendant's vehicle. In the car Maye observed "some containers of alcohol"; on defendant's person he found "a container of valium." Defendant had a strong odor of alcohol about him and was obviously "under the influence." Officer Maye charged defendant "with driving under the influence." He then took him into custody, advised him of his rights, and took him to the Buncombe County jail breathalyzer room.

During the trip defendant made the voluntary and spontaneous statement to the officer "that he had just gotten rid of seventeen years of trouble and that he was going to get his sister to take care of his 10-year-old child and he was going to hide out in Madison County."

Mr. Frank Satterfield, an expert in ballistics and firearm identification, examined the lead fragment removed from Mrs. Allison's body. However, because of the distortion and mutilation of the bullet, he could not say positively it had been fired from State's Exhibit No. 1. However, he did say, "but I would explain further that the bullet could well have been fired in there."

Defendant did not testify. The record shows, however, that he "offered 4 alibi witnesses whose testimony tended to show that the defendant was in the barber shop of his brother-in-law Emory Moxley on Lexington Avenue in Asheville, North Carolina, in an intoxicated condition from approximately 1:50 p.m. until 2:25 p.m. on March 3, 1977."

The record also discloses that the State offered rebuttal evidence from three witnesses which tended to show "that the defendant or his car was seen in the area of the shooting at approximately 1:15 p.m. until 2:10 p.m., 3 March 1977."

Attorney General Rufus L. Edmisten, Associate Attorney Rebecca R. Bevacqua, for the State.

E. Penn Dameron, Jr., for defendant.

SHARP, Chief Justice.[1]

Defendant's first assignment of error is that the trial judge erred in admitting over defendant's objection the .22 caliber rifle (State's Exhibit No. 1) which Deputy Sheriff Autrey took from defendant's trailer on the afternoon of 3 March 1977. When the State offered the rifle in evidence, defendant objected and moved to suppress the rifle as the fruit of an illegal search. The judge immediately conducted a voir dire, overruled defendant's contention that the seizure of the rifle violated his rights under U.S. Const., Fourth Amendment, N.C. Const., Art. 1, § 20, and G.S.

1. This opinion was written in accordance with the Court's decision made prior to Chief Justice Sharp's retirement and was adopted by the Court and ordered filed after she retired.

15A-401(e)(1), and admitted the rifle in evidence. We consider first the constitutional questions involved.

[1] The seizure of suspicious items in plain view inside a dwelling is lawful if the officer possesses legal authority to be on the premises. *State v. Hoffman,* 281 N.C. 727, 736, 190 S.E. 2d 842, 849 (1972). *Accord, Harris v. United States,* 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968); *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968).

As pointed out in the dissenting opinion of Mr. Justice Marshall and Mr. Justice Brennan in *United States v. Santana,* 427 U.S. 38, 45, 49 L.Ed. 2d 300, 307, 96 S.Ct. 2406, 2411 (1976), the Supreme Court continues to reserve the "question of whether and under what circumstances a police officer may enter the home of a suspect in order to make a warrantless arrest." *See also People v. Peyton,* 45 N.Y. 2d 300, 408 N.Y.S. 2d 395, 380 N.E. 2d 224 (1978), *Coolidge v. New Hampshire,* 403 U.S. 443, 476-482, 29 L.Ed. 2d 564, 588-92, 91 S.Ct. 2022, 2043-44 (1971). However, the following dicta and other similar expressions in *Coolidge v. New Hampshire,* supra, suggest that the Supreme Court will eventually hold that the Fourth Amendment imposes upon a warrantless entry for the purpose of making an arrest limitations comparable to the strictures on residential searches and seizures:

"It is clear, then, that the notion that a warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate is in fundamental conflict with the basic Fourth Amendment law that seizures inside a man's house without warrant are per se unreasonable in the absence of some of a number of well defined 'exigent circumstances.' " *Id.* at 477-78, 29 L.Ed. 2d 589-90, 91 S.Ct. 2044.

The Fourth Amendment to the United States Constitution and Art. 1, § 20 of the North Carolina Constitution prohibit officers of the law, under ordinary circumstances, from invading the home except under authority of a search warrant issued in accord with constitutional and statutory provisions. *McDonald v. United States,* 335 U.S. 451, 93 L.Ed. 153, 69 S.Ct. 191 (1948); *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969). Further, evidence obtained during an unconstitutional search is inadmissible at trial, not as a rule of evidence, but as a requisite of due process. *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961); *State*

v. Colson, 274 N.C. 295, 163 S.E. 2d 376, *cert. denied*, 393 U.S. 1087 (1968).

[2] A warrantless search is not unconstitutional, however, when (1) probable cause to search exists and (2) the government satisfies its burden of demonstrating that the exigencies of the situation made search without a warrant imperative. *Chimel v. California*, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969). If the circumstances of a particular case render impracticable a delay to obtain a warrant, a warrantless search on probable cause is permissible, because the constitutional proscriptions run only against *unreasonable* searches and seizures. *See Maryland Penitentiary v. Hayden*, 387 U.S. 294, 18 L.Ed. 2d 782, 87 S.Ct. 1642 (1967); *State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972).

[3] In connection with warrantless entries into a dwelling to make an arrest, the federal courts have isolated seven factors, first cataloged in *Dorman v. United States*, 435 F. 2d 385, 392-393 (D.C. Cir. 1970), which are weighed together to assess the reasonableness of a failure to acquire a warrant: (1) the gravity and violent character of the offense; (2) the reasonableness of the belief the suspect is armed; (3) the degree of probable cause to believe the suspect committed the crime involved; (4) whether reason to believe the suspect is in the premises entered existed; (5) the likelihood of escape if not swiftly apprehended; (6) the amount of force used to effect the unconsented entry; and (7) whether the entry was at day or night.

Most of the other federal circuits have explicitly or implicitly approved the *Dorman* rationale. *See, e.g., United States v. Jarvis*, 560 F. 2d 494 (2d Cir.), *cert. denied*, 435 U.S. 934 (1977); *United States v. Reed*, 572 F. 2d 412 (2d Cir. 1978), *cert. denied*, 439 U.S. 913 (1978); *United States v. Cravero*, 545 F. 2d 406 (5th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *United States v. Shye*, 492 F. 2d 886 (6th Cir. 1974) (*per curiam*); *Salvador v. United States*, 505 F. 2d 1348 (8th Cir. 1974); *United States v. Phillips*, 497 F. 2d 1131 (9th Cir. 1974); *United States v. Davis*, 461 F. 2d 1026 (3d Cir. 1972); *Vance v. State of North Carolina*, 432 F. 2d 984 (4th Cir. 1970). In light of these decisions, we deem it appropriate to judge the constitutionality of Deputy Autrey's entry in accordance with doctrines developed in the context of searches and seizures.

After the voir dire the trial judge found the facts to be in accordance with the testimony of Joseph Whittaker and Deputies Smith and Autrey as set out in the preliminary statement. Defendant took no exceptions to these findings, which are summarized below:

After Joseph Whittaker summoned the officers, Deputy Smith was the first to arrive. He observed the body of Mrs. Rose Allison lying on the ground and, in his opinion, she was dead. Whittaker told Smith that defendant Allison had shot his mother and, when asked where Allison was, he pointed toward his trailer which was located some 150 feet away. About this time Officer Autrey arrived on the scene. Whittaker had not told Smith that he had heard a car door slam, the engine crank, and a car leave. Nor did he tell Smith he had been to the trailer looking for the defendant. "Smith told Whittaker to get under cover as he might be endangered and directed Deputy Sheriff Autrey to go to the defendant's trailer for the purpose of apprehending the defendant." Following instructions, Autrey went to the trailer, knocked on the door and, when no one answered, went in. On a couch "immediately in the trailer," he saw a rifle which he took into custody. He looked through the trailer, found no one, and left.

The information which Joseph Whittaker furnished Deputy Smith when he found Mrs. Rose Allison lying on the ground shot to death in front of her son's trailer clearly gave him probable cause to believe that defendant had committed murder—a most grave and violent crime. Smith had every reason to believe that defendant was armed, and it was certainly not unreasonable to believe that defendant would likely escape if not apprehended immediately. Whittaker, in answer to a direct question, had told Smith that defendant was at his trailer by pointing to it. When Autrey arrived, Smith communicated this information to him; and he reasonably relied upon it. "Probable cause 'may be based upon information given to the officer by another, the source of such information being reasonably reliable.'" *State v. Phifer*, 290 N.C. 203, 215, 225 S.E. 2d 786, 794 (1976), *cert. denied*, 429 U.S. 1050 (1977). When Autrey entered the empty trailer in the daytime after knocking, he merely turned the knob of an unlocked door.

The foregoing facts embrace all the exigent circumstances cataloged in *Dorman v. United States*, supra, and fully justified

Autrey's warrantless entry. Additionally, we would point out that even if Autrey's entry had been unlawful no real benefit resulted to the State from the seizure of defendant's rifle, for the State was unable to establish that the bullet fragments recovered from Mrs. Allison's body were fired from it. As Judge Craven noted in *Vance v. State of North Carolina*, 432 F. 2d 984, 990 (4th Cir. 1970) (a case involving a warrantless arrest), in criminal practice unconstitutional police behavior is immaterial "so long as they are not permitted to benefit from their lawless conduct in court."

[4] We next consider defendant's contention that Deputy Autrey's entrance into the trailer was a violation of N.C. Gen. Stat. 15A-401(e)(1)b. and c. in that (1) he lacked reasonable cause to believe defendant was in the trailer and (2) he did not announce his authority and purpose to enter immediately after knocking on the door but waited until after he had opened the unlocked door and stepped into the front room. This section provides:

> "(1) A law-enforcement officer may enter private premises or a vehicle to effect an arrest when:
>
> a. The officer has in his possession a warrant or order for the arrest of a person or is authorized to arrest a person without a warrant or order having been issued,
>
> b. The officer has reasonable cause to believe the person to be arrested is present, and
>
> c. The officer has given, or made reasonable effort to give notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice would present a clear danger to human life."

For the purpose of this argument defendant concedes "that the requirements of subsection 'a' were met in the instant case, in that Deputy Autrey had probable cause to believe that the defendant had committed the felony of murder." We find no merit in defendant's contention that Autrey violated subsection "b" for, as we have heretofore pointed out, Autrey did have reasonable cause to believe defendant was in the trailer. As to subsection "c", we note that here we are not dealing with a situation where an officer entered occupied premises without "knocking or an-

nouncing" and violence erupted in consequence.[2] In this case, after knocking, Deputy Autrey opened an unlocked door, instantly saw and seized a rifle on the sofa immediately to the right of the door, and then announced his presence and authority to an empty trailer. Upon ascertaining that the premises were unoccupied, Autrey left and turned the rifle over to Deputy Smith.

At the time Autrey approached defendant's trailer all he knew was that 150 feet away a woman was lying dead from a bullet wound which—he was told by the first officer on the scene—had been inflicted by a man who was supposed to be in the trailer. Under these conditions Autrey might reasonably have feared that giving notice of his authority and purpose to arrest defendant "would present a clear danger" to his life. Under all the circumstances, we conclude that the manner of Officer Autrey's entry was reasonable and his failure to announce after knocking and before entry, if error, was not a substantial violation of G.S. 15A-401(e)(1)c. and therefore did not require the exclusion or suppression of the rifle.[3]

For the reasons stated we uphold the trial judge's ruling that Deputy Autrey's entry into the trailer and his seizure of the rifle were lawful, and we overrule defendant's first assignment of error.

[5] Prior to the trial, in response to defendant's request under G.S. 15A-902, -903, the State informed defendant's counsel that defendant had made no inculpatory statements while in custody and that no statements by defendant would be offered in evidence. Later, during the trial, the State offered the testimony of the arresting officer, Patrolman T. C. Maye, that during the

2. Compare *State v. Sparrow*, 276 N.C. 499, 512, 173 S.E. 2d 897, 905-06 (1970).

3. § 15A-974. Exclusion or suppression of unlawfully obtained evidence.—Upon timely motion, evidence must be suppressed if:

(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or

(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:

a. The importance of the particular interest violated;

b. The extent of the deviation from lawful conduct;

c. The extent to which the violation was willful;

d. The extent to which exclusion will tend to deter future violations of this Chapter. (1973, c. 1286, s. 1.)

drive to the Buncombe County jail on 3 March 1977 defendant told him "that he had just gotten rid of seventeen years of trouble and that he was going to get his sister to take care of his ten-year-old child and he was going to hide out in Madison County." Defendant objected to this testimony on the ground that the State had failed to comply with the discovery sections of Chapter 15A and moved the court alternatively to prohibit the introduction of the testimony or to grant a continuance. The court, after conducting a voir dire, denied defendant's alternative motion. This ruling is the subject of defendant's assignment of error No. 2.

The evidence adduced upon voir dire tended to show that at the time the State responded to defendant's motion for discovery neither the district attorney nor any of his assistants were aware of the statement which defendant had made to Patrolman Maye, who was then stationed in another district; that the district attorney first learned of defendant's statement during the lunch hour of the day the statement was offered in evidence; that as soon as the statement came to his attention he notified defense counsel of it and arranged for him to interview Patrolman Maye prior to the reconvening of the afternoon court session.

Defense counsel stipulated that the district attorney had notified him of Mr. Maye's proposed testimony "as soon as he was notified by Mr. Maye." Counsel did not question the State's good faith; his contention was that the district attorney should have ascertained what Maye's testimony would have been prior to the trial. At the conclusion of the voir dire, the court found the facts to be as all the testimony tended to show, and held that the district attorney had complied with the provisions of Chapter 15A with reference to discovery when he advised counsel of defendant's statement as soon as he learned of it and gave him an opportunity to talk with Patrolman Maye prior to the resumption of the trial.

G.S. 15A-910 gives the trial judge ample authority to provide relief when either the State or defendant fails to comply with the discovery article of Chapter 15A. However, "the exclusion of evidence for the reason that the party offering it has failed to comply with the discovery statutes granting the right of discovery, or with an order issued pursuant thereto, rests in the

discretion of the trial court. . . . The exercise of that discretion, absent abuse, is not reviewable on appeal." *State v. Hill*, 294 N.C. 320, 331, 240 S.E. 2d 794, 801-02 (1978). In the court's denial of defendant's alternative motion, we perceive no abuse of discretion; and defendant has pointed to no prejudice resulting to him from the delayed disclosure that Patrolman Maye would testify to the statement in question. Assignment of error No. 2 is overruled.

The remaining assignments of error relate to the judge's charge. Defendant's third assignment challenges the following instruction:

"I charge you that if the State has satisfied you from the evidence and beyond a reasonable doubt that on March 3rd, 1977, the defendant, Ervin Allison, by lying in wait, that is by concealing himself behind a tree and watching and waiting for Rose Allison to come out of her house, unlawfully and intentionally killed Rose Allison by shooting her with a .22-calibre rifle, it would be your duty to return a verdict of guilty of murder in the first degree."

Defendant contends this instruction was erroneous because Whittaker, who identified defendant as the assassin, testified that defendant was plainly visible to him. He argues that therefore there was no evidence defendant ever concealed himself behind a tree. He further argues that the court's instructions must have led the jury to believe "that the act of partially concealing one's self by placing a rifle against the trunk of a small tree would constitute lying in wait as a matter of law." For the reasons hereinafter stated we find no error in the court's instructions.

In pertinent part G.S. 14-17 provides: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing . . . shall be deemed to be murder in the first degree. . . ."

In this jurisdiction "[t]he precedents show that while being in ambush would be lying in wait, it is not necessary that a person [the assassin] should be concealed." *State v. Walker*, 170 N.C. 716, 718, 86 S.E. 1055, 1056 (1915). In affirming defendant's conviction of first degree murder in *State v. Wiggins*, 171 N.C. 813, 89 S.E. 58 (1916), this Court said, "There was evidence, which the jury

believed, that the prisoners lay in wait and killed the deceased from ambush. There was no evidence tending to show any other state of facts, and the sole issue of fact was as to the identity of the prisoners, that is whether they were the persons who slew the deceased." In a dying declaration, the deceased had said that about 7:30 a.m., as he rode his mule down the road toward Robbinsville, he had seen and passed the two defendants at a big chestnut at Hazel Branch. After he passed them, one of the defendants shot him in the back. That night he died from the bullet wound. There was also evidence that bloodhounds had marked defendants, that defendants bore deceased a grudge, and that both had threatened to kill him.

In *State v. Wiseman*, 178 N.C. 784, 101 S.E. 629 (1919), the deceased was killed at twilight within moments after he stepped off the train at Glen Alpine. As soon as he had walked around the two or three people who were waiting to board the train, ten bullets from a pistol were fired into his body. Powder burns indicated that the pistol must have been fired within twenty inches of the victim. Two men at the station identified the defendant as the man they saw standing with a pistol in each hand, emptying each pistol into the body of the deceased as rapidly as he could pull the trigger. In affirming the defendant's conviction (Chief Justice Clark writing the opinion), the Court said, "That the slaying was by lying in wait, is beyond question."

In *State v. Dunheen*, 224 N.C. 738, 32 S.E. 2d 322 (1944), the State's evidence was that on the night of May 8th the defendant concealed a gun behind a hedge on the edge of a street. About 8:00 a.m. on May 9th he was seen stooping behind the hedge. Thereafter, from time to time, up until 9:15 a.m., witnesses saw the defendant behind the hedge. At 9:15 a.m. the deceased passed along the street by the hedge, and defendant shot her to death. The State prosecuted the defendant on the theory that he was either guilty of perpetrating a murder by lying in wait or not guilty. The jury convicted him of first degree murder, and this Court affirmed.

[6] The foregoing decisions make it clear that when G.S. 14-17 speaks of murder perpetrated by lying in wait, it refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim. An assailant who watches

and waits in ambush for his victim is most certainly lying in wait. However, it is not necessary that he be actually concealed in order to lie in wait. If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait. *See State v. Wiseman*, supra at 789-90, 101 S.E. at 630-31. Certainly one who has lain in wait would not lose his status because he was not concealed at the time he shot his victim. The fact that he reveals himself or the victim discovers his presence will not prevent the murder from being perpetrated by lying in wait. Indeed, a person may lie in wait in a crowd as well as behind a log or a hedge. *See State v. Miller*, 110 Ariz. 489, 520 P. 2d 1113 (1974).

[7] All the evidence in this case supports the trial court's charge on lying in wait. The State's evidence tended to show that about 1:30 p.m. on the day of Mrs. Allison's death, defendant was parked facing the highway by which his wife would return to her son's trailer; that as she passed by him he pulled in behind her car, and when she drove into the trailer lot he was "right on the bumper." However, he "poured the gas on and went shooting out the road in the direction of his trailer." Thereafter, while Mrs. Allison carried packages into the trailer after leaving her pocketbook on the fender of the car, defendant stationed himself beside or behind a tree 150 feet away on higher ground. When Mrs. Allison went back outside to get her pocketbook, defendant called to her and immediately fired a single lethal shot. Defendant's evidence did not call into question the manner of Mrs. Allison's death; it related only to defendant's alibi and disputed only the identity of her killer. The trial judge correctly applied the law with reference to murder perpetrated by lying in wait to the evidence in this case, and defendant's assignment of error No. 3 is overruled.

[8] Defendant's fourth and final assignment of error is that the trial judge erred in restricting the jury to the two verdicts of guilty of murder in the first degree or not guilty. He contends that the issue of his guilt of murder in the second degree should also have been submitted. This contention is without merit, for in this case the uncontradicted evidence excludes the possibility of a verdict of a lesser degree of guilt than first degree murder. It has

long been the rule in this State that "[w]hen the entire evidence shows, and no other reasonable inference can be fairly drawn therefrom, that the murder was committed either by lying in wait or in an attempt to perpetrate a felony, and the controverted question is the identity of prisoner as the murderer, the trial judge does not commit error in charging the jury to render a verdict of guilty of murder in the first degree or not guilty." *State v. Wiggins*, 171 N.C. 813, 817, 89 S.E. 58, 60 (1916) and *State v. Spivey*, 151 N.C. 676, 65 S.E. 995 (1909). *Accord, State v. Dunheen*, 224 N.C. 738, 32 S.E. 2d 322 (1944); *State v. Satterfield*, 207 N.C. 118, 176 S.E. 466 (1934); *State v. Walker*, 170 N.C. 716, 86 S.E. 1055 (1915). *See State v. Wiseman*, 178 N.C. 784, 795-796, 101 S.E. 629, 633-34 (1919). As Justice Barnhill (later Chief Justice) pointed out in *State v. Dunheen*, "When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving, or torture, the means and method used involve planning and purpose. Hence the law presumes premeditation and deliberation. The Act speaks for itself. G.S. 14-17." *State v. Dunheen*, supra at 739-40, 32 S.E. 2d at 323-24.

In the trial below we find

No error.

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

STATE OF NORTH CAROLINA v. CARDELL SPAULDING

No. 10

(Filed 4 September 1979)

1. Homicide § 28.1 — first degree murder — evidence of self-defense — refusal to instruct error

The trial court in a first degree murder case erred in refusing to instruct the jury on self-defense where defendant, who was an inmate in Central Prison, offered evidence tending to show that (1) he did not provoke the affray where his only comments to the victim, another prison inmate, were that he wanted no trouble with him and did not want to hurt him; (2) defendant was not the aggressor, as the victim came toward defendant with his hand "jammed" into his pocket, and defendant backed up several steps to a fence in the

recreational yard of the prison before pulling out his knife and stabbing the victim; and (3) though the victim had no weapon on his body when he was removed from the crime scene by prison guards, and never actually made a show of deadly force toward defendant, defendant nevertheless offered evidence of apparent necessity to kill in self-defense where he testified that the victim had threatened him, he feared that the victim meant to stab him, and the victim backed him up to a fence, all the while having his hand "jammed" into his pocket.

2. **Homicide § 19— first degree murder in prison—self-defense—prior attack on defendant—evidence improperly excluded**

In a prosecution of defendant, a prison inmate, for the first degree murder of another prison inmate, the fact that defendant, while in prison, had previously been the subject of a violent, near-fatal attack was clearly relevant and material to the jury's determination of the issue of the reasonableness of defendant's response to the victim's alleged threats and behavior, and the trial court erred in excluding evidence concerning the earlier attack.

3. **Homicide § 19— first degree murder in prison -self-defense claimed—availability of knives—evidence improperly excluded**

In a prosecution of defendant for the first degree murder of a fellow prison inmate where defendant claimed that he stabbed his victim in self-defense, the trial court erred in refusing to permit defendant to offer evidence concerning the availability of knives to the inmates in his prison block in order to assist in establishing his claim of self-defense and to rebut the State's evidence as to security precautions taken to assure that inmates in defendant's block did not have access to weapons.

4. **Homicide § 19— first degree murder—self-defense—knowledge that men were dangerous—evidence improperly excluded**

In a prosecution of defendant for the first degree stabbing of a fellow prison inmate where both inmates were confined to the block housing the most incorrigible and dangerous prisoners, the trial court erred in excluding testimony by defendant that he knew that anyone assigned to his block of the prison would be a dangerous man and that this knowledge was one of the reasons he took a knife out to the recreational yard, since such evidence was relevant to defendant's claim of self-defense.

5. **Homicide § 19— first degree murder—self-defense—pervasiveness of fear of physical harm—evidence improperly excluded**

In a prosecution of defendant for the first degree murder of a fellow prison inmate where both inmates were confined to the block housing the most incorrigible and dangerous prisoners, the trial court erred in excluding testimony by defendant, other inmates and a former Commissioner of Corrections as to the pervasiveness of fear of physical harm on the part of inmates in that block, since that evidence was admissible with respect to defendant's claim of self-defense to assist the jury in determining whether defendant reacted to the situation as a person of "ordinary firmness" would have.

6. Homicide § 19— first degree murder—self-defense—evidence properly excluded

In a prosecution of defendant for the first degree murder of a fellow prison inmate, the trial court did not err in excluding: (1) the opinion of a social anthropologist that the circumstances defendant encountered in prison could have produced in a person of ordinary firmness an apprehension of death or great bodily harm, since the jury could determine the reasonableness of defendant's apprehension as well as the anthropologist; (2) testimony concerning hostility between guards and prisoners on the block which housed defendant, since such evidence did not show that the guards would fail to come to the aid of an inmate being attacked; and (3) evidence of the allegedly dehumanizing conditions under which defendant lived, since there was no logical connection between this evidence and the issue of defendant's right to kill in self-defense.

7. Criminal Law § 135.3; Jury § 7.11— bifurcated trial—one jury—jurors opposed to capital punishment

There was no merit to the contention of defendant in a first degree murder case that he was entitled to have separate juries empaneled to hear the issues of guilt and punishment and that a prospective juror could not be excluded from the guilt determination phase because of his views on capital punishment.

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

BEFORE *Judge Albright* at the 19 June 1978 Criminal Session of WAKE Superior Court and on a bill of indictment proper in form, defendant was tried and convicted of first degree murder. He was sentenced to death in a separate proceeding as required by G.S. 15A-2000. He appeals pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by J. Michael Carpenter and Donald W. Stephens, Assistant Attorneys General, for the state.

Wade M. Smith and Roger W. Smith, Attorneys for defendant appellant.

EXUM, Justice.

I

Defendant is charged with the murder of Hal Roscoe Simmons. At trial he admitted killing Simmons but offered evidence tending to show he did so out of fear because Simmons had threatened him and was advancing on him at the time of the killing. The trial court refused to instruct the jury on self-defense.

We hold this was prejudicial error and order that defendant receive a new trial. We also discuss the admissibility of certain evidence offered by defendant relating to the issue of self-defense and defendant's assignment of error concerning the exclusion of prospective jurors for cause because of their attitudes on capital punishment.

At the time of the killing, both defendant and Simmons were inmates in Central Prison, quartered on J Block. J Block and the adjoining I Block are the most heavily secured sections in Central Prison. Inmates in these two blocks are not allowed contact with any other inmates in the prison. Their only contact with each other is for a period of one hour a day when they are given the option of going to a fenced-in area outside for recreation. The inmates are allowed out at this recreation period in small groups of not more than seven to nine men. They must undergo a strip search before they go out to the yard.

There are 46 prisoners housed in I and J Blocks. According to the testimony of Mr. Kenneth E. Garner, a Correctional Officer at Central Prison,

> "All prisoners who are on I & J Block have had problems within the prison system. They are people who have been put into the North Carolina Prison System and thereafter had some kind of trouble. They either had problems with the inmate population or the staff. Basically speaking, the people in I Block and J Block are the toughest or most incorrigible prisoners in the North Carolina Prison System."

The state's evidence showed that Simmons was transferred from I Block to J Block on 8 February 1978. On 9 February he did not leave his cell for the recreational period; on 10 February, at about 9:30 a.m., he did. Some minutes thereafter defendant also left his cell to go onto the yard.

The procedure which is followed by an inmate on I or J Blocks who wishes to go outside was described as follows: The inmate removes all his clothing except for his underwear and his shoes and hands it to a guard. The clothes are then searched. The inmate is handcuffed and walked to a security cage. He is placed in the cage, and it is locked. His handcuffs are removed. He then takes off the rest of his clothing, and his body cavities and hair

are examined to ensure he has no weapons. He is given back his clothing and allowed to dress, after which a mechanical door to the security cage is opened so he can go outside.

Both Simmons and defendant went through this process. According to the state's evidence, as the door to the outside was being opened for defendant, he positioned himself so that it could not be closed. He then reached back and took a homemade knife that was handed him by Benny Linder, the inmate whose cell was next to the security cage. After receiving the knife, defendant stepped out into the yard, approached Simmons and stabbed him several times. Simmons ran up the stairs to I Block where he collapsed. Defendant laid the knife on a ledge and returned to J Block. Simmons died shortly after the stabbing. The cause of his death was a wound to the neck.

Defendant testified in his own behalf. He stated that he had been placed on J Block on 20 August 1977 after he had been stabbed by other prisoners on 26 June 1977. He did not not know Hal Roscoe Simmons prior to 10 February 1978. On the morning of that day he heard someone yell out his name. He responded and the person yelling identified himself as Simmons. The following conversation then ensued:

> "He [Simmons] said, well, he asked me what floor, I told him I was in J-3-6 down there, and he said, well, well, don't want you to get in my face at no time; said going on the yard, don't want nothing to do with you on account I left from I Block over there and my friends have been talking about you, I don't want you in my face.
>
> "I told him, I said, well, I didn't want no trouble with him, hadn't been having any trouble with the guys on the floor I had been recreating with them all of the time. And he still—he said, go on the yard, hit the yard, I got something for you. I told him again I didn't want any trouble, you know, if I could avoid it."

Defendant testified that as a result of this conversation he feared that Simmons meant to stab him when they went out to the yard. He wanted to "talk it over" with Simmons but as a precaution he placed a knife which he had fashioned from a broken light fixture in the lining of his shoe. He then went out for

recreation. According to defendant, the officer who searched his shoe did not find the knife.

Defendant stated that after he got outside he took the knife out of his shoe and put it in his pocket. As he came up to the other inmates, Simmons began advancing toward him with his hand "jammed" in his pocket. Defendant told Simmons he didn't want any trouble and didn't want to hurt him. Simmons said nothing and continued to advance. Defendant then took out his knife and stabbed Simmons.

Testimony of several inmates corroborated defendant's version of the events, both as to the conversation and the incident in the yard. Benny Linder denied having handed defendant the knife with which Simmons was killed. Several inmates said they heard Simmons threaten defendant. Each of the inmates who were in the recreation area at the time of the killing testified that Simmons was advancing toward defendant with his hand in his pocket.

II

[1] The principal question presented on this appeal is whether the trial court erred in refusing to instruct the jury on self-defense. "In resolving this question the facts are to be interpreted in the light most favorable to defendant." *State v. Watkins*, 283 N.C. 504, 509, 196 S.E. 2d 750, 754 (1973).

"A person may kill in self-defense if he be free from fault in bringing on the difficulty and it is necessary, or appears to him to be necessary to kill so as to save himself from death or great bodily harm." *State v. Davis*, 289 N.C. 500, 509, 223 S.E. 2d 296, 302, *death penalty vacated*, 429 U.S. 809 (1976). To be entitled to an instruction on self-defense, then, defendant had to present evidence tending to show (1) he was free from fault in the matter, and (2) it was necessary, or reasonably appeared to be necessary, to kill in order to protect himself from death or great bodily harm.

"The requirement that a defendant must be free from fault in bringing on the difficulty before he can have the benefit of self-defense ordinarily means that he himself must not have precipitated the fight by assaulting the decedent or by inciting in him the reaction which caused the homicide." *State v. Jennings*, 276

N.C. 157, 163, 171 S.E. 2d 447, 451 (1970). When the evidence here is interpreted in the light most favorable to defendant, this requirement is satisfied. Defendant's only comments to Simmons were that he wanted no trouble with him and did not want to hurt him. This is not language tending to incite an affray. Defendant's evidence is that he was not the aggressor in the affray. Simmons was coming toward defendant with his hand "jammed" into his pocket. Defendant had made no show of force. He told Simmons he wanted no trouble. Simmons said nothing and continued advancing. According to other inmates, defendant backed up several steps to a fence in the yard before pulling out his knife and stabbing Simmons. All of this evidence tends to show Simmons was the aggressor. In going out into the yard, defendant was going to a place where he had a right to be. *See State v. Guss*, 254 N.C. 349, 118 S.E. 2d 906 (1961). In arming himself as a precaution, in the context of this case, defendant was not at fault vis-a-vis the law of homicide so long as he did not use the knife or threaten decedent with it until it became necessary or apparently necessary to do so in self-defense.

The state relies on *State v. Watkins, supra*, 283 N.C. 504, 196 S.E. 2d 750, and *State v. Brooks*, 37 N.C. App. 206, 245 S.E. 2d 564 (1978), to support its contention that an instruction on self-defense was inappropriate. Both these cases are factually distinguishable. Defendant in *Watkins* sought out the deceased and approached to within five or six feet of him brandishing a shotgun. Deceased lunged at defendant and defendant shot him. Defendant in *Brooks* was an inmate in Caledonia Prison. He testified that he had an argument with another prisoner, James T. Williams, and that shortly afterwards he saw Williams get a knife and put it in his pocket. Williams then went to the bathroom area of the prison dormitory to take a shower. Defendant followed Williams to the shower area and waited for him. When Williams emerged and confronted defendant, he reached toward his pocket; defendant then pulled his own knife from his pocket and stabbed Williams.

In both *Watkins* and *Brooks* the defendants aggressively sought out their victims. In each case, the defendant's actions were of such a nature as to provoke the affray. Viewing the evidence in the light most favorable to defendant, such is not the case here. Defendant went out to the yard, a place where he had

a right to be. He did not seek Simmons out for the purpose of a violent encounter. He neither did nor said anything to provoke Simmons. Instead, he repeatedly told Simmons he wanted no trouble. According to evidence presented by defendant, he was free from fault in the difficulty.

Defendant was thus entitled to an instruction on self-defense if there is any evidence in the record that it was necessary, or reasonably appeared to be necessary, to kill in order to protect himself from death or great bodily harm. *See State v. Johnson*, 166 N.C. 392, 81 S.E. 941 (1914). There was no evidence presented that Simmons was armed at the time of the stabbing; indeed, the guards who removed him from the yard testified they found no weapon on his person. Defendant cannot under these facts claim a right to kill in self-defense based on actual necessity; to the extent that right was available to him, it arose from apparent necessity.

The concept of apparent necessity was explained as follows by then Chief Justice Bobbitt in *State v. Gladden*, 279 N.C. 566, 572, 184 S.E. 2d 249, 253 (1971):

> "[T]he right of self-defense rests upon necessity, real or apparent; and, in the exercise of his lawful right of self-defense, a person may use such force as is necessary or apparently necessary to protect him from death or great bodily harm. (Citation omitted.) In this connection, the full significance of the phrase 'apparently necessary' is that *a person may kill even though to kill is not actually necessary to avoid death or great bodily harm, if he believes it to be necessary and has a reasonable ground for that belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to him at the time of the killing.*" (Emphasis supplied.)

Defendant here offered evidence that Simmons threatened him and that because of the threats he thought Simmons meant to stab him. There was testimony that when the two of them went out into the yard Simmons advanced on defendant with his hand in his pocket; that defendant told Simmons he did not want trouble; that Simmons said nothing and continued to advance; and that defendant stabbed Simmons only after he had backed up to the fence in the yard.

Simmons never actually made a show of deadly force toward defendant. It is this fact on which the trial court primarily relied in refusing to instruct on self-defense. Such a show of force is not, however, necessary under these circumstances. It is sufficient that defendant have a reasonable apprehension that an assault on him with deadly force is imminent. *See State v. Goode*, 249 N.C. 632, 107 S.E. 2d 70 (1959); *State v. Ellerbe*, 223 N.C. 770, 28 S.E. 2d 519 (1944). As this Court said in *State v. Barrett*, 132 N.C. 1005, 1008, 43 S.E. 832, 833 (1903):

> "If [a defendant's] adversary does anything which is calculated to excite in his mind, while in the exercise of ordinary firmness, a reasonable apprehension that he is about to assail him and to take his life or to inflict great bodily harm, it would seem that the law should permit him to act in obedience to the natural impulse of self-preservation and to defend himself against what he supposes to be a threatened attack, even though it may turn out afterwards that he was mistaken; provided, always, as we have said, the jury find that his apprehension was a reasonable one and that he acted with ordinary firmness."

This Court has, moreover, held that an action by the victim as if to reach for a weapon was sufficient to justify an instruction on self-defense. *State v. Finch*, 177 N.C. 599, 99 S.E. 409 (1919); *State v. Johnson, supra*, 166 N.C. 392, 81 S.E. 941. Defendant claims it was his belief, as a result of the threats and the behavior to which he testified, that he was in imminent danger of great bodily harm or death. Under the evidence he presented, the reasonableness of this belief was a question for the jury. It was prejudicial error for the trial court to refuse an instruction on self-defense, and for that error defendant is entitled to a new trial.

III

Defendant has brought forward under some thirteen assignments of error over two hundred exceptions to rulings of the trial court excluding evidence defendant sought to introduce on the issue of self-defense. We discuss these rulings generally for guidance of the trial court on remand.

The principal issue to which all this evidence is directed is the reasonableness of defendant's fear that he was in danger of

death or great bodily harm. Generally speaking, "a jury should, as far as is possible, be placed in defendant's situation and possess the same knowledge of danger and the same necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life." *State v. Johnson*, 270 N.C. 215, 219, 154 S.E. 2d 48, 52 (1967). This is in line with our general rule in criminal cases that "every circumstance that is calculated to throw any light upon the supposed crime is admissible." *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E. 2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020 (1966). Nevertheless, "such facts and circumstances as raise only a conjecture or suspicion ought not to be allowed to distract the attention of [the jury] from material matters." *Pettiford v. Mayo*, 117 N.C. 27, 29, 23 S.E. 252, 253 (1895). With these rules in mind, we examine the excluded evidence.

[2] Defendant offered through Dr. Alfred Hamilton and Kelly Sparks, another inmate, testimony concerning the stabbing of defendant while he was a prison inmate on 26 June 1977. Dr. Hamilton would have testified to the nature of defendant's wounds, which apparently could have been fatal had he not received prompt medical attention. Sparks, who was also stabbed and seriously injured at the same time, would have testified about the incident. This testimony should be admitted, assuming it is otherwise properly presented and kept within reasonable bounds. The reasonableness of defendant's response to Simmons' alleged threats and behavior is the primary factor for the jury to weigh in determining whether he had a right to kill in self-defense. *See State v. Gladden, supra*, 279 N.C. 566, 184 S.E. 2d 249. The fact that defendant as a prison inmate had previously been the subject of a violent, near-fatal attack is clearly relevant and material to the jury's determination of this issue.

[3] Defendant also offered extensive evidence relating to the availability of knives to the inmates on J Block. This evidence included testimony (1) that most inmates had knives or similar weapons, (2) that knives could be fashioned from materials in the inmates' cells, (3) that there were weapons hidden in the recreation yard, and (4) that it was possible to smuggle weapons past the guards into the recreation yard. Defendant here was privileged to use deadly force in self-defense only if he had a reasonable apprehension of an imminent assault upon him with

deadly force. *See State v. Clay*, 297 N.C. 555, 256 S.E. 2d 176 (1979); *State v. Goode, supra*, 249 N.C. 632, 107 S.E. 2d 70. Under the circumstances of this case, this apprehension could have arisen only if he had a reasonable belief that Simmons was armed. The state offered extensive testimony as to security precautions taken to assure that inmates in J Block did not have access to weapons. Defendant should be permitted to present to the jury his evidence of the availability of weapons both to rebut the state's evidence and to assist in establishing his claim of self-defense.

[4] Defendant sought to testify that although he did not know Simmons prior to 10 February 1978, he knew that anyone assigned to I and J Blocks would be a dangerous man. He also would have testified, if permitted, that this knowledge was one of the reasons he took a knife out to the yard with him. Defendant argues for the admissibility of this evidence with an apt quotation from *State v. Floyd*, 51 N.C. 392, 398 (1859); "One cannot be expected to encounter a lion as he would a lamb." We agree; if properly presented, such testimony should be admitted. There was evidence in the record from the state's witnesses that the inmates in I and J Blocks were the most dangerous and incorrigible in Central Prison. Defendant's awareness of this fact is a relevant factor for the jury to consider.

[5] Defendant offered testimony through himself, other inmates and Lee Bounds, former Commissioner of Corrections, as to the pervasiveness of fear of physical harm on the part of inmates in I and J Blocks. To the extent this evidence tends to show then current conditions on I and J Blocks and defendant's awareness of them, it is admissible. The jury on the issue of self-defense must decide whether defendant reacted to the situation as a person of "ordinary firmness" would have. *State v. Barrett, supra*, 132 N.C. 1005, 43 S.E. 832. Evidence that defendant lived in a climate of constant fear, and that those around him experienced a similar state of fear, is relevant and material in applying the standard of "ordinary firmness" under the circumstances. Testimony by defendant and other inmates to this effect is competent and should be admitted. Testimony by Mr. Bounds, a man with extensive experience with regard to North Carolina's prisons, is likewise admissible to the extent it reflects his personal knowledge of the conditions of I and J Blocks prevailing at the

time of this incident. To the extent, however, that his testimony relates to the prior organization and the former objectives of I and J Blocks, it does not have a sufficient logical connection to the issues in this case to be admitted.

[6] Defendant also attempted to introduce the opinion of Dr. Collin Turnbull, a social anthropologist who had done studies on southern prisons, that the circumstances defendant encountered could have produced in a person of ordinary firmness an apprehension of death or great bodily harm. The trial court acted properly in excluding this opinion. In determining if the opinion of an expert witness is admissible, the key question 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." *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E. 2d 905, 911 (1978). Here, the jury, after hearing and weighing all the evidence, would be in as good a position as Dr. Turnbull to determine the reasonableness of defendant's apprehension. His opinion on this issue is, therefore, inadmissible.

Defendant offered to show through a number of witnesses the hostility that existed between guards and prisoners on I and J Blocks. Defendant argues this evidence is admissible to show that the guards would not have come to the aid of an inmate being attacked. We do not agree. Even if we assume that such hostility does exist it supports no more than a conjecture that the prison guards would so neglect their duty as to fail to stop a fight between prisoners. Evidence, therefore, of general hostility between guards and inmates is inadmissible.

Lastly, defendant attempted to show particular aspects of the dehumanizing conditions under which he lived. Defendant has failed to demonstrate any logical connection between this evidence and the issue of defendant's right to kill in self-defense. This evidence is not independently admissible, although we note that much of it necessarily came before the jury in connection with the admission of other relevant evidence.

IV

[7] Defendant also assigns as error the trial court's exclusion from the jury of eleven prospective jurors who indicated they would not vote for the death penalty under any circumstances.

Defendant concedes that the jurors could properly have been excluded from the punishment phase of the trial under *Witherspoon v. Illinois*, 391 U.S. 510 (1968). He argues, however, that he is entitled to have separate juries empaneled to hear the issues of guilt and punishment and that a prospective juror cannot be excluded from the guilt determination phase because of his views on capital punishment. This argument was raised and rejected in *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979). There, Chief Justice Branch, speaking for the Court, said, *id.* at 105-06, 257 S.E. 2d at 563-64:

> "Defendant's position in this regard is that a bifurcated trial pursuant to Article 100 of Chapter 15A should be abolished and the two phases of the trial should be heard by two separate and distinct juries. We do not agree. The United States Supreme Court has approved the bifurcated trial procedure in which the same jurors heard both phases of the trial. *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859, 96 S.Ct. 2909 (1976); *Jurek v. Texas*, 428 U.S. 262, 49 L.Ed. 2d 929, 96 S.Ct. 2950 (1976). Further, in *Witherspoon* the Court expressly noted that there was no error in exclusion for cause of jurors who made it clear that their attitudes toward the death penalty would prevent them from making an impartial decision as to defendant's *guilt*.
>
> "Under Article 100 of Chapter 15A of the General Statutes of North Carolina, it is contemplated that the same jury shall hear both phases of the trial unless the original jury is 'unable to reconvene.' G.S. 15A-2000(2). We are, therefore, of the opinion that the trial judge acted pursuant to the mandate of the statute and within the rationale of *Witherspoon*." (Emphasis original.)

This assignment of error is without merit.

We need not comment on defendant's other assignments of error for they may not arise on remand. For the reasons stated, defendant is entitled to a

New trial.

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

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND RUFUS L. EDMISTEN, ATTORNEY GENERAL v. MEBANE HOME TELEPHONE COMPANY

No. 56

(Filed 4 September 1979)

1. **Telecommunications § 1.3; Utilities Commission § 26— indicators of fair value—credibility and weight**

It is the clear intent of former G.S. 62-133(b)(1) that the Utilities Commission use its own expert judgment as to the credibility of the evidence in the record and the weight to be given it in considering the indicators of fair value which are themselves supported by competent and substantial evidence, and while the Commission may not brush aside one of the prescribed indicators by giving it "minimal consideration," the appellate court will not disturb an order of the Commission merely because it would have given a different weight to each of the indicators of fair value.

2. **Telecommunications § 1.3; Utilities Commission § 26— meaning of "fair value"**

The "fair value" of a utility system cannot exceed the present cost of constructing a substitute system of modern design.

3. **Telecommunications § 1.3; Utilities Commission § 30— replacement cost—consideration of obsolescence**

When a utility's expert witness fails to take obsolescence into account in calculating replacement cost, this is a fact which the Utilities Commission may properly consider in weighing replacement cost to arrive at fair value.

4. **Telecommunications § 1.4; Utilities Commission § 30— 10% weighting to replacement cost—consideration of ratio of equity to debt**

Assuming that the Utilities Commission considered evidence of a telephone company's low ratio of equity to debt in its determination of the fair value of the company's property and that it was error to do so, the Commission did not act either arbitrarily or capriciously in giving only a 10% weighting to replacement cost and a 90% weighting to original cost where there was ample evidence in the record that the company's estimates of replacement cost were improperly calculated and based on inaccurate and incomplete information and that replacement cost should be substantially discounted as an indicator of fair value.

5. **Telecommunications § 1.9; Utilities Commission § 56— weighting of indicators of fair value—appellate review**

Appellate courts will reverse the Utilities Commission because of its weighting of the respective indicators of fair value only if the weighting is arbitrary or capricious, lacking support in the evidence in view of the entire record, or otherwise affected by errors of law. G.S. 62-94.

6. **Telecommunications § 1.4; Utilities Commission § 28— weighting of replacement cost and original cost—debt to equity ratio**

Had the Utilities Commission based its weighting of replacement cost and original cost of a telephone company's property on the percentages of debt and equity in the company's capital structure, such action would represent the impermissible use of a mathematical formula to determine fair value and would have constituted prejudicial error.

7. **Telecommunications § 1.4; Utilities Commission § 30— 10% weighting of replacement cost—no "minimal consideration" of replacement cost**

The Utilities Commission's 10% rating of replacement cost in determining the fair value of a telephone company's property did not result in that indicator being given only "minimal consideration" where the record shows that the Commission carefully considered the company's estimate of replacement cost and decided against a substantial weighting of that figure only after concluding that the company's estimate was inacccurate and that a lesser weighting was justified by additional evidence in the record.

8. **Telecommunications § 1.6; Utilities Commission § 35— excessive plant investment—exclusion from rate base**

The evidence supported a finding by the Utilities Commission that 1000 lines and terminals owned by a telephone company were not used and useful in providing telephone service and should be excluded from the company's rate base as excessive plant investment where there was evidence tending to show that the company ordered a 5500-line electronic central office for cut-over in 1976; this order was based upon a predicted growth of 400 main stations per year, but there was no historical support for a growth rate that high; shortly after the order was placed the country entered a recession and public demand for telephone service fell sharply; a reasonable growth rate for the company at the time it placed its order was only 250 main stations per year; and in early 1974 the company was given an opportunity by the manufacturer to reduce its order to 4500 lines but declined to do so.

9. **Telecommunications § 1.8; Utilities Commission § 42— return on original cost common equity**

A finding by the Utilities Commission that a return of 14.76% on original cost common equity of the Mebane Home Telephone Company was fair and reasonable was supported by an expert's testimony that the cost of equity for two larger telephone companies operating in North Carolina was 12.75%; that because a small utility like Mebane poses greater risks to the investor, a risk premium of 2 to 3% should be added; and that while a high ratio of debt to equity such as shown by Mebane is ordinarily associated with increased risk, Mebane's affiliation with the Rural Electrification Association has effectively reduced much of the risk its stockholders would otherwise face.

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

APPEAL by Mebane Home Telephone Company under G.S. 7A-30(3) from the decision of the Court of Appeals, reported in 35 N.C. App. 588, 24 S.E. 2d 165 (1978), affirming the order of the North Carolina Utilities Commission allowing an increase in rates for telephone service, docketed and argued as Case No. 12 at the Fall Term 1978.

Mebane Home Telephone Company is a public utility based in Mebane, North Carolina. It provides telephone service for an area of approximately 150 square miles in portions of Alamance and Orange Counties. At the end of the test year in May 1976, the Company was serving 5676 stations, of which approximately 3798 were main stations (*i.e.*, primary telephones). It had 24 employees at an average annual salary of $10,269.34.

On 13 August 1976 the Company filed an application for authority to increase its rates to bring in approximately $340,061 in additional gross revenues. Upon order of the Commission, the Attorney General was allowed to intervene on behalf of the consuming public. The public hearing on petitioner's application began on 4 January 1977 and was concluded on January 10th. On 4 March 1977 the Commission filed its order setting rates and charges. Its findings of fact and conclusions pertinent to this appeal are quoted below:

"3. That the last rate increase approved for Mebane Home became effective April 1, 1968, and that in March 1976 the Commission reduced Mebane Home's rates by $3,246 annually in order to offset a portion of an anticipated intrastate toll rate increase.

"4. That the overall quality of service provided by Mebane Home to its customers is adequate.

"5. That as of December 31, 1976, the Company had excess plant investment consisting of 1,000 lines and terminals amounting to $175,639, which was not used and useful in rendering telephone service.

"6. That the original cost of Mebane Home Telephone Company's investment in telephone plant used and useful in providing service in North Carolina is $5,030,501. From this amount should be deducted the reasonable accumulated provision for depreciation at May 31, 1976, of $1,083,907, resulting in a reasonable original cost less depreciation of $3,946,594. . . .

"9. That the reasonable replacement cost less depreciation of Mebane Home's plant used and useful in providing telephone service in North Carolina is $4,244,361.

"10. That the fair value of Mebane Home's plant used and useful in providing telephone service in North Carolina should be derived by giving 9/10 weighting to the reasonable original cost less depreciation of Mebane Home's plant in service and 1/10 weighting to the depreciated replacement cost of Mebane Home's plant. Using this method, with the depreciated original cost of $3,946,594 and the depreciated replacement cost of $4,244,361, the Commission finds that the fair value of Mebane Home's utility plant in North Carolina is $3,976,371. This fair value includes a reasonable fair value increment of $29,777.

"11. That the fair value of Mebane Home Telephone Company's plant in service to its customers in North Carolina at the end of the test year of $3,976,371, plus the reasonable allowance for working capital of $73,355 and the investment in Rural Telephone Bank Class B stock of $118,500, yields a reasonable fair value of Mebane Home's property in service to North Carolina customers of $4,168,226. . . .

"14. That cost-free funds arising from the Job Development Investment Tax Credit, implemented by the Revenue Act of 1971, should be included in the capital structure at zero cost.

"15. That the capital structure which is proper for use in this proceeding is as follows:

"Item	Percent
(a)	(b)
Long-term debt	81.86%
Common equity	10.28%
Cost-free capital	7.86%
Total	100.00%

"16. That when the excess of fair value rate base over original cost net investment (fair value increment) is added to the equity component of the original cost net investment, the fair value capital structure is as follows:

"Item	Percent
(a)	(b)
Long-term debt	81.28%
Common equity	10.92%
Cost-free capital	7.80%
Total	100.00%

"17. That the Company's proper embedded cost of total debt is 3.56%. The fair rate of return which should be applied to the fair value rate base is 4.40%. This return on Mebane Home's fair value property of 4.40% will allow a return on fair value equity of 13.80% after recovery of the embedded cost of debt. A return of 13.80% on fair value equity results in a return of 14.76% on original cost common equity.

"18. That Mebane Home should be allowed an increase in additional annual gross revenues not exceeding $151,135 in order for it to have an opportunity through efficient management to earn the 4.40% rate of return on the fair value of its property used and useful in serving its customers."

From the order of the Commission granting only a portion of the requested increase in rates, the Company appealed to the Court of Appeals assigning errors in the Commission's exclusion of certain items from the rate base, its determination of "fair value," and its calculation of a fair rate of return. The Court of Appeals affirmed the order of the Commission, and the Company appealed as a matter of right to this Court. By order of the Commission the authorized increases were made applicable to all bills rendered on and after 4 March 1977.

Rufus L. Edmisten, Attorney General, Jesse C. Brake, Special Deputy Attorney General, and Francis W. Crawley, Associate Attorney, for Attorney General of North Carolina, plaintiff.

Robert P. Gruber, General Counsel, and Antoinette R. Wike, Assistant Commission Attorney for North Carolina Utilities Commission, plaintiff.

Boyce, Mitchell, Burns & Smith by F. Kent Burns and James M. Day for defendant.

SHARP, Chief Justice.[1]

I. DETERMINATION OF "FAIR VALUE"

In the hearing which gave rise to this appeal, the Utilities Commission found that the reasonable original cost, depreciated, of Mebane Home Telephone's property in North Carolina was $3,946,594 and that the depreciated replacement cost was $4,244,361. Having made these preliminary findings, the Commission concluded that the "fair value" of Mebane's property should be derived by giving a 1/10 weighting to depreciated replacement cost and a 9/10 weighting to original cost. To the figure obtained from this weighting ($3,976,371) it added an allowance for working capital of $73,355 and investment in Rural Telephone Bank Class B stock of $118,500 to reach a "reasonable fair value" of $4,168,226. The weighting process used by the Commission resulted in a "fair value increment" of $29,777. The Commission also found that Mebane Home Telephone's capital structure consists of 81.86% long-term debt (largely in the form of low-interest loans from the REA), 10.28% common equity, and 7.86% cost-free capital.

In its second assignment of error, which we elect to consider first, Mebane contends that the Commission improperly based its weighting of original cost and replacement cost on the Company's ratio of debt to equity and that this resulted in Mebane's estimates of replacement cost being given only "minimal consideration."

Under the statutory scheme in effect at the time Mebane filed its application, its rates were set in accordance with the formula of "a fair return on fair value," a test first set down by the U.S. Supreme Court as a constitutional requirement in *Smyth v. Ames*, 169 U.S. 466, 42 L.Ed. 819, 18 S.Ct. 418 (1898). In *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 88 L.Ed. 333, 64 S.Ct. 281 (1944), the Supreme Court decided that this test was no longer required by the due process clause. Notwithstanding, at the time Mebane filed its application for a rate increase, it was still followed in this State as a matter of

1. This opinion was written in accordance with the Court's decision made prior to Chief Justice Sharp's retirement and was adopted by the Court and ordered filed after she retired.

statutory law.[2] At that time, the statute which controls this case, G.S. 62-133, read in pertinent part as follows:

> § 62-133. How rates fixed.—(a) In fixing the rates for any public utility subject to the provisions of this Chapter, other than motor carriers and certain water and sewer utilities, the Commission shall fix such rates as shall be fair both to the public utility and to the consumer.
>
> (b) In fixing such rates, the Commission shall:
>
> (1) Ascertain the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, considering the reasonable original cost of the property less that portion of the cost which has been consumed by previous use recovered by depreciation expense, the replacement cost of the property, and any other factors relevant to the present fair value of the property. Replacement cost may be determined by trending such reasonable depreciated cost to current cost levels, or by any other reasonable method.
>
> (2) Estimate such public utility's revenue under the present and proposed rates.
>
> (3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.
>
> (4) Fix such rate of return on the fair value of the property as will enable the public utility by sound management to produce a fair profit for its stockholders, considering changing economic conditions and other factors, as they then exist, to maintain

2. "Fair value" is a concept unique to rate-making. *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 339, 189 S.E. 2d 705, 719 (1972). The difficulties it poses for both the Utilities Commission, which must subjectively weigh the statutory indicators of value in determining fair value, and for the reviewing court are amply illustrated by the instant case. Effective as to rate applications filed on and after 1 July 1979, the legislature has eliminated "fair value" as the criterion for determining the utility's rate base and substituted in its place "the reasonable original cost of the public utility's property." N.C. Gen. Stat. § 62-133(b)(1) (Cum. Supp. 1977); 1977 N.C. Sess. Laws, ch. 691.

We note, therefore, that the issue raised in this case as to whether the Commission may properly consider a utility's capital structure in its weighting of replacement and original cost is not likely to arise again.

> its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

This statute directs the Utilities Commission to "consider" both original cost and replacement cost in ascertaining fair value. However, neither of these is the measure of "fair value." They are merely evidence of that figure to be considered by the Commission in the exercise of its independent expert judgment. *Utilities Commission v. Power Co.*, 285 N.C. 398, 412, 206 S.E. 2d 283, 294 (1974); *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 339, 189 S.E. 2d 705, 719 (1972).

[1] It is the clear intent of former G.S. 62-133(b)(1) that the Commission use its own expert judgment as to the credibility of the evidence in the record and the weight to be given to it in "considering" the indicators of fair value which are themselves supported by competent and substantial evidence. *Utilities Commission v. Power Co.*, 285 N.C. 377, 389-90, 206 S.E. 2d 269, 278 (1974); *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 358, 189 S.E. 2d 705, 730 (1972). While the Commission may not brush aside one of the prescribed indicators by giving it "minimal consideration,"[3] this Court will not disturb an order of the Commission merely because we would have given a different weight to each of the indicators of fair value. *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 339, 189 S.E. 2d 705, 719 (1972). It is the prerogative of the Commission to determine the credibility of the evidence, even when the evidence is uncontradicted by another witness. *Utilities Commission v. Power Co.*, 285 N.C. 377, 390, 206 S.E. 2d 269, 278 (1974).

Our review of the record in the instant case reveals ample support for a substantial discounting of replacement cost as an indicator of fair value. Among the factors the Commission considered in judging the credibility of Mebane's estimate of replacement cost and then weighing that figure to arrive at "fair value" were (1) the failure of the Company's expert witness to take ob-

3. *Utilities Commission v. Power Co.*, 285 N.C. 377, 390, 206 S.E. 2d 269, 278 (1974); *Utilities Commission v. Gas Co.*, 254 N.C. 536, 550, 119 S.E. 2d 469, 479 (1961).

solescence into account in calculating replacement cost, (2) the lack of reliable data upon which to base a proper study of that figure, and (3) the fact that Mebane had recently made a major replacement to plant in the form of a new million dollar central switching office.

The Chief of the Operations Analysis Section for the Utilities Commission, Allen L. Clapp, testified that the Company's expert witness had overstated replacement costs by calculating a trended *reproduction* cost for Mebane's plant in service and then using that figure as an approximation of *replacement* cost, with no deduction for obsolescence. The Commission indicated in the discussion of its findings and conclusions that it had considered this oversight in weighing replacement cost to arrive at "fair value":

> Although the term "replacement cost" envisions replacing the utility plant in accordance with modern design techniques and with the most up-to-date changes in the art of telephony, trended original cost as presented by the Company is founded upon the premise of duplication of much of the plant as is, with certain inefficiencies and outmoded designs included. While obsolescence can, to an extent, be accounted for in proper depreciation treatment, the economies of scale inherent in the telecommunications industry (*e.g.*, employing one 600-pair cable down a road instead of six 100-pair cables installed over a number of years) are not fully recognized in the trending process.

[2, 3] Obviously, the "fair value" of a utility system cannot exceed the present cost of constructing a substitute system of modern design. *Utilities Commission v. Power Co.*, 285 N.C. 377, 392, 206 S.E. 2d 269, 279 (1974). When a utility's expert witness fails to take obsolescence into account in calculating replacement cost, this is a fact which the Commission may properly consider in weighing replacement cost to arrive at fair value. *Utilities Commission v. Power Co.*, 285 N.C. 398, 410-11, 206 S.E. 2d 283, 292-93 (1974); *Utilities Commission v. Power Co.*, 285 N.C. 377, 390-92, 206 S.E. 2d 269, 278-79 (1974).

Mr. Clapp also testified that he had serious misgivings as to the accuracy of the data upon which the Company's expert witness based his study of replacement costs. He testified that "a

major culprit, if not the major culprit, in causing the problems with the Company's reproduction cost study [was] not the witness' methods but . . . the appalling lack of Company plant construction records and data."

As this Court observed in *Utilities Commission v. Gas Co.*, 254 N.C. 536, 550, 119 S.E. 2d 469, 479 (1961), "trended cost evidence deserves weight [only] in proportion to the accuracy of the tests [used] and their intelligent application." The burden of proving the need for a rate increase is on the utility. G.S. 62-75, 62-134(c); *Utilities Commission v. Railway*, 267 N.C. 317, 148 S.E. 2d 210 (1966). When a utility fails to present convincing evidence of an increase in the value of its property above its original cost, it cannot complain when the Commission discounts the rate base accordingly.

In September 1973 Mebane purchased a new 5500-line electronic switching center, the Stromberg-Carlson ESC-1—PL2. This million dollar addition to plant constitutes almost 1/4 of Mebane's total investment in plant and equipment. Both the Commission staff and the Company's expert witness included it in their estimates of replacement cost at its untrended, undepreciated cost. In consequence, there is only a $297,767 difference between the Company's original costs and its replacement costs as determined by the Commission. Given the relatively small discrepancy between the Company's replacement costs and its original costs, we find unconvincing Mebane's argument that the Commission's determination of fair value seriously understates the value of its investment.

[4] In discussing the evidence bearing upon the weighting of replacement costs, the Commission made the following comments regarding Mebane's high ratio of debt to equity:

> The process of weighting replacement cost less depreciation and original cost less depreciation in determining fair value allows the Commission to exercise its judgment with respect to the reliability of the replacement cost estimates and to the degree to which the Company should be compensated for inflation. Since it is impossible to compensate bondholders after the fact for the effects of inflation upon their investment because of their contracturally [sic] fixed rate of return, it is only necessary to consider compensation to the

stockholders. A weighting of replacement cost equal to the equity ratio of the capital structure would indicate a 100% compensation for inflation of the equity investment in plant and a complete confidence in the reliability of all replacement cost estimates. A greater weighting to replacement cost would overcompensate the equity holders since the return earned on the portion of the fair value increment which was supplied by debt holders would accrue to the equity holders in addition to the return on the equity investment.

Because one of the purposes of the fair value formula is compensation for the equity investor for the effects of inflation, consideration by the Commission of the relative percentages of debt and equity in the Company's capital structure has some practical appeal. However, as the Commission itself recognized in a discussion of its findings and conclusions:

> [A] blind weighting of the replacement cost and the original cost in the same proportion as the equity and debt portions of the capital structure would merely reduce to a mathematical formula the exercise of the Commission's judgment. [It would require] the Commission to assume that the original cost figures were exactly correct; that the equity holders should be protected completely from the effects of inflation; that the effects of inflation are known; that the determination of replacement cost is completely reliable; and that the depreciation reserves of both original cost and replacement cost reflect precisely the degree of wear and tear, obsolescence and other factors that are supposed to be reflected in these accounts. Its use would also preclude the Commission from considering such factors as age and condition to the extent that it is not properly reflected in the accounts.

Carried to its logical extreme, a misplaced reliance on such evidence could lead the Commission to place an upper limit—based on the percentage of common stock in the utility's capital structure—on the weight to be accorded replacement cost in the determination of fair value. Moreover, such an approach disrupts the statutory scheme established by former G.S. 62-133 insofar as it encourages the Commission to "look ahead" at the time it ascertains fair value to the ultimate dollar return to which the com-

pany will be entitled. Clearly, the legislature intended for the Commission to ascertain the "fair value" of the utility's property *before* it attempts to ascertain what would be a "fair return" on the utility's investment.

It is not entirely clear from the record what weight, if any, the Commission ultimately gave the evidence concerning Mebane's low ratio of equity to debt in its determination of fair value. However, assuming *arguendo* that the Commission considered this evidence and that it was error to do so, that fact alone will not require reversal of the Commission's decision.

[5] The determination of the weight to be accorded replacement cost rests in the discretion of the Commission. *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 358-59, 189 S.E. 2d 705, 730-31 (1972). Recognizing that the Commission has accumulated substantial expertise through its experience in supervising the public utilities of this State and that it should ordinarily be free to exercise that discretion, the scope of our review is narrow. Appellate courts will reverse the Commission because of its weighting of the respective indicators of fair value only if the weighting is arbitrary or capricious, lacking support in the evidence in view of the entire record, or otherwise affected by errors of law. G.S. 62-94; *Utilities Commission v. Power Co.*, 285 N.C. 398, 411, 206 S.E. 2d 283, 293 (1974).

[4] Considering the record in the case before us, we cannot say that the Commission acted either arbitrarily or capriciously in weighting replacement cost at 10% of fair value. There was ample expert opinion testimony in the record to the effect that the Company's estimates of replacement cost were improperly calculated and based on inaccurate and incomplete information. Even in the absence of such expert testimony, the Commission would have been free to judge the credibility of the Company's estimates for itself and to discount the weight given to replacement cost accordingly. *Utilities Commission v. Power Co.*, 285 N.C. 377, 390, 206 S.E. 2d 269, 278 (1974). Because of the recent addition of a new central switching office, it is also clear that inflation had taken a relatively minor toll on the value of the Company's investment. The Commission's weighting of replacement cost is therefore fully supported by competent evidence. Under these cir-

cumstances we will not presume that incompetent evidence affected the result.

[6] Had the Utilities Commission based its weighting solely on the percentages of debt and equity in the Company's capital structure, as alleged by Mebane, such action would represent the impermissible use of a mathematical formula to determine fair value and would have constituted prejudicial error. *Utilities Commission v. City of Durham*, 282 N.C. 308, 324-25, 193 S.E. 2d 95, 107 (1972); *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 358, 189 S.E. 2d 705, 730 (1972). However, the Commission expressly rejected any "blind weighting" of replacement and original cost in proportion to the percentages of debt and equity in the Company's capital structure. Given this statement by the Commission and the presence of substantial additional evidence in the record which would justify a material discounting of replacement cost, we must assume that any similarity between the weight accorded replacement cost and the percentage of common stock in Mebane's capital structure is coincidental.

[7] Appellant's final objection under this assignment of error is addressed to the end result. Mebane contends that the Commission's 10% weighting of replacement cost resulted in that indicator of value being given only "minimal consideration."

In the case which gave rise to the requirement that replacement cost be accorded more than "minimal consideration," the Commission had largely ignored the utility's estimate of that figure on the grounds that replacement cost was an inherently unreliable measure of value. *Utilities Commission v. Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469 (1961). The directive of that case is not that replacement cost must be given any particular weighting, but rather that in each case the Commission must consider the estimates of replacement cost on their merits and give the evidence the weight it deserves "in proportion to the accuracy of the tests [used] and their intelligent application." 254 N.C. at 550, 119 S.E. 2d at 479.

It is apparent that the Commission in the case before us carefully considered the Company's estimate of replacement cost and decided against a substantial weighting of that figure only after concluding that the Company's estimate was inaccurate and that a lesser weighting was justified by additional evidence in the

record. Under these circumstances, we cannot say that a 10% weighting of replacement cost constitutes only "minimal consideration."

Mebane's second assignment of error is overruled.

II. EXCLUSION FROM THE RATE BASE

[8] The Commission excluded from the rate base as excess plant investment 1000 lines and terminals which the Commission determined were not "used and useful" in rendering telephone service. This resulted in a reduction in fair value of $175,639. Mebane contends that these items should have been included in the rate base and that it is being penalized for failing to anticipate a downturn in the economy which has only become apparent through hindsight. We disagree.

Under former G.S. 62-133(b)(1) property is includable in the rate base only if it is "used and useful" in providing service to the public as determined at the end of the test period. *Utilities Commission v. Power Co.*, 285 N.C. 377, 206 S.E. 2d 269 (1974); *Utilities Commission v. Morgan, Attorney General*, 277 N.C. 255, 177 S.E. 2d 405 (1970); *Utility Commission v. Telephone Co.*, 266 N.C. 450, 146 S.E. 2d 487 (1966). A "telephone company, with central office equipment sufficient to serve any reasonably anticipated increase in customers, may not properly add to its rate base additional units of central office equipment merely because in the long future, it hopes to have customers who will use it." *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 353, 189 S.E. 2d 705, 728 (1972). This does not mean, however, that a utility can never purchase plant or equipment in anticipation of future needs. As we stated in *Utilities Commission v. Telephone Co.*, 281 at 352, 189 S.E. 2d at 727:

> [A] public utility is under a present duty to anticipate, within reason, demands to be made upon it for service in the near future. Substantial latitude must be allowed the directors of the utility in making the determination as to what plant is presently required to meet the service demand of the immediate future, since construction to meet such demand is time consuming and piecemeal construction programs are wasteful and not in the best interests of either the ratepayers or the stockholders. However, Commission action

> deleting excess plant from the rate base is not precluded by a showing that present acquisition or construction is in the best interests of the stockholders. The present ratepayers may not be required to pay excessive rates for service to provide a return on property which will not be needed in providing utility service within the reasonable future. (Citations omitted.)

Both the Commission and the courts recognize that predictions of the economic future can never be exact. A utility should not be penalized because its reasonable predictions have failed to materialize. The question for the Commission is whether the utility's expenditures were reasonable in the light of circumstances which the Company knew or should have known at the time it made its purchase.

In September 1973 Mebane ordered a new 5500-line electronic central office for cut-over in November 1976. This order was based upon a predicted growth rate of 400 main stations (*i.e.*, primary telephones) per year. In making this prediction the Company relied on (1) an engineering report prepared by a consulting firm in 1972, (2) the entry of new industries in the service area, and (3) optimistic forecasts of future growth by area businessmen.

Shortly after the order was placed the country entered a recession and public demand for telephone service fell sharply.

Benjamin R. Turner, a telephone engineer employed by the Commission, testified that—notwithstanding the recession—based on information available to the Company in September 1973, its predicted growth rate was far in excess of any reasonably anticipated increase in demand:

> At the time the Company was planning construction of the new central office, the annual growth rate was equal to 265 main stations, new housing developments were planned and Mebane was generally regarded as a good location for new business; however, these factors do not justify a growth rate of 400 main stations per year. Particularly because there is no historical support for a growth rate that high. For example, the annual growth rate was 156 in 1968, 130 in 1969, 111 in 1970, 163 in 1971, 265 in 1972, and 161 in 1973. The highest growth occurred in 1972 the year before the order

for the new central office was placed. The order was placed in September 1973 after the growth rate had fallen to a level of 161 new main stations per year. This should have been an indication to the Company that the forecasted growth rate of 400 main stations per year was in need of a downward adjustment.

In the light of these facts, he concluded that a reasonable growth rate for the Company at the time it placed its order would have been 250 main stations per year. He also noted that the engineering study on which the Company based its prediction was compiled 18 months prior to the placement of its order. In the year preceding the purchase, the rate of growth began to turn downward. In early 1974 the Company was given an opportunity by the manufacturer to reduce its order but declined to do so. It was the difference in cost between this proposed order of 4500 lines and the actual order of 5500 lines that the Commission excluded from the rate base.

The staff expert's testimony provides substantial, competent evidence in support of the Commission's findings. When the Commission's exclusion of specific property from the rate base is supported by such evidence, it is binding on this Court. *Utilities Commission v. Telephone Co.*, 281 N.C. at 354, 189 S.E. 2d at 728.

Assignment of error No. 1 is overruled.

III. FAIR RATE OF RETURN

[9] In its final assignment of error, Mebane contends that the Commission's determination of a fair rate of return is not supported by competent evidence. The Commission found that a return of 4.40% on the fair value of Mebane's property would be fair and reasonable. It also found that such a return would allow a 14.76% return on original cost common equity. The Company sought a rate of return on original cost common equity of 18.19% but offered no supporting testimony.

The applicable statutory provision is former G.S. 62-133(b)(4) which directs the Commission to:

> Fix such rate of return on the fair value of the property as will enable the public utility by sound management to produce a fair profit for its stockholders, considering changing

> economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

The setting of rates which are "reasonable and . . . fair" to both the public and the investor requires an exercise of judgment. No rate of return can be fixed which will be appropriate for all utilities or for a single utility company at all times. *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 340, 189 S.E. 2d 705, 720 (1972).

The Utilities Commission based its findings in the present case largely on the testimony of Mr. H. Randolph Currin, Senior Operations Analyst for the Commission. Testifying that it was difficult to estimate Mebane's cost of equity directly since its stock is not widely traded, Mr. Currin first determined the cost of equity for two other telephone companies operating in North Carolina, Central Telephone and Western & Westco. Recognizing that a small utility like Mebane poses greater risks for the investor, and using the larger companies' cost of equity (12.75%) as a "minimum starting point," he then recommended the addition of a risk premium of 2 to 3%.

Although a high ratio of debt to equity is ordinarily associated with increased risk, *see Utilities Commission v. Telephone Co.*, 281 N.C. at 341, 189 S.E. 2d at 720, Mr. Currin testified that Mebane's affiliation with the Rural Electrification Association (REA) effectively reduced much of the risk its stockholders would otherwise face:

> [T]he Company has been able to finance its construction with 35-year REA notes, historically, at an interest rate of only 2%, and more recently, at a rate of 5.5%, resulting in an embedded cost of debt of only 3.56%. . . .
>
> In addition to the very low interest rates . . . the Company recognizes other benefits from its affiliation with the REA. If needed, REA provides its borrowers with accounting and engineering services at no charge. . . . REA is also an atypical lender. It is not a profit-maximizing operation. Its

mission is to assist utilities in the provision of telephone and electric service to rural areas, which might otherwise go unserved. Thus, while a major bank might choose to initiate bankruptcy against a utility which defaulted on a loan payment, REA has traditionally not chosen to do so.

Mebane argues that its small size makes inappropriate any comparison between its cost of equity and that of larger companies like Central Telephone and Western & Westco. It also argues that the Commission did not sufficiently consider the thinness of its capital in calculating the risk to its investors. Both of these objections go solely to the weight which the Commission gave the testimony of its expert witness. The credibility of witnesses is a matter for the Commission, and not this Court, to determine. *Utilities Commission v. Telephone Co.*, 281 N.C. at 371, 189 S.E. 2d at 739. The findings of the Commission as to a proper rate of return are supported by competent and substantial evidence. They are therefore binding on appeal. *Utilities Commission v. City of Durham*, 282 N.C. 308, 326, 193 S.E. 2d 95, 107 (1972).

Assignment of error No. 3 is overruled.

For the reasons stated in this opinion the decision of the Court of Appeals affirming the order of the Utilities Commission is

Affirmed.

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

STATE OF NORTH CAROLINA v. DOUGLAS ARTHUR LYLES AND DAVID JONATHAN ROSE

No. 68

(Filed 4 September 1979)

1. **Burglary and Unlawful Breakings § 5; Larceny § 7— burglary of motel room— larceny of items—sufficiency of evidence**

There was sufficient evidence for the charges of first degree burglary and felonious larceny against one defendant to go to the jury where such evidence

tended to show that defendant was seen around 2:30 a.m. "fumbling" with the door knob of the office at a motel; when he discovered he had been seen, he turned and ran away; within one hour after he was first seen, it was discovered that doors to two of the rooms at the motel were standing ajar and, subsequently, that one of them had been burglarized; at about 6:15 a.m. defendant was seen again leaving the motel in his codefendant's car; when the person who saw defendant then looked back at the car, defendant was down out of sight; a later search of the car uncovered a motel master key behind the kick panel on the passenger side; when tested, the key opened the door of the room that had been burglarized; that door showed no signs of forced entry; and the occupant of the room testified that he had locked it before going to bed.

2. **Burglary and Unlawful Breakings § 5; Larceny § 7— burglary of motel room—insufficiency of evidence**

Evidence against one defendant in a first degree burglary and felonious larceny case was insufficient to be submitted to the jury where it tended to show only that defendant was seen with his codefendant near the scene of the crime some three hours after the crime was discovered, and a master key to the motel which was burglarized was found in defendant's car on the passenger side where the codefendant had been riding, but there was no evidence that defendant was at the crime scene so as to use the key.

3. **Criminal Law § 92.1— two defendants charged with same crimes—consolidation proper**

The trial court did not err in consolidating for trial charges of first degree burglary and felonious larceny against two defendants, and there was no merit to one defendant's argument that he was prejudiced because, if the trials had not been consolidated, a master key to the motel burglarized found in the other defendant's car would not have been admissible against him.

4. **Criminal Law § 96— evidence stricken—no instruction to disregard—no error**

The trial court did not commit prejudicial error in failing to instruct the jury to disregard a witness's answer immediately after allowing a motion to strike.

5. **Criminal Law §§ 89.2, 96— testimony not corroborative—failure to strike—no prejudice**

Even if the trial court erred in failing to order certain testimony offered for corroboration stricken once it became apparent that the witness who was to be corroborated thereby would not testify, defendant was not prejudiced since such "corroborative" testimony added nothing to the State's case.

6. **Searches and Seizures § 15— search of vehicle—standing of one other than owner to object**

Defendant had no standing to object to a search of the codefendant's car and to seizure of items therefrom.

7. **Criminal Law § 122 — additional jury instructions after retirement — request by State — no error**

The trial court did not err in bringing the jury back into the courtroom fifteen minutes after they retired, informing them that the State had requested an instruction on acting in concert, and then giving such instruction, since the court clearly conveyed to the jury their duty to give equal weight to all the court's instructions.

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

Justice HUSKINS dissenting as to defendant Lyles.

Justice CARLTON joins in the dissenting opinion.

BEFORE *Judge Donald L. Smith* at the 16 May 1977 Session of HALIFAX Superior Court and on bills of indictment proper in form defendants were tried and convicted of first degree burglary and felonious larceny. Each defendant was sentenced to imprisonment for life on the burglary conviction and imprisonment for ten years on the larceny conviction to run concurrently with the life sentence. Defendants appeal pursuant to G.S. 7A-27(a). We permitted initial review of the larceny conviction pursuant to G.S. 7A-31(a). The case was docketed and argued as No. 5 at the Spring Term 1978.

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting, Assistant Attorney General, for the State.

W. Lunsford Crew, Attorney for defendant appellants.

EXUM, Justice.

Defendants' principal assignment of error challenges the trial court's denial of their motion to dismiss at the close of the state's evidence. We hold that the evidence was sufficient to go to the jury as to defendant Rose but not as to defendant Lyles. With regard to the remaining points raised, we hold: (1) there was no error in the consolidation of the trials of the two defendants; (2) the trial court did not err to defendant Rose's prejudice in its rulings on the evidence; (3) defendant Rose had no standing to object to a search of defendant Lyles' car; and (4) the trial court did not err in giving the jury additional instructions requested by the state.

The state's evidence showed that E. L. Johnson was working as a night auditor at the Howard Johnson's Motel in Roanoke Rapids on the morning of 24 February 1977. Around 2:30 a.m. he heard someone fumbling with the knob of the door outside his office. Thinking it was a guest seeking admission, Johnson went over, pulled back a curtain, and motioned for the man to come to the front door. When the man saw Johnson he whirled and ran away. Johnson identified the man he saw as defendant Rose.

Johnson then called the police. Officers Whitton and Bobbitt arrived within four to five minutes after his call. Johnson described the man he had seen to them. Upon searching the area they did not find the man he described, but they did find the doors to two motel rooms ajar. Room 206 turned out to be unoccupied. Room 204 was occupied by Mr. Cecil Coletrain. After some difficulty, the officers managed to awaken him about 4:00 a.m. Coletrain was missing $140.00, which he had laid on a table in the room before going to bed. He had locked his door before retiring. He did not know either defendant and had not given either of them permission to enter his room.

Officer Whitton stated that there were no physical signs of forced entry on the door to Coletrain's room. He also testified: "I drove through the motel lot two more times that night and made a visual check of the premises. We looked at each individual car on the lot. We found some to be locked and some to be unlocked, but none appeared to have been tampered with. I know that Douglas [Lyles] drives a 1967 Chevrolet Malibu station wagon. I did not see that automobile during the periodic checks that I made throughout the night."

About 5:30 a.m. Johnson called Mr. Al Matta, manager of the motel. Johnson told Matta about the break-in and described the man he had seen. Matta came to the motel about 6:15 a.m. and walked around it. He saw a car parked in the laundry room area where usually none were parked. He started toward the office to see if the car was registered and was interrupted by a guest seeking directions. When he returned to look at the car he came within ten feet of it and saw two men sitting inside. He recognized the passenger as looking like the man Johnson had described to him. Matta apparently looked away and when he looked back the passenger was down in the front seat out of sight. The

car then backed out and started away. Matta identified the driver as defendant Lyles and the passenger as defendant Rose.

Mr. G. C. Southerland was also a guest at the motel, staying in Room 413. He discovered shortly after he awoke around 7:00 a.m. on 24 February 1977 that he was missing a watch, some jewelry and $75.00 to $80.00. He then noticed his door was slightly ajar. He did not otherwise notice the condition of the door. Southerland stated he had closed and locked the door before going to bed. He did not know either Lyles or Rose and had not given them permission to enter his room.

Danny Rogers, a Roanoke Rapids police officer, found a car fitting the description of the one seen by Matta around noon on 24 February 1977. The car was parked at Walser Motor Company where defendant Lyles worked. It was registered to him. Matta identified it as the car he had seen. At approximately 3:30 p.m. the police searched the car and found, among other things, a bedspread and a key. The bedspread was similar in color, design and shape to those used at Howard Johnson's, but it was not positively identified as being from there.

The key was behind a "kick panel" on the passenger side of the car. Matta identified it as a motel master key. It was tried on the doors of the rooms broken into, and it opened them.

Defendants offered no evidence. At the close of the state's evidence, they made a motion to dismiss for insufficiency of the evidence to sustain a conviction. This motion was allowed as to the charges arising out of the alleged Southerland burglary and theft and denied as to the charges arising out of the alleged Coletrain burglary and theft.

We deal at the outset with defendants' contention that their motions to dismiss should have been allowed as to all the charges. Defendants concede there was sufficient evidence to establish the commission of the crimes charged. They argue, however, that the evidence was insufficient to identify them as the perpetrators.

The case against these defendants consists of circumstantial evidence. The test of the sufficiency of the evidence to go to the jury in such a case was stated by Justice Higgins in *State v. Stephens*, 244 N.C. 380, 383-84, 93 S.E. 2d 431, 433-34 (1956):

"Taking the evidence in the light most favorable to the State, if the record . . . discloses substantial evidence of all material elements constituting the offense for which the accused was tried, then this court must affirm the trial court's ruling on the motion. The rule for this and for the trial court is the same whether the evidence is circumstantial or direct, or a combination of both.

"We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons*, 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson*, 199 N.C. 429, 154 S.E. 730: 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury."

The question here, then, is whether there is any substantial evidence that defendants were the perpetrators of the alleged crimes. Since the quantum of evidence differs as to each of them, we shall discuss each separately.

[1] The evidence against defendant Rose was that he was seen around 2:30 a.m. "fumbling" with the door knob of the office at the Howard Johnson's Motel. When he discovered he had been

seen, he turned and ran away. Within an hour after he was first seen, it was discovered that doors to two of the rooms at the motel were standing ajar and, subsequently, that one of them had been burglarized. At about 6:15 a.m. Rose was seen again leaving the motel in defendant Lyles' car. When the person who saw him then looked back Rose was down out of sight. A later search of the car uncovered a motel master key behind the "kick panel" on the passenger side. When tested, the key opened the door of the room that had been burglarized. That door showed no signs of forced entry. The occupant of the room testified that he had locked it before going to bed.

Viewing this evidence in the light most favorable to the state, it establishes that Rose was on the premises shortly before the crimes were discovered. His behavior was suspicious. He twice attempted to avoid being seen by motel personnel, once when he was discovered fumbling with the door knob to the motel office itself. It is reasonable to infer from these circumstances and from his presence on the passenger side of defendant Lyles' car that he was in possession of the motel master key found there. A reasonable inference also arises that this key was used to gain entry to the burglarized room, since there were no signs of entry being forced.

Taking all these circumstances into account, we hold there was sufficient evidence for the charges of first degree burglary and felonious larceny against defendant Rose to go to the jury. We find support for our holding in *State v. Lakey*, 270 N.C. 786, 154 S.E. 2d 900 (1967). The evidence in *Lakey* showed that the Farmers Exchange building in Pittsboro had been broken into and that an attempt had been made to rob the safe. The question there, as here, was whether the defendant was the perpetrator of the crime. A Mr. Sam Polston, who lived in the neighborhood, had heard banging and knocking noises coming from the Farmers Exchange building and called the police. A police officer arrived about 3:50 a.m. Shortly thereafter he saw one Douglas Brady running from the vicinity of the building. About the same time Polston saw the defendant come running across the Farmers Exchange yard. Later that morning the defendant's car was found parked three miles by road and one mile by railroad tracks from the Farmers Exchange building. Fingerprints of Douglas Brady were in the car.

While there are some variations, the evidence against defendant Rose is similar to and at least as compelling as that in *Lakey*. The trial court did not err in denying the motion to dismiss as to Rose.

[2] The state's evidence first placed defendant Lyles on the motel premises about 6:15 a.m. on 24 February 1977. His car was seen parked near the laundry room by Matta. Shortly thereafter, Matta saw Lyles and Rose leaving the motel in the car. Lyles was the driver. According to Matta, "the car did not speed in any fashion but got on 158 headed toward Roanoke Rapids." That afternoon the search of Lyles' car revealed the master key.

Viewing this evidence in the light most favorable to the state, it shows that Lyles' car was found parked at 6:15 a.m. in an area where cars are not usually parked. Otherwise his actions were not such as to excite suspicion in and of themselves. In essence the case against him consists of (1) his being seen with defendant Rose near the scene of the crime some three hours after the crime was discovered and (2) his constructive possession of the motel master key found in his car. While as noted above there is a reasonable inference that the key was used to gain entry to Coletrain's room, there is a serious question as to whether the evidence gives rise to an inference that defendant Lyles was on the scene to so use it.

In this respect the case against defendant Lyles is much like *State v. Burton*, 272 N.C. 687, 158 S.E. 2d 883 (1968). In *Burton* the General Electric Supply Company had been broken into, the safe opened, and $300 stolen. The only evidence against the defendants was a crowbar found in their possession some three days later. This crowbar was identified by scientific tests as having been used in the break-in. This Court held that the defendants' motion for nonsuit should have been granted, stating *id.* at 691, 158 S.E. 2d at 887:

> "In the instant case the State fails to place defendants at or near the scene of the crime on the date the crime was committed; fails to show any of the 'fruits of the crime' in the possession of either defendant, and relies solely upon possession of a crowbar used by someone in the commission of the crime to show 'substantial evidence of all material elements of the offense.' True, the evidence is sufficient to put the in-

strument used at the scene of the crime, but whether one of the defendants, or both of the defendants, or either of the defendants was the person or persons who on or about 17 January 1967 'unlawfully and wilfully and feloniously did, by the use of a crowbar and other tools force open a safe of General Electric Supply Company, 18 Seaboard Ave., Raleigh, N. C., used for storing chattels, money and other valuables,' remains in the realm of speculation and conjecture."

So it is here with defendant Lyles. Even assuming the key was the instrument used to enter Coletrain's room, the state's evidence does not place defendant Lyles anywhere near the scene of the crime until some three hours after it must have been committed. The state's evidence includes positive testimony by Officer Whitton that Lyles' car was not on the motel lot during the night. No fruits of the crime were found on Lyles' person or in his car. Admittedly, suspicion as to his guilt has some basis, but it rests on speculation rather than reasonable inferences arising from the evidence. The trial court erred in denying the motion to dismiss as to defendant Lyles.

[3] Defendant Rose also contends that the trial court erred in allowing the trials in these cases to be consolidated despite defendants' motions for separate trials. "Ordinarily, unless it is shown that irreparable prejudice will result therefrom, consolidation for trial rather than multiple individual trials is appropriate when two or more persons are indicted for the same criminal offense(s)." *State v. Jones*, 280 N.C. 322, 333, 185 S.E. 2d 858, 865 (1972); *see* G.S. 15A-926(b). Defendant Rose argues that there was prejudice here because if the trials had not been consolidated, the key found in Lyles' car would not have been admissible against him. This argument is without merit. The key was clearly admissible against Rose. *See State v. Gatling*, 5 N.C. App. 536, 169 S.E. 2d 60, *aff'd* 275 N.C. 625, 170 S.E. 2d 593 (1969) (watch found in car some 48 hours after defendants were in it held admissible). This assignment of error is overruled.

[4] Defendant Rose next assigns as error the trial court's failure to instruct the jury properly as to evidence ordered stricken from the record. The following exchange took place during the direct examination of E. L. Johnson:

"Q. Is there any doubt in your mind that David Rose was the person you saw the night fumbling at the door at 2:30 in the morning?

MR. CREW: Object.

A. No, sir.

MR. CREW: Motion to strike.

THE COURT: Motion to strike is allowed.

EXCEPTION NO. 6"

Defendant argues that the trial court committed prejudicial error by not immediately instructing the jury to disregard the answer. We do not agree. In *Moore v. Insurance Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966), the trial court allowed a motion to strike but failed to instruct the jury accordingly. This Court found no prejudicial error, stating, *id.* at 450, 146 S.E. 2d at 500:

> "Although the proper procedure, upon allowing a motion to strike an answer not responsive to the question, is for the court immediately to instruct the jury not to consider the answer, we think that the failure to do so in this instance, in view of the court's prompt allowance of the motion to strike, is not prejudicial error. The jury could only have interpreted the ruling of the court as meaning that the answer given by the witness was not to be regarded as evidence in the case."

The same reasoning applies here. We note, moreover, that Johnson had already positively identified Rose as the person he saw. Given that fact, his reiteration of his identification in the manner described could not have prejudiced defendant 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. This assignment of error is overruled.

[5] The trial court likewise did not err to defendant's prejudice in admitting certain testimony by the witness Matta. Matta identified the key found in Lyles' car as a motel master key. He also testified that he had been told by one Percy Gilliard, a yard man at Howard Johnson's, that Gilliard had lost his master key. This latter statement was admitted for corroborative purposes with accompanying instructions by the trial court, although no objection

to it or request for instructions by defendant appears in the record. Gilliard never testified; thus, there was nothing for the supposedly corroborative testimony to corroborate. It was, therefore, inadmissible. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972).

Assuming it was error for the trial court not to order the testimony stricken once it became apparent Gilliard would not testify, we see no prejudice to defendant in its failure to do so. The essential thrust of Matta's testimony was that the key was a motel master key which would unlock the room that had been burglarized. That it might have been lost by Gilliard or someone else added nothing to the state's case. This assignment of error is overruled.

[6] Defendant Rose next assigns as error the trial court's denial of the motion to suppress the items seized from Lyles' car. We have already held that these items were admissible against Rose. He has no standing to object to the search of Lyles' car and their seizure therefrom. *State v. Curry*, 288 N.C. 660, 220 S.E. 2d 545 (1975). This assignment of error is overruled.

[7] Defendant Rose's final assignment of error relates to the trial court's charge on "acting in concert." His objection is not to the content of the charge. It is, rather, to the court's bringing the jury back into the courtroom fifteen minutes after they retired and informing them that the state had requested the instruction. Defendant argues that this encouraged the jury to give undue emphasis to this instruction. We do not agree. At the close of this additional instruction the trial court stated: "Again I remind you of the instructions I gave to you earlier and I am not going to repeat those, but you in your deliberations, of course, must consider all of the instructions that have been given to you by the Court." This clearly conveyed to the jury their duty to give equal weight to all the instructions. This assignment of error is overruled.

We need not discuss the remaining exceptions brought forward as they could have had a prejudicial effect only as to defendant Lyles.

Reversed as to defendant Douglas Arthur Lyles.

No error as to defendant David Jonathan Rose.

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

Justice HUSKINS dissenting as to defendant Lyles.

I respectfully dissent from that portion of the majority opinion which holds that the trial court erred in denying the motion to dismiss as to defendant Lyles. The State's evidence places defendant Rose on the motel premises fumbling with the knob on the office door around 2:30 a.m. on the morning of 24 February 1977. Defendant Lyles was first *seen* on the motel premises about 6:15 a.m. that same morning in his blue-green station wagon parked near the laundry room. Lyles and Rose left in the vehicle with Lyles driving and Rose attempting to conceal himself. A master motel key was missing and a later search of the Lyles station wagon uncovered a master motel key behind the "kick panel" which, when tested, opened the doors of the motel rooms, including the rooms that had been burglarized. The doors showed no signs of forced entry and the occupants testified they had locked the doors before going to bed. The Lyles vehicle also contained a bedspread like the bedspreads used in the Howard Johnson motel rooms. Such a bedspread was missing after the burglary.

The fact that Lyles and his station wagon were not *discovered* on the premises until after the burglary does not require dismissal of the charges against him. Lyles was discovered driving Rose away from the premises in a vehicle registered in Lyles' name. This circumstance together with the subsequent discovery of the master key and the bedspread in Lyles' car, unexplained, gives rise to a permissible inference that the burglary was a joint venture—Rose serving as Mr. Inside and Lyles as Mr. Outside. These facts support the further inference that while the burglary was being committed by Rose, Lyles was nearby, to the knowledge of Rose, ready to furnish the means of escape. "It is settled law that all who are present (either actually or constructively) at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose, to the knowledge of the actual perpetrator, are principals and are equally guilty." *State v. Holland*, 234 N.C. 354, 67 S.E. 2d 272 (1951).

In my view, when considered in the light most favorable to the State, the evidence is sufficient to carry the case to the jury and support a verdict of guilty as to Lyles as an aider and abettor, and thus equally guilty as a principal. I vote to uphold the convictions of both defendants.

Justice CARLTON joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. ERNEST RAYMOND HARDY AND DENNIS RAY HARDY

No. 80

(Filed 4 September 1979)

1. **Arrest and Bail § 6; Assault and Battery § 4— assault on police officer—resisting police officer—separate offenses**

   The charge of resisting an officer who is discharging a duty of his office, G.S. 14-223, is not a lesser included offense of the charge of assaulting a law enforcement officer while he is discharging a duty of his office, G.S. 14-33(b)(4); however, the facts in a given case might constitute a violation of both statutes, but defendant could not be punished twice for the same conduct.

2. **Arrest and Bail § 6.1— assault on police officer charged in warrant—conviction of resisting officer—no jurisdiction of court to enter judgment**

   Where defendants were charged with assaults upon two police officers, the trial court was without jurisdiction to enter judgment upon verdicts convicting defendants of resisting arrest by those officers, since resisting arrest is not a lesser included offense of assaulting a police officer.

3. **Arrest and Bail § 6.2; Assault and Battery § 15.4— assault on police officer and resisting officer charged—failure to require election—conviction of resisting officer—no double jeopardy**

   Although the trial court erred in not requiring the State to elect at the close of the evidence between the charges of resisting and assaulting a police officer and in submitting the issue of defendants' guilt of resisting as a lesser degree of the offense of assaulting the officer, such errors were harmless, since (1) defendants were properly charged in valid warrants with resisting the officer, (2) defendants were convicted of only one crime, resisting, and the double jeopardy rule was therefore inapplicable, and (3) the trial court acquired jurisdiction of the resisting charge when defendants appealed all their convictions in the District Court.

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

ON defendants' petition under 7A-31 for discretionary review of the decision of the Court of Appeals, reported in 33 N.C. App. 722, 236 S.E. 2d 709 (1977), affirming the judgments entered by *Webb, J.*, at the 30 August 1976 Session of the Superior Court of CRAVEN County, docketed and argued as Case No. 113 at the Fall Term 1977.

On 7 May 1976 defendant Dennis Ray Hardy was charged in separate warrants with threatening Officers King (76CR4704) and Hall (76CR4710), a violation of G.S. 14-277.1; assaulting Officers King (76CR4706), Hall (76CR4708), and Mylette (76CR4707), in violation of G.S. 14-33(b)(4); and resisting Officer Hall (76CR4709), in violation of G.S. 14-223. At the same time, separate warrants were issued for defendant Ernest Raymond Hardy charging him with threatening Officers Hall (76CR4711) and Mylette (76CR4713); assaulting Officers Hall (76CR4715) and Mylette (76CR4714); and resisting arrest by Officer Hall (76CR4712).

In the District Court each defendant was convicted as charged and appealed to the Superior Court, where evidence for the State tended to show the following facts:

At approximately 6:00 p.m. on 7 May 1976, Randy Hall, uniformed officer of the Havelock Police Department, was driving his patrol car on Highway 70 East near the city limits when he observed a gold Chevrolet force a church activity bus onto the shoulder while passing. Officer Hall pulled in behind the car and stopped it after having watched it weave from one lane to the other for an appreciable distance and, at one point, run off the shoulder of the road.

As Hall approached the car, Ernest Hardy got out on the driver's side and his brother Dennis emerged from the other. The officer was not acquainted with either. Hall instructed Dennis to return to his seat and he did. Ernest, who stumbled when leaving the car, walked to the rear of the vehicle with his hand on the car. A strong odor of alcohol emanated from him. When Hall asked him for his license and registration card, Ernest asked him for a "break" and declared that "he had not had much to drink."

At Hall's request, Ernest agreed to go through a sobriety test. His performance was not satisfactory and Hall informed him he was under arrest for driving under the influence of alcohol.

Ernest's reply was, "You are not going to arrest me." Hall placed his hand on Ernest's arm and told him he would have to go with him. As Ernest jerked away from Hall, Dennis jumped out of the car and started toward them, ignoring Hall's instruction to return to the car. Ernest then swung at Hall and struck his arm. When Hall responded to the blow by pushing Ernest against the car, Dennis grabbed Hall's right arm and told the officer to leave his brother alone. Dennis also had a strong odor of alcohol about him, and he too appeared to be under the influence. Hall told Dennis he was under arrest for obstructing an officer, and Dennis jumped on Hall's back.

In the fight which ensued, Ernest and Dennis struck Hall several times while the officer tried to fend off the blows. During the melee, the three slid down a grassy embankment into the ditch beside the car, where the Hardy brothers continued beating Hall, promising to teach him a lesson, and threatening to kill him. Hall managed to extricate himself from the ditch and run to the front of the Chevrolet, where he hastily called for assistance on his walkie-talkie. The Hardys pursued Hall and resumed the fight. Again, the three rolled into the ditch, where Ernest and Dennis repeatedly struck Hall's head, arms and chest and choked him. Dennis tried to claw his eyes out and both continued to tell him they were going to kill him. Several motorists stopped and watched the fight. However, none attempted to help him at that time.

When Sergeant Mylette arrived in uniform in response to Hall's frantic request for aid, Ernest had him "in a headlock" and Dennis "had his hand up in Hall's face." Dennis obeyed Sergeant Mylette's order to stand by the car, but Mylette had to forcibly restrain Ernest, who was still threatening to kill Hall. At this point, Ernest "went wild" and attacked Mylette, who was unable to subdue him. Two private citizens came to his aid, and the three finally managed to handcuff him. In the meantime, Dennis jumped on Hall again. Hall wrestled Dennis down onto his stomach and was holding him there when Sergeant King, a plain clothes detective whom the defendants knew to be a police officer, arrived and helped him handcuff Dennis. Dennis continued kicking and screamed that he would teach Hall and King a lesson and that he would "get them" and their families. Dennis told King that he knew who he was; that he had people who would take care of him;

and that he was a son of a bitch. King had known both defendants for two years and believed them capable of carrying out such a threat.

King and Hall carried Dennis to Hall's patrol car while Dennis kicked their legs and knees. When they tried to put him inside the car, Dennis kicked Mylette's face. Ernest, who was already in the car, used his feet in an effort to prevent the officers from putting Dennis inside. After the Hardy brothers were finally inside the patrol car and the door was closed, they attempted unsuccessfully to kick out the side windows and the plexiglass shield between the front and back seat.

Although they were armed, at no time did Officers Hall, Mylette or King ever use a weapon to subdue the defendants. During the ride to New Bern to take defendants to the breathalyzer operator, the men continued to scream and repeat their threats "to get" the officers and their families. When Hall read defendants "their rights," they told him they did not want to hear about "their rights." When the various warrants were served upon defendants, Ernest threw the warrants at the Magistrate and made obscene remarks to him.

The testimony of Officers Hall, King and Mylette was substantially the same. All three testified that defendants' threats caused them concern because they believed they would carry out the threats made against their lives and families. The testimony of Mr. Charles Strunk and Major Joe Stone, U.S.M.C., retired, the two passersby who witnessed the disturbance and came to the aid of the officers, corroborated the testimony of the police officers.

Defendants' evidence consisted of the testimony of Ernest Hardy, which tended to show: When Officer Hall grabbed him and told him he was under arrest, Ernest jerked away. Hall then planted a blow on the side of his face which knocked him down and "out for a couple of minutes." When he regained consciousness Ernest saw Dennis and Hall wrestling in the ditch. He arose to help Dennis, thinking he had come to his rescue after Hall had assaulted him. Ernest insisted that he never attempted to hit Hall until after Hall had first hit him; that ten days after the incident he underwent surgery for the reduction of a fracture

of the left malar bone; and that on the evening in question he "blew 16" on the breathalyzer.

In the Superior Court, all warrants were consolidated for trial. The jury found each defendant guilty as charged on the two counts of threatening an officer (Cases No. 4704, 4710, 4711 and 4713). In each of the cases in which Dennis Hardy was charged with assaulting Officers King, Mylette and Hall (Nos. 4706, 4707 and 4708) and in which Ernest was charged with assaulting Officers Mylette and Hall (Nos. 4714 and 4715), the judge submitted the issue of defendant's guilt of resisting arrest under G.S. 14-233 to the jury as a lesser included offense of the crime of assaulting an officer under G.S. 14-32(b)(4). In each of these five assault cases, the defendant was acquitted of assaulting an officer and convicted of resisting arrest. No warrant charged defendants with having resisted either Officer Mylette or Officer King while he was discharging or attempting to discharge a duty of his office. However, in separate warrants (Cases No. 4709 and 4712), each defendant was charged with having unlawfully resisted Officer Hall while he was discharging an official duty, i.e., making an arrest.

In pronouncing judgment, Judge Webb imposed upon each defendant for the crime of which he was convicted consecutive sentences of six months each. The judgment imposing sentence upon each defendant for resisting arrest by Officer Hall recited that the warrant charging resisting arrest had been consolidated for trial with the warrant charging defendant with assaulting Officer Hall and that the defendant had been found guilty of resisting arrest.

Upon defendants' appeal, the Court of Appeals affirmed all the judgments against both defendants. Each petitioned this Court for discretionary review of the decision of the Court of Appeals and the petitions were allowed.

Attorney General Rufus Edmisten and Associate Attorney Thomas H. Davis, Jr., for the State.

Ernest C. Richardson III, for Ernest Raymond Hardy, defendant.

Alfred D. Ward, Jr., for Dennis Ray Hardy, defendant.

SHARP, Chief Justice.[1]

We first consider defendants' contentions:

(1) That the offense of unlawfully resisting, delaying or obstructing a public officer in the discharge of a duty of his office, G.S. 14-223 (resisting), is not a lesser degree of the offense of assaulting a law-enforcement officer while he is discharging or attempting to discharge a duty of his office, G.S. 14-33(b)(4) (assaulting an officer);

(2) That, therefore, Judge Webb erred (a) when he charged the jurors in Cases Nos. 4706 and 4707 that if they were not satisfied beyond a reasonable doubt that Dennis Hardy was guilty of assaulting Officers King and Mylette, they would acquit him of the assault charge and consider whether he was guilty of resisting these officers; and (b) when he gave the same charge in Case No. 4714 in which Ernest was charged with having assaulted Officer Mylette;

(3) That when the jury acquitted defendants of the charges of assaulting Officers King and Mylette and convicted defendants of resisting, the court lacked authority to sentence them for that offense for which they had been neither charged nor convicted in the District Court.

For the reasons hereinafter stated, defendants' contentions with reference to these three cases must be sustained, and the decision of the Court of Appeals that the trial judge's error in submitting the offense of resisting as a lesser degree of the crime of assaulting an officer was favorable to defendant must be reversed.

[1] As the Court of Appeals pointed out in *State v. Kirby*, 15 N.C. App. 480, 489, 190 S.E. 2d 320, 326 (1972), "[T]he charge of resisting an officer * * * and the charge of assaulting a public officer while discharging or attempting to discharge a duty of his office are separate and distinct offenses. * * * No actual assault or force or violence is necessary to complete the offense described by G.S. 14-223."

An examination of the statutes verifies the correctness of the foregoing statement. G.S. 14-223 provides: "If any person shall

1. This opinion was written in accordance with the Court's decision made prior to Chief Justice Sharp's retirement and was adopted by the Court and ordered filed after she retired.

willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

G.S. 14-33(b)(4) provides in pertinent part that any person who "assaults a law-enforcement officer * * * while the officer is discharging or attempting to discharge a duty of his office" is guilty of a misdemeanor "punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment."

The legislative history of these two statutes and the fundamental difference in the interests they seek to protect precludes the notion that resisting an officer, a six-month misdemeanor, is a lesser degree of the offense of assaulting an officer, a two-year misdemeanor. The wording of G.S. 14-223, except with reference to punishment, has remained virtually unchanged since its original enactment in 1889. The location of G.S. 14-223 within N.C. Gen. Stats. Ch. 14, Art. 30, entitled "Obstructing Justice," evidences its purpose "to enforce orderly conduct in the important mission of preserving the peace, carrying out the judgments and orders of the court, and upholding the dignity of the law." *State v. Leigh*, 278 N.C. 243, 251, 179 S.E. 2d 708, 713 (1971). G.S. 14-223 is concerned with acts threatening a public officer with injury only insofar as they interfere with the performance of his official duties. Violence or direct force is not necessarily an element of the crime of resisting an officer.

The misdemeanor of assault on a law enforcement officer, now codified as G.S. 14-33(b)(4) (1977 Cum. Supp.) within Chapter 14 under Article 8, Assaults, is a part of the latest rewrite of G.S. 14-33 (1943). These rewrites have created no new offenses as to assaults, but have only provided different punishments for various types of assaults. Common law definitions still govern assaults. *State v. Roberts*, 270 N.C. 655, 155 S.E. 2d 303 (1967). The location and language of G.S. 14-33(b)(4) manifest its purpose to protect the State's law enforcement officers from bodily injury and threats of violence rather than to preserve order and uphold the dignity of the law.

We hold, therefore that G.S. 14-223 and G.S. 14-33(b)(4) describe separate offenses and that the former is not a lesser

degree of the latter. This holding, however, does not eliminate the possibility that the facts in a given case might constitute a violation of both statutes. In such a case the defendant could not be punished twice for the same conduct. It was so held in *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 659 (1972). As we will later point out more specifically, defendants in this case are not threatened with double punishment for any of their conduct.

The Court of Appeals, while conceding that the trial court erred in submitting the issue of defendants' guilt of resisting arrest in Cases 4706, 4707 and 4714, nevertheless held that this error was harmless. As supporting this conclusion the Court relied upon *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972) and *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). Such reliance is misplaced, for these decisions are not to be compared with the three cases we now consider.

In *State v. Thacker*, supra, defendant was tried upon an indictment charging him under G.S. 14-32(a) with a felonious assault upon one Pierce. Albeit all the evidence tended to show that the defendant had inflicted serious injuries upon Pierce by assaulting him with a knife having a six-inch blade, the trial judge inexplicably submitted to the jury the issue of defendant's guilt of an assault with a deadly weapon and an assault inflicting serious injury, misdemeanors condemned by G.S. 14-33. The jury convicted the defendant of an assault inflicting serious injury, a lesser degree of the felonious assault charged in the indictment. Although the verdict was illogical and inappropriate, it was upheld under the well settled principle that an indictment for any offense includes all lesser degrees of the same crime and, although all the evidence points to the commission of the gravest crime charged, the jury's verdict for an offense of a lesser degree will not be disturbed, since it is favorable to the defendant. G.S. 15-170, *State v. Acor* and *State v. Moore*, 281 N.C. 287, 188 S.E. 2d 332 (1972); *State v. Roy* and *State v. Slate*, 233 N.C. 558, 64 S.E. 2d 840 (1951).

Similarly, in *State v. Stephens*, supra, the defendant was indicted for first degree murder and convicted of manslaughter. All the evidence strongly pointed to the crime of murder; evidence of manslaughter was lacking. Notwithstanding, manslaughter being a lesser degree of murder, this Court was constrained to uphold the verdict.

[2] In *Thacker* and *Stephens* the return of valid indictments gave the Superior Court jurisdiction over both the defendants and the offenses for which they were tried and convicted. A valid warrant or indictment encompassing the offense for which the defendant is convicted is essential to the jurisdiction of the court. *State v. Crabtree*, 286 N.C. 541, 212 S.E. 2d 103 (1975). A defendant indicted for a criminal offense may be convicted of the crime charged or of any lesser degree of that offense provided the appropriate evidence is present. However, "[h]e may not, upon his trial under that indictment, be lawfully convicted of any other criminal offense, whatever the evidence introduced against him may be." *State v. Overman*, 269 N.C. 453, 464, 153 S.E. 2d 44, 54 (1967).

In the instant case neither defendant was ever charged with the offense of resisting Officers King or Mylette. The warrants in Cases 4706 and 4714 charged only assaults upon Officers King and Mylette, and it was their convictions of these assaults in the District Court which the defendants appealed. The Superior Court's jurisdiction was derivative, G.S. 7A-271(b), and was, therefore, restricted to the charges specified in the warrants. Consequently, Judge Webb lacked jurisdiction under the assault warrants to enter judgment upon verdicts convicting defendants of resisting arrest by Officers King and Mylette. The judgments in Cases 4706, 4707, and 4714 must be arrested. *State v. Guffey*, 283 N.C. 94, 194 S.E. 2d 827 (1973); *State v. Bryant*, 280 N.C. 407, 185 S.E. 2d 854 (1972).

[3] It does not follow from what we have just said, however, that the judgments must be arrested in Cases 4709 and 4712 in which defendants were respectively *charged* and convicted of resisting Officer Hall after the cases were consolidated for trial with Nos. 4708 and 4715. On the contrary, we affirm the decision of the Court of Appeals that, although the judge erred (1) in not requiring the State to elect at the close of the evidence between the charges of resisting and assaulting Officer Hall, and (2) in submitting the issue of defendants' guilt of resisting as a lesser degree of the offense of assaulting Officer Hall, these errors were harmless.

Albeit the assaults charged in Cases 4708 and 4715 were the means by which Officer Hall was resisted, the double jeopardy ra-

tionale which prevailed in *State v. Summrell*, supra, has no application here. Unlike defendant Summrell, who was convicted and sentenced for both assaulting and resisting an officer "when the assault was the means by which the officer was resisted," the defendants Hardy were not twice convicted for the same conduct.

In submitting the charges that defendant assaulted and resisted Officer Hall in the context of greater and lesser included offenses, the judge clearly instructed the jury that they could convict defendants of only one of these charges—not both. In other words, he allowed the jury to make the election the State should have made. This error was harmless to the defendants beyond any reasonable doubt. Although overwhelming evidence tended to show that each defendant had made a vicious attack upon Officer Hall, "by an act of grace," the jury convicted them of the less serious misdemeanor of resisting. "[S]ince the verdicts were favorable to the accused, it is settled law they will not be disturbed." *State v. Stephens*, supra, at 384, 93 S.E. 2d at 434.

We reemphasize the fact that the two verdicts of guilty of resisting are supported by valid warrants and that the Superior Court acquired jurisdiction of the four cases involving Officer Hall (Nos. 4708, 4709, 4712 and 4715) when defendants appealed all their convictions in the District Court. Thus, the Court of Appeals did not err in affirming the judgments in Cases 4712 and 4709 (resisting Hall).

Defendants' remaining assignments of error relate to specified portions of the judge's instructions to the jury relating to the charges of communicating threats and resisting arrest and to defendants' right to self-defense. As to each of these assignments, we borrow the language which the Court of Appeals used with reference to the charge on communicating threats: "While we would not adopt the charge as a model, we think the jury was fully apprised of the law as it applied to the facts and could not have been misled." The assignments to the charge are overruled.

Except as specified herein, the decision of the Court of Appeals is affirmed.

The result as to Ernest Raymond Hardy:

No. 76CR4711—Threatening Officer Hall—No error.

No. 76CR4713—Threatening Officer Mylette—No error.

No. 76CR4714—Assaulting Officer Mylette, defendant acquitted of assaulting and convicted of resisting—Judgment arrested.

No. 76CR4712—Resisting Officer Hall—No error.

No. 76CR4715—Assaulting Officer Hall, consolidated with No. 76CR4712, verdict of not guilty.

The result as to Dennis Ray Hardy:

No. 76CR4704—Threatening Officer King—No error.

No. 76CR4710—Threatening Officer Hall—No error.

No. 76CR4709—Resisting Officer Hall—No error.

No. 76CR4708—Assaulting Officer Hall, consolidated with No. 76CR4709—Verdict of not guilty.

No. 76CR4706—Assaulting Officer King, defendant acquitted of assaulting and convicted of resisting—Judgment arrested.

No. 76CR4707—Assaulting Officer Mylette, defendant acquitted of assaulting and convicted of resisting—Judgment arrested.

The judgment of the Court of Appeals is

Affirmed in part; Reversed in part.

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

CEDAR WORKS v. MFG. CO. and EDWARDS v. CHESSON

No. 205 PC.

Case below: 41 N.C. App. 233.

Petition by defendant Chesson for discretionary review under G.S. 7A-31 denied 23 August 1979.

CEDAR WORKS v. LUMBER CO. and EDWARDS v. CHESSON

No. 206 PC.

Case below: 41 N.C. App. 404.

Petition by defendant Chesson for discretionary review under G.S. 7A-31 denied 23 August 1979.

CLICK v. FREIGHT CARRIERS

No. 202 PC.

No. 95 (Fall Term).

Case below: 41 N.C. App. 458.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 23 August 1979.

CONCRETE CO. v. BOARD OF COMMISSIONERS

No. 237 PC.

No. 98 (Fall Term).

Case below: 41 N.C. App. 557.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 23 August 1979.

EMERSON v. TEA CO.

No. 274 PC.

Case below: 41 N.C. App. 715.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1979.

ENTERPRISES, INC. v. EQUIPMENT CO.

No. 213 PC.

No. 97 (Fall Term).

Case below: 41 N.C. App. 204.

Petition by third-party plaintiff Equipment Co. for discretionary review under G.S. 7A-31 allowed 23 August 1979.

HASSELL v. BANK

No. 207 PC.

Case below: 41 N.C. App. 296.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 23 August 1979.

HUNTER v. LIABILITY CO.

No. 228 PC.

Case below: 41 N.C. App. 496.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 23 August 1979.

IN RE ROGERS

No. 253 PC.

Case below: 41 N.C. App. 191.

Petition by respondent for writ of certiorari to North Carolina Court of Appeals allowed 23 August 1979 and the cause is remanded to the Court of Appeals for consideration of the case on its merits. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 23 August 1979.

PARISH v. PETERS

No. 249 PC.

Case below: 41 N.C. App. 767.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 23 August 1979.

POWER & LIGHT CO. v. MERRITT

No. 217 PC.

Case below: 41 N.C. App. 438.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1979.

SMITH v. STATON

No. 211 PC.

Case below: 41 N.C. App. 395.

Petition by defendants for discretionary review under G.S. 7A-31 denied 23 August 1979.

SNML CORP. v. BANK

No. 187 PC.

Case below: 41 N.C. App. 28.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1979.

STATE v. CORRIHER

No. 279 PC.

Case below: 42 N.C. App. 257.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 August 1979.

STATE v. CRONIN

No. 204 PC.

No. 96 (Fall Term).

Case below: 41 N.C. App. 415.

Petition by the State for discretionary review under G.S. 7A-31 allowed 23 August 1979.

STATE v. DRAKEFORD

No. 221 PC.

Case below: 42 N.C. App. 257.

Application by defendant for further review denied 23 August 1979.

STATE v. PARDUE

No. 248 PC.

Case below: 41 N.C. App. 768.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 August 1979.

STATE v. RIVENS

No. 277 PC.

No. 100 (Fall Term).

Case below: 41 N.C. App. 404.

Petition by the State for writ of certiorari to North Carolina Court of Appeals allowed 23 August 1979.

STATE v. SPORTS

No. 225 PC.

Case below: 41 N.C. App. 687.

Application by defendant for further review denied 23 August 1979.

WILSON v. WILSON

No. 190 PC.

Case below: 41 N.C. App. 404.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 August 1979.

WOLFE v. HEWES

No. 168 PC.

Case below: 41 N.C. App. 88.

Petitions by plaintiffs and defendants for discretionary review under G.S. 7A-31 denied 23 August 1979.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1979

A-S-P ASSOCIATES v. CITY OF RALEIGH

No. 103

(Filed 3 October 1979)

1. **Constitutional Law § 13.1; Municipal Corporations § 29.4— creation of historic preservation district—valid exercise of police power**

An ordinance of the City of Raleigh creating the Oakwood Historic District constituted a valid exercise of the police power since (1) the police power encompasses the right to control the exterior appearance of private property when the object of such control is the preservation of the State's legacy of historically significant structures and (2) the architectural and design standards set forth in the ordinance provide the only feasible manner in which the historic aspects of an entire district can be maintained.

2. **Municipal Corporations § 30.10— creation of historic preservation district—application of standards to new construction**

An ordinance of the City of Raleigh creating the Oakwood Historic District is not invalid when applied to new construction in the historic district, since the preservation of the historic aspects of a district requires more than simply the preservation of those buildings of historical and architectural significance within the district.

3. **Constitutional Law § 8.2; Municipal Corporations § 30.1— historic preservation district—"incongruity" standard for use by historic district commission—no delegation of legislative authority**

Provisions of G.S. 160A-397 and of the Raleigh ordinance creating the Oakwood Historic District which give to the Raleigh Historic District Commission the authority to prevent certain specified activities which would be "incongruous" with the historic aspects of the District do not constitute an impermissible delegation of the legislative power to the Commission since the conditions and characteristics of the Oakwood Historic District's physical environ-

ment are sufficiently distinctive and identifiable to provide reasonable guidance to the Commission in applying the "incongruity" standard. *A fortiori*, architectural guidelines and design standards provided by the ordinance for use by the Commission in its administration of the Oakwood Historic District ordinance do not constitute an impermissible delegation of legislative power.

4. **Municipal Corporations § 30.9— creation of historic preservation district—no spot zoning**

A city ordinance creating a historic preservation district did not constitute "spot zoning" because it failed to include certain property owned by the N. C. Medical Society while including property owned by plaintiff and others in the same block, since the ordinance created a 102 acre overlay zoning district and did not reclassify a relatively small tract owned by a single person surrounded by a much larger area.

5. **Municipal Corporations § 30.10— creation of historic preservation district—no denial of equal protection**

A city ordinance creating a historic preservation district did not deny equal protection of the laws to plaintiff by including property owned by plaintiff and certain others in the historic district while excluding property on the same block owned by the N. C. Medical Society, since a reasonable basis existed for the exclusion of the Medical Society's property and the inclusion of other similarly located property where the evidence tended to show: the Medical Society's building is a large, four story modern structure; its architectural style is extremely incongruous with the historic aspects of the district; the Medical Society made substantial investments in the foundations of the building in order that two additional stories can be added in the future; adjacent lots owned by the Medical Society, which were also excluded from the historic district, were acquired to provide additional parking necessary to future expansion of the building; plaintiff's property, when purchased in 1972, had on it a dilapidated structure which was subsequently demolished, and the property has since remained vacant; and other pieces of property in the same block are either vacant or have structures on them which are reasonably compatible in scale, orientation, setback and architectural style with the historic aspects of the district.

6. **Municipal Corporations § 30.9— comprehensive zoning plan—creation of historic preservation district**

The superior court did not err in its conclusion that the City of Raleigh has a comprehensive plan for zoning purposes and that an ordinance creating the Oakwood Historic District was enacted in accordance with it as required by G.S. 160A-383.

7. **Municipal Corporations § 30.5— uniformity in zoning regulations—overlay historic preservation district**

The requirement of G.S. 160A-382 that zoning regulations "shall be uniform for each class or kind of building throughout each district" does not prohibit the creation of an overlay historic district which imposes additional regulations on some property within an underlying use-district and not on all of the property within it, since this does not destroy the uniformity of the regulations applicable to the underlying use-district.

8. Municipal Corporations § 30.5— creation of historic preservation district—most appropriate use of land requirement

In enacting an ordinance creating the Oakwood Historic District, the City of Raleigh did not violate the requirement of G.S. 160A-383 that zoning regulations "be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the city."

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

ON defendant's petition for discretionary review of the decision of the Court of Appeals, 38 N.C. App. 271, 247 S.E. 2d 800 (1978), reversing summary judgment entered by *Braswell, J.*, on 30 June 1977, in Superior Court, WAKE County. This case was argued as No. 31 at the Spring Term 1979.

Plaintiff brought this action seeking a declaratory judgment the two ordinances adopted on 3 June 1975 by the City of Raleigh are invalid both on constitutional and statutory grounds. The two ordinances (hereinafter referred to collectively as the Oakwood Ordinance) amended the City's zoning ordinance to create a 98 acre, overlay historic district in the City's Oakwood neighborhood (hereinafter referred to as the Historic District), established the Raleigh Historic District Commission (hereinafter referred to as the Historic District Commission), adopted architectural guidelines and design standards to be applied by the Historic District Commission in its administration of the Oakwood Ordinance, and provided civil and criminal penalties for failure to comply with the Oakwood Ordinance. *See Code of the City of Raleigh*, §§ 24-57 through 57.8 (1959).

The Ordinance was adopted pursuant to G.S. §§ 160A-395 through 399, which authorize municipalities to designate historic districts and to require that after the designation of a historic district any property owner within it who desires to erect, alter, restore, or move the exterior portion of any building or other structure first obtain a certificate of appropriateness from a historic district commission.[1] A historic district commission's action is limited by G.S. § 160A-397 to "preventing the construc-

1. The constitutionality of historic district preservation is a matter of first impression for this Court. Governmental regulation of private property in the interest of historic district preservation is by no means a novelty within this State, however. In 1948 the City of Winston-Salem passed a comprehensive zoning ordinance, which included the creation of an Old Salem Historic Preservation District. The ordinance created a Board of Architectural Review and required issuance of a certificate of appropriateness prior to alteration of

tion, reconstruction, alteration, restoration, or moving of buildings, structures, appurtenant fixtures, or outdoor advertising signs in the historic district which would be incongruous with the historic aspects of the district."

In May of 1974, the Division of Archives and History of the North Carolina Department of Cultural Resources nominated Raleigh's Oakwood neighborhood for inclusion on the United States Department of Interior's National Register of Historic Places. In the required statement of significance, the Division's Survey and Planning Unit observed:

> "Oakwood, a twenty-block area representing the only intact nineteenth century neighborhood remaining in Raleigh, is composed predominantly of Victorian houses built between the Civil War and 1914. Its depressed economic state during most of the twentieth century preserved the neighborhood until 1971, when individuals began its revitalization. The great variety of Victorian architectural styles represented by the houses reflects the primarily middle-class tastes of the business and political leaders of Raleigh for whom they were built, as well as the skill of local architects and builders. Oakwood is a valuable physical document of Southern suburban life during the last quarter of the nineteenth century."

On 25 June 1974, the Oakwood neighborhood was placed on the National Register.

At the request of The Society for the Preservation of Historic Oakwood, the Planning Department of the City of Raleigh conducted a study of the Oakwood neighborhood in 1974. Those conducting the study found that a high rate of absentee ownership existed in the neighborhood, that banks were reticent to lend money in the Oakwood area as a result of its unstable property values, that significant private efforts to preserve the historic aspects of the neighborhood had been undertaken, and that the neighborhood was at a transition point with an uncertain future. The recommendation of the study was that the City take affirmative action in one of two ways: (1) Plan and zone the

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the exterior architectural features of any structure within the district. It was not until 1965, however, that the General Assembly passed a special enabling act authorizing the cities of Winston-Salem, Halifax, and Edenton to create historic districts. N. C. Session Laws, Ch. 504 (1965). *See Note, Land Use Controls in Historic Areas*, 44 Notre Dame Law. 379, 397-401 (1969).

neighborhood for high density residential and commercial development, which would result in the loss of most aspects of the historic significance of the neighborhood, or (2) maintain the neighborhood as medium density residential with an emphasis on preserving its historic aspects.

In January of 1975, the Planning Department submitted to the City Council *A Proposal for the Designation of Oakwood as an Historic District.* A proposed ordinance was submitted to the State Division of Archives and History for review, and recommended changes were made. On 10 April 1975, a joint public hearing was held before the Raleigh City Council and Planning Commission at which both proponents and opponents of the ordinance presented their views. On 3 June 1975 the City Council adopted the Oakwood Ordinance.

The Historic District thus created is an overlay zoning district. All zoning regulations in the area in effect prior to passage of the Oakwood Ordinance remain in effect. Compliance with the Oakwood Ordinance is required in addition to compliance with the pre-existing, underlying zoning regulations. Most of the area covered by the Historic District is zoned residential. A relatively small portion of the area covered by it is zoned as office and institutional. Associates own a vacant lot, located within the Historic District at 210 North Person Street. The lot is within the office and institutional zoning district.

On 22 July 1975 Associates brought this action challenging the validity of the Ordinance on constitutional and statutory grounds. A. C. Hall, Jr., Director of Planning for the City of Raleigh, and Linda Harris, an employee of the City Planning Department, who did extensive work on the drafting of the Ordinance, were subsequently deposed by Associates. Associates also submitted to the defendant City a lengthy set of interrogatories. On 19 January 1977, Associates filed a motion for summary judgment. Defendant City submitted, without objection by Associates, a substantial amount of documentary evidence in response to the motion. On 30 June 1977, the superior court entered an order denying Associates' motion for summary judgment and granting summary judgment in favor of defendant City on all claims raised by the complaint. The Court of Appeals reversed the case on several grounds and remanded it. On 5

January 1979, we allowed defendant's motion for discretionary review of the decision of the Court of Appeals.

Allen, Steed & Allen, by Arch T. Allen III, and Noah H. Huffstetler III, for plaintiff.

Thomas A. McCormick, City Attorney, by Ira J. Botvinick, Associate City Attorney, for defendant.

BROCK, Justice.

Associates' appeal to the Court of Appeals assigned error to the grant of summary judgment in favor of defendant City. Summary judgment may, when appropriate, be rendered against the party moving for such judgment. *Blades v. City of Raleigh,* 280 N.C. 531, 187 S.E. 2d 35 (1972); *Bland v. Bland,* 21 N.C. App. 192, 203 S.E. 2d 639 (1974). Summary judgment in favor of the non-movant is appropriate when the evidence presented demonstrates that no material issues of fact are in dispute, and the non-movant is entitled to entry of judgment as a matter of law.

Associates argue in their brief that their motion for summary judgment was limited to their claims of constitutional invalidity of the Oakwood Ordinance. They argue that it was, therefore, error for the superior court to grant summary judgment in favor of defendant City on all claims raised in Associates' complaint.

It is apparent from the record, however, that both plaintiff and defendant were afforded adequate opportunity to and did submit evidentiary materials on all aspects of the case. The evidentiary materials submitted show, furthermore, that both Associates' constitutional and their statutory challenges to the validity of the Oakwood Ordinance raise only questions of law. Summary judgment for the non-moving party should be granted only when the moving party has been given adequate opportunity to show in opposition that there is a genuine issue of fact to be resolved. 10 Wright & Miller, *Federal Practice and Procedure,* § 2720, p. 471 (1973). Associates were afforded that opportunity in this instance and the entry of summary judgment in favor of defendant City on all claims was proper.

The Court of Appeals found that material issues of fact existed with respect to two claims in Associates' complaint.

Associates' contention that substantial questions of fact existed with respect to other claims was not considered. Because we reverse the decision of the Court of Appeals on the two issues considered determinative by it, we must consider all issues raised.

Associates' first contentions are that the Oakwood Ordinance deprives them of their property without due process of law in contravention of the Fourteenth Amendment to the United States Constitution, and that it deprives them of their property otherwise than by the law of the land in contravention of Article I, Section 19, of the North Carolina Constitution. The terms "law of the land" and "due process of law" are synonymous. *Horton v. Gulledge*, 277 N.C. 353, 177 S.E. 2d 885 (1970); *State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949).

Associates' claim is premised on a line of cases in which this Court has indicated that a statute or ordinance based purely on aesthetic considerations, without any real or substantial relation to the public health, safety or morals, or the general welfare, deprives individuals of due process of law. *State v. Vestal*, 281 N.C. 517, 189 S.E. 2d 152 (1972); *Little Pep Delmonico Restaurant, Inc. v. Charlotte*, 252 N.C. 324, 113 S.E. 2d 422 (1960); *State v. Brown*, 250 N.C. 54, 108 S.E. 2d 74 (1959); *In Re O'Neal*, 243 N.C. 714, 92 S.E. 2d 189 (1956); *State v. Staples*, 157 N.C. 637, 73 S.E. 112 (1911); *Barger v. Smith*, 156 N.C. 323, 72 S.E. 376 (1911); *State v. Whitlock*, 149 N.C. 542 (1908). Associates contend that the Oakwood Ordinance falls within the scope of such impermissible exercise of the police power because it focuses entirely on the exterior appearance of structures within the Historic District. Associates further contend that even if the Ordinance is a valid exercise of the police power insofar as it is applied to historic structures, it is invalid when applied to new construction on property such as Associates' vacant lot.

The police power is inherent in the sovereignty of the State. *Winston-Salem v. Southern R.R. Co.*, 248 N.C. 637, 105 S.E. 2d 37 (1958). It is as extensive as may be required for the protection of the public health, safety, morals and general welfare. *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768 (1961); *State v. Warren*, 252 N.C. 690, 114 S.E. 2d 660 (1960). The police power may be delegated by the State to its municipalities whenever deemed

necessary by the Legislature. *Raleigh v. Norfolk Southern R.R. Co.*, 275 N.C. 454, 168 S.E. 2d 389 (1969).

Several principles must be borne in mind when considering a due process challenge to governmental regulation of private property on grounds that it is an invalid exercise of the police power. First, is the object of the legislation within the scope of the police power? Second, considering all the surrounding circumstances and particular facts of the case is the means by which the governmental entity has chosen to regulate reasonable? *G.I. Surplus Store v. Hunter*, 257 N.C. 206, 125 S.E. 2d 764 (1962); *State v. Brown*, 250 N.C. 54, 108 S.E. 2d 74 (1959); *Winston-Salem v. Southern R.R. Co.*, 248 N.C. 637, 105 S.E. 2d 37 (1958). This second inquiry is two-pronged: (1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?

Moreover, in reviewing acts of the Legislature this Court must not lose sight of the fact that "[s]ince the police power of the State has not been, and by its nature cannot be, placed within fixed definitive limits, it may be extended or restricted to meet changing conditions, economic as well as social." *Winston-Salem v. Southern R.R. Co.*, *supra*, at 642-43, 105 S.E. 2d at 41. Also, "[w]hen the most that can be said against [an ordinance] is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare." *In Re Appeal of Parker*, 214 N.C. 51, 197 S.E. 706 (1938). *Euclid v. Ambler Realty*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Legislative exercise of the police power to regulate private property in the interest of historic preservation has met with increasing acceptance by the courts of other jurisdictions. *E.g.*, *Maher v. City of New Orleans*, 516 F. 2d 1051 (5th Cir. 1975); *Bohannan v. City of San Diego*, 30 Cal. App. 3d 416, 106 Cal. Rptr. 333 (1973); *Figarsky v. Historic District Comm.*, 171 Conn. 198, 368 A. 2d 163 (1976); *Rebman v. City of Springfield*, 111 Ill. App. 2d 430, 250 N.E. 2d 282 (1969); *City of New Orleans v. Levy*, 223

La. 14, 64 So. 2d 798 (1953); *Opinion of the Justices*, 333 Mass. 773, 128 N.E. 2d 557 (1955); *Opinion of the Justices*, 333 Mass. 783, 128 N.E. 2d 563 (1955); and *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P. 2d 13 (1964). *See Comment, Historic Preservation Cases: A Collection*, 12 Wake Forest L. Rev. 227 (1976). Historic district legislation similar to the provisions of G.S. §§ 160A-395 through 399 has now been enacted by at least thirty-nine states. Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 Wake Forest L. Rev. 93, 95 n. 18 (1976); Wilson and Winkler, *The Response of State Legislation to Historic Preservation*, 36 Law and Contemp. Prob., 329 (1971). More than 500 cities and towns have passed local landmark or historic district ordinances. National Trust for Historic Preservation, *Historic Preservation and the Law*, Part IV, ch. 5, p. 3 (1978).

In *Maher v. City of New Orleans, supra*, plaintiff challenged an ordinance that regulates the preservation and maintenance of buildings in the historic Vieux Carre section of that City. In rejecting plaintiff's contention that the architectural controls imposed by the ordinance were not within the parameters of police power regulation, the Court observed: "[p]roper state purposes may encompass not only the goal of abating undesirable conditions, but of fostering ends the community deems worthy . . . . Nor need the values advanced be solely economic or directed at health and safety in their narrowest senses. The police power inhering in the lawmaker is more generous, comprehending more subtle and ephemeral societal interests." *Id.* at 1060.

The United States Supreme Court has also recognized the expansive scope of the states' police power. In *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) it was observed, albeit in the context of an exercise of power of eminent domain, that "the concept of the public welfare is broad and inclusive. (Citation omitted.) The values it represents are spiritual as well as physical, aesthetic as well as monetary." In the recent case of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978), applying the concept of the public welfare found in *Berman*, the Court upheld comprehensive governmental regulation of private property designed to preserve historic buildings in the City of New York.

[1] In *State v. Vestal*, 281 N.C. 517, 189 S.E. 2d 152 (1972), we took note of the growing body of authority in other jurisdictions recognizing that the police power may be broad enough to include reasonable regulation of property for aesthetic reasons alone. Although we are not now prepared to endorse such a broad concept of the scope of the police power, we find no difficulty in holding that the police power encompasses the right to control the exterior appearance of private property when the object of such control is the perservation of the State's legacy of historically significant structures. "While most aesthetic ordinances are concerned with good taste and beauty . . . a historic district zoning ordinance . . . is not primarily concerned with whether the subject of regulation is beautiful or tasteful, but rather with preserving it as it is, representative of what it was, for such educational, cultural, or economic values as it may have. Cases dealing with purely aesthetic regulations are distinguishable from those dealing with preservation of a historical area or a historical style of architecture." *A. Rathkopf, The Law of Zoning and Planning*, § 15.01, p. 15-4, (4th ed. 1975).

The preservation of historically significant residential and commercial districts protects and promotes the general welfare in distinct yet intricately related ways. It provides a visual, educational medium by which an understanding of our country's historic and cultural heritage may be imparted to present and future generations. That understanding provides in turn a unique and valuable perspective on the social, cultural, and economic mores of past generations of Americans, which remain operative to varying degrees today. *N. Williams, American Planning Law, Land Use and the Police Power*, § 71A.02, p. 88 (Cum. Supp. 1978). Historic preservation moreover serves as a stimulus to protection and promotion of the general welfare in related, more tangible respects. It can stimulate revitalization of deteroriating residential and commercial districts in urban areas, thus contributing to their economic and social stability. *Figarsky v. Historic District Comm.*, 171 Conn. 198, 208, 368 A. 2d 163, 167 (1976); R. Montague & T. Wrenn, *Planning for Preservation*, pp. 11-17 (America's Society of Planning Officials 1969). It tends to foster architectural creativity by preserving physical examples of outstanding architectural techniques of the past. *N. Williams, supra*, at § 71A.02. It also has the potential, documented in

numerous instances, *e.g.*, in the Vieux Carre section of New Orleans, of generating substantial tourism revenues. *City of New Orleans v. Levy*, 223 La. 14, 64 So. 2d 798 (1953); R. Montague & T. Wrenn, *supra;* Schroder, *The Preservation of Historical Areas*, 62 Ky. L. J. 940 (1974). Although it is also recognized that historic preservation legislation, particularly historic district ordinances, may adversely affect the welfare of certain segments of society and infringe on individual liberty, Beckwith, *Developments in the Law of Historic Preservation and A Reflection on Liberty*, 12 Wake Forest L. Rev. 93 (1976); Newsom, *Blacks, and Historic Preservation*, 36 Law & Contemp. Probs. 423 (1971), the wisdom of such legislation is "fairly debatable," precluding substitution of our judgment for that of the General Assembly.

[1,2] Although the object of particular legislation may well be within the scope of the police power, the legislation may yet deprive individuals of due process of law if the means chosen to implement the legislative objective are unreasonable. *Euclid v. Ambler Realty, supra; Maher v. City of New Orleans, supra.* Such is not the case here, however. Comprehensive regulation of the "construction, reconstruction, alteration, restoration, or moving of buildings, structures, appurtenant fixtures, or outdoor advertising signs in the historic district which would be incongruous with the historic aspects of the district" is the only feasible manner in which the historic aspects of an entire district can be maintained. Associates' contention that the provisions in the Oakwood Ordinance requiring issuance of a certificate of appropriateness for *new construction* is unreasonable, particularly when applied to Associates' plans to construct an office building on its now vacant lot, is without merit. It is widely recognized that preservation of the historic aspects of a district requires more than simply the preservation of those buildings of historical and architectural significance within the district. In rejecting a similar challenge, the District Court in *Maher v. City of New Orleans*, 371 F. Supp. 653, 663 (E.D. La. 1974) observed: "just as important is the preservation and protection of the setting or scene in which [structures of architectural and historical significance] are situated." *See City of New Orleans v. Permagent, supra;* Wiedl, *Historic District Ordinances*, 8 Conn. L. Rev. 209, 215-17 (1976). This "tout ensemble" doctrine, as it is now often termed, is an integral and reasonable part of effective historic district preservation.

Most important, however, is the fact that Associates and other property owners similarly situated are not prohibited by the Oakwood Ordinance from erecting new structures. They are only required to construct them in a manner that will not result in a structure incongruous with the historic aspects of the Historic District. Property owners within the Historic District may, by virtue of this requirement, be unable to develop their property for its most profitable use or at the cost they would prefer. But the mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid. *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E. 2d 325 (1968); *Helms v. Charlotte*, 255 N.C. 647, 122 S.E. 2d 817 (1961). The test of reasonableness necessarily involves a balancing of the diminution in value of an individual's property and the corresponding gain to the public. Sax, *Takings and the Police Power*, 74 Yale L. J. 36 (1964).

[3] Associates next contend that the superior court erred as a matter of law in ruling that the Oakwood Ordinance does not delegate legislative power to the Historic District Commission. Legislative power is vested exclusively in the General Assembly by Article II, Section 1, of the North Carolina Constitution. From this provision and from Article I, Section 6, derives the principle that the General Assembly may not delegate its power to any other department or body. *Motsinger v. Perryman*, 218 N.C. 15, 9 S.E. 2d 511 (1940); *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310 (1953). This principle, however, is not absolute.

> "Since legislation must often be adapted to complex conditions involving numerous details with which the Legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the Legislature the necessary flexability of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the Legislature shall apply. (Citation omitted.) Without this power, the Legislature would often be placed in the awkward situation of possessing a power over a given subject without being able to exercise it." *Coastal Highway v. Turnpike Authority*, *supra*, at 60, 74 S.E. 2d at 316.

Associates contend that adequate standards have not been established in this instance.

Analysis of the statutes authorizing the establishment of historic districts by cities and counties and the Oakwood Ordinance itself is necessary to resolution of this issue. G.S. § 160A-395 authorizes any municipal governing body to designate one or more historic districts as a part of its general zoning ordinance. Municipal governing bodies (which term includes governing boards of counties as well) are thereby delegated the legislative power to determine whether or not to designate a historic district or districts. This delegation of power is not challenged by Associates. Delegation to municipal corporations of the States' police power to legislate concerning local problems such as zoning is permissible by long standing exception to the general rule of non-delegation of legislative power. *In Re Markham,* 259 N.C. 566, 131 S.E. 2d 329 (1963); *Jackson v. Board of Adjustment,* 275 N.C. 155, 166 S.E. 2d 78 (1969).

The delegation of legislative power to municipal governing bodies is not in this instance, however, an unlimited delegation. G.S. § 160A-396 provides that before a city or county may designate one or more historic districts it must establish a historic district commission.[2] G.S. § 160A-396 further limits the delegation of power by specifying that, "a majority of the members of such a commission shall have demonstrated special interest, experience, or education in history or architecture . . . ." G.S. § 160A-397 imposes another limitation by specifying the method by which a historic district ordinance adopted by a city or county is to be enforced:

> "From and after the designation of a historic district, no exterior portion of any building or other structure (including stone walls, fences, light fixtures, steps and pavement, or other appurtenant features) nor above-ground utility structure nor any type of outdoor advertising sign shall be erected, altered, restored, or moved within such district until after an application for a certificate of appropriateness as to exterior architectural features has been submitted to and approved by the historic district commission."

2. G.S. § 160A-396 provides as an alternative that, "[i]n lieu of establishing a separate historic district commission, a municipality may designate as its historic district commission, either (i) the municipal historic properties commission, established pursuant to G.S. § 160A-399.2, or (ii) the municipal planning board. In order for the planning board to be designated, at least two of its members shall have demonstrated special interest, experience, or education in history or architecture."

G.S. § 160A-397 then establishes the standard by which a historic district commission is to be bound in its administration of a historic district by approving or disapproving applications for Certificates of Appropriateness:

> "The commission shall not consider interior arrangement and shall take no action under this section except for the purpose of preventing the construction, reconstruction, alteration, restoration, or moving of buildings, structures, appurtenant fixtures, or outdoor advertising signs in the historic district *which would be incongruous with the historic aspects of the district.*" (Emphasis added.)

The statutory authorization of historic district ordinances is, therefore, a mixture of delegated legislative and administrative power. A municipal governing body has unlimited discretion to determine whether or not to establish a historic district or districts. Once it chooses to do so, however, its discretion insofar as the method and the standard by which a historic district ordinance is to be administered is, by contrast, extremely limited. A historic district ordinance is to be administered by a historic district commission, the composition of which is specified by the General Assembly, in accordance with the standard of "incongruity" set directly by the General Assembly in G.S. § 160A-397.

The Oakwood Ordinance itself reflects this statutory mixture of delegated legislative and administrative powers. The Ordinance first establishes the Historic District and its boundaries. Section 24-57.4 of the Code of the City of Raleigh establishes the Raleigh Historic District Commission to enforce the Ordinance;[3] Section 24-57.1 authorizes the Historic District Commission to require applications for a Certificate of Appropriateness for any proposed activities within the Historic District which are covered by the specific provisions of G.S. § 160A-397, quoted *supra;* Section 24-57.3 adopts the standard set forth in G.S. § 160A-397 of preventing those activities specified in G.S. § 160A-397 "which would be incongruous with the historic aspects of the district" as the limitation on the discretion conferred on the Historic District Commission.

Section 24-57.3 further provides that an appeal may be taken to Raleigh's Board of Adjustment from the Historic District Com-

3. The City of Raleigh apparently followed the alternative procedure provided for by G.S. § 160A-396, set forth in note 2, *supra,* of designating the Raleigh Historic Properties Commission as the City's Historic District Commission as Section 24-57.4 of the Ordinance indicates that the membership of the two commissions is to be the same.

mission's decision on an application for a Certificate of Appropriateness. Appeal to the Superior Court of Wake County from a decision of the Board of Adjustment is also provided for.

Section 24-57.5 incorporates by reference "architectural guidelines and design standards," which are set forth in a January 1975 report prepared by Raleigh's Planning Department entitled *A Proposal for the Designation of Oakwood as an Historic District.*[4] The Historic District Commission is directed to apply the incorporated guidelines and standards in its consideration of applications for Certificates of Appropriateness.

It is on these "architectural guidelines and design standards" that Associates mistakenly focus their contention that power to administer the Oakwood Ordinance has been delegated to the Historic District Commission without adequate standards. Associates contend the architectural guidelines and design standards "vest the Commission with the untrammeled authority to compel individual property owners in the Historic District to comply with whatever arbitrary or subjective views the members of the Commission might have as to how property in the district should be maintained or developed."

From the foregoing analysis of the enabling statutes and the Oakwood Ordinance itself, however, it is manifestly clear that it is not the guidelines and standards incorporated into the Oakwood Ordinance which must meet the legal test of sufficiency, but rather it is the standard set forth in G.S. § 160A-397 and in the Ordinance itself, which limits the discretion of the Historic District Commission to preventing only those of certain specified activities, "which would be incongruous with the historic aspects of the district." Although we cannot ignore in our consideration the guidelines and standards incorporated into the Oakwood Ordinance, if the general standard of "incongruity" is legally sufficient to withstand a delegation challenge, the incorporated

4. There are three major divisions to the architectural guidelines and design standards; those which apply to proposed changes to existing structures; those which apply to new construction; and those which apply to landscaping. Those which apply to existing structures of the Victorian style are further subdivided into nine categories, each of which focuses on a different structural element, *e.g.*, materials, colors, and fenestration patterns. A description of the different Victorian styles as they relate to a particular structural element is given. Specific and general prohibitions of designs, materials and styles that are incongruous with the existing elements of particular Victorian styles are also set forth. Similar, although less developed consideration is given to the other architectural styles of historical interest found in the Historic District.

Those guidelines which apply to new construction are similarly subdivided with cross-references to the structural element categories of existing structures. In addition, this section of the guidelines sets forth limitations on such things as spacing, lot coverage, and height, which are flexibly related to the same characteristics of existing structures in proximity to a proposed new structure. Consideration is also given to characteristics such as spacing, orientation, scale, and proportions of new structures in a third part of this section.

guidelines and standards, which give varying degrees of specificity to that general standard, are sufficient *a fortiori.*

In the recent case of *Adams v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E. 2d 402 (1978) we observed with respect to the delegation of power to an administrative agency:

> "When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances." *Id.* at 698, 249 S.E. 2d 411.

We also joined in *Adams* a growing trend of authority by recognizing that "the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards." *Id.*

The general policy and standard of "incongruity," adopted by both the General Assembly and the Raleigh City Council, in this instance is best denominated as "a contextual standard." A contextual standard is one which derives its meaning from the objectively determinable, interrelated conditions and characteristics of the subject to which the standard is to be applied. *See* Turnbull, *Aesthetic Zoning,* 7 Wake Forest L. Rev. 230, 242 (1971). In this instance the standard of "incongruity" must derive its meaning, if any, from the total physical environment of the Historic District. That is to say, the conditions and characteristics of the Historic District's physical environment must be sufficiently distinctive and identifiable to provide reasonable guidance to the Historic District Commission in applying the "incongruity" standard.

Although the neighborhood encompassed by the Historic District is to a considerable extent an architectural melange, that heterogeneity of architectural style is not such as to render the standard of "incongruity" meaningless. The predominant architectural style found in the area is Victorian, the characteristics of which are readily identifiable. City of Raleigh, Planning Department, *A Proposal to Designate Oakwood as a Historic District,* p. 1 (1975); N.C. Department of Cultural Resources, *National*

Register Nomination Form, Oakwood Historic District (1974). In his deposition, Raleigh's Planning Director, A. C. Hall, Jr., testified:

> "[T]he remaining part of Oakwood, yes, has been developed since that time, with varying types of architectures, filling in the holes, so to speak, in the neighborhood, but still this is in my opinion and my recollection, this is the only and the best example, and has a majority of worthwhile Victorian or Victorian Era structures in it, in the neighborhood that we have."

The characteristics of other architectural styles of historical interest found in the Historic District are equally distinctive and objectively ascertainable. *A Proposal to Designate Oakwood as a Historic District, supra*, pp. 16-17. The architectural guidelines and design standards incorporated into the Oakwood Ordinance (described in note 4, *supra*) provide an analysis of the structural elements of the different styles and provide additional support for our conclusion that the contextual standard of "incongruity" is a sufficient limitation on the Historic District Commission's discretion.

It will be remembered that G.S. § 160A-396 requires that a majority of the members of a historic district commission shall have demonstrated special interest, experience, or education in history or architecture. There is no evidence that Raleigh's Historic District Commission is not so constituted. To achieve the ultimate purposes of historic district preservation, it is a practical necessity that a substantial degree of discretionary authority guided by policies and goals set by the legislature, be delegated to such an administrative body possessing the expertise to adapt the legislative policies and goals to varying, particular circumstances. *Adams v. Dept. of N.E.R., supra.* It is a matter of practical impossibility for a legislative body to deal with the host of details inherent in the complex nature of historic district preservation.

It is therefore sufficient that a general, yet meaningful, contextual standard has been set forth to limit the discretion of the Historic District Commission. Strikingly similar standards for administration of historic district ordinances have long been approved by courts of other jurisdictions. *E.g., Maher v. City of New Orleans*, 516 F. 2d 1051 (5th Cir. 1975); *South of Second Associates v. Georgetown*, (Colo.) 580 P. 2d 807 (1978); *City of*

New Orleans v. Permagent, 198 La. 852, 5 So. 2d 129 (1941); *Town of Deering ex rel. Bittenbender v. Tibbetts,* 105 N.H. 481, 202 A. 2d 232 (1964); *City of Santa Fe v. Gamble-Skogmo, Inc.,* 73 N.M. 410, 389 P. 2d 13 (1964); *Opinion of the Justices,* 333 Mass. 773, 128 N.E. 2d 557 (1955); *Hayes v. Smith,* 92 R.I. 173, 167 A. 2d 546 (1961).

The procedural safeguards provided will serve as an additional check on potential abuse of the Historic District Commission's discretion. *Adams v. Dept. of N.E.R., supra.* Provisions for appeal to the Board of Adjustment from an adverse decision of the Historic District Commission will afford an affected property owner the opportunity to offer expert evidence, cross-examine witnesses, inspect documents, and offer rebuttal evidence. *See Refining Co. v. Board of Aldermen,* 284 N.C. 458, 202 S.E. 2d 129 (1974). Similar protection is afforded to a property owner by the right to appeal from a decision of the Board of Adjustment to the Superior Court of Wake County.

For the reasons stated, the superior court's ruling that the Oakwood Ordinance does not impermissibly delegate legislative power to the Historic District Commission is affirmed.

[5] Associates' third contention is that the superior court erred in concluding that defendant City did not deny Associates' equal protection of the laws by including Associates' property in the Historic District while excluding property owned by the North Carolina Medical Association, which is located in the same block.

The factual basis on which this contention rests is set forth in detail at 38 N.C. App. 271, 247 S.E. 2d 802 (1978). Condensing it somewhat for purposes of brevity, the facts are as follows. Associates' vacant lot is located at 210 North Person Street. Adjacent to it at 216 North Person Street is the former Mansion Square Inn, built in the nineteenth century. The State Medical Society's large, four story office building is located at 222 North Person Street. These three pieces of property and a fourth at 204 North Person Street have been included since 1961 in an office and institutional zoning district. At the request of the State Medical Society, the property on which its building is located and two other adjacent lots owned by the Society in the same block were excluded from the overlay Historic District. Associates' request that their vacant lot be similarly excluded was denied and theirs and all other property in the same block was included in the Historic District. Associates' equal protection claim is based

on its allegations that defendant City acted arbitrarily and capriciously in setting the boundaries of the Oakwood Historic District because the included and excluded pieces of property are similarly located.

Without considering the questions raised by this contention, the Court of Appeals held that Associates had made a prima facie showing of arbitrary and capricious spot zoning. The Court of Appeals further held, relying on our holding in *D&W, Inc. v. The City of Charlotte,* 268 N.C. 577, 151 S.E. 2d 241 (1966) that a major part of defendant City's evidence offered to show a reasonable basis for exclusion of the Medical Society's property should not have been considered because "it is impermissible in this jurisdiction to prove the intent of a legislative body by statements of one of its members." 38 N.C. App. at 276, 247 S.E. 2d at 804. Disregarding defendant City's evidence, the Court of Appeals reversed the judgment of the superior court and ordered the case remanded for further proceedings on the question of whether or not defendant City had engaged in impermissible spot zoning.

[4] Spot zoning is "[a] zoning ordinance or amendment which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area, uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected . . . ." *Blades v. City of Raleigh,* 280 N.C. 531, 549, 187 S.E. 2d 35, 45 (1972). So defined, it is apparent that defendant City has not, in this instance, engaged in spot zoning at all. The City by passing the Oakwood Ordinance created a 102 acre overlay, zoning district (as it is authorized to do by G.S. § 160A-395), the restrictions of which apply to numerous individual property owners. In drawing the boundaries of the Historic District the City merely decided not to include certain property owned by the Medical Society, while including that owned by Associates and others in the same block. Reclassification of a relatively small tract owned by a single person surrounded by a much larger area, uniformly zoned, is simply not the issue involved. Thus we need only consider the equal protection of the laws claim raised by Associates.

The applicable rule of law by which our consideration must be guided is well stated in *Guthrie v. Taylor,* 279 N.C. 703, 185 S.E. 2d 193 (1971), *cert. denied,* 406 U.S. 920, 92 S.Ct. 1774, 32 L.Ed. 2d 119 (1972).

"Neither the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution nor the similar language in Art. I, § 19, of the Constitution of North Carolina takes from the State the power to classify persons or activities when there is reasonable basis for such classification and for the consequent difference in treatment under the law. (Citations omitted.)

The test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation." *Id.* at 713-14, 185 S.E. 2d at 201.

The reasonableness of a particular classification is a question of law for determination by the court. *State v. Bass*, 171 N.C. 780, 87 S.E. 972 (1916). In its consideration of a particular legislative classification, which term encompasses the setting of zoning district boundaries, a court is bound, however, by two fundamental, related limitations. 8A McQuillin, Municipal Corporations, § 25.278, p. 284 (3d ed. 1976). First, there is a presumption that a particular exercise of the police power is valid and constitutional. *Durham County v. Addison*, 262 N.C. 280, 136 S.E. 2d 600 (1964); *Kinney v. Sutton*, 230 N.C. 404, 53 S.E. 2d 306 (1949), and the burden is on the property owner to show otherwise. *Raleigh v. Morand*, 247 N.C. 363, 100 S.E. 2d 870 (1957); *State v. Baynes*, 222 N.C. 425, 23 S.E. 2d 344 (1942). Second, it must be remembered that classification is exclusively a legislative function. Because it is such, a court may not substitute its judgment of what is reasonable for that of the legislative body, particularly when the reasonableness of a particular classification is fairly debatable. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Schloss v. Jamison*, 262 N.C. 108, 136 S.E. 2d 691 (1964). This second limitation is reflected in former Chief Justice Bobbitt's observation in *State v. Greenwood*, 280 N.C. 651, 658, 187 S.E. 2d 8, 13 (1972) that: "The equal protection clauses do not require perfection in respect of classifications. In borderline cases the legislative determination is entitled to great weight."

A major part of defendant City's evidence on which it relied to show a reasonable basis for exclusion of the Medical Society's property was in the form of transcripts of proceedings of Raleigh's City Council. The City also relied upon the depositions of Linda Harris and A. C. Hall, Jr. The Court of Appeals held, as noted *supra*, that the transcripts of the council's proceedings were not competent evidence to be construed by the court in rul-

ing on the motion for summary judgment. We note that the transcripts in this instance were offered not to prove the intent of a legislative body but offered instead to prove the facts stated therein and the council's consideration of them. *See Cheatham v. Young*, 113 N.C. 161, 18 S.E. 92 (1893). The issue of their admissibility is thus distinguishable from that involved in *D&W, Inc. v. The City of Charlotte, supra.* We need not decide, however, the different question raised. That decision is obviated by the fact that no objection was made to consideration of the evidence. Indeed, counsel for Associates expressly stated at the hearing on the motion that Associates had no objection to the court considering the affidavit of Gail Smith, Raleigh's City Clerk and Treasurer, of which the transcripts were a part. Thus the long standing rule applies that "[e]vidence admitted without objection, though it should have been excluded had proper objection been made, is entitled to be considered for whatever probative value it may have," 1 *Stansbury's North Carolina Evidence*, § 27, p. 66 (Brandis Rev. 1973). *See Harriet Cotton Mills v. Textile Workers*, 251 N.C. 218, 111 S.E. 2d 457 (1959).

[5] The evidence presented at the hearing on the motion for summary judgment showed: The State Medical Society's building is a large (four story), modern structure; virtually all elements of its architectural style are, by contrast with the structures on property included in the Historic District, extremely incongruous with its historic aspects; The Medical Society made substantial investments in the foundations of the building in order that two additional stories can be added at some point in the future; the adjacent lots owned by the Society, which were also excluded from the District, were acquired to provide additional off-street parking necessary to future expansion of the building; Associates' property, when purchased in 1972 had on it a delapidated structure, which was subsequently demolished, and the property has remained vacant since; other pieces of property in the same block are either vacant or have structures on them which are reasonably compatible in terms of scale, orientation, setback and architectural style with the historic aspects of the District.

Bearing in mind the touchstone of judicial review of a particular legislative classification, the object of the legislative exercise of the police power, we cannot say that the superior court erred in its conclusion of law that a reasonable basis existed for

the exclusion of The Medical Society's property while other property in the same block was included in the Historic District. Associates' property, other property in the same block, and that owned by the Medical Society are indeed *similarly located.* They are not, however, *similarly situated,* insofar as the purposes of the Historic District Ordinance is concerned. Substantial and material differences exist, as clearly shown by the uncontroverted evidence presented, which support the superior court's conclusion of law.

Exclusion from the Historic District of only that property owned by the Medical Society on which its building is located might have been a wiser choice. But is well settled that legislative bodies may make rational distinctions with substantially less than mathematical exactitude. *New Orleans v. Dukes,* 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed. 2d 511 (1976).

The decision of the Court of Appeals on this aspect of the case is reversed and the judgment of the superior court is affirmed.

[6] Associates' fourth contention is that the superior court erred in its conclusion of law that the City of Raleigh has a comprehensive plan for zoning purposes and that the Oakwood Ordinance was enacted in accordance with it as required by G.S. § 160A-383.

The Court of Appeals held that the evidence presented raised "substantial issues of material fact with regard to the existence *vel non* of a current comprehensive plan for development of the City of Raleigh and its application to the plaintiff's property." *A-S-P Associates, supra,* at 278, 247 S.E. 2d at 805. On this basis the Court of Appeals reversed the judgment of the superior court and remanded the case for further proceedings.

The holding of the Court of Appeals is apparently based upon the view that an extrinsic, written plan, such as a master plan based upon a comprehensive study, is required. This definition of the comprehensive plan required by G.S. § 160A-383 was expressly rejected by the Court of Appeals in *Allred v. City of Raleigh,* 7 N.C. App. 602, 173 S.E. 2d 533 (1970). *Allred* was reversed by this Court on other grounds at 277 N.C. 530, 178 S.E. 2d 432 (1971). We refrained there from defining the required comprehensive plan.

As noted in the opinion of the Court of Appeals in *Allred* at 7 N.C. App. 607, 173 S.E. 2d at 536, the zoning enabling legislation of more than forty states includes a comprehensive plan requirement similar to that in G.S. § 160A-383, 1 *Williams, American Land Planning Law,* § 18.05, p. 359 (1974). Absent a specific requirement in the enabling legislation, courts have generally not construed the term to require, as a condition precedent to the enactment of a zoning ordinance, the preparation and adoption of a formal master plan. *E.g., Poremba v. Springfield,* 354 Mass. 432, 238 N.E. 2d 43 (1968); *Chestnut Hill Co. v. Snohomish,* 76 Wash. 2d 741, 458 P. 2d 891, *cert. denied,* 397 U.S. 988 (1969). *See* Haar, *In Accordance with a Comprehensive Plan,* 68 Harvard L. Rev. 1154 (1955). "[T]he courts have discovered the requisite comprehensive plan in places ranging from the zoning ordinance itself to the preamble of the zoning amendment in question." 1 Anderson, *Ameircan Law of Zoning,* § 5.05, p. 268 (1976). We do not find it necessary here to attempt an all-inclusive definition of the required comprehensive plan. What suffices as such may well vary according to the stage at which a particular city or county is in its zoning process. The evidence presented at the hearing on the motion for summary judgment showed, however, that at this late stage in its zoning process, the City of Raleigh is operating pursuant to a sufficiently comprehensive plan. The City has in effect a comprehensive set of zoning regulations which cover the entire City. The City's Planning Department has conducted comprehensive studies of the City's housing, transportation, public facilities, parks and recreation, and a wide range of other needs. Moreover, the evidence showed that before the City adopted the Oakwood Ordinance, planning studies of the area proposed to be included in the Historic District were conducted, which gave careful and comprehensive consideration to the potential effect on other ways in which the City is attempting to protect and promote the general welfare through the exercise of its zoning powers. That some inconsistencies exist among the various planning efforts engaged in by the City is not indicative of the possible absence of a comprehensive plan as so held by the Court of Appeals. A rational process of planning for a large city's varied needs inherently involves conflicts, changes, and inconsistent proposals as to how they should be met.

The decision of the Court of Appeals reversing the conclusion of law of the superior court that the City of Raleigh has in effect

a comprehensive plan and that the Oakwood Ordinance was enacted pursuant to it is reversed, and the judgment of the superior court is affirmed.

Associates further contend that the superior court erred in its conclusions of law that the defendant City did not violate two other requirements of Chapter 160A, Article 19, Part 3, of the General Statutes when it enacted the Oakwood Ordinance.

[7] The first of these is G.S. § 160A-382, which requires that "[a]ll regulations shall be uniform for each class or kind of building throughout each district . . . ." It will be remembered that G.S. § 160A-395 authorizes alternative types of historic districts. A historic district may be either a separate use-district or an overlay district.

Defendant City followed the latter alternative, superimposing the Historic District on preexisting residential and office and institutional districts in which Associates' property is located. Associates contend this action by the City violates the uniformity requirement of G.S. § 160A-382, since its property is subject to the Historic District regulations while other property in the same office and institutional district is not.

G.S. § 160A-382 only requires that the regulations of a particular use-district apply uniformly throughout the district. It does not prohibit by implication the creation of overlay districts. That the creation of an overlay historic district may impose additional regulations on some property within an underlying use-district and not on all of the property within it, does not destroy the uniformity of the regulations applicable to the underlying use-district. This conclusion of law by the superior court is, therefore, affirmed.

[8] Associates' final contention is that the superior court erred when it concluded that the City complied with the requirement of G.S. § 160A-383 that zoning regulations "be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."

"This statute, obviously, does not contemplate that the zoning pattern must be, or should be, designed to permit each in-

dividual tract of land to be devoted to its own most profitable use, irrespective of the surrounding area." *Blades v. City of Raleigh*, 280 N.C. 531, 545, 187 S.E. 2d 35, 43 (1972). Moreover, the inclusion of Associates' property in the Historic District does not change the use to which Associates' property may be put, since it remains within an office and institutional district first created in 1961. The uncontroverted evidence amply supports the superior court's conclusion of law on this point.

The decision of the Court of Appeals is reversed, and the entry of summary judgment by the superior court in favor of defendant City on all claims raised by Associates' complaint is affirmed.

Reversed and remanded.

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

HAYDEE C. CRAVER PLAINTIFF v. PAUL E. CRAVER DEFENDANT AND UNITED STATES OF AMERICA DEFENDANT

No. 105

(Filed 3 October 1979)

1. **Appeal and Error § 38— settlement of case on appeal—clerk's certification—filing of settled record—actions not timely**

   The Court of Appeals had no authority on 5 June 1978 to consider the merits of the trial court's order entered on 27 September 1977, since defendant failed within ten days of the settlement of the case on appeal to obtain the clerk's certification of the record and failed within 150 days of giving notice of appeal to file the settled record in the Court of Appeals, and the trial court had dismissed the appeal on 6 April 1978.

2. **Appeal and Error § 22.1— certiorari to preserve exception to settlement of record—appeal not kept alive**

   The trial court's order was not placed before the Court of Appeals for review by way of defendant's petition for certiorari, since that petition was made solely for the purpose of preserving an exception to the trial judge's settlement of the record, and it did not itself serve to keep alive the case on appeal.

3. Appeal and Error § 17— stay of trial court's order—appeal from order not perfected—motion to dissolve stay improperly denied

The Court of Appeals erred in denying plaintiff's motion to dissolve a stay of the trial court's order since the appeal of the order to which the stay was directed was not perfected.

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

ON writ of certiorari to review two orders of the Court of Appeals. This case was docketed and argued as No. 117 at the Fall Term 1978.

Gene B. Gurganus, Attorney for plaintiff appellant.

Cameron and Collins, by E. C. Collins, Attorneys for defendant appellee.

George M. Anderson, United States Attorney, by Elaine R. Pope, Assistant United States Attorney, for defendant United States of America.

Rufus L. Edmisten, Attorney General, by R. James Lore, Associate Attorney, for the State, amicus curiae.

EXUM, Justice.

We allowed plaintiff's petition for writ of certiorari pursuant to App. R. 21 to review two orders of the Court of Appeals, the latest in a series of rulings by District Court Judge Walter P. Henderson and the Court of Appeals in a dispute that has become procedurally entangled. Because of defendant's procedural defaults the Court of Appeals erred in making these orders. They are reversed.

Apparently unsatisfied with her estranged husband's support payments[1] for her and two children born of the marriage, plaintiff filed action for alimony, child support, and divorce from bed and board on 16 March 1977. After a hearing Judge Henderson on 29 March 1977 ordered defendant to pay $325.00 per month alimony pendente lite and $225.00 per month for child support. The onset of litigation and Judge Henderson's order had a chilling effect on defendant's willingness to support his dependents, for as of 15

1. According to Judge Henderson's findings these were as follows: September, 1976, $700; October, 1976, $500; November, 1976, $500; December, 1976, $400; January, 1977, $500; and February, 1977, $400.

July 1977 defendant had made no alimony payments and was $187.00 in arrears in child support. In response to plaintiff's motion to find defendant in contempt, Judge Henderson conducted a hearing on 15 July 1977, found facts, and concluded that defendant's wilful failure to make payments as earlier ordered placed him in contempt of court. Judge Henderson ordered that defendant could purge himself of contempt by paying arrearages totaling $1,487.00. Judge Henderson also ordered defendant to execute an assignment of his retirement pay due from the United States to the extent of $550.00 per month for plaintiff's use.[2] The assignment was to be executed on or before 1 September 1977. Should defendant fail to assign his retirement benefits as ordered, Judge Henderson directed him to appear on 9 September 1977 to show cause why his wages should not be attached and why he should not be punished for contempt.

On 27 September 1977, after a hearing, Judge Henderson entered an order in which he recited prior proceedings and found that defendant had wilfully failed to pay arrearages earlier determined to be due and had wilfully failed to assign his retirement pay. The order concluded that defendant was in contempt of court. The order (1) provided that the United States, as garnishee,[3] pay 65 percent of defendant's retirement pay into court for plaintiff's use; (2) committed defendant to jail for six months; and (3) provided that defendant could purge himself of contempt by executing an assignment of wages as earlier ordered. This is the only order from which defendant attempted to perfect an appeal.

On 22 November 1977 Judge Henderson, on motion of plaintiff pursuant to Civ. P. R. 70, appointed plaintiff's counsel, Mr. Gene Gurganus, as commissioner to execute an assignment of

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2. In an earlier judgment, Judge Henderson had found that defendant was retired from the United States Marine Corps and that his annual retirement income amounted to $7,533.90, or $627.82 per month. He also found that defendant had training as a contractor and realtor and had been in the insurance adjusting business for approximately six years from which business he earned $8,350.00 in 1975. Defendant's total income for 1976 was found by Judge Henderson to be $15,967.00.

The order for assignment of retirement pay was apparently based on G.S. 50-16.7(b) which authorizes the court to "require the supporting spouse to secure the payment of alimony or alimony pendente lite by means of a bond, mortgage, or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the supporting spouse to execute an assignment of wages, salary, or other income due or to become due."

3. The United States on plaintiff's motion was joined in the action as garnishee by order dated 21 June 1977.

wages for defendant and ordered the United States to comply with the assignment. Defendant neither excepted to nor appealed from this order. Mr. Gurganus executed an assignment of defendant's retirement pay to the extent of $550.00 per month or 65 percent, whichever is less.

On 2 December 1977 defendant filed a petition for writ of supersedeas in the Court of Appeals. That Court on 6 December 1977 stayed Judge Henderson's 27 September 1977 order to the extent that it provided that more than 20 percent of defendant's retirement pay "be attached." The Court of Appeals also stayed Judge Henderson's 22 November 1977 order to the extent that it required Mr. Gurganus to "execute an assignment of more than twenty (20) percent of defendant's" retirement pay. Judge Henderson's orders, to the extent provided, were "stayed pending appellate review by this Court of the proceedings and the said orders of 27 September 1977 and 22 November 1977." The Court of Appeals further noted that "If the defendant fails to perfect appeal in accordance with the North Carolina Rules of Appellate Procedure, this stay order will be dissolved."

The parties being unable to agree to the record on appeal, Judge Henderson settled the record by order entered 16 February 1978 pursuant to App. R. 11(c). Rather than obtaining the clerk's certificate within ten days thereafter as required by App. R. 11(c) and filing the settled record in the Court of Appeals within ten days of the clerk's certificate as required by App. R. 12(a), defendant did nothing until 6 March 1978. On that date defendant petitioned the Court of Appeals for a writ of certiorari. Attached to the petition was the record on appeal as settled by Judge Henderson. The petition asked only that the Court of Appeals require Judge Henderson to amend the record to include certain items defendant contended were essential for determination of the dispute but which Judge Henderson had deleted when he settled the record.[4] Responding to this petition, the Court of Appeals postponed ruling "pending expiration of time for oral argument, or further order."

Thereafter on 6 April 1978 Judge Henderson dismissd defendant's appeal pursuant to App. R. 25 on the grounds: (1) the

4. Ultimately, as later discussed in the text, the Court of Appeals determined that all these items related to orders entered by Judge Henderson on 28 April 1977 and 26 August 1977 to which defendant did not except and from which he did not appeal. It concluded, therefore, that Judge Henderson properly excluded these items in his settlement of the record on appeal.

settled record on appeal was not presented to the clerk for certification within ten days after settlement, App. R. 11(e); (2) the record on appeal was not filed with the Court of Appeals within ten days after the clerk's certification, App. R. 12(a); and (3) the record on appeal was not filed with the Court of Appeals within 150 days after giving notice of appeal, App. R. 12(a).

Assuming no doubt that the end of litigation was in sight, plaintiff on 16 May 1978 moved the Court of Appeals to dissolve its earlier stays of Judge Henderson's 22 November and 27 September orders. Plaintiff argued in support of this motion that defendant had failed to perfect his appeal from these orders and that his appeal had been dismissed.

On 5 June 1978 the Court of Appeals responded to plaintiff's motion as follows: Referring to defendant's petition for writ of certiorari filed 6 March 1978, the Court of Appeals purported to grant certiorari and affirmed Judge Henderson's settlement of the record. Proceeding then without benefit of arguments or briefs, the Court of Appeals went on to conclude that Judge Henderson's 27 September 1977 order "attaching 65 percent of monies payable to defendant by the United States of America is contrary to law," referring to its opinions in *Phillips v. Phillips*, 34 N.C. App. 612, 239 S.E. 2d 743 (1977) and *Elmwood v. Elmwood*, 34 N.C. App. 652, 241 S.E. 2d 693 (1977).[5] The Court of Appeals vacated this order in its entirety and remanded the case to the district court "for further proceedings not inconsistent with" *Phillips* and *Elmwood*. Plaintiff's motion to dissolve the 6 December 1977 stays was denied.

We issued our writ of certiorari on plaintiff's application to consider the correctness of the Court of Appeals' 5 June 1978 rulings. We conclude that all these rulings must be vacated on procedural grounds.

[1] Defendant's appeal from Judge Henderson's 27 September 1977 order was simply not before the Court of Appeals on 5 June 1978. Defendant's challenge to that order, *qua* appeal on its merits, was derailed procedurally when defendant failed to comply with the Rules of Appellate Procedure following Judge Henderson's settlement of the record on appeal. Within ten days

5. This opinion was later modified in *Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E. 2d 668 (1978).

of the settlement on 16 February 1978 defendant was required to obtain the clerk's certification of the record. App. R. 11(e). Within ten days of the clerk's certification of the record, and no later than 150 days after giving notice of appeal, defendant was required to file the settled record in the Court of Appeals. App. R. 12(a). He did neither of these things. He did nothing within the time permitted by the Rules.

"Ordinarily our legal system operates in an adversary mode. One incident of this mode is that only those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions. This can be a strict requirement." *In re Lancaster*, 290 N.C. 410, 424, 226 S.E. 2d 371, 380 (1976). The Rules of Appellate Procedure are mandatory. *Walter Corporation v. Gilliam*, 260 N.C. 211, 132 S.E. 2d 313 (1963). They are designed to keep the process of perfecting an appeal flowing in an orderly manner. "Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process." *Ledwell v. County of Randolph*, 31 N.C. App. 522, 523, 229 S.E. 2d 836, 837 (1976). Thus, where an appellant fails "within the time allowed by these rules or by order of the court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the docketing of an appeal in an appellate court motions to dismiss are to be made to the court . . . from which appeal has been taken." App. R. 25. A failure by appellant to meet the requirements of App. R. 11(e), *Ledwell v. County of Randolph*, *supra*, or to comply with the mandate of App. R. 12(a), *Byrd v. Alexander*, 32 N.C. App. 782, 233 S.E. 2d 654 (1977), works a loss of the right of appeal. *In re DeFebio*, 237 N.C. 269, 74 S.E. 2d 531 (1953). Judge Henderson thus acted correctly on 6 April 1978 in dismissing defendant's appeal from the order of 27 September 1977. The Court of Appeals erred in ignoring this ruling. There being no appeal pending in the appellate division after the appeal's dismissal on 6 April, the Court of Appeals had no authority on 5 June to consider the merits of the order.

[2] Nor was this order placed before the Court of Appeals for review by way of defendant's petition for certiorari filed on 6 March. That petition was made solely for the purpose of preserving an exception to the trial judge's settlement of the record; it

did not itself serve to keep alive the case on appeal.[6] Neither did it suffice as a petition for certiorari to review matters *other* than the challenged settlement of the record. When used as at common law to bring up for review the judicial action of an inferior tribunal, certiorari triggers appellate scrutiny not of the full case, but only of the action complained of. *Harrell v. Powell*, 249 N.C. 244, 106 S.E. 2d 160 (1958); *Belk's Department Stores, Inc. v. Guilford County*, 222 N.C. 441, 23 S.E. 2d 897 (1942). If the Court of Appeals had desired to exercise its supervisory powers under G.S. 7A-32(c) and treat the defendant's March 6 petition as one intended to bring up the entire case for review, the proper course would have been to require the settled record to be duly docketed for briefing pursuant to App. R. 12(b) and 13 *prior* to the dismissal of 6 April. This step not only would have forced the perfection of defendant's appeal and insulated it from dismissal by the district court, but also would have afforded plaintiff the critical opportunity to be heard on the merits of the appeal.[7] As it was, the appeal itself expired of its own inertia in early April. The Court of Appeals was without jurisdiction two months later to revive by a petition for limited certiorari defendant's right to bring up a case on appeal which had been lost by defendant's procedural defaults. *Bell v. Nivens*, 225 N.C. 35, 33 S.E. 2d 66 (1945); *State v. Freeman, supra*, n. 6. Its action in vacating the 27 September order must itself be vacated. *Shepard v. Leonard*, 223 N.C. 110, 25 S.E. 2d 445 (1943).

[3] The Court of Appeals also erred in denying plaintiff's motion to dissolve the 6 December stay of Judge Henderson's 27 September order. Application to the appellate division to stay a determination of an inferior court is properly considered only "when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination." App. R. 23(a)(1). The writ of supersedeas may issue only in the exercise of, and as ancillary to,

6. Generally the action of the trial judge in settling the record on appeal when the parties cannot agree thereon is final and not subject to direct appeal. However, a challenge to the trial court's settlement may be preserved by an application for certiorari *made incidentally* with the perfection of the appeal upon what record there is. Perfection, including docketing, is still necessary to the preservation of the whole appeal because until a record on appeal is filed and docketed, there is nothing pending before the appellate division. The bare petition for certiorari to review the settlement does not itself suffice as a record of the "case on appeal." *State v. Freeman*, 114 N.C. 872, 19 S.E. 630 (1894); *State v. Waddell*, 3 N.C. App. 58, 164 S.E. 2d 75 (1968). *See State v. Gooch*, 94 N.C. 982 (1886); *Lindsay v. Brawley*, 226 N.C. 468, 38 S.E. 2d 528 (1946).

7. It should be beyond question that the right to notice and an opportunity to be heard on motions in a lawsuit is "critically important to the non-movant"; its omission by the court cannot be considered of little consequence. *Pask v. Corbitt*, 28 N.C. App. 100, 220 S.E. 2d 378 (1975).

the revising power of an appellate court; its office is to preserve the *status quo* pending the exercise of appellate jurisdiction. *New Bern v. Walker*, 255 N.C. 355, 121 S.E. 2d 544 (1961); *Bank v. Stanley*, 13 N.C. (2 Dev.) 476 (1830). When an appeal of the order to which the stay of supersedeas is directed is not perfected, the stay must be dissolved. Since defendant neither perfected his appeal from the 27 September order nor made timely application for certiorari to have the order reviewed as on appeal, the Court of Appeals should have granted plaintiff's motion to have the stay dissolved.

Likewise the Court of Appeals erred in failing to dissolve its stay of Judge Henderson's 22 November 1977 order. There is nothing in any of the papers before us suggesting that defendant even purported to appeal from this order. Nothing indicates that he excepted to it, gave notice of appeal from it, or even asked that it be included in the record on appeal relating to the 27 September order.

Therefore the 5 June 1978 rulings of the Court of Appeals vacating Judge Henderson's 27 September 1977 order and denying plaintiff's motion to dissolve the stays of 6 December 1977 are reversed. Because of defendant's procedural defaults, the orders of the trial division remain in full force and effect.

Reversed.

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

STATE OF NORTH CAROLINA v. LEE THOMAS HAMILTON

No. 26

(Filed 3 October 1979)

1. Criminal Law § 15.1— pretrial publicity—denial of change of venue

The trial court in a prosecution for burglary, kidnapping and rape did not abuse its discretion in the denial of defendant's motion for a change of venue because of unfavorable pretrial publicity.

2. **Criminal Law § 66.8— admissibility of photograph used in photographic identification**

A photograph of defendant used in a photographic identification procedure was properly admitted in evidence where a rape and kidnapping victim immediately picked out a photograph of defendant as her assailant when shown photographs of five young black males; the photograph of defendant had been taken at the sheriff's office after his arrest earlier that day; and the evidence showed that officers had probable cause to arrest defendant and that his arrest was therefore lawful.

3. **Criminal Law § 66.16— in-court identification—no taint from pretrial photographic identification**

A rape and kidnapping victim was properly permitted to identify defendant at trial as her assailant where the court found upon supporting voir dire evidence that the victim had ample opportunity to view defendant at the time the crimes were committed; a pretrial photographic procedure was not illegal; and the victim's identification of defendant at trial was of independent origin and not tainted by the pretrial photographic identification.

4. **Criminal Law § 113.1— instructions supported by evidence**

In a prosecution for burglary, kidnapping and rape, the trial court in its review of the evidence did not mistakenly quote defendant as stating that his girl friend burned his clothing when defendant did not in fact testify at trial, since the record shows that the court was referring to a statement of an S.B.I. agent or some other witness. Furthermore, the court's reference in the charge to blood having been found on defendant's clothing was supported by the evidence at trial.

5. **Criminal Law § 114.2— instructions—"confession" by defendant—conflicting statements by defendant—no expression of opinion**

In a prosecution for first degree burglary, kidnapping and rape, the trial court did not express an opinion in instructing the jury, "The evidence tends to show that the defendant confessed that he committed the crime charged in this case," since defendant's statement to officers did in fact amount to a "confession" of the crimes of first degree burglary and rape. Nor did the court express an opinion in instructing that defendant "made two conflicting statements" where defendant did make conflicting statements as to how blood got on his clothing, and the court's statement merely reminded the jury that they should consider both statements.

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

APPEAL by defendant from *McConnell, J.*, 4 December 1978 Criminal Session of UNION Superior Court.

Upon bills of indictment proper in form, defendant was tried for (1) first-degree rape, (2) kidnapping and (3) first-degree burglary. The alleged victim of the rape and kidnapping charges

was Teresa Janet Pressley, 11 years old. The home allegedly burglarized was that of Teresa's father, James W. Pressley. Defendant pled not guilty to all charges.

Evidence presented by the state is summarized briefly as follows:

On 4 October 1978 the James Pressley family was residing in a new home in the town of Wingate, N. C. The family consisted of Mr. and Mrs. Pressley and four children, including 11-year-old Teresa and 8-year-old Debbie. At about 10:00 p.m. on that date the family went to bed, all windows and doors leading to the outside of the house being closed. Teresa and Debbie shared a bedroom together.

Around midnight Teresa awoke and found a man in her room. The man lifted her from her bed, put her through an open window onto the ground and then went out the window behind her. Teresa began running and the man caught her and threatened her with a knife. He then carried her to some tall grass or weeds at the edge of the yard and forcibly had sexual intercourse with her.

After the man left, Teresa went to the front door of her home and screamed for her parents. They awoke, went to the door and admitted her into the house. She was bleeding from her genital area and told her parents what had happened.

Police officers were called and the sheriff caused a bloodhound to be used. The dog picked up a trail in the Pressley yard and proceeded some three or four blocks to a house occupied by defendant's girl friend. She gave the police permission to search the house and they found defendant hiding behind some clothing in a closet. His underwear had blood on it.

Defendant was arrested and several hours later he made a statement. He stated that he entered the Pressley home by removing a screen and entering a bedroom window; that the room was occupied by two people; that a young girl went with him through the window and into the yard; and that he had sexual intercourse with her. He further stated that she consented to having intercourse with him.

Teresa was carried to the hospital where she was examined and treated. Surgery was required to repair torn places in her

genital area. Later that day she viewed several photographs and identified defendant as her assailant. She positively identified him at trial.

Defendant offered no evidence.

The jury found defendant guilty as charged. The court consolidated the rape and kidnapping cases for purpose of judgment. It then entered judgments imposing two life sentences to begin at the expiration of a 20-25 year sentence imposed on 16 May 1978 in Union County in Case No. 78CRS1731.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas F. Moffitt, for the State.

Joe P. McCollum, Jr., for defendant-appellant.

BRITT, Justice.

[1] By his first assignment of error, defendant contends the trial court erred in denying his motion for a change of venue because of unfavorable pretrial publicity. The assignment is without merit. This motion was addressed to the sound discretion of the trial judge and his ruling thereon will not be disturbed absent a showing of abuse of discretion. 4 Strong's N.C. Index 3d, Criminal Law § 15.1. We perceive no abuse of discretion in this case.

By his second and third assignments of error, defendant contends the trial court erred (1) in admitting into evidence photographs of him and others used in the identifying procedure, and (2) in admitting Teresa's testimony identifying him as her assailant. There is no merit in these assignments.

[2] With respect to the photographs, defendant argues that in *State v. Accor and Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970), this court recognized the principle that when photographs are used to identify a defendant, the state must show that a photograph of the defendant was lawfully obtained; and that absent such a showing, the photograph and evidence relating thereto, when objected to by the defendant, are inadmissible at trial. We hold that the principle was not violated in the case at hand.

While she was testifying, Teresa was asked if she could identify the man who committed the acts complained of. Defendant ob-

jected, the jury was taken from the courtroom, and the court conducted a voir dire. Evidence presented at the voir dire tended to show that around 11:00 a.m. on 5 October 1978 Sheriff Fowler and other officers went to Teresa's hospital room. After obtaining permission from hospital personnel to talk to her, they proceeded to do so. She told them that she would be able to identify the man who molested her. The officers thereupon placed photographs of five young black males, including defendant, on a table and Teresa immediately selected a photograph of defendant as a photograph of her assailant.

The photograph of defendant had on it the date of 5 October 1978 and the sheriff testified that it was made on that date. Other testimony showed that defendant was arrested at the home of his girl friend around 3:30 that morning, carried to the sheriff's office and "processed" which included being photographed and fingerprinted. Following the voir dire the court made findings of fact and concluded, among other things, that "there were no illegal identification procedures" in connection with the victim's identification of defendant.

G.S. 15A-502(a)(1) authorizes the photographing of a person charged with a felony or a misdemeanor when the person has been "arrested"; G.S. 15A-502(b) and (c) set forth certain exceptions not pertinent to the case at hand. Of course, the arrest must have been lawful. The evidence in this case was more than sufficient to show that there was probable cause to arrest defendant on the morning of 5 October 1978, hence his arrest was lawful.

A new trial was granted in *Accor* and *Moore* primarily for the reason that there was no showing that defendants were being *lawfully* detained at the time their photographs were being taken. That was not the case here.

[3] With respect to the admission of Teresa's testimony identifying defendant, clearly there was no error. She testified at the voir dire. The court found and concluded that she had ample opportunity to view defendant at the time the crimes were committed, that there was nothing to indicate that her identification was tainted and that her identification of defendant at trial was of independent origin, based solely on what she saw at the time the alleged crimes were committed. The court's findings are amply supported by the evidence, therefore, this court is bound by

them. *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975), death sentence vacated, 428 U.S. 903 (1976); *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974). The findings fully support the conclusions of law.

Defendant's main argument on these assignments appears to be that the court did not make sufficient findings of fact. Should we concede that point, which we do not, the error was harmless in view of the fact that the record shows that the pretrial identification procedure was proper and that the in-court identification of defendant had an origin independent of the pretrial identification. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968).

[4] By the next assignment of error argued in his brief, defendant contends the trial court erred in reciting evidence in the jury charge that was not presented to the jury. This assignment has no merit.

Defendant argues that the court mistakenly referred to evidence (1) quoting him as stating that his girl friend burned his clothing, and (2) that blood was found on his clothing. He submits that while such evidence was shown on voir dire, it was not presented to the jury. We disagree.

A careful examination of the jury charge discloses that while the court was reviewing the testimony, and particularly that of S.B.I. Agent Richardson which included statements made by defendant to him, the court said that "he stated that she had burned them (defendant's clothing) out in the backyard". This statement standing alone might indicate that the court was referring to defendant. However, the next sentence in the charge is: "That was brought out on cross-examination of one of the witnesses." Defendant was not a witness at trial. Therefore, it is clear that the court was referring to a statement by Agent Richardson or some other *witness*.

The reference in the jury charge to blood having been found on defendant's clothing is clearly supported by the evidence. The statement given by defendant to Agent Richardson (Exhibit 16) was admitted into evidence and it contains several references to blood on defendant's clothing.

The assignment of error is overruled.

[5] By the last assignment of error argued in his brief, defendant contends the trial court committed error by expressing an opinion on the evidence. We find no merit in this assignment.

Evidently this assignment is based on Exceptions 9 and 10 to the jury charge. Portions of the charge relating to these exceptions are as follows:

> The fact that he made a statement should be scrutinized by you. He would contend that he didn't make it; and if he did make it, it wasn't voluntary. You heard the officers testify that they advised him of his constitutional rights to remain silent, and the other rights that they advised him of; and that he made this statement; and that he made it freely and voluntarily. That is a matter for the jury to determine. (The evidence tends to show that the defendant confessed that he committed the crime charged in this case.)
>
> EXCEPTION NO. 9
>
> That is what the statement said. If you find that the defendant made that confession, then you will consider all of the circumstances under which it was made in determining whether it was a truthful confession, and the weight you will give it.
>
> (He made two conflicting statements.)
>
> EXCEPTION NO. 10
>
> The defendant will contend that he was under pressure to make it, and that it was not a voluntary statement; and that it was not truthful; that the first statement was the truth. He contends they were conflicting statements, and you should consider this.

With respect to Exception 9, this court has approved many times the use of the words "the evidence tends to show". *See State v. Roberts*, 293 N.C. 1, 235 S.E. 2d 203 (1977); *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 409 U.S. 948 (1972); *State v. Huggins*, 269 N.C. 752, 153 S.E. 2d 475 (1967). We then consider whether the statement referred to amounted to "a confession" of the crimes charged.

In his statement defendant admitted going to the Pressley home in the nighttime, removing the screen from and raising the

window of a bedroom occupied by two persons, entering the room through the open window, going back through the window with 11-year-old Teresa, going with her to some weeds at the edge of the yard and having sexual intercourse with her.

G.S. 14-21 provides, *inter alia,* that every person who unlawfully and carnally knows and abuses any female child under the age of 12 years shall be guilty of rape. Burglary in the first degree is the breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein. *State v. Bell,* 285 N.C. 746, 208 S.E. 2d 506 (1974). Clearly, defendant's statement amounted to a "confession" of the crimes of rape and burglary in the first degree, two of the three offenses with which he was charged.

With respect to the court's instruction that defendant made two conflicting statements, this instruction, when considered with the quoted sentences which follow, was favorable to defendant. In the first statement, defendant said that any blood on his clothing came from Fleeta (his girl friend). In the second statement he said that there was blood on his clothing after he had intercourse with Teresa and that Fleeta questioned him about it. The court's instruction reminded the jury that they should consider both of the statements. The burden is on defendant not only to show error but that the error was prejudicial to him. 4 Strong's N.C. Index 3d, Criminal Law § 167. This he has failed to do.

We conclude that defendant received a fair trial free from prejudicial error.

No error.

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

NATIONWIDE MUTUAL INSURANCE COMPANY v. ANDREW CURRIE CHANTOS

No. 7

(Filed 3 October 1979)

1. **Automobiles § 46— opinion testimony as to speed—admissibility**

Defendant driver of an automobile could properly give his opinion as to the speed of his automobile just prior to the accident giving rise to this cause of action, since defendant's testimony revealed that he was a person of at least ordinary intelligence and experience and that he had a reasonable opportunity to judge the speed of the vehicle he was operating.

2. **Automobiles § 53.1— loss of control of vehicle—crossing into lane of oncoming traffic—reason other than negligence—jury question**

In an action to recover from defendant an amount paid to a third person for injuries sustained in an automobile accident where defendant stipulated that the car he was operating crossed over the median into the lane of traffic going in the opposite direction and collided with the third person's car, a jury question was nevertheless presented where defendant offered evidence that his car, which was travelling at 25 mph, skidded and went into a spin when he drove it onto a recently repaved bridge which was covered with rain water, and such evidence tended to show that defendant was in the lane of oncoming traffic from a cause other than his own negligence.

3. **Appeal and Error §§ 45.1, 63— misapprehension of law by trial court—refusal to set verdict aside—error not discussed in brief—abandonment of assignment of error**

Where the trial court would have set the verdict aside but for its misunderstanding that an earlier decision of the Supreme Court required that the matter be submitted to and determined by the jury, such error of the court in misconstruing the law would entitle plaintiff to have the cause remanded to the trial judge for consideration of its motion to set the verdict aside; however, because plaintiff did not raise the question in its brief, such assignment of error is deemed abandoned.

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

Justice HUSKINS dissenting.

ON certiorari to review judgment of *Bailey, J.*, entered at the 16 October 1978 Session of WAKE Superior Court.

This case has been tried four times and this marks its fourth appearance in the appellate division. The first trial resulted in a summary judgment in favor of defendant; that judgment was reversed by the Court of Appeals. *See* 21 N.C. App. 129, 203 S.E.

2d 421 (1974). The second trial also resulted in a summary judgment in favor of defendant and that judgment was reversed by the Court of Appeals. 25 N.C. App. 482, 214 S.E. 2d 438, *cert. denied*, 287 N.C. 465, 215 S.E. 2d 624 (1975).

Following the third trial, judgment was again entered for defendant. Plaintiff appealed from that judgment and this court allowed plaintiff's petition for discretionary review prior to determination by the Court of Appeals. In an opinion reported at 293 N.C. 431, 238 S.E. 2d 597 (1977), this court ordered a new trial and stated that the following issues should be submitted to the jury:

1. Was Charles Edward McDonald injured and damaged by the negligence of defendant?
2. Was plaintiff's settlement with McDonald made in good faith?
3. Was plaintiff's settlement with McDonald fair and reasonable?
4. What amount is plaintiff entitled to recover?

Said issues were submitted at the fourth trial. The jury answered the first issue "No" and, in view of that answer and instructions of the court, it did not answer the other issues. From judgment entered on the verdict in favor of defendant, plaintiff gave notice of appeal and we allowed plaintiff's petition for certiorari prior to determination of the case by the Court of Appeals.

Ragsdale & Liggett, by George R. Ragsdale and Robert R. Gardner, for plaintiff-appellant.

Johnson, Patterson, Dilthey & Clay, by Ronald C. Dilthey, for defendant-appellee.

BRITT, Justice.

Plaintiff instituted this action seeking reimbursement from defendant of the sum of $9,581.25 which plaintiff had paid to Charles E. McDonald (McDonald) in settlement for personal injuries and property damage sustained by McDonald in a collision with an automobile insured by a policy of insurance issued by plaintiff to Mr. and Mrs. David Earl Williams. Plaintiff's allegations are summarized as follows:

On 30 January 1971 Mrs. Williams allowed her minor son David to use her 1965 Mustang automobile which was insured by the policy referred to above. David, in turn, gave defendant, who was then 16 years old, permission to use the car. While in lawful possession of the Williams car, defendant negligently operated the same and caused a collision with an automobile operated by McDonald. Defendant's negligence was the proximate cause of serious personal injuries and substantial property damage suffered by McDonald. Plaintiff thereafter notified defendant that it was reserving all rights and defenses under the provisions of the Williams policy, but, nonetheless, under its reservation of rights and at the request of defendant, proceeded in good faith to settle the McDonald claim against defendant for the sum of $9,581.25. As a result of this settlement, plaintiff obtained a release which forever discharged defendant from any further liability to McDonald. Defendant was in lawful possession of the insured automobile. Therefore, plaintiff was required by the terms of G.S. 20-279.21(b) to extend coverage to defendant. Plaintiff is entitled to reimbursement from defendant pursuant to the provisions of G.S. 20-279.21(h) and the policy.

In his answer, the defendant admitted that while he was in lawful possession of the insured vehicle, he was involved in an accident with McDonald, and that McDonald suffered personal injuries and property damage in the collision. He further alleged that plaintiff was obligated to extend protection to him. He denied that the collision was caused by his negligence and that he was liable to plaintiff in any amount.

Plaintiff's evidence pertinent to this appeal tended to show: that the collision occurred during daylight hours on North Boulevard in the City of Raleigh at or near the bridge which carries boulevard traffic over Peace Street; that it was raining at the time; that North Boulevard at that point had three lanes for southbound traffic and three lanes for northbound traffic; that McDonald was traveling south on the inside lane; that defendant was traveling north; that the Mustang defendant was driving left the northbound lanes, went across a concrete median eight inches high into the southbound lanes and hit McDonald's car head on; and that the tires on the Mustang were slick.

Evidence favorable to defendant tended to show: Shortly before the collision, he drove onto the parking lot of a small shop-

ping center located on the east side of North Boulevard and a short distance south of Peace Street. It was raining. Before reentering the boulevard, defendant came to a complete stop at the north entrance of the shopping center parking lot. He then drove onto the boulevard, proceeding north. As he entered the bridge at about 25 m.p.h., the car went out of control into a spin, crossed the median into the southbound lane and collided with the McDonald car. A new coat of asphalt had been recently applied on the bridge. At the time defendant entered the bridge, it was covered with water. The speed limit at said point was 45 m.p.h.

Prior to trial defendant stipulated that on the date in question, while driving the Mustang north on Downtown Boulevard during a rainstorm, he left the northbound lane, crossed over into the southbound lanes and collided with McDonald's car which was traveling south.

For further elaboration on the evidence and the contentions of the parties, see the opinions of this court and the Court of Appeals cited above. While numerous questions were addressed in the prior appeals, the questions pertinent to this appeal are very limited and only they are discussed here.

In the first two assignments of error brought forward and discussed in its brief, plaintiff contends the trial court erred (1) in refusing to strike the opinion testimony of defendant relative to the speed of the automobile he was driving, and (2) in denying plaintiff's motion for directed verdict on the issues. We find no merit in these assignments, and, since they are closely related, we will discuss them together.

[1] On direct examination defendant testified that the bridge was some 75 to 100 yards north of the shopping center exit where he entered the boulevard from a completely stopped position; that he gradually increased his speed and moved over into the left northbound lane; that when he entered upon the bridge, he was traveling about 25 m.p.h.; and that he began to skid or spin immediately after going upon the bridge.

During a vigorous cross-examination, defendant steadfastly reaffirmed his statement that he was driving approximately 25 m.p.h.—30 m.p.h. at the most. He further stated that while he was not sure whether he observed the speedometer, he based his

opinion as to speed on the cautiousness with which he entered the boulevard, the "climatic situation", the fact that he did not accelerate very fast, the short distance he had traveled, and his impression that "the terrain around me was not flashing by". He also stated that while he knew his friend David Williams had "burned the rubber" on the Mustang, he did not know that the tires were slick.

It is well settled in North Carolina that a person of ordinary intelligence and experience is competent to state his opinion as to the speed of a vehicle when he has had a reasonable opportunity to observe the vehicle and judge its speed. 2 Strong's N.C. Index 3d, Automobiles § 46 and cases cited therein. A review of defendant's testimony clearly discloses that he was a person of at least ordinary intelligence and experience and that he had a reasonable opportunity to judge the speed of the vehicle he was operating. That being true, the evidence was competent, and its credibility was for the jury to decide.

[2] With respect to its motion for directed verdict, plaintiff argues that defendant's stipulation that he drove across the median and collided with McDonald head on establishes that defendant was negligent *per se*. Plaintiff further argues that defendant's testimony that he was traveling only 25 m.p.h. was of no probative value in light of the physical evidence presented and should, therefore, be disregarded.

We agree with plaintiff's assertion that a violation of G.S. 20-146 (requiring a vehicle operator to drive on the right side of the highway, with certain exceptions) is negligence *per se*. *Reeves v. Hill*, 272 N.C. 352, 158 S.E. 2d 529 (1968); *Lassiter v. Williams*, 272 N.C. 473, 158 S.E. 2d 593 (1968). However, a defendant may escape liability by showing that he was on the wrong side of the road from a cause other than his own negligence. *Anderson v. Webb*, 267 N.C. 745, 148 S.E. 2d 846 (1966). *See also Ramsey v. Christie*, 19 N.C. App. 255, 198 S.E. 2d 470 (1973).

While defendant in the instant case stipulated that the car he was operating crossed over the median into the southbound lane and collided with McDonald, he also offered evidence tending to show that he was in the southbound lane from a cause other than his own negligence. Therefore, a jury question was presented and

the trial court properly denied plaintiff's motion for a directed verdict on the first issue. *Anderson v. Webb, supra.*

Having held that plaintiff was not entitled to a directed verdict on the first issue, we need not consider its contention that it was entitled to a directed verdict on the other issues because answers in favor of plaintiff on those issues were dependent upon an answer in its favor on the first issue.

Plaintiff states its third question as follows: "Did the trial court err in denying Nationwide's Motion for a Judgment Notwithstanding the Verdict on the first issue and for refusing to set the verdict aside?"

For plaintiff to be entitled to judgment notwithstanding the verdict (n.o.v.) on the first issue, it must first be determined that it was entitled to a directed verdict on that issue. G.S. 1A-1, Rule 50. Having already held that plaintiff was not entitled to a directed verdict, we also hold that it was not entitled to a judgment n.o.v.

Finally, we consider whether the trial court erred in refusing to set the verdict aside. After the jury returned its verdict, plaintiff moved for judgment n.o.v. on the first issue and for a new trial on the grounds that the verdict was against the greater weight of the evidence. After arguments of counsel, the trial judge stated that he would have granted plaintiff's motion for directed verdict except that the Supreme Court had mandated that the issues be submitted. He thereupon denied the motion for judgment n.o.v. While the court properly denied plaintiff's motion for a directed verdict, it stated the wrong reason for doing so, the proper reasons being hereinabove stated.

[3] Counsel then made arguments on the question of setting the verdict aside after which the trial judge stated that he agreed with plaintiff's counsel. His Honor further stated: "The verdict of the jury shocks me but I'm not going to set it aside. And the only reason on earth I'm not going to set it aside is that the Supreme Court stipulated that it would be a jury issue."

Obviously, the trial judge was referring to our former opinion which set out the issues warranted by the pleadings and the evidence. Nevertheless, His Honor grossly misconstrued our opin-

ion in concluding that he had been deprived of his authority granted by G.S. 1A-1, Rule 59, and particularly his authority under subsection (7), to set the verdict aside because of insufficiency of the evidence to justify the verdict.[1]

Upon proper presentation to this court, the error of the trial judge in misconstruing the law would entitle plaintiff to have the cause remanded to the trial judge for consideration of its motion to set the verdict aside because of "insufficiency of the evidence to justify the verdict" or, to use the term in common usage, for the reason that the verdict "was against the greater weight of the evidence". Where a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light. 1 Strong's N.C. Index 3d, Appeal and Error § 63.

However, while plaintiff raised the question regarding the failure of the trial court to grant its motion to set the verdict aside for the reason that it was against the greater weight of the evidence, it abandoned the assignment in its brief. At no place in the brief does plaintiff argue the assignment with respect to this question. "Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned." Rule 28, Rules of Appellate Procedure, 287 N.C. 671, 741.

Furthermore, plaintiff concludes its brief with the following statements: "Nationwide has not asked for and does not seek a new trial. . . . Believing in its entitlement to the motions sought, Nationwide seeks only that relief here, and respectfully prays this Court to grant it a judgment n.o.v. on the first issue and directed verdicts on the second and third."

For the reasons stated, the verdict and judgment of the trial court will not be disturbed.

No error.

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

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1. Rule 59 supercedes former G.S. 1-207 which authorized the trial judge to set aside a verdict and grant a new trial "upon exceptions, or for insufficient evidence, or for excessive damages". The term "against the greater weight of the evidence" came into usage as synonymous with "insufficiency of the evidence". *See* 2 McIntosh, N.C. Practice and Procedure 2d, § 1596(4) and cases cited therein.

Justice HUSKINS dissenting.

At the fourth trial of this case the jury answered the first issue "No," saying that Charles Edward McDonald was not injured and damaged by the negligence of defendant. Plaintiff, among other things, moved to set the verdict aside as against the greater weight of the evidence. That motion, as well as others, was denied by Judge Bailey, not on the merits but on the ground that the decision of this Court following the third trial, 293 N.C. 431, 238 S.E. 2d 597 (1977), required him to submit certain issues to the jury and to render judgment accordingly. Plaintiff then petitioned this Court for a writ of mandamus to require Judge Bailey to consider the various motions on their merits. We treated that document as a petition for *certiorari* and allowed it. Therefore, in actuality, the question before this Court on this appeal is whether Judge Bailey erred in refusing to consider on its merits the plaintiff's motion to set the verdict aside.

Judge Bailey's comments during the arguments for and against the various motions after verdict clearly indicate that he acted under the misapprehension that this Court's decision, reported in 293 N.C. 431, required him (1) to submit the issues set out in that opinion whether or not the evidence offered at the fourth trial justified submission, (2) to sign a judgment on the verdict, (3) to refuse to set the verdict aside even though it be against the greater weight of the evidence, and (4) to prohibit a peremptory instruction on any and all of the first three issues regardless of what the evidence was. For example, Judge Bailey stated to counsel: The jury's verdict "shocks my conscience. . . . I don't see how the jury reached the conclusion to save my life. . . . The verdict of the jury shocks me but I am not going to set it aside. And the only reason on earth I'm not going to set it aside is that the Supreme Court stipulated that it would be a jury issue." The record contains other expressions of like import.

Our decision did not repeal the Rules of Civil Procedure and it should not have impaired Judge Bailey's common sense. If the verdict was so far out of line as to "shock" Judge Bailey's conscience, and I think it must have been, then he should have set the verdict aside.

For the reasons stated I dissent from the majority opinion and vote to remand this case so that Judge Bailey may pass upon

the motion to set the verdict aside in the exercise of his *sound* discretion. Justice is not served when unseemly verdicts are sustained on technicalities. We have said many times that where a ruling or a judgment is based upon a misapprehension of applicable law, the cause will be remanded in order that the matter may be considered in its true legal light. *See Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973); *Myers v. Myers*, 270 N.C. 263, 154 S.E. 2d 84 (1967); *Davis v. Davis*, 269 N.C. 120, 152 S.E. 2d 306 (1967).

STATE OF NORTH CAROLINA v. AUBREY LEWIS POOLE

No. 9

(Filed 3 October 1979)

1. **Homicide § 30— first degree murder charged—instruction on second degree murder required**

   The trial court in a first degree murder prosecution should have instructed the jury on second degree murder, since (1) evidence that defendant had a conversation with deceased inside and outside a bar, told deceased's companion that deceased "had gone for bad," ran to his pickup truck, pulled out his rifle, slung the barmaid out of the way when she tried to intercede, and then shot deceased once was sufficient for the jury to infer that defendant did not think before acting and did not act cooly and calmly with premeditation and deliberation; and (2) where the State relies upon premeditation and deliberation to support a conviction of first degree murder, the court must submit to the jury an issue of murder in the second degree.

2. **Criminal Law §§ 73.2, 73.4— spontaneous utterance—corroborative testimony**

   Testimony by an eyewitness to a murder that, when defendant ran to his pickup truck to get his rifle, a barmaid ran up to the truck and said, "Pee Wee, stop, don't do it," was admissible as a spontaneous utterance; furthermore, testimony by a detective as to what the eyewitness told him was admissible to corroborate the eyewitness's testimony.

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

Justice HUSKINS dissenting in part.

APPEAL by defendant from *Collier, J.*, at the 2 October 1978 Criminal Session of IREDELL Superior Court.

The defendant was charged in an indictment, proper in form, with the first degree murder of Ivory Alfonzo Vanderburg. In a warrant he was charged with the misdemeanor of assault by pointing a gun at James Edward Caldwell. The defendant pleaded not guilty to both charges, and the cases were consolidated for trial over the objection of the defendant.

The evidence for the State tended to show the following:

After playing in a softball game on 22 April 1978, Vanderburg asked Caldwell to take him home. The two stopped off for a beer at the home of Mr. Redfer, the manager of their ball team. After the two left Redfer's house in Caldwell's car, they proceeded on Highway 21 toward Vanderburg's house. As they approached Baxter's, which is a grocery store—beer parlor—gas station located on Highway 21 between Mooresville and Troutman, Vanderburg suggested that they stop for a beer.

When they went inside the station, Caldwell noticed that there were twenty to twenty-five people in the bar area, and he and Vanderburg were the only blacks present. Caldwell ordered two beers and spoke to the barmaid because he knew her "indirectly from other places." Caldwell felt a rush of air go past his head (apparently resulting from defendant swinging at him with his fist) which caused him to drop his beer. He turned and faced the defendant, Aubrey Lewis Poole, whose nickname was Pee-Wee. Caldwell asked the defendant why he had swung at him, and defendant said it was because the barmaid was his girl. Caldwell explained that he knew her. Defendant apologized and replaced his beer. Defendant and Vanderburg then had a conversation, but Caldwell testified that no harsh words were spoken by anyone in the bar. Caldwell grabbed Vanderburg's arm and the two left the bar. Defendant and everyone else in the bar followed the two as they left.

Outside, defendant approached Caldwell and apologized again and then told him that he could come back any time, but that Caldwell's friend "had gone for bad." Defendant then exchanged a few words with Vanderburg which Caldwell could not make out. Defendant then ran to his truck and pulled out a rifle from behind the seat. The barmaid ran from the door of the bar to the truck and said, "Pee Wee, stop, don't do it." Defendant "slung her out of the way" and put a clip in his rifle. Vanderburg began to run,

and defendant fired one round. Vanderburg dropped to the pavement. Defendant then walked up to Caldwell, pointed the gun at him, and said that he would have to kill him also since he was the only witness. Caldwell pleaded with the defendant, and defendant told him he could go. Officer Dagenhart, who had interviewed Caldwell, substantially corroborated Caldwell's testimony.

Defendant relied upon the defense of alibi. Six witnesses testified for the defense that they were inside Baxter's when they heard a shot outside. All six witnesses testified that the defendant was also inside, working at the bar when the shot was fired. The witnesses testified that everyone in the bar, including the defendant, went outside *after* the shot was fired in order to see what had happened.

The jury found the defendant guilty of first degree murder and assault by pointing a gun. At the sentencing phase on the murder conviction, the jury recommended life imprisonment. The trial court consolidated the two convictions for judgment and sentenced the defendant to life imprisonment. The trial court imposed no separate sentence for the assault conviction and there was no appeal to the Court of Appeals and thus, no motion to bypass that court on the assault conviction. The defendant has properly appealed his murder conviction to this Court.

Other facts relevant to the decision will be related in the opinion below.

Jack R. Harris and Edwin A. Pressly for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Elizabeth C. Bunting for the State.

COPELAND, Justice.

[1] In his sixteenth assignment of error, the defendant claims the trial court erred in failing to submit the issue of second degree murder to the jury. We agree; therefore, the defendant must be granted a new trial.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17; *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969).

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963).

Premeditation means thought beforehand for some length of time, however short. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975).

Deliberation means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose. . . . *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769 (1961).

The jury should be instructed on a lesser included offense when there is evidence from which the jury could find that such lesser included offense was committed. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). Error in failing to submit the question of defendant's guilt of a lesser degree of the same crime is not cured by a verdict of guilty of the offense charged because it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly submitted to the jury. *State v. Duboise, supra.*

Here, there is some evidence from which the jury could infer that the defendant killed Vanderburg without premeditation and deliberation. The evidence discloses that the defendant had a conversation with Vanderburg both inside and outside the bar. Caldwell did not overhear those conversations, but the defendant did tell Caldwell while apologizing to him that his friend Vanderburg "had gone for bad." Immediately after the exchange of words between the defendant and Vanderburg, defendant ran to his pickup truck, pulled out his rifle and clip, "slung" the barmaid out of the way when she tried to intercede, and then the defendant shot Vanderburg once.

From this evidence a jury could infer that the defendant did not think before acting and did not act cooly and calmly with premeditation and deliberation. Therefore, it was error for the trial court not to instruct on second degree murder. This is not to say that it was error for the trial court to instruct on first degree murder. The circumstantial evidence of premeditation and

deliberation cuts both ways on the facts of this case, and the court should have instructed on both first and second degree murder.

Assuming *arguendo* that there was no positive evidence of the absence of premeditation and deliberation, the trial court was still required to submit the issue of second degree murder to the jury. In the instant case the state relied upon premeditation and deliberation to support a conviction of murder in the first degree. In *State v. Harris*, 290 N.C. 718, 730, 228 S.E. 2d 424, 432 (1976), we held 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." This requirement is present because premeditation and deliberation are operations of the mind which must always be proved, if at all, by circumstantial evidence. If the jury chooses not to infer the presence of premeditation and deliberation, it should be given the alternative of finding the defendant guilty of second degree murder. *State v. Keller*, 297 N.C. 674, 256 S.E. 2d 710 (1979).

For the above two reasons, the defendant is entitled to a new trial.

We note that the appeal of the assault conviction is not properly before us as the Court of Appeals has original jurisdiction of appeals of misdemeanor convictions. G.S. 7A-27. It would have been the better practice for the trial judge to have imposed a separate sentence for the assault conviction and then run it concurrently with the murder sentence, if that is what he desired to accomplish.

We shall comment only briefly upon those of his remaining assignments of error which raise issues likely to recur on retrial.

In his eighth assignment of error, defendant raises two issues concerning hearsay statements that the trial court admitted into evidence over defendant's objection.

[2] Caldwell testified that when the defendant ran to his pickup truck to get his rifle, the barmaid ran up to the truck and said, "Pee Wee, stop, don't do it." This statement is clearly admissible as a "spontaneous and instinctive declaration of the witness

springing out of the transaction and relating to the contemporaneous acts" of the defendant. *State v. Bethea*, 186 N.C. 22, 25, 118 S.E. 800, 801 (1923).

Detective Dagenhart testified that Caldwell told him that, "he heard his (the defendant's) name mentioned as Pee Wee." This statement appears to contain double hearsay because it states what Caldwell told the detective that he heard someone else say. What Caldwell heard someone else say has been discussed above and found to meet a hearsay exception. The detective's testimony about what Caldwell told him corroborates Caldwell's testimony because Caldwell had already testified that the barmaid called the defendant, "Pee Wee." Testimony by one witness that corroborates the testimony of another witness is admissible for that purpose and is not hearsay since it is not offered to prove the truth of the matter asserted therein. *State v. Best*, 280 N.C. 413, 186 S.E. 2d 1 (1972). The prior statement should be considered only for the purpose of corroboration, and the trial court should so instruct the jury. However, when the limiting instruction is not asked for by the defendant, it is not error if it is not given. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied*, 410 U.S. 958 (1973).

We deem it unnecessary to discuss defendant's remaining assignments of error, inasmuch as the matters which gave rise to them probably will not recur on retrial.

New trial.

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

Justice HUSKINS dissenting in part.

This Court held in *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976), 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." We reaffirmed that holding in *State v. Keller*, 297 N.C. 674, 256 S.E. 2d 710 (1979). On further reflection, however, I am convinced that *Harris* and *Keller* perpetuate an unnecessary refinement in the law.

Submission of a lesser included offense when there is no evidence to support the milder verdict is not required when the indictment charges felony murder, arson, burglary, robbery, rape, larceny, felonious assault, or any other felony whatsoever. In all such cases if the evidence tends to show that the crime charged in the indictment was committed and there is no evidence tending to show commission of a crime of lesser degree, the court correctly refuses to charge on unsupported lesser degrees. The *presence* of evidence tending to show commission of a crime of lesser degree is the determinative factor. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971), and cases there cited; *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954).

For the reasons stated I no longer support the majority view which requires the court to submit second degree murder as a permissible verdict in a prosecution for premeditated first degree murder when there is no evidence to support the lesser degree.

STATE OF NORTH CAROLINA v. MATHIAS BOLLING WINFREY, JR.

No. 23

(Filed 3 October 1979)

Homicide § 19.1— defense of accident—evidence of deceased's reputation inadmissible

In a homicide prosecution in which defendant relied on the defense of accident, the trial court properly excluded testimony by the victim's former wife that the victim was a dangerous man and that she had told defendant of the victim's reputation prior to the time of the killing, since evidence of the victim's character traits is admissible under certain circumstances only in cases involving self-defense and is not relevant to a determination of whether defendant's pistol discharged accidentally and inflicted the fatal wounds.

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

APPEAL by defendant from *Baley, S. J.*, 22 May 1978 Session of MONTGOMERY Superior Court.

Defendant was charged in an indictment, proper in form, with the first degree murder of William John Janieri. He entered a plea of not guilty.

The evidence in this case may be summarized as follows: Defendant and Donna Small had dated and were engaged to be married during the period from January, 1977, to May, 1977. Thereafter, Ms. Small began dating the victim. On 3 November 1977, defendant went to Janieri's place of business to talk with him about accusations by Janieri that defendant had set fire to his store. He carried a loaded semi-automatic pistol in his raincoat because, according to him, he knew Janieri had a violent, unpredictable temper. He was afraid of him and carried the gun only as a "prop."

Defendant stated to an S.B.I. agent that the pistol discharged accidentally when Janieri reached "double handed" for him, touching the gun.

There was expert medical testimony that Janieri died as a result of two gunshot wounds to the head, fired at a range of six to ten inches from the victim's head.

At trial, defendant did not contend that he acted in self-defense but relied on the defense of accident. The jury returned a verdict of guilty of murder in the second degree, and defendant appealed from judgment imposing a sentence of imprisonment for a period of sixty years. The Court of Appeals in an opinion by Judge Erwin with Judge Martin (Robert M.) concurring and Judge Mitchell dissenting found no error in the trial. Defendant appealed to this Court pursuant to G.S. 7A-30(2).

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

Van Camp, Gill & Crumpler, P.A., by James R. Van Camp, for defendant appellant.

BRANCH, Chief Justice.

The sole question presented by this appeal is whether the trial judge erred in excluding testimony of the victim's former wife that he was a dangerous man and that she had told defendant of the victim's reputation prior to the time he was killed. Defendant contends that the excluded testimony was admissible (1) to show that deceased was the aggressor; (2) to show that defendant's fear of deceased was reasonable; (3) to corroborate

defendant's claim that he carried the gun with him because of his fear of the deceased; and (4) to corroborate defendant's version of the shooting.

The general rule is that evidence of the character of a third person who is not a witness or a party to an action is inadmissible. *State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (1978); *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967). *See* Stansbury's N. C. Evidence (Brandis Rev. 1973), § 105 and cases cited therein. Well-settled exceptions to the general rule are recognized in cases where there is a plea of self-defense. In such a case, evidence of a deceased's violent or dangerous character is admissible where (1) such character was known to the accused, or (2) the evidence of the crime is all circumstantial or the nature of the transaction is in doubt. *State v. Turpin*, 77 N.C. 473 (1877). The same rules are equally applicable to homicide cases and to both criminal and civil assault and battery cases. *See* Stansbury, *supra*, § 106 and cases cited therein.

Generally, evidence of a victim's violent character is irrelevant, but when the accused knows of the violent character of the victim, such evidence is relevant and admissible to show to the jury that defendant's apprehension of death and bodily harm was reasonable. *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967). Clearly, the reason for this exception is that, "a jury should, as far as is possible, be placed in defendant's situation and possess the same knowledge of danger and the necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life." *Id.* at 219, 154 S.E. 2d at 52.

The second of the recognized exceptions to the general rule permits evidence of the violent character of a victim because it tends to shed some light upon who was the aggressor since a violent man is more likely to be the aggressor than is a peaceable man. The admission of evidence of the violent character of a victim which was unknown to the accused at the time of the encounter has been carefully limited to situations where all the evidence is circumstantial or the nature of the transaction is in doubt. *See* Stansbury, *supra*, § 106; *State v. Blackwell*, 162 N.C. 672, 78 S.E. 316 (1913). The relevancy of such evidence stems from the fact that in order to sustain a plea of self-defense, it must be made to appear to the jury that the accused was not the aggressor. *See State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971).

Defendant contends that the exception should be extended to cases involving defenses other than self-defense, and more specifically, that the exceptions should apply where the defense of accident is raised. We disagree.

The North Carolina courts have consistently limited the recognized exceptions to the general rule to cases involving self-defense and in the case of *State v. Rawley*, 237 N.C. 233, 74 S.E. 2d 620 (1953), this Court specifically declined to extend the exception to the defense of accident.

In the instant case, defendant does not rely on self-defense. He relies solely on the defense of accident which, in effect, says that the homicide did not result from any volitional act on his part. Thus, there could be no relevancy in evidence tending to show that he acted reasonably. The only issue before the jury was whether the pistol discharged accidentally and, therefore, evidence of the victim's character traits could shed no light on whether the pistol accidentally discharged and inflicted the fatal wounds.

We hold that the trial judge properly excluded testimony from the victim's former wife to the effect that he was a dangerous man and that she had made defendant aware of the victim's reputation for violence prior to 3 November 1977.

The decision of the Court of Appeals is

Affirmed.

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

STATE OF NORTH CAROLINA v. JAMES EARL EVANS

No. 32

(Filed 3 October 1979)

1. Criminal Law § 99.9— court's questioning of witnesses—no expression of opinion

The trial court did not express an opinion in a prosecution for burglary, assault with intent to rape and larceny when he questioned two witnesses as

to the accuracy of fingerprint impressions taken from the crime scene and from defendant's hands.

2. **Burglary and Unlawful Breakings § 5; Assault and Battery § 14.8; Larceny § 7— first degree burglary—assault on female—larceny of money**

In a prosecution for burglary, assault with intent to rape and larceny, evidence was sufficient to be submitted to the jury where it tended to show that defendant entered the victim's house during the night, held a knife to her throat, felt her breasts and pubic area, left his fingerprints on the kitchen windowsill, and took money from a wallet in the house.

3. **Assault and Battery § 14.8— assault on female—defendant's age—jury's estimate**

In a prosecution for assault with intent to commit rape, the jury could find defendant guilty of the offense of assault on a female, though there was no evidence that defendant was over 18, since the jury had ample opportunity to look at defendant and could estimate his age.

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

APPEAL by defendant from judgments of *Rouse, J.*, entered at the 4 December 1978 Criminal Session of PITT Superior Court.

Upon pleas of not guilty, defendant was tried on bills of indictment charging him with (1) first-degree burglary, (2) assault on a female with intent to commit rape, and (3) felonious larceny. Evidence presented by the state is summarized in pertinent part as follows:

On the night of 4-5 July 1978, Vickie Galloway and Sandra Atkinson were the sole occupants of a dwelling house located at 1110 Forbes Street in the City of Greenville, N. C. Ms. Galloway went to bed around midnight. At 5:00 or 5:30 the next morning she awoke and found a man crouching beside her bed. She sat up and screamed after which the intruder pushed her back down on the bed, put a butcher knife to her throat and told her not to scream.

The intruder then told Ms. Galloway that he was not going to hurt her, that he just wanted "to feel of her". While he held the knife to her throat with one hand, he felt of her breasts and pubic area with the other.

Although it was still nighttime, the light from nearby streetlights enabled Ms. Galloway to get a clear view of her assailant and she positively identified defendant as that person. After staying in Ms. Galloway's room approximately ten minutes, defendant left the house by way of the back door.

After defendant left the house, Ms. Galloway awakened Ms. Atkinson and they called police. A check of the house disclosed that a screen which was intact when the women went to bed had been removed from a kitchen window. Defendant had not been given permission to enter the house.

Ms. Atkinson went to bed around 2:00 a.m. Before doing so she left her wallet and car keys on a table in the kitchen. After Ms. Galloway called her at around 5:15 a.m., she went to the kitchen and found that $3.00 was missing from her wallet.

Defendant offered no evidence.

The jury returned verdicts finding defendant guilty of first-degree burglary, guilty of assault on a female and not guilty of larceny. On the burglary charge, the court entered judgment imposing a life sentence. On the assault charge, the court imposed a prison sentence of two years.

Defendant appealed from both judgments and we allowed the motion to bypass the Court of Appeals on the assault charge.

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

Dallas Clark, Jr., for defendant-appellant.

BRITT, Justice.

[1] By his first assignment of error defendant contends the trial court expressed an opinion on the evidence in violation of G.S. 15A-1232 (formerly G.S. 1-180). There is no merit in this assignment.

This contention relates to the testimony given by S.B.I. Agent Glenn Bozarth and Identification Officer Pat Bundy, Jr., of the Greenville Police Department. Mr. Bozarth testified that state's exhibits 9 and 10 were cards bearing latent fingerprints which he lifted from impressions on the windowsill of the kitchen in question; and that exhibits 11 and 12 were cards bearing latent fingerprints which he lifted from a bottle of perfume in said kitchen. Thereafter the trial judge asked the witness if exhibits 9, 10, 11 and 12 were true and accurate representations of the print impressions "as you observed them and found them in the top in-

side of the kitchen windowsill and [on] the bottle of Chantilly perfume". The witness gave an affirmative answer to the question.

Mr. Bundy testified that state's exhibit 4 had on it the inked impressions of the fingers and palms of defendant which he (Mr. Bundy) had taken. Thereafter, the court asked the witness if "the fingerprint and palm print impressions which appear on State's #4 truly and accurately portray the fingerprint and palm print impressions of the defendant in this case." The witness answered in the affirmative.

"It is elementary that it is error for the trial judge to express or imply, in the presence of the jury, any opinion as to the guilt or innocence of the defendant, or as to any other fact to be determined by the jury, or as to the credibility of any witness. It is immaterial how such opinion is expressed or implied, whether in the charge of the court, in the examination of a witness, in the rulings upon objections to evidence or in any other manner. . . . (Citations.)" *State v. Freeman*, 280 N.C. 622, 626-27, 187 S.E. 2d 59 (1972). However, it is also clear that the trial judge may direct questions to a witness for the purpose of clarifying his testimony and promoting a better understanding of it. *State v. Freeman, supra; State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied*, 393 U.S. 1087 (1969).

While it would have been more appropriate for the district attorney to have asked the questions complained of here, we hold that the trial judge did not err in asking them under the circumstances of this case. The questions were appropriate to clarify the testimony of the witnesses and to promote a better understanding of the testimony.

In the other two assignments of error argued in his brief, defendant contends that the trial court erred (1) in denying his motions for nonsuit and (2) in submitting assault on a female as an alternative verdict in the assault case. These contentions have no merit.

[2] Burglary in the first degree is the breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); G.S. 14-51. The evidence presented in this case and reviewed above was sufficient to prove every element of the offense of burglary in the first degree.

[3] With respect to the assault charge, defendant argues that while the jury in effect found him not guilty of assault with intent to commit rape, it found him guilty of assault on a female; that one of the elements of assault on a female is that the offender be a male person more than 18 years of age; and that there was no evidence that he was over the age of 18.

A charge of assault with intent to commit rape includes the lesser offense of assault on a female. *State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963); *State v. Beam*, 255 N.C. 347, 121 S.E. 2d 558 (1961). While it is true that one of the elements of assault on a female is that the defendant be more than 18 years old, the jury may look upon a person and estimate his age. *State v. McNair*, 93 N.C. 628 (1885); 1 Stansbury's N.C. Evidence (Brandis Rev.) § 119. The jury had ample opportunity to view the defendant in this case and estimate his age.

Furthermore, any error that might have been committed by the trial court relative to the assault charge was harmless. The judgments did not provide that either of the sentences imposed would begin at the expiration of the sentence in the other; therefore, the sentences will run concurrently. 4 Strong's N.C. Index 3d, Criminal Law § 140.1. It is well settled that where concurrent sentences are imposed on counts of equal gravity, or concurrent sentences of equal length are imposed, any error in the charge relating to one count only is harmless. *Id.* § 171.2. Clearly, this principle would apply to the case at hand where the two-year sentence imposed for assault will run concurrently with the life sentence imposed for first-degree burglary.

Defendant received a fair trial free from prejudicial error.

No error.

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

STATE OF NORTH CAROLINA v. ZEB VANCE GREENE, JR.

No. 6

(Filed 3 October 1979)

Criminal Law § 177— evenly 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 judgment of the trial court is affirmed without becoming a precedent.

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

APPEAL by defendant from judgment of *Howell, J.*, 2 October 1978 Criminal Session, Superior Court of AVERY County.

Defendant was tried upon a bill of indictment, proper in form, charging him with first degree murder of Dallas Hicks on 18 February 1976 in Avery County.

The State offered evidence tending to show that on the evening of 18 February 1976 Dallas Hicks and wife, Pauline Hicks were in their home in the Linville Falls community watching television. About 9:20 p.m. two men wearing masks opened the door and walked in unannounced. One of them said: "This is a Goddamn hold-up." Dallas Hicks said: "Boys, sit down on the couch, I know you're here for fun." At that point one of the intruders shot Mr. Hicks with a twenty-two caliber rifle. Dallas Hicks then picked up a hammer lying beside his chair and made about three steps from where he was sitting and the same intruder shot him again. Both men then fled into the night.

Dallas Hicks collapsed after the second shot and his wife sought help at a nearby neighbor's house. Officers and an ambulance were summoned. Mr. Hicks talked freely during the trip to the hospital, relating what had occurred, but was dead on arrival.

Defendant was identified by his accomplice Mickey Cox who testified that he and defendant committed the robbery; that defendant shot Dallas Hicks and he, Cox, hid the gun in the dirt at Pineola. Later Cox said he recovered the weapon and turned it over to the sheriff. Cox testified that he covered his face with a

white T-shirt and defendant wrapped a towel around his head. Cox said it was their intention to rob Mr. Hicks at gunpoint but the robbery failed when the shooting occurred.

Frank G. Satterfield, a ballistics expert who worked for many years with the State Bureau of Investigation, testified that the shell casings found in the Hicks residence had been fired in the gun identified by Mickey Cox. However, he was unable to say whether the bullets removed from the body of Dallas Hicks were fired from that gun.

Defendant did not testify but offered the testimony of Dawn Greene, a girl friend who is now his wife, Alice Greene, his mother, Zeb V. Greene, Sr., his father, Geneva Greene, his sister, and Jesse Greene, his brother. Their testimony generally tended to establish alibi.

Defendant was convicted of murder in the first degree and sentenced to life imprisonment. He was also found guilty of attempted armed robbery of Dallas Hicks but judgment in that case was arrested since the attempted robbery constituted the underlying felony which made the killing a capital offense.

Rufus L. Edmisten, Attorney General, by James E. Magner, Jr., and Archie W. Anders, Assistant Attorneys General, for the State.

Joseph W. Seegers, attorney for defendant appellant.

PER CURIAM.

Justice Brock was absent on account of illness and did not participate in the consideration and decision of this case. The remaining six justices are equally divided as to whether the trial court prejudicially erred in refusing to excuse juror Raymond Simmons for cause, thus forcing defendant to use a peremptory challenge to remove him. In accordance with the usual practice and long established rule, this equal division requires that the judgment of the trial court be affirmed without becoming a precedent. *Mortgage Co. v. Real Estate, Inc.*, 297 N.C. 696, 256 S.E. 2d 688 (1979); *Townsend v. Railway Co.*, 296 N.C. 246, 249 S.E. 2d 801 (1978); *Sharpe v. Pugh*, 286 N.C. 209, 209 S.E. 2d 456 (1974); *State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974); *Parrish v.*

Publishing Company, 271 N.C. 711, 157 S.E. 2d 334 (1967); *Burke v. R.R.*, 257 N.C. 683, 127 S.E. 2d 281 (1962); *State v. Smith*, 243 N.C. 172, 90 S.E. 2d 328 (1955); *James v. Rogers*, 231 N.C. 668, 58 S.E. 2d 640 (1950); *Parsons v. Board of Education*, 200 N.C. 88, 156 S.E. 244 (1930); *Hillsboro v. Bank*, 191 N.C. 828, 132 S.E. 657 (1926); *McCarter v. Railway Co.*, 187 N.C. 863, 123 S.E. 88 (1924). It is so ordered, no error appearing with respect to the remaining assignments.

Affirmed.

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

THE STATE OF NORTH CAROLINA v. CHARLOTTE LIBERTY MUTUAL INSURANCE COMPANY

THE STATE OF NORTH CAROLINA v. GEORGE HENRY TALBOT

THE STATE OF NORTH CAROLINA v. MID-SOUTH INSURANCE COMPANY

THE STATE OF NORTH CAROLINA v. WALTER BURNS CLARK

No. 10

(Filed 3 October 1979)

Criminal Law § 177— evenly divided Court—decision 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 is affirmed without becoming a precedent.

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

APPEAL by the state from a divided panel of the Court of Appeals. The opinion of that court by *Judge Erwin* in which *Chief*

Judge Morris concurred and *Judge Harry Martin* dissented is reported at 39 N.C. App. 557, 251 S.E. 2d 867 (1979). The Court of Appeals affirmed the judgment of *Judge Preston* entered in WAKE Superior Court on 11 July 1978 which affirmed earlier orders entered by *Judge Winborne* of WAKE District Court on 27 April 1978 quashing all criminal summonses issued in these consolidated cases.

These cases began as prosecutions under Articles 22 and 22A in Subchapter VIII of Chapter 163 entitled, respectively, "Corrupt Practices and Other Offenses Against the Elective Franchise" and "Regulating Contributions and Expenditures in Political Campaigns." More specifically the prosecutions were brought under G.S. 163-270 and G.S. 163-278.19(a). The individual defendants, George Talbot and Walter Clark, are presidents, respectively, of the corporate defendants, Charlotte Liberty Mutual Insurance Company and Mid-South Insurance Company. Prosecutions against the individual and corporate defendants began in Wake District Court with the issuance pursuant to G.S. 15A-303 of the criminal summonses in question. The summons issued against Charlotte Liberty Mutual Insurance Company alleged:

> "THE UNDERSIGNED FINDS THAT THERE IS PROBABLE CAUSE TO BELIEVE that on or about the eighth day of January, 1977, in the county named above, the Charlotte Liberty Mutual Insurance Company was an insurance company doing business in North Carolina and did pay five hundred dollars in United States currency for and in behalf of and in aid of the successful candidate for the political office of Commissioner of Insurance of the State of North Carolina John Randolph Ingram and for the political purpose of honoring the said Commissioner and demonstrating widespread grass roots support for his programs by support of a large attendance at an appreciation breakfast preceding his inaugural ceremonies in violation of GS 163-270 and GS 163-278.19(a); that the said money was paid by means of a corporate check dated January 8, 1977, payable to John Ingram Breakfast in the amount of $500.00 drawn against account number 1030162 of North Carolina National Bank, Charlotte, N.C., signed George H. Talbot and Lorraine Woods, a copy of which is attached and incorporated herein by reference."

The summons against Talbot alleged:

"THE UNDERSIGNED FINDS THAT THERE IS PROBABLE CAUSE TO BELIEVE that on or about the eighth day of January, 1977, in the county named above, you were President and Treasurer and a Director of Charlotte Liberty Mutual Insurance Company and did participate in, aid, abet, advise and consent to violation of GS 163-270 and GS 163-278.19(a) by said corporation and association in the payment of five hundred dollars in United States currency for and in behalf of and in aid of the successful candidate for the political office of Commissioner of Insurance of the State of North Carolina John Randolph Ingram and for the political purpose of honoring the said Commissioner and demonstrating widespread grass roots support for his programs by support of a large attendance at an appreciation breakfast preceding his inaugural ceremonies in violation of GS 163-270 and GS 163-278.19(a); that the said money was paid by means of a corporate check dated January 8, 1977, payable to John Ingram Breakfast in the amount of $500.00 drawn against account number 1030162 of North Carolina National Bank, Charlotte, N. C., signed by George H. Talbot and Lorraine Woods, a copy of which is attached and incorporated herein by reference."

Summonses issued against defendants Mid-South Insurance Company and Walter Clark were substantively identical to those issued against Charlotte Liberty Mutual Insurance Company and George Talbot, respectively.

General Statute 163-270 provides in pertinent part:

"No insurance company . . . shall . . . pay . . . money . . . for or in aid of any political party, committee or organization . . . or in aid of any candidate for political office . . . or for any political purpose whatsoever. . . . An officer . . . for any corporation or association which violates any of the provisions of this section, who participates in, aids, abets, advises or consents to any such violation . . . shall be guilty of a misdemeanor, and shall be punished by imprisonment for not more than one year and a fine of not more than one thousand dollars ($1,000)."

General Statute 163-278.19(a) provides in pertinent part:

"[I]t shall be unlawful for any . . . insurance company . . .

(1) To make any contribution . . . in aid or in behalf of or in opposition to any candidate or political committee in any election or for any political purpose whatsoever;

(2) To pay . . . money . . . for or in aid of or in opposition to any candidate or political committee or for or in aid of any person, organization or association organized or maintained for political purposes, or for or in aid of or in opposition to any candidate or political committee or for any political purpose whatsoever; and

(3) To reimburse or indemnify any person or individual for money or property so used or for any contribution or expenditure so made;

and it shall be unlawful for any officer . . . of any corporation . . . to aid, abet, advise or consent to any such contribution or expenditure."

Violations of G.S. 163-278.19 are punishable by a fine of not less than One Hundred Dollars ($100) nor more than Five Thousand Dollars ($5000) or imprisonment for not more than one year or by both fine and imprisonment.

The Court of Appeals concluded that the summons in each case was insufficient to charge an offense prohibited by the statutes in question.

While not necessary to a determination of the legal questions presented, the Court of Appeals pointed out that the facts underlying the prosecutions in these cases are not really in dispute. After Commissioner of Insurance Ingram was reelected in the Fall, 1976, both individual defendants received an invitation to join the Commissioner and Mrs. Ingram at a buffet breakfast on 8 January 1977 at a specified location in Raleigh. Both attended the breakfast. While at the breakfast defendant Talbot was asked to make a contribution to help defer its cost. He asked if he could use a company check and was told that he could

because the breakfast was not a political function. He then issued a $500 check to "John Ingram Breakfast" on the account of Charlotte Liberty Mutual Insurance Company. No attempt has ever been made to hide the check or the fact of its existence. Similarly defendant Clark was contacted by telephone three times before the breakfast and asked if he could make a contribution to defray its expenses. Five Hundred Dollars was the amount suggested. After being assured that it was not a political function, defendant Clark sent his company's check for $500 to "John Ingram Appreciation Breakfast" from Fayetteville to Mr. Howard Bloom in Roanoke Rapids.

Rufus L. Edmisten, Attorney General, by Christopher P. Brewer, Associate Attorney, for the State.

Cansler, Lockhart, Parker & Young, P.A., by Joe C. Young, Bruce M. Simpson, Attorneys for defendants Charlotte Liberty Mutual Insurance Company and George Henry Talbot.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins, Attorneys for defendant appellees Mid-South Insurance Company and Walter Burns Clark.

PER CURIAM.

Justice Brock, being absent on account of illness, did not participate in the consideration and decision of this case. The remaining six justices are equally divided as to whether the Court of Appeals erred in concluding that each summons issued failed to charge a criminal offense specified by G.S. 163-270 or G.S. 163-278.19(a) and in affirming the orders of the trial divisions quashing each summons. Therefore, in accordance with our practice, the decision of the Court of Appeals is left undisturbed; but it should not be considered to have precedential value. *Mortgage Co. v. Real Estate, Inc.*, 297 N.C. 696, 256 S.E. 2d 688 (1979); *Townsend v. Railway Co.*, 296 N.C. 246, 249 S.E. 2d 801 (1978); *State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974); *see also State v. Greene*, 298 N.C. 268, 258 S.E. 2d 71 (1979), and cases therein cited; *Starr v. Clapp*, 298 N.C. 275, 258 S.E. 2d 348 (1979).

Affirmed.

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

ROBERT D. STARR AND ROBERT D. STARR, GUARDIAN AD LITEM FOR BRETT R. STARR v. JOHN G. CLAPP, JR. AND GLADYS C. CLAPP

No. 24

(Filed 3 October 1979)

Appeal and Error § 64— evenly divided Court—decision 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 is affirmed without becoming a precedent.

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

ON appeal by defendants from the decision of the Court of Appeals, 40 N.C. App. 142, 252 S.E. 2d 220 (1979) (*Vaughn, J.*, concurred in by *Arnold, J.*, with *Hedrick, J.*, dissenting), which reversed the order of *Graham, S.J.* entered in the 22 November 1977 Session of GUILFORD County Superior Court denying defendants' motions for directed verdict and judgment notwithstanding the verdict.

Plaintiff, a minor twelve years of age at the time of the accident, was severely and permanently injured on 16 November 1975 when the motorcycle he was riding struck a cable erected by defendants across a private road located on a farm owned by the defendants.

At trial plaintiff's evidence tended to show the following:

Plaintiff's grandfather had obtained permission from a Mr. Pegram for plaintiff to ride his motorcycle on the private road located on the farm owned by Pegram. In January, 1975, Pegram sold the farm to the defendants, but he continued to live on the farm until September, 1975. Plaintiff rode his motorcycle on the road approximately twenty to twenty-five times between January and September, 1975. During this time defendants had problems with trespassers on the road. In the summer of 1975 while Pegram still lived on the farm, defendants put up "no trespass"

and "posted land" signs to prevent trespassers from going on the property. About a month or two before the accident, plaintiff saw one of the "no trespass" signs on a telephone pole on the right side of the road, but plaintiff believed that Pegram still owned the farm and was never informed that the "no trespass" signs applied to him. Plaintiff rode his motorcycle on the road approximately ten times in September and early October after seeing the "no trespass" sign. Plaintiff had not ridden on the road for about one month immediately preceding the day of the accident.

After Pegram vacated the farmhouse in September, 1975, defendants prepared to rent out the house. At no time did defendants live on the farm. There were increasing problems with trespassers using and littering the roadway. As a result, defendants decided to erect a cable across the road to control the traffic to the house. Plaintiff and others had ridden motorcycles on the road numerous times, and plaintiff and his grandfather rode horses on the road during the first half of 1975. However, defendants testified that they were aware only of automobile traffic on the road and had no knowledge that the road was also travelled by horses and motorcycles.

Defendants erected the cable approximately one month to six weeks prior to the accident. The cable was silver colored and three-eighths of an inch in diameter. It was attached between a tree and a telephone pole at a height of approximately three and one-half feet. The cable was stretched across the road within defendants' property some eighty-six feet from the line and one-eighth to one-quarter of a mile from the farmhouse. There were no signs, markers, streamers or flags of any kind attached to the cable at any point.

Malcolm Moore, an ambulance driver, testified for the plaintiff that he did not see the cable when he responded to the accident call and arrived on the scene. Plaintiff's grandfather testified that on the day after the accident the cable was barely visible to him from a distance of eighty feet. He testified that the cable blended in with the sun and the background and that if you did not know it was there, you would not see it. Plaintiff testified that he did not know what caused him to wreck his motorcycle, and he does not remember riding his motorcycle on the day he was injured.

Defendants' motions for a directed verdict and judgment notwithstanding the verdict were denied by the trial judge. The jury returned a verdict for the plaintiff in the amount of $12,500.00. Defendant appealed to the Court of Appeals, and the majority held that plaintiff was a trespasser and that defendants had not willfully or wantonly injured him.

Booth, Fish, Simpson, Harrison & Hall by E. Jackson Harrington, Jr., for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice by Daniel W. Donahue for the defendant-appellees.

PER CURIAM.

Due to his absence on account of illness, Justice Brock did not participate in this case. The remaining six justices are equally divided as to whether the plaintiff's evidence, when considered in the light most favorable to him, makes out a case against the defendants of willful or wanton negligence. 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 BROCK took no part in the consideration or decision of this case.

T. A. PIPKIN, D. J. DUDLEY, P. M. WILLIAMS, AND MACK DONALD WEEKS, INDIVIDUALLY AND TRADING AS P.W.D. & W., A NORTH CAROLINA GENERAL PARTNERSHIP v. THOMAS & HILL, INC.

No. 104

(Filed 17 October 1979)

Contracts §§ 29.2, 29.3— breach of contract to make long-term loan—special and compensatory damages

Where defendant lender breached a commitment to provide long-term financing for plaintiffs' motel construction project, a substitute loan was unavailable upon any terms at the time of the breach, and, in order to forestall foreclosure, plaintiffs had to refinance their construction loan by a demand note at a fluctuating rate of interest which was higher than that called for by defendant's commitment, plaintiffs are entitled to recover the following special and compensatory damages for defendant's breach of the loan commitment; (1) amounts which they expended for additional title insurance and for brokerage, accounting and appraisal fees in refinancing their construction loan and in their unsuccessful attempts to secure a substitute long-term loan; (2) the interest plaintiffs have paid on the demand note between the date of defendant's breach of its commitment and the date of trial, less the amount of interest plaintiffs contracted to pay defendant between those dates; and (3) the present value of the difference between the interest payments at 9½% per annum which would be owed under the contract between the date of the trial and the end of the credit period and interest which would have been paid during the same period for a loan bearing interest at 10½% per annum, the rate found by the trial court to be the lowest prevailing rate of interest on the date of the breach for a long-term commercial loan.

ON discretionary review of the decision of the Court of Appeals reported in 33 N.C. App. 710, 236 S.E. 2d 725 (1977), which modified the judgment of *McKinnon, J.*, entered 26 May 1976 in the Superior Court of WAKE, docketed and argued as Case No. 113 at the Fall Term 1977 of this Court.

Plaintiffs, as individuals and general partners doing business under the name of P.W.D. & W., brought this action for damages against defendant, a West Virginia corporation engaged in the mortgage banking business, to recover damages for its breach of an alleged contract to make plaintiffs a long-term loan to repay a construction loan from Central Carolina Bank (CCB). Defendants denied the contract, and the case was tried at the 29 March 1976 session before Judge McKinnon without a jury. The essential facts, as found by the trial court and stated in his judgment, are supported by the evidence and are not now in dispute. In brief summary the pertinent facts are set out below.

Defendant maintained a branch office in Greensboro, North Carolina, from 2 August 1971 until 15 April 1974. During this time, Mr. O. Larry Ward (Ward), then an assistant vice-president of defendant corporation, was the manager of this office. Ward was equipped with and authorized to use stationery and business cards bearing defendant's name and his own name and corporate titles. He was also authorized to solicit loan applications from prospective borrowers, but he did not have actual authority to issue permanent loan commitments. However, no notice of this limitation upon Ward's authority appeared anywhere, and plaintiffs were unaware of it until August 1974.

In August 1972 plaintiffs acquired property on U. S. Highway 70 and 401 just south of Raleigh for the purpose of constructing and operating a motel and restaurant. At that time they were experienced business men but inexperienced real estate developers. After extended negotiations with Ward, on 19 April 1973 plaintiffs jointly and severally filed with him, on a form furnished by defendant, an application for a "long-term permanent loan commitment from the defendant" in the amount of $1,162,500, repayable over 25 years at an interest rate of nine and one-half percent (9½%) per annum, with monthly payments of $10,156.76 for amortization of principal and interest. Plaintiffs' application was accompanied by a check for $500, the specified application fee.

At the same time plaintiffs were negotiating with Ward they were also negotiating with CCB for a loan in the amount of $1,162,500 to finance construction of the motel-restaurant project. As a condition for making the construction loan CCB required that plaintiffs obtain a permanent loan commitment in the same amount "to provide a payout of the construction loan upon the completion of construction." Mr. Weeks, one of the plaintiffs, introduced Ward to Mr. Scott Edwards, an assistant vice-president of CCB and the manager of its Credit Department. Edwards told Weeks that he would check out defendant's financial situation. After doing so he told Weeks he was satisfied with it and would make the construction loan based on its permanent commitment.

Mr. Edwards testified that he told Ward from the beginning that CCB would not make plaintiffs a construction loan until plaintiffs had secured a commitment for a long-term loan with which to

repay CCB at the time construction was completed, and that Ward assured him defendant would itself "take the loan out of the bank" if it had not found a permanent lender when the construction loan became due. Mr. Edwards further testified that his investigation of defendant corporation led him to believe it "had an honorable reputation among West Virginia banks . . . and had financial strength . . . to fund this loan out of its own resources at the appointed time if they had not brought another lender into the picture."

On 7 June 1973 Ward received word from defendant's home office in Charleston, West Virginia, that defendant had been unable to place plaintiffs' application with a permanent lender. Notwithstanding, on 11 June 1973, Ward wrote Edwards a letter in which he committed defendant to make the long-term loan plaintiffs had requested. A copy of this letter was sent to each plaintiff. In pertinent part this letter said:

"Thomas & Hill, Inc., is processing an application for a permanent loan for Mr. P. M. Williams, Mr. D. J. Dudley, Mr. Thomas A. Pipkin, and Mr. McDonald (sic) Weeks, on the above property.

"Please accept this letter as our commitment to fund the permanent loan on or before September 1, 1974, in an amount of $1,162,500.00, as outlined in the loan submission mailed to you May 24, 1973."

Thereafter, Edwards mailed Ward documents detailing the terms of CCB's construction loan and asked that these terms be incorporated into defendant's letter of commitment. On 27 June 1973 Ward replied as follows:

"Please accept this letter as our commitment to fund the permanent loan on or before October 1, 1974, in an amount of not less than $1,162,500.00 as outlined in my loan package submitted to you on May 24, 1973.

"Please be further advised that your commitment dated June 26, 1973, for the construction loan is hereby made a part of our commitment to the borrowers and is attached as Exhibit A."

Again each plaintiff received a copy of the correspondence. At that time Ward and plaintiffs agreed that defendant would receive a fee of $11,625 for the loan commitment and a fee of $11,625 for closing the loan, a total of $23,250.

Relying upon defendant's commitment to make the permanent loan, on 2 July 1973 CCB and plaintiffs executed a construction loan agreement in the amount of $1,162,500, at 9% interest per annum, payable on 1 October 1974 or at the closing of the long-term permanent loan, whichever occurred first. The construction loan was closed in August 1973. Thereafter plaintiffs utilized the entire loan of $1,162,500 in building the motel and restaurant, except for $23,250 representing the fees due defendant upon the closing of its loan to plaintiffs. Upon Ward's instructions, and with plaintiffs' consent, CCB held this sum in an escrow account for defendant.

The motel was completed on 8 July 1974. When it became apparent in May that construction would be finished well in advance of October, Mr. Edwards then attempted to contact Ward to ascertain if defendant would be interested in taking the construction loan out of CCB earlier. At that time he learned that defendant had closed its Greensboro office, and that Ward could not be located. On 9 May 1974 Edwards took the matter up with defendant's home office in Charleston, West Virginia, informing its officers in detail of all dealings which plaintiffs and CCB had had with Ward with reference to the loan in suit. However, it was not until 6 August 1974 that defendant repudiated the loan commitment Ward had made to plaintiffs and to CCB. On 27 August 1974 in a letter to CCB's attorney, defendant's president stated that Ward had no authority to issue the loan commitment and that the defendant would not honor the commitment.

Immediately upon receiving notice that defendant had repudiated the loan commitment the plaintiffs, assisted by CCB, began a diligent and exhaustive search for alternative permanent financing. They found that no such loans were available at any rate of interest. All the evidence tended to show that it had become extremely difficult to obtain commerical loans of any type and motel loans were almost nonexistent; that had such money been obtainable, it would have been at a very high rate, the best terms being a "10½% rate for 20 years with a 25-year amortization schedule at seven discount points."

After the completion of construction plaintiffs' motel-restaurant project was appraised at $1,790,000. This gave plaintiffs a net equity, over and above the $1,162,500 construction loan, of $627,500.

On 1 October 1974, to forestall foreclosure, CCB required plaintiffs to refinance their construction loan by "executing a new deed of trust" and "a six-month demand note" for $1,162,500, bearing a variable interest rate of 2% above CCB's prime. On 1 January 1976 CCB increased the interest payments on the loan to three percent above its prime rate. Between 1 October 1974 and the date of the trial, 31 March 1976, plaintiffs had paid CCB $184,619.49 in interest. No payments had been made on the principal of the loan. During the same 18 months, in attempting to obtain another long-term loan, plaintiffs incurred the following "reasonable expenses," totaling $5,888.12: (1) $1,613.12 for title insurance required by CCB; (2) $3,000 in additional brokerage fees; (3) $1,025 for extra accounting expenses; and (4) $250 for an updated MAI appraisal. Despite their diligent efforts, and the efforts of CCB, plaintiffs had not been able to arrange alternative, long-term financing at the date of the trial. Plaintiffs demonstrated and the trial court found, however, that the lowest prevailing rate of interest on comparable commercial loans on 1 October 1974 was 10½% per annum.

On the basis of his findings of fact, all of which are supported by competent evidence, Judge McKinnon concluded (1) that although Ward did not have actual authority to obligate defendant to make a loan to plaintiffs, he nevertheless "had apparent authority to bind the defendant to a contract"; (2) that plaintiffs, who had no notice of Ward's lack of such authority, had reasonably relied upon his apparent authority to commit defendant to make them the loan for which they had applied; (3) that in June 1973 plaintiffs and defendant had entered into a contract, duly supported by consideration, which embodied the terms of plaintiffs' loan application; and (4) that defendant had breached this agreement.

Judge McKinnon then adjudged that "the plaintiffs [had] sustained and [were] entitled to recover past, present, and prospective damages as follows": $5,888.12 for the additional expenses incurred in searching for an alternative lender; (2) $120,000, "representing the present worth of the reasonable additional cost to the plaintiffs of a loan at the lowest prevailing rate of interest on 1 October 1974, after also being duly discounted for the likelihood of early payment." Judgment was entered in favor of plaintiffs for $125,888.12 with legal interest from the date of judg-

ment. No recovery for the interest plaintiffs paid CCB between 1 October 1974 and the date of trial was allowed.

The explanation for judgment item (2) above ($120,000) appears to be the following: Dr. J. Finley Lee, a professor of business administration specializing in economics, insurance, and statistics at the University of North Carolina, was qualified as an expert in calculating the present economic value of monetary payments to be made in the future. He testified that the difference between the cost of the agreed loan in the amount of $1,162,500 repayable over 25 years with interest at 9½% per annum and the cost of a similar loan at 10½% per annum was $245,805. He determined the present cash value of that sum to be $143,282.03, a figure which Judge McKinnon evidently reduced by $23,282.03 "for the likelihood of early payment," thereby obtaining the amount of $120,000.

Upon defendant's appeal and plaintiffs' cross appeal the Court of Appeals affirmed the judgment of the trial court insofar as it imposed liability on defendant for breach of contract. However, the Court of Appeals modified Judge McKinnon's award of damages in two respects: It held that plaintiffs were entitled to recover (1) the $184,619.49 in interest which they had paid CCB from 1 October 1974 on the demand notes until the date of the trial and (2) the full present cash value of the difference between the cost of the agreed loan at 9½% interest per annum and 10½% interest for 25 years, $143,282.03, without any reduction "for the likelihood of early prepayment."

We allowed defendant's petition for discretionary review for the sole purpose of considering what damages plaintiffs are entitled to recover for defendant's breach of contract.

Manning, Fulton & Skinner by M. Marshall Happer III, and Charles L. Fulton, for plaintiffs.

Smith, Anderson, Blount & Mitchell by H. A. Mitchell, Jr., and Michael E. Weddington, for defendant.

SHARP, Chief Justice.[1]

Initially, the primary relief which plaintiffs sought in this action was a decree ordering defendant to specifically perform its

1. This opinion was written in accordance with the Court's decision made prior to the retirement of Chief Justice Sharp and was adopted by the Court and ordered filed after she retired.

commitment to provide long-term or "permanent" financing to enable plaintiffs to take up CCB's interim construction loan on their motel-restaurant project. Historically, courts of equity refused to decree specific performance of a contract to lend money on the ground that the disappointed borrower could be fully compensated by damages because, presumably, money could always be found elsewhere.[2] More recently, however, courts have employed the equitable remedy of specific performance when the circumstances of the particular case demonstrate the inadequacy of money damages to afford appropriate relief.[3] In this case the parties' stipulation that defendant is financially unable to comply with its contract rendered the availability of the remedy of specific performance immaterial. Plaintiffs, therefore, are relegated to such damages as they are legally entitled to recover, and are able to collect, from defendant.

A borrower's claim for damages resulting from a lender's breach of a contract to lend money is primarily circumscribed by the rule of *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. 1854). This rule limits generally the recovery of damages in actions for breach of contract. To recover, a disappointed borrower must not only prove his damages with reasonable certainty, he must also show that they resulted naturally—according to the usual course of things—from the breach or that, at the time the contract was made, such damages were in the contemplation of the parties as a probable result of the breach. Additionally, the borrower must demonstrate that, upon the lender's breach, he minimized his damages by securing the money elsewhere if available. When alternative funds are unavailable, however, the borrower may recover the damages actually incurred because of the breach, subject to the general rules of foreseeability and certainty of proof. *See* 5 Corbin, Contracts § 1078 (1964); 11 Williston on Contracts, § 1411 (3d Ed. Jaeger 1968); Annot., 36 A.L.R. 1408 (1925); 22 Am. Jur. 2d *Damages* §§ 68, 69 (1965); *Coles v. Lumber Co.*, 150

2. Annot., 41 A.L.R. 357 (1926); Draper, The Broken Commitment: A Modern View of the Mortgage Lender's Remedy, 59 Cornell L.R. 418 (1974). *See Norwood v. Crowder*, 177 N.C. 469, 472, 99 S.E. 345, 346 (1919).

3. *See Columbus Club v. Simons*, 110 Okla. 48, 236 Pac. 12; Annot., 41 A.L.R. 350 (1925); *Vandeventer v. Dale Construction Co.*, 271 Ore. 691, 534 P. 2d 183 (1975); *Cuna Mutual Insurance Society v. Dominguez*, 9 Ariz. App. 172, 175, 450 P. 2d 413, 416 (1969); *Cohen v. Leaman and Clesi*, 152 So. 136 (La. App. Ct. Orleans 1934); *Selective Builders, Inc. v. Hudson City Savings Bank*, 137 N. J. Super. 500, 507, 349 A. 2d 564, 569 (1975); 81 C.J.S. *Specific Performance* § 94 (1977); 71 Am. Jur. 2d *Specific Performance* § 104 (1973); 5A Corbin, Contracts § 1152, 167-68 (1964); Groot, Specific Performance of Contracts to Provide Permanent Financing, 60 Cornell L.R. 718, 736-742 (1975).

N.C. 183, 63 S.E. 736 (1909); *Anderson v. Hilton and Dodge Lumber Co.*, 121 Ga. 688, 49 S.E. 725, 727 (1905); *Bond Street Knitters, Inc. v. Peninsula National Bank*, 266 App. Div. 503, 42 N.Y.S. 2d 744 (1943); *Davis v. Small Business Investment Co. of Houston*, 535 S.W. 2d 740, 742-43 (Tex. Civ. App.-Texarcana 1976).

The rule governing damages for breach of a contract to lend money is nowhere stated more succinctly than in Restatement of Contracts § 343 (1932):

"Damages for breach of a contract to lend money are measured by the cost of obtaining the use of money during the agreed period of credit, less interest at the rate provided in the contract, plus compensation for other unavoidable harm that the defendant had reason to foresee when the contract was made.

"*Comment*:

a. This Section is an application of the general rules of damages to a special class of contracts. The damages awarded are affected by the fact that money is nearly always obtainable in the market. If the loan was to be repayable on demand, or if the contract rate of interest is as much as the current market rate and the money is available to the borrower in the market, his recoverable damages are nominal only. He is expected to avoid other harm by borrowing elsewhere if he can, the reasonable expenses being chargeable to the defendant. Sometimes inability to borrow elsewhere or the delay caused by the lender's action results in loss of a specific advantageous bargain, an unfinished building, or an equity of redemption in mortgaged land; damages are recoverable for losses if the lender had reason to foresee them."

Clearly, the plaintiffs in this case have been injured by defendant's breach of contract. Without defendant's commitment to provide long-term financing they would not have begun construction of the motel project. When it was completed and the construction loan from CCB became due they were unable to obtain alternative long-term financing because none was available at any rate of interest. Plaintiffs were able to forestall foreclosure only by refinancing the construction loan with a demand note at a fluctuating rate of interest which varied from 2 to 3% above CCB's

prime rate and was always in excess of the contract rate. At the time of the trial CCB was still carrying the construction loan.[4] Thus, this case differs significantly from those cases involving a disappointed developer-borrower who, unable to obtain specific performance or an alternative permanent loan, either suffers foreclosure[5] or obtains alternative permanent funds at additional expense, for a shorter time, or at a higher but constant rate of interest.[6]

Specifically, the question for our determination is the following:

What is the measure of damages for breach of a contract to make a loan of $1,162,500 at 9½% interest per annum, the loan to be amortized over 300 monthly installments and to be used to take out a short-term construction loan, when a substitute loan was unobtainable upon any terms at the time of the breach and, in order to forestall foreclosure, the borrowers had to refinance the construction loan by a demand note at a fluctuating rate of interest for a period of 18 months?

At trial plaintiffs sought to recover—and the judge purported to assess—their past, present and prospective damages. The case was tried upon the fiction that at the time of trial plaintiffs had obtained a permanent loan at 10½% interest, which the court found was the lowest prevailing rate of interest for a comparable long-term commercial loan as of 1 October 1974, the date of the breach. In attempting to fashion a rule which would appropriately measure plaintiffs' damages the trial judge analogized this case to those in which the borrower actually obtained another loan. On this theory, the trial court awarded plaintiffs general damages in the amount of $120,000, this amount being the difference between the interest on a 25-year loan of $1,162,500 at 10½% per annum and a similar loan at 9½%, reduced to present value *and* "discounted for the likelihood of early payment." As special damages, Judge McKinnon awarded plaintiffs $5,888.12, the total of amounts which plaintiffs reasonably expended in

4. Upon oral argument here, in response to questions from the Court, counsel for plaintiffs stated that CCB was still carrying the construction loan.

5. *St. Paul at Chase Corporation v. Manufacturer's Life Ins. Co.*, 262 Md. 192, 278 A. 2d 12, *cert. denied*, 404 U.S. 857 (1971).

6. *Bridgkort Racquet Club v. University Bank*, 85 Wis. 2d 706, 271 N.W. 2d 165 (1978).

refinancing their construction loan with CCB to prevent foreclosure, and in their unsuccessful attempts over 18 months to secure a replacement long-term loan. The judge, however, refused to allow any recovery of the $184,619.49 in interest which plaintiffs paid CCB on the demand note during that 18-month interim.

The Court of Appeals affirmed the trial judge's award of $5,888.12 in special damages. This ruling was clearly correct, and we affirm it. As the Court of Appeals pointed out, additional title insurance and brokerage, accounting and appraisal fees "were foreseeable expenses which, but for the breach, plaintiffs would not have incurred." With reference to these expenditures, defendant concedes in its brief filed in this Court that "in view of the evidence and the Trial Court's explicit and implicit factual findings pertaining to these items there is no room for further argument and the judgment of the Trial Court is binding as to such damages."

The Court of Appeals also ruled that the trial judge was correct in using the lowest prevailing rate of interest for a long-term commercial loan (10½%) to determine "the basic measure" of plaintiffs' damages, *i.e.*, the difference between the interest on the loan at the contract rate during the agreed period of credit and the rate (not exceeding that permitted by law) which plaintiffs would have had to pay for the money in the market on the date of breach.[7] Defendant argues that the use of a hypothetical loan at the lowest prevailing rate of interest for comparable long-term loans, at least in cases where an alternative lender cannot be found, is too speculative and uncertain a technique for approximating the borrower's prospective losses. However, a party seeking recovery for losses occasioned by another's breach of contract need not prove the amount of his prospective damages with absolute certainty; a reasonable showing will suffice. "Substantial damages may be recovered though plaintiff can only give his loss proximately." *Wilkinson v. Dunbar*, 149 N.C. 20, 22, 23, 62 S.E. 748 (1908). *See Tillis v. Cotton Mills & Cotton Mills v. Tillis*, 251 N.C. 359, 366-67, 111 S.E. 2d 606, 612, 613 (1959); *Thrower v. Dairy Products*, 249 N.C. 109, 113, 105 S.E. 2d 428, 430, 431 (1958); *Perkins v. Langdon*, 237 N.C. 159, 171, 74 S.E. 2d 634, 644 (1953).

7. *Hedden v. Schneblin*, 126 Mo. A. 478, 104 S.W. 887, 890 (1907); Annot., 36 A.L.R. 1408, 1410-11 (1925); *Restatement, Contracts* § 343 (1932); 22 *Am. Jur. 2d Damages* § 68 (1965).

In our view, plaintiffs have reasonably demonstrated that as a consequence of defendant's breach of its loan commitment they will suffer prospective losses; and we agree with the Court of Appeals that the trial court's use of the lowest prevailing rate for comparable long-term loans as a figure to be compared with the contract interest rate represents effort to provide relief from these prospective damages. We also agree that the trial judge erred in reducing the present worth of plaintiff's prospective damages ($143,282.03) to the amount of $120,000 "for the likelihood of early payment."

Although a witness for defendant opined that the average life of a commercial loan such as the one defendant was committed to make for plaintiffs was "approximately seven years," no witness attempted to fix the value of such a probability. Further, there was no evidence that plaintiffs contemplated early payment of the loan. The Court of Appeals, therefore, properly ordered this reduction stricken, and we affirm.

Finally, the Court of Appeals concluded that the trial judge erred in refusing to allow plaintiffs to recover the $184,618.49 in interest which they paid CCB on the demand notes during the 18 months elapsing between the date of defendant's breach of its contract and the date of the trial. This interest, that court said, was recoverable as special damages which defendant should have foreseen as the probable consequence of its failure to provide plaintiffs the promised long-term financing. Thus, the question remaining is whether, in order to avoid foreclosure, a disappointed borrower to whom a defaulting lender had committed long-term financing to pay off a temporary construction loan, is entitled to obtain temporary refinancing at a higher rate of interest and to recover the cost of this refinancing as special damages.

On the ground that such refinancing was an unforeseeable consequence of the breach defendant argues that the trial court properly denied plaintiffs any recovery of the interest they paid on the demand note which refinanced the temporary construction loan. In our view, this contention by a defaulting lender, fully aware of the purpose for which plaintiffs had secured its commitment, is entirely unrealistic. In 11 Williston on Contracts § 1411 (3d Ed. Jaeger 1968) it is stated:

"It will frequently happen that the borrower is unable to get money elsewhere, and, if the defendant had notice of the purpose

for which the money was desired, he will be liable for damages caused by the plaintiff's inability to carry out his purpose, if the performance of the promise would have enabled him to do so."

The case of *St. Paul at Chase Corp. v. Manufacturers Life Ins. Co.*, 262 Md. 192, 278 A. 2d 12, *cert. denied*, 404 U.S. 857 (1971), grew out of the defendant's breach of a commitment to provide the plaintiff with permanent financing "to take out" a construction loan on a high rise apartment building. When the defendant canceled its commitment and the plaintiff was unable to obtain a substitute loan, the bank carrying the construction loan foreclosed the property and obtained a deficiency judgment against the plaintiff, which then sued the defendant for damages. In affirming the trial court's award of compensatory damages which would enable the plaintiff to pay the deficiency judgment and other "consequential damages," the Court of Appeals of Maryland also adopted both the judge's rationale and his succinct statement of it. After noting that in loan transactions such as the one in suit "the parties, of course, anticipate that everything will proceed according to Hoyle—that there will be no breach by either party," Judge Proctor added:

"On the other hand, the would be permanent mortgage lender *must contemplate* that if, at the last minute, it cancels its commitment such action would be disastrous to the borrower; that in such event obtaining a new permanent mortgage loan would be well-nigh impossible, for the reason that whatever brought about the cancellation would in all likelihood prevent another lender from entering the fray; that one doesn't find someone willing and able to lend $4,800,000 at a moment's notice; that, under such circumstances, foreclosure under the construction mortgage would not only be a probability, it would be almost inevitable." (Emphasis added.) 262 Md. at 243, 278 A. 2d at 36.

Whether the loan commitment be for $4,800,000 or $1,162,500, we harbor no doubt that a committed permanent lender on a substantial building project certainly must foresee that a breach of his commitment a relatively short time before the date he has contracted to provide the money to pay off the interim construction loan will result in substantial harm to the borrower.

Defendant, in this case, being unable to find a lender willing to make the permanent loan it had committed itself to provide plaintiffs, formally notified them on 6 August 1974—less than two months before the scheduled closing date—that it would not make the loan. At that time the same conditions which had thwarted defendant's efforts to obtain the loan also thwarted plaintiffs. In a reasonable effort to minimize their losses, while they continued their search for another permanent loan plaintiffs refinanced the construction loan to prevent foreclosure of property in which they had acquired equity of approximately $627,500. That their search during the subsequent 18 months proved futile is no reason to deny them compensation for the resulting damages they sustained during that period.

However, our conclusion that plaintiffs should recover as foreseeable damages their losses arising from the interest payments on the demand notes does not necessarily entail an award for the full amount of interest actually paid to CCB. On the contrary, we hold that the Court of Appeals erred insofar as it awarded plaintiffs both the full amount of interest actually paid CCB from the date of the breach until the date of trial *and* the present value of the difference between the interest on $1,162,500 amortized over 25 years from the date of the trial at the hypothetical rate of 10½% per year and the contract rate of 9½%.

In *Bridgkort Racquet Club v. Univeristy Bank*, 85 Wis. 2d 706, 271 N.W. 2d 165 (1978), plaintiffs contracted with defendant University Bank for a loan of $250,000 at 10¼% to be amortized over a 15-year period. The loan closing, which was scheduled for 13 January 1976, involved both the short-term construction lender, and long-term financiers. The short-term loan was closed on 13 January, but on 23 January 1976 plaintiffs discovered that the defendant University Bank had breached its contract and would not make its long-term loan. After extensive attempts to obtain financing at a comparable rate, the plaintiffs obtained financing at 11% for the same 15-year period. The Wisconsin court recognized the plaintiff's damages as the difference between the cost of obtaining substitute money at an increased rate of interest and the interest rate specified in the contract. In the case at bar, plaintiffs contracted with defendant to have the use of $1,162,500 from 1 October 1974 until 1 October 1999. To award

plaintiffs the entire amount of interest paid to CCB from the time of the breach until the time of the trial ($184,619.49), with no deduction for interest at the contract rate of 9½%, would give plaintiffs the use of $1,162,500 interest-free for that 18 months period. When defendant failed to make the agreed loan on 1 October 1974 it became liable to plaintiffs *at that time* for the increased cost of obtaining the use of the money "during the agreed period of credit," that is, 25 years from 1 October 1974.

We are of the opinion that the Wisconsin Court in Bridgkort Racquet Club, *supra*, was correct in determining the plaintiffs' damages to be the differential between the cost of obtaining new financing and the interest payments specified in the contract. Based on this principle, plaintiffs' recovery of interest payments made to CCB during this 18-month period must be reduced by the amount of interest which would have been payable to defendant at the contract rate of 9½%.

Having concluded that plaintiffs are entitled to compensatory damages for the cost of refinancing during the 18-month period between the date of defendant's breach and trial, and a general damages award resulting from defendant's breach, we believe the most equitable remedy will be achieved by compensating plaintiffs for the amount of their actual losses up until the date of trial and using the difference between the hypothetical interest rate of 10½% and the contract rate as the basis for determining the damages sustained after the trial. The record shows that for each of the 300 months of the loan plaintiffs contracted for, the amount of interest which plaintiffs would have been obligated to pay defendant can be determined with exactitude. Therefore the amount of plaintiffs' actual damages prior to trial can be computed by subtracting from the $184,619.49 actually paid CCB by March 31, 1976, the amount of interest plaintiffs would have paid to defendant under the contract by that date. As to plaintiffs' prospective losses from the contractural breach, they can be calculated by using the differential between the 10½% per annum rate which the trial court hypothesized to be the lowest prevailing rate of interest on 1 October 1974 for a long-term commercial loan on a project such as plaintiffs' and the contract rate of 9½%. Plaintiffs are therefore entitled to the present value of the difference in interest payments owed under the contract from 1 April 1976, the date of the trial, until 1 October 1999 and the in-

terest which would have been paid during the same period for a loan bearing interest at 10½% per annum.

This cause is returned to the Court of Appeals for remand to the Superior Court of Wake County with instructions that, after hearing such additional evidence as may be necessary to make the calculations required to determine the amounts defined in subsections (b) and (c) below, that court shall enter judgment that plaintiff recover of defendant as damages the sum of the amounts specified in subsections (a), (b), and (c) as follows:

(a) $5,888.12 expended for additional title insurance, brokerage, accounting, and appraisal fees necessitated by defendant's breach;

(b) $184,619.49, less the amount of interest plaintiffs contracted to pay defendant from 1 October 1974 until 31 March 1976;

(c) the present value of the amount determined by subtracting the interest payments which were to have been made by plaintiffs pursuant to the contract from 1 April 1976 until 1 October 1999, from the interest payable during the same period on a loan of $1,162,500, amortized over 300 months from 1 October 1974 bearing an interest rate of 10½% per annum.

The judgment entered shall also provide that the damages therein awarded plaintiff shall bear interest at the legal rate of six percent from 28 May 1976, the date of the judgment from which the parties appealed. *See* G.S. 24-1 and 24-5 (1965); 45 Am. Jur. 2d *Interest and Usury* § 109 (1965). *See also Jackson v. Gastonia*, 247 N.C. 88, 100 S.E. 2d 241 (1957).

For the reasons stated and specified above, the decision of the Court of Appeals is

Affirmed in part, and

Reversed in part.

BANK v. BELK

No. 282 PC.

Case below: 41 N.C. App. 328.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 September 1979.

BANK v. BELK

No. 234 PC.

Case below: 41 N.C. App. 356.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 September 1979.

BAXTER v. POE

No. 22 PC.

Case below: 42 N.C. App. 404.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 25 September 1979.

BLACK v. INSURANCE CO.

No. 266 PC.

Case below: 42 N.C. App. 50.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 September 1979.

BOARD OF TRANSPORTATION v. ANNAS

No. 241 PC.

Case below: 41 N.C. App. 405.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 September 1979. Motion of third party defendants to dismiss appeal for lack of substantial constitutional question allowed 10 September 1979.

BOEHM v. BOARD OF PODIATRY EXAMINERS

No. 25 PC.

Case below: 41 N.C. App. 567.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 25 September 1979.

BROWN v. BONEY

No. 287 PC.

Case below: 41 N.C. App. 636.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 September 1979.

BROWN v. BRYANT

No. 245 PC.

Case below: 41 N.C. App. 405.

Petition by defendants for discretionary review under G.S. 7A-31 denied 10 September 1979.

CHARETT v. CHARETT

No. 294 PC.

Case below: 42 N.C. App. 189.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 September 1979.

COLE v. SORIE

No. 238 PC.

Case below: 41 N.C. App. 485.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 September 1979.

CONNER v. INSURANCE CO.

No. 243 PC.

Case below: 41 N.C. App. 610.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 September 1979.

DAVIDSON AND JONES, INC. v. COUNTY OF NEW HANOVER

No. 251 PC.

Case below: 41 N.C. App. 661.

Petition by third party defendants for discretionary review under G.S. 7A-31 denied 10 September 1979.

DAVIS v. McREE

No. 212 PC.

No. 121 (Fall Term).

Case below: 40 N.C. App. 238.

Petition by plaintiffs for writ of certiorari to North Carolina Court of Appeals allowed 10 September 1979 for the limited consideration of the trial judge's instructions on the amount of credit, if any, the lessee is entitled on the purchase price for rental payments.

FALLS SALES CO. v. BOARD OF TRANSPORTATION

No. 291 PC.

Case below: 42 N.C. App. 257.

Petition by third party defendant for discretionary review under G.S. 7A-31 denied 25 September 1979.

FREIGHT LINES v. POPE, FLYNN & CO.

No. 1 PC.

Case below: 42 N.C. App. 285.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 September 1979.

HARRELL v. CONSTRUCTION CO.

No. 239 PC.

No. 111 (Fall Term).

Case below: 41 N.C. App. 593.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 10 September 1979.

HEDRICK v. SOUTHLAND CORP.

No. 231 PC.

Case below: 41 N.C. App. 431.

Petition by defendants for discretionary review under G.S. 7A-31 denied 10 September 1979.

HESTER v. MILLER

No. 216 PC.

Case below: 41 N.C. App. 509.

Petition by defendants Ipock for discretionary review under G.S. 7A-31 denied 10 September 1979.

HOUSING AUTHORITY v. TRUESDALE

No. 120 PC.

Case below: 42 N.C. App. 256.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 September 1979. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 10 September 1979.

INDUSTRIES, INC. v. CONSTRUCTION CO.

No. 3 PC.

Case below: 42 N.C. App. 259.

Petition by additional defendant for discretionary review under G.S. 7A-31 denied 25 September 1979.

IN RE FORECLOSURE OF DEED OF TRUST

No. 242 PC.

Case below: 41 N.C. App. 563.

Petition by respondents for discretionary review under G.S. 7A-31 denied 10 September 1979.

IN RE HUNTLEY

No. 275 PC.

Case below: 42 N.C. App. 1.

Petition by appellee Huntley for discretionary review under G.S. 7A-31 denied 10 September 1979.

IN RE MENTAL HEALTH CENTER

No. 9 PC.

Case below: 42 N.C. App. 292.

Petition by Mental Health Center for discretionary review under G.S. 7A-31 denied 25 September 1979.

JOYNER v. LUCAS

No. 21 PC.

Case below: 42 N.C. App. 541.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 September 1979.

KIRKMAN v. KIRKMAN

No. 281 PC.

Case below: 42 N.C. App. 173.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 September 1979.

KNOWLES v. COACH CO.

No. 252 PC.

Case below: 41 N.C. App. 709.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 September 1979.

LYNCH v. CONSTRUCTION CO.

No. 188 PC.

Case below: 41 N.C. App. 127.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 September 1979.

MAZZOCONE v. DRUMMOND

No. 29 PC.

Case below: 42 N.C. App. 493.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 25 September 1979.

MIDDLETON v. MYERS

No. 233 PC.

No. 110 (Fall Term).

Case below: 41 N.C. App. 543.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 10 September 1979.

NIEHAGE v. AUTO PARTS, INC.

No. 232 PC.

Case below: 41 N.C. App. 538.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 September 1979.

OGLESBY v. McCOY

No. 271 PC.

Case below: 41 N.C. App. 735.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 25 September 1979. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 25 September 1979.

OGLESBY v. McCOY

No. 270 PC.

Case below: 41 N.C. App. 767.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 25 September 1979. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 25 September 1979.

RAGLAND v. MOORE

No. 236 PC.

No. 122 (Fall Term).

Case below: 41 N.C. App. 588.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 25 September 1979.

RAILWAY CO. v. FIBRES, INC.

No. 268 PC.

Case below: 41 N.C. App. 694.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 September 1979.

REALTY, INC. v. WHISNANT

No. 269 PC.

Case below: 41 N.C. App. 702

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 September 1979.

ROOFING CO. v. DEPT. OF REVENUE

No. 283 PC.

Case below: 42 N.C. App. 248.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 September 1979.

SASSER v. BECK

No. 179 PC.

Case below: 40 N.C. App. 668.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 September 1979.

SILVERTHORNE v. LAND CO.

No. 289 PC.

Case below: 42 N.C. App. 134.

Petition by intervenor plaintiffs for discretionary review under G.S. 7A-31 denied 25 September 1979.

SNYDER v. FREEMAN

No. 280 PC.

No. 123 (Fall Term).

Case below: 40 N.C. App. 348.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals allowed 25 September 1979.

STARMOUNT CO. v. CITY OF GREENSBORO

No. 209 PC.

Case below: 41 N.C. App. 591.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 September 1979.

STATE v. ANDERSON

No. 296 PC.

Case below: 42 N.C. App. 505.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 September 1979.

STATE v. BROADWAY

No. 278 PC.

Case below: 42 N.C. App. 257.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 September 1979.

STATE v. BUCKNER

No. 285 PC.

Case below: 40 N.C. App. 629.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 10 September 1979.

STATE v. BYRD

No. 263 PC.

Case below: 40 N.C. App. 172.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 10 September 1979.

STATE v. CARTER

No. 15 PC.

Case below: 42 N.C. App. 325.

Application by defendant for further review denied 25 September 1979. Motion of plaintiff to dismiss appeal for lack of significant public interest allowed 25 September 1979. Defendant's motions for appointment of counsel and application for stay of execution denied 25 September 1979.

STATE v. CHILDERS

No. 260 PC.

Case below: 41 N.C. App. 729.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 September 1979.

STATE v. EDWARDS

No. 17 PC.

Case below: 41 N.C. App. 767.

Application by defendant for further review denied 25 September 1979.

STATE v. ELLISON

No. 288 PC.

Case below: 41 N.C. App. 767.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 10 September 1979.

STATE v. HOSKINS

No. 290 PC.

Case below: 42 N.C. App. 108.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 September 1979.

STATE v. LOCKLEAR

No. 107.

Case below: 42 N.C. App. 486.

Motion of appellee to dismiss appeal for lack of substantial constitutional question allowed 25 September 1979.

STATE v. OXENDINE

No. 2 PC.

Case below: 40 N.C. App. 280.

Application by defendant for further review denied 25 September 1979.

STATE v. PARKS

No. 215 PC.

Case below: 41 N.C. App. 514.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 10 September 1979.

STATE v. POE

No. 130 PC.

Case below: 40 N.C. App. 385.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 September 1979. Appeal dismissed 25 September 1979.

STATE v. SCHOOL

No. 44 PC.

No. 125 (Fall Term).

Case below: 42 N.C. App. 665.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 25 September 1979.

STATE v. SNEED and STATE v. WEBB

No. 254 PC.

Case below: 42 N.C. App. 258.

Petition by defendants for discretionary review under G.S. 7A-31 denied 10 September 1979.

STRICKLAND v. TANT

No. 240 PC.

Case below: 41 N.C. App. 534.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 September 1979.

TRUST CO. v. GRAINGER

No 293 PC.

Case below: 42 N.C. App. 337.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 September 1979.

TRUST CO. v. SEVIER

No. 267 PC.

Case below: 41 N.C. App. 762.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 September 1979.

WALL v. CITY OF DURHAM

No. 258 PC.

Case below: 41 N.C. App. 649.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 September 1979.

WHALEHEAD PROPERTIES v. COASTLAND CORP.

No. 284 PC.

No. 124 (Fall Term).

Case below: 42 N.C. App. 198.

Petitions by plaintiffs and defendants for discretionary review under G.S. 7A-31 allowed 25 September 1979.

WINBORNE v. WINBORNE

No. 259 PC.

Case below: 41 N.C. App. 756.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 September 1979.

WISE v. WISE

No. 273 PC.

Case below: 42 N.C. App. 5.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 25 September 1979.

WOODHOUSE v. BOARD OF COMMISSIONERS

No. 244 PC.

No. 112 (Fall Term).

Case below: 41 N.C. App. 473.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 10 September 1979.

STATE OF NORTH CAROLINA v. MARGIE BULLARD BARFIELD

No. 12

(Filed 6 November 1979)

1. **Constitutional Law § 40— indigent defendant—appointment of only one attorney sufficient**

The trial court did not err in denying the indigent defendant's motion for the appointment of additional counsel to represent her in a first degree murder case since the burden placed upon defense counsel was not excessive, and the attorney appointed by the court was competent to represent the best interests of defendant.

2. **Criminal Law § 15.1— venue—change because of pretrial publicity and number of jailed defendants—no abuse of discretion**

The trial court did not err in denying defendant's motion for change of venue to the western part of the State, nor did it err in moving the case from Scotland County to Bladen County for trial, since the court acted within its discretion in moving the case; no abuse of discretion was shown; the court had to consider the rights of twenty jailed persons awaiting trial in Scotland County and therefore properly moved the case to Bladen County; and though a radio station in Lumberton as well as newspapers in Robeson County and surrounding counties gave coverage to the pending trial, there was nothing which suggested that the coverage was anything more than general in nature and likely to be found in any jurisdiction to which the trial might be removed.

3. **Criminal Law § 91.3— witness absent due to illness—deposition taken—continuance properly denied**

The trial court did not err in denying defendant's motion for continuance based upon the absence of a witness where the witness was hospitalized and was not expected to be available at trial, and the testimony of the witness was in fact obtained and presented before the jury by way of deposition.

4. **Jury § 6— individual voir dire denied—no abuse of court's discretion**

Defendant failed to show an abuse of the trial court's discretion in its refusal to grant her motion for an individual voir dire of each juror and sequestration of the jurors during voir dire.

5. **Jury § 7.11— attitudes toward death penalty—challenge for cause proper**

A prospective juror is properly excused for cause when his answers on voir dire concerning his attitudes toward the death penalty, although equivocal, show when considered contextually that regardless of the evidence he would not vote to convict the defendant if conviction meant the imposition of the death penalty; three jurors in this case who indicated that, no matter what aggravating circumstances were established by the evidence, they could not vote to impose a death sentence were properly excused for cause.

6. **Criminal Law § 34.4— evidence of other offenses committed by defendant—admissibility to show intent, motive, common scheme or plan**

In a prosecution of defendant for poisoning the man with whom she lived, the trial court did not err in admitting evidence concerning defendant's poisoning of four other individuals and defendant's forging and uttering forged checks, since such evidence was admissible to show (1) that defendant knew the probable consequences of her actions when she administered the poison to her fifth victim; (2) specific intent on defendant's part in that she had a pattern of administering poison to persons, knowing full well the probable consequences of her actions; (3) a motive for the crime in that defendant poisoned the individuals, with one exception, only after the forgeries were discovered or she became fearful of discovery; and (4) that a continuing plan or scheme existed whereby defendant used the proceeds of her forgeries to support her drug addiction, and then murdered her victims when the forgeries were discovered or she feared discovery.

7. **Criminal Law § 102.5— prosecutor's conduct in examining witnesses—no prejudice**

There was no merit to defendant's contention that the district attorney presented the case for the State in such a way that he was guilty of prosecutorial misconduct since the district attorney could properly ask a witness to complete his account of the condition of the homicide victim before he died by asking the witness to demonstrate the victim's scream; though the district attorney improperly asked the opinion of a witness who had not been properly qualified and offered as an expert, defendant was not prejudiced because the witness was not permitted to answer; the district attorney could properly pursue a line of questioning which tended to show that the victim carried large sums of money in his wallet, as this evidence was relevant to show motive; the district attorney could repeatedly attempt to elicit certain information from the daughter of defendant's deceased husband, as there was nothing in the record to indicate that he was badgering the witness or that his questions were not asked in good faith; the district attorney could properly ask defendant if she had poisoned another person; and defendant was not prejudiced by the district attorney's question as to why she poisoned a named person, even if the question was improper, since the court sustained defense counsel's objection as to form.

8. **Homicide § 20— murder by poisoning—evidence of other forgeries and poisonings—rat poison bottle—forged checks—admissibility**

In a prosecution of defendant for poisoning the man with whom she lived where there was also evidence that she had poisoned four other people and forged checks, the trial court did not err in admitting into evidence an empty bottle bearing the label "Singletary's Rat Poison" found by a police officer behind the house of one victim, though the bottle had been in the field over a year when found, since the label was still legible; the bottle was found in the spot where defendant said she had thrown it; and the officer stated that he had kept the bottle in his sole possession from the time he recovered it to the time of the trial. Furthermore, the court did not err in receiving into evidence the various checks which defendant allegedly forged, since a proper foundation

was laid by testimony of witnesses who were familiar with the handwriting of the victims and by testimony of a handwriting expert.

9. **Homicide § 15.5— cause of death—opinion evidence admissible**

In a prosecution of defendant for first degree murder by poisoning, the trial court did not err in permitting three pathologists to state their opinions as to cause of death and to state that such opinions were based on an autopsy performed on the victim.

10. **Criminal Law § 75.6— statements to police officers—Miranda warnings given —sufficiency**

The trial court did not err in denying defendant's motion to suppress statements given by defendant to police officers since the evidence on voir dire tended to show that defendant was given the *Miranda* warnings, did not seem to be under the influence of anything, and was not promised any leniency if she confessed. Furthermore, the fact that defendant was not given *Miranda* warnings immediately preceding each of four statements on the second day she was questioned did not render the statements inadmissible, since defendant was warned of her constitutional rights before she made any statements; defendant made four separate statements in the space of a relatively short time; the interrogation took place in the same location where she was given her Miranda warnings; the interrogation was conducted by the same officers who advised her of her constitutional rights; and there was no evidence that defendant was under the influence of any substance at the time she made the statements.

11. **Criminal Law § 112.6— jury instructions—insanity—insufficient evidence to require instruction**

The test of insanity that is recognized in N. C. is whether the accused at the time of the commission of the alleged act was laboring under such defect of reason from disease or defect of the mind as to be incapable of knowing the nature and quality of the act or, if he does know this, was by reason of such defect of reason incapable of distinguishing right from wrong in relation to such act; therefore, the trial court did not err in failing to submit the defense of insanity to the jury in this homicide prosecution where all three psychiatrists who testified concluded that defendant knew the difference between right and wrong, and there was no evidence that she did not know the nature and quality of her acts.

12. **Homicide § 21.6— murder by poisoning—sufficiency of evidence**

In a prosecution of defendant for the first degree murder of the man with whom she lived, evidence was sufficient to be submitted to the jury where it tended to show that defendant was addicted to drugs; she forged checks in order to obtain money to support her habit; when deceased discovered the forgeries, he threatened to report them to police; and defendant then obtained ant poison which she placed in deceased's drinks.

13. **Constitutional Law § 80; Homicide § 31.3— death penalty—no cruel and unusual punishment**

The death penalty for first degree murder is not cruel and unusual punishment within the meaning of the Eighth Amendment, since it is neither the pur-

poseless imposition of severe punishment nor a punishment grossly disproportionate to the severity of the crime.

14. Constitutional Law § 80; Homicide § 31.3— death penalty not mandatory

The N. C. death penalty statutes, G.S. 15A-2000 *et seq.*, are not mandatory in nature and therefore unconstitutional since they provide for the exercise of guided discretion in the imposition of sentence.

15. Constitutional Law § 80; Homicide § 31.3— death penalty—statutes sufficiently specific

There is no merit to defendant's contention that the N. C. death penalty statutes are unconstitutional because they fail to give the jury objective standards to guide it in weighing aggravating against mitigating circumstances in passing upon the issue of sentence and that the aggravating circumstances are vague and without accurate definition, since the issues which are posed to a jury at the sentencing phase of N. C.'s bifurcated proceeding have a common sense meaning, and jurors who are sitting in a criminal trial ought to be capable of understanding them when they are given appropriate instructions by the trial judge.

16. Constitutional Law § 80; Homicide § 31.3— death penalty—burden of disproving mitigating circumstances not on State

There is no merit to defendant's contention that the N. C. death penalty statutes are unconstitutional because the State ought to be required to prove that there are no mitigating circumstances before the death penalty may be imposed, since due process does not require a state to disprove beyond a reasonable doubt the existence of a factor which mitigates the degree of criminality or punishment.

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

APPEAL by defendant from *McKinnon, J.*, 27 November 1978 Special Criminal Session, BLADEN Superior Court.

Upon pleas of not guilty and not guilty by reason of insanity, defendant was tried on a bill of indictment which charged her with the murder of Stewart Taylor. The trial was conducted in the bifurcated manner mandated by G.S. § 15A-2000 *et seq.* Phase one of the trial determined the guilt or innocence of defendant. Phase two of the trial was held to decide her sentence for first-degree murder following her conviction on that charge.

During the guilt determination phase of the trial, the State introduced evidence summarized in pertinent part as follows:

Prior to January 1978, defendant and Stewart Taylor had been going together. On occasion, defendant stayed with Taylor at his home in St. Pauls, North Carolina. At the time of his

death, Taylor was fifty-six years old. He had been in fairly good health until the evening of 31 January 1978, four days before his death. On that evening, defendant and Taylor went to Fayetteville to attend a gospel sing. While at the performance, Taylor became ill. The couple left and returned to St. Pauls. At approximately 2:30 the following morning, Taylor began vomiting and having diarrhea. He continued to be ill throughout the day.

On the next day defendant took Taylor to Southeastern General Hospital in Lumberton where he was treated. At the time he was examined by an emergency room physician, Taylor was complaining of nausea, vomiting and diarrhea, as well as general pain in his muscles, chest and abdomen. His blood pressure was low. His pulse was weak and rapid. He was dehydrated and his skin was ashen in color. After receiving intravenous fluids and vitamins, as well as other treatment, Taylor was released from the hospital and defendant took him back to his home in St. Pauls where she fed him.

The next day, 3 February 1978, an ambulance was summoned to Taylor's home. The attendants found him to be in great pain. His blood pressure was very low, his breathing was rapid, and his skin was gray. During the trip to the hospital, Taylor was restless and moaning. While he was in the emergency room, he was given intravenous fluids. A tracheotomy was performed but he died in the emergency room approximately one hour after he was brought in. One of the attending physicians, Dr. Richard Jordan, was "not satisfied" as to the precise cause of death. After talking with two of the attending physicians, members of Taylor's family requested that an autopsy be performed.

The autopsy was performed by Dr. Bob Andrews, a pathologist. During the course of the autopsy, toxicological screenings were performed on samples of Taylor's liver and blood. Though the normal human body contains no arsenic in the blood or in the liver tissue, Taylor's blood was found to have an arsenic level of .13 milligrams percent. His liver had an arsenic level of one milligram percent. These findings led Dr. Andrews to conclude that Taylor died from acute arsenic poisoning.

On 10 March 1978, Robeson County Deputy Sheriffs Wilbur Lovette and Al Parnell talked with defendant at the Sheriff's Department in Lumberton. After having been given her *Miranda*

warnings, defendant executed a written waiver indicating that she understood what her rights were and that she was willing to make a statement as well as answer questions without the presence of an attorney. The conversation between defendant and the deputies related to a number of checks that had been forged on the account of Stewart Taylor. During the interview, the officers produced a check dated 31 January 1978 in the amount of $300.00. Defendant stated that she had seen the check before; that she had cashed the check; and that while she had "filled out" the check it was signed by Taylor himself. While she talked with the officers, defendant produced two checks from her pocketbook which were dated 4 November 1977 and 23 November 1977. Both checks were drawn on Taylor's checking account and were payable to her. They were in the amounts of $100.00 and $95.00, respectively.

The State introduced evidence obtained through handwriting analysis which tended to show that the three checks were not written by Stewart Taylor; and that the checks had been cashed by defendant at a branch of First Union National Bank in Lumberton. During the interview with the deputies, defendant denied that she had forged any checks on Taylor's account.

Defendant was asked by the officers if she knew the cause of Taylor's death. Upon being told that the autopsy had indicated that arsenic poisoning was the cause of Taylor's death, defendant began crying, stating that "You all think I put poison in his food." She then proceeded to deny that she was in any way involved with Taylor's death. After making that denial, defendant was taken home. The investigation continued through the weekend.

On Monday, 13 March 1978, defendant returned to the sheriff's department accompanied by her son, Ronald Burke. After she was again advised of her constitutional rights, she executed another written waiver. She then made a lengthy statement in the presence of Deputies Lovette and Parnell.

In her statement, she admitted that before 1 January 1978 she had forged some checks on Taylor's account which he found out about when his bank statements came in the mail; that upon finding out about the forgeries, Taylor talked with her and threatened to "turn her in" to the authorities; that she forged another check on Taylor's account on 31 January 1978; that the

forgery bothered her because Taylor would find out about it; that on that day, she and Taylor went to Lumberton because she had an appointment with her doctor; that after they left the doctor's office, they stopped at a drug store ostensibly for her to purchase some hair spray; that instead she purchased a bottle of Terro Ant Poison; that the next day, 1 February 1978, she put some of the poison in Taylor's tea at lunchtime; and that later that same day, she put more of the substance in Taylor's beer.

Defendant told the officers that she felt sure that what she had done was wrong but that she had not told anyone at the hospital about it on the two occasions that Taylor had been taken there for treatment. She stated that she gave Taylor the poison because she was afraid that he would "turn her in" for forgery. She further stated that she used the money she got out of the 31 January check to pay bills for doctors and medicine. She concluded by confessing that she had given poison to other persons besides Taylor and that they too had died.

Deputy Lovette then advised defendant that there was a possibility that a number of bodies would be exhumed. He asked her if arsenic would be found in the bodies. When she answered affirmatively, Deputy Lovette asked her in which bodies arsenic would be found.

Defendant admitted that while she lived and worked in the home of John Henry Lee as a housekeeper and nurse's aide in early 1977 she found a checkbook for an account in the joint names of Lee and his wife, Record; that she wrote a check on the account in the amount of $50.00; that Mr. and Mrs. Lee found out about the forgery and asked her about it; that she then purchased a bottle of poison, pausing to read the label which said "May be fatal if swallowed" and that she gave Mr. Lee poison three times—once in his tea and twice in his coffee.

The state introduced other evidence which tended to show: On or about 28 April 1977 Mr. Lee, 80 years old, became ill. Until then he had been in good health and attended to numerous chores around his home. On 29 April 1977, he was taken to the hospital complaining of vomiting and diarrhea. Though he was released from the hospital on 2 May 1977, he continued to be ill throughout the month of May, complaining of vomiting, diarrhea, and general pain through his body. On 3 June 1977, he was taken to the

hospital again where the attending physician, Dr. Alexander, observed that he was critically ill. Deep blue in color, his skin was cold and wet with perspiration. He was confused and unresponsive and his blood pressure was subnormal. On 4 June 1977 he died.

Though no autopsy was performed at the time of Mr. Lee's death, his body was exhumed pursuant to a court order on 18 March 1978 and taken to the office of the Chief Medical Examiner in Chapel Hill where an autopsy was performed. Toxicological screenings revealed that the liver contained an arsenic level of 2.8 milligrams percent and the muscle tissue contained an arsenic level of 0.3 milligrams percent. Dr. Page Hudson, Chief Medical Examiner of the State of North Carolina, testified that in his opinion Mr. Lee's death was caused by arsenic poisoning.

Defendant admitted to the officers that she had poisoned Mrs. Dolly Taylor Edwards; that in early 1976 she moved into the home of Mr. and Mrs. Montgomery Edwards in Lumberton as a live-in helper; that Mr. Edwards died on 29 January 1977; that in late February 1977 she drove to St. Pauls where she purchased a bottle of poison; that she noticed on the bottle the words "Could be fatal if swallowed"; that returning home she put some of the poison in Mrs. Edwards coffee and cereal; and that shortly afterwards Mrs. Edwards became ill, suffering from nausea and general weakness in her body.

The state introduced evidence that Mrs. Edwards was taken to the hospital on 27 February 1977, was treated and released. Her condition did not improve and she was again taken to the hospital on 1 March 1977 where she died later that evening. The attending physician, Dr. Henry Neill Lee, Jr., testified that Mrs. Edwards was dehydrated and suffered from nausea, diarrhea, and vomiting.

In her statement to the deputies, defendant said that she knew that the poison was responsible for the death of Mrs. Edwards; that after Mrs. Edwards died, she threw the bottle of poison into a field behind the Edwards residence; and that she did not know why she gave the poison to Mrs. Edwards.

Officer Lovette testified that during the course of his investigation he went to the field behind the Edwards home and

found an empty bottle of Singletary's Rat Poison which still bore the original label. He initialed the bottom of the bottle and kept it in his sole possession until the time of trial.

Though no autopsy was performed on the body of Mrs. Edwards at the time of her death, pursuant to a court order, her body was exhumed on 18 March 1978 and sent to the Office of the Chief Medical Examiner in Chapel Hill where an autopsy was performed. During the autopsy, toxicological screenings were conducted on samples of Mrs. Edwards' liver tissue and muscle tissue. In the liver tissue, there was found an arsenic level of 0.4 milligrams percent. In the muscle tissue, there was found an arsenic level of .08 milligrams percent. Dr. Page Hudson testified that in his opinion Mrs. Edwards' death was caused by arsenic poisoning.

Defendant further admitted in her statement to the deputies that she had poisoned her mother, Lillie McMillan Bullard; that during 1974 she lived with her mother in Parkton, N. C.; and that while she lived with her mother she forged her mother's name to a note in favor of the Commercial Credit Company of Lumberton. (Other testimony indicated that the note was in the amount of $1,048.00.) She further told the deputies that she was afraid that her mother would find out about the note; that she bought a bottle of poison and the bottle bore the warning "Can be fatal if swallowed"; that one day at dinnertime she put some of the poison in some soup and a soft drink and gave both to her mother; that later in the evening on the same day she gave her mother a soft drink which contained a dose of the poison; that Mrs. Bullard began to vomit and have diarrhea; and that she was taken to Cape Fear Valley Hospital in Fayetteville on 30 December 1974 where she died shortly after her arrival.

The attending physician, Dr. Weldon Jordan, testified that Mrs. Bullard was restless and gasping for breath when she was brought into the hospital; that she was in shock; and that he was unable to discern any blood pressure.

Upon the death of Mrs. Bullard, an autopsy was performed with the permission of her family, including defendant. No toxicological screenings were conducted at that time. Pursuant to a court order the body of Mrs. Bullard was exhumed on 18 March 1978 and taken to the Office of the Chief Medical Examiner in

Chapel Hill. Dr. William Frank Hamilton testified that he performed toxicological screenings upon samples of hair, muscle tissue and skin which had been taken from the body; that the hair sample revealed an arsenic concentration of .6 milligrams percent; that the muscle tissue had an arsenic level of .3 milligrams percent; that the skin sample had an arsenic level of .1 milligrams percent; and that in his opinion, Mrs. Bullard's death was caused by arsenic poisoning.

Although defendant did not admit any involvement in the death of her husband, Jennings L. Barfield, his body was exhumed pursuant to a court order on 31 May 1978. It was taken to the Office of the Chief Medical Examiner in Chapel Hill where an autopsy was performed. Toxicological screenings indicated that varying levels of arsenic were present in his body tissue.

Dr. Neil A. Worden testified that he treated Mr. Barfield when he was brought to the emergency room of the Cape Fear Valley Hospital in Fayetteville on 22 March 1971. At that time Mr. Barfield complained of nausea, vomiting, diarrhea and aching throughout his body. Mr. Barfield had been brought to the emergency room for the first time at about 11:00 p.m. on 21 March 1971. At that time he was treated and released. However, he returned to the hospital at 5:00 the next morning at which time he was given intravenous fluids. By the time that Dr. Worden first saw him at about 8:00 a.m., Mr. Barfield was in shock; his blood pressure was low; his pulse was rapid; and his complexion was ashen. Dehydrated and gasping for air, Mr. Barfield appeared to Dr. Worden to be in great pain. Dr. Hamilton testified that the cause of Mr. Barfield's death was arsenic poisoning.

At the close of the state's evidence, defendant made a motion to dismiss. Upon the court's denial of the motion, she presented evidence which tended to show:

During the month of January 1978 defendant was under the care of five doctors none of whom knew she was under the care of the others. She had been seeing the doctors for some time and had obtained prescriptions for a number of drugs from them. Among the drugs she was taking at that time were: Elavil, Sinequan, Tranxene, Tylenol III, and Valium. She had a history of drug abuse and had been admitted to the hospital at least four times for overdoses.

Two doctors, Dr. Arthur E. Douglas and Dr. Bob Rollins, testified that it was their opinion that while defendant was prone to abuse prescription drugs she was sane at the time of the death of Stewart Taylor, as well as at the time of trial. Though he declined to render an opinion as to defendant's sanity, Dr. Anthony Sainz, testifying by way of a deposition, agreed with the observations of Dr. Douglas and Dr. Rollins that there was no evidence that defendant suffered from any mental illness. Dr. Sainz also agreed with the conclusions of the other doctors that defendant was competent to stand trial and participate in her own defense. All of the doctors agreed that defendant knew the difference between right and wrong. Dr. Douglas and Dr. Rollins concluded that defendant had a passive-dependent type of personality whereas Dr. Sainz felt that she had a passive-aggressive personality.

Defendant took the stand on her own behalf. Her testimony was generally consistent with the statements she gave to Officers Lovette and Parnell. She admitted to poisoning Stewart Taylor, John Henry Lee, Dolly Taylor Edwards and her mother, Lillie McMillan Bullard. She had no recollection of what happened with regard to the death of her husband, Jennings L. Barfield. She stated that on 31 January 1978, the day she allegedly administered poison to Taylor, she took a quantity of medication at about 11:30 a.m.: three Sinequans, three Elavils, six Valiums, and four Tranxenes. She further stated that she was taking her medication in double doses in late January and early February 1978.

Defendant admitted that she had poisoned Dolly Taylor Edwards, but said that she could not offer any explanation as to why. She gave her reasons for poisoning Stewart Taylor, John Henry Lee and Lillie McMillan Bullard. As to Taylor, she stated that she had forged a check on his account. Fearing that Taylor would "turn her in" for forgery, she gave him Terro Ant Killer thinking it would make him sick. In regard to Lee, though her recollection was vague, she recalled that she had written a check on his account because she needed the money to pay for drugs, the same reason that she wrote checks on Taylor's account. In the case of her mother, defendant stated that she had forged the note at Commercial Credit Company because she needed the money to pay for drugs and visits to her various doctors.

The jury returned a verdict finding defendant guilty of the first-degree murder of Taylor.

The court then proceeded to conduct the sentencing phase of the trial before the same jury pursuant to G.S. 15A-2000 et seq. to determine if defendant's sentence on the murder conviction would be death or life imprisonment. The state offered no additional evidence. Defendant presented evidence which tended to show that prior to the death of her first husband in 1969 she did not abuse prescription drugs; following his death, however, she underwent a change in attitude and demeanor which was reflected in a pattern of drug abuse.

Issues as to punishment were submitted to and answered by the jury as follows:

1. Do you find beyond a reasonable doubt that the following aggravating circumstance(s) exist?

   a. The murder of Stewart Taylor was committed for pecuniary gain.

      ANSWER: YES

   b. The murder of Stewart Taylor was committed to hinder the enforcement of the law.

      ANSWER: YES

   c. The murder was especially heinous, atrocious or cruel.

      ANSWER: YES

2. Do you find that one or more of the following mitigating circumstances exist?

   a. The murder was committed while the defendant was under the influence of mental or emotional disturbance.

      ANSWER: NO

   b. The capacity of the defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law was impaired.

      ANSWER: NO

c. Other circumstances which the jury deems to have mitigating value:

3. Do you find beyond a reasonable doubt that the mitigating circumstance(s) (is) (are) insufficient to outweigh the aggravating circumstance(s)?

ANSWER: YES

4. Do you find beyond a reasonable doubt that the aggravating circumstance(s) (is) (are) sufficiently substantial to call for the death penalty?

ANSWER: YES

The jury recommended that a sentence of death be imposed upon the defendant. Pursuant thereto the court imposed the death sentence.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Robert D. Jacobson for defendant-appellant.

BRITT, Justice.

We find no prejudicial error in either phase of defendant's trial and conclude that the verdicts and judgments should not be disturbed. We will discuss the errors assigned under each phase.

PHASE I—GUILT DETERMINATION

[1] By her first assignment of error defendant contends that the trial court erred in denying her motion for the appointment of additional counsel. There is no merit in this assignment.

When it had been determined that defendant was indigent, Attorney Robert D. Jacobson of the Robeson County Bar was appointed to serve as her counsel. At an early stage of the proceedings against defendant, Mr. Jacobson learned that the defendant was suspected of having committed at least four other murders by poisoning in addition to the one that she then stood accused of. On 15 March 1978 a motion was made that additional counsel be appointed to assist Mr. Jacobson in representing defendant. District Judge Charles G. McLean denied the motion after conducting a hearing.

It is the responsibility of the state to provide an indigent defendant with counsel and the other necessary expenses of representation. G.S. 7A-450. However, defendant's right to court-appointed counsel does not include the right to require the court to appoint more than one lawyer unless there is a clear showing that the first appointed counsel is not adequately representing the interests of the accused. *People v. Marsden,* 2 Cal. 3d 118, 465 P. 2d 44, 84 Cal. Rptr. 156 (1970). In making that determination the legitimate interest that the state has in securing the best utilization of its legal resources must be considered along with the interests of the defendant. *Cf. State v. Hardy,* 293 N.C. 105, 235 S.E. 2d 828 (1977) (appointment of two attorneys for each defendant in a murder trial critized).

While there may be situations in which the right to the effective assistance of counsel can be safeguarded only by the appointment of additional counsel, such a situation is not present in this case. Though defendant was suspected of having poisoned four persons other than Stewart Taylor, no charges were brought in connection with those deaths. While it is true that the state introduced evidence at trial which tended to show that defendant was involved in those deaths, the burden imposed upon defense counsel was not excessive. It is not unusual for a defendant to be tried for a number of offenses in one trial. Nor is it uncommon for evidence of other acts of misconduct to be introduced in a criminal trial to show motive, intent, or a scheme or plan. An attorney who is representing a criminal defendant must be prepared to deal with such evidence as it arises in the course of the trial. Though Mr. Jacobson carried a great burden in representing the defendant in a capital case, we do not find it to have been so disproportionate to that borne in the usual course of criminal defense work so as to have required the court to have appointed another attorney to provide assistance. We would add, parenthetically, that Judge McLean's order reflects favorably upon Mr. Jacobson's professional background and experience, indicating that he was competent to represent the best interests of the defendant. It is our opinion that Mr. Jacobson gave defendant high quality representation.

[2] By her second assignment of error, defendant contends that the court improperly denied her motion for a change of venue to the western part of the state. In her third assignment of error,

she contends that the court erred in moving the case from Scotland County to Bladen County for trial. These assignments are interrelated and will be dealt with accordingly. Neither is meritorious.

On 19 April 1978 defendant moved for a change of venue to the western part of the state pursuant to G.S. 15A-957. She contended that she would be unable to secure a fair and impartial trial in Robeson County because of extensive pretrial publicity. Following a hearing on the motion, Judge Hobgood ordered that the case be removed to Scotland County.

On 1 November 1978 the district attorney moved that the case be transferred from Scotland County to Bladen County for the reasons that there were only four weeks of criminal superior court scheduled for Scotland County during 1978, defendant was scheduled to be tried during the 27 November 1978 Session of Scotland Superior Court, and there were approximately twenty persons confined to jail who were awaiting trial at that session. Though defendant objected to the change of venue, stating that she was satisfied with Scotland County, Judge Hobgood granted the motion and ordered that the case be removed to Bladen County for trial.

G.S. 15A-957 provides that if the court determines, upon the motion of the defendant 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 transfer the proceeding or order a special venire from another county. The *statutory power* of the court to change the venue of a trial is limited to transferring the case to an adjoining county in the judicial district or to another county in an adjoining judicial district. G.S. 15A-957. Notwithstanding this apparent statutory limitation upon the power of a court to order a change of venue, a court of general jurisdiction, of which our superior court is one, *Bryant v. Dougherty*, 267 N.C. 545, 148 S.E. 2d 548 (1966), has the inherent authority to order a change of venue in the interests of justice. *English v. Brigman*, 227 N.C. 260, 41 S.E. 2d 732 (1947). In either case, a motion for a change of venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222,

death sentence vacated, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 46 (1976); *State v. Mitchell,* 283 N.C. 462, 196 S.E. 2d 736 (1973); *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971).

There has been no showing of an abuse of discretion in this instance. While it is true that there is evidence in the record which tends to show that a radio station in Lumberton as well as newspapers in Robeson County and surrounding counties gave coverage to the pending trial, there is nothing which suggests that the coverage was anything more than general in nature and likely to be found in any jurisdiction to which the trial might be removed. *See, State v. Alford, supra; see also* Annot., 33 A.L.R. 3d 17 (1970). Furthermore, Judge Hobgood, in view of the Speedy Trial Act, G.S. 15A-701 et seq. had to consider the rights of the twenty other defendants awaiting trial in Scotland County as well as the rights of the defendant in this case.

[3] In her fourth assignment of error, defendant asserts that the trial court erred in refusing to grant her motion for a continuance. This assignment has no merit.

On 1 November 1978 the court was advised that one of defendant's witnesses, Dr. Anthony Sainz, was hospitalized and not expected to be released soon thereafter. Defendant moved for a continuance. Following a hearing, Judge McKinnon denied the motion but provided that defendant could renew her motion upon obtaining a written statement by a physician that Dr. Sainz would not be able to testify or give a deposition before or during the week of 27 November 1978, the week defendant's case was scheduled for trial. On 27 November 1978, with Dr. Sainz still hospitalized, defendant renewed her motion for a continuance. The motion was denied. On 30 November 1978 the deposition of Dr. Sainz was taken in his hospital room at the Cape Fear Valley Hospital. Defendant's attorney, the district attorney, the presiding judge, and a court reporter were present at the time the deposition was taken.

A motion for a continuance is ordinarily addressed to the sound discretion of the court and will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974); *State v. Cox,* 281 N.C. 275, 188 S.E. 2d 356 (1972); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972). However, when the motion for continuance is based upon

a right which is guaranteed by the State or Federal Constitutions, the question is not one of discretion but one of law and is reviewable upon appeal. *State v. Smathers*, 287 N.C. 226, 214 S.E. 2d 112 (1975); *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973).

Defendant argues that the standards enunciated in *Smathers* and *Robinson* ought to control the disposition of her case. We disagree. Contrary to the allegations of defendant, this is not a case where a continuance could properly have been based upon her Sixth Amendment right to have compulsory process issue to secure the presence of witnesses in her behalf. The facts of *State v. Rigsbee, supra*, are similar to the facts of this case. In *Rigsbee* this court applied the abuse of discretion standard of review to uphold the trial judge's denial of a motion for a continuance when a confidential informant under subpoena failed to appear at trial. In *Rigsbee*, as well as in the present case, the motion for a continuance was predicated upon the absence of a witness sought by the defendant. The present case differs from *Rigsbee* in that the testimony of Dr. Sainz was obtained and presented before the jury by way of deposition. While it is true that the demeanor and appearance of a witness upon the stand before the jury may prove to be beneficial to the party who offers the witness' testimony, a deposition is an accepted means of perpetuating and presenting the testimony of an unavailable witness. G.S. § 8-74. One of the specific grounds upon which a deposition may be taken and offered into evidence at a criminal trial is such an infirmity or physical incapacity on the part of a witness that the defendant is unable to procure his attendance at trial. Such were the facts in the present case. Dr. Sainz was then suffering from tuberculosis and was not expected to be able to return to his office before the first of the year (1979). Therefore, we conclude that the court did not abuse its discretion in denying defendant's motion for a continuance.[1]

[4] In her sixth assignment of error, defendant contends that the trial court erred in refusing to grant her motion for an individual *voir dire* of each juror and sequestration of the jurors during *voir dire*. This assignment has no merit.

1. When this case was argued, defendant's counsel advised the court that Dr. Sainz died sometime after his deposition was taken.

A pretrial motion for an individual *voir dire* of each juror and for sequestration of the jurors during *voir dire* was made by defendant on 25 April 1978. The motion was denied in chambers immediately before the trial began. The court directed that twelve prospective jurors be seated in the jury box during *voir dire*. All other prospective jurors were excluded from the courtroom until such time as they were seated in the jury box to replace a venireman who had been excused.

A motion for an individual *voir dire* is addressed to the sound discretion of the court and will not be disturbed except for an abuse of discretion. *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1977); *State v. Young*, 287 NC. 377, 214 S.E. 2d 763 (1975), *death sentence vacated* 428 U.S. 903, 49 L.Ed. 2d 1208, 96 S.Ct. 3207 (1976). Defendant argues that a collective *voir dire* enables the jurors to digest the answers of each other and consider answers that would result in their exclusion from the panel. A domino effect is then alleged to take place, whereby juror after juror professes an aversion to the death penalty in order to be relieved of jury duty. At best, defendant's argument is speculative. There is no showing that any such thing occurred during defendant's trial. We find no basis upon which to disturb the exercise of the trial court's discretion.

[5] In her seventh assignment of error, defendant contends that the trial court erred in allowing the state to challenge for cause certain jurors who voiced general objections to capital punishment or who expressed conscientious or religious scruples against the death penalty. Defendant asserts that an examination of the record reveals that several of the prospective jurors who were challenged for cause by the district attorney and excused by the court were merely ambivalent toward the death penalty. This assignment is without merit.

"[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L.Ed. 2d 776, 784-85, 88 S.Ct. 1770, *rehearing denied*, 393 U.S. 898, 21 L.Ed. 2d 186, 89 S.Ct. 67 (1968). *See also* Cook, Constitutional Rights of the Accused: Trial Rights § 117 (1974); 3 Whar-

ton's Criminal Procedure § 461 (13th ed. 1975). Unless a venireman is irrevocably committed before the trial begins to vote against the death penalty regardless of what the facts and circumstances might prove to be from the evidence adduced at trial, he cannot be excluded from the panel. *Davis v. Georgia*, 429 U.S. 122, 50 L.Ed. 2d 339, 97 S.Ct. 399 (1976). If a venireman who is not so committed is improperly excluded, any subsequently imposed death sentence cannot stand. *Davis v. Georgia, supra.*

A prospective juror is properly excused for cause when his answers on *voir dire* concerning his attitudes toward the death penalty, although equivocal, show when considered contextually that regardless of the evidence he would not vote to convict the defendant if conviction meant the imposition of the death penalty. *State v. Bernard*, 288 N.C. 321, 218 S.E. 2d 327 (1975); *State v. Simmons*, 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Avery*, 286 N.C. 459, 212 S.E. 2d 142 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1209, 96 S.Ct. 3209 (1976). *See generally* Annot., 39 A.L.R. 3d 550 (1971).

While it is true that taken by themselves, the answers that some of the jurors called to serve in defendant's trial seem to be equivocal or contradictory, taken as a whole, the examination indicates opposition to the death penalty so strong that they could not vote to impose it regardless of the evidence. The words of Justice (now Chief Justice) Branch from *State v. Bernard* are instructive on this point. In *Bernard*, the following exchange took place on *voir dire*:

Q. Do you have any religious or moral scruples or beliefs against capital punishment?

A. Well, I don't believe in the death penalty, no.

Q. Sir?

A. I don't believe in the death penalty, no.

Q. It would be impossible regardless of the evidence for us to put enough evidence in there to satisfy you to bring in a verdict of guilty if that meant the imposition of the Death Penalty, is that right?

In reference to this exchange, Justice Branch commented, "An unequivocal answer to the final question asked by the solicitor

would have determined prospective juror Gantt's competence to serve on the panel *so far as the Witherspoon rule might apply.*" (Emphasis added.) Our examination of the record in the case now before us would seem to indicate that the benchmark laid down in *Bernard* was met. In her brief, defendant mentions the *voir dire* of three jurors in particular: Mr. Dent, Miss Grimes, and Miss McKoy. After each was challenged for cause by the district attorney, the presiding judge proceeded to conduct an examination of their attitudes toward the death penalty. In response to questioning by the court, each of the named jurors indicated that no matter what aggravating circumstances were established by the evidence, he or she could not vote to impose a death sentence. These unequivocal responses satisfy the demands of *Bernard.* There was no error.

[6] Defendant assigns as error the admission of evidence concerning the deaths of John Henry Lee, Dolly Taylor Edwards, Lillie McMillan Bullard and Jennings Barfield. The evidence tended to show that defendant was responsible not only for the poisoning death of Stewart Taylor for which she was charged but also for the poisoning deaths of the other four individuals. The evidence further tended to show that she had committed additional acts of forgery and uttering. This assignment has no merit.

Evidence that a defendant has committed 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 guilt of another crime. *State v. McQueen,* 295 N.C. 96, 244 S.E. 2d 414 (1978); *State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262 (1975), *death sentence vacated,* 49 L.Ed. 2d 1205, 96 S.Ct. 3203 (1976); 1 Stansbury's North Carolina Evidence § 91 (Brandis Rev. 1973).

The rule is predicated upon the law's desire to preserve for the accused in an unencumbered state the presumption of innocence which is at the heart of every criminal prosecution. *See State v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667 (1962). Furthermore, the rule operates to protect the defendant from the surprise introduction of extraneous matters which are unduly prejudicial because their probative value is outweighed by the danger that the issues before the jury will be confused and the

trial's length will be prolonged. *See generally* McCormick on Evidence § 190 (2d ed. 1972); 1 Wharton's Criminal Evidence § 240 (13th ed. 1972). Notwithstanding these important considerations of public policy, there are a number of instances where the probative value of such evidence outweighs the specter of unfair prejudice to the defendant. *Cf. State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954) ("The general rule excluding evidence of the commission of other offenses by the accused is subject to certain well recognized exceptions, which are said to be founded on as sound reasons as the rule itself.") We perceive at least four grounds upon which evidence tending to show that defendant poisoned four individuals other than Stewart Taylor would be relevant.

It is clear that evidence that a defendant committed other offenses is relevant to establish a defendant's knowledge of a given set of circumstances when such a set of circumstances is logically related not only to the crime the defendant is on trial for but also is logically related to the extraneous offense. *State v. Walker,* 251 N.C. 465, 112 S.E. 2d 61, *cert. denied,* 364 U.S. 832, 5 L.Ed. 2d 58, 81 S.Ct. 45 (1960); *State v. McClain, supra; State v. Smoak,* 213 N.C. 79, 195 S.E. 72 (1938); McCormick on Evidence § 190 (2d ed. 1972); 1 Stanbury's North Carolina Evidence § 92 (Brandis Rev. 1973); 2 Wigmore on Evidence § 363 (1940). The *Smoak* case is particularly illustrative of this point.

In *Smoak,* the defendant was on trial for the first-degree murder of his daughter, Annie Thelma Smoak. Though she died on 1 December 1936, Annie was taken to a hospital on Thanksgiving Day, 1936, and treated for symptoms of strychnine poisoning. An autopsy indicated that the cause of her death was strychnine poisoning. At trial the state was permitted to introduce evidence tending to show that the defendant's second wife had died from strychnine poisoning. This court upheld the admission of the evidence, offering a number of grounds upon which it was relevant. One of the grounds of relevancy noted in the opinion was showing the defendant's knowledge of the effect of a particular poison, citing with approval the leading cases of *Goersen v. Commonwealth,* 99 Pa. 388 (1882), and *Zoldoske v. State,* 82 Wis. 580, 52 N.W. 778 (1892). It is appropriate to apply the principle of *Smoak* to the facts of the present case. When she took the stand in her own defense, the defendant testified:

> On Tuesday, after the weekend, I had to come to Lumberton to Dr. Baker's office to have a dressing changed and on the way back home, we stopped at Eckerd's Drug Store to get some hair spray and there is where I purchased the Terro [Ant Killer]. *I purchased it because I thought it would make him [Stewart Taylor] sick. I did intend to give it to him.* (Emphasis added.)

Earlier, in the presentation of the state's case-in-chief, the statement which the defendant had given to Officers Parnell and Lovette was introduced into evidence. In her statement, the defendant confessed:

> I had given poison to people before and they died. The label (on the bottle of poison) read, "May be fatal if swallowed."

The defendant's testimony from the stand is at odds with the clear implication of the statement that she gave to the deputies, i.e., that she knew the fatal properties of the insecticide. The evidence which relates to the deaths of the other four individuals is, therefore, admissible to show that the defendant knew the probable consequences of her actions when she administered the poison to Stewart Taylor. Its relevancy is made more striking when one notes that defendant entered a plea of not guilty by reason of insanity in addition to a general plea of not guilty. The test of insanity as a defense to a criminal charge is whether the accused, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of the mind, as to be incapable of knowing the nature and quality of the act, or, if he does know this, was by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to such act. *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977); *see also*, W. LaFave & A. Scott, Handbook on Criminal Law § 37 (1972); Comment, The Insanity Defense in North Carolina, 14 Wake Forest L. Rev. 1157 (1978). For a defendant to know the nature and quality of his act, he must have understood the physical nature and consequences of the act. *State v. Terry*, 173 N.C. 761, 92 S.E. 154 (1917); *State v. Spivey*, 132 N.C. 989, 43 S.E. 475 (1903); *see also* LaFave & Scott, *supra*, § 37; Comment, The Insanity Defense in North Carolina, *supra* at 1166-1168. Since the defendant tendered a plea of not guilty by reason of insanity, it was in issue whether

or not the defendant knew the physical nature and consequences of her actions. Accordingly, the *Smoak* holding is buttressed further.

Evidence that defendant poisoned four individuals in addition to Stewart Taylor was relevant for the purpose of showing her intent. Evidence of other offenses is properly admitted whenever it is necessary to prove that a defendant had a specific intent or that a particular act was done intentionally rather than accidentally. *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735 (1972); *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969); McCormick on Evidence § 190 (2d ed. 1972); 1 Stansbury's North Carolina Evidence § 92 (Brandis Rev. 1973). Though homicide which is committed by use of poison does not differ in its substantive elements from homicide committed by other means, the deliberative features which usually attend the use of poison have historically caused the courts to receive evidence of its prior uses in order to show intent. 2 Wigmore on Evidence § 363, n. 11 (1940). Such evidence is clearly relevant in a prosecution for first-degree murder in that the state must prove a specific intent to kill if it is to win a conviction. *State v. Wilson,* 280 N.C. 674, 187 S.E. 2d 22 (1972). Defendant was tried for first-degree murder. Evidence that she had previously administered poison to others was competent to show specific intent on her part in that she had a pattern of administering poison to persons, knowing full well the probable consequences of her actions.

Evidence of other offenses is relevant to establish a defendant's motive in engaging in criminal conduct. *State v. Poole,* 289 N.C. 47, 220 S.E. 2d 320 (1975); *State v. Arnold,* 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Smoak, supra;* McCormick on Evidence § 190 (2d ed. 1972); 1 Stansbury's North Carolina Evidence § 92 (Brandis Rev. 1973). Again, the facts of the *Smoak* case are pertinent in explaining this point. In *Smoak,* the state was allowed to introduce evidence that tended to show a pattern of similar deaths which were followed by the defendant filing proof of death and collecting the proceeds of life insurance policies he had procured on the lives of the decedents. Such evidence was deemed competent to show the defendant's motive in administering poison to his daughter, for whose death he was being tried. These facts are analogous to the facts of the case at bar. The state presented evidence which tended to show a pattern of behavior on the part

of defendant in perpetrating a repeated number of forgeries which were accompanied by the discovery of the forgery or of a fear on the part of defendant that they would be discovered. The state's evidence tended to show that defendant poisoned the individuals, with the exception of Dolly Taylor Edwards, only after the forgeries were discovered or when she became fearful of discovery. The evidence tends, therefore, to establish a motive for the crimes.

Furthermore, the evidence tends to establish the existence of a continuing plan or scheme on the part of defendant. The state established that defendant used the proceeds of her forgeries to support her drug addiction. The state further showed that in each instance, with the exception of Mrs. Edwards, the deaths were preceded by conduct which resulted in pecuniary gain to the defendant. The deaths were, therefore, the product of the same motivation to act on the part of the defendant and reflected an ongoing design on her part to assure the support of her drug habit.

Evidence of other offenses is admissible if it tends to show the existence of a plan or design to commit the offense charged, or to accomplish a goal of which the offense charged is a part or toward which it is a step. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978); *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539, 97 S.Ct. 1106 (1977); *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975); McCormick on Evidence § 190 (2d ed. 1972); 1 Stansbury's North Carolina Evidence § 92 (Brandis Rev. 1973). When it is offered for this purpose, such evidence ought to be examined with special care to see that it is really relevant to the establishment of a design or plan rather than merely showing character or a disposition to commit the offense charged. 1 Stansbury's North Carolina Evidence § 92 (Brandis Rev. 1973). A mere similarity in results is not a sufficient basis upon which to receive evidence of other offenses. Instead, there must be such a concurrence of common features that the assorted offenses are naturally explained as being caused by a general plan. 2 Wigmore on Evidence § 304 (3d ed. 1940). This requirement is grounded in the proposition which underlies much of the law of criminal evidence. The prosecution ought not to be able to introduce evidence of other criminal offenses of the defendant unless the evidence is relevant for some

other purpose than to show that the defendant is guilty because he has a criminal disposition. *See* McCormick on Evidence § 190 at p. 447 (2d ed. 1972).

A careful examination of the facts of the present case reveals the concurrence of common features that Dean Wigmore refers to in his treatise. This concurrence is found in the showing that prior to the death of each victim, defendant had lived or worked in his or her home; and that the means of inflicting death was identical in each instance. In the cases of Stewart Taylor, John Henry Lee and Lillie McMillan Bullard, there was evidence that the defendant had executed a forgery that resulted in pecuniary gain to her before their deaths. The forgeries which were committed against Taylor and Lee were discovered. Defendant became afraid that the forgery that she had committed against her mother would be discovered. It was only then, in each instance, that she obtained poison and administered it to her intended victim.

In light of the foregoing, it is clear that the evidence was properly admitted under the rules of evidence as they have been accepted and interpreted in North Carolina and by the weight of the leading authorities in the field. It therefore follows that since the evidence of the other deaths was properly admitted as components of the state's case, it was not error for the district attorney to refer to them in his argument before the jury. While it is true that an attorney may not travel outside of the record and inject into his argument facts which are not in evidence, *Jenkins v. Harvey C. Hines*, 264 N.C. 83, 141 S.E. 2d 1 (1965), there is no prohibition against an attorney making reference in his argument to evidence which has been properly admitted. Nor was there error in the instructions the court gave the jury as to how they might consider the evidence concerning the other deaths. The court instructed the jury that the evidence was received and was to be considered by them only for the purpose of showing that the defendant had the intent required for first-degree murder, that she knew that the administration of poison would cause the death of Stewart Taylor, and that there existed in her mind a plan or scheme or design on her part to kill Stewart Taylor. Judge McKinnon's charge properly stated the applicable law as it is enunciated above, reminding them that "evidence of guilt of

such charges would not be evidence of guilt of the present charge . . . ."

[7] Defendant assigns as error the admission of certain evidence for the reason that its sole purpose was to inflame the minds of the jurors against her. She further contends that throughout the trial, the district attorney presented the case for the state in such a way that he was guilty of prosecutorial misconduct. We disagree with these contentions.

Every criminal defendant is entitled to have a fair trial which is conducted before an impartial judge and unprejudiced jury in an atmosphere of calm deliberation. *State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1978); *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975); *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971). The obligation to take steps to assure a defendant's right to a fair trial rests upon the shoulders of both the presiding judge and the district attorney. *State v. Britt, supra; State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954). However, it should be noted that the obligation of the district attorney to conduct himself in such a manner as to assure the right to a fair trial does in no way lessen his obligation to the state to prosecute criminal charges to the best of his abilities on the basis of the evidence that he is able to bring before the jury. *See State v. Britt, supra; State v. Stegmann, supra; State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972). Accordingly, counsel is given wide latitude in the argument of hotly contested trials, subject to the exercise of the sound discretion of the presiding judge. *State v. Monk, supra; State v. Westbrook, supra; State v. Seipel*, 252 N.C. 335, 113 S.E. 2d 432 (1960). The district attorney has the right and the duty to cross-examine vigorously a defendant who takes the stand in his own defense, *State v. Ross*, 275 N.C. 550, 169 S.E. 2d 875 (1969), *cert. denied*, 397 U.S. 1050, 25 L.Ed. 2d 665, 90 S.Ct. 1387 (1970); *State v. Wentz*, 176 N.C. 745, 97 S.E. 420 (1920).

The district attorney's performance of his duties as public prosecutor is tempered by his obligation to the defendant to assure that he is afforded his right to a fair trial. Therefore, he may not, by argument or by cross-examination, place before the jury incompetent and prejudicial matters. *State v. Noell*, 284 N.C.

670, 202 S.E. 2d 750 (1974), *death sentence vacated,* 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3203 (1976); *State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664 (1953). This rule is violated by asking questions which are phrased impertinently or insultingly so as to badger or humiliate a witness. *State v. Daye,* 281 N.C. 592, 189 S.E. 2d 481 (1972); *State v. Wyatt,* 254 N.C. 220, 118 S.E. 2d 420 (1961). Nor may he place before the jury evidence whose only effect is to excite prejudice or sympathy. *State v. Britt, supra; State v. Lynch, supra; State v. Rinaldi,* 264 N.C. 701, 142 S.E. 2d 604 (1965). The test that is to be applied is whether the evidence tends to shed any light upon the subject matter of the inquiry or has as its only effect the exciting of prejudice or sympathy. *State v. Braxton,* 294 N.C. 446, 242 S.E. 2d 769 (1978).

In her brief, defendant refers to a number of instances of alleged misconduct on the part of the district attorney in the prosecution of this case. While we do not perceive a need to discuss these allegations in great detail, we will proceed to discuss each one briefly in light of the foregoing principles of law.

John D. McPherson, a member of the St. Pauls Rescue Squad, as well as an employee of the Robeson County Ambulance Service, testified during the state's case-in-chief as to the condition of Stewart Taylor when he was taken back to the hospital on 3 February 1978. McPherson had the opportunity to observe the decedent not only at his home but also during the trip to the hospital as well as at the emergency room of Southeastern General Hospital. McPherson testified that he and two ambulance attendants had to restrain Taylor so that the emergency room personnel could administer shots and intravenous fluids. It was his testimony that Taylor's hands, arms, and legs had to be held down in order to keep him in the bed in the emergency room. McPherson testified that he worked to restrain Taylor until he threw back his head and screamed. At that time, McPherson ran from the room and summoned a nurse after which a doctor began to administer a tracheotomy. The following exchange then took place on direct examination:

Q. How loud was the scream that you say he uttered?

A. Fairly loud.

Q. Can you duplicate it here?

MR. JACOBSON: Object.

COURT: Overruled, if he can.

A. Well, he just threw back his head and said (witness made screaming noise).

MR. JACOBSON: Object. Move to strike.

COURT: Overruled, motion denied.

The conduct of the witness amounts, in substance, to a courtroom demonstration. The conditions under which demonstrations are performed must correspond in all essential particulars with those existing at the time and place of the event. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). The circumstances need not be identical, but a reasonable or substantial similarity is sufficient. *State v. Phillips*, 228 N.C. 595, 46 S.E. 2d 720 (1948). So long as that touchstone is met, the weight that is to be given to the demonstration is for the jury to decide. *State v. Brown*, 280 N.C. 588, 187 S.E. 2d 85 (1972). The degree of similarity is a question upon which the trial judge must exercise his discretion in evaluating. *State v. Carter*, 282 N.C. 297, 192 S.E. 2d 279 (1972). We perceive no abuse of discretion on the part of the trial judge. The witness was present at the time of the incident to which he was testifying. The demonstration did serve to complete his account of the condition of Taylor before he died and the pain he was experiencing. Any demonstration in some sense and to some degree breaches the customary decorum of the courtroom. It is only with great caution that this decorum should be breached. Such caution is allowed for when the demonstration is necessary in order to allow the trier of fact to fully understand the facts and circumstances of the case that is before it.

Dr. John D. Larson testified for the state concerning the condition Stewart Taylor was in when he was taken back to the hospital on 3 February 1978. During redirect examination by the district attorney, the following exchange took place.

A. . . . I have indicated that I have never treated an arsenic case.

MR. BRITT: Is that to say arsenic is more or less exotic or not?

MR. JACOBSON: Object.

COURT: Sustained.

The question was improper because it called for an opinion on the part of a witness who had not been properly qualified and offered as an expert competent to state an opinion. *See generally* 1 Stansbury's North Carolina Evidence §§ 133-134 (Brandis Rev. 1973). However, the witness did not have an opportunity to answer the propounded question in that the timely objection of defense counsel was sustained by the court. No evidence was elicited by the district attorney in response to the question. We find no prejudice.

Alice Storms, Stewart Taylor's daughter, testified on behalf of the state. During her direct examination, the district attorney pursued a line of questioning which tended to show that Taylor was accustomed to carrying large sums of money with him in his wallet. Mrs. Storms testified that after her father died at the hospital she received his personal property, including his wallet. When defendant gave Mrs. Storms Taylor's wallet, it contained two dollars. Defendant contends that the line of questioning was irrelevant. We do not find that to be the case. The evidence was relevant on the issue of the defendant's motive in committing the crime. It was competent because the witness was testifying as to facts within her personal knowledge.

Ellen Mintz, Jennings Barfield's daughter, testified on behalf of the state. In a line of questioning, the district attorney tried to elicit information concerning the nature and extent of her father's estate. He also sought to place before the jury whether the defendant received any of the proceeds of the estate or of any insurance. Repeatedly, objections made by defense counsel were sustained by the presiding judge when the witness would attempt to testify as to what she had been told what defendant had received from the estate. At other times she attempted to testify as to her assumptions as to what defendant had received from the estate. The objections were properly sustained. There is nothing in the law of evidence which serves to prevent an attorney from persisting in his efforts to obtain competent evidence from a witness. There is nothing in the record which indicates that the district attorney was badgering his own witness. Nor is there

anything in the record which suggests that the questions were not asked in good faith.

When defendant took the stand on her own behalf, the district attorney asked her during cross-examination if she had poisoned Record Lee, the wife of John Henry Lee. Defendant denied having given any poison to Mrs. Lee. It was only after defendant answered the question that an objection was made. The district attorney did not, as defendant contends, accuse defendant of poisoning Record Lee. When defendant denied that she had done so, the district attorney elected not to pursue the matter. There was no prejudice.

After defendant admitted on the stand to having poisoned Dolly Taylor Edwards, the district attorney posed the following question to her:

> Q. And the reason you poisoned her to death was because she was just a cantankerous old lady to live with, wasn't she?

Defendant's attorney objected and the court sustained the objection as to form. Assuming the question was improper as a breach of courtroom decorum, in light of the overall conduct of the trial and the evidence otherwise presented against defendant, we perceive no prejudice.

[8] Defendant contends that the trial court erred in receiving several items into evidence without first requiring that an adequate foundation be laid. There is no merit in this contention.

In the statement which she gave to Officers Lovette and Parnell, defendant admitted poisoning Dolly Taylor Edwards saying:

> I went to D. D. McCall's store and bought a bottle of poison. It was in a plastic bottle. The label read "Could be fatal if swallowed." I came back home and put some of it in her coffee and cereal . . . . I knew what I gave her caused her death. I threw the bottle in the field back of the house.

During his investigation, Officer Lovette went to the home of Mrs. Edwards, went around to the back of the house and to the spot where defendant said she had thrown the bottle. There, he found an empty bottle which bore the label of "Singletary's Rat

Poison." Officer Lovette testified that he initialed the bottom of the bottle when he recovered it and that he had kept the bottle in his sole possession from the time he recovered it to the time of the trial with no one else having access to it. Defendant argues that the bottle was inadmissible on the grounds of remoteness in that more than a year had passed from the time she allegedly threw it in the field and the time it was recovered.

Real evidence is that evidence which is provided by producing for inspection at trial a particular item rather than having witnesses describe it. 1 Stansbury's North Carolina Evidence § 117 (Brandis Rev. 1973). A two-pronged foundation must be laid before such evidence is properly received in evidence. First, the item which is offered must be identified as being the same object involved in the incident at issue. *State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977); *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971). Officer Lovette testified that he recognized state's Exhibit Number Ten as being the bottle he found in the field behind Mrs. Edwards' house. Second, it must also be shown that since the incident in which it was involved, the object has undergone no material change in its condition. *State v. Harbison, supra; Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326 (1953). Officer Lovette testified that the label was still on the bottle and was recognizable when he recovered it in the field. He further testified that it had been in his sole custody until the time of trial. The trial judge possesses and must exercise sound discretion in determining the standard of certainty that is required to show that the object which is offered is the same object involved in the incident in issue and that the object is in an unchanged condition. *State v. Harbison, supra*. Abuse of discretion is not shown here.

Nor is there evidence of an abuse of discretion on the part of the presiding judge in receiving into evidence the various checks that defendant is alleged to have forged upon the accounts of Stewart Taylor and John Henry Lee. During her direct examination, Alice Storms identified six checks bearing her initials for identification as being checks bearing the signature of her father, Stewart Taylor. She was then shown three other checks which she identified as not bearing the authentic signature of her father. A lay person is competent to state an opinion as to the

handwriting of an individual provided that the witness is familiar with the handwriting of that person. *In re Bartlett,* 235 N.C. 489, 70 S.E. 2d 482 (1952); *Lee v. Beddingfield,* 225 N.C. 573, 35 S.E. 2d 696 (1945). Not only did she testify that she recognized her father's handwriting, Mrs. Storms testified that she recognized the checks as being the ones shown to her before the trial by law enforcement officers. She further testified that she recognized the check dated 31 January 1978 in the amount of $300.00 as being one she found in her father's bank statement. The state also offered the testimony of Durward C. Matheny, supervisor of the Questioned Documents Section of the State Bureau of Investigation, concerning these same checks. Mr. Matheny testified that the signatures which appeared on the second group of checks which was shown to Mrs. Storms were not made by the same individual who made the signatures on the first group of checks which she identified on the stand. Therefore, we conclude that there was no abuse of discretion on the part of the trial judge in that there was a sufficient foundation laid.

Margie Lee Pittman, daughter of John Henry Lee and Record Lee, identified state's Exhibit Number Three as being a check payable to the Internal Revenue Service bearing her mother's signature. She identified it as being a check that she had written out for her mother and which her mother had signed in her presence the morning after John Henry Lee had been taken to the hospital. Mrs. Pittman also identified state's Exhibit Number Four, a check payable to Bo's Supermarket in the amount of $50.00, as not bearing the authentic signature of her mother. This was a sufficient foundation.

[9] Defendant contends that an improper foundation was laid for the experts who testified as to their opinions of the cause of death of Stewart Taylor, Dolly Taylor Edwards, John Henry Lee and Jennings Barfield. This contention has no merit. The evidence showed that each of the doctors who stated an opinion as to cause of death was a qualified pathologist and that his opinion was based on an autopsy performed on the victim.

The competency of a witness to testify as an expert is a matter addressed to the discretion of the trial court judge and will not be disturbed on appeal if there is evidence in the record to support his finding. *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548

(1956). The absence of an express finding in the record that the witness is qualified as an expert is no ground for challenging the ruling implicitly made by the judge in allowing the witness to testify. 1 Stansbury's North Carolina Evidence § 133 (Brandis Rev. 1973). If the record indicates that such a finding could have been made it will be assumed that the judge properly found the witness to be an expert, or that his competency was admitted, or that no question was raised in regard to his competency. *State v. Shaw,* 293 N.C. 616, 239 S.E. 2d 439 (1977); *State v. Cates,* 293 N.C. 462, 238 S.E. 2d 465 (1977); *State v. Mitchell,* 283 N.C. 462, 196 S.E. 2d 736 (1973). There is sufficient evidence in the record in this case to justify allowing the three doctors to state their opinions as experts as to the cause of the deaths of the individuals in question. There was no abuse of discretion.

[10] Defendant contends that the trial court erred in denying her motion to suppress the statements given by her to Officers Lovette and Parnell. This contention has no merit.

The content of these statements has been set forth previously in this opinion. In short, on 10 March 1978 defendant denied having anything to do with the death of Stewart Taylor. On 13 March 1978 she gave the officers four separate statements concerning the deaths of Stewart Taylor, John Henry Lee, Lillie McMillan Bullard, and Dolly Taylor Edwards. On *voir dire,* Deputy Sheriff Lovette testified on behalf of the state. According to Lovette, he and Deputy Sheriff Parnell talked with defendant on 10 March 1978 at the Robeson County Sheriff's Department. On that occasion defendant was given her *Miranda* warnings and indicated that she did not want a lawyer at that time. She told the officers that she was willing to talk with them. Officer Lovette further testified that she did not appear to be under the influence of anything. When defendant returned to the sheriff's department to talk with the officers again, she was given her *Miranda* warnings a second time. At that time she was accompanied by her son, Ronald Burke. The officer testified that at the second conference defendant did not appear to be under the influence of anything; that she was upset and crying; and that no promises or threats were made to her.

On *voir dire* defendant testified that on the morning of the second interview she had taken a quantity of drugs: two Sine-

quans, two Elavils, two Tylenol III, two Tranxenes, and three Valium, and that at no time was she given her *Miranda* warnings. She went on to say "He told me that if I would open up and tell everything it would be much easier on me." Ronald Burke took the stand during *voir dire* and testified that when he went to his mother to take her to the sheriff's office he found a pill container in her hand and that she was wobbly; that she was crying and upset when she talked with the officers; and that Officer Lovette told him that "It will be easier for her."

The judge then made findings of fact and conclusions of law which he entered in the record denying the motion to suppress.

G.S. 15A-977(f) requires a judge to make findings of fact and conclusions of law when there is a motion to suppress. Such findings of fact must include findings on the issue of voluntariness. When the evidence is conflicting, the findings of fact must be sufficient to provide a basis for the judge's ruling. *State v. Herndon*, 292 N.C. 424, 233 S.E. 2d 557 (1977); *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). The facts so found by the trial court judge are conclusive if they are supported by competent evidence. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death sentence vacated*, 428 U.S. 908, 49 L.Ed. 2d 1213, 96 S.Ct. 3215 (1976). The trial judge found as facts that defendant's statements were voluntary and that no promises or threats were made to her. There is competent evidence in the record which supports those findings.

Defendant argues that it was error to receive her statements into evidence because her *Miranda* warnings were not repeated prior to the making of each statement. This argument is without merit.

Before defendant talked with Officers Lovette and Parnell for the first time on 10 March 1978, she was advised of her constitutional rights by Deputy Lovette. Defendant stated to the officers that she understood her rights and that she did not want a lawyer. At that time, she executed a written waiver of rights form. Before they began questioning the defendant again on 13 March 1978, the officers once more advised her of her rights. In response to the repeated warning, defendant stated that she did not want a lawyer and that she wanted to make a statement. A written waiver of rights form was then read to her and she sign-

ed it. After executing the waiver, defendant proceeded to make four separate statements to the officers concerning her involvement in the deaths of Stewart Taylor, John Henry Lee, Dolly Taylor Edwards, and Lillie McMillan Bullard. There was no repetition of *Miranda* warnings before each separate statement was taken.

Repetition of *Miranda* warnings is not required where no inordinate time elapses between interrogations, the subject matter remains the same and there is no evidence that anything occurred in the interval which would serve to dilute the effect of the first warning. *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977); *State v. Cole*, 293 N.C. 328, 237 S.E. 2d 814 (1977); *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976). The need for a repetition of *Miranda* warnings must be determined by the totality of circumstances of each case. *State v. McZorn, supra.* Among the factors that are to be considered in making this determination are: The length of time between the giving of the first warnings and the subsequent interrogation; whether the warnings and the subsequent interrogation occurred in the same place or in different places; whether the warnings and the subsequent interrogation were conducted by the same or different officers; the extent to which the subsequent statement differed from any previous statements; and the apparent intellectual and emotional state of the suspect at the time of the interrogation. *State v. McZorn, supra.*

In the present case, there were two interrogations of defendant by Officers Lovette and Parnell. During the first interrogation defendant denied any involvement in the death of Stewart Taylor. Before the first interrogation began, defendant was given her *Miranda* warnings. These warnings were repeated before the second interrogation began. During the second interrogation, defendant made four separate statements in the space of a relatively short time. The interrogation took place in the same location where she was given her *Miranda* warnings. The interrogation was conducted by the same officers who advised her of her constitutional rights. The statements which she gave to the officers on 13 March differed from one another because they were each concerned with different incidents. While it is true that there was testimony on *voir dire* which tended to show that

defendant had consumed a large quantity of drugs on the morning of March 13, there is no evidence in the record which would suggest that at the time of the interrogation she was under the influence of any substance. That the defendant was crying and otherwise visibly upset at the time of questioning does not by itself prove that she was not sober or otherwise cognizant of what was happening.

[11] By her eleventh assignment of error, defendant contends that the trial court erred in not submitting the defense of insanity to the jury for its consideration. The assignment is without merit.

Defendant entered a plea of not guilty by reason of insanity in addition to a general plea of not guilty. The district attorney was given written notice of defendant's intention to rely upon this defense. Dr. Bob Rollins, a psychiatrist specializing in forensic psychiatry, examined defendant upon her referral to the Forensic Unit of Dorothea Dix State Hospital by the district court. Dr. Rollins testified that though defendant was uncooperative, he concluded that she was competent to stand trial and that she knew the difference between right and wrong. Nothing in his examination led Dr. Rollins to conclude that defendant suffered from any type of mental illness at the time she allegedly administered poison to Stewart Taylor.

Dr. A. Eugene Douglas, a psychiatrist, examined the defendant upon referral on order of Judge Hobgood. Dr. Douglas concurred in the findings and conclusions of Dr. Rollins. Testifying by way of deposition, Dr. Anthony Sainz declined to state an opinion on the sanity of defendant but did testify that in his opinion, defendant was competent to stand trial and knew the difference between right and wrong. Dr. Sainz went on to state that while there was no evidence of mental illness on the part of the defendant, she did have what he termed a passive-aggressive personality with her judgment being immaturely developed.

Defendant argues that she presented sufficient evidence tending to show mental illness and to raise the issue of whether she knew the nature and quality of her act or knew that it was wrong. We find this argument unpersuasive.

The test of insanity that is recognized in North Carolina is whether the accused at the time of the commission of the alleged

act was laboring under such defect of reason from disease or defect of the mind as to be incapable of knowing the nature and quality of the act or if he does know it was by reason of such defect of reason incapable of distinguishing right from wrong in relation to such act. *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977). Every person is presumed to be sane and possess a sufficient degree of reason to be responsible for his crimes. *State v. Hicks*, 269 N.C. 762, 153 S.E. 2d 488 (1967); *State v. Creech*, 229 N.C. 662, 51 S.E. 2d 348 (1949). The burden is on the defendant to prove the defense of insanity to the satisfaction of the jury. *State v. Caldwell*, 293 N.C. 336, 237 S.E. 2d 742 (1977), *cert. denied*, 434 U.S. 1075, 55 L.Ed. 2d 780, 98 S.Ct. 1264 (1978). A trial judge does not err in failing to place the issue of insanity before the jury where there is no evidence produced at trial that would tend to show that a defendant was insane at the time of the commission of the alleged offense. *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1206, 96 S.Ct. 3204 (1978); *State v. Melvin*, 219 N.C. 538, 14 S.E. 2d 528 (1941).

From the record in the present case, we conclude that the evidence was insufficient to require the trial judge to submit the issue of defendant's sanity to the jury. All three of the psychiatrists who testified concluded that defendant knew the difference between right and wrong. There was no evidence that she did not know the nature and quality of her acts.

[12] Defendant contends that the trial court erred in refusing to dismiss the charges against her, in denying her motion for a directed verdict, in denying her motion to set the verdict aside as being contrary to law and the weight of evidence, in denying her motion for a new trial and in denying her motion for a mistrial on the ground that the prosecutor's behavior amounted to misconduct. These contentions have no merit. There was sufficient evidence to take the case to the jury on the issue of defendant's guilt. Furthermore, the evidence adduced at trial was sufficient to uphold the verdict against a motion for a new trial as well as against a motion to set it aside as being contrary to law and against the weight of the evidence. As we have indicated above, we fail to find that any of the conduct on the part of the district attorney in the prosecution of this case amounted to misconduct.

PHASE II—SENTENCE DETERMINATION

By her fifth assignment of error, defendant contends that the trial court erred in entering a judgment calling for the death penalty because the North Carolina statutes providing for capital punishment, G.S. § 15A-2000 et seq., are unconstitutional. We find no merit in this assignment.

Defendant argues that the statutes are unconstitutional for four reasons: (1) the death penalty amounts to cruel and unusual punishment which is barred by the Eighth and Fourteenth Amendments to the United States Constitution; (2) the sentencing procedure is mandatory in nature; (3) the aggravating and mitigating circumstances prescribed in the statute are too vague; and (4) the state ought to be required to prove that there are no mitigating circumstances before the death penalty may be imposed.

The benchmark by which the constitutionality of G.S. § 15A-2000 et seq. is to be judged is that provided by the landmark case of *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972), and its progeny. In *Furman*, the United States Supreme Court held that the Eighth and Fourteenth Amendments to the United States Constitution invalidate any scheme for the imposition of the death penalty when either the judge or jury is permitted to impose that sentence as a matter of unbridled discretion. *See Furman v. Georgia*, 408 U.S. at 253, 33 L.Ed. 2d at 357, 92 S.Ct. at 2734 (Douglas, J., concurring); *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973). Only two justices concluded that capital punishment is *per se* unconstitutional, Justices Brennan and Marshall. For Justices Douglas, Stewart and White, the issue in *Furman* turned on their concern that because of the uniqueness of the death penalty, it ought not to be imposed under sentencing procedures that create a substantial risk that it could be inflicted in an arbitrary and capricious manner.

Justice Stewart concluded that the death sentences examined by the court in *Furman* were "cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . the petitioners [in *Furman*] were among a capriciously selected random handful upon which the sentence of death has been imposed." *Furman v. Georgia*, 408 U.S. at 309, 310, 33 L.Ed. 2d at 390, 92 S.Ct.

at 2762 (Stewart, J., concurring). Justice White echoed these sentiments in finding that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. at 313, 33 L.Ed 2d at 292, 92 S.Ct. at 2764 (White, J., concurring). Justice Douglas eloquently summarized the position of those justices who did not find capital punishment to be *per se* unconstitutional, of which he was one, in observing that ". . . we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries whether defendants committing these crimes should die or be imprisoned. Under these laws, no standards govern the selection of the penalty. People live or die, dependent upon the whim of one man or of 12." *Furman v. Georgia*, 408 U.S. at 253, 33 L.Ed. 2d at 357, 92 S.Ct. at 2734 (Douglas, J., concurring).

It is appropriate to look to the concurring opinions of these three justices in determining the precise holding of *Furman* in that their concurrences were based upon narrower grounds than those of Justices Brennan and Marshall. Therefore, since the unbridled discretion of judges and juries to impose the death penalty formed the core of the court's disposition of *Furman*, it remained for later cases to carve from the decision clear boundaries within which the imposition of capital punishment would be constitutional.

In the wake of the *Furman* decision, the legislatures of at least 35 states enacted new statutes which called for the imposition of the death penalty for specified crimes. These newly adopted statutes attempted to address the concerns expressed by the Supreme Court in *Furman* primarily by retaining the concept of discretionary power on the part of judges and juries to impose capital punishment but at the same time specifying factors to be weighed and procedures to be followed in exercising that discretion or by making the death penalty mandatory for specified crimes. In a set of cases decided on the same day, the Supreme Court upheld three statutory schemes which called for the death penalty to be imposed as a matter of guided discretion on the part of judges or juries. At the same time, the court declared unconstitutional North Carolina's statute which called for the mandatory imposition of the death penalty upon a finding that the defendant was guilty of one or more enumerated crimes.

The statutory formulas for imposing the death penalty of Georgia, Florida and Texas were upheld in *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859, 96 S.Ct. 2909 (1976); *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed. 2d 913, 96 S.Ct. 2960 (1976); *Jurek v. Texas*, 428 U.S. 262, 49 L.Ed. 2d 929, 96 S.Ct. 2950 (1976). Though the statutes differed in their particulars, they shared a similar characteristic: each left the decision to impose the death penalty to the *guided* discretion of either the judge or the jury.

After the *Furman* decision, Georgia enacted a new statutory formula for imposing the death penalty. Ga. Code Ann. §§ 26-3102; 27-2503; 27-2534.1; 27-2537 (Supp. 1975). The Georgia statute interpreted in *Gregg* requires that there be a bifurcated trial. In the first stage of the proceeding, the capital defendant's guilt is determined in the traditional manner before a jury or a judge. In the second stage of the trial after there has been a finding of guilt, a hearing to determine sentence is conducted before whoever made the determination of guilt. At this hearing, the jury or the judge hears additional evidence in mitigation, aggravation, or extenuation of punishment. Evidence in aggravation is limited to that which the state makes known to the defendant before trial. Argument of counsel is permitted. In making a determination of sentence, there must be a weighing of any mitigating or aggravating circumstances authorized by law as well as ten specially enumerated aggravating circumstances enumerated in the statute. The death penalty may be imposed only if the jury or the judge finds at least one of the statutorily enumerated aggravating circumstances beyond a reasonable doubt. Evidence considered during the guilt phase of the trial may be considered during the sentencing phase without being resubmitted. *Eberheart v. State*, 232 Ga. 247, 206 S.E. 2d 12 (1974). The statute provides for a special expedited appeal to the Supreme Court of Georgia. The court is directed to consider any errors brought forward on appeal as well as whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the finding of the statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the particular defendant.

The Florida statute approved in *Proffitt* is similar to that examined in *Gregg* in that it too mandates a bifurcated trial as well

as an expedited appeal to the Florida Supreme Court. Fla. Stat. Ann. § 921.141 (Supp. 1976-1977). It differs, however, in that it calls for the jury to make, by a majority vote, a recommendation to the judge as to the appropriate punishment. Its finding is only advisory because the actual sentence is determined by the judge. In making that determination, the judge is directed to weigh eight enumerated aggravating factors against seven mitigating factors. The statute further provides for an automatic review by the Florida Supreme Court. It differs from that of Georgia in that it does not require the court to conduct a specific type of review. It is apparent that the basic difference between the Florida scheme and the Georgia approach is that in Florida the sentence is determined by the trial judge rather than the jury.

The Texas system examined in *Jurek* requires that if a defendant is convicted of a capital offense, the trial court must then conduct a separate sentencing proceeding before the same jury that tried the issue of guilt. Tex. Crim. Proc. Code Ann. § 37.071 (Supp. 1975-1976). The procedure requires the jury to answer three questions in a proceeding that takes place subsequent to the return of a verdict finding a person guilty of one of the categories of murder specified in the statute. The questions the jury must answer are these:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

If the jury finds that the state has proven beyond a reasonable doubt that the answer to each of the questions is yes, then the death penalty is imposed. If the jury answers any one of the questions no, a sentence of life imprisonment is imposed. The law also provides for an expedited review by the Texas Court of Criminal Appeals. The Texas approach to the imposition of capital punish-

ment differs from that of Georgia in that there is no weighing, as such, of aggravating and mitigating factors. Instead, the jury must answer beyond a reasonable doubt in an affirmative manner each of the three questions submitted to it at the sentencing hearing. The Texas scheme differs from that of Florida in that the jury, rather than the judge, is the ultimate arbiter of punishment.

From the foregoing sketch, it is apparent that the North Carolina statutes dealing with capital punishment are most similar to those of Georgia examined in *Gregg* because of the role of the jury in weighing various aggravating and mitigating factors in a separate sentencing proceeding. Therefore, it is appropriate to analyze the constitutionality of G.S. 15A-2000 et seq. in light of the framework provided by the *Gregg* case. This analysis must not proceed in a vacuum. It must take into account the case of *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976), decided the same day as *Gregg*. In *Woodson*, the United States Supreme Court struck down as unconstitutional the North Carolina death penalty statute as it was then applied. After *Furman* this court held unconstitutional the provisions of the death penalty statute for first-degree murder, G.S. § 14-17, in the case of *State v. Waddell, supra*. This court held further that the provision of the statute that gave the jury the option of returning a verdict of guilty without capital punishment to be severable so that the statute survived as a mandatory death penalty statute. The General Assembly enacted in 1974 a new statute that was essentially unchanged from the old one except that it made the death penalty mandatory upon a finding of guilt. It was this statute that was before the United States Supreme Court in *Woodson*.

In delivering the decision of the court in *Woodson*, Justice Stewart identified three grounds upon which the court found the North Carolina statute to be constitutionally infirm. First, he observed that the mandatory death penalty statute for first-degree murder departed from contemporary standards respecting the imposition of punishment of death in that there was a rejection on the part of society of making death mandatory for certain crimes. Second, he commented that the imposition of a mandatory death penalty for first-degree murder did not respond to *Furman's* rejection of unbridled discretion in imposing the penalty of death. This he found by assuming that juries would weigh

the severity of the mandatory punishment in making a determination of guilt or innocence and would exercise unbridled discretion in deciding whether to convict of the capital crime at all. Third, he noted that the statute did not allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the death penalty was imposed upon him. Justice Stewart buttressed this argument by observing that because of the finality of capital punishment, it is qualitatively different from imprisonment for a term of years. Accordingly, he found that there needed to be a finding that death is the appropriate punishment in a specific case. Therefore, it is not enough to examine the constitutionality of the present death penalty statutes under *Gregg*. We must also look to *Woodson* in order to determine if the defects of the prior statute have been corrected.

[13] Defendant argues that the death penalty amounts to cruel and unusual punishment barred by the Eighth and Fourteenth Amendments to the United States Constitution. It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment. *Coker v. Georgia*, 433 U.S. 584, 53 L.Ed. 2d 982, 97 S.Ct. 2861 (1977); *Gregg v. Georgia, supra.* To pass scrutiny under the Eighth Amendment, a penalty must accord with the dignity of man which is the underlying concept of the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. at 173, 49 L.Ed. 2d at 874, 96 S.Ct. at 2925; *Trop v. Dulles*, 356 U.S. 86, 100, 2 L.Ed. 2d 630, 78 S.Ct. 590 (1958). At the very least, this means that the punishment must not be excessive. *Gregg v. Georgia*, 428 U.S. 173, 49 L.Ed. 2d 875, 96 S.Ct. at 2925. Whether a penalty is excessive must be determined in light of two considerations. First, a penalty may be excessive and unconstitutional if it makes no measurable contribution to acceptable goals of punishment and is nothing more than the needless and purposeless imposition of pain and suffering. *Coker v. Georgia*, 433 U.S. at 592, 53 L.Ed. 2d at 989, 97 S.Ct. at 2865; *Gregg v. Georgia*, 428 U.S. at 173, 49 L.Ed. 2d 875, 96 S.Ct. at 2925. *See also Wilkerson v. Utah*, 99 U.S. 130, 136, 25 L.Ed. 345, 348 (1879) ("It is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty are forbidden by that amendment.") Second, the punishment inflicted must not be grossly out of proportion to the severity of the crime.

Coker v. Georgia, 433 U.S. at 592, 53 L.Ed. 2d at 989, 97 S.Ct. at 2865; *Trop v. Dulles*, 356 U.S. at 100, 2 L.Ed. 2d at 642, 78 S.Ct. at 598; *Weems v. United States*, 217 U.S. 349, 381, 54 L.Ed. 793, 804, 30 S.Ct. 544, 554-555 (1910). In weighing these considerations, courts must give attention to public attitudes concerning a particular penalty as deduced from history and precedent, legislative action, and the conduct of juries. *See Coker v. Georgia*, 433 U.S. at 592, 53 L.Ed. 2d at 989, 97 S.Ct. at 2866. In *Gregg*, the United States Supreme Court held that the death penalty for first-degree murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the severity of the crime. *Gregg v. Georgia*, 428 U.S. at 187, 49 L.Ed. 2d at 882, 96 S.Ct. at 2932. We are in agreement with that holding.

[14] Defendant argues that the North Carolina death penalty is mandatory in nature. It is at this point that we must consider G.S. § 15A-2000 et seq. in light of *Woodson v. North Carolina*, *supra*. It will be recalled that *Woodson* declared the mandatory death penalty North Carolina then imposed to be unconstitutional. There were three grounds upon which the finding of unconstitutionality was based. First, Justice Stewart noted that the mandatory death penalty departed from society's rejection of the practice of making capital punishment mandatory. Second, he observed that juries would weigh the severity of the penalty in making the determination of guilt or innocence. In short, they would exercise unbridled discretion in deciding whether to convict of the capital crime at all. Because of this, a mandatory death penalty does not adequately address the issues raised in *Furman*. Third, a mandatory death penalty does not allow for the particularized consideration of the relevant aspects of the character and record of each convicted defendant before the sentence of death is imposed upon him. To carry her argument that the present death penalty statutes are mandatory in nature, defendant must establish that the infirmities of the old statute which were identified in *Woodson* have not been corrected. We are not persuaded that the present statutes provide for the *mandatory* imposition of the death penalty.

The apparent simplicity of the manner in which the prior statute operated was its constitutional downfall. Under former practice, a defendant who was found guilty of first-degree murder was invariably sentenced to death. Sentence would be pronounced

without an examination of the particular facts and circumstances relating to the commission of the crime or to the defendant. Insofar as sentencing was concerned, the law was blind in its operation and application. However, mindful of the mandatory sentence which attached upon a conviction of first-degree murder, juries were free to exercise wide latitude over the sentence to be imposed by their conduct at the guilt determination stage of the trial. This conduct was not subject to any guidance or structure of any kind except for the instructions which the trial court judge gave to the jury before they retired to deliberate. Therefore, at one and the same time, a mandatory death penalty allows two distinct constitutional infirmities to have free play even though they are polar opposites to one another. Juries are allowed to have too much discretion in their determination of defendant's guilt; while at the sentencing phase of the proceeding there is no discretion to be exercised whatsoever. We conclude that the present North Carolina death penalty statutes overcome the problems identified in *Woodson.*

First, the determination of guilt is entirely divorced from the imposition of punishment. Though the same jury that made the determination of guilt may make the determination of punishment, it makes that determination at a different time, subject to a different set of instructions from the trial judge. Therefore, the issue of jury nullification of the instructions of the court by refusing to convict of the capital offense is diffused. In making the finding of guilt or innocence, the jury now does not invariably weigh the probable punishment. In addition, the evidence that it considers in the punishment phase of trial is not necessarily the same as that it dealt with in finding the defendant guilty. Though it may consider evidence previously introduced at the guilt determination stage, it is not limited to that evidence. Additional evidence in mitigation as well as aggravation may be introduced. Additional argument of counsel is permitted. In short, the nature of the bifurcated trial itself serves to prevent the issue of probable punishment from bleeding over into the determination of guilt or innocence. In so providing, the present North Carolina death penalty statutes recognize not only what Justice Stewart perceived to be society's rejection of the mandatory imposition of the death penalty but also the actual conduct of juries in weighing the guilt or innocence of the accused.

Second, while the present statutes serve to diffuse the issue of jury discretion in the process of guilt determination, they also provide for the exercise of *guided* discretion at the sentencing stage of the proceeding. After hearing the evidence, arguments of counsel, and further instructions of the trial court judge, the jury is required to deliberate and render a binding sentence recommendation to the court. This recommendation is not presented until the jury has engaged in a two-step process. Initially, the jury must determine which of the aggravating and mitigating circumstances exist on the basis of the evidence presented. If it finds that none of the statutory aggravating circumstances exist beyond a reasonable doubt, the inquiry is at an end and the defendant is sentenced to life imprisonment. If, however, the jury finds that any of the statutory aggravating circumstances exist, it must determine whether they outweigh any mitigating circumstances in a sufficiently substantial manner so as to call for the imposition of the death penalty. It is this process that overcomes the problem spotlighted in *Woodson*: a mandatory death penalty does not allow for the particularized consideration of the relevant aspects of the character and record of a convicted defendant. Furthermore, a mandatory death penalty does not allow the singular characteristics of the conduct found to be criminal to be weighed in the balance in the imposition of sentence as is invariably done in the finding of guilt.

While there is discretion at this stage of the process, it is not discretion that is constitutionally forbidden. It is discretion which is guided by the very language of the statute and the process by which it is implemented. Prior to *State v. Waddell, supra*, juries had uncontrolled discretion as to the punishment to be imposed in a capital case. A jury then had the power to sentence a convicted capital defendant to life imprisonment by so recommending at the time it rendered its verdict. While it is true that the present statute empowers the jury in effect to impose sentence upon the defendant, that decision is not made blindly. No defendant may be sentenced to death unless and until the jury finds at least one statutory aggravating circumstance to exist beyond a reasonable doubt which outweighs any mitigating circumstance in a sufficiently substantial manner so as to call for the death penalty. No aggravating circumstance which is not provided by the language of the statute may be considered by the jury in imposing sen-

tence. G.S. 15A-2000(e). In this respect, our statute is significantly more narrow than the statute which was upheld in *Gregg*. The Georgia death penalty statute which was at issue in that case allowed a jury to consider "any . . . aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence. . . ." Ga. Code Ann. § 27-2534.1(b) (Supp. 1975). It is apparent that juries operating under the Georgia procedure have *greater discretion* in imposing the death penalty than do juries in North Carolina. While the present North Carolina statute enumerates several mitigating factors to be considered by the jury, it does not limit the jury in its consideration of mitigating factors. A North Carolina jury is specifically empowered to consider "[A]ny other circumstance arising from the evidence which the jury deems to have mitigating value." In short, while the jury's discretion to impose the death penalty is sharply limited, it retains wide discretion to consider the particular circumstances of the defendant and his conduct so that the punishment which is ultimately imposed is not grossly disproportionate to the crime.

It is clear from the foregoing discussion that the present North Carolina death penalty statutes are not mandatory in nature but instead provide for the exercise of guided discretion in the imposition of sentence.

[15] Defendant further argues that the North Carolina death penalty statutes are unconstitutional because they fail to give to the jury objective standards to guide it in weighing aggravating against mitigating circumstances in passing upon the issue of sentence. In particular, defendant contends that the aggravating circumstances are vague and without accurate definition. Intertwined with that contention is the further argument that the jury is given no guidance in how it is to go about determining whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances found. Defendant's argument is not persuasive.

As a general proposition, a jury is not likely to be skilled as a body in handling the information which is brought before it on the issue of punishment. *See Gregg v. Georgia*, 428 U.S. at 192, 49 L.Ed. 2d at 885, 96 S.Ct. at 2934. However, the jury's inexperience in digesting the information presented to it can be over-

come if it is given sufficient guidance regarding the relevant factors about the defendant and the crime he was found to have committed. *Id.* Appropriate sentencing standards operate to reduce the risk that the death penalty will be imposed in an arbitrary or capricious manner. In the words of Justice Stewart, "[I]t is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." *Gregg v. Georgia*, 428 U.S. at 193, 49 L.Ed. 2d 886, 96 S.Ct. at 2934. Appropriately framed and submitted sentencing standards allow a jury to consider on the basis of all the relevant evidence not only why the death sentence should be imposed but also why it should not be imposed. *Jurek v. Texas*, 428 U.S. at 271, 49 L.Ed. 2d at 938, 96 S.Ct. at 2956.

Sentencing standards are by necessity somewhat general. While they must be particular enough to afford fair warning to a defendant of the probable penalty which would attach upon a finding of guilt, they must also be general enough to allow the courts to respond to the various mutations of conduct which society has judged to warrant the application of the criminal sanction. *See Gregg v. Georgia*, 428 U.S. at 194-195, 49 L.Ed. 2d at 886-887, 96 S.Ct. at 2935. While the questions which these sentencing standards require juries to answer are difficult, they do not require the jury to do substantially more than is ordinarily required of a factfinder in any lawsuit. *See Proffitt v. Florida*, 428 U.S. at 257-258, 49 L.Ed. 2d at 926, 96 S.Ct. at 2969. The issues which are posed to a jury at the sentencing phase of North Carolina's bifurcated proceeding have a common sense core of meaning. Jurors who are sitting in a criminal trial ought to be capable of understanding them and applying them when they are given appropriate instructions by the trial court judge. *See Jurek v. Texas*, 428 U.S. at 279, 49 L.Ed. 2d at 939, 96 S.Ct. at 2959 (White, J., concurring).

[16] Defendant's attack upon the constitutionality of the present North Carolina death penalty statutes concludes with the assertion that due process of law requires the state to bear the burden of proof that in a given case no mitigating circumstances exist. We find no merit in this argument.

Due process requires the state to bear the burden of proving beyond a reasonable doubt each element of a substantive criminal offense. *Hankerson v. North Carolina*, 432 U.S. 233, 53 L.Ed. 2d

306, 97 S.Ct. 2339 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975); *In Re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970). However, the concept of due process does not require that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses which are related to the culpability of an accused. *Patterson v. New York*, 432 U.S. 197, 53 L.Ed. 2d 281, 97 S.Ct. 2319 (1977). Nor does due process require a state to disprove beyond a reasonable doubt the existence of a factor which mitigates the degree of criminality or punishment. *See Cole v. Stevenson*, 447 F. Supp. 1268 (E.D.N.C. 1978).

In light of the foregoing discussion, we hold that the North Carolina death penalty is constitutional.

Although defendant has not brought forward and argued to this court any assignment of error which relates to the submission of a particular aggravating circumstance to the jury, in view of the penalty that has been imposed, we have carefully considered those that were submitted. We conclude that the trial court did not err in this respect. *See State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979).

* * * * * *

As a check against the capricious or random imposition of the death penalty, this court is empowered to review the record in a capital case to determine whether the record supports the jury's findings of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. G.S. 15A-2000(d)(2).

We do not take lightly the responsibility imposed on us by G.S. 15A-2000(d)(2). We have combed the record before us. We have carefully considered the briefs and arguments which have been presented to us. We conclude that there is sufficient evidence in the record to support the jury's findings as to the aggravating circumstances which were submitted to it. We find nothing in the record which would suggest that the sentence of death was imposed under the influence of passion, prejudice, or

any other arbitrary factor. The manner in which death was inflicted and the way in which defendant conducted herself after she administered the poison to Taylor leads us to conclude that the sentence of death is not excessive or disproportionate considering both the crime and the defendant. We, therefore, decline to exercise our statutory discretion to set aside the sentence imposed.

No error.

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

STATE OF NORTH CAROLINA v. NORMAN DALE JOHNSON

No. 101

(Filed 6 November 1979)

1. **Criminal Law § 135.4; Homicide §§ 13, 31.1— first degree murder—plea bargain for life sentence prohibited**

G.S. 15A-2000 and G.S. 15A-2001 do not permit a defendant in a capital case to enter a plea of guilty on condition that his sentence be life imprisonment but require that a jury be impaneled to determine the punishment to be imposed on a defendant who pleads guilty.

2. **Jury § 7.11— exclusion of jurors for death penalty views**

The trial court in a bifurcated trial for first degree murder did not err in excluding for cause seven prospective jurors who stated that under no circumstances would they return a verdict which would result in the imposition of the death penalty.

3. **Jury § 6— capital case—denial of individual voir dire, sequestration**

The trial judge in a first degree murder case did not abuse his discretion in denying defendant's motion for an individual voir dire of each prospective juror and for sequestration of jurors during voir dire.

4. **Criminal Law § 5— insanity—burden of proof**

The decision of *Mullaney v. Wilbur*, 421 U.S. 684, does not require that the burden be placed on the State to refute the defense of insanity.

5. **Constitutional Law § 40— failure to appoint associate counsel for appeal**

The trial judge did not abuse his discretion in denying defendant's motion for the appointment of associate counsel for his appeal from a conviction of

first degree murder where there is nothing in the record to indicate that defendant's appointed counsel failed to handle his appeal in a competent manner.

6. Jury § 7.13— capital case—refusal to increase peremptory challenges

The trial court in a first degree murder case did not err in refusing to increase the number of defendant's peremptory challenges because of pretrial publicity and the State's successful challenge for cause of prospective jurors opposed to capital punishment, since the trial judge is not authorized to permit a defendant in a capital case to exercise more than the 14 peremptory challenges allowed by G.S. 15A-1217.

7. Criminal Law § 75.3— confession not tainted by prior acquisition of pistol

Defendant's in-custody confession to a murder was not tainted by the State's prior acquisition of a pistol used by defendant in an unrelated homicide where the court found upon supporting evidence that no information about the pistol was obtained from defendant until after he was advised of his constitutional rights and that his statements were understandingly and voluntarily made after he was advised of his rights.

8. Jury § 7.11— excusal of juror for death penalty views—harmless error

The trial court in a first degree murder case erred in excusing for cause a juror whose answers on voir dire did not show that she was unequivocally opposed to the death penalty and would not under any circumstances vote for its imposition; however, defendant was not prejudiced by such error where the record does not indicate that any other juror was excused for cause who did not state that he was unequivocally opposed to the death penalty or that jurors who were impaneled were prejudiced against defendant or were otherwise not qualified or competent to serve.

9. Criminal Law § 102.13— jury argument—no comment on possibility of parole

The district attorney did not impermissibly suggest to the jury the possibility of parole in a first degree murder case when he argued to the jury that the only way to protect society, themselves and their children from defendant was to impose the death penalty.

10. Criminal Law § 135.4— capital case—sentencing hearing—eyewitness account of gas chamber execution

The trial court properly refused to permit defendant to present during the sentencing phase of a first degree murder trial an eyewitness account of a 1957 gas chamber execution.

11. Criminal Law § 102.2— jury argument—review in capital cases

In a capital case an appellate court may review the prosecution's jury argument even though defendant raised no objection thereto at the trial, but the impropriety of the argument must be gross indeed for the appellate court to hold that a trial judge abused his discretion in failing to correct *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.

12. Criminal Law § 102.6— capital case—improper jury argument—harmless error

Assuming arguendo that during the sentencing phase of a first degree murder trial the district attorney improperly stated a personal opinion about the evidence and argued matters outside the record by injecting his experiences, stories he had heard and other cases in which he had been involved or of which he had knowledge, the impropriety was not so gross or excessive as to compel the appellate court to hold that the trial judge abused his discretion in failing to correct the arguments *ex mero motu* or that defendant is entitled to a new trial because of such arguments.

13. Criminal Law § 135.4— capital case—failure of jury to agree within reasonable time—life imprisonment imposed—refusal to instruct

The trial court did not err in refusing during the sentencing phase of a first degree murder trial to instruct the jury that its failure to agree unanimously on the sentence within a reasonable time would result in the imposition of a sentence of life imprisonment, since the trial judge's authority to impose a life sentence upon the jury's failure to agree upon a sentence within a reasonable time is not a proper matter for jury consideration.

14. Criminal Law § 135.4— sentencing phase of capital case—motion to impose life sentence after jury had deliberated for some time

The trial judge in a first degree murder case did not abuse his discretion in denying defendant's motion for imposition of a sentence of life imprisonment when the jury failed to return a verdict after deliberating for two hours and thirty-nine minutes.

15. Criminal Law § 135.4— refusal to set aside jury's death sentence recommendation

The trial judge did not err in refusing to set aside the jury's sentence recommendation of death in a first degree murder case since (1) the evidence was sufficient to support the jury's finding that the killing was "especially heinous, atrocious, or cruel," and (2) the jury's sentence recommendation is binding on the trial judge and he does not have the power to disturb such recommendation.

16. Criminal Law § 154.5— settlement of record on appeal—no right of appeal

The action of the trial judge in settling the record on appeal is final and will not be reviewed on appeal, defendant's remedy, if any, being by certiorari.

17. Criminal Law § 126.3— affidavit and newspaper clipping—exclusion from record—impeachment of verdict—possibility of parole—photographs taken into jury room

In this first degree murder case, the trial judge did not err in excluding from the record on appeal a juror's affidavit stating that photographic exhibits of the victim's body were taken into the jury room and a newspaper clipping indicating that the possibility of parole was a major consideration in the jury's deliberations on whether to recommend the death penalty since the affidavit and clipping would serve only to impeach the verdict; evidence concerning the jury's consideration of the possibility of parole would be excluded by G.S. 15A-1240(a); and the affidavit concerning the photographs could not be con-

sidered pursuant to G.S. 15A-1240(c)(1) because the photographs had been admitted into evidence and consideration of them would not "violate the defendant's constitutional right to confront the witnesses against him."

18. **Criminal Law § 135.4— first degree murder—instructions on "impaired capacity" mitigating circumstance**

In a first degree murder prosecution in which there was evidence from which the jury could have found that, although defendant knew the difference between right and wrong at the time of the killing, he suffered from schizophrenia and his schizophrenia had surfaced at the time of the killing, defendant is entitled to a new sentencing hearing because of the trial court's failure to explain to the jury the difference between defendant's capacity to know right from wrong and the *impairment* of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law within the meaning of G.S. 15A-2000(f)(6).

19. **Criminal Law § 135.4; Homicide § 20.1— erroneous admission of photographs of victim's body—harmlessness in guilt phase—prejudice in sentencing phase**

The trial court in a first degree murder case erred in the admission of photographs depicting the child victim's body as it appeared two months subsequent to his death after it had been dismembered by animals where there was no evidence that defendant mutilated or dismembered deceased's body. Such error was harmless beyond a reasonable doubt in the guilt determination phase of the trial but constituted prejudicial error in the sentencing phase and entitles defendant to a new sentencing hearing.

Justice EXUM dissenting in part.

APPEAL by defendant from *Seay, J.*, 19 June 1978 Session of ALEXANDER Superior Court. This case was docketed and argued as No. 19 at the Spring Term 1979.

Defendant was charged in an indictment proper in form with the first degree murder of Robert Alonzo Bartlette III. Prior to arraignment, defendant tendered a plea of guilty to first degree murder upon the condition that he be sentenced to a term of life imprisonment or in the alternative a plea of guilty to second degree murder without condition. The court rejected the tendered pleas, and defendant entered a plea of not guilty.

At the guilt determination phase of the trial, the State presented evidence which tended to show that on 4 September 1977 defendant was fishing in the Catawba River in Alexander County where he saw the deceased, Bobby Bartlette, a ten year old boy. Defendant decided to go to a nearby creek to continue his fishing, and young Bartlette accompanied him. Thereafter, defendant offered the boy ten dollars to have sex with him, and

when Bartlette refused, defendant strangled him with a nylon fish stringer. There was evidence that either during or after the killing defendant perpetrated a sexual assault upon the victim. In addition to the statement defendant made after his arrest confessing the killing, the State also introduced over defendant's objection pictures of the victim's body as it appeared when found some two months after the killing.

Defendant testified that after Bartlette refused to have sex with him "something snapped in my head and I strangled him. I think I had sexual contact with him but I am not sure." Defendant also testified that he has difficulty getting along with people; that he has tried to kill himself on many occasions; that he has never been able to do anything particularly well, except fish; that he doesn't like anyone except his minister and wants to kill everybody he does not like. He stated on cross-examination that it did not bother him that he killed Bobby Bartlette and that he "would probably do it again . . . . After killing the boy, I didn't feel anything. Not bad, not grief, in a way, I guess I felt good."

Dr. James Groce, a staff psychiatrist at Dorothea Dix Hospital, testified that he examined defendant and in his opinion defendant suffered from schizophrenia.

The jury returned a verdict of guilty of first degree murder.

The State offered no additional evidence at the sentencing phase of the trial.

Defendant's brother testified that during childhood, their home life was difficult and their father was a tyrant. He stated that defendant was very helpful and always willing to do things for people. He also testified that as a child, defendant "played with ants and on one occasion tortured a cat that had been run over by an automobile."

Nora Paige, a neighbor, testified that defendant's co-workers teased him about being a virgin, which upset him a great deal. She also related one incident which indicated that defendant might have schizophrenic tendencies.

The jury found as an aggravating circumstance that the murder was especially heinous, atrocious or cruel. As mitigating circumstances, the jury found that: (1) the murder was committed

while defendant was under the influence of mental or emotional disturbance; (2) defendant has no significant history of prior criminal activity; and (3) there was another (unspecified) circumstance which the jury deems to have mitigating value. The jury further found beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstance and the aggravating circumstance was sufficiently substantial to call for imposition of the death penalty. Based on these findings, the jury recommended that defendant's punishment be death.

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

Edward L. Hedrick for defendant appellant.

BRANCH, Chief Justice.

[1] Defendant first contends that the trial judge erred in construing G.S. 15A-2000 and G.S. 15A-2001 as not allowing a defendant to enter a plea of guilty on condition that his sentence be life imprisonment. We are of the opinion that the pertinent provisions of the statutes involved support the trial judge's ruling which, in effect, recognized that he had no authority to waive the requirement that a jury be impaneled to recommend punishment when a defendant enters a plea of guilty. G.S. 15A-2000(a)(2) provides in pertinent part that: "If the defendant pleads guilty, *the sentencing proceeding shall be conducted before a jury* impaneled for that purpose." [Emphasis added.] G.S. 15A-2001 provides:

> *Capital offenses; plea of guilty.*—Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may sentence such person to life imprisonment or to death pursuant to the procedures of G.S. 15A-2000. Before sentencing the defendant, *the presiding judge shall impanel a jury* for the limited purpose of hearing evidence and determining a sentence recommendation as to the appropriate sentence pursuant to G.S. 15A-2000. The jury's sentence recommendation in cases where the defendant pleads guilty shall be determined under the same procedure of G.S. 15A-2000 applicable to defendants

who have been tried and found guilty by a jury. [Emphasis added.]

In this jurisdiction, it is a well-established rule of statutory construction that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must adhere to its plain and definite meaning. *State ex rel. Utilities Comm'n v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977). The statutes in question provide in part that, "If the defendant pleads guilty, a sentencing proceeding *shall* be conducted before a jury . . ." and "the presiding judge *shall* impanel a jury." [Emphasis added.] As used in statutes, the word "shall" is generally imperative or mandatory. *Black's Law Dictionary* 1541 (4th rev. ed. 1968). *Accord: Poole v. Board of Examiners*, 221 N.C. 199, 19 S.E. 2d 635 (1942); *Davis v. Board of Education*, 186 N.C. 227, 119 S.E. 372 (1923); *State ex rel. Battle v. Rocky Mount*, 156 N.C. 329, 72 S.E. 354 (1911). It is clear from the language of the statutes that upon a plea of guilty in a capital case the trial judge is required to impanel a jury to determine the sentence to be imposed. In instant case, the trial judge properly followed the legislative mandate expressed in Article 100 of Chapter 15A.

[2] Defendant assigns as error the ruling of the trial judge permitting the District Attorney to challenge for cause seven prospective jurors because of their disbelief in capital punishment. The record indicates that the trial judge excused the seven individuals in question only after their assertion that under no circumstances would they return a verdict which would result in the imposition of the death penalty. Based on *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), we held in *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), that excusal for cause of any juror who states that under no circumstances would he return a verdict which would result in the imposition of the death penalty is constitutionally permissible. Thus, in instant case, the trial judge properly excused the challenged prospective jurors.

[3] Defendant next contends that the trial court erred in denying his motion for individual voir dire and sequestration of jurors during voir dire. In his brief, defendant cites no authority in support of this contention. G.S. 15A-1214(j) provides that: "In capital cases the trial judge for good cause shown may direct that jurors

be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." This provision vests in the trial judge discretion to allow individual voir dire and sequestration of jurors during voir dire. It is well settled in North Carolina that the trial judge has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion. *State v. Lee*, 292 N.C. 617, 234 S.E. 2d 574 (1977); *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975), *death sentence vacated*, 428 U.S. 904. Defendant argues that collective voir dire of jurors in panels as to their familiarity with the crime, the victim or the probability of defendant's guilt or innocence will make all jurors aware of prejudicial and possibly incompetent material, thereby rendering it impossible to select a fair and impartial jury. He further argues that collective voir dire precluded the candor and honesty on the part of the jurors which was necessary in order for counsel to intelligently exercise his peremptory challenges. This is mere speculation on defendant's part, and he has made no showing that the trial judge's denial of his motion amounted to an abuse of discretion. This assignment of error is overruled.

[4] Defendant assigns as error the trial court's refusal to grant his motion to require the State to refute the defense of insanity. Defendant argues that *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), requires reallocation of the burden of proof with respect to the defense of insanity. We expressly rejected the same argument in the recent case of *State v. Caldwell*, 293 N.C. 336, 237 S.E. 2d 742 (1977), *cert. denied*, 434 U.S. 1075. Defendant acknowledges that *Caldwell* is contrary to his position and has shown nothing which requires reconsideration of that decision.

[5] Defendant contends that the trial judge erred in denying his motion for appointment of associate counsel. Defendant cites no authority in support of this contention but states that additional counsel should have been appointed. As in the case of providing private investigators or other expert assistance to indigent defendants, we think the appointment of additional counsel is a matter within the discretion of the trial judge and required only upon a showing by a defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of

his defense or that without such help it is probable that defendant will not receive a fair trial. *See State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). There is nothing in the record to indicate that his court appointed counsel handled his appeal other than in a competent manner. While the trial judge could, in his discretion, have appointed additional counsel, his refusal to do so can by no stretch of the imagination be deemed an abuse of discretion.

[6] Defendant assigns as error the trial court's refusal to increase the number of his peremptory challenges. He contends that substantial pretrial publicity and the State's successful challenge for cause of prospective jurors opposed to capital punishment were advantages which benefited the State, and his motion for additional challenges should have been allowed to offset those advantages. Defendant cites no authority in support of his contention, and we can find none. G.S. 15A-1217 provides that in capital cases each defendant is entitled to fourteen peremptory challenges. The statute does not authorize trial judges to permit either the State or a defendant to exercise more peremptory challenges than specified by statute. In instant case, the record does not reveal how many peremptory challenges, if any, defendant used. Moreover, defendant does not contend that the trial judge's denial of his motion resulted in the acceptance of any jurors over defendant's challenge. Even if the trial judge had authority to increase the number of peremptory challenges, a power which is precluded by G.S. 15A-1217, we fail to perceive any prejudice to defendant resulting from the denial of this motion.

[7] Defendant next contends that the trial court erred in denying his motion to suppress his in-custody confession which he argues flowed from and was tainted by the State's acquisition of a .38 caliber pistol used by defendant in an unrelated homicide. Prior to trial, the trial judge conducted a voir dire hearing to determine the admissibility of defendant's confession. Captain Webster of the Caldwell County Sheriff's Department testified that on 31 October 1977 defendant was a suspect in the murder of one Mabel Sherrill. On that same day, Webster took defendant into custody in Hickory, North Carolina, and asked defendant if he would accompany him to Caldwell County. Defendant agreed to return to Caldwell County, and Captain Webster informed him

on his rights. After stating that he understood his rights, defendant told Webster that he had a .38 caliber pistol at his brother's house. The two men went to the brother's house and obtained the pistol which had belonged to the deceased, Mabel Sherrill. After obtaining the pistol, Webster again informed defendant of his rights. Defendant was again informed of his rights at the Caldwell County Sheriff's Department by members of that department to whom he confessed killing both Mrs. Sherrill and Bobby Bartlette.

Defendant testified on voir dire that Captain Webster did not inform him of his rights until he had asked and been told about the .38 caliber pistol which had belonged to Mrs. Sherrill. Defendant thus contends that the pistol and the confessions which flowed from its recovery were tainted evidence which should have been excluded. We do not agree. Based upon the evidence offered on voir dire, the trial judge found as a fact that no information was obtained from defendant until after he had been advised of his rights and concluded that defendant's statements were understandingly and voluntarily made after he was advised of all of his constitutional rights. 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 even when there is conflicting evidence. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971); *State v. Haskins*, 278 N.C. 52, 178 S.E. 2d 610 (1971).

In instant case, defendant concedes that there was sufficient evidence to support the trial judge's ruling.

[8] Defendant contends that the trial court erred in allowing the State's challenge for cause of Mrs. Alva Adams in violation of the rule set forth in *Witherspoon v. Illinois, supra.* The record indicates the following exchange during the voir dire of prospective juror Adams:

> Q. Do you have any moral or religious scruples against the use of capital punishment in a situation you think calls for it?
>
> A. Well, I'm not sure. I just can't make up my mind.
>
> Q. . . . Do you just feel like, maybe you couldn't do that even if it was so bad that you felt it called for it?

A. Well, I'm not sure whether I could say capital punishment or not.

Q. Ma'am?

A. I'm not sure whether I could say the gas chamber or not.

Q. So you feel like, then, that you would not vote in favor of the death penalty under any facts or circumstances no matter what the aggravation was. Is that right?

A. Probably.

Q. All right. We'll challenge her for cause.

THE COURT: All right, stand aside, ma'am.

At this time, the defendant objected to this challenge for cause and requested permission to ask the excused juror a series of questions inquiring into her feelings concerning capital punishment, which request was denied.

MR. HEDRICK: I would like to ultimately ask the juror if the Judge instructed her regarding the law, and recognizing her sworn duty as a juror, as much as she might dislike it, could she consider a verdict which might result in the death penalty? I submit that if she could do that, then she is not challengeable for cause under the Witherspoon decision.

The juror being recalled, was questioned and answered as follows:

Q. Mrs. Adams, do you have any moral scruples against the use of capital punishment? Yes or no.

A. Yes.

Q. All right. Now, I take it, then, that even if the State satisfied you beyond a reasonable doubt that this was so vicious and such a cruel killing, based on the law the judge will give you, you would not vote in favor of the death penalty under any facts or circumstances no matter how aggravated the case, no matter what the facts were. Is that correct? You wouldn't vote for the death penalty?

A. I don't think so.

Q. Thank you. Challenge for cause.

THE COURT: Stand aside.

Although Mrs. Adams expressed reservations about the death penalty, her answers, collectively or individually, cannot be construed to give the impression that she was unequivocally opposed to the death penalty and would not under any circumstances vote for its imposition. Therefore, the trial judge erred in allowing the State's challenge for cause of Mrs. Adams. *State v. Bernard*, 288 N.C. 321, 218 S.E. 2d 327 (1975); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). The record does not indicate, however, that any other juror was excused for cause who did not state that he was unequivocally opposed to the death penalty. We are not confronted then with the *systematic* exclusion of prospective jurors, generally opposed to the death penalty as was the case in *Witherspoon v. Illinois, supra*. In instant case, there is no suggestion that the jurors who were impaneled were prejudiced against defendant or were otherwise not qualified or competent to serve. Thus, the trial judge's error in excusing prospective juror Adams for cause was not prejudicial. *State v. Bernard, supra*; *State v. Monk, supra*.

[9] Defendant next contends that the trial judge erred in allowing the District Attorney to argue to the jury that the only way to protect society, themselves and their children from defendant was to impose the death penalty, thereby impermissibly suggesting the possibility of parole. In support of his contention, defendant refers to the following excerpts from the District Attorney's argument:

> . . . Now, make no bones about it, Ladies and Gentlemen of the jury, you are the only thing standing between him and freedom to walk around again.
>
> * * *
>
> . . . The State says and contends to you, common sense will tell you, that the only way you can ever be sure this man will never walk out again is to give him the death penalty.
>
> * * *

> . . . And I say to you this, the only way you can ever be sure that he will never do this again is to sentence him to death by the inhalation of lethal gas in Raleigh.
>
> * * *
>
> . . . The State is asking you now to sentence him to die in the gas chamber in Raleigh, because that's the only place, that's the only place where you can be sure that what you see sitting before you would not kill another child or kill another old woman in his life . . . .

We recognize that a defendant's eligibility for parole is not a proper matter for consideration by the jury. *State v. Cherry, supra*; *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976). However, as the above-quoted excerpts show, the District Attorney never used the word parole nor did he tell the jury that if defendant received a life sentence he could be out in twenty years. He did argue vigorously for imposition of the death penalty, and this Court has held that in a prosecution for first degree murder it is the right and duty of the prosecuting attorney to seek the death penalty. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939. We are of the opinion that the District Attorney's argument did not suggest the possibility of parole.

[10] Defendant assigns as error the trial judge's refusal to allow the defendant to present during the sentencing phase of the trial, an eyewitness account of a gas chamber execution. G.S. 15A-2000(a)(3) provides in part that, "Evidence may be presented as to any matter that the court deems relevant to sentence . . . or . . . to have probative value . . . ." In the recent capital case of *State v. Cherry, supra*, we reiterated that factors to be considered in sentencing are the defendant's age, character, education, environment, habits, mentality, propensities and record, all of which are relevant to the jury's determination of punishment. Defendant contends that the testimony of an eyewitness to a 1957 gas chamber execution was relevant to the jury's determination of defendant's sentence. The evidence was in no way connected to defendant, his character, his record or the circumstances of the charged offense. It was totally irrelevant and, therefore, properly excluded by the trial judge.

[12] Defendant contends that the trial judge erred in allowing the District Attorney to state a personal opinion about the evidence and to argue matters outside the record including his experiences, stories he had heard and other cases he had been involved in or of which he had knowledge. The following statements to which defendant now takes exception, even though he raised no objection at trial, were made during the sentencing phase of the trial:

> . . . And, of course, the State says and contends to you from the evidence that you've seen here that this particular homicide is, if I've ever seen one, and I've seen a whole lot of them before, is especially cruel, heinous and atrocious.
>
> * * *
>
> . . . You have had laid before you, and I've been your District Attorney for eight years, one of the worst murder cases I've ever seen. My Daddy was in the SBI for a number of years, law enforcement. I heard him talk as a child, just like Hugh Wilson has got his boy over here today. You hear that talk around the dinner table, and it's just about as bad as anything I've ever heard all of my life. I was a child growing up. I think that this case, and the facts that you have in front of you now, absolutely and without qualification call for the imposition of the death penalty.
>
> * * *
>
> . . . But when I first heard about this case, I—what bothers me now, what if that was my boy there. That just tears me up.

[11, 12] It is well settled in North Carolina that counsel is allowed wide latitude in the argument to the jury. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970), *rev'd on other grounds*, 403 U.S. 948. Even so, counsel may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). The control of the arguments of counsel must be left largely to the discretion of the trial judge, *State v. Britt, supra*; *State v. Monk, supra*, and the appellate

courts ordinarily will not review the exercise of the trial judge's discretion in this regard unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976). In capital cases, however, an appellate court may review the prosecution's argument, even though defendant raised no objection at trial, but the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978). Assuming arguendo that the statements of which defendant complains were improper, the impropriety was not so gross or excessive to compel us to hold that the trial judge abused his discretion in not correcting them or that defendant is entitled to a new trial.

[13] Defendant next contends that the trial judge erred in failing to instruct the jury on one of the provisions of G.S. 15A-2000(b). The record indicates that prior to trial defendant tendered a written request that the trial judge include in his charge the following instruction should the case proceed to the sentencing phase:

> If the jury cannot within a reasonable time unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment, provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously on its sentence recommendation.

The record does not show that the trial judge ever ruled on this request. The requested instruction was not included in the trial judge's charge, and no exception to the charge was taken. In fact, at the conclusion of his charge on the sentencing phase, the trial judge inquired of defense counsel, "Anything further from the defendant?" To this inquiry, defense counsel responded, "No, Your Honor." Since the request was not renewed at this time and no exception was taken, defendant is not now entitled to assign as error the trial judge's failure to give the requested instruction. Rule 10, North Carolina Rules of Appellate Procedure.

More importantly, however, the trial judge's authority to impose a life sentence upon the jury's failure to unanimously agree

upon a sentence recommendation within a reasonable time is not a proper matter for jury consideration. G.S. 15A-2000(b) provides, in part, that after hearing the evidence, argument of counsel, and instructions of the court, the jury shall render a sentence recommendation based upon its consideration of the aggravating and mitigating circumstance or circumstances it finds to exist. At best, the requested instruction would be of absolutely no assistance to the jury in making its recommendation. At worst, the instruction would permit the jury to escape the onerous task of recommending the sentence to be imposed. The trial judge's refusal, or failure, to give the requested instruction was in all respects proper.

[14] Neither was there error in the trial judge's refusal to grant defendant's motion for imposition of a sentence of life imprisonment when the jury had failed to return a verdict after deliberating for two hours and thirty-nine minutes. This motion was made at approximately 4:45 p.m. after one of the jurors stated that it would be an extreme hardship on her to provide for the care of her twelve month old child if she were required to stay beyond a certain hour in the afternoon. The trial judge indicated that, as the jury had been in the box until approximately 5:45 p.m. the two previous days, they would be released at a reasonable hour and denied the motion. The sentence recommendation was returned about one hour later at 5:45 p.m. Defendant does not contend that the jury was pressured into agreeing on a sentence recommendation but apparently contends that it was unreasonable to allow them to continue deliberation after two hours and thirty-nine minutes. We cannot agree that the period of three hours and thirty-nine minutes, required for the jury to agree on a sentence recommendation, was unreasonable. Moreover, what constitutes a "reasonable time" for jury deliberation in the sentencing phase should be left to the trial judge's discretion. We perceive no abuse of discretion, and defendant has shown none.

This assignment of error is overruled.

[15] Defendant contends that the trial judge erred in refusing to set aside the jury's sentence recommendation of death and entering judgment in accordance therewith, since the sole aggravating circumstance submitted to the jury was not supported by the

evidence. There was sufficient evidence to support the jury's finding that the killing was "especially heinous, atrocious, or cruel." Moreover, we do not think Article 100 of Chapter 15A confers upon the trial judge the power to disturb the jury's sentence recommendation. G.S. 15A-2002 provides that if the jury recommends a sentence of death, the trial judge *shall* impose a sentence of death, and if the sentence recommendation is life imprisonment, the trial judge *shall* impose a sentence of life imprisonment. This section clearly indicates the Legislature's intention that the jury's sentence recommendation be binding on the trial judge. In addition, G.S. 15A-2000(d)(2) confers only upon this Court, not the trial court, the power to overturn a death sentence "upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death . . . ." The trial judge properly entered judgment in accordance with the jury's sentence recommendation.

Finally, defendant contends that the trial court erred in excluding from the record on appeal a juror's affidavit stating in substance that photographic exhibits were taken into the jury room, and a newspaper clipping indicating that the possibility of parole was a major consideration in the jury's deliberation. Although the record is silent on this point, defendant states in his brief that seven jurors were questioned concerning whether the pictures were taken into the jury room. Two jurors including the one whose affidavit was excluded stated that pictures were taken into the jury room. The other five jurors who responded indicated that the pictures were not taken into the jury room. The jurors were not questioned as to whether the possibility of parole played a part in their deliberations. In setting the record on appeal, the trial judge entered an order which stated in part:

* * *

> It appearing to the court that the defendant appellant has included in the record on appeal an affidavit of a juror and newspaper clipping, a copy of which is attached hereto and incorporated by reference, said affidavit stating in substance that the photographic exhibits were taken into the Jury Room; and

It further appearing to the court that the State in its countercase on appeal has objected to the inclusion of said affidavit and newspaper clipping as not being a part of the record on appeal; and

It appearing that the transcript of said trial does not indicate that the photographic exhibits were taken into the Jury Room; and

It appearing to the court and the court finding as a fact that the transcript does not reflect that the photographic exhibits were taken into the Jury Room and that the said juror's affidavit should not constitute a part of the record on appeal;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the juror's affidavit and newspaper clipping not be included in the record on appeal in the above styled cause.

[16] Rule 11(c) of the North Carolina Rules of Appellate Procedure provides that if the parties are unable to agree on the record on appeal, it becomes the duty of the trial judge to settle the record. *See, State v. Sanders*, 280 N.C. 67, 185 S.E. 2d 137 (1971). This the trial judge did, and defendant excepted to his exclusion of the two items in question from the record on appeal. However, the action of the trial judge in settling the record is final and will not be reviewed on appeal. *State v. Gooch*, 94 N.C. 982 (1886). Defendant's remedy, if any, would have been by certiorari. *State v. Allen*, 283 N.C. 354, 196 S.E. 2d 256 (1973).

[17] More importantly, however, we perceive no purpose which would have been served by inclusion of the juror's affidavit and the newspaper clipping other than impeachment of the verdict. As we recently stated in *State v. Cherry, supra*, such evidence would only be allowed pursuant to the provisions of G.S. 15A-1240:

Impeachment of the verdict.—(a) Upon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.

(b) The limitations in subsection (a) do not bar evidence concerning whether the verdict was reached by lot.

(c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:

(1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him; or

(2) Bribery, intimidation, or attempted bribery or intimidation of a juror.

Any evidence relative to the jury's consideration of the possibility of parole would be excluded by G.S. 15A-1240(a). Even if the jury did take the pictures into the jury room, the pictures had been admitted into evidence and in no event would consideration of them "violate the defendant's constitutional right to confront the witnesses against him." Therefore, the juror's affidavit concerning the pictures could not have been considered pursuant to G.S. 15A-1240(c)(1). For reasons stated, we hold that the trial judge properly excluded the affidavit and the newspaper clipping from the record on appeal.

[18] Defendant does not contend that there was error in the trial judge's instructions. However, in view of our holding in *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979), (decided 4 September 1979), we are of the opinion that defendant is entitled to a new trial upon the sentencing phase of his trial because of the inadequacy of the court's instructions on the mitigating circumstance set out in G.S. 15A-2000(f)(6) which provides: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." As to this mitigating circumstance, the trial judge charged the jury:

That is, the second mitigating circumstance listed is: The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. That means that his capacity to recognize what he was doing was a criminal act, or his capacity to follow the law, was lessened by reason of an impairment of his capacity in those respects.

In *State v. Johnson, supra,* defendant was convicted of murder and sentenced to death in a homicide not related to instant case. We there held that a virtually identical instruction on this mitigating circumstance was insufficient. In both cases, psychiatrists testified that in their opinion defendant knew right from wrong at the time of the killings. They also indicated, however, that defendant exhibited schizophrenic tendencies.

In instant case, Dr. James Groce, a Staff Psychiatrist at Dorothea Dix Hospital, testified, in part, as follows:

> . . . Some of his responses indicated a schizophrenic disturbance . . . .
>
> * * *
>
> The defendant has never had a major psychotic episode, that is, he has never completely lost touch with reality, although he has symptoms of schizophrenia, which condition is probably of long standing, beginning in early adolescence and continuing to the present.
>
> * * *
>
> I conducted a variety of tests with the defendant and his responses suggested a schizophrenic disturbance . . . . The defendant had a high peak or score in the schizophrenic problem area.
>
> * * *
>
> There are several theories as to the cause of schizophrenia, one of which is that it results from certain chemical changes that take place in the central nervous system and sexual excitement changes the chemistry of the central nervous system.

During the guilt-determination phase of the trial, defendant testified, in part:

> . . . I offered him ten ($10.00) dollars to have sex with me. He refused at which time something snapped in my head and I strangled him . . . .

Defendant's statement considered in conjunction with Dr. Groce's subsequent testimony that in his opinion defendant had a high

peak score in the schizophrenic problem area, which condition of long standing might be triggered by sexual excitement, raises a strong inference that at the time of the killing defendant's schizophrenia had surfaced. In *State v. Johnson, supra,* we stated, with reference to the mitigating circumstance in question:

> . . . This mitigating circumstance may exist even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to know the nature and quality of that act. It would exist even under these circumstances if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished).

In that case, the vice in the trial judge's instruction was his failure to explain the difference between defendant's capacity to know right from wrong, and the *impairment* of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

In instant case, Dr. Groce testified that defendant knew right from wrong at the time of the killing. However, Dr. Groce's testimony concerning defendant's schizophrenia and the possible cause thereof, when considered in light of defendant's testimony suggesting an event which might have triggered the schizophrenia, lends considerable support to defendant's contention that his capacity was impaired at the time of the killing. Therefore, the trial judge's instruction concerning this mitigating circumstance was, as in *State v. Johnson, supra,* prejudicially insufficient.

[19] Defendant next contends that the trial court erred in allowing into evidence certain pictures of the body of Bobby Bartlette as it appeared some two months subsequent to his death, in an advanced stage of decomposition and after being partially ravaged and dismembered by animals.

Although there must be a new trial in the sentencing phase of the trial because of deficiencies in the charge, we deem it

necessary to consider this assignment of error since the questions here presented may arise at the new trial on the sentencing phase. We are of the opinion that the admission of the photographs constituted prejudicial error in the sentencing phase of the trial. However, in view of the overwhelming evidence of guilt, the admission of the challenged photographs was harmless error beyond a reasonable doubt in the guilt determination phase of the trial. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967).

Prior to trial, defendant filed a motion to suppress any photographs of the remains of the victim. A pretrial evidentiary hearing was held pursuant to defendant's motion, and eighteen photographs were identified by S.B.I. Agent Lester. The trial judge ordered four of these photographs to be suppressed and refused to suppress the remaining fourteen. At the guilt determination phase of the trial, five photographs of the remains of the victim's body were introduced into evidence over defendant's objections. One of the photographs had been ordered suppressed at the pretrial hearing. The photographs in question show portions of the victim's body, apparently dismembered by wild animals, found some two months after the killing. Defendant made no contention that the trial judge failed to properly instruct the jury that the photographs were admitted into evidence for the sole purpose of illustrating the testimony of the witness.

Ordinarily in a prosecution for homicide, properly authenticated photographs may be used to illustrate the testimony of a witness concerning the location and condition of the victim's body even though the photographs are gruesome and shocking. *State v. Chance*, 279 N.C. 643, 185 S.E. 2d 227 (1971), *death sentence vacated*, 408 U.S. 940; *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd on other grounds*, 403 U.S. 948; *State v. Stanley*, 227 N.C. 650, 44 S.E. 2d 196 (1947). However, this rule is not inflexible, and our Court has recognized certain qualifications to the rule.

In *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969), the defendant was convicted of second degree murder, and during the course of the trial, three photographs of the victim were admitted into evidence portraying his lifeless body in a funeral home with

projecting probes indicating the entry and exit of the fatal bullet. The victim was lying in a bed when he was shot, and the evidence was uncontradicted as to the cause of death. Holding that these photographs were without probative value, the Court, speaking through Justice Bobbitt, later Chief Justice, in part, stated:

> "If a photograph is *relevant and material*, the fact that it is gory or gruesome, and thus may tend to arouse prejudice, will not alone render it inadmissible." (Our italics.) Stansbury, North Carolina Evidence, Second Edition, § 34, pp. 66-67; *State v. Porth*, 269 N.C. 329, 337, 153 S.E. 2d 10, 16. But where a prejudicial photograph is relevant, competent and therefore admissible, the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors. *State v. Foust*, 258 N.C. 453, 460, 128 S.E. 2d 889, 894.

We also note that it is the view of this Court that evidence should be excluded when its prejudicial effect outweighs any probative force it may have upon the issues before the Court. *Pearce v. Barham*, 267 N.C. 707, 149 S.E. 2d 22 (1966); *Electric Company v. Dennis*, 259 N.C. 354, 130 S.E. 2d 547 (1963); *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). *See also*, Annot., 73 ALR 2d 769, Later Case Service, Section 3.5 (Cum. Supp. 1979).

In instant case, the single relevant photograph was State's Exhibit 12 which portrays the nylon fish stringer around the remains of the victim's neck. This exhibit corroborated the confession of defendant to the effect that he strangled the victim. The other photographs, all of which were repetitive, depicted the dismembered bones of the child. There was no evidence that defendant mutilated or dismembered the body of deceased. Defendant had made an oral, handwritten confession in which he stated that he *strangled* Robert Alonzo Bartlette III. The use of these gory and gruesome photographs as substantive evidence did not tend to prove any material fact at issue.

We find no error sufficient to warrant a new trial in the guilt determination phase of the trial; however, for reasons stated, there must be a new trial on the sentencing phase of the trial.

In the guilt determination phase of the trial—No error.

In the sentencing phase of the trial—New trial.

Justice EXUM dissenting in part.

I fully concur in the result reached and with all aspects of the majority opinion except the dictum that a trial judge should not inform a jury considering whether to impose the death penalty that failure of the jury to agree on the sentence within a reasonable time will result in the judge's imposing a life sentence under G.S. 15A-2000(b). Since the majority has properly held that defendant waived his right to complain about the judge's failure to give such an instruction and since the matter must be returned for a new sentencing proceeding, the proposition with which I disagree is not necessary to decide this case.

More importantly, this restriction on a trial judge's communication with the jury seems unwise and actually to run counter to the reasons given by the majority for it. The majority says that such an instruction at best "would be of absolutely no assistance to the jury in making its recommendation. At worst, the instruction would permit the jury to escape the onerous task of recommending the sentence to be imposed." To the contrary I believe the instruction would inform the jury that it cannot escape the task of recommending a sentence. Whatever it does some sentence will be imposed as a result. If the jury unanimously agrees on a sentence of life imprisonment or death, that sentence to which there is unanimous agreement shall be imposed. On the other hand if the jury cannot agree, then a sentence of life imprisonment will be imposed. Since its failure to agree is tantamount to a final determination of the case and has the same legal effect as a unanimous decision for life imprisonment, the jury should be instructed on this effect of its disagreement. Being fully informed as to the final legal effect of a disagreement, the jury is bound to be in a position to perform its function more intelligently.

The Pattern Jury Instruction Committee of the Conference of Superior Court Judges has recommended that this instruction be given. N.C.P.I.—Crim. 150.10. The instruction recommended by this committee reads:

> "If you [the jury] unanimously recommend that the defendant be sentenced to death, the Court will be required to impose a sentence of death. If you unanimously recommend a sentence of life imprisonment, the Court will be required to impose a sentence of imprisonment in the State's prison for life. If you are unable, within a reasonable time, unanimously to agree on your recommendation, the Court shall impose a sentence of life imprisonment."

A footnote to the last sentence of this instruction reads as follows:

> "The Committee considered deleting this sentence on the ground that the information which it contains might unduly encourage juror holdouts and early deadlocks. However, since the consequences of a jury deadlock are different at the separate sentencing proceeding under G.S. § 15A-2000 than at the guilt phase of any trial, the Committee believes that the jury is entitled to have this information. To avoid undue emphasis, it is given only once, and at the beginning of the instruction."

I believe the committee, for the reasons it stated, wisely determined to include such an instruction. Normally a jury deadlock results in a mistrial and presentation of the case in its entirety to a new jury. A jury would be so instructed in the event of a deadlock on the guilt phase of the proceeding. Many jurors of their own knowledge know that this is normally the result of a deadlock. In a death case a jury should not be permitted to labor under the incorrect assumption that a deadlock on the question of sentence would result in a new proceeding before a new jury.

Further, if a jury is not so instructed at the outset and then deadlocks on the question of sentence, should the trial judge then be entitled to inform them of the consequences in an effort to *avoid* a deadlock? If he does, a defendant thereafter sentenced to death would be in a good position to argue that the verdict was unduly coerced. The better practice is to follow the recommendation of the Pattern Jury Instruction Committee and routinely include such an instruction even absent a request by either side.

Frankly I am at a loss to know whether failure to give such an instruction prejudices the state or the defendant. If it is not

given the jury knows only that failure unanimously to recommend death will preclude the death penalty being imposed in this proceeding. It may, however, assume that by being deadlocked some other jury at some future time will have to make the decision. It seems to me that a jury in this state of mind might more easily deadlock than a jury that knows a deadlock will result in a life sentence. In the latter case those jurors favoring death are likely to urge their views on the others more vociferously. If this is so, failure to give the instruction would tend to prejudice the state.

In a case where defendant asks for the instruction for reasons best known to him, I believe he is entitled to have it.

Clearly the attorneys in the case can read the statute to the jury on the effect of a disagreement. G.S. 84-14; *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976); *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). If they do, it seems particularly unwise to preclude the trial judge from impartially instructing the jury on the law applicable to the point.

STATE OF NORTH CAROLINA v. JOHN ROSWELL REYNOLDS, JR.

No. 5

(Filed 6 November 1979)

1. **Criminal Law §§ 23, 75.1, 76.10, 146.5— confession—suppression motion properly denied**

   Defendant was not denied his rights under *Dunaway v. New York*, 99 S.Ct. 2248, by the trial court's denial of his motion to suppress statements which he made to police officers, since (1) *Dunaway* dealt with the legality of custodial interrogation of an unwilling detainee on less than probable cause, while defendant in this case initiated contact with the police who, acting upon his phone call, investigated the crime scene and discovered links connecting defendant with the crime sufficient to establish probable cause for his arrest, though defendant was not "in custody" at the time of his confession; and (2) defendant effectively waived any rights he might have had under *Dunaway* by failing to notify either the state or the court during plea negotiations that he intended to appeal denial of his suppression motion.

2. **Criminal Law §§ 23, 76.10, 146.5— suppression motion denied—notice of appeal required before plea bargain completed**

   When a defendant intends to appeal from a suppression motion denial pursuant to G.S. 15A-979(b), he must give notice of his intention to the prosecutor

and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute.

3. **Arrest and Bail § 3.11; Constitutional Law § 51— taking defendant before magistrate without delay—no mandatory requirement**

Provisions of G.S. 15A-501 and G.S. 15A-511 requiring that an arrested person must be taken before a magistrate without unnecessary delay do not prescribe mandatory procedures affecting the validity of a trial.

4. **Arrest and Bail § 3.11; Constitutional Law § 51— warrantless arrest—taking defendant before magistrate—no unnecessary delay**

Defendant was taken before a judicial official "without unnecessary delay" where he was not under arrest prior to the time of his initial questioning; once questioning began around noon, defendant confessed his guilt within approximately 40 minutes; he was fully informed of his rights on two occasions within that 40 minutes and made an intelligent waiver of counsel; and as soon as the confession was recorded, defendant was taken to a magistrate sometime between 2:00 and 3:00 p.m. at which time he was formally charged.

5. **Criminal Law § 76.6— waiver of counsel at interrogation—sufficiency of finding**

There was no merit to defendant's contention that the trial court erred in failing to make adequate findings as to whether defendant requested counsel during the time of his interrogation, since the court clearly found that defendant waived his right to counsel, and the essential finding on a voir dire to determine suppression is not that defendant "did not request" counsel but that defendant waived counsel.

6. **Criminal Law § 84; Searches and Seizures § 4— taking of hair samples—consent—no illegal arrest**

Where there was no illegal arrest and defendant clearly consented to the taking of hair samples after officers explained that he was not required to do so, defendant could not complain on appeal that testimony of the results of an analysis of the hair samples should have been excluded at his sentencing hearing.

7. **Criminal Law § 138.4; Homicide § 31— three crimes charged—plea bargain—two life sentences given—issue of merger not before court**

Where defendant was charged with first degree murder, first degree rape and first degree burglary but received two consecutive life terms upon negotiated pleas of guilty to second degree murder, first degree rape and first degree burglary, the issue of merger was not before the court on appeal.

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

Justice EXUM dissenting in part.

DEFENDANT was charged with first degree murder, first degree rape and first degree burglary of an 86-year-old woman. He received two consecutive life terms upon *negotiated pleas of*

guilty to second degree murder, first degree rape and first degree burglary. Sentence was imposed by *Judge Seay* at the 6 November 1978 Special Criminal Session of Superior Court, CASWELL County.

Prior to trial, defendant moved to suppress certain evidence and a confession he made to the police. At the suppression hearing before Judge Kivett at the 19 June 1978 Session of Caswell County Superior Court, the State presented several witnesses.

EVIDENCE FOR THE STATE

Caswell County Deputy Sheriff O. A. Worsham testified that he was on duty as a radio dispatcher on 11 September 1977 when he received a call at 2:12 a.m. The caller stated that he was defendant, Johnny Reynolds, and said that he needed an officer. The caller said that he had been coming down the road by his house, thought he heard an elderly neighbor, Mrs. Lula Stephens Thompson, holler and had gone up to her house. He said it appeared to him that Mrs. Thompson was unconscious or dead in the house. Worsham told the caller to stay right there and the sheriff's office would send out an officer. Worsham testified that the caller talked intelligently and "plain," and gave directions to his location. A Deputy Gwynn, who apparently knew defendant as a friend, also spoke with him.

S.B.I. Agent S. A. Pennica testified that he arrived at the crime scene about 4:30 a.m. and noticed defendant asleep in the back seat of one of the patrol cars. Pennica had no discussion with defendant at that time and went on into the Thompson house to conduct his investigation which he concluded at approximately 10:40 a.m. that morning.

Agent Pennica's next opportunity to observe the defendant was at the Caswell County Sheriff's Office in Yanceyville at approximately 11:50 a.m. At that time he saw defendant in the holding cell of the jail. Soon after he arrived, Agent Pennica witnessed S.B.I. Agent Childrey advising defendant of his rights and saw defendant sign a waiver. Agent Childrey, Agent Pennica and the sheriff, who were all present, identified themselves to defendant as investigators of the crime. Defendant had not been told prior to questioning that he was a suspect in the case.

Agent Pennica testified that defendant appeared to be alert and awake during the initial questioning and acted concerned about what the investigation had shown. Defendant was dressed in blue jeans with no shirt or shoes on and had scratches and bruises on him. Pennica did not smell the odor of alcohol on defendant's breath and defendant did not appear to him to be overly upset, though "a little nervous." No offer was made to call an attorney for the defendant but later on an offer was made to call a family member.

Pennica advised the defendant that he was not required to give hair samples but requested permission to obtain them anyway. Defendant replied that this would be "fine," so Pennica took the samples. Pennica also asked if defendant would submit to having blood drawn and defendant consented. Before either the hair was taken or the blood drawn, defendant was told about the physical findings at the scene and told what use would be made of the samples.

No one told defendant that if he told the truth and cooperated that this would be disclosed in court or that it would help clear his conscience. After approximately 40 minutes, defendant made a taped statement after having been reminded of his rights for the second time.

Defendant was fingerprinted and photographed and his pants were taken after the interview was completed around 2:30 p.m. The blood sample was drawn at 3:00 p.m.

State's third witness, S.B.I. Agent Thomas C. Childrey, testified that he was in charge of the investigation and first spoke to the defendant at 11:58 a.m. in the sheriff's office. At that time he advised defendant of his constitutional rights. Defendant signed a statement indicating that he understood his rights and that he did not want a lawyer. Defendant was again advised of his rights at 12:40 p.m. Defendant indicated again that he understood his rights and that his original waiver was still in effect. No promise of leniency was made to defendant. At 11:58 a.m., when defendant was first advised of his rights, he was told that he was suspected of murder and later in the interview was told that it would be possible that the charges against him would be first degree murder, first degree burglary and rape. Agent Childrey did not take defendant to a magistrate before questioning him.

EVIDENCE FOR THE DEFENDANT

Defendant testified on his own behalf that he was 25 years old, was involved in logging work and lived with his stepmother. He said he drank heavily during the week leading up to 11 September 1977 and did not recall making a phone call to the sheriff's office but had been told that he had done so. He did recall seeing Deputies Graves and Gwynn the morning after the crime. The officers came to his home on that date and took him to Mrs. Thompson's house. Once there he got out of the car and started toward the dwelling, but one of the officers told him not to come to the house. He was asked to get back into the car and did so. He assumes he then went to sleep and did not get up until the next morning, after daylight. He asked what he was doing there and did not get an answer, "but I didn't go anywhere because I was under the impression that I could not go anywhere." When he woke up, one of the officers was standing up against the front of the car. No one said anything to him while he was in the car and he felt miserable when he woke up from the heavy drinking. No one said that he was under arrest and he does not recall asking if he could leave. After they left the Thompson house and started to Yanceyville, he asked Officer Gwynn if he would stop at a store so that he could get milk and cigarettes. Officer Gwynn did so, and defendant entered the store unaccompanied to make his purchases.

After defendant arrived at the sheriff's office around 10:00 a.m. one of the officers told him that he could sit in the holding cell because there was a bench or stool there that would be comfortable. Defendant went in and sat down and someone closed the door and he said they locked it. They later brought him a mattress and a sheet.

When taken into the sheriff's office, defendant said he was not told that he was a suspect in the case, but he was told he had a right to a lawyer. He was shown a piece of paper and signed it. He was told that he had made a phone call to the sheriff's department that night and was told what he had said during the call. He was shown a shirt, and was asked if it was his. He was told the shirt was found at the crime scene. He recalls police asking for his hair and blood samples but does not recall his response. He recalls mentioning "something about having an attorney present"

but said he was told that he had signed a waiver with respect to a lawyer. He said he was led to believe that police would be easier on him if he cooperated. He was not taken before a magistrate until around 2:30 or 3:00 p.m. and was never told that he had the right to communicate with family or friends. The magistrate did not indicate that he had a right to communicate with counsel. He did not realize what he was being charged with until he received copies of the warrants. He first saw a lawyer the following day.

Several other witnesses testified that defendant had been drinking heavily up until around midnight on the evening in question and had engaged in a fight. A psychiatrist testified about defendant's mental condition.

Defendant also called Deputy Sheriff Graves who testified that at about 3:30 a.m. he and Deputy Gwynn were directed by the sheriff to go to the home of defendant, about a mile and a half from the crime scene, and pick him up. Defendant was in the house and came to the door when the deputies blew their horn. The defendant got into the unlocked back seat and they all went to the Thompson house. The deputies did not ask defendant any questions, but immediately upon entering the car, he spontaneously started speaking. He told them he had heard a noise from Mrs. Thompson's house while passing by and went to see what had happened. Her door was locked so he pulled a screen off, went in a window and saw someone lying on the floor. He said he came out, ran the mile and a half home, and called because he did not want anyone to think he had done something wrong.

After this volunteered comment, deputies and defendant arrived at the Thompson house. The deputies got out of the car and the defendant lay down and went to sleep in the back seat. During the night, the deputies were out in the yard at different places and at times were in the house, but Deputy Graves specifically stated that "nobody was definitely watching and assigned to keep an eye on [defendant]." After finishing their work at the crime scene, deputies were instructed to bring defendant back to Yanceyville, get him something to eat and "put him up" until the sheriff and the S.B.I. arrived. "As to whether he was free to walk home at the time we left the scene . . . [n]obody said nothing about him walking home." In Yanceyville defendant was not taken to a regular lockup but was shown to a holding cell.

Defendant was not arrested at the time he was with Deputy Graves. Deputy Graves did not suspect defendant, nor had the sheriff said anything about defendant being a suspect. Defendant was simply considered the only source of information about the crime since he had reported discovering the victim's body.

Graves further testified that after arriving at the Thompson home, no one said anything to the defendant about restricting his movements in any way. The car was never locked. Defendant asked if it would be alright to go to sleep and was told that it was. Defendant complained that it was cold so the deputies rolled up the windows and he went to sleep.

Explaining the stop for cigarettes at the convenience store, Graves said no one attempted to restrict defendant's movements in any way. Defendant was not asked questions by anyone during the time he was in the car at the Thompson house or while en route to Yanceyville. As they were driving toward Yanceyville, defendant asked if they thought he had done it and was told only that "the sheriff might want to talk with him later as he was the only man that saw it."

At the sentencing hearing, the testimony of S.B.I. Agent Childrey revealed that the defendant made, *inter alia*, the following disclosures to the officers at his interview which was transcribed from the tape recording: That he went in Mrs. Thompson's house and started "messing" with her; that she tried to hit him with a flashlight and he took it away from her and wrestled with her; that he didn't know when she was dead but it scared him and he ran home and called the sheriff's department; that he thinks he had intercourse with her and that she was alive at the time; that he might have choked her; that too much drinking caused him to do this.

TRIAL COURT ORDER

Judge Kivett, in a lengthy and detailed order denying the motion to suppress, found and concluded, *inter alia*, as follows: (enumeration ours)

(1) That the sheriff and other investigators considered defendant the only source of information available to them in connection with the investigation and defendant was transported to

the Thompson home for the purpose of being available to provide further information.

(2) Defendant made a voluntary statement but he was not considered a suspect at the time by the deputies and had been picked up only at the request of the sheriff so that he might possibly provide additional information.

(3) That while in the sheriff's car at the Thompson home for several hours, his movements were not restricted and he was not suspected at that time because the investigation had not progressed far enough; that he slept in the back of the sheriff's car from approximately 3:30 a.m. until approximately 9:00 a.m. the next morning. At approximately 10:00 a.m., he was transported to the sheriff's office "to make him available for providing additional information to the sheriff if the need should arise."

(4) That no promises were made to defendant to induce him to waive his right to have an attorney; that he was not coerced in any way and that he did freely, voluntarily and understandingly answer questions of an incriminating nature to the officer conducting the interview.

(5) That, after he made the first statement which the State proposed to offer at trial, following the advisement of his constitutional rights and his waiver to have a lawyer present and his waiver to remain silent at approximately 11:58 a.m., the investigating officer reiterated certain rights and defendant reiterated that he understood them and did not want an attorney present and that he consented to a tape recording being thereafter made of any answers he might give in the interrogation.

(6) That defendant was clearly in control of his faculties at the time and understood the nature of the inquiry being made and of his rights under the law.

(7) That he freely and voluntarily and understandingly waived his right to have an attorney present and waived the right to remain silent and other rights under the law and that he freely and voluntarily gave his statement to the interrogating officer.

(8) That none of defendant's rights under Chapter 15A of the General Statutes were violated and that specifically with respect to G.S. 15A-511 and G.S. 15A-501, defendant made no showing that he was not taken before a magistrate "without unnecessary delay."

(9) That defendant was not placed under arrest until sometime later during the morning of 11 September 1977 and that until the time that the sheriff and the two S.B.I. agents began their interview, defendant was free to leave the dispatcher's room and the sheriff's office at the Caswell County Jail.

(10) That even if the arrest had actually occurred at an earlier time, it was necessary for the officers to proceed further with the investigation before they had an opportunity to return to the sheriff's office to make further inquiries of the defendant.

(11) That none of defendant's rights under either federal or state constitutions were violated.

(12) That defendant's statements were freely and voluntarily made and defendant was told by the officers that they were asking for samples of hair from his person and blood from his body so that comparison tests might be made and that he knowingly and intelligently and voluntarily decided to cooperate with the officers and to voluntarily give samples or permit them to be taken for the purposes stated by the officer.

The trial court then denied defendant's motion to suppress the statements and the samples taken.

Judge Kivett's order is dated 22 June 1978. Thereafter, on 7 November 1978, Judge Seay conducted a sentencing hearing at which time much of the evidence summarized above was again introduced. Defendant entered a negotiated plea of guilty and sentence was imposed as hereinabove indicated. Immediately after the sentence was entered, defendant gave notice of appeal with respect to the denial of his motion to suppress and moved for the court to provide a transcript of the suppression hearing, a transcript of his sentencing hearing and moved for appointment of counsel to prepare the notice of appeal. Judge Seay held that the pleas of guilty entered for defendant were negotiated pleas, that defendant stated in open court that the negotiated plea set

forth in his transcript of plea contained the entire plea arrangement and that defendant had accepted the arrangement with no mention to the court concerning an appeal. Judge Seay concluded that by entry of the negotiated pleas, the defendant waived any right of appeal that he might have had in regard to the motion to suppress in these cases. He therefore denied defendant's motions.

Defendant thereafter petitioned this Court for certiorari which was allowed on 6 February 1979 on the basis of G.S. 15A-979(b) which provides: "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, *including a judgment entered upon a plea of guilty.*" (Emphasis added.)

Our consideration, therefore, is whether Judge Kivett properly denied defendant's motion to suppress.

Attorney General Rufus L. Edmisten by Associate Attorney Grayson G. Kelley for the State appellee.

Melzer A. Morgan, Jr. for defendant appellant.

CARLTON, Justice.

On appeal, defendant presents five contentions for our review: (1) That his rights were denied under principles established by the United States Supreme Court in *Dunaway v. New York*, 99 S.Ct. 2248 (1979); (2) that his right to be taken promptly to a magistrate was denied, violating principles established by the United States Supreme Court in *McNabb v. United States*, 318 U.S. 322, 63 S.Ct. 608, 87 L.Ed. 819 (1943), and *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed. 2d 1479 (1957), and by our own legislature in G.S. 15A-501 and G.S. 15A-511; (3) that the trial court did not properly find that defendant had freely and voluntarily waived his right to counsel; (4) that the trial court erred in finding that defendant freely and voluntarily consented to the taking of hair samples, and (5) that the three offenses charged merged and only one life term would be the appropriate sentence.

We reject defendant's contentions and affirm the trial court. We discuss the contentions in order.

I. The Contention Under *Dunaway v. New York*

In *Dunaway, supra*, the proprietor of a pizza parlor in Rochester, New York was killed during an attempted robbery. A Rochester detective was told by another officer that a jailed informant had supplied a possible lead implicating the defendant. The detective questioned the jail inmate but learned nothing sufficient to get a warrant for defendant's arrest. Nevertheless, he ordered other detectives to "pick up" defendant and "bring him in." Three detectives located defendant and he was taken under custody but was not told he was under arrest. Police testified, however, he would have been physically restrained if he had attempted to leave. He was driven to police headquarters in a police car and placed in an interrogation room where he was questioned by officers after having been given his *Miranda* warnings. He waived counsel and eventually made statements and drew sketches that incriminated him in the crime. At trial, defendant moved to suppress the statements and sketches and the motion was denied. Defendant was convicted as charged. The United States Supreme Court granted certiorari "to clarify the Fourth Amendment's requirements as to the permissible grounds for custodial interrogation. . . ." 99 S.Ct. at 2253, in a situation when there is less than probable cause for a full-fledged arrest.

That Court then held that police officers violated defendant's fourth and fourteenth amendment rights.

The Court first noted that defendant was "seized" in the fourth amendment sense when he was taken *involuntarily* to the police station. The State had readily conceded that the police lacked probable cause to arrest defendant before his incriminating statement during interrogation. The Court rejected the State's argument that the seizure of defendant did not amount to an arrest and was permissible under the fourth amendment because the police had a "reasonable suspicion" that defendant possessed "intimate knowledge about a serious and unsolved crime." 99 S.Ct. at 2254. The Court noted that detention of defendant was in important respects indistinguishable from a traditional arrest. Defendant was not questioned briefly where he was found, but was taken from a neighbor's home in a police car, transported to a police station, and placed in an interrogation room. The Court noted that defendant was never informed that

he was free to leave and, in fact, police testified that he would have been physicially restrained if he had attempted to leave. The Court emphasized the central importance and historical guarantee of the fourth amendment's probable cause requirement and refused to adopt the New York Court's balancing test of "reasonable police conduct under the circumstances" to cover all seizures that do not amount to technical arrests. The Court concluded that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." 99 S.Ct. at 2258.

The Court then addressed the question whether the connection between the unconstitutional police conduct and the incriminating statements and sketches obtained during the illegal detention was nevertheless attenuated to permit the use at trial of the statements and sketches. The Court held, citing *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975), that although a confession after proper *Miranda* warnings may be found to be "voluntary" for purposes of the fifth amendment, this type of "voluntariness" is merely a "threshhold requirement" for fourth amendment analysis. The Court stated:

> If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be sustantially diluted. . . . Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings.

99 S.Ct. at 2258-59, citing *Brown v. Illinois*, *supra* at 602, 95 S.Ct. at 2261, 45 L.Ed. 2d at 426.

[1] While this decision by our United States Supreme Court clearly has major ramifications with respect to the question of the legality of custodial questioning on less than probable cause, we do not believe that it controls the case at bar. First, this case is significantly distinguishable on the facts and, second, defendant effectively waived any rights he might have had under *Dunaway*

by failing to notify either the State or the court during plea negotiations that he intended to appeal denial of his suppression motion.

Dunaway and the case at bar differ significantly in the following respects:

(1) In *Dunaway*, three detectives went to get the defendant on the basis of a tip. The Court specifically stated that defendant *involuntarily* went with the police. Here, defendant initiated the contact with the sheriff's office by calling the dispatcher on the telephone. This defendant *voluntarily* accompanied the deputies.

(2) In *Dunaway*, the evidence clearly established that defendant would not have been allowed to leave had he attempted to do so. Here, there is no evidence that defendant would not have been allowed to leave. Moreover, Judge Kivett found as a fact at the suppression hearing that defendant, during the period prior to his arrest, was free to leave the dispatcher's room and the sheriff's office at the Caswell County Jail. There is sufficient evidence in the record to support the trial court's finding and we are bound by it on this appeal. *State v. Freeman*, 295 N.C. 210, 221, 244 S.E. 2d 680, 686 (1978); *State v. Jones*, 293 N.C. 413, 424, 238 S.E. 2d 482, 489 (1977); *State v. Thompson*, 287 N.C. 303, 317, 214 S.E. 2d 742, 751 (1975), *death sentence vacated*, 428 U.S. 908, 96 S.Ct. 3215, 49 L.Ed. 2d 1213 (1976).

(3) In *Dunaway*, the Court found that the detention of defendant was indistinguishable from a traditional arrest because petitioner was not questioned briefly where he was found but was instead taken from a neighbor's home to a police car and transported directly to an interrogation room. Here, however, petitioner volunteered his availability, and was obtained from his home because he had called in information to the sheriff. He was taken by car to the yard of the crime scene to be available to provide further information to the sheriff but arrived in the midst of a busy investigation and promptly made himself unavailable for coherent questioning by falling asleep.

(4) In *Dunaway*, there is some evidence of physical coercion by the police at the time of the pickup. *See People v. Dunaway*, 61 App. Div. 2d 299, 305-06, 402 N.Y.S. 2d 490, 495 (1978) (Cardamone, J., dissenting). Here, there is no evidence of any physical coercion by the police at any time.

(5) In *Dunaway*, the Court, citing Brown, *supra*, identified several factors to be considered "in determining whether the confession is obtained by exploitation of an illegal arrest": (a) The temporal proximity of the arrest and the confession (less than two hours elapsed between the arrest and the confession), (b) the presence of intervening circumstances (the Court found none), and (c) the purpose and flagrancy of the official misconduct (the arrest without probable cause had a "quality of purposefulness" in that it was an "expedition for evidence" admittedly undertaken "in the hope that something might turn up"). 99 S.Ct. at 2259, citing *Brown v. Illinois*, *supra* at 603-05, 95 S.Ct. at 2261-62, 45 L.Ed. 2d at 427-28. Here, (a) over ten hours elapsed between the time defendant left his home with the deputies and the confession, (b) there was a significant "intervening event" of defendant sleeping from 3:30 a.m. until 9:00 a.m. at his own request as well as ample evidence defendant could have left at any time including the stop at the convenience store, and (c) there certainly was no evil purpose or "expedition for evidence" on the part of the deputies in originally going for the defendant for defendant himself had called to offer information about the crime and to volunteer his help. Indeed he was so eager to help that he didn't even wait for police to come to his door but came out when they sounded the car horn.

In summary, we do not think that the principles regarding detention for custodial interrogation promulgated by *Dunaway* contemplate the factual situation disclosed by the record before us. Certainly these facts do not "trigger the traditional safeguards against illegal arrest." Defendant here originally confronted police on his own volition for the purpose of providing additional information. He then elected to sleep several hours in the police car in which there is no evidence to indicate that he was restrained. Before being questioned, the police had developed adequate probable cause to suspect defendant of the crimes from the result of their investigation and defendant was accorded all of his constitutional rights.

With respect to the claim under *Dunaway*, we add this final note. As indicated *supra*, since there is evidence to support it, we are bound by the trial court's finding that the defendant was not under arrest until he was advised of his rights and questioning commenced. We would simply note that there was also sufficient evidence to have supported a trial court finding that defendant

was restrained beginning at approximately 10:00 a.m. when he and the deputies left the crime scene by car and started toward Yanceyville. Even under that finding, however, defendant's reliance on *Dunaway* would be misplaced because at that time sufficient probable cause existed to detain defendant.

The record reveals that by the time the investigation was nearly completed (sometime just prior to 10:00 a.m.) the police had established the following links between defendant and the crime:

(1) Bare footprints were found in and about the house and defendant was wearing no shoes at the time he came to the scene.

(2) A T-shirt, blood stained, was found in the house and defendant was shirtless.

(3) There was evidence of a vigorous struggle and defendant was scratched about his face and torso.

(4) The only unsecured entrance to the house police found was the window defendant had said he used to break into the house. All other exits were still locked.

Based on such a series of facts " 'the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [were] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense [had] been . . . committed" by the defendant. *Brinegar v. U.S.*, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879, 1890 (1949) quoting *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 2d 543, 555 (1925).

Moreover, assuming *arguendo* that the facts of this case are embraced by the holding in *Dunaway*, we believe that defendant effectively waived any fourth amendment rights by failing to give notice of appeal during his negotiated plea of guilty.

The rule is well established that a guilty plea, intelligently and voluntarily made with the aid of counsel, bars the latter assertion of constitutional challenges to the plea negotiation proceeding. *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed. 2d 747 (1970); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970); *Parker v. North Carolina*, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed. 2d 785 (1970).

This rule was reiterated by the United States Supreme Court in *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed. 2d 235 (1973). There, the Court said:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Id. at 267, 93 S.Ct. at 1608, 36 L.Ed. 2d at 243.

The Court characterized the guilty plea as "a break in the chain of events which has preceded it in the criminal process." Therefore, a person complaining of such "antecedent constitutional violations" is limited in a federal habeas corpus proceeding to attacks on the voluntary and intelligent nature of the guilty plea, through proof that the advice received from counsel was not "within the range of competence demanded of attorneys in criminal cases."

More recently, in *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed. 2d 628 (1974), the Court held that the principles established by the *Brady* trilogy and *Tollett* are not applicable to preclude a defendant's appeal when the constitutional claim relied upon by defendant goes to the very power of the state to bring the defendant into court to answer the charge brought against him. In *Blackledge*, the State had improper jurisdiction over the defendant because it denied him due process of law when it brought a felony charge against him in a North Carolina superior court after his appeal from a misdemeanor conviction for the same conduct. *Blackledge* was distinguished from the *Brady* trilogy and *Tollett* on the ground that the constitutional claims presented by the former went to the ability of the State to bring the defendant into court to answer the charge brought against him. *Accord, Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed. 2d 195 (1975) (per curiam).

Here, another dimension is added to the general rule because our legislature has decided to permit a defendant to appeal from an adverse ruling in a pretrial suppression hearing despite the fact that defendant's conviction is based on a guilty plea. G.S. 15A-979(b) provides: "An order finally denying a motion to sup-

press evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty."

Several states, most notably New York, California and Wisconsin, have similar statutes. *See* Cal. Penal Code § 1538.5(m) (West Supp. 1978); N.Y. Crim. Proc. Law § 710.70(2) (McKinney 1977); Wisc. Stat. Ann. § 971.31(10) (West 1971).

The reasons given for the adoption of such laws vary. In some courts it is said that allowing an appeal from a guilty plea by statute where defendant has only a single constitutional challenge reduces the unnecessary waste of time involved when a defendant proceeds to trial to preserve the issue. *See People v. Paris*, 48 Cal. App. 3d 766, 122 Cal. Rptr. 272 (1975). Other courts assert that such statutes provide a speedy remedy for a defendant in a readily accessible court. *See People v. Enos*, 34 Cal. App. 3d 25, 109 Cal. Rptr. 876 (1973). Indeed, the idea has become a model standard of both the American Bar Association, and the National Conference on Uniform Rules of Criminal Procedure. *See* A.B.A. Project on Minimum Standards for Criminal Standards, Standards Relating to Criminal Appeals 31-32 (Approved Draft 1970), and the National Conference on Uniform Rules of Criminal Procedure, Rule 444(d). However, at least one New York court has found the practice burdensome. *See People v. Navarro*, 61 App. Div. 2d 534, 403 N.Y.S. 2d 80 (1978).

The United States Supreme Court has also dealt with this issue. In *Lefkowitz v. Newsome*, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed. 2d 196 (1975), the Court held that when a state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding. The narrow holding in *Lefkowitz*, however, was made on the basis that "[t]he plea [was] entered with the clear understanding and expectation by the State, the defendant, and the courts that it will not foreclose judicial review of the merits of the alleged constitutional violations." *Id.* at 290, 95 S.Ct. at 890, 43 L.Ed. 2d at 202. In *Lefkowitz*, the Court emphasized that Newsome had indicated his intention to appeal both his conviction and the denial of his motion to suppress at the time of his sentencing proceeding. Such a clear understanding and expectation are lacking in the case *sub judice*. There is absolutely

no evidence in the record that the State or the Court were aware at the sentencing hearing that defendant intended to appeal the denial of his suppression motion. Indeed, the sentencing hearing was before a different judge some three months after the suppression motion hearing and Judge Seay's order indicates that he did not anticipate such an appeal. We do not believe that our statute, nor the holding in *Lefkowitz*, contemplates a factual pattern such as that disclosed here—one which would cause the State to be trapped into agreeing to a plea bargain in a case as gruesome as this and then have the defendant contest that bargain.

As stated by the United States Supreme Court, "Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained." *Lefkowitz v. Newsome*, *supra* at 289, 95 S.Ct. at 889, 43 L.Ed. 2d at 202.

[2] The plea bargaining table does not encircle a high stakes poker game. It is the nearest thing to arm's length bargaining the criminal justice system confronts. As such, it is entirely inappropriate for either side to keep secret any attempt to appeal the conviction. We therefore hold that, when a defendant intends to appeal from a suppression motion denial pursuant to G.S. 15A-979(b), he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute. We cannot believe that our legislature, in adopting G.S. 15A-979(b), intended any less fair posture for appeal from a guilty plea.

II. Claim of Right To Be Taken Before A Magistrate

Defendant next contends that the trial court committed error in failing to grant his motion to suppress by virtue of that portion of G.S. 15A-974(2) which requires that evidence must be suppressed if "[i]t is obtained as a result of a *substantial violation* of the provisions of this Chapter." (Emphasis added.) He contends that there was a "substantial violation" of certain requirements of G.S. 15A-501 and G.S. 15A-511.

G.S. 15A-501(2), upon which defendant relies, provides that upon the arrest of a person, a law enforcement officer "[m]ust . . .

take the person arrested before a judicial official without unnecessary delay."

G.S. 15A-511 provides in pertinent part as follows:

(a) Appearance before Magistrate.—

(1) A law-enforcement officer making an arrest with or without a warrant must take the arrested person without unnecessary delay before a magistrate as provided in G.S. 15A-501.

. . . .

(b) Statement by the Magistrate.—The magistrate must inform the defendant of:

(1) The charges against him;

(2) His right to communicate with counsel and friends; . . .

. . . .

(c) Procedure When Arrest Is without Warrant; Magistrate's Order.—If the person has been arrested, for a crime, without a warrant:

(1) The magistrate must determine whether there is probable cause to believe that a crime has been committed and that the person arrested committed it, . . .

Defendant's essential contention here is that both the letter and spirit of these statutes illustrates the legislative intent that the right of counsel can, and should, be more effectively explained by a judicial officer. He further contends that failure to comply with these statutes was prejudicial to him because, during the two-hour period of questioning by the law enforcement officers, he gave hair samples and an incriminating confession.

[3] Unquestionably, the failure of law enforcement personnel in complying with the provisions of these statutes can result in the violation of a person's constitutional rights. We reaffirm, however, our holding under the predecessor statutes to G.S. 15A-501 and G.S. 15A-511 that these statutes do not prescribe mandatory procedures affecting the validity of a trial. *State v.*

McCloud, 276 N.C. 518, 531, 173 S.E. 2d 753, 763 (1970); *see also State v. Curmon*, 295 N.C. 453, 457, 245 S.E. 2d 503, 505 (1978); *State v. Burgess*, 33 N.C. App. 76, 234 S.E. 2d 40 (1977).

[4] Here, we perceive no prejudice against defendant on the basis of the record before us. As we have indicated, *supra*, defendant was not under arrest prior to the time of his initial questioning. Once questioning began around noon, defendant confessed his guilt within approximately 40 minutes. He was fully informed of his rights on two occasions within that 40 minutes and made an intelligent waiver of counsel. As soon as the confession was recorded, defendant was taken to a magistrate sometime between 2:00 p.m. and 3:00 p.m. at which time he was formally charged. We find that defendant was taken before a judicial official "without unnecessary delay."

Defendant also contends that failure of law enforcement personnel to take him before a magistrate sooner violates the decisions of our United States Supreme Court in *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943) and *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed. 2d 1479 (1957). Defendant's reliance on these decisions is misplaced. In both those cases, confessions were suppressed by virtue of Rule 5(a) of the Federal Rules of Criminal Procedure. Those rules, of course, apply only to the federal courts and the holdings in *McNabb* and *Mallory* have expressly not been applied by state courts. *See* 29 Am. Jur. 2d, Evidence § 547 at 600 (1967 & Cum. Supp. 1979) and cases cited therein. The validity of this approach is bolstered by decisions of the United States Supreme Court to the effect that the McNabb-Mallory Rule is not binding on state courts, and holding that a confession is not inadmissible merely because of an undue delay on the part of police in taking defendant to the magistrate prior to his confession. *See Crooker v. California*, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed. 2d 1448 (1958); *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), *ovrld. on other grounds, Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770 (1963); *Gallegos v. Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86 (1951). We would further note that the holdings established by the decisions of the United States Supreme Court in *McNabb* and *Mallory* were greatly modified for federal courts by Title II of the Omnibus Crime Control and Safe

Streets Act of 1968, 18 U.S.C. § 3501. This assignment of error is overruled.

III. CLAIM OF INADEQUATE FINDINGS BY TRIAL COURT

[5] Defendant next contends that the trial court erred in failing to make adequate findings as to whether defendant requested counsel during the time of his interrogation. He argues that there is some conflict in the testimony presented at the suppression hearing which was not addressed or resolved by the trial court's order. Defendant relies on the decision of this Court in *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968) and *State v. Waddell*, 34 N.C. App. 188, 237 S.E. 2d 558 (1977).

Defendant's reliance on these decisions is also misplaced. In both those cases, the evidence was sharply conflicting as to whether the defendant had requested an attorney prior to the time of making his confession. And in both cases, the trial court made *no* mention of counsel whatsoever in its findings of fact. Such omission was sufficient to remand each case for a new trial.

Here, however, the trial court did mention a request for counsel. While its order does not expressly find that defendant "did not request" counsel during the time of his interrogation, the court clearly found, in several instances, that defendant *waived* his right to counsel.

Indeed, under our decisions in *State v. Siler*, 292 N.C. 543, 549-50, 234 S.E. 2d 733, 737 (1977) and *State v. Biggs*, 289 N.C. 522, 531, 223 S.E. 2d 371, 377 (1976), the essential finding at *voir dire* is not that defendant "did not request" counsel but that defendant waived counsel. Here that essential finding was made.

We do not believe that *Fox, supra*, or *Waddell, supra*, requires the use of any particular phrasing to express the trial court's clear and unmistakable finding that defendant did not request counsel but in fact waived it. This assignment of error is therefore overruled.

IV. CLAIM OF VIOLATION OF FOURTH AMENDMENT RIGHTS IN TAKING OF HAIR SAMPLES

[6] Defendant next assigns as error the admission into evidence at the sentencing hearing of testimony of the results of an

analysis of hair samples taken from his body. F.B.I. laboratory specialist Neil testified that "[b]ased upon my experience in the last 15 years, this is one of the few cases in which I was able to work with this many questioned hairs, all of which fell within the range of comparison characteristics exhibited in the samples." He added, "The hairs either originated from the person represented by the known sample, purportedly from the defendant, or from some other individual of the white race exhibiting the same range of microscopic characteristics and the latter possibility I consider as remote." The record discloses that, during the interrogation in the sheriff's office, the officers requested, and defendant consented to, the taking of head and pubic hairs from the defendant.

We have previously dealt with this issue in *State v. Sharpe*, 284 N.C. 157, 200 S.E. 2d 44 (1973). We held there, and reaffirm here, that an official in-custody investigative technique designed to uncover incriminating evidence from a person's body is such a minor intrusion into or upon the individual's person that it is not an unreasonable seizure. In *Grimes v. United States*, 405 F. 2d 477 (5th Cir. 1968), it was said that "the obtaining of hair samples after lawful arrest, where the means employed are reasonable, is not a violation of [one's] constitutional right." *Id.* at 479. *See also United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed. 2d 67 (1973) (voice exemplars); *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966); *United States v. D'Amico*, 408 F. 2d 331 (2d Cir. 1969).

We also note our prior holding that the provisions of the Criminal Procedure Act, G.S. 15A, Art. 14, relating to nontestimonial identification orders were not aimed at defendants in the custody of police officers. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). There, as here, defendant was clearly in custody at the time of the police acts about which defendant complains. Indeed, defendant concedes, "had there been no illegality in detaining [him] without bringing him before a magistrate, no question of consent could be legitimately raised." Brief for Defendant at 30. We have held in an earlier portion of this decision that there was no illegal arrest. Moreover, the record discloses the defendant clearly consented to the taking of the hair sample after the officers explained that he was not required to do so. Hence, this assignment of error is overruled.

V. CLAIM OF MERGER OF OFFENSES

[7] Finally, defendant requests that we pass upon the question whether charges against him should merge. He argues that the killing was an unpremeditated "aberration" committed in the course of a rape. He notes that under cases such as *State v. Boyd*, 287 N.C. 131, 214 S.E. 2d 14 (1975), had the State proceeded under the felony murder rule, at least two of the charges would have merged.

We are not inclined to discuss extensively the various combinations of guilt and the consequences thereof which *might* have resulted had the State proceeded to trial on the original indictments. Clearly, the merger doctrine, which is well established in North Carolina, would have arisen had a jury found defendant guilty of felony murder. *State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563, *cert. denied sub nom., Brown v. N.C.*, 434 U.S. 998, 98 S.Ct. 638, 54 L.Ed. 2d 493 (1977); *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). Here, however, the issue of merger is not before us. This is so because defendant entered into a negotiated plea of guilty to second degree murder, first degree rape and first degree burglary in specific exchange for a sentence of two consecutive life terms. Defendant has in no way, on this appeal, attacked the validity of the terms of his plea bargain and we find no impropriety with respect to it.

We further note that while, as stated above, we granted certiorari on the basis of G.S. 15A-979(b), we also treated the petition as one to bypass the Court of Appeals. G.S. 7A-27(a) provides that there is no appeal of right to this Court when a sentence is based on a plea of guilty even when that sentence is life imprisonment. The proper court to hear this appeal, if motion to bypass is not made and granted, is the Court of Appeals.

We have carefully examined all of defendant's assignments of error and find them devoid of merit.

We find no error in either defendant's suppression or sentencing hearing.

No error.

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

Justice EXUM dissenting in part.

The majority opinion has tried mightily to distinguish this case from *Dunaway v. New York*, 99 S.Ct. 2248, 60 L.Ed. 2d 824 (1979), decided after the trial proceedings in the instant case had occurred and while it was on direct appeal.[1] I believe the attempt is unsuccessful and that *Dunaway* is not distinguishable from the case before us. I respectfully dissent from that portion of the opinion dealing with the *Dunaway* issue.

The majority argues defendant was not in custody of the sheriff at the time he made his confession and, even if he was, the sheriff had probable cause to arrest him prior to that time. The state concedes that defendant was in custody and there was no probable cause to arrest him before he made his confession. We, of course, are not necessarily bound by these concessions; but, in the context of a fully adversarial proceeding as this is, they are entitled to some weight.

The majority says defendant was not in custody because (1) he voluntarily accompanied the deputy sheriffs when they were sent "to pick him up"; (2) no law officer testified that defendant would not have been allowed to leave had he attempted to do so; (3) defendant himself initiated the contact with the sheriff's office; and (4) Judge Kivett found that defendant was free to leave the sheriff's office "*up until the time that Sheriff Poteat and the two SBI agents . . . began their interview.*" (Emphasis supplied.)

That defendant voluntarily accompanied the deputies and initiated contact with the sheriff's office in no way detracts from the crucial fact that he was taken into custody by the deputies at the direction of the sheriff for questioning. Judge Kivett found as a fact that defendant "had been picked up by [the deputies] . . . at the request of the sheriff so that they might possibly secure additional information from him" and that "he was not considered a suspect at the time." That no law officer testified defendant

1. The majority assumes that *Dunaway* is sufficiently retroactive to apply to this case. An argument could be mounted that it is not. *Johnson v. New Jersey*, 384 U.S. 719 (1966) (held, *Miranda v. Arizona*, 384 U.S. 436 (1966) applicable only to trials begun after the date of its decision); *see also Jenkins v. Delaware*, 395 U.S. 213 (1969). The argument would probably fail, however, because of *Linkletter v. Walker*, 381 U.S. 618 (1965) (held, *Mapp v. Ohio*, 367 U.S. 643 (1961) applies to cases in which appeals were not final on date of decision.)

would not have been allowed to leave had he attempted to do so is immaterial. Neither did any officer testify that defendant would have been allowed to leave. Such testimony would at most have been the witness' opinion of the circumstances. As this Court decided today in *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979), determination of whether a suspect is in custody is made objectively by focusing on the actions of law officers. It is not based on whether defendant subjectively believed himself to be detained against his will or whether any particular officer might have so opined.

There can be no doubt that defendant here was taken into custody by the sheriff for the purpose of questioning and remained in such custody until he made his incriminating statements. Even if he had been somehow free to leave prior to the time the questioning began (and I find nothing in the record which supports this conclusion), Judge Kivett's findings establish by clear implication that at the time questioning itself began defendant would not have been free to leave. If, consequently, at that point there was no probable cause to detain defendant, his subsequent incriminating statements are rendered inadmissible by *Dunaway*.

I disagree also with the majority's alternative conclusion that the sheriff had probable cause to arrest defendant prior to the time interrogation began. The facts relied on by the majority to link defendant to the crime are consistent merely with defendant's initial admissions that he visited the crime scene and entered the victim's residence by breaking in a window. They are, in themselves, insufficient to constitute probable cause that defendant himself committed the crimes. After the investigation at the victim's residence had been completed and defendant was being taken by deputies to the sheriff's office, Judge Kivett found that defendant asked the deputies whether they suspected him. They replied, "No, they did not suspect him but they guessed that the sheriff might want to talk to him." Again the state concedes the absence of probable cause prior to defendant's making his incriminating statements.

I fully agree with the remainder of the majority opinion including its conclusion that defendant waived his Fourth Amendment rights by entering a negotiated guilty plea without notice

that he was pleading guilty conditionally under G.S. 15A-979(b). The legislature did not intend a defendant to have it both ways. The state is entitled to rely on a negotiated plea, nothing else appearing, as being a full and final settlement of the entire matter. The sentencing judge should know whether defendant's plea will finally dispose of the matter or whether there is the immediate prospect of a new proceeding and a new sentence. Where a defendant negotiates a plea with the state and enters it without notice to the state or the court that he intends after all to seek a new trial, he waives the procedure made available to him by G.S. 15A-979.

STATE OF NORTH CAROLINA v. NORRIS TAYLOR, A/K/A TOM GATLING

No. 3

(Filed 6 November 1979)

1. **Criminal Law § 29.2— capacity of defendant to proceed—failure to order psychiatric examination or commitment before hearing**

The trial judge did not err in failing to order that defendant be examined by medical experts or committed to a State mental facility for observation prior to holding the hearing mandated by G.S. 15A-1002 to determine defendant's capacity to proceed where there was no evidence presented at the hearing which would have caused a prudent judge to call for a psychiatric examination or commitment.

2. **Criminal Law § 29.1— capacity of defendant to proceed—constitutionality of statutory procedure**

Due process does not require a trial judge automatically to order a psychiatric examination of a defendant any time a question is raised concerning defendant's capacity to proceed, and the procedure provided by G.S. 15A-1002 to determine a defendant's capacity to proceed is, on its face, constitutionally adequate to protect a defendant's right not to be tried while legally incompetent.

3. **Jury § 6— denial of examination of prospective jurors individually—refusal to sequester prospective jurors**

The trial court in a first degree murder case did not abuse its discretion in refusing to sequester the venire while each prospective juror was examined individually or, in the alternative, to exclude all prospective jurors except the twelve currently under examination.

4. Jury § 5— statements by prospective jurors not prejudicial—excusal of jurors—acceptance of one juror

A remark made by a prospective juror on voir dire in the presence of other prospective jurors that when he read about the case in the newspaper he thought defendant was guilty and a remark by another prospective juror that she had formed an opinion and it would take some evidence to change her mind were harmless where both such jurors were excused either for cause or peremptorily. Furthermore, defendant cannot now complain that another prospective juror's comment about defendant being on escape was so inherently prejudicial as to require a new trial where defendant questioned such prospective juror further and accepted her as a juror when he could have challenged her for cause or peremptorily.

5. Criminal Law § 135.3; Jury § 7.11— capital case—Witherspoon-qualified jurors

There is no merit in defendant's contention that jurors not opposed to the death penalty are more apt to convict and tend to favor the prosecution in the determination of guilt and that a defendant in a bifurcated trial for first degree murder is denied due process when members of the jury are qualified pursuant to the standards of *Witherspoon v. Illinois*, 391 U.S. 510.

6. Searches and Seizures § 15— motion to suppress—aggrieved person

A defendant is "aggrieved" and "may move to suppress evidence" under G.S. 15A-972 only when it appears that his personal rights, not those of some third party, have been violated, and such defendant has the burden of establishing that he is an "aggrieved" party before his motion to suppress will be considered.

7. Searches and Seizures § 15— no standing to object to search of "shot house"

Defendant failed to establish that he had a privacy interest in the room at a "shot house" where his gun was found by officers sufficient to give him standing to object to the search of that room where the record shows only that defendant was present at the shot house, presumably to buy a drink, and hid his pistol in a small room there, and there was no evidence that defendant owned the shot house, that he leased, controlled or occupied the room as a paying guest, or even that he had permission to store his belongings in the room.

8. Searches and Seizures § 7— arrest of defendant outside premises—search of premises for weapons—exigent circumstances

After having caused defendant to exit a shot house where illegal liquor is sold and to submit to an arrest outside the premises, the strong possibility that the officers might be fired upon from the shot house constituted an "exigent circumstance" which made it reasonable for them to make a limited, protective sweep of the shot house, and the warrantless seizure of defendant's pistol and ammunition from a small room in the shot house was lawful.

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

DEFENDANT appeals from judgment of *Hobgood, J.*, 25 September 1978 Session, JOHNSTON Superior Court.

Defendant was tried upon a bill of indictment charging him with the first degree murder of Kathiline Ann Mansullo, also known as Kathi King, on 2 January 1978 in Johnston County.

The state's evidence tends to show that defendant was the maintenance man at the Save Inn in Selma. He was on duty at and after 11 p.m. on 2 January 1978. Around 11:30 p.m. Kathiline Mansullo, or Kathi King, checked in at the motel and was assigned to Room No. 157. She paid for occupancy by one person. Several minutes later defendant and the night clerk saw a male person slip into her room. When she had occasion to enter the lobby soon thereafter, the night clerk, James Larry Brown, indicated his knowledge that a second occupant was in the room and stated it would be all right to pay for the extra person the next morning. Defendant Taylor, however, insisted that she pay immediately. The victim told defendant she would call police if he continued hassling her. An argument ensued. The night clerk dissuaded defendant and told him several times that if the second occupant spent the night there, it would be satisfactory to pay for the extra person the following morning. Nevertheless, the argument intensified and the victim told defendant, "I don't do anything that a filthy nigger tells me to do." As she turned to leave through the lobby door, defendant drew his gun and shot her twice. Miss Mansullo fell out the door. She was lying feet toward the door with her head toward the driveway. Defendant went to the doorway and shot her three more times as she lay on the ground. He reentered the lobby area, waved the gun at the night clerk and told him not to call the police. Miss Mansullo died from the gunshot wounds inflicted by defendant.

The jury convicted defendant of murder in the first degree. At the sentencing phase of the trial, no new evidence was presented. The jury found one aggravating and one mitigating circumstance and found that the aggravating circumstance was sufficient to call for imposition of the death penalty, finding beyond a reasonable doubt that the mitigating circumstance was insufficient to outweigh the aggravating circumstance. Despite these findings, however, the jury recommended life imprisonment and

judgment was pronounced accordingly. Defendant appealed, assigning errors discussed in the opinion.

Rufus L. Edmisten, Attorney General, by W. A. Raney, Jr., Special Deputy Attorney General; Daniel C. Oakley and Jo Anne Sanford, Assistant Attorneys General, for the State.

James B. Etheridge, attorney for defendant appellant.

HUSKINS, Justice.

[1] By his first assignment of error defendant contends the trial court erred in failing to commit defendant for a psychiatric examination prior to holding a hearing to determine defendant's capacity to proceed as mandated by G.S. 15A-1002. That statute provides in relevant part:

> "(a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.
>
> (b) When the capacity of the defendant to proceed is questioned, the court:
>
> > (1) May appoint one or more impartial medical experts to examine the defendant and return a written report describing the present state of the defendant's mental health. Reports so prepared are admissible at the hearing and the court may call any expert so appointed to testify at the hearing. In addition, any expert so appointed may be called to testify at the hearing by the court at the request of either party.
> >
> > (2) May commit the defendant to a State mental health facility for observation and treatment for the period necessary to determine the defendant's capacity to proceed. In no event may the period exceed 60 days. The superintendent of the facility must direct his report on defendant's condition to the defense attorney and to the clerk of superior court, who must bring it to the attention of the court. The report is admissible at the hearing.

a. If the report indicates that the defendant lacks capacity to proceed, proceedings for involuntary civil commitment under Chapter 122 of the General Statutes may be instituted on the basis of the report in either the county where the criminal proceedings are pending or in the county in which the defendant is hospitalized.

b. If the report indicates that the defendant has capacity to proceed, the clerk must direct the sheriff to return him to the county.

(3) Must hold a hearing to determine the defendant's capacity to proceed. If examination is ordered pursuant to subdivision (1) or (2), the hearing must be held after the examination. Reasonable notice must be given to the defendant and to the prosecutor and the State and the defendant may introduce evidence."

It is obvious from the language of the statute itself that the provisions of (b)(1) and (2) are permissible and discretionary whereas the langugage of (b)(3), requiring a hearing to determine defendant's capacity to proceed, is mandatory. The record reveals that the able trial judge, in accordance with G.S. 15A-1002(b)(3), conducted a pretrial hearing, found facts, and concluded that defendant had the mental capacity to proceed to trial. That conclusion is supported by the findings and the findings are supported by the evidence adduced at the hearing.

We note that defense counsel's motion suggesting defendant's incapacity to proceed did not "detail the specific conduct that [led] the moving party to question the defendant's capacity to proceed." G.S. 15A-1002(a). Rather, defense counsel generally argued that defendant's lengthy criminal record and several statements defendant had made to him had led him to conclude that defendant might not be able to stand trial. Moreover, defendant, in response to questioning from the trial judge, showed himself to be mentally alert and ready to go on with the trial. Finally, the district attorney stated that defendant had been cooperative in his interviews with police officers and "had related the details and the facts of the incidents under investigation very clearly to the officers. . . ." In summary, there was no evidence presented at the pretrial hearing which should

have caused a prudent judge to call for a psychiatric examination or commitment. Accordingly, denial of defense motions for examination or commitment, or both, under G.S. 15A-1002(b)(1) and (2) was entirely proper, and the trial judge did not abuse his discretion in determining that further psychiatric testing was unnecessary. The correctness of this determination was confirmed by defendant's subsequent disruptive behavior during the trial, which said more about his capacity for deliberate mischief than his incapacity to proceed.

[2] Defendant nevertheless contends that the trial court's failure to order a psychiatric examination per se deprived him of a fair trial and amounted to a denial of due process in that it failed to adequately protect his right not to be convicted while incompetent. Essentially, defendant argues that due process requires a trial judge to automatically order a psychiatric examination any time a question is raised concerning defendant's capacity to proceed. This contention is without merit. It is well established, of course, that the conviction of an accused person while he is legally incompetent violates due process and that state procedures must be adequate to protect this right. *Drope v. Missouri*, 420 U.S. 162, 43 L.Ed. 2d 103, 95 S.Ct. 896 (1975); *Pate v. Robinson*, 383 U.S. 375, 15 L.Ed. 2d 815, 86 S.Ct. 836 (1966). However, the United States Supreme Court has never held any particular procedure, such as the one advanced by defendant, to be constitutionally mandated for the protection of a defendant's right not to be tried or convicted while incompetent to stand trial. *See Drope v. Missouri, supra*, 402 U.S. at 172. Rather, the Court has generally indicated that in order to comport with due process, the procedure utilized must "jealously guard" a defendant's right to a fair trial. *Drope v. Missouri, supra; Pate v. Robinson, supra.*

Due consideration of North Carolina's statutory scheme for determining a defendant's capacity to proceed leads us to conclude that it "jealously guards" a defendant's right to a fair trial. The question of defendant's capacity "may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court." G.S. 15A-1002(a). When defendant's capacity to proceed is questioned, the court "*[m]ust* hold a hearing to determine the defendant's capacity to proceed." G.S. 15A-1002(b)(3). (Emphasis added.) Defendant may introduce evidence at this hearing. *Id.* Prior to holding a mandatory hearing the court may, in its

discretion, order defendant to be examined by medical experts or committed to a State mental facility for observation. G.S. 15A-1002(b)(1) and (2). The above procedure is, on its face, constitutionally adequate to protect a defendant's right not to be tried while legally incompetent. Defendant's first assignment of error is overruled.

[3] The trial court refused to sequester the venire while each prospective juror was examined individually or, in the alternative, to exclude all prospective jurors except the twelve currently under examination. The ruling of the court in this respect constitutes defendant's second assignment of error.

So long as the defendant's rights are scrupulously afforded him, all matters relating to the actual conduct of a criminal trial rest largely in the sound discretion of the trial judge. *State v. Perry*, 277 N.C. 174, 176 S.E. 2d 729 (1970). Thus, a motion to examine jurors individually rather than collectively is addressed to the discretion which the trial court possesses for regulating the jury selection process. *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), *death sentence vacated*, 428 U.S. 903 (1976). Here, the jury was selected in the manner heretofore approved by this Court in many cases, including those cited in *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975), *death sentence vacated*, 428 U.S. 903 (1976).

[4] In his brief, defendant concedes that the trial court did not abuse its discretion in denying his motions concerning the sequestration of prospective jurors. He strongly insists, however, that at least three prospective jurors expressed their opinions, based upon what they had heard and read, that defendant was guilty. Since those remarks occurred in the presence of the other prospective jurors, defendant contends he was prejudiced, especially in view of the fact that no curative instruction was given. He relies on *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977). In *Finch*, two prospective jurors stated on voir dire in the presence of the remainder of the venire that, based upon what they had read or heard, it was their opinion that defendant was guilty. The trial judge excused those two jurors and instructed the other members of the venire not to consider the remarks. We held that any prejudice was thereby cured.

In the case before us, venireman Smith was asked by defense counsel if he had an opinion as to defendant's guilt or innocence, and Mr. Smith replied: "What I have read in the paper—when I read it in the paper I thought he was guilty."

Mrs. Barnes on her voir dire examination by defense counsel said she had read about the case in the newspaper, heard about it on television, and said it was very hard not to form an opinion. She said it would take some evidence at this time to change her mind and she would have a hard time giving defendant a fair and impartial trial.

Mrs. Hadsell, when asked whether she had heard anything about the case, replied: "The only time I can remember actually hearing anything on the radio was when he had escaped and that is all I heard because I am in a position where—I am working most of the time and I don't hear anything much."

Curative instructions were not requested and none were given. No objection was lodged at the time, and defendant seems to have attached no particular significance to the matter until he made up the record on appeal.

The record on appeal reveals that (1) defendant excused Mr. Smith, whether peremptorily or for cause does not appear, and (2) defendant challenged Mrs. Barnes for cause and the court excused her. The record is silent as to Mrs. Hadsell. However, we have examined the Voir Dire on Jury Selection (Exhibit A), not a part of the record on appeal but filed with the Clerk. This Exhibit reveals that defense counsel continued to interrogate Mrs. Hadsell after her comment which is now under challenge, and elicited answers indicating that she had an open mind, belonged to the church, did not feel obligated to vote for the death penalty merely because the district attorney was seeking it, and had the free option, if defendant was found guilty, to vote for either death or life imprisonment. Following such examination, counsel stated "we are satisfied," and Mrs. Hadsell was duly sworn and empaneled as a member of the jury. Defendant, having posed no objection at the time, and having freely accepted Mrs. Hadsell as a juror when he could have challenged her for cause or, if necessary, peremptorily, may not now be heard to complain that her comment about defendant being on escape was so inherently prejudicial as to require a new trial.

We hold that the remarks by prospective jurors Smith, Barnes and Hadsell were entirely harmless and could not have prejudiced defendant's right to a fair trial. Our conclusion is reinforced by the fact that the trial judge in his charge admonished the jury, among other things, ". . . to decide the case solely upon the evidence presented in the courtroom. . . ." It is clear beyond a reasonable doubt that the statements were harmless. Defendant's second assignment of error is overruled.

[5] By his third assignment of error defendant seeks an answer to the following question: "Where both stages of a bifurcated trial for first degree murder are tried to the same jury and the members of that jury are qualified on voir dire for jury selection pursuant to *Witherspoon* standards, is the defendant deprived of due process under the Sixth and Fourteenth Amendments to the United States Constitution even though, upon conviction as charged, the jury recommends life imprisonment?" Defendant argues that jurors not opposed to the death penalty are more apt to convict and thus tend to favor the prosecution in the determination of guilt. However, defendant neither objected nor excepted to any ruling of the trial court which could constitute the basis for this assignment of error.

To be effectual, assignments of error must be based on exceptions duly noted at trial to rulings of the trial court. *State v. Ferebee*, 266 N.C. 606, 146 S.E. 2d 666 (1966); *State v. Mallory*, 266 N.C. 31, 145 S.E. 2d 335 (1965), *cert. denied*, 384 U.S. 928 (1966); *State v. Worley*, 246 N.C. 202, 97 S.E. 2d 837 (1957); *State v. Taylor*, 240 N.C. 117, 80 S.E. 2d 917 (1954); Rule 10, Rules of Appellate Procedure. Furthermore, exceptions which appear for the first time under a purported assignment of error will not be considered. *Dilday v. Bd. of Education*, 267 N.C. 438, 148 S.E. 2d 513 (1966). *See* 1 N.C. Index 3d, Appeal and Error, §§ 24, 24.1.

The question which defendant attempts to raise by his third assignment was properly presented in *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), and decided adversely to defendant's contentions here. Many cases in accord with *Cherry* include *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968); *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977); *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976), *cert. denied*, 429 U.S. 1123 (1977); *State v. Bock*, 288 N.C. 145, 217 S.E. 2d 513

(1975), *death sentence vacated*, 428 U.S. 903 (1976). There is no evidence in this case—none whatever—to support the argument that a *Witherspoon*-qualified jury tends to favor the prosecution in the determination of guilt, or precludes the selection of a jury from a representative cross-section of the community, or denies defendant the equal protection of the laws. Defendant's third assignment of error is without merit.

Finally, defendant contends the search by the Hampton, Virginia police and seizure of the murder weapon violated his Fourth Amendment rights to be free from unreasonable searches and seizures. He does not dispute the existence of probable cause but asserts the search was unreasonable because it was warrantless. Admission of the pistol seized in the search constitutes his fourth assignment of error.

The record discloses that defendant was wanted for a robbery and maiming that had occurred in the City of Hampton, Virginia. The officers had information that defendant was in a house at 34 Lancer Street in Hampton. "It was a shot house."[1] Some twenty to thirty officers surrounded the house about 8 p.m. on the night of 4 January 1978, and defendant was adivsed by a loud speaker to come out with his hands up. Defendant did so, identitifed himself as Norris Taylor, and Officer Allen frisked him. The officer found no weapon but feared for his own safety. "[W]e did not know if there was anyone else in the house or if, in fact, this was Norris Taylor or exactly what." He asked defendant "where his weapon was," and defendant stated it was "in the house." What then transpired is narrated by Officer Allen on a voir dire examination as follows: "I asked him to show me where the pistol was. I escorted him back into the house with him in front of me. We went right in the door. He led me right up the flight of stairs to a small room at the front of the house. He pointed down at the floor, took some clothing or rags from off the floor, and concealed underneath these rags was the pistol and twenty-nine rounds of ammunition. There were six rounds in the pistol and then loose rounds lying in the floor. I placed Norris Taylor under arrest for robbery and maiming that had occurred in the City of Hampton. These were Virginia charges."

1. On oral argument of this case, defense counsel stated that a "shot house" is a house where liquor by the drink is illegally sold.

"The immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed. They alone may invoke it against illegal searches and seizures." *State v. Craddock*, 272 N.C. 160, 158 S.E. 2d 25 (1967). *Accord*, *Jones v. United States*, 362 U.S. 257, 261, 4 L.Ed. 2d 697, 702, 80 S.Ct. 725, 731 (1960). Thus, a defendant may not object to the introduction of evidence which has been obtained in violation of the rights of some third party. Only those defendants whose *personal* rights have been infringed by an allegedly illegal search have standing to object to the introduction of evidence obtained as a result of that search. Moreover, it is well settled that the burden is on defendant to establish standing. *Jones v. United States, supra;* 3 W. LaFave, Search and Seizure, § 11.2 at 501 (1978).

The case law as to standing, summarized above, has been incorporated into G.S. 15A-972 which provides:

> "When an indictment has been returned or an information has been filed in the superior court, or a defendant has been bound over for trial in superior court, a defendant *who is aggrieved* may move to suppress evidence in accordance with the terms of this Article." (Emphasis added.)

The Official Commentary to G.S. 15A-972 notes that the word "aggrieved" is the same word used in Rule 41(e), Federal Rules of Criminal Procedure, to describe those persons who have standing. The word "aggrieved" is utilized to "give North Carolina the benefit of case law as to standing developed in the federal courts and in the courts of many other states which use the same terminology."

[6] We note that *Jones v. United States, supra*, which defines standing in accord with *State v. Craddock, supra*, and places the burden on defendant to establish standing, was decided under Rule 41(e), Federal Rules of Criminal Procedure. Taking the discussion of standing in *Jones* and *Craddock* as our guide, we hold that a defendant is "aggrieved" and "may move to suppress evidence" under G.S. 15A-972 only when it appears that his *personal* rights, not those of some third party, may have been violated, and such defendant has the burden of establishing that he is an "aggrieved" party before his motion to suppress will be

considered. Thus, before defendant may challenge the legality of the instant search, he must demonstrate that the room in the shot house where the search occurred was an area in which he had a reasonable expectation of privacy. *See State v. Alford*, 298 N.C. 465, 259 S.E. 2d 242 (1979).

[7] Review of the record in this case leads us to conclude that defendant has failed to establish that he had a privacy interest in the room at the shot house where his gun was found sufficient to give him standing to object to the search of that room. The record fails to indicate what privacy interest, if any, defendant had in the room that was searched. There is no evidence that defendant owned the shot house, that he leased, controlled or occupied the room as a paying guest at the shot house, or even that he had permission to store his belongings in the room. The record shows only that defendant was present at the shot house, presumably to buy a drink, and hid his pistol and ammunition in a small room there. This showing is insufficient to confer standing upon defendant to invoke the constitutional immunity of the Fourth Amendment with respect to the search and seizure challenged by this assignment.

[8] Independent of the question of standing, we note that the Hampton officers were justified by exigent circumstances in making a limited, warrantless search of the shot house and in seizing the pistol.

"The Constitution does not prohibit all searches but only those which are unreasonable." *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied*, 393 U.S. 1087 (1969). An unreasonable search has been defined as an unauthorized search of a person or a person's premises with a view to the discovery of some evidence of guilt, to be used in the prosecution of a criminal action. *Id.* A warrantless search of a dwelling following an arrest outside the dwelling will be upheld where the circumstances provide the arresting officers with reason to believe that a serious threat to their safety is presented. *McGeehan v. Wainwright*, 526 F. 2d 397 (5th Cir.), *cert. denied*, 425 U.S. 997 (1976). Where the facts disclose a "high potentiality for danger" surrounding an arrest made outside a dwelling, an entry into the dwelling is permissible for the limited purpose of making a cursory safety check, even though the arrest itself was achieved without entry. *United*

States v. Smith, 515 F. 2d 1028 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976); *United States v. Looney*, 481 F. 2d 31 (5th Cir.), *cert. denied*, 414 U.S. 1070 (1973). The immediate need to ensure that no one remains in the dwelling preparing to fire a yet unfound weapon at the arresting officer as he leaves the scene of the arrest with arrestee constitutes an exigent circumstance which makes it reasonable for the officer to conduct a limited, warrantless, protective sweep of the dwelling. *Hopkins v. Alabama*, 524 F. 2d 473 (5th Cir. 1975); *Banks v. State*, --- Nev. ---, 575 P. 2d 592 (1978); *People v. Olajos*, 397 Mich. 629, 246 N.W. 2d 828 (1976); 2 W. LaFave, *supra*, § 6.4 at 427-31.

The circumstances in this case indicate that even though defendant had been arrested outside the shot house, the officers had good reason to question "whether they [could] withdraw from the area with their prisoner without being fired upon." 2 W. LaFave, supra, § 6.4 at 431. The officers knew that an armed and dangerous fugitive, wanted for murder in North Carolina and for robbery and maiming in Virginia, was inside the shot house. Moreover, the darkness and the nature of the place, *i.e.*, a shot house where liquor by the drink is illegally sold, amplified the apprehension of danger. Recognizing these hazards, the police did not attempt to enter the premises in order to make the arrest; rather, they took steps to cause the suspect to exit the premises and submit to arrest outside.

Once defendant had been arrested, the officers had good reason to fear for their safety. In the first place, the officers "did not know if there was anyone else in the house, or if, in fact, this was Norris Taylor or exactly what." Additionally, defendant's weapon had not been accounted for. Given the strong possibility of an ambush or "set up," it was eminently reasonable for the police to make a limited protective sweep of the premises in order to recover defendant's weapons and to ensure there was no one in the house who could fire on them while they withdrew with defendant.

Review of the record indicates that the entry into the shot house was made for the sole purpose of ensuring the safety of the officers and was not used as a pretext for uncovering evidence of a crime. The scope of the search undertaken was no greater than necessary to ensure the officers a safe withdrawal from the scene

of the arrest. Defendant informed Officer Allen that his pistol was inside the house and agreed to show him where the pistol was. Officer Allen then escorted defendant into the house. Defendant led the officer up a flight of stairs to a small room where his pistol and ammunition were hidden. Officer Allen, accompanied by defendant, left the house immediately after recovering defendant's pistol and determining that the shot house posed no further threats to safety.

In summary, the strong possibility that the officers might be fired upon from the shot house constituted an "exigent circumstance" which made it reasonable for them to make a limited, protective sweep of the shot house. Since the gun and ammunition were seized pursuant to a lawful search of the shot house, it follows that they were properly admitted into evidence. Defendant's fourth assignment of error is overruled.

The remaining assignments of error are not presented and discussed in defendant's brief and are therefore deemed abandoned. Rule 28, Rules of Appellate Procedure.

For the reasons stated the verdict and judgment must be upheld.

No error.

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

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY MAYHAND

No. 16

(Filed 6 November 1979)

1. **Rape § 4; Criminal Law § 45.1 — demonstration depicting manner in which rape occurred — no prejudice**

The trial court in a rape prosecution did not err in permitting a demonstration by the prosecuting witness and a detective depicting the manner in which the rape took place, even though the demonstrative evidence was of limited value because the prosecuting witness had testified as to the manner in which penetration occurred, since there was no evidence that the pros-

ecutrix participated in the demonstration unwillingly or was embarrassed by the reenactment, and the demonstration did not create an emotionally charged atmosphere in the courtroom.

2. **Criminal Law § 63— defendant's mental capacity—testimony by lay witnesses**

The trial court in a rape case did not err in allowing two lay witnesses who were police officers to testify concerning defendant's mental capacity where one officer observed defendant for approximately 45 minutes both before and after the arrest and spoke with defendant both in the police car and later at the police station, and the second officer, who was the correctional officer in charge of the prison unit in which defendant had been confined for a prior offense, observed defendant for approximately five months prior to the rape.

3. **Criminal Law § 89.2— corroborating testimony—slight variations permissible**

The trial court in a prosecution for rape and assault with intent to rape did not err in permittng the rape victim's school teacher to testify that the victim had told her that she had been raped, nor did the court err in permitting an officer to testify that the assault victim was extremely upset and that the victim said she had heard her assailant unzip his pants, since such testimony was properly admitted for corroboration and contained only slight variations from the original statements of the prosecuting witnesses.

4. **Criminal Law § 42.2— tests performed on clothing and hair—no foundation laid for evidence**

The trial court in a rape prosecution properly excluded evidence concerning tests performed by the FBI on clothing, hair combings and cuttings obtained from defendant and the prosecuting witnesses since there was no testimony by any person actually involved in conducting the tests and the FBI report was therefore without foundation and was correctly excluded as hearsay.

5. **Criminal Law § 86.1— prior convictions and misconduct—cross-examination for impeachment**

Cross-examination of defendant concerning prior cases in which defendant had been convicted and represented by counsel and concerning prior specific acts of misconduct by defendant was properly allowed for impeachment purposes.

6. **Criminal Law § 169; Rape § 4— learning disability of rape victim—irrelevant evidence—admission not prejudicial**

Though the trial court in a rape case erred in allowing the testimony of a witness, who was a teacher of exceptional children, concerning the prosecuting witness being an exceptional student in that she had a learning disability, such error was not prejudicial to defendant.

7. **Criminal Law § 82.2— examination of criminal defendant by psychiatrist—no physician-patient privilege**

No privileged relationship arises where a psychiatrist examines a criminal defendant for the sole purpose of passing upon his ability to proceed to trial.

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

APPEAL by defendant from *Albright, J.*, 30 October 1978 Criminal Session of GUILFORD Superior Court, Greensboro Division.

Defendant was charged in separate bills of indictment with the second degree rape of Judy Ann Davis and with assault with intent to commit rape upon Jill Elizabeth Utter. He entered pleas of not guilty and not guilty by reason of insanity to each charge. The cases were consolidated for trial.

The State's evidence tended to show that on 16 May 1978 defendant, an inmate of McLeansville Prison Unit, was taken with other prisoners to a track meet at Grimsley High School in Greensboro, North Carolina.

Brian Keith Morgan, one of the prisoners, testified that defendant consumed from a quart to a quart and a half of wine during the day. He and defendant left the stadium and entered the school building. After a short time, the witness departed leaving defendant inside the building.

Judy Ann Davis, a 16 year old student at Grimsley High School, testified that at about 2:25 p.m. on 16 May 1978, she left her classroom to go to a girls restroom located two doors away. Defendant entered the bathroom but left when she told him he was in the wrong bathroom. When she started to leave, defendant blocked the door, grabbed her by the neck and forced her into one of the stalls. She initially resisted defendant's efforts to remove her clothes but complied when he threatened to kill her. After she was disrobed, defendant forced her against the wall and unsuccessfully tried to penetrate her from the rear. After turning her around and again failing in his efforts to penetrate, defendant sat on the commode and forced her to sit on top of him. The witness stated, "I felt his penis in my vagina." She further testified that when a maid came into the restroom, defendant released her and left. Miss Davis immediately reported the assault to her teacher, Ms. Judy Hall, and later gave a statement to the police. On cross-examination, the witness admitted that on 22 June 1978 she testified at a probable cause hearing that no penetration occurred.

Ms. Judy Hall, testifying in corroboration of the prosecuting witness, stated that immediately after the assault Judy told her that penetration had occurred.

Jill Elizabeth Utter, a 15 year old student at Grimsley High School, testified that on 16 May 1978 she left her classroom to go to a nearby restroom. In the hallway, she saw defendant who followed her into the restroom, grabbed her by the arms and threatened to kill her if she screamed. He undressed her and fondled her person, but she managed to escape on the pretext of having to go to the bathroom. The witness gave a complete statement including a description of her assailant to Dorothy Kimel of the Greensboro Police Department.

Police Officer T. P. Dolinger testified that at about 3:00 p.m. on 16 May 1978, he received a call to go to Grimsley High School and be on the lookout for a black male of a certain description who was suspected of rape. He proceeded to the student parking lot of Grimsley High School where he observed defendant who matched the description furnished to him. Defendant's belt was unbuckled and his pants were unzipped. He arrested defendant, advised him of his rights and took him to the Greensboro Police Department.

Defendant offered evidence and testified in his own behalf. He stated that it was not he but Satan, or rather Satan in possession of his body, who went into the restrooms and touched the two girls. He remembered seeing the two girls in a vision, but he denied that either he or Satan had intercourse with either of the girls. Defendant also offered the testimony of Mr. Robert Gray, an investigator hired for his defense, his mother and father who each testified that in his or her opinion defendant was unable to distinguish right from wrong on 16 May 1978. Police Officer T. P. Dolinger upon being recalled by defendant stated that in his opinion defendant knew right from wrong on that date.

In rebuttal the State offered the testimony of Dr. Billy W. Royal, an expert in the field of psychiatry, who stated that in his opinion defendant knew right from wrong on 16 May 1978. Also on rebuttal, Mr. Gregory L. Martin, a correctional officer at the McLeansville Unit, testified that in his opinion defendant was capable of knowing right from wrong on that date.

The jury returned verdicts of guilty of second degree rape and guilty of assault with intent to commit rape. Defendant appealed from judgments imposing a sentence of life imprisonment on the rape charge and a consecutive sentence of imprisonment

for twelve to fifteen years on the charge of assault with intent to commit rape. On 15 May 1979, we allowed defendant's motion for certification prior to determination by the Court of Appeals on the charge of assault with intent to commit rape.

Rufus L. Edmisten, Attorney General, by Grayson G. Kelley, Associate Attorney, for the State.

Wallace C. Harrelson for defendant appellant.

BRANCH, Chief Justice.

[1] Defendant first contends that the trial judge erred in permitting a demonstration by the prosecuting witness and a detective depicting the manner in which the rape took place. During her testimony, Miss Davis was allowed to sit in the lap of a police detective who was sitting in an armchair so as to illustrate the relative positions of the parties at the time the rape occurred.

The law is well settled in this jurisdiction that experimental or demonstrative evidence is admissible when performed under circumstances substantially similar to those existing at the time of the original transaction if the evidence tends to shed light on that transaction. The conditions need not be identical, but a reasonable or substantial similarity is sufficient. *State v. Brown*, 280 N.C. 588, 187 S.E. 2d 85 (1972); *Mintz v. R.R.*, 236 N.C. 109, 72 S.E. 2d 38 (1952); *State v. Phillips*, 228 N.C. 595, 46 S.E. 2d 720 (1948). The measure of permissible variation in the conditions of the experiment from those of the original transaction is usually determined by whether such variation would tend to confuse or mislead the jury. If the evidence would tend to enable the jury to consider more intelligently the issues presented and arrive at the truth, it is admissible. *State v. Jones*, 287 N.C. 84, 214 S.E. 2d 24 (1975); *State v. Phillips, supra.*

Relevant evidence will not be excluded simply because it may tend to prejudice the accused or tend to excite sympathy for the cause of the party who offers it. Yet if the only effect of the evidence is to excite prejudice or sympathy, its admission may be ground for a new trial. 1 Stansbury's N.C. Evidence § 80 (Brandis rev. 1973); *State v. Gaskins*, 252 N.C. 46, 112 S.E. 2d 745 (1960); *State v. Wall*, 243 N.C. 238, 90 S.E. 2d 383 (1955).

The trial court has broad discretion in the admission of demonstrative evidence, especially as to the similarity of conditions surrounding the crime and those surrounding the experiment, *State v. Carter*, 282 N.C. 297, 192 S.E. 2d 279 (1972), and the court's rulings thereon will not be interfered with on appeal unless an abuse of discretion is clearly shown. *State v. Jones, supra; State v. McLamb*, 203 N.C. 442, 166 S.E. 507 (1932).

In the instant case, it is the State's position that since the question of penetration was at issue, the demonstration was relevant and of probative value because it tended to show that penetration could have occurred from the demonstrated positions. On the other hand, defendant contends that the probative value of the demonstration was heavily outweighed by the resulting prejudice to defendant and that the trial judge abused his discretion by permitting the demonstration.

In support of his position, defendant relies on *Commonwealth v. Morgan*, 358 Pa. 607, 58 A. 2d 330 (1948). There the trial judge permitted the district attorney to conduct a demonstration in which the sobbing witness climbed onto a table and demonstrated the position in which she had been raped. The defendant objected on the grounds that the demonstration did not fairly reproduce the conditions that had existed and was highly inflammatory. The Supreme Court of Pennsylvania reversed holding that the demonstration was totally unnecessary, that it created an atmosphere of emotion unsuited to the courtroom, that it was unfair to the prosecuting witness to compel her to submit to such indignity, and that allowing such practices would make rape victims more reluctant to report their assaults.

Morgan and the case *sub judice* are distinguishable. In *Morgan* the sobbing witness was, without warning, compelled to reenact her posture at the time of the rape. Here there is no evidence that Ms. Davis participated in the demonstration unwillingly or was embarrased by the reenactment. Neither can we say from an examination of this record that the demonstration created an emotionally charged atmosphere in the courtroom.

Admittedly, the demonstrative evidence in the instant case was of limited probative value since the prosecuting witness had testified as to the manner in which penetration occurred. We are of the opinion that the chief victim of this demonstration was the

dignity of the court. Ordinarily, we do not approve of such undignified displays unless they clearly aid the jury in its search for the truth. However, under the facts of this case, we are unable to discern any prejudice to defendant.

This assignment of error is overruled.

[2] By his second assignment of error, defendant contends that the trial judge erred in allowing two lay witnesses to testify as to his mental capacity. Defendant avers that neither of these witnesses had a reasonable opportunity to form such an opinion based on their observation of defendant.

In the case *In re Will of Brown*, 203 N.C. 347, 166 S.E. 72 (1932), Chief Justice Stacy concisely stated the applicable law when he wrote:

> Anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders. [Citations omitted.]

Id. at 350, 166 S.E. at 74; *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *Moore v. Insurance Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966).

The test of insanity as a defense to a criminal charge is whether defendant had the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation. *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975); *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971). However, evidence of the party's mental condition before and after the commission of the offense is competent, provided the time is not too remote to warrant an inference that the same condition existed at the time of the offense. 1 Stanbury's N. C. Evidence § 127 (Brandis rev. 1973), text accompanying nn. 79 & 80 and cases cited therein; *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd as to death penalty*, 403 U.S 948 (1971); *State v. Duncan*, 244 N.C. 374, 93 S.E. 2d 421 (1956).

Here, Officer Dolinger observed defendant for approximately forty-five minutes both before and after the arrest and spoke with defendant both in the police car and later at the police station. Officer Martin, the correctional officer in charge of defendant's unit at McLeansville Prison, observed defendant for approximately five months prior to the rape. There was ample evidence to support the trial judge's finding that each of the officers had a reasonable opportunity to form an opinion as to defendant's mental condition. Nor was the time of Officer Martin's observation too remote to require exclusion by the trial judge.

[3] Defendant next assigns as error the admission of certain testimony allowed for the purpose of corroborating the testimony of the prosecuting witnesses.

When the credibility of a witness has been impugned in any way, prior consistent statements are admissible to strengthen his credibility. *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977); *Brown v. Loftis*, 226 N.C. 762, 40 S.E. 2d 421 (1946); *Jones v. Jones*, 80 N.C. 246 (1879). Such statements, however, are admitted only when they are in fact consistent with the witness's testimony. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977); *State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), *death sentence vacated*, 428 U.S. 904 (1976); *State v. Bagley*, 229 N.C. 723, 51 S.E. 2d 298 (1949). "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." *State v. Madden, supra; State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963). Nevertheless, if the testimony offered in corroboration is generally consistent with the witness's 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. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976); *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. den.*, 410 U.S. 958, 987 (1973); *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. den.*, 365 U.S. 830 (1961).

Defendant in the instant case first objects to the corroborative testimony of Miss Davis's teacher, Judy A. Hall, who stated that Miss Davis had told her that she had been "raped," on

the grounds that Miss Davis had not used that exact language in testifying. Defendant also contends that Officer Dorothy Kimel should not have been allowed to testify that Miss Utter was extremely upset, and that Miss Utter said she had heard her assailant at one point unzip his pants. When compared to the original testimony of the prosecuting witnesses, however, it is clear that the trial judge did not err in so ruling. He properly instructed the jury that the testimony was not substantive evidence but rather was admitted for the limited purpose of corroboration. The corroborative testimony, containing only slight variations from the original statements of the prosecuting witnesses, was properly admitted for that limited purpose.

[4] Defendant next assigns as error the exclusion of evidence concerning tests performed by the Federal Bureau of Investigation on clothing, hair combings and cuttings obtained from defendant and the prosecuting witnesses. Defendant cross-examined Detective Allen G. Travis of the Greensboro Police Department, who sent the items to the F.B.I. laboratory in Washington, D.C. for analysis. Defendant attempted unsuccessfully to introduce the results of such tests and the F.B.I. report for the purpose of showing that no hairs from defendant were found on the witnesses' clothing. There was no testimony by any person actually involved in conducting the tests.

It is true that scientific tests conducted on the hairs of a criminal defendant have been admitted in many cases as relevant to and probative of the issue of identification. *State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977); *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Dickens*, 278 N.C. 537, 180 S.E. 2d 844 (1971). However, the results of such tests are competent only when shown to be reliable and where a proper foundation has been laid. *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974), *death sentence vacated*, 428 U.S. 903 (1976).

Here, the report was without proper foundation and was, therefore, correctly excluded as hearsay.

[5] Defendant also contends that the trial judge erred in allowing the district attorney to conduct an improper cross-examination of defendant. Defendant objects primarily to the

State's questions concerning defendant's prior convictions and bad acts, asked for the purpose of impeaching his credibility.

In *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972), this Court discussed the applicable law:

> It has long been the rule that where a defendant in a criminal case testifies in his own behalf, specific acts of misconduct may be brought out on cross-examination to impeach his testimony. [Citations omitted.] Such cross-examination for the purpose of impeachment *is not limited to conviction of crimes.* Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination. [Citations omitted.]
>
> Although a defendant may not be asked if he has been accused, arrested or indicted for a particular crime, [Citation omitted], he may be asked if he in fact committed the crime . . . . [Citations omitted.] Of course, such questions must be asked in good faith, [Citations omitted].

Id. at 341-42, 193 S.E. 2d at 76. *See also State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). Nevertheless, the trial judge has wide discretion over the scope of such cross-examination, and his rulings should not be disturbed except when prejudicial error is disclosed. *State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (1973); *State v. Stone*, 226 N.C. 97, 36 S.E. 2d 704 (1946); *State v. Wray*, 217 N.C. 167, 7 S.E. 2d 468 (1940).

In the instant case, the trial judge excused the jury and conducted a voir dire hearing to determine whether the district attorney would be permitted to cross-examine defendant regarding prior convictions for purposes of impeachment. The judge, after an examination of defendant's criminal record, designated the cases in which defendant had been convicted and represented by counsel at the time of said convictions. Thereafter, the district attorney confined his questions to prior convictions and prior, specific acts of misconduct by defendant. We hold that such cross-examination did not constitute error.

[6] Defendant argues that the trial judge erred in allowing the testimony of Judy Hall, a teacher of exceptional children, concern-

ing Miss Davis being an exceptional student in that she had a learning disability.

Regarding the relevance of such evidence, this Court has held that "[i]t is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions." *Jones v. Hester*, 260 N.C. 264, 132 S.E. 2d 586 (1963); *Farmers' Federation, Inc. v. Morris*, 223 N.C. 467, 27 S.E. 2d 80 (1943); *Bank v. Stack*, 179 N.C. 514, 103 S.E. 6 (1920). Relevant evidence will not be excluded simply because it may tend to prejudice the accused or excite sympathy for the cause of the party who offers it. On the other hand, if the only effect of the evidence is to excite prejudice or sympathy, its admission may be ground for a new trial. *State v. Wall, supra;* 1 Stansbury's N. C. Evidence § 80 (Brandis rev. 1973), and cases cited therein. Ordinarily, the admission of irrelevant evidence constitutes harmless error, absent a showing of substantial prejudice. *State v. Cogdale*, 227 N.C. 59, 40 S.E. 2d 467 (1946).

Here, the fact that Ms. Hall was Miss Davis's teacher was relevant to qualify Ms. Hall and lay a proper foundation for her corroborative testimony concerning the rape. However, the district attorney's questions concerning whether Miss Davis was an exceptional student and the nature of her specific problems were irrelevant. Although it was error to admit this evidence, its weight and prejudicial effect was so minimal that it would not warrant disturbing the verdict and judgment entered.

[7] Defendant finally contends that the trial judge erred in admitting the testimony of Dr. Billy W. Royal. Dr. Royal, a psychiatrist at Dorothea Dix Hospital, was appointed by the court to determine the defendant's capacity to proceed to trial pursuant to G.S. 15A-1002(b)(1). Defendant contends that the court's ruling permitting Dr. Royal to testify at trial as to defendant's ability to distinguish between right and wrong at the time of the rape violated the physician-patient privilege.

The privilege protecting communications between physician and patient in North Carolina is controlled by G.S. 8-53 (Supp. 1977), which states:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon. Confidential information obtained in medical records shall be furnished only on the authorization of the patient . . . provided, that the court, either at the trial or prior thereto . . . may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

This privilege has long been construed by this Court to extend only to those cases in which the physician and patient relationship existed at the time of the communication and where the information given was necessary for diagnosis or treatment. *State v. Hollingsworth*, 263 N.C. 158, 139 S.E. 2d 235 (1964); *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326 (1962); *State v. Wade*, 197 N.C. 571, 150 S.E. 32 (1929). Moreover, the statutory privilege is a qualified one, and the judge may compel disclosure by the physician if he finds, in his discretion, that it is necessary for the proper administration of justice. *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928); 1 Stansbury's N.C. Evidence § 63 (Brandis rev. 1973).

In *State v. Newsome, supra*, this Court held that no privileged relationship arose where a physician examined a criminal defendant for the sole purpose of passing upon his ability to proceed to trial. We hold that the same rule applies here and renders Dr. Royal's testimony admissible because no privileged relationship was ever created.

We have carefully considered the entire record and find no error warranting a new trial.

No error.

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

STATE OF NORTH CAROLINA v. THOMAS GORDON WHITE

No. 65

(Filed 6 November 1979)

1. **Criminal Law §§ 96, 99.1— court's erroneous remarks to prospective jurors about death penalty—curative instructions**

Defendant was not prejudiced by the trial court's erroneous instruction to prospective jurors that defendant could receive the death penalty if he was convicted of first degree murder where the court thereafter instructed the prospective jurors that there was no death penalty in North Carolina at the time the alleged offense occurred, that the death penalty would be of no consideration in the case, and that they should disregard the court's previous remarks about the death penalty.

2. **Homicide § 20.1— photograph of deceased's body**

A photograph of deceased's decomposed body as it was found lying in a stream, face up, was properly admitted for the purpose of illustrating an officer's testimony as to the location and position of the body and how it was clothed when found.

3. **Criminal Law § 75— admissibility of in-custody statements**

Defendant's in-custody statements to an officer were properly admitted in evidence where the trial court found upon supporting voir dire evidence that defendant was properly advised of his *Miranda* rights; defendant knowingly and intelligently waived his right to have counsel present during questioning; and defendant's statements to the officer were understandingly and voluntarily made without duress, coercion or inducement of any kind.

4. **Criminal Law § 73.2— telephone call—testimony not hearsay**

An officer's testimony that the county sheriff's department received a telephone call from a female on a certain date that she had seen a vehicle down an embankment with its nose in a river was not inadmissible as hearsay where the testimony was not offered to prove the truth of the matter asserted but was offered to explain the officer's subsequent conduct.

5. **Criminal Law § 73.1— hearsay as harmless error**

The trial court in a homicide case erred in admitting a witness's hearsay testimony that his wife told him that the name of the person he saw and talked with at a pond on a certain date was Tommy White, the defendant; however, such error was not prejudicial where the witness had already identified defendant as the man he had seen and talked with on the occasion in question.

6. **Criminal Law § 87.1— leading questions of own witness**

The trial court did not err in permitting the district attorney to ask leading questions of his own witness.

7. **Criminal Law § 111.1— instruction that all evidence is important**

The trial court did not err in instructing the jury that ". . . all the evidence is important."

8. **Criminal Law § 113.1— adequacy of summary of witness's testimony**

There is no merit in defendant's contention that the trial court inadequately summarized the testimony of a State's witness because the court summarized only those parts of the testimony which were favorable to the State and did not include parts showing the incredibility of the witness's testimony.

APPEAL by defendant from *Martin (John C.), J.*, 22 January 1979 Session Superior Court ALAMANCE County.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with the murder of Horace Mitchell Payne. Evidence prsented by the state is summarized in pertinent part as follows:

On 6 June 1977 Mitchell Payne was reported missing, he having been seen last on 28 May 1977. On 8 June 1977 his Pontiac automobile was found in the Haw River. On the following day, after an extensive search, his body was found in a small stream in a remote area of the Payne farm in southern Alamance County. The body was lying face up with fresh water running over it.

An autopsy performed the next day revealed that Payne had died from fresh water drowning; that he had been dead for at least a week; and that he was under the influence of intoxicants at the time of his death.

Julius Alston, defendant's cousin, testified that on a night late in May in 1977 defendant came to his home in Alamance County; that a young girl, Gayle Poole, was with defendant; that defendant was driving a 1968 or 1969 Pontiac; that defendant told him that he had killed Mitchell Payne; that defendant thereafter drove the Pontiac into the river; that several days later he went fishing with defendant in a pond on the Payne farm; that while there, defendant said he was going to see if Payne's body was still where he left it; and that after defendant had been gone from the pond a short while, he returned and stated that the body was where he had left it.

On 23 August 1978 defendant was being held in the Orange County Jail on other charges. While there he was questioned by

Lt. Qualls of the Alamance County Sheriff's Department. After being advised of his *Miranda* rights and executing a document waiving his right to the presence of counsel, defendant made statements briefly summarized as follows:

In May of 1977 he was being sought by police for stealing a truck. He was very familiar with the Payne farm because he grew up on it. Accompanied by Gayle Poole, he set up a tent in a wooded area of the farm and they camped there for about a week or more. After they had been there for several days, Mitchell Payne, whom he knew, drove up nearby and found them. Payne had a considerable amount of beer with him and he and Payne began drinking. Payne became drunk and began making insulting remarks about defendant's mother, referring to her as a s.o.b. This and other remarks by Payne made defendant mad and he pushed Payne. Payne fell and his head struck a rock causing him to become unconscious. He tried to drag Payne up the hill to the automobile for purpose of carrying him to a doctor but Payne was too heavy. Thereupon he dragged Payne down the hill to the little stream and placed him in it.

Defendant offered no evidence.

The court submitted the case to the jury on first-degree murder, second-degree murder, voluntary manslaughter and not guilty. The jury returned a verdict finding defendant guilty of second-degree murder and from judgment imposing a life sentence, he appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney Christopher P. Brewer, for the State.

Daniel H. Monroe and W. O. Shue for defendant-appellant.

BRITT, Justice.

[1] By his first assignment of error, defendant contends the trial court committed reversible error by instructing prospective jurors that he was charged with first-degree murder and that, if he was found guilty, he could receive the death penalty, when in fact the death penalty was not applicable to this case. This assignment has no merit.

When this case was called for trial, the court instructed the prospective jurors that defendant was charged with murder in the first degree; and that if he was convicted of that charge the court would then conduct a separate sentencing proceeding to determine if the sentence would be death or life imprisonment. After a conference at the bench with counsel, the court then instructed the prospective jurors that his statement that defendant's punishment might be death was erroneous; that the alleged offense occurred on 28 May 1977 and at that time there was no death penalty in effect in North Carolina; that the death penalty would be of no consideration in this case; and that they would disregard the previous remarks of the court about the death penalty.

Defendant argues that the erroneous instruction had the effect of emphasizing that the charge against defendant was very serious; that this prejudiced defendant in the eyes of the jury; and that the prejudice could not be removed by curative instructions. This argument is not persuasive.

While counsel has not cited, and we have not found, precedent directly in point with the question raised, we think a valid analogy can be drawn from other situations in which curative instructions are held to be sufficient to overcome error.

In 4 Strong's N.C. Index, Criminal Law § 96, we find: "Where the court properly withdraws incompetent evidence from the consideration of the jury and instructs the jury not to consider it, error in its admission is cured in all but exceptional circumstances, and there is a presumption on appeal that the jury followed such instruction unless prejudice appears or is shown by appellant. . . ." In like manner, a trial judge by appropriate instructions may correct an erroneous recapitulation of the evidence or a misstatement of the contentions of the parties. *Id.* § 113.9.

With respect to curative instructions, this court in *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977), said:

> "Ordinarily, where objectionable evidence is withdrawn and the jury instructed not to consider it no error is committed because under our system of trial by jury we assume that jurors are people of character and sufficient intelligence to fully understand and comply with the court's instructions and they are presumed to have done so. (Citations.)"

Defendant's reliance upon *State v. Manning*, 251 N.C. 1, 110 S.E. 2d 474 (1959), is misplaced. In that case, the solicitor, in passing on the jury, commented: ". . . as far as the State is concerned, the sole purpose of this trial is to send the defendant . . . to his death in the gas chamber. . . ." The jury in *Manning* found defendant guilty of first-degree murder without a recommendation of mercy. This court granted a new trial on the ground that the remarks of the solicitor were inflammatory and prejudicial to the defendant and that the curative instructions of the presiding judge were not sufficient to erase the prejudice. It is clear that the statements of the trial judge in this case do not compare with the vicious remarks of the solicitor in *Manning*. The remarks in *Manning* were calculated not to inform the jury of the role they were to play in the trial but were, instead, directed at prejudicing defendant's right to an unbiased jury. This is to be contrasted with the present case. The remarks of the trial judge were in no way inflammatory. Rather, it is apparent that they were designed and delivered so as to educate members of the jury as to the nature of the proceeding in which they were then engaged. Furthermore, since Manning received the death penalty, every error in his trial was subject to close scrutiny. In the present case, however, defendant was not even convicted of first-degree murder but of the lesser included offense of second-degree murder.

[2] By his second assignment of error, defendant contends that the trial court erred by allowing the state to introduce into evidence a photograph of the body of the deceased. This assignment has no merit.

During the testimony of Officer Thomas R. Overman, the state offered into evidence a photograph which depicted the body of decedent as it was found in a stream, face up. Before the district attorney offered the photograph into evidence, Officer Overman testified that it "fairly and accurately" depicted the scene as he found it to be on 9 June 1977. Counsel for defendant objected. After conducting a *voir dire*, the trial judge overruled the objection. Before the photograph was passed among the jury, the court instructed the jury that:

> [T]he photograph is admitted into evidence for the sole purpose of illustrating the witness' testimony if the jury

finds that it does. Members of the jury, you will remember the instructions concerning the use of the photograph and you will not use it as substantive evidence in the case, but may use it only as you find that it does illustrate this witness' testimony.

If a photograph is relevant and material, the fact that it is gory or gruesome will not, by itself, render it inadmissible. *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977); *State v. Miley*, 291 N.C. 431, 230 S.E. 2d 537 (1976); *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539, 97 S.Ct. 1106 (1977). *See generally* 1 Stansbury's North Carolina Evidence § 34 (Brandis Rev. 1973). It is unquestioned that the photograph in this case was gruesome. It depicted the body of Payne in an advanced state of decomposition. The photograph was offered into evidence during the direct examination of Officer Overman, one of the officers who had been called to the scene after the body had been discovered. At the time of the offer, Officer Overman had just completed testifying as to the location and position of the body when it was found as well as how it was clothed. The photograph was properly authenticated. When it was received into evidence but before it was passed among the jurors, the trial judge gave an appropriate limiting instruction to the jury as to the manner in which they might consider the photograph. We perceive no error.

[3] By his third assignment of error, defendant contends that the trial court committed prejudicial error by admitting into evidence a statement which defendant gave to Lieutenant Daniel Qualls of the Alamance County Sheriff's Department. This assignment is without merit.

On 23 August 1978 defendant was being held in the Orange County Jail on charges which were unrelated to the death of Payne. After Lieutenant Qualls informed defendant of his *Miranda* rights, he executed a written waiver of rights. During questioning by Officer Qualls, defendant stated that he pushed Payne; that Payne fell and hit his head on a rock; that Payne was knocked unconscious; and that after Payne became unconscious, he dragged the body to a nearby creek where he left it. When Lieutenant Qualls began testifying on direct examination about the interrogation of defendant, defense counsel objected. After

conducting a *voir dire*, the trial judge found as a fact that defendant was properly advised of his *Miranda* rights; that he knowingly and intelligently waived his right to have counsel present during questioning; and that the statements which defendant gave to the officer were understandingly and voluntarily made without duress, coercion, or inducement of any kind. The trial judge ruled that the statements were admissible and overruled defendant's objection.

When the state offers in evidence a defendant's in-custody statements made in response to police interrogation conducted in the absence of counsel, the state must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel. *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977); *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976); *State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975). A failure on the part of an accused to request the presence of counsel does not, by itself, constitute a waiver. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966); *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972); *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971). A valid waiver will not be presumed from the mere silence of the accused or the fact that a confession was eventually obtained. *Miranda v. Arizona, supra* at 475, 16 L.Ed. 2d at 724, 86 S.Ct. at 1628. *See also, State v. Connley*, --- U.S. ---, 60 L.Ed. 2d 657, 99 S.Ct. 2046 (1979), *reversing State v. Connley*, 295 N.C. 327, 245 S.E. 2d 663 (1978); and *State v. Butler*, --- U.S. ---, 60 L.Ed. 2d 286, 99 S.Ct. 1755 (1979), *reversing State v. Butler*, 295 N.C. 250, 244 S.E. 2d 410 (1978).

Upon defendant's objection to the admissibility of an incriminating statement made while in custody, the court must conduct a *voir dire* hearing to ascertain whether the incriminating statement was voluntarily made after the defendant was apprised of and had waived his constitutional rights, and the admission into evidence of any such statement without a hearing is prejudicial error. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). At the conclusion of the hearing, the trial judge should make findings of fact setting out the basis of his ruling. *State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978). Where the trial judge finds upon competent evidence that defendant's statements were made freely and voluntarily after having been fully advised

of his constitutional rights, such a finding is conclusive and will not be disturbed on appeal. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976).

On *voir dire*, Officer Qualls testified that at about 6:00 p.m. on 23 August 1978 he met with defendant in the detective's room at the Orange County Sheriff's Department for the purpose of investigating the possible involvement of defendant in the death of Horace Mitchell Payne; that he read to defendant a waiver of rights form; that he explained each of the rights to defendant; that defendant signed the waiver form; that defendant was not in any way coerced or threatened; and that defendant was not deprived of anything during the interrogation. No evidence was presented at the *voir dire* other than the testimony of Officer Qualls. The evidence was competent to establish the voluntariness of defendant's conduct in talking with the officer. We find no basis upon which to disturb the findings of the trial court.

By his fourth assignment of error, defendant contends that the trial court erred by allowing the state to introduce hearsay testimony on two occasions. This assignment has no merit. We will briefly discuss each instance separately.

[4] In the first instance, defendant argues that the trial court erred in allowing the state to introduce the testimony of Officer Qualls that the Alamance County Sheriff's Department received a telephone call from a female on 7 June 1978 that she had seen a vehicle down an embankment with its nose in the water of the Haw River below Saxapahaw, North Carolina. Defense counsel objected and the objection was overruled. The court instructed the jury that the testimony of Officer Qualls as to what the phone call had been about was not to be considered by them as proof of any facts but only as tending to explain his conduct upon hearing it.

If a statement is offered for any purpose other than that of proving the truth of the matter asserted, it is not objectionable as hearsay. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975); *State v. Crump*, 277 N.C. 573, 178 S.E. 2d 366 (1971); *see generally* 1 Stansbury's North Carolina Evidence § 141 (Brandis Rev. 1973). The statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made. *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978); *State*

v. Irick, supra; *State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976), *cert. denied*, 431 U.S. 916, 53 L.Ed. 2d 226, 97 S.Ct. 2178 (1977).

The limiting instruction which was given by the trial judge was correct and appropriate. The testimony of Officer Qualls about the phone call and its contents was competent as tending to explain his subsequent conduct. It was not offered to prove the truth of the matter asserted, i.e. the location and position of a particular truck.

[5] In the second instance, defendant argues that the trial court erred in allowing the state, over objection, to introduce evidence concerning the identity of defendant. Allen Waterson testified for the state. In his testimony he said that on 2 June 1977 he and his wife saw defendant at the pond on the Payne farm; that he got out of his car and walked toward the man he recognized as defendant; that the man answered to the name "Tommy"; that he asked defendant if he had seen Payne; that defendant said he had not seen Payne; and that he asked defendant to let him know if he saw Payne. On redirect examination of Mr. Waterson, the following exchange took place.

Q. Mr. Waterson, who was with you when you saw this man over here, this defendant, that day at the pond down there?

A. My wife.

Q. And is she present in this courtroom?

A. Yes, sir.

Q. Did she tell you who he is?

MR. SHUE: Well, objection.

COURT: Overruled.

* * * * * *

A. Yes.

Q. And who did your wife say this man over there, the defendant in this case, his name?

A. Tommy White.

Q. Thank you.

This exchange did elicit hearsay testimony as to the identity of the individual the witness saw at the pond on 2 June 1977. However, we are unable to say that the error was prejudicial to the rights of defendant. Before a new trial will be awarded for the erroneous admission of evidence, "the appellant must show error positive and tangible, that has affected his rights substantially and not merely theoretically, and that a different result would likely have ensued." *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973), quoting *State v. Cogdale*, 227 N.C. 59, 40 S.E. 2d 467 (1946). Appellant has failed to carry this burden. The witness had already identified defendant as being the man he had seen and talked with on 2 June 1977 at the pond. While it is true that the witness would not have known the name of the individual had it not been for what his wife had told him, there was a sufficient independent basis for the identification of defendant other than that provided in the testimony which was objected to by defendant to overcome any allegation of prejudice.

[6] Defendant contends that the trial court erred in allowing the district attorney to ask leading questions of his own witness, Julius Wayne Alston. There was no error.

A witness may be interrogated by leading questions when the witness appears to have exhausted his memory without stating the matter required or has trouble understanding the question posed as evidenced by unresponsive answers. *State v. Hopkins*, 296 N.C. 673, 252 S.E. 2d 755 (1979); *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). Rulings of the trial judge on the use of leading questions are discretionary; and he is reversible only for an abuse of discretion. *State v. Hopkins, supra*; *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Greene, supra*. We do not perceive there to have been an abuse of discretion in this case.

[7] By his seventh assignment of error, defendant contends that the trial judge committed error by instructing the jury in his charge ". . . all the evidence is important." Defendant argues that this is an incorrect statement of the law in that it is for the jury to decide what is important. This assignment is without merit.

We do not find the instruction given in this case to differ significantly from that approved in *State v. McClain*, 282 N.C. 396, 193 S.E. 2d 113 (1972), where Justice Lake observed "The

trial judge correctly instructed the jury: 'It is your duty to remember and consider all of the evidence whether called to your attention by counsel or the Court or not, for all of the evidence is important.' " *State v. McClain, supra* at 400.

Once it is established that proffered evidence is competent, that evidence is entitled to be submitted to the jury for its due consideration in light of all the other evidence brought forward at trial. However, the jury remains the final arbiter of the credibility. Probative force and weight which is to be accorded to the evidence which it considers. *See generally* 1 Stansbury's North Carolina Evidence § 8 (Brandis Rev. 1973).

[8] By his eighth assignment of error, defendant contends the trial court erred in his charge to the jury in summarizing the testimony of Julius Wayne Alston, a witness for the state. Defendant argues that the judge summarized only those parts of Alston's testimony which were favorable to the state in that "[T]he summarization of the testimony of Alston by the Court simply does not reflect the incredibility of his testimony." There was no error.

It is fundamental that a trial judge may not by words or conduct suggest an opinion as to the weight of evidence or the credibility of a witness. G.S. 15A-1222; *see e.g., State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Maready*, 269 N.C. 750, 153 S.E. 2d 483 (1967). After reviewing the judge's charge and construing it contextually, we do not find the charge to have been inadequate. When a court undertakes to restate the contentions of the parties, it must fairly present the contentions of both parties without giving undue stress to those of either side. *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978); *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968). It is sufficient if the contentions are restated with reasonable accuracy. *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973). Any minor discrepancies or misstatements in the charge must be brought to the attention of the judge at trial. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976).

Defendant contends that the trial court erred in denying his motions to dismiss at the close of the state's evidence and to set aside the verdict as being contrary to the weight of evidence. There was no error. The state presented sufficient evidence to

send the case to the jury on the issue of defendant's guilt as well as to support the jury's verdict.

We conclude that the defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOE MARK HERBIN

No. 35

(Filed 6 November 1979)

1. **Homicide § 21.7— shooting death—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a homicide prosecution where it tended to show that defendant fired a shot through the window of a recreation center; deceased yelled to him that he could get hurt playing around like that; defendant then approached deceased and shot him at close range; and deceased never raised the bottle he was holding and never approached defendant as if he were going to harm him.

2. **Homicide § 28— self-defense—jury instruction—definition—burden of proof**

When charging on self-defense, a trial judge must correctly define the term self-defense and must place the burden on the State to disprove self-defense beyond a reasonable doubt, both of which the trial court did in this case.

3. **Criminal Law § 114.3— jury instructions—reporter's improper punctuation—no expression of opinion**

There was no merit to defendant's contention that the trial court expressed an opinion in instructing the jury that " . . . the defendant was not the aggressor if the defendant voluntarily and without provocation entered the fight. He was the aggressor," since the court's apparent expression of opinion was simply the result of the court reporter's improper punctuation.

4. **Homicide § 28.2— self-defense—apparent necessity—instructions adequate**

Where the trial court at some other point in the charge properly instructed on self-defense and thereby gave defendant the full benefit of the doctrine of apparent necessity, the court's use of the phrase "circumstances as they existed" rather than "as they appeared" did not deny defendant the benefit of an instruction that he had a right to defend himself under circumstances of apparent necessity as well as real or actual necessity.

5. Criminal Law § 99.7— court's admonishing of witnesses—no expression of opinion

The trial court did not impermissibly express an opinion concerning the credibility of defendant's testimony and testimony of a defense witness where the judge admonished defendant to answer the questions asked by the district attorney, not to talk back, and to refrain from arguing with the district attorney, and where the judge instructed the defense witness to answer the question and not to argue with the district attorney.

6. Criminal Law § 114.2— State's contentions—no expression of opinion in instructions

The trial court did not express an opinion in stating to the jury that "the state says and contends that when you weigh and consider all of the evidence in this case that you should have no doubt in your mind but that this defendant is guilty of first degree murder" and that "the state says and contends that he is the aggressor all the way. That he started the whole thing," since the jury could not have understood the statement to be an opinion of the judge regarding the facts of the case, and could only have understood that the judge was simply recounting the State's contentions.

7. Criminal Law §§ 86.2, 86.6— prior inconsistent statement—prior convictions—cross-examination for impeachment proper

Defendant who testified in his own behalf could properly be cross-examined concerning a prior inconsistent statement, a knifing incident which resulted in a conviction of assault on a female, and another incident in which defendant was charged with rape but convicted of assault on a female, the question with respect to rape being proper since defendant could have in fact raped the victim, but have been convicted only of the lesser offense of assault on a female; furthermore, failure of the court to limit consideration of the evidence solely for impeachment purposes was not reversible error where defendant did not request such limiting instruction.

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

Justice EXUM dissenting in part.

APPEAL by defendant from *Crissman, J.* at the 27 November 1978 Criminal Session of GUILFORD County Superior Court.

The defendant was charged in an indictment, proper in form, with first degree murder in the death of Michael Johnny Conwell. The evidence for the State tended to show the following:

At approximately 9:30 p.m. on 8 September 1978, the defendant met Carolyn Royal and Felicia Hazlip at a fish market on Florida Street in Greensboro. Royal got in the defendant's car and the two went to the Caldcleugh Recreation Center. Hazlip walked the few blocks to the Center. The defendant parked his car in the parking lot in front of the Center, and he and Royal

talked for a few minutes. Then, as Royal was leaving, the defendant asked her to call two girls, Josie Crosby and Angela Jones, to the car. When they went over to the car, Crosby asked him to take them to her niece's house and he agreed to do so. The girls got into the car about 9:45 p.m. The Center had closed at 9:30 p.m., but there were still several people standing around the parking lot and seated on the front steps of the Center, including the deceased Johnny Conwell.

As the defendant was preparing to leave the Center, he pulled out his .22 caliber pistol from the waistband of his pants and fired a shot that went through the front window of the Center. Conwell yelled something to the defendant to the effect that he could get hurt playing around like that. Defendant stopped his car and got out with his pistol in his hand. Conwell picked up a soft drink bottle and stood on the steps with the bottle down by his side. Sometime after firing the first shot defendant made the statement, "When I pull my stuff out, I don't pull it out for nothing." Defendant walked up the steps to Conwell and shot him once in the head. Conwell did not raise the bottle at any time, nor did he threaten the defendant verbally or physically.

There was a stipulation entered at trial that Conwell died from a gunshot wound to the head and that in the opinion of Dr. Page Hudson, Chief Medical Examiner for North Carolina, the gun was within one foot of Conwell's head at the time of the fatal injury. After the shooting, the defendant got in his car and drove away alone. He was apprehended by police early the next morning at his apartment.

The evidence for the defendant tended to show the following:

Defendant testified that while he and Royal were in his car at the Center, Chubby Chestnutt came up to the car and wanted to borrow the pistol that he and the defendant owned together. The defendant told Chestnutt that he did not have the pistol with him and Chestnutt walked away and sat on the side of a small hill by the Center. Then, as Royal was leaving, the defendant had her call two girls to his car. One of the girls asked him to take them somewhere and he agreed to do so. They got in and he backed up about twenty feet.

Defendant then pulled out his pistol and while playing with it, fired it into the air. Since defendant did not want the gun in his car in the event the police were called, he got out and started walking toward Chestnutt to give the gun to him.

Conwell was sitting on the steps fifteen to twenty feet to the defendant's left. Conwell stood up, picked up a bottle and yelled several profane statements to the defendant. He told the defendant that he was going to kill him, and he walked toward him, raising the bottle as if he planned to strike him. Defendant told him to halt and to put the bottle down and then backed up and fired a warning shot over his head. Conwell continued advancing toward the defendant, told him again he was going to kill him, and struck the defendant's hand. Defendant then shot him. Testimony by one of the State's witnesses tended to corroborate defendant's testimony that a total of three shots were fired rather than two.

The jury found the defendant guilty of second degree murder. He was sentenced to imprisonment for not less than forty years nor more than life.

Public Defender Wallace C. Harrelson for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Marvin Schiller for the State.

COPELAND, Justice.

[1] Defendant assigns as error the trial judge's denial of his motions for directed verdict at the close of the State's evidence and at the close of all the evidence. Defendant's brief sets out no reason or argument and cites no authority in support of this assignment of error; therefore, it is deemed abandoned. Rule 28(a), (b)(3), Rules of Appellate Procedure; *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336 (1972).

In any event, due to the seriousness of the charge and conviction in this case, we have examined the record carefully and find that there is ample evidence, when considered in the light most favorable to the State, to support a conviction of second degree murder. The State's evidence tends to show that the defendant approached the deceased and shot him at close range after the defendant had fired a shot through the window of the Center and

deceased had yelled to him that he could get hurt playing around like that. There is evidence in the record that the deceased never raised the bottle he was holding and never approached the defendant as if he were going to harm him. Therefore, defendant's motions for directed verdict were properly denied.

Defendant raises two contentions concerning the following portion of the trial judge's charge to the jury on the definition of self-defense: "and third, that the defendant was not the aggressor if the defendant voluntarily and without provocation entered the fight. He was the aggressor."

First, defendant contends that in making the above statement the trial judge was impermissibly placing the burden of proving self-defense on the defendant. However, it is clear that at that point in his charge the trial judge was *defining* self-defense. Immediately after defining self-defense, the trial judge *then* charged with respect to the burden of proof on the self-defense issue as follows: "Now, members of the jury, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense."

In *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978), we held that it was error to tell the jury that it must find beyond a reasonable doubt that the defendant was not the aggressor. The burden is upon the State to prove beyond a reasonable doubt that the defendant did not act in self-defense when there is some evidence in the case that he did. *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977).

However, we also held in *Potter* that,

"It would have been proper . . . to tell the jury that the killing . . . would be excused altogether as being in self-defense if:

(1) it appeared to defendant and he believed it to be necessary to shoot [the deceased] in order to save himself from death or great bodily harm . . . ; *and*

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were suffi-

cient to create such a belief in the mind of a person of ordinary firmness . . . ; *and*

(3) *defendant was not the aggressor* in bringing on the affray, defining what is meant by this term . . . ; *and*

(4) defendant did not use excessive force, defining what is meant by this term. . . ." *State v. Potter, supra* at 142-43, 244 S.E. 2d at 408. (Citations omitted.) (Emphasis added.)

[2] When charging on self-defense, a trial judge must correctly define the term self-defense, *State v. Potter, supra; State v. Wynn,* 278 N.C. 513, 180 S.E. 2d 135 (1971), and must place the burden on the State to disprove self-defense beyond a reasonable doubt, *State v. Hankerson, supra.* In the instant case, the trial judge performed both tasks in compliance with our decision in *Potter* and we find no merit in this assignment or error.

[3] Second, the defendant contends that the trial judge expressed an opinion in stating that, "He was the aggressor." In essence the defendant is alleging error in the court reporter's punctuation of the judge's charge. Such an allegation, standing alone, is not sufficient to warrant a new trial. *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974), *death sentence vacated,* 428 U.S. 903 (1976).

The State has moved to amend the record as follows: "and third, that the defendant was not the aggressor. If the defendant voluntarily and without provocation entered the fight, he was the aggressor."

We held in *Potter* that when the jury is instructed that the third requirement of self-defense is that the defendant not be the aggressor, the jury should have the term "aggressor" defined for them. In this connection, the pattern jury instructions provide the following definition: "If he voluntarily and without provocation entered the fight, he was the aggressor." NC.P.I.—Crim. 206.10, Page 7. In the instant case, the trial judge used those exact words in his charge to the jury. Obviously, the punctuation of the court reporter was in error. Therefore, the State's motion to amend the record is allowed so that the above sentence is punctuated the same as the pattern jury instructions.

A trial judge cannot express an opinion on the evidence in the presence of the jury at any stage of the trial. G.S. 15A-1222;

G.S. 15A-1232. Those two provisions repealed and replaced G.S. 1-180 effective 1 July 1978. The new provisions restate the substance of G.S. 1-180 and the law remains essentially unchanged. *State v. Hewett,* 295 N.C. 640, 247 S.E. 2d 886 (1978). At this point in the charge it is obvious that the trial judge expressed no opinion. He was defining the term "aggressor" for the jury as he should have done and committed no error in doing so.

[4] Defendant assigns as error the following portion of the trial judge's charge on self-defense:

> "If the State has failed to satisfy you behind [sic] a reasonable doubt that the defendant did not reasonably believe under the circumstances *as they existed* at the time of the killing that he was about to suffer death or serious bodily harm or bodily injury at the hands of Johnny Conwell, or that the defendant used more force than reasonably appeared to him to be necessary, and third, that the defendant was the aggressor then the killing of Johnny Conwell by the defendant would be justified on the grounds of self-defense then it would be your duty to return a verdict of not guilty." (Emphasis added.)

Defendant contends that use of the phrase "as they existed" rather than "as they appeared" denied him the full benefit of a jury instruction that he had the right to defend himself under circumstances of apparent necessity as well as real or actual necessity.

It is true, as defendant contends, that in the exercise of his lawful right of self-defense, an accused may use such force as is necessary or apparently necessary to protect himself from death or serious bodily harm. *State v. Davis,* 289 N.C. 500, 223 S.E. 2d 296, *death sentence vacated,* 429 U.S. 809 (1976); *State v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892 (1959). The doctrine of apparent necessity means that a person may kill if he reasonably believes it to be necessary to do so in order to avoid death or serious bodily harm, even though it is not actually necessary to kill. *State v. Goode,* 249 N.C. 632, 107 S.E. 2d 70 (1959); *State v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620 (1953). The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the defendant at the time of the killing. *State v.*

Marsh, 293 N.C. 353, 237 S.E. 2d 745 (1977); *State v. Kirby*, 273 N.C. 306, 160 S.E. 2d 24 (1968).

Elsewhere in his charge, the trial judge instructed the jury as follows:

> "Now, members of the jury, a killing would be excused entirely on the ground of self-defense. First, if it appeared to the defendant and he believed it to be necessary to shoot Johnny Conwell in order [to] save himself from death or great bodily harm; and second, the circumstances as they appear [sic] to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you, members of the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination you should consider the circumstances as you find them to have existed from the evidence that the fierceness of the assault, if there was any upon the defendant, and whether or not Johnny Conwell had any sort of weapon in his possession. . . ."

This instruction is in accord with the law and afforded the defendant the full benefit of the doctrine of apparent necessity. *State v. Jackson*, 284 N.C. 383, 200 S.E. 2d 596 (1973); *State v. Gladden*, 279 N.C. 566, 184 S.E. 2d 249 (1971). Under the same circumstances, Justice Huskins, quoting former Chief Justice Bobbitt, said that defendant's contention "relates more to semantics than to substance." *State v. Jackson, supra* at 391, 200 S.E. 2d at 601, *quoting State v. Gladden, supra* at 572, 184 S.E. 2d at 253. Thus, this assignment of error is overruled.

[5] The defendant contends that the trial judge impermissibly expressed an opinion concerning the credibility of the defendant's testimony and the testimony of Mr. Robert Gray, a defense witness. At several points during defendant's testimony, the trial judge admonished the defendant to answer the questions asked by the district attorney, to not talk back, and to refrain from arguing with the district attorney. At one point in Gray's testimony, the trial judge instructed him to answer the question and not to argue with the district attorney.

The rule against the expression of opinions by the trial judge in the presence of the jury includes the prohibition against the expression of an opinion about the witness or his credibility. *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481 (1966). However, it is proper for the trial judge to admonish a witness to give responsive answers to questions asked of him, *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974); to admonish the witness not to argue with the prosecutor but to answer the questions asked of him, *State v. Lentz,* 270 N.C. 122, 153 S.E. 2d 864, *cert. denied,* 389 U.S. 866 (1967); and to admonish the defendant and his witness to confine their responses to the questions asked, *State v. Chandler,* 30 N.C. App. 646, 228 S.E. 2d 69 (1976). *See also,* 88 C.J.S. Trial § 49(3) (1955).

A trial judge has the duty to control the examination of witnesses in the interest of an efficient administration of justice so long as he intimates no opinion either of the witness or his credibility. *State v. Frazier,* 278 N.C. 458, 180 S.E. 2d 128 (1971); *State v. Mansell,* 192 N.C. 20, 133 S.E. 190 (1926). We hold that the trial judge properly performed this duty and expressed no opinions at these points in the record. This assignment of error is overruled.

[6] The defendant contends that the court expressed an opinion in stating to the jury that, "the state says and contends that when you weigh and consider all of the evidence in this case that you should have *no doubt* in your mind, but that this defendant is guilty of first degree murder" and that, "the state says and contends that he is the aggressor *all the way.* That he started the whole thing." (Emphasis added.)

This assignment is without merit. The instruction clearly reveals that the judge was simply recounting the State's contentions. This was made quite clear to the jury by the trial judge; therefore, the jury could not have understood the statement to be an opinion by the judge regarding the facts of the case. *State v. Abernathy,* 295 N.C. 147, 244 S.E. 2d 373 (1978). The jury was instructed that it was their duty to weigh and consider all the evidence. We find no expression of an opinion in the above statements of the trial judge.

[7] Defendant assigns as error a series of questions asked of him on cross-examination by the district attorney. Defendant contends

that questions put to him concerning a prior statement he made to the police that he did not own a pistol and questions regarding his two convictions for assault on a female exceeded the proper boundaries of cross-examination. We find no merit in this assignment.

When a defendant becomes a witness and testifies in his own behalf, he is subject to cross-examination like any other witness, G.S. 8-54, and, for purposes of impeachment, he may be cross-examined by the district attorney concerning prior inconsistent statements, *State v. Jones*, 294 N.C. 642, 243 S.E. 2d 118 (1978), *State v. Battle*, 269 N.C. 292, 152 S.E. 2d 191 (1967); prior convictions, *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975), *State v. Wright*, 282 N.C. 364, 192 S.E. 2d 818 (1972), *State v. Miller*, 281 N.C. 70, 187 S.E. 2d 729 (1972); and any specific acts of misconduct which tend to impeach his character, *State v. Purcell*, 296 N.C. 728, 252 S.E. 2d 772 (1979), *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated*, 429 U.S. 912 (1976), *State v. Hartsell*, 272 N.C. 710, 158 S.E. 2d 785 (1968). *See also*, 4 Strong's N.C. Index 3d, Criminal Law §§ 86.1-86.7; 1 Stansbury's N.C. Evid. §§ 46, 111-112 (Brandis Rev. 1973).

Here, the district attorney cross-examined the defendant concerning his prior statement to police that he did not own a pistol after he had testified on direct examination that he and Chubby Chestnutt jointly owned a .22 caliber pistol. There was no error in this line of questioning. The district attorney properly questioned the defendant concerning a prior inconsistent statement. *State v. Jones, supra; State v. Battle, supra.*

The defendant was asked if he had cut Carolyn Woodhite with a butcher knife on 22 May 1972. He replied that she pulled the knife on him, he knocked it out of her hand, and he was convicted of assault on a female. There was no error in asking defendant about this prior instance of misconduct. *State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (1973).

In a separate incident, defendant was charged with the rape of Virginia Pearson on 8 August 1978 in Richmond, Virginia. He was convicted of assault on a female. The district attorney may not ask about or refer in his question to prior arrests, indictments, charges or accusations. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). Therefore, the trial judge properly sustain-

ed defense counsel's objection to the district attorney's reference in one question to "this charge of rape." However, it was permissible for the district attorney to ask the defendant if he had in fact raped Virginia Pearson since such question concerned a specific act of misconduct. *State v. Mack,* 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972).

Questions regarding specific acts of misconduct must be asked in good faith. *State v. Mack, supra.* Here, the question was asked in good faith because the district attorney's information was that the defendant had been charged with the rape of Virginia Pearson. *State v. Lowery,* 286 N.C. 698, 213 S.E. 2d 255 (1975), *death sentence vacated,* 428 U.S. 902 (1976). This remains true even though he was actually convicted only of assault on a female in that case and not rape. *See generally,* 1 Stansbury's N.C. Evid. § 111, n. 12 (Brandis Rev.) (Cum. Supp. 1979) and cases cited therein. The defendant could still have in fact raped Virginia Pearson. The question properly concerned a matter within the knowledge of the witness. *State v. Williams, supra.*

It was also proper for the district attorney to ask the defendant if he had been convicted of assault on a female in this same incident. In *State v. Mack, supra,* we held that it was permissible for the district attorney to phrase his questions as specific acts of misconduct rather than as prior convictions even though defendant had been convicted of those offenses. In *State v. Mason,* 295 N.C. 584, 248 S.E. 2d 241 (1978) and *State v. Ross,* 295 N.C. 488, 246 S.E. 2d 780 (1978), we held that cross-examination for purposes of impeachment is not limited to questions concerning prior convictions, but extends to questions relating to specific acts of criminal and degrading conduct for which there have been no convictions.

Here, there was no conviction for rape. There was a conviction for assault on a female. We hold that it was proper for the district attorney to question the defendant about both aspects of this incident. Defendant could have in fact raped Virginia Pearson, but have been convicted only of the lesser offense of assault on a female. Therefore, both questions were proper.

The district attorney was persistent during this line of questioning in the face of evasive and equivocal answers from the defendant. It is not error to permit the district attorney to pursue

the cross-examination and "sift the witness" in such situations. *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972). Whether the cross-examination goes too far or is unfair is a matter resting within the sound discretion of the trial judge, *State v. Black, supra; State v. Williams, supra; State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534, *cert. denied*, 400 U.S. 946 (1970), and we find no abuse of discretion in this case.

When a defendant has testified, but has not otherwise placed his character in issue, evidence concerning prior inconsistent statements, prior convictions, and specific acts of misconduct is competent only for purposes of impeachment and not as substantive evidence of guilt. 1 Stansbury's N.C. Evid. § 108 (Brandis Rev. 1973). Here, the defendant did not ask for and the trial judge did not give a limiting instruction during this questioning to consider the evidence solely for impeachment purposes. When the defendant does not request such a limiting instruction, it is not reversible error on appeal if the limiting instruction is not given. *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978); *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *State v. Williams*, 272 N.C. 273, 158 S.E. 2d 85 (1967). This assignment of error is overruled.

The defendant has had a fair trial free from prejudicial error. Thus, the verdict and judgment of the court below will not be disturbed and we find

No error.

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

Justice EXUM dissenting in part:

I disagree only with that portion of the majority's opinion holding that it is permissible to cross-examine a witness about alleged crimes for which the witness has been tried and acquitted. The majority relies on the rule that a witness may be asked about prior acts of misconduct for purposes of impeachment. This rule has no application where such acts have been the subject of a criminal prosecution which terminated favorably to the defendant. *State v. Sharratt*, 29 N.C. App. 199, 223 S.E. 2d 906 (1976), *cert. denied*, 290 N.C. 554, 226 S.E. 2d 512 (1976).

This kind of cross-examination is tantamount to asking the witness about past accusations of crime, a practice which was prohibited in *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971).

When one has been tried for and acquitted of a particular crime that should end the matter for all purposes. A person so acquitted should not be required continually to defend himself against the charge in subsequent criminal proceedings in which he may become involved.

Nevertheless I concur in the result reached by the majority in this case on the ground that the questions asked by the district attorney, albeit improper, were not so prejudicial as to require a new trial. The charge here was for homicide. Questions on cross-examination related to an alleged rape. Further, the defendant appropriately explained to the jury that he did not rape Virginia Pearson and that he had been acquitted of that charge.

DONALD A. SEDERS v. EDWARD L. POWELL, COMMISSIONER OF MOTOR VEHICLES

No. 20

(Filed 6 November 1979)

1. **Automobiles § 126.3— breathalyzer test—right to consult attorney—applicability of 30 minute time limit**

   G.S. 15A-501(5), which gives a criminal defendant a right to consult with an attorney within a reasonable time after arrest, does not apply to breathalyzer tests, and the 30 minute time limit referred to in G.S. 20-16.2(a)(4) applies both to the purpose of calling an attorney and the purpose of selecting a witness to view the breathalyzer testing procedure. The contrary opinion of *Price v. Dept. of Motor Vehicles*, 36 N.C. App. 698 (1978) is overruled.

2. **Automobiles § 126.3— willful refusal to take breathalyzer test—elapse of time while awaiting attorney's call**

   The trial court properly found that plaintiff "willfully refused" to submit to a breathalyzer test where there was evidence tending to show that plaintiff was advised that the test could not be delayed for more than 30 minutes and that if plaintiff did not take the test it would be noted as a refusal; plaintiff refused to take the test until he talked with his attorney; the breathalyzer operator on three occasions warned plaintiff that his time was running out and told plaintiff how many minutes he had left; and the 30 minute time limit expired while plaintiff was waiting for an attorney to return his call.

3. **Automobiles § 126.3— breathalyzer test—no right to consult attorney**

The operator of a motor vehicle in North Carolina has no constitutional right to confer with counsel prior to making a decision on whether to submit to a breathalyzer test since (1) proceedings involving the suspension or revocation of a license to operate a motor vehicle are civil, not criminal, in nature, and (2) anyone who accepts the privilege of driving upon the highways of this State has consented, pursuant to G.S. 20-16.2(a), to the use of the breathalyzer test and has no constitutional right to consult a lawyer to void that consent.

4. **Automobiles § 126.3— breathalyzer test—30 minute time limit—constitutionality**

The strict 30 minute limitation of G.S. 20-16.2(a)(4) for taking a breathalyzer test is not irrational and violative of due process, since the State must balance its need to test the person arrested for driving under the influence before evidence of his condition metabolizes away with the arrestee's statutory right to consult counsel before undergoing the test.

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

ON plaintiff's petition for discretionary review of decision of the Court of Appeals, 39 N.C. App. 491, 250 S.E. 2d 690 (1979), affirming judgment entered 26 September 1977 by *Lupton, Judge* in the Superior Court, GUILFORD County.

This civil action was initiated by plaintiff on 25 February 1976 pursuant to G.S. 20-16.2(e) and G.S. 20-25. Plaintiff sought review of the revocation of his driving privileges by the defendant for plaintiff's alleged refusal to submit to the breathalyzer test as required by G.S. 20-16.2(a). Defendant had notified plaintiff on 17 February 1976 that his driving privileges would be revoked for a period of six months beginning 27 February 1976. When plaintiff initiated this action on 25 February 1976, the superior court entered an order staying the revocation of the driving privileges pending the outcome of his case. The matter came on for hearing at the 26 September 1977 Civil Session of Guilford County Superior Court.

On Sunday, 7 September 1975, Trooper Philip R. Wadsworth came upon the plaintiff's vehicle at about 3:00 p.m. Plaintiff was driving the car alone. Trooper Wadsworth approached the car, smelled the strong odor of alcohol and found the plaintiff's speech to be "fair" and the plaintiff "talkative." Plaintiff was placed under arrest for driving under the influence. It took approximately 15 to 20 minutes to take plaintiff to the breathalyzer room where Trooper R. D. Jacobs was on duty. Once there, Trooper

Wadsworth requested that the plaintiff take the breathalyzer test and Trooper Jacobs read plaintiff's rights as set out in G.S. 20-16.2(a). The rights read were:

1. You have a right to refuse to take the test.

2. Refusal to take the test will result in revocation of your driving privilege for six months.

3. You may have a physician, qualified technician, chemist, registered nurse, or other qualified person of your own choosing administer a chemical test or tests in addition to any administered at the direction of the law enforcement officer.

4. You have the right to call an attorney and select a witness to view for you the testing procedures, but the test shall not be delayed for this purpose for a period in excess of thirty minutes from the time you are notified of your rights.

Trooper Jacobs completed reading these rights at 3:30 p.m. and gave plaintiff a copy. Plaintiff advised the trooper that he would like to call a lawyer and he was given a telephone and telephone book. He attempted several calls unsuccessfully. While he was trying to call, Trooper Jacobs warned plaintiff several times that time was running out and told him how many minutes he had remaining. Jacobs also warned defendant that the test could not be delayed for more than 30 minutes or it would be written up as a refusal. Plaintiff replied that he was not going to do anything until he had a chance to talk to his lawyer. Trooper Jacobs testified, "I requested Mr. Seders to take the breath test, and in fact requested him three times but Mr. Seders refused to take the test and said he was not going to take the test until he had talked with his lawyer."

At 4:01 p.m., Trooper Jacobs "wrote Mr. Seders up" as having refused the breathalyzer test and the machine was dismantled. Approximately 10 minutes later at 4:11 p.m., plaintiff received a telephone call in the breathalyzer room and thereafter advised Trooper Jacobs that he would take the test. Trooper Jacobs advised plaintiff that it was too late and that he "had already written him up as having refused."

Plaintiff's explanation was that he had had a few drinks while watching a football game at a friend's house. He was on the way home when his car slid on the road and Trooper Wadsworth came up and arrested him for driving under the influence. At the police station he tried to call several lawyers but was unable to reach any of them. He finally reached a lawyer's wife and she stated that she would have her husband call him "right away." The lawyer called in several minutes and told him to go ahead and take the breathalyzer. Plaintiff told this to Trooper Wadsworth but was advised that it was too late. He did not notice Trooper Jacobs dismantling the machine and does not recall Trooper Jacobs telling him while he was trying to reach a lawyer that the test could not be delayed for more than 30 minutes. He was not aware of how much time was passing when he was trying to call the lawyer. He had previously been convicted of driving under the influence and he had taken the breathalyzer on that occasion. However, his lawyer in that case told him he should never have taken the test and this is why he wanted to call a lawyer before taking the breathalyzer on this occasion.

The superior court entered findings of fact, concluded that the plaintiff willfully refused to take the chemical test of breath in violation of law and upheld the order of the Division of Motor Vehicles revoking plaintiff's license. Plaintiff served notice of appeal to the Court of Appeals. The superior court continued in effect the restraining order previously entered which allowed defendant to retain his driving license. The matter was heard in the Court of Appeals and that court, on 16 January 1979, affirmed the judgment of the superior court. Plaintiff petitioned this Court for discretionary review pursuant to G.S. 7A-31 on 13 February 1979 and the motion was allowed on 5 April 1979. We allowed the petition primarily because the opinion of the Court of Appeals is in apparent conflict with another decision of that court in *Price v. N.C. Dept. of Motor Vehicles*, 36 N.C. App. 698, 245 S.E. 2d 518, *disc. rev. denied* 295 N.C. 551, 248 S.E. 2d 728 (1978).

Smith, Patterson, Follin, Curtis, James & Harkavy by Charles A. Lloyd for plaintiff appellant.

Attorney General Rufus L. Edmisten by Assistant Attorney General William B. Ray and Deputy Attorney General William M. Melvin for defendant appellee.

CARLTON, Justice.

We are presented by plaintiff with three arguments on this appeal: (1) That the lower courts misconstrued G.S. 20-16.2(a)(4) to impose an absolute 30 minute time limit in which one charged with driving under the influence has an opportunity to consult with a lawyer, (2) that the evidence in the instant case does not support the trial court's finding that plaintiff willfully refused to submit to the breathalyzer test, and (3) that there is a constitutional right to confer with counsel prior to taking the breathalyzer test and the 30 minute time limit is both irrational and a violation of due process. We reject the plaintiff's contentions and affirm.

I. The Statutory Claim

[1] Plaintiff first contends that the Court of Appeals incorrectly resolved the conflict between G.S. 20-16.2(a)(4) and G.S. 15A-501(5) and thereby created a conflict with a prior decision of another panel of the Court of Appeals in *Price v. N.C. Dept. of Motor Vehicles, supra.*

G.S. 20-16.2(a)(4) provides in pertinent part:

> [The accused] has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed *for this purpose* for a period in excess of 30 minutes from the time he is notified of his rights. (Emphasis added.)

G.S. 15A-501, however, provides in pertinent part:

> Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law enforcement officer:
>
> . . . .
>
> (5) Must without unnecessary delay advise the person arrested of his right to communicate with counsel and friends and must allow him *reasonable time* and reasonable opportunity to do so. (Emphasis added.)

In *Price*, the Court of Appeals held that the 30 minute time limitation mandated by G.S. 20-16.2(a)(4) refers only to the right to

"select a witness." It interpreted G.S. 15A-501(5), which gives a criminal defendant a right to consult with counsel within a reasonable time after arrest, as applying to breathalyzer tests. Thus, the right to contact an attorney before taking the test was not limited to 30 minutes but rather was limited to a "reasonable time." Only the right to select a witness was subject to the 30 minute ban.

The State argues here that the reasonable time language in *Price* is mere dictum. We disagree. Speaking through Judge Hedrick, the Court of Appeals in the instant case expressly disavowed the *Price* analysis. The two decisions are obviously in conflict.

In 1973 our legislature amended G.S. 20-16.2 in several respects and the phrase "for this purpose" was inserted in place of the phrase "for other purposes." 1973 N.C. Sess. Laws 181-82 (Chap. 206, s. 1). Echoing an argument advanced in *Price*, plaintiff here asserts that the phrase "for this purpose" is singular and that the change enacted by the General Assembly expressed its obvious intent to apply the 30 minute time limit only to defendant's right to secure a witness to view the testing procedure. On the basis of that construction, plaintiff argues, he would then have a "reasonable time" not limited to 30 minutes within which to call an attorney pursuant to G.S. 15A-501(5).

We cannot agree for several reasons. First, the 1973 amendment which inserted "for this purpose" in the place of "for these purposes" did so at the same time that it enumerated three other rights accruing to a driver faced with the prospect of a breathalyzer test. We believe the limiting words were inserted to apply to the single generic right enumerated in (a)(4), the right to have advice and support during the testing process, as opposed to the other rights enumerated in the preceding subsections, G.S. 20-16.2(a)(1) through (a)(3). This view is bolstered by the very wording of G.S. 20-16.2(a)(4):

> That he has the right to call an attorney and select a witness to view for him the testing procedure; but that the test shall not be delayed for *this purpose* [*that is, the purpose of exercising the generic right embodied in this particular subsection*] for a period in excess of 30 minutes from the time he is notified of his *rights* [*that is, the other rights enumerated in*

> *G.S. 20-16.2(a) which include the right to refuse, and the right to have an independent test done of alcohol content of the blood*]. (Emphasis added.)

Furthermore, a grammarian's reading of the limiting phrase within its statutory context reveals that that to which plaintiff pins his hopes is not an ambiguity of phrasing but a proper grammatical expression of number. The singular noun phrase "this purpose" refers to the singular antecedent noun phrase "the *right* to call an attorney and select a witness. . . ." Grammatically and logically, then, the phrase "this purpose" refers to one right with two components—the right to call and to select. The 30 minute time limit applies to both components of that one right.

In resolving the potential conflict between these two statutes, we have, of course, employed the established rule that the legislative will is the controlling factor. *Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979); *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978); *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). We do not think the legislature intended the breathalyzer statute to be either ungrammatical or illogical.

Furthermore, we do not think the legislature intended for the "reasonable time" contemplated by G.S. 15A-501(5), a part of the Criminal Procedure Act, to apply to the specialized situation contemplated by G.S. 20-16.2, a civil matter involving the administrative removal of driving privileges as a result of refusing to submit to a breathalyzer test. When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control. *Colonial Pipeline Co. v. Neill*, 296 N.C. 503, 251 S.E. 2d 457 (1979); *National Food Stores v. N.C. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E. 2d 582 (1966).

We finally note that it would be incongruous to hold that G.S. 20-16.2(a)(4) requires an accused to select a witness to view for him the testing procedure within 30 minutes but allows a greater period for the purpose of calling an attorney. Surely, in virtually every situation, it would be easier for an accused to contact an attorney by telephone within 30 minutes than to contact anyone

else and have them travel to the breathalyzer room to observe the test within that same time period. Our legislature has wisely recognized the genuine need for a time limit for both purposes and we hold that the 30 minute time limit referred to by G.S. 20-16.2(4) applies both to the purpose of calling an attorney and to the purpose of selecting a witness to view the testing procedure. Any language to the contrary in *Price v. Department of Motor Vehicles, supra,* is overruled. In the instant case, the superior court and the Court of Appeals properly construed G.S. 20-16.2(a)(4).

II. The Trial Court's Finding

G.S. 20-16.2(c) provides as follows:

> The arresting officer, in the presence of the person authorized to administer a chemical test, shall request that the person arrested submit to a test described in subsection (a). If the person arrested *willfully* refused to submit to the chemical test designated by the arresting officer, none shall be given. However, upon the receipt of a sworn report of the arresting officer and the person authorized to administer a chemical test that the person arrested, after being advised of his rights as set forth in subsection (a), *willfully* refused to submit to the test upon the request of the officer, the Division shall revoke the driving privilege of the person arrested for a period of six months. (Emphasis added.)

[2] In the instant case, the trial court concluded, after making detailed findings of fact, that the plaintiff "willfully refused" to submit to the breathalzyer and reaffirmed defendant's revocation order.

Plaintiff contends that the facts presented to the trial court were insufficient to support its conclusion that the refusal was willful. Crucially missing, he argues, is any evidence that plaintiff had knowledge that his time was running while he was waiting for his attorney to return his telephone call. We do not agree. The findings of the trial court are conclusive on appeal if there is evidence to support them. *Henderson County v. Osteen,* 297 N.C. 113, 254 S.E. 2d 160 (1979); *Williams v. Pilot Life Ins. Co.,* 288 N.C. 338, 218 S.E. 2d 368 (1975); *Gaston-Lincoln Transit, Inc. v. Maryland Casualty Co.,* 285 N.C. 541, 206 S.E. 2d 155 (1974). This

is true even though the evidence might sustain findings to the contrary. *Williams v. Pilot Life Ins. Co.*, *supra*, *Blackwell v. Butts*, 278 N.C. 615, 180 S.E. 2d 835 (1971); *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E. 2d 29, 33 (1968). Here, Trooper Wadsworth testified that he warned plaintiff on three occasions that his time was running out and told plaintiff how many minutes he had remaining. The trooper also stated that he told plaintiff that the test could not be delayed for more than 30 minutes and that if plaintiff did not take the test within that time it would be noted as a refusal. From this evidence, it is apparent that plaintiff was told the consequences of his failure to submit to the test within the 30 minute time limitation yet still elected to run the risk of awaiting his attorney's call. Plaintiff's action constituted a conscious choice purposefully made and his omission to comply with this requirement of our motor vehicle law amounts to a willful refusal. *See, e.g.*, *Joyner v. Garrett*, 279 N.C. 226, 182 S.E. 2d 553, *reh. denied*, 279 N.C. 397, 183 S.E. 2d 241 (1971); *Creech v. Alexander*, 32 N.C. App. 139, 231 S.E. 2d 36, *cert. denied*, 293 N.C. 589, 239 S.E. 2d 263 (1977). We affirm the trial court's conclusion that plaintiff's refusal was willful.

III. THE CONSTITUTIONAL CLAIM

[3] Plaintiff next contends that he was denied his constitutional right to confer with counsel prior to deciding whether to submit to the breathalyzer. We join the majority of our sister states in holding that the operator of a motor vehicle in North Carolina has no constitutional right to confer with counsel prior to a decision to submit to the breathalyzer test. *See, e.g.*, *State v. Sanchez*, 110 Ariz. 214, 516 P. 2d 1226 (1973); *Calvert v. Colorado Dept. of Revenue*, 184 Colo. 214, 519 P. 2d 341 (1974); *Swenumson v. Iowa Dept. of Public Safety*, 210 N.W. 2d 660 (Iowa 1973); *State v. Palmer*, 291 Minn. 302, 191 N.W. 2d 188 (1971); *Lewis v. Nebraska State Dept. of Motor Vehicles*, 191 Neb. 704, 217 N.W. 2d 177 (1974); *Harlan v. State*, 113 N.H. 194, 308 A. 2d 856 (1973); *Agnew v. Hjelle*, 216 N.W. 2d 291 (N.D. 1974); *Phares v. Dept. of Public Safety*, 507 P. 2d 1225 (Okla. 1973); *Deaner v. Commonwealth*, 210 Va. 285, 170 S.E. 2d 199 (1969); *Davis v. Pope*, 128 Ga. App. 791, 197 S.E. 2d 861 (1973); *Commonwealth v. Cannon*, 4 Pa. Commw. Ct. 119, 286 A. 2d 24 (1972).

We base our holding on two grounds. First, it is well established in this State that proceedings involving the suspention or revocation of a license to operate a motor vehicle are civil, not criminal in nature. *Joyner v. Garrett, supra; Honeycutt v. Scheidt*, 254 N.C. 607, 119 S.E. 2d 777 (1961); *Harrell v. Scheidt*, 243 N.C. 735, 92 S.E. 2d 182 (1956). Thus in *Joyner, supra*, this Court held that a year long suspension of the plaintiff's driver's license imposed by the court on a plea of guilty to an arrest for driving under the influence did not preclude the Department of Motor Vehicles from suspending the same plaintiff's driver's license when he refused to take a breathalyzer test at the time of his arrest. Speaking for the Court, Justice Sharp, later Chief Justice, reasoned that:

> 'the same motor vehicle operation may give rise to two separate and distinct proceedings. One is *a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked.* The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other and the outcome of one is of no consequence to the other.'

Joyner v. Garrett, supra, at 238, 182 S.E. 2d at 562, *quoting Ziemba v. Johns*, 183 Neb. 644, 646, 163 N.W. 2d 780, 781. (Emphasis added.) *See also Creech v. Alexander, supra; Vuncannon v. Garrett*, 17 N.C. App. 440, 194 S.E. 2d 364 (1973). Elsewhere we have reasoned that revocation proceedings are civil because they are not intended to punish the offending driver but to protect other members of the driving public. *Honeycutt v. Scheidt, supra* at 610, 119 S.E. 2d at 780. Thus, any constitutional claim plaintiff asserts to counsel is entirely inappropriate in this civil proceeding.

Second, anyone who accepts the privilege of driving upon our highways has already consented to the use of the breathalyzer test and has no constitutional right to consult a lawyer to void that consent. *See, e.g., Harlan v. State, supra; Deaner v. Commonwealth, supra.* G.S. 20-16.2(a) provides:

> Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent, subject to the provisions of G.S. 20-139.1,

> to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor.

In view of this prior consent, we see no reasons why plaintiff here has any claim to consult counsel other than that provided for in G.S. 20-16.2(a)(4).

Our decision today conforms with the United States Supreme Court's analysis in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966). There, the Court held, *inter alia*, that a driver arrested for drunk driving could not constitutionally object to a compulsory blood test done over his objections based on the advice of counsel. Stating that the objection had no basis in the fourth and fifth amendments, the Court held that he had no right to counsel in such a situation. Here, too, because of the civil nature of this proceeding, plaintiff has no claim to greater constitutional protections and thus no mandated constitutional right to counsel. *See also State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974), citing *Schmerber* and *State v. Randolph*, 273 N.C. 120, 159 S.E. 2d 324 (1968) (per curiam), holding that admission of results of breathalyzer tests administered to a motorist is not dependent upon whether warning as to right to counsel had been given and waived.

This assignment of error is overruled. We hold that there is no constitutional right to confer with counsel prior to making a decision as to whether to take the breathalzyer test.

[4] Our holding also disposes of plaintiff's final contention that the strict 30 minute time limitation is irrational and violative of due process. Faced with one arrested for driving under the influence, the State must balance its need to test him before evidence of his condition metabolizes away with his statutory right to consult counsel before undergoing the test. In view of these two conflicting considerations, we do not believe the legislative grace period of 30 minutes is so irrational or unreasonable as to be in violation of due process. We are not unmindful of plaintiff's contention that the process of "extrapolation" would permit the State to obtain a meaningful

reading of blood alcohol content even several hours after the time of a defendant's arrest. Plaintiff contends there is thus no need for the 30 minute limitation. We elect not to delve into the merits of extrapolation. Such a process, if more desirable than our present statutory system, is plainly one for the legislature to evaluate and adopt or reject.

Plaintiff in this appeal in effect requests that we equate his rights in this civil proceeding to those of a criminal defendant who faces the possibility of incarceration. This we are unwilling to do.

> A license to operate a motor vehicle is not a natural or unrestricted right, nor is it a contract or property right in the constitutional sense. It is a conditional privilege, and the General Assembly has full authority to prescribe the conditions upon which licenses may be issued and revoked. However, once issued, a license is of substantial value to the holder and may be revoked or suspended only in the manner and for the causes specified by statute.

Joyner v. Garrett, supra at 235, 182 S.E. 2d at 559.

The Division of Motor Vehicles, pursuant to statute, issued plaintiff a license to operate a motor vehicle on the public highways of North Carolina after he met the requirements therefor. By accepting his license and operating a motor vehicle on our highways, plaintiff consented to submitting to a breathalyzer test if arrested for driving under the influence. He was so arrested and, after being advised that the test could not be administered to him more than 30 minutes following his being advised of his rights, plaintiff elected to refuse the test and elected to ignore the warning and his driving privileges were revoked. The record discloses that the Division of Motor Vehicles and the lower courts fully complied with the statute enacted by the legislature pursuant to the police power of the State. This revocation proceeding has now been reviewed by three levels of our court system and we find that plaintiff has received the full and complete protection of the requirements of fairness at every stage. We think the legislature wisely enacted the statute in question. Its purpose is to provide scientific evidence of intoxication not only for the purpose of convicting the guilty and removing them from the public highways for the safety of others, but

also to protect the innocent by eliminating mistakes from objective observation such as a driver who has the odor of alcohol on his breath when in fact his consumption is little or those who appear to be intoxicated but actually suffer from some unrelated cause. Public policy behind such a statute is a sound one. It ensures civil cooperation in providing scientific evidence and avoids incidents of violence in testing by force. It gives an arrested person a reasonable time to make up his mind about the test and yet does not tie up officers involved for an unreasonable amount of time which would interfere with their regular duties.

While plaintiff has no constitutional guarantee to counsel prior to deciding whether to submit to a breathalyzer, he can, of course, hire counsel to challenge proceedings such as that involved in the case before us. We note that plaintiff has taken full advantage of that privilege. Plaintiff was originally arrested for driving under the influence on 7 September 1975. His journey through the administrative tribunal and three levels of our court system has allowed him, so far as the record discloses, to retain his driver's license for over four years from the time of his original arrest.

The decision of the Court of Appeals in affirming the judgment of the superior court is

Affirmed.

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

STATE OF NORTH CAROLINA v. LEE ODIS ALFORD

No. 18

(Filed 6 November 1979)

1. Constitutional Law § 31— indigent defendant—appointment of investigator

An indigent defendant's constitutional and statutory right to a State appointed investigator arises only upon a showing by defendant that there is a reasonable likelihood that such an investigator would discover evidence which would materially assist defendant in the preparation of his defense; defendant in this case pointed to no evidence which, if properly developed by an in-

vestigator, would tend to show that someone other than defendant committed the crime, and the court therefore properly refused to appoint a private investigator.

2. Searches and Seizures § 15— outbuilding not rented by defendant—standing to challenge search

Defendant had no standing to object to the search of a storage building located behind a house which he rented where defendant did not own or rent the outbuilding; he did not ever seek permission from the landlady to use the building; he had notice that the building was being used to store property belonging to someone else; and defendant therefore could not reasonably have concluded that the outbuilding constituted part of the premises rented to him.

3. Criminal Law § 83; Marriage § 5— no common law marriage between defendant and witness—witness competent to testify

Defendant failed to establish that the woman with whom he lived and who bore his child was his common law wife pursuant to the laws of Pennsylvania, despite the fact that they lived together from 1968 and held themselves out as husband and wife, since the woman testified unequivocally that she did not marry defendant because she was not divorced from another man; therefore, G.S. 8-57, providing that the spouse of a criminal defendant is neither competent nor compellable to give evidence against the other spouse, did not preclude the woman from testifying against defendant.

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

DEFENDANT appeals from judgment of *Canaday, J.*, October 1978 Criminal Session, HARNETT Superior Court.

Defendant was tried upon a bill of indictment charging him with second degree murder.

The State offered evidence tending to show that in November, 1977, defendant was living in Sanford, North Carolina, with Margaret Alford, whom he considered to be his "common law" wife, and three children. Two of the children were born to Margaret and James Johnson, whom she had married in South Carolina. One of the children was born to Margaret and defendant during the time they lived together.

On Thanksgiving Day 1977 defendant took Margaret and the three children to visit various relatives and friends. Defendant first drove to his mother's house in Robeson County and then to his father-in-law's house. From there they went to see a friend in Fayetteville. From Fayetteville they drove to Fuquay to visit Eula Mae McArthur, known to defendant and Margaret as "Shor-

ty." Both defendant and Margaret had at one time worked tobacco with Ms. McArthur and were friendly with her.

It was dark by the time they arrived at Ms. McArthur's house. Margaret knocked and it took awhile for Shorty to answer. Finally, she came out with a butcher knife in her hand. Apparently she had been drinking. She was cursing her boyfriend Robert Mitchell and said she needed to make a telephone call. She got into defendant's car and they drove to various places until they found a telephone. After she made her telephone call, defendant drove everyone back to her house. Defendant and Shorty stayed in the car and talked. Defendant told her that "he didn't want no two dollars he wanted something else instead." Shorty gave the keys to her house to Margaret and drove off with defendant, leaving Margaret and the children behind.

Many hours later defendant returned alone. He told Margaret he had done what he wanted to do with Shorty and then shot her in the face with his shotgun. He thought she was dead. He said he had pulled her blouse up, her pants down, then dragged her into the woods and covered her up. Defendant and Margaret put Shorty's stereo and television in the car and drove home. During the trip home defendant noticed blood on the car window and wiped it up with some wine Margaret was drinking.

On 5 December 1977 Ms. McArthur's body was found near Angier in the southwest corner of a big field. The body was lying in a drainage ditch and was covered with leaves. The body was unclothed except for a blouse, a bra, a pair of panties, and a pair of socks. The blouse was pulled up around the shoulders. The brassiere had been pulled up, exposing the breasts, and the panties had been pulled down to the knees. A single shotgun wound on the right side of the face was determined to be the cause of death. Some superficial shotgun pellet injuries were found on the right shoulder.

Three spent Revelation 12-gauge shotgun shells were found at the scene of the crime. A Savage 12-gauge shotgun was found in defendant's house. A box of unfired Revelation 12-gauge shotgun shells was found in a metal outbuilding directly behind defendant's house. An expert in firearm identification and ballistics testified that, in his opinion, the spent shotgun shells

found at the scene of the crime were fired from the 12-gauge shotgun found in defendant's house.

The daughter of deceased went to her mother's home on the Saturday morning after Thanksgiving. She found the house had been ransacked and noticed her mother's television and stereo were missing. The stereo and television were later found in defendant's home.

Two of the children testified they had heard defendant tell their mother that he had shot Ms. McArthur.

Defendant testified that after Shorty made her telephone call, she asked him to pick up her boyfriend, Robert Mitchell, and bring him back to her house. Defendant drove everyone back to Ms. McArthur's house, then set off alone to pick up Robert Mitchell. Defendant was unable to find Robert Mitchell's house, returned to Shorty's house and told her he was not going to spend all night looking for Robert Mitchell. Defendant put Margaret and the children in the car and set out for home. This was the last time defendant saw deceased. On the way home defendant had car trouble. Margaret told him she still had the keys to Shorty's house. Defendant drove back to Ms. McArthur's house and found no one there. He and Margaret entered the house but did not ransack it. However, they decided to take Shorty's stereo and television. They loaded the stereo and television in the car and then left, arriving home at about eleven that night.

The jury convicted defendant of murder in the second degree, and he was sentenced to life imprisonment.

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

W. A. Johnson and Sandra L. Johnson, attorneys for defendant appellant.

HUSKINS, Justice.

[1] Defendant, an indigent, assigns as error the refusal of the trial court to appoint a private investigator for the purpose of assisting him in his defense. Defendant contends such denial of his pretrial motion for appointment of an investigator deprived him of his constitutional right to effective assistance of counsel

and violated the provisions of G.S. 7A-450(b), which requires the State to provide an indigent defendant "with counsel and the other necessary expenses of representation."

We fully considered the questions presented by this assignment in *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976); and *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). These cases hold that an indigent defendant's constitutional and statutory right to a State appointed investigator arises only upon a showing by defendant that there is a reasonable likelihood that such an investigator would discover evidence which would materially assist defendant in the preparation of his defense. Moreover, these cases conclude "that the appointment of experts to assist an indigent in his defense depends really upon the facts and circumstances of each case and lies, finally, within the discretion of the trial judge." *State v. Gray*, supra.

In the instant case defendant points to no evidence which, if properly developed by an investigator, would tend to show that someone other than defendant committed the crime. Absent such a showing, the State is not required by law to finance a fishing expedition for defendant in the vain hope that "something" will turn up. *State v. Tatum*, supra. Moreover, we note that a crucial component of State's case against defendant consisted of ballistics evidence tending to show that shells recovered at the scene of the crime were fired from a shotgun belonging to defendant. Recognizing this, the able trial judge allowed defendant's motion for appointment of a ballistics expert to aid in the preparation of his defense.

No abuse of discretion on the part of the trial judge has been shown. Accordingly, defendant's first assignment of error is overruled.

Defendant next challenges the admission of a box of shotgun shells and all testimony pertaining thereto on the ground that the shells were obtained in violation of defendant's rights under the Fourth Amendment and Chapter 15A of the General Statutes.

Defendant's motion to suppress this evidence was originally granted by the trial court. The State appealed this decision prior to trial pursuant to G.S. 15A-979(c), and the Court of Appeals

reversed the trial court's ruling, 38 N.C. App. 236, 247 S.E. 2d 634, *cert. denied*, 295 N.C. 649 (1978). At the trial of this case defendant renewed his objections to the admission of the shotgun shells and now assigns as error the admission of this evidence in his appeal of right to this Court following imposition of a life sentence. See G.S. 7A-27(a) (Cum. Supp. 1977).

The evidence adduced on voir dire tends to show that on 21 December 1977, defendant knowingly and voluntarily signed a concededly valid consent to search form which authorized SBI Agent Stewart and Deputy Sheriff Gregory to search "a one story frame residence occupied by Lee Otis Alford and Margaret (Maggie) Alford located at 1200 South Third Street, Sanford, N.C. . . . for a 12 gauge shotgun, single barrel, brown stock, dark barrel which is approximately 36″ to 40″ long."

After obtaining the above consent, Agent Stewart and Deputy Gregory drove to the Alford residence. Before searching the house, the officers had Margaret sign a consent form identical to the one signed by defendant. The search commenced and Agent Stewart quickly found a 12-gauge shotgun in a closet where defendant said it would be found. No 12-gauge shotgun shells were found in the house.

After the shotgun had been recovered, Deputy Gregory proceeded to a metal outbuilding located directly behind the frame house occupied by defendant and Margaret. During this time Agent Stewart remained inside the house engaged in conversation with Margaret.

The metal outbuilding approached by Deputy Gregory had dimensions of 30 feet by 20 feet and was located some fifty feet behind the Alford residence. The building had a double front door which was fastened shut but was not padlocked. Upon entering the building, Deputy Gregory turned directly to the left and spotted a box containing "thin tube radiations used in heating." In the corner, directly behind this box, he discovered the box of shotgun shells, the admissibility of which is now in question.

Defendant contends the warrantless search of the metal outbuilding after recovery of the shotgun was constitutionally improper because it exceeded the scope of the consent to search granted to Agent Stewart and Deputy Gregory. The State con-

tends defendant had no legitimate interest in the metal outbuilding and therefore has no standing to object to the search of the premises.

[2] "The immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed. They alone may invoke it against illegal searches and seizures." *State v. Craddock*, 272 N.C. 160, 158 S.E. 2d 25 (1967). *Accord*, 3 W. LaFave, Search and Seizure, § 11.3 (1978). Thus, before proceeding to the legality of the instant search, we must first determine whether defendant had a sufficient privacy interest in the metal outbuilding so as to confer standing to object to a search of the structure.

An individual's standing to claim the protection of the Fourth Amendment depends upon whether the place invaded was an area in which such individual "had a reasonable expectation of freedom from governmental intrusion." *Mancusi v. DeForte*, 392 U.S. 364, 20 L.Ed. 2d 1154, 88 S.Ct. 2120 (1968). Thus, the lack of property rights in an invaded area is not necessarily determinative of whether an individual's Fourth Amendment rights have been infringed. *Mancusi v. DeForte*, supra; *Jones v. United States*, 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725 (1960). Nonetheless, there are many instances in which the presence or absence of property rights in an invaded area are the best determinants of an individual's reasonable expectations of privacy. *See Brown v. United States*, 411 U.S. 223, 36 L.Ed. 2d 208, 93 S.Ct. 1565 (1973); *Alderman v. United States*, 394 U.S. 165, 22 L.Ed. 2d 176, 89 S.Ct. 961 (1969); *United States v. Hunt*, 505 F. 2d 931 (5th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972). This is especially true in the circumstances of this case, where an individual who was not present at the time the search was made objects to the search of an outbuilding located directly behind his rented home. Thus, it is generally held that "a lessee has no standing to question the search of a portion of the premises not leased to him." W. LaFave, supra, § 11.3, at 549; *Spirko v. Commonwealth*, 480 S.W. 2d 169 (Ky. 1972); *State v. Robertson*, 102 R.I. 623, 232 A. 2d 781 (1967), *cert. denied*, 390 U.S. 1036 (1968); *Commonwealth v. Boykin*, 246 Pa. Super. 154, 369 A. 2d 857 (1977).

Application of the above principles to the facts of this case leads us to conclude that defendant has no standing to object to

the search of the outbuilding. Ruby McSwain, defendant's landlady, testified that she owned a storage building behind the house she rented to defendant; that the building was used to store materials belonging to her late husband; that her son also used the building to store certain elements of a solar heating system; that she had not included the storage building in the rental agreement with defendant; that defendant had never sought permission to use the storage building for his own personal use. Mrs. McSwain's testimony was substantially corroborated by Deputy Gregory, who testified that inside the storage building "was a big quantity of insulation, thin tube radiation, pipes, pipe fitting, like it might have been a store building that some plumber had put old junk in."

The above evidence makes it clear that defendant did not have a reasonable expectation of privacy with respect to the metal outbuilding and therefore has no standing to object to the search conducted by Deputy Gregory. Defendant did not own or rent the outbuilding. Nor did he ever seek permission from Mrs. McSwain to use the building. Moreover, defendant had notice that the building was being used to store property belonging to someone else. Under these circumstances, defendant could not have reasonably concluded that the metal outbuilding constituted part of the premises rented to him. Defendant's second assignment of error is therefore overruled.

[3] With certain exceptions not applicable here, G.S. 8-57 (Cum. Supp. 1977) provides that the spouse of a criminal defendant is neither competent nor compellable to give evidence against the other spouse. Defendant contends the trial court erred in denying his motion to suppress the testimony of Margaret Alford, who was allegedly his common law wife pursuant to the laws of Pennsylvania.

Common law marriages are invalid in North Carolina. *State v. Wilson*, 121 N.C. 650, 28 S.E. 416 (1897); 1 R. Lee, North Carolina Family Law, § 9 (4th ed. 1979); Lynch, Social Security Encounters Common-Law Marriages in North Carolina, 16 N.C. L. Rev. 255, 259 (1938). Hence, the husband-wife testimonial privilege granted in G.S. 8-57 may not be asserted by a criminal defendant to disqualify a witness alleged to be his spouse by virtue of a common law marriage contracted in North Carolina.

This State, however, will recognize as valid a common law marriage "if the acts alleged to have created it took place in a state in which such a marriage is valid." 1 R. Lee, supra, § 9; *Harris v. Harris*, 257 N.C. 416, 126 S.E. 2d 83 (1962). Pennsylvania recognizes common law marriages. *In re Manfredi's Estate*, 399 Pa. 285, 159 A. 2d 697 (1960); *In re McGrath's Estate*, 319 Pa. 309, 179 A. 599 (1935). Thus, if defendant establishes that he entered into a *valid* common law marriage in Pennsylvania with Margaret Alford, she would not be "competent or compellable" under G.S. 8-57 to give evidence against him.

In Pennsylvania "[a] common law marriage is established by words in the present tense, uttered with the view and for the purpose of establishing the relation of husband and wife." *In re Estate of Gower*, 445 Pa. 554, 284 A. 2d 742 (1971). *Accord, In re Stauffer's Estate*, 372 Pa. 537, 94 A. 2d 726 (1953); *In re McGrath's Estate*, supra. It is well settled in Pennsylvania that if *more positive proof is not available*, a common law marriage may be established by sufficient " 'proof of reputation and cohabitation, declarations and conduct of the parties, and such other circumstances as usually accompany the marriage relation.' " *In re McGrath's Estate*, supra (citations omitted). However, great pains are taken in the Pennsylvania cases to emphasize that cohabitation and reputation in and of themselves do not create a marriage. *In re Manfredi's Estate*, supra, and cases there cited. Cohabitation and reputation are merely circumstances from which a marriage may be presumed and such presumption may always be rebutted and will *wholly disappear* in the face of positive proof that no marriage has in fact occurred. *In re McGrath's Estate, supra*; *In re Bisbing's Estate*, 266 Pa. 529, 109 A. 670 (1920); *Commonwealth ex rel. McDermott v. McDermott*, 236 Pa. Super. 541, 345 A. 2d 914 (1975). Accordingly, it has been repeatedly held in Pennsylvania that evidence of cohabitation and reputation is *valueless* where one of the parties to the alleged marriage establishes through his or her testimony that no valid contract of marriage was entered into. *In re Nikitka's Estate*, 346 Pa. 63, 29 A. 2d 521 (1943); *In re McDevitt's Estate*, 280 Pa. 50, 124 A. 294 (1924); *In re Bisbing's Estate, supra*; *Commonwealth v. Jones*, 224 Pa. Super. 352, 307 A. 2d 397 (1973); *Jamison v. Williams*, 164 Pa. Super. 344, 64 A. 2d 857 (1949).

At the voir dire held pursuant to defendant's motion to suppress the testimony of Margaret Alford, the following testimony was given by the woman defendant asserted was his common law wife:

> "My name is Margaret Ann Alford. I have lived with Lee Odis Alford since 1968. Prior to 1968, I had lived with another man. His name was James L. Johnson. I was married to him. I don't know when we got married, but we went to Dillon, South Carolina. We had two children. I have not obtained a divorce from James Johnson. During the time that Lee and I lived together I told him of my marriage to James Johnson. I never married Lee because I did not have a divorce.
>
> * * * *
>
> I did not marry Lee Alford because I hadn't got a divorce. While I was living with Lee Alford I did make him aware of the fact that I had been married to James Johnson. That was before we moved to Pennsylvania."

This testimony by one of the parties to the alleged marriage constitutes positive proof that defendant and Margaret never contracted a common law marriage during the time they were "living" together in Pennsylvania. *Compare, Commonwealth v. Jones, supra.* In the face of such positive proof negating marriage, the evidence that Margaret and defendant have cohabited since 1968 and have held themselves out as husband and wife since that time is utterly valueless. *In re Nikitka's Estate, supra.*

We note that at the voir dire defendant testified that wedding vows were exchanged privately between himself and Margaret *in North Carolina* shortly after they began living together. Such vows had no legal effect in this State, which doesn't recognize common law marriage, or in Pennsylvania, since the vows were made outside its boundaries. At most, the testimony that such wedding vows were exchanged in North Carolina constitutes only minimal circumstantial proof that while living together in Pennsylvania, defendant and Margaret established the relation of husband and wife. However, such circumstantial evidence, like the evidence of cohabitation and reputation, is rendered valueless in the face of Margaret's

positive assertion that she never married defendant during the time she "lived" with him in Pennsylvania.

In light of our conclusion that defendant did not contract a valid common law marriage with Margaret Alford in Pennsylvania, we need not consider the effect of Margaret's previous marriage to one James Johnson on the validity of her subsequent relationship with defendant. Nor need we discuss the presumption arising in favor of the validity of a second marriage when it appears that a person has contracted two successive marriages. *See generally, Chalmers v. Womack*, 269 N.C. 433, 152 S.E. 2d 505 (1967); *Kearney v. Thomas*, 225 N.C. 156, 33 S.E. 2d 871 (1945).

In summary, defendant has failed to establish that Margaret Alford was his common law wife pursuant to the laws of Pennsylvania. It follows therefore that G.S. 8-57 did not preclude Margaret from testifying against defendant. Accordingly, defendant's motion to suppress Margaret's testimony was properly denied by the trial court. Assignments of error three, four and five are overruled.

For the reasons stated the verdict and judgment must be upheld.

No error.

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

GEORGE HARVEY CAMPBELL, INDIVIDUALLY AND AS REPRESENTATIVE OF THE CITIZENS AND TAXPAYERS OF DURHAM, NORTH CAROLINA v. FIRST BAPTIST CHURCH OF THE CITY OF DURHAM, AN UNINCORPORATED ASSOCIATION; THE CITY OF DURHAM; THE REDEVELOPMENT COMMISSION OF THE CITY OF DURHAM; AND THE UNITED STATES OF AMERICA, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, JAMES T. LYNN, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

No. 42

(Filed 6 November 1979)

Municipal Corporations §§ 4.5, 22.3— exchange of property between redevelopment commission and church—bid or appraisal requirements

An exchange of real property between a redevelopment commission and a church constitutes a "sale" which must comply with the advertisement and bid requirements of G.S. 160A-514(d) unless the redevelopment commission elects to treat it as a "private sale" to a nonprofit association under the provisions of G.S. 160A-514(e)(4), in which case the commission must hold a public hearing and obtain a valuation of "the fair value of the property agreed upon by a committee of three professional appraisers."

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

ON discretionary review pursuant to G.S. 7A-31 to review the decision of the North Carolina Court of Appeals reported in 39 N.C. App. 117 (1978) reversing the judgment of *Brewer, J.*, entered at 13 May 1974 Session of DURHAM Superior Court.

Plaintiff, George Harvey Campbell, individually and as representative of the citizens and taxpayers of Durham, North Carolina, instituted this action seeking to set aside an exchange of real estate between the First Baptist Church and the Redevelopment Commission of the City of Durham made pursuant to the urban renewal project for the Durham Central Business District.

The pertinent facts involved in this appeal may be summarized as follows:

In March, 1972, pursuant to Redevelopment Plan NC R-26, the Redevelopment Commission acquired by condemnation a tract of land known as the Markham property. This parcel of land, bounded by Cleveland, Elliot, and Roxboro Streets, contained approximately 44,614 square feet and was valued by a jury in the condemnation proceedings to be worth $164,300.

The second tract of land involved in the exchange was a strip of land fronting on Roxboro Street and owned by the First Baptist Church. This parcel was 12 feet wide and 234 feet long and contained approximately 2,803 square feet.

On 4 February 1970, the Redevelopment Commission adopted a resolution approving the idea of an exchange of the two tracts. On 16 October 1972, the Durham City Council approved the land exchange between the Redevelopment Commission and the Church. On 7 November 1972 and 14 November 1972, respectively, the Redevelopment Commission placed two advertisements with respect to the proposed exchange in the *Durham Morning Herald*. The advertisement listed $15,614.83 as the proposed price for the Markham property and gave $17,500 as the proposed price of the Church property. The published notice further indicated that the Redevelopment Commission would pay to the Church the sum of $1,885.17, which represented the difference between the fair market values of the two tracts. Defendants admitted in their Answers that there was no advertisement for bids pursuant to G.S. 160A-514(d). It was also conceded in defendants' briefs that the provisions of G.S. 160A-514(e) were not followed. Deeds effecting the exchange were duly delivered and were recorded on 19 January 1973.

Plaintiff instituted this action on 7 February 1973 seeking to void the deeds on grounds that the exchange did not comport with the statutory requirements governing transfers of land by the Redevelopment Commission. Plaintiff also challenged the exchange on grounds that it constituted an arbitrary and capricious abuse of discretion on the part of the Commission and that it violated the Establishment Clause of the First Amendment to the United States Constitution. The United States Department of Housing and Urban Development was joined as a party defendant but did not participate in the trial or any subsequent proceeding. Trial was begun on 23 January 1974 and on 28 June 1974 final judgment was entered in the case. The trial judge found as a fact that the parties to the exchange were proceeding under G.S. 160A-514(c) and that they considered the transaction an "exchange" rather than a sale or a private sale. He determined that the transaction was in all respects lawful and that each party to the exchange held good title to the property received upon the exchange.

Plaintiff appealed and the Court of Appeals, in an opinion by Judge Hedrick with Judges Brock and Mitchell concurring, reversed the trial court and held that the purported exchange of properties was in essence a "private sale" and as such must comply with the statutory requirements of G.S. 160A-514(e)(4).

Defendants' petition for discretionary review pursuant to G.S. 7A-31 was denied by this Court on 6 March 1979. On 1 May 1979 we granted defendants' petition to reconsider our denial of the petition for discretionary review.

Blackwell M. Brogden for plaintiff appellee.

Haywood, Denny & Miller, by Egbert L. Haywood, for defendant appellant First Baptist Church of the City of Durham.

William Thornton for defendant appellant City of Durham.

Edwards & Manson, by Daniel K. Edwards, for defendant appellant Redevelopment Commission of the City of Durham.

BRANCH, Chief Justice.

The sole question presented for review in this case is whether the trial court erred in sustaining the validity of an exchange of real estate between the Redevelopment Commission of the City of Durham and the First Baptist Church of the City of Durham. The Court of Appeals reversed the trial court, holding the conveyance void from its inception due to the failure of the Commission to comply with certain procedural requirements set out in G.S. 160A-514(e) (formerly G.S. 160-464(e)).

Pursuant to Chapter 160A of the General Statutes, a redevelopment commission is empowered to "sell, exchange, transfer . . . or otherwise encumber or dispose of any real or personal property . . . ." G.S. 160A-512(6) (formerly G.S. 160-462(6)). This power is explicitly made "subject to the provisions of G.S. 160A-514."

The relevant portions of G.S. 160A-514 are as follows:

(c) A commission may sell, exchange, or otherwise transfer real property or any interest therein in a redevelopment project area to any redeveloper for residential, recreational, commercial, industrial or other uses or for public use in ac-

cordance with the redevelopment plan, subject to such covenants, conditions and restrictions as may be deemed to be in the public interest or to carry out the purposes of this Article; provided that such sale, exchange or other transfer, and any agreement relating thereto, may be made only after, or subject to, the approval of the redevelopment plan by the governing body of the municipality and after public notice and award as specified in subsection (d) below.

(d) Except as hereinafter specified, no sale of any property by the commission or agreement relating thereto shall be effected except after advertisement, bids and award as hereinafter set out. The commission shall, by public notice, by publication once a week for two consecutive weeks in a newspaper having general circulation in the municipality, invite proposals and shall make available all pertinent information to any persons interested in undertaking a purchase of property or the redevelopment of an area or any part thereof. The commission may require such bid bonds as it deems appropriate. After receipt of all bids, the sale shall be made to the highest responsible bidder. All bids may be rejected. All sales shall be subject to the approval of the governing body of the municipality. Nothing herein, however, shall prevent the sale at private sale without advertisement and bids to the municipality or other public body, or to a nonprofit association or corporation operated exclusively for educational, scientific, literary, cultural, charitable or religious purposes, of such property as is specified in subdivisions (1), (2), (3), or (4) of subsection (e) of this section, provided that such sale is in accordance with the provisions of said subdivisions. The commission may also sell personal property of a value of less than five hundred dollars ($500.00) at private sale without advertisement and bids.

(e) In carrying out a redevelopment project, the commission may:

* * *

(4) After a public hearing advertised in accordance with the provisions of G.S. 160A-513(e), and subject to the approval of the governing body of the municipality, convey to a nonprofit association or corporation

> organized and operated exclusively for educational, scientific, literary, cultural, charitable or religious purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual, such real property as, in accordance with the redevelopment plan, is to be used for the purposes of such associations or corporations. Such conveyance shall be for such consideration as may be agreed upon by the commission and the association or corporation, which shall not be less than the fair value of the property agreed upon by a committee of three professional real estate appraisers currently practicing in the State, which committee shall be appointed by the commission. All conveyances made under the authority of this subsection shall contain restrictive covenants limiting the use of property so conveyed to the purposes for which the conveyance is made.

Plaintiff in this action seeks to have the conveyance set aside because of the failure of the Commission to comply with the hearing and appraisal requirements of G.S. 160A-514(e)(4). Plaintiff maintains, and correctly so, that subsection (c) by its terms authorizes a commission to sell or exchange real estate, "provided that such *sale, exchange or other transfer* . . . may be made *only . . . after public notice and award as specified in subsection (d) below.*" (Emphasis added.)

Subsection (d) states the general rule that no sale is valid unless the statutory requirements of notice, solicitation of bids, and award are followed. The section does provide, however, that in the case of a "private sale" to a nonprofit corporation the commission need not comply with the advertisement and bid requirements but may, in the alternative, comply with the provisions of subsection (e).

Plaintiff contends that even though subsection (d) refers only to "sales," that term incorporates the term "exchanges" by virtue of the proviso of subsection (c) which requires that sales and exchanges comply with subsection (d). Plaintiff further argues that the "proviso" at the end of subsection (d) mandates compliance with the provisions of subsection (e) in any case involving a nonprofit association. He relies on the following statutory language in support of this contention:

> Nothing herein, however, shall prevent the sale at a *private sale* without advertisement and bids . . . to a *nonprofit association* . . . of such property as is specified in subdivisions (1), (2), (3), or (4) of subsection (e) of this section, provided that such sale is in accordance with the provisions of said subdivisions. (Emphasis added.)

In short, plaintiff's position is that subsection (c) authorizes exchanges so long as they meet the requirements of subsection (d) and that subsection (d) requires compliance with subsection (e) where the exchange is between the Commission and a nonprofit association.

Plaintiff argues alternatively that subsection (d) is irrelevant and that when religious organizations are involved, conveyances are governed solely by the provisions of subsection (e). Plaintiff notes that while subdivisions (1), (2), and (3) of subsection (e) refer explicitly to "private sales," subdivision (4) speaks only of "conveyances." Since the term "conveyance" also obviously encompasses an "exchange," plaintiff submits that this subdivision, standing alone, covers any exchange between a commission and a nonprofit association and mandates compliance with the procedural provisions therein.

Defendants, on the other hand, point to the language in subsection (e) which states that, "[i]n carrying out a redevelopment project, the commission *may* . . . ." They contend that the use of the word "may" renders the section non-obligatory. While conceding that they did not comply with the provisions of subsection (e), they maintain that subsection (e) is an alternative to the procedural requirements of subsection (d) and that they were free to choose not to proceed under the provisions of subsection (e) and instead to elect to exchange properties pursuant to subsections (c) and (d). Defendants submit that subsection (d) by its own terms refers only to "sales" and to "private sales" and does not mention "exchanges" of property. For this reason, they maintain that the requirements of subsection (d) are not applicable to this transaction. They urge strongly that solicitation of bids is inappropriate in cases where an exchange of specific properties is contemplated and that they have complied with the requirements of subsection (d) insofar as publication and approval by the governing board of the municipality are concerned.

The Court of Appeals held that the exchange of properties in this case "must be in compliance with all of the requirements of [subsection (e)]." We agree.

Subsection (d) states clearly that "*no sale* of any property by the commission or agreement relating thereto *shall be effected except after advertisement, bids and award* as hereinafter set out." (Emphasis added.) The proviso in subsection (c) states just as clearly that exchanges, as well as sales, must comport with the procedural requirements of subsection (d). In only two instances does subsection (d) permit a departure from the general rule requiring advertisement and bids. One of those exceptions, and the only one which concerns us here, permits a commission to engage in a private sale with a nonprofit association "without advertisement and bids . . . *provided* that such sale is in accordance with the provisions of [subsection (e)]." (Emphasis added.)

It is also pertinent to note that two subsections (a) and (b), outline certain other instances where advertisement and bids are not required. Under the doctrine of *expressio unius est exclusio alterius*, the mention of specific exceptions implies the exclusion of others. *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 43 L.Ed. 341, 19 S.Ct. 77 (1898).

In light of the specifically outlined exceptions to the general rule, coupled with the specific inclusion of "exchanges" within the proviso of subsection (c), we believe the intent of the Legislature to include exchanges within the general rule requiring advertisement and bids is clear. We are aware, as defendants argue, that requiring compliance with a bidding procedure when an exchange is contemplated is tantamount to requiring a useless act. When a commission seeks out a particular tract of land suited for a particular purpose, the solicitation of bids would be nothing more than a sham. However, as we read the statutory language, it is clear that an "exchange" is included within the provisions of subsection (d) unless the commission elects to treat it as a private sale and proceed under the provisions of subsection (e). The duty of a court is to construe a statute as it is written. It is not the duty of a court to determine whether the legislation is wise or unwise, appropriate or inappropriate, or necessary or unnecessary. *Olsen v. Nebraska*, 313 U.S. 236, 85 L.Ed. 1305, 61 S.Ct. 862 (1941).

We recognize that subsection (e) uses the term "may," and that the use of "may" generally connotes permissive or discretionary action and does not mandate or compel a particular act. *Felton v. Felton*, 213 N.C. 194, 195 S.E. 533 (1938). We also note, however, that the word "may" is used in every other subsection of G.S. 160A-514, save one. Ordinarily it is reasonable to presume that words used in one place in the statute have the same meaning in every other place in the statute. *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 79 L.Ed. 211, 55 S.Ct. 50 (1934); *Wells v. Housing Authority*, 213 N.C. 744, 197 S.E. 693 (1938). As used in the other subsections of the statute, the phrase, "the commission may" serves as the vehicle through which the legislative grant of authority is conferred. Municipal corporations are creatures of the Legislature and all of their powers are determined by the Legislature. *Starbuck v. Havelock*, 252 N.C. 176, 113 S.E. 2d 278 (1960). It is a universal rule that municipalities can exercise only those powers which are expressly or impliedly conferred. *Buffalo v. Joslyn*, 527 P. 2d 1106 (Wyo. 1974). As we read the statute, each subsection confers upon a redevelopment commission the authority to perform certain acts necessary to carry out the redevelopment project, and the use of the word "may" merely denotes that the commission is not *required* to do each and every act authorized in G.S. 160A-514. However, should a commission elect to exercise the authority conferred upon it by a particular section, then the procedural requirements "shall" be followed. *See, e.g.*, G.S. 160A-514(c). Thus, we construe the use of the word "may" in subsection (e)(4) as not being mandatory in the sense that it requires a commission to convey to a nonprofit association. Whether there shall be a conveyance is a matter in the discretion of the commission. However, once a commission decides to exercise its authority to so convey, that conveyance must be after a public hearing and "shall be for such consideration as may be agreed upon by the commission and the association or corporation, which shall not be less than the fair value of the property agreed upon by a committee of three professional real estate appraisers currently practicing in the State, which committee shall be appointed by the commission."

Our holding today is not inconsistent with the decisions of other jurisdictions faced with the question of whether the term "sale" includes an "exchange" and whether the same procedural

safeguards apply equally to both. *See, e.g., Buffalo v. Joslyn, supra.* The statute involved here and similar statutes in other jurisdictions provide safeguards designed to guard against potential abuse on the part of a municipal redevelopment commission and to reinforce the notion that such commission should proceed openly and with prudence. As noted in *Buffalo v. Joslyn, supra,* "it is important to the officials of a city and the residents thereof that any appearance of unfairness be guarded against." Compliance with the procedural guidelines serves to notify the members of the community that a disposition of public property is about to take place and "to throw a safeguard around land owned by the City in order that it might not be disposed of without due consideration." *McKinney v. Abilene,* 250 S.W. 2d 924 (Tex. Civ. App. 1952).

The primary rule of statutory construction is that the intent of the Legislature controls. *In re Hardy,* 294 N.C. 90, 240 S.E. 2d 367 (1978). The intent of the Legislature may be ascertained from the phraseology of the statute as well as the nature and purpose of the act and the consequences which would follow from a construction one way or another. *In re Hardy, supra.* A court should always construe the provisions of a statute in a manner which will tend to prevent it from being circumvented. *See State v. Lipkin,* 169 N.C. 265, 84 S.E. 340 (1915). If the rule were otherwise, the ills which prompted the statute's passage would not be redressed.

In light of what we perceive to be the overall purpose and intent of the Legislature in enacting the comprehensive procedural framework for the disposition of real property by a redevelopment commission, we hold that, in the context of G.S. 160A-514, a private "exchange" is no different from a private "sale" in terms of its nature and effect. Thus, if a commission elects not to comply with the provisions of subsection (d), it must at least comply with the applicable provisions set out in subsection (e).

The Redevelopment Commission in this case did not comply with either section of the statute. The Commission did not solicit bids as required by G.S. 160A-514(d); nor did it hold a public hearing and obtain a valuation of "the fair value of the property agreed upon by a committee of three professional appraisers" as required by subsection (e). The conveyance of the Markham prop-

erty exceeded the authority granted to the Commission by the Legislature and is therefore void *ab initio. See Bagwell v. Brevard,* 267 N.C. 604, 148 S.E. 2d 635 (1966).

The decision of the Court of Appeals is

Affirmed.

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

NORTH CAROLINA NATIONAL BANK AND ETHEL STOWE, AS TRUSTEES OF THE TRUSTS CREATED UNDER ITEMS VII & VIII OF THE WILL OF ALLISON LLOYD GOODE v. ALSON LLOYD GOODE, JR.; KATHRYN GOODE CLARK; ALSON LLOYD GOODE, III; WINSTON GLASGOW GOODE; KATHRYN KING GOODE; DAVID CLARK, JR.; ALLISON THORNE CLARK; WALTER CLARK; CAROLINE CLARK; THE UNKNOWN AND UNBORN CHILDREN OF ALSON LLOYD GOODE, JR. AND KATHRYN GOODE CLARK AND THE ISSUE OF SUCH UNKNOWN AND UNBORN CHILDREN; THE UNKNOWN AND UNBORN ISSUE OF ALSON LLOYD GOODE, III, WINSTON GLASGOW GOODE, KATHRYN KING GOODE; DAVID CLARK, JR., ALLISON THORNE CLARK, WALTER CLARK AND CAROLINE CLARK

No. 102

(Filed 6 November 1979)

1. **Wills § 38— creation of individual trusts for grandchildren—sufficiency of evidence**

Evidence was sufficient to support the trial court's conclusion that a will created seven separate trusts for the seven grandchildren of testator living at the time of his death where such evidence tended to show that (1) the language of the will itself strongly suggested separate trusts where it provided that the "share" of a deceased grandchild should retain its individual existence "in trust" for that grandchild's issue, provided that "a trust" should not be set up under certain circumstances for a grandchild born after testator's death, and referred to a beneficiary's entitlement as "his or her distribution of the principal or corpus of the trust held for him or her"; (2) the testator had consistently handled his personal and corporate financial affairs to minimize the bite of federal and state taxes, and the conclusion was therefore permissible that testator sought also to minimize the tax liability of his testamentary dispositions by providing for separate trusts for his beneficiaries, particularly in light of the fact that the tax savings resulting from such disposition would be enjoyed by the very persons testator selected as beneficiaries; and (3) the will provided that each "share" should be managed by the trustees to fit the needs of the individual beneficiary to whom the share

belonged, and the trustees, since the initial funding, had themselves managed the shares as separate and independent trusts.

2. Wills § 65— afterborn grandchildren—trust provided for in will

Where testator's will provided that no grandchild born after testator's death "shall become a beneficiary under this Will . . . and a trust shall not be set up hereunder for him or her if such grandchild shall have been born subsequent to the time when any beneficiary hereunder . . . shall have become entitled to receive . . . distribution of the principal or corpus of the trust held for him or her," the will is interpreted to modify the limitation as to afterborn grandchildren so as to exclude only those grandchildren born after testator's death *and* after the first date of entitlement to the trust corpus by any other beneficiary.

3. Wills § 44— trusts set up for grandchildren—death of grandchild—corpus distributed to issue per capita

The trial court properly concluded that provisions of testator's will directed that any property remaining in the established trust of a deceased grandchild should be held in trust for that grandchild's issue until the date of final distribution, at which time the then surviving issue of the deceased grandchild should share *per capita* in the separate trust estate.

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

APPEAL by H. Morrison Johnston, Guardian Ad Litem for Kathryn King Goode and Caroline Clark and the Unknown and Unborn Issue of Alson Lloyd Goode, III, Winston Glasgow Goode, Kathryn King Goode, David Clark, Jr., Allison Thorne Clark, Walter Clark and Caroline Clark, from a judgment entered 21 September 1978 by *Judge Grist* in the Schedule A Mixed Session of MECKLENBURG Superior Court. Petition for discretionary review under G.S. 7A-31, prior to review by the Court of Appeals, allowed 4 January 1979. This case was docketed and argued as No. 30, Spring Term, 1979.

Fleming, Robinson, Bradshaw and Hinson, by Neill G. McBryde and Peter C. Buck, Attorneys for plaintiff appellees.

H. Morrison Johnston for defendant appellants.

EXUM, Justice.

Plaintiff trustees instituted this action under our Declaratory Judgment Act, G.S. 1-253 *et seq.*, seeking a construction of the will of Allison Lloyd Goode, who died 14 August 1968. The will was written by the testator himself and was properly executed on

31 August 1965. A codicil, immaterial to this dispute, was executed 30 December 1966. The will provides in pertinent part as follows:

"ITEM VIII.

The remainder of my estate shall be held in trust for the benefit of grandchildren of mine who may be living at the time of my death, and said trust shall be administered and disbursed equally as follows:

(a) If, in the opinion of my Trustees, sickness or an emergency arises with any beneficiary, the Trustees shall advance any money the Trustees deem adequate. Any money so advanced shall be deducted from said beneficiary's share at the time of final distribution.

(b) Distribution of the estate shall be made by the Trustees at the time Caroline Clark becomes twenty-six years of age, or should she die before she becomes twenty-six, then at such time as she would have been twenty-six.

(c) If any beneficiary should die before his or her share is received by him or her, and leaving issue, then their share shall be held in trust for the issue of such beneficiary until he or she becomes twenty-one years of age, and shall be administered and disbursed in the same manner as the trust created hereunder. If the beneficiary does not leave issue, their share shall immediately be and become a part of the trust to be divided among the remaining beneficiaries, and not to any relatives whatsoever.

(d) Notwithstanding any provisions hereinbefore contained to the contrary, no grandchild of mine born after my death shall become a beneficiary under this Will, and a trust shall not be set up hereunder for him or her if such grandchild shall have been born subsequent to the time when any beneficiary hereunder, a grandchild of mine or the issue of a grandchild of mine, shall have become entitled to receive his or her distribution of the principal or corpus of the trust held for him or her; provided, however, that a distribution of the corpus or principal under the provisions of Subsection (a) of this Item VIII shall not be considered a distribution thereof under this Subsection (d).

(e) In making a distribution of income among the several beneficiaries of this my Will, the action of my Trustees in this connection shall be binding upon all the beneficiaries hereunder and shall not be subject to question by any one whether or not the distributions are equal, it being my intention that my said Trustees shall have full authority to exercise this discretion with reference to the distribution of such income, and this shall likewise apply to any distributions of principal or corpus made under the provisions of Subsection (a) of this Item VIII.

ITEM IX.

Notwithstanding any of the provisions herein contained to the contrary, I do direct that distribution of income or principal to or among the issue of my grandchildren shall be per capita and not per stirpes."

Upon distribution to plaintiffs as trustees in 1973, they divided the residuary estate into seven equal shares and managed each share as a separate "trust" for the benefit of each of the testator's seven grandchildren living at his death. During subsequent taxable years, plaintiffs filed separate federal and state tax returns for each of the individual shares. In October, 1976, the District Director of the Internal Revenue Service notified plaintiffs of proposed adjustments to federal income tax liability of the trusts for taxable years 1973 and 1974. A tax deficiency was ultimately assessed by the Service on the theory that testator's will created a single trust for multiple beneficiaries rather than seven independent trusts as plaintiffs contended.[1] Plaintiffs paid the alleged deficiency; they then filed this action for construction of the will in Mecklenburg Superior Court which came on for hearing before Judge Grist.

After reviewing the evidence and arguments of counsel, Judge Grist entered findings of fact and conclusions of law interpreting the will. His judgment provided in pertinent part that:

(1) The will of Allison Lloyd Goode created seven separate trusts for the benefit of his seven grandchildren living at his death;

1. Treating the residuary estate as a single trust corpus, the Internal Revenue Service computed the trust's income tax liability for 1973 and 1974 as $127,086.30. This amount exceeded the tax earlier paid on the separate shares by $69,575.30.

(2) The will further established additional separate trusts for any grandchildren born after the testator's death but before the date of termination of the trust and final distribution of the residuary estate (10 December 1988)[2];

(3) The trust interest of any grandchild beneficiary who predeceases the date of distribution shall continue to be held in trust for that grandchild's issue and distributed *per capita* to the grandchild's issue surviving at the time of termination of the trust or distributed equally among the remaining trusts should no such issue be then surviving.

All of these conclusions are before us for review.[3] We find no error in any of them. The judgment is affirmed.

As in any case requiring the construction of a will, we are mindful of the warning by Justice, later Chief Justice, Parker that "[p]robing the minds of persons long dead as to what they meant by words used when they walked this earth in the flesh is, at best, perilous labor." *Gatling v. Gatling*, 239 N.C. 215, 221, 79 S.E. 2d 466, 471 (1954). Nevertheless, it is our fundamental duty to give effect to a testator's intent, at least insofar as that intent does not conflict with the demands of law or public policy. *North Carolina National Bank v. Carpenter*, 280 N.C. 705, 187 S.E. 2d 5 (1972). And the intent which controls is that which is gleaned from the writing of the testament in its entirety. Every word and phrase in the instrument has its place and none ought to be rejected. Each should be given a meaning that, wherever possible, harmonizes with the other. "Every string should give its sound." *Edens v. Williams*, 7 N.C. (3 Mur.) 27, 31 (1819). But where parts conflict and lead to ambiguity, their discord must be resolved in light of the prevailing purpose of the whole. To this end we must examine the will in light of the facts and circumstances known to the testator at the time of the instrument's execution. *Worsley v.*

2. Item VIII(b) sets the time of final distribution as the date of the twenty-sixth birthday of Caroline Clark, testator's youngest grandchild living at his death. This date was stipulated by the parties as December 10, 1988, some twenty years after testator's death.

3. Judge Grist's conclusion that the will creates separate trusts is technically not disputed here, inasmuch as the briefs of both appellants and appellees argue in favor of separate trusts. However, the question of multiple trusts is the key to testator's dominant dispositive intent. Resolution of the question is necessary to the correct interpretion of other provisions of the will, the construction of which is here challenged. We thus deem the multiple trusts issue to be properly raised, albeit indirectly, by appellants' assignments that other provisions of the judgment are not supported by fact or law. App. Rule 10(a).

Worlsey, 260 N.C. 259, 132 S.E. 2d 579 (1963); *Wachovia Bank and Trust Co. v. Wolfe*, 243 N.C. 469, 91 S.E. 2d 246 (1956).

[1] Applying these principles to the will before us, we agree with Judge Grist that its particular terms and provisions, when read together, indicate a testamentary intent to establish individual trusts. Although the singular reference to a "trust" in the preamble to Item VIII may be read in isolation to suggest a single trust corpus managed for the use of all beneficiaries, subsequent language in the will strongly suggests the contrary. Item VIII(c) provides that the "share" of a deceased grandchild shall retain its individual existence "in trust" for that grandchild's issue. Item VIII(d) directs that "*a trust* shall not be set up" under certain circumstances for a grandchild born after testator's death. This same provision then refers to a beneficiary's entitlement to "his or her distribution of the principal or corpus *of the trust held for him or her.*" (Emphasis added.) These latter references weigh heavily in favor of the creation of multiple trusts. *See* Robert L. Moody Trust, 65 T.C. 932 (1976).

The multiple trusts issue is not easily resolved, however, by simply marshalling plural references in the document against singular. *See, e.g., Strauss v. van Beuren*, 378 A. 2d 1057 (R.I. 1977). On the face of the instrument, these terms simply conflict. Too laborious a search for some deep meaning "hidden" in their inconsistency may do no more than further obscure the testator's true intent, and yet it is that intent which must control. *Clark v. Conner*, 253 N.C. 515, 117 S.E. 2d 465 (1960); *Commercial Bank at Winter Park v. United States*, 450 F. 2d 330 (5th Cir. 1971). Certainly there is such an ambiguity here as to the question of multiple trusts to permit the trial court's examination of the circumstances known to the testator and attendant to his execution of the will. *See Wachovia Bank and Trust Co. v. Wolfe, supra*, 243 N.C. 469, 91 S.E. 2d 246.

From affidavits and stipulations before him, Judge Grist found as a fact that testator had consistently handled his personal and corporate financial affairs to minimize the bite of federal and state taxes. The conclusion is then permissible that testator sought also to minimize the tax liability of his testamentary dispositions. A construction of the will in favor of separate trusts would result in substantial tax savings which ultimately accrue to

the benefit of the trusts' beneficiaries, the obvious objects of the testator's bounty. That there would be such savings is alone a significant factor regarding testator's presumed dispositive intent. *Strauss v. van Beuren, supra.* That the savings would be enjoyed by the very persons testator selected as beneficiaries is of even greater significance. Absent a manifest intention to the contrary, a will should be construed to favor the natural or special objects of the testator's bounty. *Coffield v. Peele*, 246 N.C. 661, 100 S.E. 2d 45 (1957); *see, e.g., Howell v. Gentry*, 8 N.C. App. 145, 174 S.E. 2d 61 (1970). There being no clear directive in the will to swell the government's purse, the conclusion is compelling that the testator intended to establish separate trusts in this instance. As was well stated by the Supreme Court of Massachusetts:

> "It would be a rare case in which a conflict of terms or an ambiguity in a will should be resolved by attributing to the testator an intention which as a practical matter is likely to benefit the taxing authorities and no one else. . . . A testator who wishes to make a gift to his State and country can do so directly, and he should not be presumed to have intended such a gift by indirect means." *Putnam v. Putnam*, 366 Mass. 261, 271, 316 N.E. 2d 729, 737 (1974). (Citations omitted.)

Still other considerations support the conclusion that testator intended separate trusts. The provisions of Item VIII in general contemplate that each "share" will be managed by the trustees to fit the needs of the individual beneficiary to whom the share belongs. Item VIII(a) empowers the trustees to advance to a beneficiary money from his or her share in case of sickness or other emergency. Such advancements are to be deducted from the beneficiary's share at final distribution. Treating each of these shares as a separate trust allows the trustees greater flexibility in the adoption of management and investment policies specifically geared to the individual requirements of each beneficiary.[4] *See Strauss v. van Beuren, supra*, 378 A. 2d at 1059; *Lynchburg Trust and Savings Bank v. Commissioner*, 68 F. 2d 356, 360-61 (4th Cir. 1934), *cert. denied*, 292 U.S. 640. Furthermore, since the initial funding the trustees have themselves managed the shares as

4. Whether the assets of the several shares are in fact physically separated and independently invested is immaterial to the existence of separate trusts. An undivided interest in a larger corpus may constitute the *res* of a separate trust. *United States Trust Co. v. Commissioner*, 296 U.S. 481, 486-87 (1936). What is important is that the trustees have the legal capacity to manage the shares as separate trusts where needed.

separate and independent trusts. While not controlling, the interpretation of a trust instrument by the trust's appointed managers is entitled to some weight. *See Davison v. Duke University*, 282 N.C. 676, 714, 194 S.E. 2d 761, 784 (1973); Frank C. Rand Trust, 19 T.C.M. (CCH) 1205, 1214 (1960).

In sum, we find ample support for the trial court's conclusion that the will created seven separate trusts for the seven grandchildren of Allison Lloyd Goode living at the time of his death.

[2] Judge Grist also concluded that the will establishes a separate trust for any grandchild of the testator born after the testator's death but before the 10 December 1988 date of distribution of the several trusts. The will itself is ambiguous on this point. It is not at all clear, as appellant contends, that the preamble to Item VIII of the will definitely restricts the operation of the trusts for the benefit only of grandchildren living at testator's death. It is true that the first part of paragraph VIII(d) directs that no grandchild born after the testator's death "shall become a beneficiary under this Will." The latter part of the very same sentence, however, continues the limitation as follows,

> "and a trust shall not be set up hereunder for him or her *if such granchild shall have been born subsequent to the time when any beneficiary hereunder . . . shall have become entitled to receive . . . distribution of the principal or corpus of the trust held for him or her*." (Emphasis added.)

If this quoted portion of the will is to be given any effect at all, it must be read to modify the limitation as to after-born grandchildren so as to exclude only those grandchildren born after the testator's death *and* after the first date of entitlement of the trust corpus by any other beneficiary. The trial court so held, and we agree. Such a construction is the only interpretation possible which can give effect to every word in VIII(d) while preserving intact the testator's general intent to establish separate trusts for the benefit of his grandchildren and their issue.[5]

[3] Construing Items VIII(c) and IX of the will, Judge Grist concluded that these provisions direct that any property remaining

5. That the individual shares of the present grandchildren might be diminished in order to establish new shares for after-born grandchildren does not make the several shares so inter-dependent as to negate their treatment as individual trusts. *See Commercial Bank at Winter Park v. United States, supra*, 450 F. 2d 330; Frank C. Rand Trust, *supra*, 19 T.C.M. (CCH) 1205.

in the established trust of a deceased grandchild shall continue to be held in trust for that grandchild's issue until the date of final distribution, at which time the then surviving issue of the deceased grandchild shall share *per capita* in the separate trust estate. If any such issue who would take under this provision shall be under twenty-one years of age at the 10 December 1988 distribution date, the *per capita* interest of that issue shall continue in trust until he or she reaches age twenty-one, or shall be distributed to his or her estate in the event of death before age twenty-one. We find that this interpretation substantially accords with the express language of the will. Item VIII(c) specifically provides that the "share" of a beneficiary who predeceases the distribution date "shall be held in trust for the issue of such beneficiary until he or she becomes twenty-one years of age." Item IX expressly directs that distribution of the trust proceeds "to or among the issue of my grandchildren shall be per capita and not per stirpes." Judge Grist's construction of *per capita* distribution is in accordance with the language in the will, with the testator's intent as evidenced in the will, and with the requirements of state law.[6]

For the reasons stated above, the judgment appealed from must be affirmed.

Affirmed.

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

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6. *As construed* by the trial court, Item VIII(c) of the will guarantees that all possible interests in the various trusts become certain and vested no later than the distribution date twenty years after the testator's death. December 10, 1988, triggers both the distribution of the various trusts' assets to the grandchildren then surviving and the per capita distribution of a trust corpus previously held for a deceased grandchild (including a grandchild born after testator's death but deceased before distribution) to that grandchild's issue then surviving. Enjoyment only is postponed as to the interest of such issue who is under twenty-one at the time of distribution. By using the date of distribution to vest all interests and close all subclasses composed of issues of deceased grandchildren, the trial court's construction of VIII(c) avoids any invalidity under the Rule Against Perpetuities. Such a construction is always preferred. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 377, 128 S.E. 2d 867, 872 (1963); *see also Clarke v. Clarke*, 253 N.C. 156, 116 S.E. 2d 449 (1960); *see generally* Link, The Rule Against Perpetuities in North Carolina, 57 N.C. L. Rev. 727 (1979).

JAMES N. KINLAW v. LONG MFG. N.C., INC.

No. 33

(Filed 6 November 1979)

Sales § 8; Uniform Commercial Code § 8— express warranty of farm tractor—action against manufacturer for breach—privity not required

Privity in the sale of goods is not necessary to a purchaser's action on an express warranty relating to the goods which is directed by its terms to the purchaser. Therefore, an action by the purchaser of a farm tractor against the manufacturer to recover for breach of an express warranty contained in the owner's manual is not barred by the absence of contractual privity between the parties in the sale of the tractor.

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

PLAINTIFF appeals pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals affirming the dismissal of his claim pursuant to G.S. 1A-1, Rule 12(b)(6) by *Judge Herring* on 14 March 1978 in BLADEN Superior Court. The decision below is reported at 40 N.C. App. 641, 253 S.E. 2d 629 (1979).

R. C. Soles, Jr., Attorney for plaintiff appellant.

Hester, Hester and Johnson, by Worth H. Hester, and Biggs, Meadows, Batts, Etheridge and Winberry, by William D. Etheridge and Auley M. Crouch III, Attorneys for defendant appellee.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, and James C. Gulick, Associate Attorney, for the state, amicus curiae.

EXUM, Justice.

This is an action to recover damages allegedly incurred by plaintiff-purchaser as a result of defendant-manufacturer's breach of an express warranty of a tractor. The sole question presented is whether the absence of contractual privity between the parties in the sale of the tractor bars the claim. We hold that it does not.

Plaintiff alleges that in November, 1975, he purchased a new farm tractor and attachments from Sessions Farm Machinery, Inc., an authorized dealer of defendant-manufacturer. An owner's manual issued by defendant and delivered to plaintiff with the

new tractor expressly warranted to the new owner that each tractor sold by defendant's authorized dealers would be free from defects in material and workmanship.[1] Plaintiff alleges that the tractor began "breaking down" when put to farm use immediately after delivery; that various parts of the tractor were defective, inoperative, or missing; that the defective parts were duly returned to defendant's Tarboro factory for repairs or replacement; and that defendant failed or refused to repair or replace the parts. Plaintiff prays for $100,000 damages allegedly attributable to various economic losses occasioned by breach of the warranty. Defendant filed answer setting up various defenses including a so-called "disclaimer" contained in the warranty and incorporated in the complaint.[2] Simultaneously he moved to dismiss for failure of the complaint to state a claim upon which relief could be granted. The motion was grounded entirely upon the complaint's failure "to allege facts to establish privity of contract between the plaintiff and the defendant manufacturer." The trial court allowed the motion on this ground alone.[3] The Court of Appeals affirmed, Judge Parker dissenting. We reverse.

For the purposes of this appeal the parties have stipulated that "There was not privity of contract between the plaintiff and defendant." A majority of the Court of Appeals agreed with the trial court that the absence of privity barred the claim. Finding

1. The warranty attached to and incorporated in the complaint provides in part:

"Long Mfg. N.C. Inc., warrants that . . . each new farm or agricultural tractor sold by it and its authorized dealers will be free from defects in material and workmanship under normal use and service for a period of one year or one thousand (1,000) hours of operation; whichever occurs first from date of purchase. Long's obligation under this warranty is limited to repairing or replacing at its option in an authorized Long Tractor Dealer's place of business any part or parts that, which within the applicable period previously stated, are returned to its factory in Tarboro, North Carolina, or one of its distributing branches . . . ."

2. The disclaimer provides:

IMPORTANT

The obligation of Long set forth in the first paragraph above shall be the exclusive remedy for any breach of warranty hereunder, in no event shall Long be liable for any general, consequential, or incidental damages, including without limitations, any damages for loss of use or loss of profits.

3. A complaint may be dismissed under Rule 12(b)(6) if 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. Lack of merit may consist in an absence of law to support the type of claim made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). We deal here only with the failure of the complaint to allege privity. The effect of the disclaimer on plaintiff's claim is not presently before the Court inasmuch as defendant's motion to dismiss, the order of the trial court allowing the motion, the decision of the Court of Appeals and defendant's brief are all grounded solely on the privity question. We express no opinion as to the sufficiency of other aspects of the complaint or as to whether the warranty here sued upon, the terms of which are disclosed in the complaint, permits the recovery of damages to the extent sought by the plaintiff.

the requirement of privity in warranty actions such as this one too well established in the decisions of this Court to be ignored or overruled, the Court of Appeals concluded that "our law requires that only a person in privity with the warrantor may recover on the warranty for mechanical devices." We disagree. We find reason and authority to support our holding that privity in the sale of goods is not necessary to a purchaser's action on an express warranty relating to the goods.

The oft-cited general principle of the privity requirement is given in *Service Co. v. Sales Co.*, 261 N.C. 660, 668, 136 S.E. 2d 56, 62 (1964), as follows:

> "A warranty is an element in a contract of sale and, whether express or implied, is contractual in nature. Only a person in privity with the warrantor may recover on the warranty; the warranty extends only to the parties to the contract of sale. *Murray v. Aircraft Corp.*, 259 N.C. 638, 131 S.E. 2d 367; *Prince v. Smith*, 254 N.C. 768, 119 S.E. 2d 923; *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21."

The apparent simplicity of this principle belies its difficult history.

Although warranty's more recent guise is contract, its heritage began in tort. Aggrieved purchasers of an earlier age were afforded relief through an action on the case in the nature of deceit, a forerunner of the modern tort of misrepresentation. Toward the latter part of the 18th Century pleading procedures wedded the action with that of *assumpsit*, producing the "curious hybrid" of warranty, "born of the illicit intercourse of tort and contract, unique in the law." Prosser, Handbook of the Law of Torts, p. 634 (4th Ed. 1971). *See also Terry v. Bottling Co.*, 263 N.C. 1, 9, 138 S.E. 2d 753, 758 (1964) (Sharp, J., later C.J., concurring); Ames, The History of Assumpsit, 2 Harv. L. Rev. 1 (1888). That a buyer of a defective product had a cause of action "*quasi ex contractu*," and could choose between a suit on a contract of warranty or a declaration in tort for a false warranty, was well recognized in our earlier cases. *See, e.g., Ashe v. Gray*, 88 N.C. 190 (1883); *Bullinger v. Marshall*, 70 N.C. 520 (1874); *Scott v. Brown*, 48 N.C. (3 Jones) 541 (1856).

Privity is a child of contract law, delivered by the courts to limit the responsibilities of contracting parties to those persons consensually involved in the primary transaction. It was originally felt that without such a limitation on liability, "the most absurd and outrageous consequences" would ensue in litigation caused by a flood of spurious claims. *Winterbottom v. Wright*, 10 M&W 109, 114, 152 Eng. Rep. 402, 405 (Exch. 1842). The *Winterbottom* rationale is justified in warranty cases, however, only to the extent that the warranty sued on is inherently an element of a true contract. Regarding the tort aspects of a false warranty claim, the rule of privity has itself produced absurd consequences and has no real application. Courts have long struggled to contrive ingenious "exceptions" to avoid unjust results in particular cases. *See* Gillam, Products Liability in a Nutshell, 37 Ore. L. Rev. 119, 153-155 (1958). In many states today these exceptions have so swallowed the rule as to lead to the total abandonment, whether by judicial fiat or legislative decree, of the privity requirement in warranty actions.[4] The erosion of the doctrine is by now familiar and well documented history. *See* Frumer and Friedman, Products Liability § 16.03 (1979); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966); Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

Our jurisdiction's allegiance to the principle of privity has, at best, wavered. After holding that an absence of a contractual relationship between the parties precluded a personally injured purchaser from maintaining an action on *implied* warranty against a remote manufacturer, *Thomason v. Ballard and Ballard Co.*, 208

4. Numerous statutes have abolished the privity defense to actions on express or implied warranty brought by a consumer or foreseeable user of the warranted goods. *See, e.g.*, Ark. Stat. Ann. § 85-2-318.1 (Supp. 1979); Colo. Rev. Stat. § 4-2-318 (1973); Me. Rev. Stat. 11, § 2-318, *as amended* 1969 (Supp. 1978-79); Mass. Ann. Laws ch. 106, § 2-318, *as amended* 1971 (Supp. 1979); N.H. Rev. Stat. Ann. § 382-A:2-318, *as amended* 1973 (Supp. 1977); S.C. Code § 36:2-318 (1976); Tenn. Code Ann. § 23-3004 (Supp. 1977). The same result appears to have been accomplished by case law in many other jurisdictions. *See, e.g., Morrow v. New Moon Homes, Inc.*, 548 P. 2d 279 (Ala. 1976) (privity defense abolished in implied warranty; tenor of the case suggests same result probable as to express warranty); *Rhodes Pharmacal Co. v. Continental Can Co.*, 72 Ill. App. 2d 362, 219 N.E. 2d 726 (1966) (no privity required under a third party beneficairy theory); *Dailey v. Holiday Distributing Corp.*, 260 Iowa 859, 151 N.W. 2d 477 (1967); *Scheuler v. Aamco Transmissions, Inc.*, 1 Kan. App. 2d 525, 571 P. 2d 48 (1977) (express warranty); *Evangelist v. Bellern Research Corp.*, 199 Kan. 638, 433 P. 2d 380 (1967) (implied warranty); *Media Productions Consultant, Inc. v. Mercedes Benz of N.A., Inc.*, 262 La. 80, 262 So. 2d 377 (1972); *Spence v. Three Rivers Builders and Supply, Inc.*, 353 Mich. 120, 90 N.W. 2d 873 (1958); *Beck v. Spindler*, 256 Minn. 543, 99 N.W. 2d 670 (1959) (implied warranty); *Milbank Mutual Insurance Co. v. Proksch*, 309 Minn. 106, 244 N.W. 2d 105 (1976) (express warranty); *Whitaker v. Farmhand, Inc.*, 567 P. 2d 916 (Mont. 1976); *Hiles v. Johnston Pump Co. of Pasadena*, 560 P. 2d 154 (Nev. 1977); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A. 2d 69 (1960); *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132, 209 N.E. 2d 583 (1965) (express warranty); *Iacono v. Anderson Concrete Corp.*, 42 Ohio St. 2d 88, 326 N.E. 2d 267 (1975) (implied warranty); *Kassab v. Central Soya*, 432 Pa. 217, 246 A. 2d 848 (1968); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W. 2d 77 (Texas 1977) (implied warranty, but broad language suggests same for express warranty).

N.C. 1, 179 S.E. 30 (1935), this Court in *Simpson v. Oil Co.*, 217 N.C. 542, 8 S.E. 2d 813 (1940), held that *express* assurances addressed by the manufacturer to the purchaser could give rise to a warranty claim against the manufacturer notwithstanding lack of privity. The express warranty in *Simpson* derived from the manufacturer's statement on a label on a can of spray insecticide that the product was nonpoisonous to humans. The plaintiff purchaser in that case suffered severe reactions when the spray came into contact with her skin. We held that the original manufacturer had warranted his product in such a way as to make a breach of that warranty actionable:

> "Here we have written assurances that were obviously intended by the manufacturer and distributor of Amox for the ultimate consumer, since they are intermingled with instructions as to the use of the product; and the defendant was so anxious that they should reach the eye of the consumer that it had them printed upon the package in which the product was distributed. The assurances that the product as used in a spray was harmless to human beings while deadly to insects was an attractive inducement to the purchaser for consumption, and such purchase in large quantities was advantageous to the manufacturer. We know of no reason why the original manufacturer and distributor should not, for his own benefit and that, of course, of the ultimate consumer, make such assurances, nor why they should not be relied upon in good faith, nor why they should not constitute a warranty on the part of the original seller and distributor running with the product into the hands of the consumer, for whom it was intended. Upon the evidence in this case, it must be so regarded." 217 N.C. at 546, 8 S.E. 2d at 815-816.

Dicta in subsequent cases recognized the validity of the *Simpson* approach to express warranty cases. In *Wyatt v. Equipment Co.*, 253 N.C. 355, 359, 117 S.E. 2d 21, 24 (1960), the Court said: "Absent privity of contract, there can be no recovery for breach of warrant *except in those cases where the warranty is addressed to an ultimate consumer or user.*" (Emphasis added.) Again in *Prince v. Smith*, 254 N.C. 768, 770, 119 S.E. 2d 923, 925 (1961) the Court noted that the manufacturer "may attach to the product a warranty to the ultimate consumer." Later, *Murray v. Aircraft Corp.*, 259 N.C. 638, 131 S.E. 2d 367 (1963), and *Brendle*

v. General Tire and Rubber Co., 304 F. Supp. 1262 (M.D.N.C. 1969), *aff'd* 505 F. 2d 243 (4th Cir. 1974), both quoted the *Wyatt* restatement of the *Simpson* rule.

The rationale of *Simpson* was diluted in *Service Co. v. Sales Co., supra*, 261 N.C. 660, 668, 136 S.E. 2d 56, 62-63 (1964) where the Court said:

> "There is an exception to [the requirement of privity] where the warranty is addressed to the ultimate consumer, and this exception has been limited to cases involving sales of goods, *intended for human consumption, in sealed packages* prepared by the manufacturer and having labels with representations to consumers inscribed thereon." (Emphasis added.)

Service Co.'s limitation of *Simpson* was quoted with approval in the majority opinion in *Terry v. Bottling Co., supra*, 263 N.C. 1, 138 S.E. 2d 753 (1964).[5] The limitation was later rendered somewhat more accurately by the Court of Appeals in *Byrd v. Star Rubber Co.*, 11 N.C. App. 297, 300, 181 S.E. 2d 227, 228 (1971):

> "It is true that there has been some slight erosion in this State of the privity requirement in breach of warranty actions. This has been limited to food and drink *and insecticides* in sealed containers which had warnings on the label which reached the ultimate consumer." (Emphasis added.)

The thrust of *Simpson* is, nevertheless, that a manufacturer can extend a warranty beyond the bounds of privity if he makes representations designed to induce a purchase and directed to the ultimate purchaser. Cases since *Service Co.* have continued to develop the *Simpson* doctrine that a manufacturer's courting of the purchaser may serve as a vehicle for warranty liability. In *Tedder v. Bottling Co.*, 270 N.C. 301, 154 S.E. 2d 337 (1967), this Court allowed a plaintiff allegedly injured by a contaminated soft drink to maintain an implied warranty action against the manufacturer.[6] The Court held there, *id.* at 305-06, 154 S.E. 2d at 340:

5. Justice, later Chief Justice, Sharp's concurrence in *Terry* yet recognized that *Simpson* stood for the principle that "North Carolina holds a manufacturer to his express warranty on the label without privity." 263 N.C. at 11, 138 S.E. 2d at 759.

6. A *Tedder* type claim is now authorized by statute. Effective October 1, 1979, new G.S. 99B-2(b) provides that a "product liability action" for breach of implied warranty may be brought directly against the manufacturer despite the lack of contractual privity. G.S. 99B-1(1) defines a product liability action to include:

". . . the bottler, by advertising and sales promotions addressed to the consumer, induced her to 'Come Alive' and that she was 'in the Pepsi Generation.' The advertising was intended to promote the use by the consumer to whom the advertising was addressed. The evidence in this case was sufficient to go to the jury on the theory of implied warranty resulting from the manner in which the Pepsi-Cola was advertised and traveled from the bottler to the plaintiff."

Similarly, in *Corprew v. Geigy Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98 (1967), this Court held that a complaint alleging the purchaser's detrimental reliance on directions for use printed on a bag of weed killer stated a claim against the manufacturer based upon breach of express warranty. More recently, our Court of Appeals has recognized that a relaxation of the privity requirement may obtain where advertising to the ultimate purchaser establishes an express warranty running from the manufacturer. *Fowler v. General Electric Co.*, 40 N.C. App. 301, 305, 252 S.E. 2d 862, 864 (1979); *McKinney Drilling Co. v. Nello Teer Co.*, 38 N.C. App. 472, 475-76, 248 S.E. 2d 444, 446 (1978); *Williams v. General Motors Corp.*, 19 N.C. App. 337, 340, 198 S.E. 2d 766, 768, *cert. denied*, 284 N.C. 258, 200 S.E. 2d 659 (1973). Our holding today simply reaffirms the vitality of *Simpson.*

Authority from most other jurisdictions holds that a purchaser who relies upon[7] a manufacturer's representations can recover for breach of an express warranty despite lack of privity.[8] The privity bound procedure whereby the purchaser claims against the retailer, the retailer against the distributor, and the

". . . any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling of any product."

Whether the act allows for the recovery of purely economic losses is a question that may require future resolution. *Cf. Gasque v. Eagle Machinery Co.*, 270 S.C. 499, 243 S.E. 2d 831 (1978), construing a similar statute to allow for recovery of both direct and consequential economic losses.

7. The element of reliance need not always be expressly alleged. It can often be inferred from allegations of mere purchase or use if the natural tendency of the representations made is such as to induce such purchase or use. *See, e.g.*, Official Comment 3 to G.S. 25-2-313; Comment, Article Two Warranties in Commercial Transactions, 64 Cornell L. Rev. 30, 51-54 (1978); *cf. Hawkins Construction Co. v. Matthews Co. Inc.*, 190 Neb. 546, 564-66, 209 N.W. 2d 643, 654-55 (1973), holding that distribution of an advertising brochure with express representations about the product sufficed for a finding of express warranty.

8. In addition to the statutes and cases cited *supra*, footnote 4, *see, e.g.*, *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P. 2d 145 (1965); *Hawkins Construction Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W. 2d 643 (1973); *Randy Knitwear v. American Cyanamid Co.*, 11 N.Y. 2d 5, 226 N.Y.S. 2d 363, 181 N.E. 2d 399 (1962). *See also* Frumer and Friedman, Products Liability § 16.04[4][a] (1979) and cases cited therein.

distributor, in turn, against the manufacturer, *see Tedder v. Bottling Co., supra,* 270 N.C. at 305, 154 S.E. 2d at 339, is unnecessarily expensive and wasteful. We find no reason to inflict this drain on the court's time and the litigants' resources when there is an express warranty directed by its terms to none other than the plaintiff purchaser. We agree with the Supreme Court of Ohio:

> "The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to regroup his loss . . . . Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious." *Rogers v. Toni Home Permanent Co.,* 167 Ohio St. 244, 248-49, 147 N.E. 2d 612, 615-616 (1958). (Citations omitted.)

Plaintiff's posture here is stronger than that of the purchaser whose tastes are shaped by inducements of mass media advertising, *Tedder v. Bottling Co., supra,* 270 N.C. 301, 154 S.E. 2d 337, or whose expectations arise in response to assurances on the product's label, *Corprew v. Geigy Chemical Corp., supra,* 271 N.C. 485, 157 S.E. 2d 98. Plaintiff here purchased both goods and a promise. He bought a new tractor, the performance of which was expressly guaranteed within the limits and upon the terms specified in the warranty contained in the owner's manual. Plaintiff could reasonably expect the author of the warranty to stand by its promise. He may base a claim upon its alleged breach. We find no "sensible or sound reason" requiring us to hold otherwise.

Plaintiff has alleged an express warranty running directly to him, breach of that warranty, and damages caused by the breach.

The absence of an allegation of privity between plaintiff and the warrantor in the sale of the warranted item is not fatal to the claim. The case must, therefore, be reversed and remanded to the trial court for further proceedings.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. RICKY DAN PERRY

No. 1

(Filed 6 November 1979)

1. **Criminal Law § 89.3— admissibility of prior consistent statements**

Prior consistent statements of a witness in North Carolina are admissible as corroborative evidence even when the witness has not been impeached, and failure of the trial court to instruct that the evidence was admitted for corroborative purposes only is not reversible error when the defendant has not requested such a limiting instruction.

2. **Criminal Law § 75.7— statements while in officer's car—no custodial interrogation**

Inculpatory statements made by defendant to a detective while defendant was in the detective's automobile did not result from custodial interrogation and were admissible in defendant's murder and rape trial though defendant had not been given the *Miranda* warnings where the police were investigating a routine missing person report; defendant was visited by one plain-clothes detective in an unmarked car at defendant's place of work; the police did not know a crime had been committed; defendant voluntarily entered the car and immediately gave an inculpatory statement; at that point, the detective ceased all questioning and took defendant to the station where he was given the *Miranda* warnings; and defendant was allowed to leave after posting bond on an unrelated charge, since at no point until defendant made his inculpatory statement would a reasonable person have believed that his freedom of movement was restrained in any significant way so that he was "in custody."

3. **Criminal Law § 68; Rape § 4— comparison of hairs—expert testimony—probative value**

Testimony by an FBI agent certified as an expert in the field of microscopic analysis of human hair that hairs found on a rape and murder victim's sweater were blond head hairs from a Caucasian which had microscopic characteristics similar to head hairs taken from defendant was not rendered inadmissible as having no probative value by the agent's testimony on cross-

examination that, although the hairs were similar, the number of characteristics they shared was "limited," when such testimony is considered with other evidence linking defendant with the crimes, including evidence which placed defendant in the victim's presence at the time she disappeared, evidence that defendant's gun was the murder weapon, and evidence that someone with defendant's blood type raped the victim.

4. Rape § 3— indictment—insufficiency to charge first degree rape

An indictment was insufficient to charge first degree rape where it failed to allege that defendant was older than sixteen or that the defendant used a deadly weapon or inflicted serious bodily injury; however, the indictment was sufficient to support a conviction of second degree rape.

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

DEFENDANT appeals from judgment of *Lee, Judge*, entered at 31 May 1977 Session of DURHAM County Superior Court.

Defendant was indicted in Durham County for first degree murder, first degree rape, kidnapping and crime against nature in April, 1977.

At trial, State's evidence tended to show that Nana Louise Smith, a 24-year-old married college student, was last seen alive about 5:00 p.m. on Thursday, 10 March 1977, in the vicinity of South Alston Avenue near Hopson Road in Durham County. Her car had broken down and two boys, aged 10 and 13, had ridden their bikes over to see if they could help. They introduced Mrs. Smith to defendant, a gas station attendant they both knew, when he stopped several minutes later. The boys testified that defendant offered to give Mrs. Smith a ride to a phone or to a gas station. After Mrs. Smith got into the car, the boys saw defendant's car go up Alston Avenue then return some 15 minutes later going the opposite direction toward Hopson Road with Mrs. Smith still inside. Over objection, the State introduced prior written statements the boys had made to the police.

When Mrs. Smith failed to return home that evening, her husband went searching for her and found only the car with emergency lights flashing. He reported her missing.

A. W. Clayton, a detective for the Durham County Sheriff's Department, testified that he investigated the missing person report filed on Mrs. Smith. The day after Mrs. Smith's disappearance, Detective Clayton queried one of the two boys and

learned that the defendant had given her a ride in his car. Detective Clayton went to the gas station where defendant worked and asked defendant if he would sit inside the detective's car to talk. The car was unmarked and Detective Clayton was not wearing a uniform.

Defendant voluntarily entered the car, sat in the front passenger seat and closed the door. On *voir dire* examination, Officer Clayton testified that at the time he went to see defendant he did not know a crime had been committed and did not consider defendant a suspect of anything. He did not, therefore, give defendant any *Miranda* warnings.

While in the car, defendant denied ever having seen Mrs. Smith or ever having given her a ride the day before. Becoming suspicious at this denial, Detective Clayton took defendant to the Durham County Sheriff's Office where a routine "safety" frisk of defendant revealed a loaded .22 caliber pistol. Detective Clayton arrested defendant for carrying a concealed weapon and read him his *Miranda* warnings. After signing a waiver, defendant first maintained that he had never seen Mrs. Smith, then said he had given her a lift to a phone booth outside a local grill but had left her there.

Defendant was released on $100.00 bond for the concealed weapon charge and his gun was confiscated. The following day, Mrs. Smith's body was found in a wooded area off Hopson Road. She had been raped and shot four times, twice in the head and twice in the back with a small caliber pistol. Either wound to the head or one of the wounds to the back would have been fatal. There were sperm present in her mouth.

Bullets recovered from Mrs. Smith's chest cavity had been fired from the pistol confiscated from defendant. Sperm present in Mrs. Smith's body was from a blood type O-secretor. Neither Mrs. Smith nor her husband had that blood type; defendant did.

Over objection, the State presented the testimony of an F.B.I. agent that a hair recovered from Mrs. Smith's sweater came from a Caucasian and was similar in its characteristics to a hair sample taken from the defendant.

The State further produced the testimony of a fellow prisoner of the defendant's who testified that the defendant had admitted, while in jail, raping and shooting Mrs. Smith.

Defendant presented testimony of a friend that he had been at the friend's house from 4:30 p.m. until shortly before 5:00 p.m. on the day of Mrs. Smith's disappearance.

The jury returned with verdicts of guilty of first degree murder, first degree rape, kidnapping and crime against nature. Defendant was sentenced to two consecutive life terms for murder and rape and a 30-year term for kidnapping. A 10-year sentence for crime against nature was imposed to run concurrently with the 30-year term for kidnapping.

Time for appeal of right pursuant to G.S. 7A-27(a) having lapsed, this Court granted defendant's petition for certiorari on the judgments imposing life sentences. On 9 May 1979, we also allowed defendant's motion to bypass the Court of Appeals from the sentences imposed for kidnapping and crime against nature.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Dennis P. Myers for the State.

John G. McCormick for defendant appellant.

CARLTON, Justice.

Defendant presents four arguments on this appeal. We find one of his assertions has merit and remand for sentencing.

[1] Defendant first asserts that it was prejudicial error for the trial judge to admit the prior written statements of the two boys since their credibility had not been impeached. This is particularly prejudicial, he argues, when no instructions were given to the jury limiting the use of those statements to corroboration of their in-court testimony. Defendant conceded on oral argument that the boys' written statements were substantially the same as their in-court testimony.

Unlike the law in many other states, prior consistent statements of a witness in North Carolina are admissible as corroborative evidence even when that witness has not been impeached. *State v. Best*, 280 N.C. 413, 419, 186 S.E. 2d 1 (1972); *State v. Rose*, 270 N.C. 406, 154 S.E. 2d 492 (1967). Failure of a

trial court to instruct that the evidence was admitted for corroborative purposes only is not reversible error when the defendant has not requested such a limiting instruction. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745, *cert. denied*, 410 U.S. 987, 93 S.Ct. 1516, 36 L.Ed. 2d 184 (1973), and cases cited therein. Here, defendant's counsel objected generally to the admissibility of the statements but failed to request a limiting instruction. This assignment of error is overruled.

[2] Defendant secondly asserts that the trial judge erred in failing to suppress defendant's inculpatory statements made to Detective A. W. Clayton while defendant was in the detective's automobile. Defendant argues that this questioning amounted to a custodial interrogation which was conducted without warning him of his right to remain silent or his right to counsel in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

At trial, the judge held a lengthy *voir dire* hearing on the admissibility of defendant's statements. At the conclusion of the hearing he found as a fact that, *inter alia*, the police were not aware a crime had been committed when they first questioned defendant. The trial court then concluded that defendant had not been subjected to *custodial* interrogation.

It is well established that statements obtained as a result of custodial interrogation without the *Miranda* warnings are inadmissible. *Miranda v. Arizona, supra*; *State v. Biggs*, 292 N.C. 328, 233 S.E. 2d 512 (1977); 2 Stansbury N.C. Evidence § 184 at 72 (Brandis rev. ed. 1973) and cases cited therein. Such warnings are not required, however, when questioning occurs while defendant is not in custody. *Miranda v. Arizona, supra*; *State v. Biggs, supra*; *State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974). The articulated test for custodial interrogations is whether questioning was "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, supra* at 444, 86 S.Ct. at 1612, 16 L.Ed. 2d at 706; *Oregon v. Mathiason*, 429 U.S. 492, 494, 97 S.Ct. 711, 713, 50 L.Ed. 2d 714, 719 (1977) (per curiam); *State v. Martin*, 294 N.C. 702, 707, 242 S.E. 2d 762, 765 (1978).

Courts have grappled with the question whether this test should be objectively applied and involve determining whether a

reasonable person would believe under the circumstances that he was free to leave, or whether it should be subjectively applied and involve determining whether the defendant believed, even unreasonably, that his freedom of movement was significantly restricted. *See* Note: Custodial Interrogation after *Oregon v. Mathiason*, 1978 Duke L. J. 1497 (1979). Most have adopted an objective test, focusing in their determination on "something . . . said or done by authorities, either in their manner of approach or tone or extent of questionings, which indicates that they would not have heeded a request to depart or to allow the suspect to do so." *U.S. v. Hall*, 421 F. 2d 540 (2d Cir. 1969), *cert. denied*, 397 U.S. 990, 90 S.Ct. 1123, 25 L.Ed. 2d 398 (1970). *See also State v. Hatton*, 116 Ariz. 142, 568 P. 2d 1040 (1977); *People v. Arnold*, 66 Cal. 2d 438, 449, 426 P. 2d 515, 522, 58 Cal. Rptr. 115, 122 (1967); *Myers v. State*, 3 Md. App. 534, 240 A. 2d 288 (1968); *People v. P.*, 21 N.Y. 2d 1, 233 N.E. 2d 255, 286 N.Y.S. 2d 225 (1967); *Commonwealth v. Brown*, 473 Pa. 562, 375 A. 2d 1260 (1977). *Cf.*, *People v. Yukl*, 25 N.Y. 2d 585, 589, 256 N.E. 2d 172, 174, 307 N.Y.S. 2d 857, 860 (1969), *cert. denied*, 400 U.S. 851 (1970) (belief of a reasonable innocent person).

The United States Supreme Court itself has used an objective rather than a subjective application of the *Miranda* test in *Oregon v. Mathiason, supra.* There, defendant, a suspect in a burglary case, was asked to meet a police officer at a state parole office to answer some questions. In holding that this was not a custodial interrogation mandating *Miranda* warnings, the Court focused on three time frames—events occurring *prior* to the questionings, including the fact that the defendant had voluntarily appeared in response to a written request; events happening *during* the questioning, including the fact that defendant was told at the outset he was not under arrest but that he was a suspect; and events taking place *after* the questioning, including the fact that defendant was allowed to leave the parole office unhindered even though he had confessed to the burglary. At least one state court has echoed this objective three factor analysis. *See Hunter v. State*, 596 P. 2d 23 (Alaska 1979).

Although this Court has not previously articulated an objective test of custodial interrogation, we have to all practical purposes applied such a standard in our consideration of the question in the past.

In *State v. Martin*, 294 N.C. 702, 242 S.E. 2d 762 (1978) police had gone to a home to question a suspect who, it turned out, was not there at the time. Encountering instead the defendant, they asked if he would talk with them. He agreed, and explained the original suspect's role in the murder while he sat in the police car. After being advised he was a witness, he was taken to City Hall where he made a statement. At the end of the statement, he involved himself as an active participant in the crime. He was immediately given his *Miranda* warnings but was allowed to leave. We held such investigative questioning was not custodial interrogation, citing *Oregon v. Mathiason, supra*, and reasoning that "all the evidence shows that defendant . . . was not under arrest and his freedom to depart was not restricted." *State v. Martin, supra* at 707, 242 S.E. 2d at 765.

In *State v. Biggs*, 292 N.C. 328, 233 S.E. 2d 512 (1977), police went to the defendant's home and asked him to help them search for deceased who was believed to have been knifed. Police asked defendant if he had been to deceased's house, and when he said yes, asked him if he had a knife. He did and he voluntarily gave it up. At the end of this conversation, the defendant volunteered an inculpatory statement and at that point all questioning ceased and he was given his *Miranda* warnings. There, as here, police had no certain idea a crime had been committed and were initially requesting defendant's help in an investigation. At the point when defendant volunteered a statement involving himself in a crime, he was given *Miranda* warnings. We again held that the initial questioning was not a custodial interrogation.

In *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978) the defendant was in jail on an unrelated charge and the police had no idea a crime had been committed in a distant county. The "interrogation" objected to was a chance remark made in idle conversation to a sheriff's deputy which placed defendant by his own admission in the county where the crime at trial had taken place. The deputy thought nothing of the remark until several days later when he was apprised of the crime in the other county. Again, we held such questioning was not custodial interrogation.

In all three cases, events occurring prior to the questioning involved primarily those routinely associated with investigations where police initially sought out a defendant only to gather infor-

mation about missing persons or known crimes. In all three cases the interrogation itself involved questioning by one or two police in an open-ended, nonthreatening manner. And in all three cases, the result of the interrogations was either to release the defendant or to arrest him only if the investigation had developed probable cause to do so.

While these fact patterns do not provide the exclusive definition of noncustodial interrogation, they do apply to the case *sub judice*. Here, prior to questioning, police were investigating a routine missing person report. Defendant was visited by one plainclothes detective in an unmarked car at defendant's place of work. The police did not know a crime had been committed. During questioning, defendant voluntarily entered the car and immediately gave an inculpatory statement. At that point, the detective ceased all questioning and took defendant to the station where he was given *Miranda* warnings. Furthermore, after giving his statements and posting bond on an unrelated charge, defendant was allowed to leave. Taking all these facts into consideration, at no point until defendant had made his inculpatory statement would a reasonable person have believed under the circumstances that his freedom of movement was restrained in any significant way so that he was "in custody."

Moreover, if Detective Clayton had not gone to the gas station to question defendant, he would have been sadly remiss in his duties. In the words of the Supreme Court in *Oregon v. Mathiason*:

> [P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."

429 U.S. at 495, 97 S.Ct. at 714, 50 L.Ed. 2d at 719. No error.

[3] Defendant next assigns as error the admission of testimony by an F.B.I. agent certified as an expert witness in the field of microscopic analysis of human hair. The witness testified that

hairs found on Mrs. Smith's sweater were blond head hairs from a Caucasian which had microscopic characteristics similar to head hairs taken from the defendant. On cross-examination this witness stated that although the hairs were similar, the number of characteristics they shared with the defendant's hair was "limited." Defendant argues that this testimony was of so little probative value it was erroneous to admit it. Defendant further asserts the error was prejudicial because the jury "no doubt" gave the evidence added weight as coming from an F.B.I. expert.

Generally evidence is relevant if it has *any* logical tendency, however slight, to prove a fact in issue in the case. *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978); *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976); *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); 1 Stansbury, N.C. Evidence § 77 at 234 (Brandis rev. ed. 1973 & Cum. Supp. 1979). On the other hand, evidence which has no tendency to prove a fact in issue in the case is inadmissible. *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973); *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973); *State v. Ferguson*, 280 N.C. 95, 185 S.E. 2d 119 (1971); 1 Stansbury, N.C. Evidence § 77 at 234 (Brandis rev. ed. 1973). In practical terms this means that the test for admissibility is necessarily elastic, *see, e.g., Bell v. Walker & Herrington*, 48 N.C. 320 (1856), 1 Stansbury, N.C. Evidence § 78 at 237, and involves a careful consideration of the objectionable evidence in light of other evidence admitted during the course of any particular trial.

The case of *State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971) upon which the State relies is appositive. In *Barber*, as here, defendant protested the admission of expert testimony on hair fibers. There the expert testified that hair taken from a rape victim's bed and from the defendant were microscopically the same in all identifying characteristics and that the hair found at the scene of the rape could have come from the defendant. Speaking for the Court, Justice Moore held that such testimony was admissible for it was a "link in the chain proving that the crime was committed by a Negro and that that Negro was the defendant." 278 N.C. at 276-77, 179 S.E. 2d at 410.

Here, neither the victim nor the defendant was black so that the possible pool of persons who could have left a hair on Mrs. Smith's sweater was much larger than that in *Barber*. And here

the expert noted that the microscopic characteristics were similar but "limited" while in *Barber* the expert was positive all characteristics were identical. However, in light of the other links in the chain of evidence offered at trial, including evidence which placed defendant in the presence of the victim at the time she disappeared, evidence which indicated the defendant's gun was the murder weapon and evidence which showed that someone with defendant's blood type raped Mrs. Smith, we cannot say that the connection between the testimony of the expert and the fact that his testimony tended to place the defendant in the presence of the victim at the time of her death was a connection so remote, latent or conjectural as to render it inadmissible. This assignment of error is overruled.

[4] Defendant finally argues that his indictment for first degree rape did not charge all the necessary elements of that crime as it is defined by G.S. 14-21(1). This problem has twice come before this Court. In *State v. Goss*, 293 N.C. 147, 235 S.E. 2d 844 (1977), and *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977), we held that where, as here, an indictment for first degree rape fails to allege that the defendant was older than sixteen or that the defendant used a deadly weapon or inflicted serious bodily injury, the indictment fails to allege all the essential elements of the crime of first degree rape and cannot support a conviction of that crime.

In those cases, as in this one, however, evidence presented at trial tended to prove the perpetration of a brutal and vicious rape by an adult defendant. In such event, we held in Goss, *supra*, and Perry, *supra*, and hold again today that the indictment is sufficient to support conviction for the crime of second degree rape which is statutorily defined: "Any other offense of rape . . . shall be a lesser included offense of rape in the first degree."

We are not unmindful that the General Assembly has provided for a shortened form of rape indictment in G.S. 15-144.1 which would cure the defect here. However, that statute only became effective on 1 July 1977, some three months after defendant was indicted and several weeks after he was convicted. The statute therefore has no application here.

The punishment for rape in the second degree is provided by G.S. 14-21(2) to include life imprisonment or imprisonment for a

term of years, in the court's discretion. That court, of course, is the trial court, not this Court. We therefore remand this case to the Superior Court of Durham County and direct that court to bring defendant before it and enter a verdict of guilty of second degree rape in lieu of the verdict now of record, and to sentence the defendant for that offense in the discretion of the court.

In Cases No. 77-CRS-7824, 77-CRS-7825 and 77-CRS-6070, no error.

In Case No. 77-CRS-7827, judgment vacated, and case remanded for correction of verdict and imposition of proper sentence.

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

STATE OF NORTH CAROLINA v. WILLIAM EARL SANDERS

No. 27

(Filed 6 November 1979)

1. **Criminal Law § 162— objection—refusal of permission to state ground—error not prejudicial**

The trial judge erred in denying defense counsel the right to state specific grounds for her objections, but such error was harmless since counsel was permitted to argue specific grounds on appeal.

2. **Criminal Law § 33.2— confrontation between defendant and officer—no evidence of character—evidence admissible**

The trial court did not err in admitting evidence of a confrontation between defendant and a police officer which occurred just prior to defendant's arrest, and there was no merit to defendant's contention that such evidence amounted to evidence of his bad character and was therefore inadmissible as he did not testify or otherwise put his character in issue, since the evidence of the confrontation was competent to show the relations between the parties and intent and malice on the part of defendant.

3. **Criminal Law § 85— evidence of defendant's condition at time of arrest—no reflection on character**

Testimony by a police officer that defendant was glassy eyed and had a faint odor of alcohol on his breath at the time of his arrest was not inadmissi-

ble as tending to impeach his character when his character had not been placed in issue but was admissible as a circumstance surrounding his arrest which took place a short time prior to the killing with which he was charged.

4. **Criminal Law § 134.2— no sentencing hearing held—defendant not prejudiced**

Defendant was not prejudiced by the trial judge's failure to conduct a sentencing hearing inasmuch as defense counsel conceded in oral argument that she had no further evidence to submit at the hearing.

5. **Criminal Law § 113.1— failure to summarize evidence favorable to defendant—defendant's objection not waived**

The trial court erred in recapitulating fully the State's evidence but failing to summarize at all evidence favorable to defendant, including evidence of defendant's prior statement to police officers and evidence elicited on cross-examination, and defendant did not waive his right to challenge the instructions by his failure to object at trial.

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

APPEAL by defendant from *Seay, J.*, 4 December 1978 Session of CUMBERLAND Superior Court.

Defendant was charged in separate indictments, proper in form, with the first degree murder of Robert Bruce Lambert and with assault with a deadly weapon with intent to kill inflicting serious bodily injury upon Charles William Terry. Defendant entered a plea of not guilty to each charge.

This is the second time this case has been before us. In the first trial, we found prejudicial error and granted defendant a new trial. *State v. Sanders*, 295 N.C. 361, 245 S.E. 2d 674 (1978). The facts of the case are set out in more detail in that opinion.

In brief summary, the State's evidence tended to show:

On 16 October 1976 defendant was illegally arrested as he walked down a street in Fayetteville, North Carolina. Officers R. R. Porter and W. L. Alsup of the Fayetteville Police and military policemen Charles W. Terry and Willard H. Barber were present at the time of the arrest. Pursuant to the arrest, defendant was taken into custody, searched, and transported to the Law Enforcement Center. At the Center, he was placed in a holding cell in the booking room. While confined in the cell, defendant exchanged words with the officers in charge. Shortly thereafter, two military officers, Sergeant Terry and the deceased, Sergeant

Lambert, entered the holding cell for the purpose of handcuffing defendant. Defendant motioned to the officers and told them to come on, that he had something for them. As the officers entered the cell and moved toward defendant, he backed towards a corner of the cell in the area of the toilet. Upon reaching the toilet area, defendant swung at Sergeant Lambert. Sergeant Terry delivered a karate kick to defendant's stomach. At that point, defendant produced a knife and began to stab Terry about the arms and back. He then stabbed Lambert in the abdomen, back, and lower chest. There was expert medical testimony that Lambert died as a result of the stab wound in his back.

Defendant presented no evidence, and the jury returned a verdict of guilty of murder in the second degree and a verdict of guilty of assault with a deadly weapon inflicting serious bodily injury. Judgment was entered imposing a life sentence upon the verdict of guilty of second degree murder and imposing a consecutive sentence of ten years upon the verdict of guilty of assault with a deadly weapon inflicting serious bodily injury. Defendant appealed the murder conviction pursuant to G.S. 7A-27(a). We allowed defendant's motion pursuant to G.S. 7A-31(a) for certification to this Court before determination in the Court of Appeals on the assault charge.

Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General and Nonnie F. Midgette, Assistant Attorney General, for the State.

Mary Ann Tally, Public Defender, for defendant appellant.

BRANCH, Chief Justice.

Defendant brings forward twenty-two assignments of error. The assignments of error not herein discussed either do not warrant consideration or are unlikely to recur at the next trial.

[1] Defendant asserts in his third assignment of error that the trial judge erred in denying defendant the right to state specific grounds for his objections. We agree.

The trial judge instructed defense counsel not to give specific grounds for her objections unless he asked for them. As a result, counsel had no choice but to rely on general objections throughout the trial. It is well settled that a general objection which is

overruled is no good if there is any purpose whatsoever for which the evidence could have been admitted. *See State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971); 1 Stansbury's N.C. Evidence § 27 (Brandis rev. 1973). The effect of the trial judge's actions was to prevent defense counsel from "making her record" and properly preserving her objections for effective review. It is the duty and the right of counsel to make and preserve objections on behalf of clients, and the better practice is for a trial judge not to circumvent that right. *See State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971). We are of the opinion that the judge's ruling in this case was erroneous; however, we hold that it was harmless error, and particularly so since counsel was permitted to argue specific grounds on appeal.

[2] Defendant's fourth assignment of error relates to the admission of evidence of a confrontation between defendant and a Fayetteville police officer which occurred just prior to defendant's arrest. Officer R. R. Porter testified that on 16 October 1976 at about 8:30 p.m. he observed defendant, just inside a local bar, arguing with one of the bar's employees. Officer Porter approached defendant and asked him to leave the area. As defendant left, Officer Porter proceeded to talk with another police officer, W. L. Alsup, concerning defendant. Within minutes, Officer Alsup and two military policemen arrested defendant.

Defendant contends that this evidence amounted to evidence of his bad character and was, therefore, not admissible since he did not testify or otherwise put his character in issue. The evidence of defendant's confrontation with Officer Porter just prior to defendant's arrest was competent to show the relations between the parties, and intent and malice on the part of defendant. *See State v. Ray*, 212 N.C. 725, 194 S.E. 482 (1938); *State v. Miller*, 189 N.C. 695, 128 S.E. 1 (1925). We hold that the questioned evidence is relevant and admissible as a circumstance inextricably tied to the arrest and fatal incident on 16 October 1976.

[3] Defendant also challenges the admission of testimony describing his appearance at the time of the arrest. Officer W. L. Alsup testified that when he first encountered defendant and asked for his identification, defendant's eyes were glassy, and he had a faint odor of alcohol on his breath.

Defendant again contends that this evidence tended to impeach his character and was inadmissible since he did not testify or otherwise place his character in issue. The challenged description, however, was a circumstance surrounding the defendant's arrest which occurred a short time prior to the killing. It was relevant and admissible because it tended to shed some light on defendant's conduct and motives at the time of the fatal stabbing. *See State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973).

[4] Defendant contends in Assignment of Error No. 22 that the trial judge erred in failing to conduct a sentencing hearing. Section 15A-1334(a) of the General Statutes states that "[u]nless the defendant waives the hearing, the court must hold a hearing on the sentence." According to the record in this case, after the jury returned with its verdict, the trial judge asked if counsel were ready for the sentencing hearing. The judge then proceeded to sentence defendant without conducting the hearing as required by statute. Inasmuch as defense counsel has conceded in oral argument that she had no further evidence to submit at the hearing, it is obvious the defendant was not prejudiced by the trial judge's failure to conduct the hearing.

[5] Finally, defendant's most serious contention is that the trial judge failed to state the evidence and apply the law to the facts as required by G.S. 15A-1232. The challenged portion of the charge reads as follows:

> Now, in this case the State of North Carolina has offered evidence which in substance tends to show that on October 16, 1976, William Earl Sanders had been arrested, that the arrest was an illegal arrest and he had been taken pursuant to that illegal arrest to the Law Enforcement Center and placed in the booking room and into the holding cell; that an altercation followed, that two military officers, one Lambert and the other Terry, opened the door, entered into the holding room, that the defendant motioned them to come in, used language telling them that he had something for them, that he was going to get them and making other threats and that as they came in the defendant backed into the area of the toilet that had a partition separating it from the holding cell and that he used a knife which has been received into evidence as State's Exhibit No. 2 and cut Charles W. Terry

> about his arm and his back and that he cut Robert Bruce Lambert around his abdomen and lower chest area and back and that Sgt. Robert Bruce Lambert died as a result of one of the stab wounds to his back; that Sgt. Charles W. Terry was taken to the hospital and remained in the hospital for some time.
>
> Now, that is what some of the evidence—oh, further, members of the jury, the State has offered evidence that on a previous occasion, that is, on September 30, 1976 the defendant, William E. Sanders, had threatened to kill Robert Bruce Lambert, the deceased in this matter.
>
> Now, that's what some of the evidence for the State tends to show. What it does show, if anything, is for you to say and determine as the court did not attempt to recapitulate or summarize all the evidence in the case as it is your duty to remember the evidence and all of it and be governed solely and entirely by your own recollection of the evidence in this case.
>
> In this matter the defendant, William E. Sanders, has not testified and the law of the State of North Carolina gives him this privilege. This same law assures him his decision not to testify creates no presumption against him. Therefore, you must be very careful and not let his silence influence your decision in any way.
>
> This constitutes DEFENDANT'S EXCEPTION NO. 59.

Although defendant offered no evidence at the conclusion of the State's case, there was certain evidence brought out on cross-examination which tended to exculpate defendant. Furthermore, the evidence of the State itself tended to raise inferences favorable to defendant. For example, State's witness Detective Bob Conerly read into evidence a voluntary statement made by defendant to police officers which included the following:

> The cops called me back and I went back to them. One of the cops grabbed me by the collar and told me that I was not allowed to walk down the street any more. I asked him why I was not allowed to walk down the street. He said because I said so. I looked him dead in the face. I wanted to call him a white son-of-a-bitch and a few other choice words but I did

not. The cop grabbed me in the collar again and I was put in the police car. I had cuffs on. They were behind me. They searched me before I was put in the car. I don't know if it was a uniformed car or not. There was at least one uniformed officer in the car. I was brought to the police station.

I asked what were the charges against me. They told me that there were no charges. I asked how long I would have to stay and they said two hours. I was put in the holding cell cuffed from behind. I kicked my shoes off and I stepped through my arms pulling the cuffs in front of me. I walked to the cell door and said, "Hey officer" in a loud voice, you want to take these things off of me. He said sit down nigger. This was an officer in a blue uniform. I said who are you calling a nigger, sucker at this a sergeant MP came over. I remember him from before. I asked him if he remembered me. I told him that I was the one that got kicked in the butt. The sergeant MP then said that he did remember me.

I asked him what was the matter with that fat cat. He did not say anything. I started yelling at the fat guy. I was cursing. Someone came to the cell bar. I put my hands through the bars and the cuffs were removed. A group of officers came up to the cell door and unlocked it. They started cursing and talking trash. They came into the cell and I started cursing back at them. I said you punk ass mother fuckers are going to move on me, right. They kept coming and I moved back. The cuffs were off at this time. I had backed into the corner. This was the bathroom area. One of the blue uniformed officers, a white guy, kicked me in my stomach. I fell to the floor. I saw a knife on the floor and picked it up.

The officers were hovering over me kicking and talking much trash. I reached up and grabbed one of them and pulled him to me and stuck him and stuck him. I was just swinging the knife. I think two got cut. The knife was a hunting knife. It could not be closed. It also had a pouch.

Under the clear mandate of G.S. 15A-1232, the trial judge "must declare and explain the law arising on the evidence." As we noted in *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978), G.S. 15A-1232 restates in substance former G.S. 1-180 which by its

terms explicitly required the judge (1) to declare and explain the law arising on the evidence in the case, (2) to state the evidence to the extent necessary to explain the application of the law thereto, and (3) to give equal stress to the State and defendant in a criminal action. While the wording of the new G.S. 15A-1232 is not identical with that of the former statute, we held in *Hewett* that "the law remains essentially unchanged." *State v. Hewett, supra.*

Ordinarily, the trial judge is not required to recapitulate all of the evidence, and he complies with the statute by presenting the principal features of the evidence relied on by the prosecution and by the defense. *State v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58, *cert. denied,* 371 U.S. 921, 9 L.Ed. 2d 230, 83 S.Ct. 288 (1962). Furthermore, it is not error for the court merely to consume more time in summarizing the State's evidence than it does in restating the evidence for the defendant. *State v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668 (1941); *State v. Cureton,* 218 N.C. 491, 11 S.E. 2d 469 (1940). However, when the court recapitulates fully the evidence of the State but fails to summarize, at all, evidence favorable to the defendant, he violates the clear mandate of the statute which requires the trial judge to state the evidence to the extent necessary to explain the application of the law thereto. In addition, he violates the requirement that equal stress be given to the State and to the defendant. In the instant case, the trial judge failed to summarize evidence which raised inferences favorable to defendant including evidence of defendant's prior statement to police officers and evidence elicited on cross-examination. We hold that this omission constitutes error prejudicial to defendant.

Even so, the State contends that defendant has waived his right to challenge the instructions by his failure to object at trial. In *State v. Hewett, supra,* however, this Court noted the following regarding the necessity to object at trial to error in the charge:

> It is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal. (Citations omitted.) The rule is otherwise, however,

> where the trial judge in his charge states fully the contentions of the State but fails to give any contentions of the defendant. In that event the party whose contentions have been omitted is not required to object or otherwise bring the omission to the attention of the trial court. (Citations omitted.)

The rationale of this rule should apply with equal force when in his instructions the trial judge states the evidence favorable to the State and applies the law to that evidence but fails to state any of the evidence favorable to defendant to the extent necessary to explain the application of the law thereto. We so hold.

We note in passing that the trial judge's instructions did not meet the requirement of G.S. 15A-1232 as related to heat of passion and provocation in his charge on voluntary manslaughter. Neither did he comply with this statute in his charge on self-defense.

For reasons stated in this opinion, defendant is entitled to a

New trial.

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

RAYMOND BURGESS, ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED v. JOSEPH SCHLITZ BREWING COMPANY

No. 21

(Filed 6 November 1979)

1. Master and Servant § 1— visually disabled—right of employment

The General Assembly did not intend the narrow definition of "visually handicapped" in G.S. 111-11, which refers only to persons who are blind or functionally blind, to control the meaning of the term "visual disabilities" in the statute defining "handicapped persons," G.S. 168-1; rather, the General Assembly intended that the definition in G.S. 111-11 would apply only when the specific term "visually handicapped" was used.

2. Master and Servant § 1— visual disability—simple glaucoma—20/20 vision—handicapped person—right of employment

A person who suffers from simple glaucoma but has 20/20 vision in both eyes with glasses does not have a "visual disability" within the meaning of G.S. 168-1 and is thus not a "handicapped person" who is granted a right of employment by G.S. 168-6.

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, 39 N.C. App. 481, 250 S.E. 2d 687 (1979), reversing judgment of *McConnell, J.*, entered 7 February 1978, FORSYTH Superior Court.

This is a class action in which plaintiff asserts that defendant's acts, policies, practices and procedures violated the rights of plaintiff and the class he represents as secured by G.S. 168-6, which grants to "handicapped persons" the right to employment.

Plaintiff alleges, in pertinent part, that on 16 February 1975, he applied for employment with defendant. On 18 February 1976, defendant informed plaintiff that it wanted him to go to work and requested him to report for a pre-employment physical examination. On 20 February 1976, defendant informed plaintiff that he would not be hired because the physical examination indicated that plaintiff had a case of simple glaucoma. Plaintiff was told that it was against defendant's policy to hire individuals who had glaucoma. Defendant was informed by competent medical authority that plaintiff's glaucoma would in no way interfere with plaintiff's job performance and that in fact plaintiff had 20/20 vision in both eyes with glasses.

Defendant filed a motion to dismiss under Rule 12(b)(6), Rules of Civil Procedure, for failure to state a cause of action upon which relief could be granted. In support of its motion, defendant contended that plaintiff's complaint affirmatively established that plaintiff was not a "handicapped person" as that term was defined in G.S. 168-1. Defendant's motion was granted by the trial court.

On plaintiff's appeal the Court of Appeals reversed. Defendant's petition for discretionary review was allowed by this Court.

Pfefferkorn & Cooley, P.A., by William G. Pfefferkorn; J. Wilson Parker and Jim D. Cooley, attorneys for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by Charles F. Vance, Jr. and W. Andrew Copenhaver, attorneys for defendant appellant.

HUSKINS, Justice.

In Chapter 168 of the General Statutes the General Assembly has granted a number of rights to "handicapped persons." Among these rights is the right to employment. This right is granted by G.S. 168-6, which provides, in pertinent part, that "*handicapped persons* shall be employed . . . on the same terms and conditions as the ablebodied, unless it is shown that the particular disability impairs the performance of the work involved." (Emphasis added.)

Plaintiff alleges that defendant violated G.S. 168-6 by refusing to hire him upon discovering that plaintiff suffered from a case of simple glaucoma which did not interfere with plaintiff's job performance. Defendant had been "informed by competent medical authority" that plaintiff's glaucoma "would in no way interfere with plaintiff's job performance and that in fact plaintiff had 20/20 vision in both eyes with glasses." Nonetheless, plaintiff was told by defendant that it was against company policy to hire an indiviudal afflicted with glaucoma.

In order to state a cause of action for violation of the right to employment granted in G.S. 168-6, plaintiff must establish that he is a "handicapped person" to whom such rights are granted. The central issue in this appeal is whether a person who suffers from "simple glaucoma," but has 20/20 vision in both eyes with glasses, is a "handicapped person" as defined in Chapter 168.

Resolution of this issue requires consideration of G.S. 168-1, which states the purpose of Chapter 168 and defines the term "handicapped person":

> "The State shall encourage and enable handicapped persons to participate fully in the social and economic life of the State and to engage in remunerative employment. The definition of 'handicapped persons' shall include those individuals with physical, mental and visual disabilities. For the purposes

> of this Article the definition of 'visually handicapped' in G.S. 111-11 shall apply."

The definition of "visually handicapped" in G.S. 111-11 referred to in G.S. 168-1 reads as follows:

> "[V]isually handicapped persons are those persons who are totally blind or whose vision with glasses is so defective as to prevent the performance of ordinary activity for which eyesight is essential."

From the above summary it is evident that "the definition of 'handicapped person' *shall include* those indivudals with . . . *visual disabilities*." G.S. 168-1. (Emphasis added.) However, G.S. 168-1 further provides that "for the purposes of [Article 1 in Chapter 168] the definition of 'visually handicapped' in G.S. 111-11 shall apply."

Defendant contends that the definition of "visually handicapped" in G.S. 111-11 limits the meaning of "visual disabilities" in G.S. 168-1. According to defendant, the only form of "visual disability" covered by G.S. 168-1 is blindness or functional blindness as defined in G.S. 111-11. Defendant points to plaintiff's allegation that he has "20/20 vision in both eyes with glasses" and concludes that plaintiff is not a "handicapped person" within the meaning of G.S. 168-1.

Plaintiff contends that the sole purpose of the reference to G.S. 111-11 is to indicate that whenever the specific phrase "visually handicapped" is used in the statute, then the definition given in G.S. 111-11 shall apply. Whenever that specific phrase is not used, then the broader term "visual disabilities," unrestricted by reference to G.S. 111-11, shall apply to define a "handicapped person."

Literally read, the statement in G.S. 168-1 making the definition of "visually handicapped" in G.S. 111-11 applicable "[f]or the purposes of this Article" can be interpreted in either the manner suggested by plaintiff or defendant. To resolve this ambiguity, we must therefore construe the statutory language in question in light of the applicable canons of statutory construction.

The intent of the legislature controls the interpretation of a statute. *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271

(1979); *Mazda Motors v. Southwestern Motors*, 296 N.C. 357, 250 S.E. 2d 250 (1979). "A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). To this end, the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute. *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978); *Underwood v. Howland, Commr. of Motor Vehicles*, 274 N.C. 473, 164 S.E. 2d 2 (1968). Finally, this statute, being remedial, should be construed liberally, in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope. *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1973); *Weston v. Lumber Co.*, 160 N.C. 263, 75 S.E. 800 (1912).

Application of the above principles leads us to conclude that the restrictive definition of "visually handicapped" in G.S. 111-11 should not be applied in a manner which limits the meaning of "visual disability" in G.S. 168-1. Significantly, the opening sentence in G.S. 168-1 announces in the broadest possible terms the legislative purpose in granting certain rights to the handicapped: "The State shall encourage and enable *handicapped persons* to participate fully in the social and economic life of the State and to engage in remunerative employment." (Emphasis added.) In the same vein, the second sentence indicates that the term *handicapped person* is to be defined expansively: "The definition of 'handicapped person' *shall include* those individuals with physical, mental and *visual disabilities.*" (Emphasis added.) Moreover, when we focus attention on those sections of the statute which enumerate the various rights of the handicapped, it becomes apparent that the narrowly defined term "visually handicapped," which refers only to persons who are blind or functionally blind, *see* G.S. 111-11, is used *solely* in connection with those sections of the statute dealing exclusively with problems unique to the type of handicap identified by that term.

> "§ 168-4. May be accompanied by guide dog.—Every *visually handicapped* person shall have the right to be accompanied by a guide dog, especially trained for the purpose, in any of the places listed in G.S. 168-3 provided that he shall

be liable for any damage done to the premises or facilities by such dog.

§ 168-5. Traffic and other rights of persons using certain canes.—The driver of a vehicle approaching a *visually handicapped* pedestrian who is carrying a cane predominantly white or silver in color (with or without a red tip) or using a guide dog shall take all necessary precautions to avoid injury to such pedestrian.

* * * *

§ 168-7. Guide dogs.—Every *visually handicapped* person who has a guide dog, or who obtains a guide dog, shall be entitled to keep the guide dog on the premises leased, rented or used by such handicapped person. He shall not be required to pay extra compensation for such guide dog but shall be liable for any damage done to the premises by such a guide dog. No person, firm or corporation shall refuse to sell, rent, lease or otherwise disallow a *visually handicapped* person to use any premises for the reason that said *visually handicapped* person has or will obtain a guide dog for mobility purposes." (1977 Cum. Supp.) (Emphasis added.)

On the other hand, those sections of the statute which address problems common to all handicapped citizens utilize the broadly defined term "handicapped person," which encompasses all persons "with physical, mental and visual disabilities":

"§ 168.2. Right of access to and use of public places.—*Handicapped persons* have the same right as the ablebodied to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and all other buildings and facilities, both publicly and privately owned, which serve the public.

§ 168.3. Right to use of public conveyances, accommodations, etc.—The *handicapped* and *physically disabled* are entitled to accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, streetcars, boats, or any other public conveyances or modes or transportation; hotels, lodging places, places of public accommodation, amusement or resort to which the general public is invited, subject only to

the conditions and limitations established by law and applicable alike to all persons.

* * * *

§ 168.6. Right to employment.—*Handicapped persons* shall be employed in the State service, the service of the political subdivisions of the State, in the public schools, and in all other employment, both public and private, on the same terms and conditions as the ablebodied, unless it is shown that the particular disability impairs the performance of the work involved.

* * * *

§ 168.8. Right to habilitation and rehabilitation services.—*Handicapped persons* shall be entitled to such habilitation and rehabilitation services as available and needed for the development or restoration of their capabilities to the fullest extent possible. Such services shall include, but not be limited to, education, training, treatment and other services to provide for adequate food, clothing, housing and transportation during the course of education, training and treatment. *Handicapped persons* shall be entitled to these rights subject only to the conditions and limitations established by law and applicable alike to all persons.

§ 168.9. Right to housing.—Each *handicapped citizen* shall have the same right as any other citizen to live and reside in residential communities, homes, and group homes, and no person or group of persons, including governmental bodies or political subdivisions of the State, shall be permitted, or have the authority, to prevent any handicapped citizen, on the basis of his or her handicap, from living and residing in residential communities, homes, and group homes on the same basis and conditions as any other citizen. Nothing herein shall be construed to conflict with provisions of Chapter 122 of the General Statutes.

§ 168.10. Eliminate discrimination in treatment of handicapped and disabled.—Each *handicapped person* shall have the same consideration as any other person for individual accident and health insurance coverage, and no insurer, solely on the basis of such person's handicap, shall deny such

> coverage or benefits. The availability of such insurance shall not be denied solely due to the handicap, provided, however, that no such insurer shall be prohibited from excluding by waiver or otherwise, any pre-existing conditions from such coverage, and further provided that any such insurer may charge the appropriate premiums or fees for the risk insured on the same basis and conditions as insurance issued to other persons. Nothing contained herein or in any other statute shall restrict or preclude any insurer governed by Chapter 57 or Chapter 58 of the General Statutes from setting and charging a premium or fee based upon the class or classes of risks on sound actuarial and underwriting principles as determined by such insurer, or from applying its regular underwriting standards applicable to all classes of risks. The provisions of this section shall apply to both corporations governed by Chapter 57 and Chapter 58 of the General Statutes." (1977 Cum. Supp.) (Emphasis added.)

[1] Thus, when we read the statute contextually, it is clear that the General Assembly did not intend the narrow definition of "visually handicapped" in G.S. 111-11 to control the meaning of the term "visual disabilities" in G.S. 168-1; rather, the General Assembly intended that the definition in G.S. 111-11 would apply only when the specific term "visually handicapped" was used.

Such a reading of the statute harmonizes the definition of "visually handicapped" in G.S. 111-11 with the remaining provisions of the statute and gives full effect to the reason and purpose of the statute. *See In re Hardy, supra.* The broadly expressed goal of this statute is "to encourage and enable handicapped persons to participate fully in the social and economic life of the State and to engage in remunerative employment." G.S. 168-1. Given such a broad expression of legislative intent, exclusion from coverage of persons suffering from "visual disabilities" less severe than blindness would be contrary to the spirit of the statute. Such exclusion would fail to bring under the statute all cases falling within its intended scope. *See Hicks v. Albertson, supra.*

[2] We must now determine whether plaintiff has "visual disabilities" within the meaning of the statute.

As used in this statute, the term "disability" refers to a present, non-correctible loss of function which substantially impairs a person's ability to function normally. Plaintiff alleges that he suffers from a case of simple glaucoma. However, he further alleges that he has 20/20 vision in both eyes with glasses. Essentially, plaintiff has indicated in his pleadings that he has an eye disease but that his vision is functioning normally with glasses. Accordingly, we must conclude that plaintiff is not visually disabled within the meaning of the statute.

Plaintiff asks us to extend the coverage of the statute to those who suffer from *potentially* disabling conditions, irrespective of whether those conditions have in fact resulted in "physical, mental, or visual disabilities." G.S. 168-1. Such an interpretation, if adopted, would exceed the intended scope of this statute. Fairly construed, the remedial provisions of this statute are intended to aid only those who are presently disabled. The problems of individuals, not presently disabled, who suffer from conditions which may or may not disable them in the future are beyond the scope of the statute. Such individuals are not "handicapped persons" within the meaning of the statute as presently written.

Plaintiff does not allege sufficient facts to establish himself as a "handicapped person" within the meaning of G.S. 168-1. His complaint, therefore, fails to state a claim under G.S. 168-6 upon which relief can be granted. Accordingly, defendant's motion to dismiss under Rule 12(b)(6), Rules of Civil Procedure, was properly granted by the trial court.

For the reasons stated, the judgment of the trial court must be reinstated. To that end, 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. WHALEN CLARK

No. 45

(Filed 6 November 1979)

Criminal Law § 96— photograph of defendant retrieved from police records—instruction to disregard testimony—defendant not prejudiced

The trial court did not err in denying defendant's motion for mistrial made after a police officer, in describing the procedure he followed when allowing a witness to make a photographic identification, testified that he had retrieved a photograph of defendant from police records, since such testimony did not tend to show that defendant had committed another distinct, separate offense; the jury was already aware that a second photograph existed because a witness had previously referred to it in her testimony; at no time in his testimony did the officer intimate that the photograph was obtained during the investigation of another criminal offense; the jury had no more reason to believe that the police had the second photograph of defendant as a result of a prior crime committed by him than that the police had simply made an additional photograph in the investigation of the crimes for which he was being tried; and defendant suffered no prejudicial error by the admission of the challenged testimony since the trial court instructed the jury to disregard the testimony.

APPEAL by defendant from *Johnson, Judge*, 4 December 1978 Criminal Session of Superior Court, MECKLENBURG County.

Upon indictments, proper in form, the defendant was tried and found guilty of second degree rape, first degree burglary, and felonious larceny. He was sentenced to imprisonment for life in the State's prison on the charge of first degree burglary, to imprisonment for not less than 15 nor more than 30 years on the charge of second degree rape and to imprisonment for not less than 2 nor more than 8 years on the charge of felonious larceny.

Evidence for the State tended to show that Cenie Alexander, a 22 year old woman, resided in an apartment on McAlway Road in Charlotte on Friday, 25 August 1978. She retired for bed around 10:30 p.m. Her windows and doors were locked. Sometime later she was awakened by a man who was standing at the foot of the bed and who yelled at her. She observed the man for about two seconds as he leaped upon her while holding an afghan in his hands. All the lights were out but the room was illuminated by an outside street light about 25 yards from her window. They struggled and assailant began choking her. In the struggle both fell to

the floor. She was having trouble breathing and could make no sound, so she went limp to have him cease choking her. He then had sexual intercourse with her against her will. This lasted for approximately five minutes. Assailant then left through the front door which he left standing open. Ms. Alexander got up and discovered that the front door was open and that entry had been gained by cutting through the glass of the kitchen window. She also noticed that her roommate's Panasonic color television set was missing. Neither she nor her roommate had given defendant permission to enter the apartment or take the television set which was valued at $250.00.

Ms. Alexander called her mother and her sister who came with the police. She thereafter gave police a description of her assailant and she was examined at Charlotte Memorial Hospital where it was determined that semen was present in her vagina.

Ms. Alexander, on 31 August 1978, selected the defendant's picture as her assailant from among a group of six photographs. She also identified another picture of the defendant. On 6 September 1978, she picked the defendant out of a lineup of men of similar size and body weight who were wearing the same clothing.

Meanwhile, the Saturday after the rape, 26 August 1978, a neighbor, Emmett Boyd, found the missing television set under some cardboard in a wooded area behind the apartment complex. He and his brother turned the TV over to the police suspecting that it was stolen. On Monday, 28 August 1978, another neighbor, James Ellis, observed the defendant looking under the cardboard and around the area where the missing television had been found. Ellis knew about the found TV set, and so became immediately suspicious. He and his roommate followed the defendant to his car and both took down the make, color and license plate number of defendant's car. Ellis later selected the defendant's picture from a photographic lineup and picked the defendant out of a live lineup.

Defendant's sole evidence was the testimony of his wife who stated that he was at home on the night in question. She also testified that when she told him the police were looking for him, he remained on his job and at his residence and made no attempt to flee.

Attorney General Rufus L. Edmisten by Assistant Attorney General Thomas F. Moffitt and Special Deputy Attorney General David S. Crump for the State.

Keith M. Stroud for the defendant.

CARLTON, Justice.

The sole question presented on this appeal is whether the trial court committed error in denying defendant's motion for mistrial after a police officer testified that he had retrieved a photograph of defendant from police records, the defendant not having testified. We find no prejudicial error.

Investigator Thomas A. Gaughen of the Charlotte Police Department, while testifying as one of the State's lead witnesses, was describing the procedure he followed when he showed photographs of various men to Jim Ellis. Ellis was attempting to identify the man he had seen searching for the TV set the Monday after the rape. During the photographic lineup, the officer testified that Ellis had pointed to the picture of the defendant and stated that he was reasonably certain this was the individual he had seen but that he would not make a positive identification unless he was able to see a photograph that showed more of defendant's body. After this testimony, the prosecuting attorney asked Officer Gaughen what he had done at that point and Gaughen replied, "I was able to secure a second photograph *from the police files of the defendant.*" (Emphasis added.)

Defendant's counsel immediately objected, and made motions to strike and for a mistrial. The jury was excused from the courtroom and the trial judge heard arguments from counsel. Upon the jury's return to the courtroom, the trial judge stated to them, "The jury is to disregard the last remark made by this witness with respect as to retrieving a photo of the defendant. You are not to give that any weight or consideration in your deliberations in this matter."

Defendant now argues that the trial court's failure to allow his motion for mistrial violates the rule enunciated in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), and reiterated in numerous decisions, that the State may not, over objection of defendant, introduce evidence that accused has committed

another independent criminal offense. As more completely stated by Justice Lake in *State v. Duncan*, 290 N.C. 741, 228 S.E. 2d 237 (1976):

> The general rule is that in a prosecution for a particular crime the State, prior to the defendant's taking the witness stand and thus placing his general character and credibility in issue, cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. . . . However, as there noted, numerous exceptions to this rule are also well established. One is that such evidence may be admissible to identify the defendant as a perpetrator of the crime with which he is presently charged. Another is that such evidence of other crimes 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 or more tends to prove the crime charged and to connect the accused with its commission.

Id. at 744-45, 228 S.E. 2d at 239.

Defendant argues that allowing the testimony in question was tantamount to testifying that defendant had committed another distinct, independent, or separate offense and that the statement does not fall within any of the exceptions hereinabove noted.

We agree with the defendant that the facts here presented do not fall within any of the exceptions noted. However, we disagree that the questioned testimony violated the rule. We do not find that the testimony tended to show "that the accused has committed another distinct, independent, or separate offense." The jury was already aware that a second photograph of defendant existed because Ms. Alexander had previously referred to it in her testimony. At no time in his testimony did Officer Gaughen intimate that the photograph was obtained during the investigation of another criminal offense. The jury had no more reason to believe that the police had the second photograph of defendant as a result of a prior crime committed by him than that the police had simply made an additional photograph in the investigation of the crimes for which he was being tried.

The situation here presented is not unlike that presented in *State v. Pitt*, 248 N.C. 57, 102 S.E. 2d 410 (1958). There, a State probation officer was allowed to testify both that he was a probation officer and that a certain admission was made to him by the defendant. The defendant moved for a mistrial on the ground that allowing such testimony was equivalent to telling the jury that defendant had been convicted of another criminal offense and presumably was on probation for that crime. The Court in *Pitt* rejected the defendant's contention. We agree with their reasoning that to conclude that the jury would assume that the defendant had a prior criminal conviction as a result of the questioned testimony would be "entirely speculation."

Furthermore, even if the jury, by some stretch of the imagination, had inferred the photograph came from a file of a separate crime, numerous decisions of this Court sustain our view that defendant suffered no prejudicial error by the admission of the challenged testimony when the trial court properly instructed the jury to disregard the testimony. In *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), *death sentence vacated*, 428 U.S. 903, 96 S.Ct. 3205, 49 L.Ed. 2d 1206 (1976), an F.B.I. witness inferred in his testimony that the defendant had escaped from prison. Defendant's counsel immediately moved for mistrial and the motion was denied. This Court found no prejudicial error because the trial court, as here, properly instructed the jury not to consider the statement.

In *State v. McKethan*, 269 N.C. 81, 152 S.E. 2d 341 (1967), defendant was on trial for rape and kidnapping. A witness, in answer to defense counsel's question about his knowledge of defendant prior to the incident, replied that he had known the defendant "for other sex offenses." Again, the court promptly instructed the jury not to consider the statement and this Court held the occurrence afforded no grounds for a mistrial.

In *State v. Robbins*, 287 N.C. 483, 214 S.E. 2d 756 (1975), *death sentence vacated*, 428 U.S. 903, 96 S.Ct. 3208, 49 L.Ed. 2d 1208 (1976), a police officer testified that he went to the Charlotte Police Department to obtain the defendant's address. He stated that the address was obtained "from an arrest record of [defendant]." Defendant objected and the court, sustaining the objection, instructed the jury to disregard any mention of the arrest record. Again, this Court found no prejudicial error, citing the rules that

"[O]ur 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, 194 S.E. 482 (1938). . . . "Ordinarily where the evidence is withdrawn no error is committed." *State v. Strickland*, 229 N.C. 201, 49 S.E. 2d 469 (1948).

Nothing in the record before us indicates these jury members were other than people of character and intelligence. Furthermore, even if the judge had failed to properly instruct them, we do not feel the testimony would have been prejudicial error. The record before us discloses an overwhelming case of guilt. Both Ms. Alexander and Mr. Ellis promptly and positively identified the defendant. Blood type, hair samples, license tags and circumstances pointed unerringly to his guilt. It is inconceivable to us that the jury could have reached a different result had the inadvertent statement by the witness not been made. We therefore find beyond a reasonable doubt that the evidence, even if it had been improperly admitted, would have been harmless error. *See, e.g., Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed. 2d 340 (1972); *State v. Robbins, supra.* We have consistently held that technically incompetent evidence is harmless unless it is made to appear that the defendant was 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), *cert. denied*, 404 U.S. 1023, 92 S.Ct. 699, 30 L.Ed. 2d 673 (1972), and authority cited therein. Defendant's sole assignment of error is overruled.

We deem it appropriate to comment that the investigative techniques employed by the Charlotte Police Department in this case were of the finest professional quality, that the case was tried, prosecuted and defended according to the highest professional legal standards, that defendant's constitutional rights were fully accorded at every stage of the proceeding and that the diligence of the prosecutrix's neighbors was laudable.

In the trial below, defendant had a fair trial, free from any prejudicial error.

No error.

BARRY T. HARRINGTON v. JOSEPH BRIGHT COLLINS

No. 57

(Filed 6 November 1979)

1. **Automobiles § 94.10— willful or wanton conduct by driver—contributory negligence or willful or wanton conduct by passenger**

While ordinary negligence on the part of a plaintiff will not defeat his recovery from a defendant whose willful or wanton negligence proximately caused plaintiff's injury, plaintiff's willful or wanton negligence is a defense in an action seeking recovery for injuries caused by defendant's willful or wanton conduct.

2. **Automobiles § 94.10— willful or wanton conduct by driver—acquiescence by passenger**

In the legal context of whether a plaintiff who is a gratuitous passenger has acquiesced in defendant's acts which constitute willful or wanton conduct, plaintiff's acquiescence must be more than ordinary negligence to bar his recovery, and plaintiff's mere failure to protest, remonstrate or request that he be allowed to leave the car is no more than simple negligence.

3. **Automobiles §§ 52, 90.10— prearranged racing—willful or wanton conduct**

Defendant driver's participation in a prearranged speed competition in violation of G.S. 20-141.3(a) constituted willful or wanton conduct and was a proximate cause of injuries received by plaintiff passenger in a collision during the race.

4. **Automobiles § 94.10— acquiescence in prearranged race—no willful or wanton conduct as matter of law**

Plaintiff passenger's failure to remonstrate or to leave a car at a rural crossroads minutes past midnight on a cold Christmas Eve when he learned of the driver's plan to engage in a prearranged speed competition did not constitute willful or wanton conduct as a matter of law which would bar his action against the driver of the second car involved in the race for injuries caused by defendant's willful or wanton conduct.

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

ON discretionary review to review the decision of the North Carolina Court of Appeals reported in 40 N.C. App. 530 reversing the judgment of *Gavin, S.J.*, entered at the 23 January 1978 Session of HARNETT Superior Court granting defendant's motion for a directed verdict.

Plaintiff Barry T. Harrington instituted this action for personal injuries sustained on 24 December 1974 while riding in an

automobile operated by Woody Salmon. The Salmon car and another automobile operated by defendant were engaged in a prearranged speed competition when the two cars collided causing plaintiff's injuries.

The undisputed evidence shows that at approximately 11:30 p.m. on 23 December 1974, plaintiff, aged eighteen, left his girlfriend at her home and drove to the Pioneer Grill on U.S. Highway 421 between Broadway and Lillington, North Carolina. Plaintiff walked to Woody Salmon's two-door Plymouth which was parked at the grill with the motor running. Salmon was in the driver's seat, Lynn Stewart was sitting in the front seat on the passenger side and Ronnie Dennis occupied the back seat. At Dennis's invitation, plaintiff climbed into the back seat behind the driver.

Defendant J. B. Collins then pulled up beside the Salmon car, and after a brief exchange between the drivers the two cars "took off beside each other" down the highway. The cars sped toward the crossroads about two miles away. The Salmon car arrived there first and pulled over onto the shoulder. Defendant then drove up beside Salmon and challenged him to a race back to the grill. Salmon indicated that he did not want to race. When defendant offered to bet him five dollars to race, Stewart agreed to cover the bet. Plaintiff and Dennis both overheard this conversation. However, neither plaintiff nor Dennis asked to get out of the car or said anything to Salmon about his driving.

The cars were stopped at the crossroads for about a minute before they started to race back to the grill. The time was just after midnight. Salmon's car passed defendant and began to slow down as it went by the designated finish line at the grill. Defendant in attempting to pass Salmon hit the left side of Salmon's car causing it to leave the road. Plaintiff and Dennis each suffered severe, permanent injuries. Salmon and Stewart were killed. The entire episode lasted about five minutes.

The parties stipulated that defendant pleaded guilty in district court to engaging in a prearranged speed competition, driving in excess of seventy-five miles per hour and operating a motor vehicle after his license had been revoked. All of these charges arose from the above-recited events.

Both plaintiff and Dennis brought civil actions against defendant, and the actions were consolidated for trial. At the conclusion of plaintiff's evidence, Judge Gavin granted defendant's motion for a directed verdict in both cases on the ground that the evidence proved each plaintiff to be contributorily negligent as a matter of law. Each plaintiff appealed separately to the Court of Appeals. One panel of that court affirmed the trial court as to Dennis in an unpublished opinion. In the instant case Judge Harry C. Martin, writing for another panel with Chief Judge Morris and Judge Carlton concurring, reversed the trial judge's ruling. In so deciding, this panel of the Court of Appeals concluded that: (1) defendant's conduct was willful or wanton as a matter of law and was a proximate cause of plaintiff's injuries; (2) mere contributory negligence on the part of plaintiff would not bar recovery against defendant's willful or wanton conduct, but plaintiff would be barred when his own conduct is also willful or wanton and a proximate cause of his injuries; (3) mere failure by plaintiff to protest or remonstrate or ask to get out of the car is no more than ordinary negligence; and (4) although plaintiff's acquiescence in the prearranged racing would bar his recovery, the evidence was insufficient to find that plaintiff acquiesced as a matter of law.

Defendant petitioned this Court for discretionary review pursuant to G.S. 7A-31, and his petition was allowed on 5 June 1979.

Bowen & Lytch by Wiley F. Bowen for plaintiff appellee.

Bryan, Jones & Johnson by Robert C. Bryan for defendant appellant.

BRANCH, Chief Justice.

The question presented by this appeal is whether the Court of Appeals erred in reversing the trial court's ruling granting defendant's motion for a directed verdict.

Defendant contends that the Court of Appeals erred in holding that ordinary contributory negligence on the part of plaintiff does not bar recovery as against defendant's willful or wanton conduct. He argues that this rule should not be applied in cases of prearranged racing in which a passenger has acquiesced by failing to take steps for his own protection, or alternatively, that plain-

tiff's acquiescence should amount to willful or wanton conduct as a matter of law and thus bar recovery. We disagree.

This Court considered the law of contributory negligence as a defense to the defendant's willful or wanton conduct in *Pearce v. Barham*, 271 N.C. 285, 156 S.E. 2d 290 (1967). There, Justice Bobbitt (later Chief Justice) speaking for the Court stated:

> "Ordinarily, where willful or wanton conduct for which defendant is responsible is a proximate cause of the injuries complained of, contributory negligence does not bar recovery." [Citations omitted.] In [*Brendle v. R.R.*, 125 N.C. 474, 34 S.E. 634 (1899)], Douglas J., for the Court states: "It is well settled that contributory negligence, even if admitted by the plaintiff, is no defense to willful or wanton injury."
>
> "While there is some authority to the contrary, it has been held that no recovery can be had for an injury willfully and wantonly inflicted, where willful or wanton conduct for which plaintiff is responsible contributed as a proximate cause thereof." [Citations omitted.] . . .
>
> The error in the quoted instruction relating to the contributory negligence issue is that the court instructed the jury the mere failure of plaintiff to protest and remonstrate and ask the driver to stop and let her get out of the car would be such contributory negligence as would bar recovery. Such conduct on the part of plaintiff would be no more than ordinary negligence and would not be a bar to recovery if plaintiff were injured as a result of Calvin's wilful or wanton conduct.

Id. at 289-90, 156 S.E. 2d at 294.

[1] *Pearce* stands for the proposition that ordinary negligence on the part of a plaintiff will not defeat his recovery from a defendant whose willful or wanton negligence proximately caused plaintiff's injury. Furthermore, it is the majority rule, and we think the better reasoned rule, that plaintiff's willful or wanton negligence is a defense in an action seeking recovery for injuries caused by defendant's willful or wanton conduct. *Hinkle v. Minneapolis, Anoka & Cuyuna Range Railway*, 162 Minn. 112, 202 N.W. 340 (1925); *see also* Annot., 41 A.L.R. 1379 (1926) and cases cited therein.

In cases where defendant is guilty of simple negligence, this Court has held that under certain circumstances it becomes the duty of the gratuitous passenger in the exercise of due care for his own safety to protest, remonstrate the driver and, if his warning is disregarded, to request that the automobile be stopped and he be permitted to leave the car. *Samuels v. Bowers*, 232 N.C. 149, 59 S.E. 2d 787 (1950), *petition for rehearing dismissed*, 232 N.C. 522, 61 S.E. 2d 448 (1950); *Bogen v. Bogen*, 220 N.C. 648, 18 S.E. 2d 162 (1942); 5 Blashfield Automobile Law and Practice § 215.20 (3d ed. 1966). However, in such cases whether the guest passenger should remonstrate, protest or even leave the automobile is ordinarily a question for the jury to be decided according to the particular circumstances of each case and upon the standard of what an ordinarily prudent person in the exercise of due care would have done under similar circumstances. *Beam v. Parham*, 263 N.C. 417, 139 S.E. 2d 712 (1965); *Dinkins v. Carlton*, 255 N.C. 137, 120 S.E. 2d 543 (1961); *Bell v. Maxwell*, 246 N.C. 257, 98 S.E. 2d 33 (1957); *Samuels v. Bowers*, *supra*.

Defendant further contends that plaintiff acquiesced in the race and thus is barred from recovery as a matter of law. He relies on *Boykin v. Bennett*, 253 N.C. 725, 118 S.E. 2d 12 (1961). That case involved a speed competition which caused the death of the plaintiff's intestate, a gratuitous passenger. In overruling the trial court's sustaining of demurrers to the complaint, this Court held that the defendants, in claiming contributory negligence, had failed to allege that the plaintiff's intestate either knew or should have known before the race was underway that the defendants would engage in a speed competition. In holding that the defendants were concurrently liable, the Court stated:

> All who wilfully participate in speed competition between motor vehicles on a public highway are jointly and concurrently negligent and, if damage to one not involved in the race proximately results from it, all participants are liable, regardless of which of the racing cars actually inflicts the injury, and regardless of the fact that the injured person was a passenger in one of the racing vehicles. *Of course, if the injured passenger had knowledge of the race and acquiesced in it, he cannot recover.*

Id. at 731-32, 118 S.E. 2d at 17 (emphasis added). Defendant in the instant case relies on the italicized portion of the above-quoted statement and contends that plaintiff is consequently barred by his own acquiescence to the race. However, in *Boykin* the question of acquiescence was not before the Court, the sole issue being whether the complaint was sufficient to state a cause of action. The statement relied upon by defendant was merely a general observation which did not attempt to define "acquiescence" or apply it to the facts of the case. In our opinion, this statement is dictum and therefore not authoritative.

[2] "Acquiescence" has been construed by the courts in many different contexts. It has been described as passive compliance as distinguished from avowed consent on one hand and open opposition on the other. *Paul v. Western Distributing Co.*, 142 Kan. 816, 52 P. 2d 379 (1935). In addition, it has been defined as a failure to make objections, *Scott v. Jackson*, 89 Cal. 258, 26 P. 898 (1891), and as submission to an act of which one has knowledge. *Pence v. Langdon*, 99 U.S. 578, 25 L.Ed. 420 (1878). Conversely, "acquiescence" is conduct recognizing the existence of a transaction and intended to some extent at least, to carry it into effect. *De Boe v. Prentice Packing & Storage Co.*, 172 Wash. 514, 20 P. 2d 1107 (1933). *See also Black's Law Dictionary* 40 (4th ed. rev. 1968). The difficulty in defining "acquiescence" stems from the fact that its meaning varies according to the context in which it is used. It is clear, however, that in the legal context of whether or not a plaintiff who is a gratuitous passenger has acquiesced in defendant's acts which constitute willful or wanton conduct, plaintiff's acquiescence must be more than ordinary negligence to bar his recovery. The mere failure to protest, remonstrate or request that he be allowed to leave the car is no more than simple negligence. *Pearce v. Barham, supra.* Under the circumstances of this case, whether or not plaintiff's conduct amounted to more than simple negligence is a question for the jury.

In ruling upon a motion for a directed verdict in favor of defendant on grounds of contributory negligence, it is the general rule that such a motion may only be granted when the evidence, taken in the light most favorable to the plaintiff, establishes his negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies even arising from plaintiff's own evidence must be resolved by

the jury rather than the trial judge. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976); *Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973). This same rule applies in cases involving willful or wanton conduct.

[3, 4] We turn to an application of the above-stated rules of law to the evidence in this case. Here, defendant pleaded guilty to willfully engaging in a prearranged speed competition in violation of G.S. 20-141.3(a). The Court of Appeals correctly held that this constituted willful or wanton conduct and was a proximate cause of plaintiff's injuries. The evidence, taken in the light most favorable to plaintiff, discloses that plaintiff had no notice of an agreement to race when he entered the Salmon car or before the automobiles left the grill. Only when the cars were stopped at the crossroads for approximately one minute did the eighteen-year-old plaintiff become aware of a plan for a prearranged speed competition. We hold that plaintiff's failure to remonstrate or to leave the car at a rural crossroads minutes past midnight on a cold Christmas Eve does not constitute willful or wanton conduct as a matter of law. Accordingly, the trial court erred in granting defendant's motion for a directed verdict.

The decision of the Court of Appeals is

Affirmed.

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

STATE OF NORTH CAROLINA v. MICHAEL LEE HEAVENER

No. 8

(Filed 6 November 1979)

1. Criminal Law § 76.5— waiver of right to counsel—necessity for specific finding

Though it would have been better if the trial court had made an express finding as to whether defendant knowingly and intelligently waived his right to counsel before answering questions by police, defendant nevertheless was not prejudiced since he testified on voir dire that he understood his rights at the time he waived them, and he therefore did not raise the issue as to whether he waived his right to counsel.

2. Homicide § 21.5— first degree murder—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for first degree murder where such evidence tended to show that defendant was angry with deceased for breaking into his apartment and taking his TV and stereo; he admitted firing a shot which was not accidental; he told witnesses that he thought he had killed deceased; he stated that he covered deceased's body with grass or bushes and police located the body following defendant's instructions; and statements made by defendant were conflicting and contrary to what the evidence tended to show.

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

APPEAL by defendant from *Kirby, J.*, 14 November 1978 Regular Criminal Session, GASTON Superior Court.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with the murder of Timothy Ray Jenkins (Tim) on 9 July 1978. Evidence presented by the state tended to show:

Tim was expected at the home of his parents (Mr. and Mrs. Jenkins) on Sunday, 9 July 1978, to eat lunch with them. He did not appear for that meal. The next day, Mr. Jenkins went to Tim's apartment but did not get an answer at the door. Tim and defendant occupied adjoining apartments. Tim's yellow Volkswagen was parked across the street from the apartment building.

Mr. Jenkins then went to the Gastonia Pepsi Cola Bottling Company plant where his son was employed but did not find him there. Thereafter he returned to the apartment and found the Volkswagen was gone.

On the following day, Tuesday, Mr. Jenkins went to the apartment again but was unable to locate Tim. On the same day, Gaston County Rural Police went to Mr. and Mrs. Jenkins' home to question them. After the police left, they again went to the apartment but failed to find their son.

The parents then decided to go to the rural police station. On their way there, they saw Tim's Volkswagen which was being driven by defendant. They proceeded to talk with defendant and he produced a receipt indicating that he had purchased the car from Tim. At the parents' request, defendant went with them to the rural police station.

At the police station, Mr. and Mrs. Jenkins were told that the police had information suggesting that Tim had been killed. Detective Harrell then talked with defendant who went with him to the detective bureau of the Gastonia Police Department. Defendant was advised of his *Miranda* rights and he signed a form waiving his rights, including the right to have an attorney present while he was being questioned.

Pursuant to questioning by police, defendant made statements to the effect that on the preceding Sunday he and Tim met three white males on a rural road for a "drug deal"; that while there, he (defendant) fell and accidentally discharged a shotgun he had carried with him; that shot from the blast struck Tim in his back; that one of the other persons present thereafter struck Tim with a rock; that another one of the persons fired the gun into Tim's face; and that he (defendant) then ran away from the area but returned later and covered Tim's body.

Following directions given by defendant, the police located Tim's body. After finding it they went to defendant's apartment with his consent and there found his shotgun as well as a large number of .410 shotgun shells.

A pathologist testified that he performed an autopsy on Tim's body; that he found a gunshot wound in the victim's back and another in his face and head; that the latter wound was caused by a gunshot entering the victim's cheek and going into his head, destroying the brain and part of the skull; that both shots were fired from a distance of approximately six feet; and that Tim died from the head injuries.

Two of defendant's friends, Randy Drum and Dan Michaels, testified as to statements he made to them (separately) on Monday and Tuesday. To both of them he stated that Tim had been in his apartment; that he caught Tim in the act of stealing his stereo and t.v. set; that he jumped on Tim and cut and sliced him with a knife; that he then made Tim at gunpoint get into his car; and that he thereafter covered Tim with brushes "and stuff like that". To Michaels, defendant also stated that he forced Tim at gunpoint to sign a piece of paper "signing his car over to him"; that after taking Tim out into the country, he cut on him some more; that Tim begged for his life but that he cut on him some more because "no [s.o.b.] was going to break into his apartment and get away

with it". Michaels reported to police on Tuesday what defendant had told him.

Defendant offered no evidence.

The jury returned a verdict finding defendant guilty of first-degree murder "with malice and with premeditation and deliberation". On the question of punishment, the jury found no aggravating circumstance and recommended that defendant be sentenced to life imprisonment. Judgment imposing a life sentence was entered by the court.

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

Assistant Public Defender Larry B. Langson for defendant-appellant.

BRITT, Justice.

[1] Defendant argues two assignments of error. By his first one, he contends that the trial court erred in not suppressing his alleged statements to police. This assignment has no merit.

Before any evidence was presented at trial, defendant moved to suppress the statements he allegedly made to police because he did not fully understand the rights he was entitled to assert as a criminal defendant. The court conducted a *voir dire* hearing at which the state and defendant presented evidence. Following the *voir dire*, the court made findings of fact, concluded that defendant was fully and completely advised of his constitutional rights, his right against self-incrimination, and his right to have counsel present during interrogation, and denied defendant's motion to suppress the evidence relative to defendant's statements to police.

Defendant argues that this court in *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976), and other cases has set forth the procedure that the trial courts must follow in passing upon the admissibility of evidence relating to incriminating statements; and that the court did not fully comply with that procedure in this case.

The law pertinent to the question raised here is well summarized by Chief Justice Sharp in *State v. Biggs, supra*, pages 529-531, as follows:

> In this jurisdiction, when a defendant challenges the admissibility of an in-custody confession, the trial judge must conduct a *voir dire* hearing to determine whether the confession was voluntarily made and whether the requirements of the *Miranda* decision have been met. *See State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53 (1969). When the trial judge concludes a *voir dire* hearing, the general rule is that he should make findings of fact to show the bases of his ruling. *See State v. Silver*, 286 N.C. 709, 213 S.E. 2d 247 (1975). However, when there is no conflict in the evidence on *voir dire*, we have held it is not error to admit a confession without making specific findings. Yet, at the same time, we have emphasized that it is always the better practice for the court to find the facts upon which the admissibility of the evidence depends. (Citations.)
>
> When there is no conflict in the testimony the necessary findings are implied from the court's admission of the confession into evidence. However, when the *voir dire* evidence is conflicting and contradictory, it is incumbent upon the trial judge to weigh the credibility of the witnesses, resolve the crucial conflicts, and make appropriate findings of fact. *State v. Smith*, 278 N.C. 36, 178 S.E. 2d 597 (1970). Because of his superior opportunity to observe the demeanor of the witness and to ferret out the truth, the trial judge is given the responsibility for resolving the factual disputes which govern the admissibility of challenged evidence. For the same reason, the trial judge's findings are conclusive on appeal if they are supported by competent evidence. *State v. Smith, supra.*
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> * * *
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> Subsequent opinions of this Court make it clear when the State seeks to offer in evidence a defendant's in-custody statements, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to

counsel. *State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975); *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972). When the *voir dire* evidence regarding waiver of counsel is in conflict, the trial judge *must* resolve the dispute and make an express finding as to whether the defendant waived his constitutional right to have an attorney present during questioning.

Defendant insists that he raised an issue at the *voir dire* as to whether he knowingly and intelligently waived his right to have an attorney present before he answered questions asked by police; that the evidence on that question was conflicting; and that the court did not resolve the dispute by making an express finding as to whether he waived his constitutional right to have an attorney present during questioning.

While we agree with defendant that the trial court did not make an express finding that defendant knowingly and intelligently waived his right to have an attorney present during questioning, we disagree with his argument that he raised an issue on the question.

Defendant testified at the *voir dire*. He was questioned with respect to each of the *Miranda* rights and stated that each of them was read to him by the police, that he read them, and that he voluntarily signed the waiver. The only right he equivocated about was the one relating to the appointment of counsel prior to questioning and the presence of counsel at the time of questioning. On that point, he stated on direct examination:

> " . . . I remember him telling me I had the right to have an attorney present while I was being questioned. I remember him telling me if I couldn't afford a lawyer I had the right to request the Court to appoint one to me at no expense before I answered questions. I remember him reading that question to me. At the time, I told him that I did understand it . . . ."

On cross-examination defendant was questioned again about each of the *Miranda* rights. He restated that each of the rights was read to him and that he understood each of them except the one relating to the appointment of counsel. He equivocated on that point but the record discloses the following:

THE COURT: — "If you cannot afford a lawyer, one will be appointed for you before questioning if you wish" — that's what Mr. Harrell's language was — and "If you desire to answer questions now without a lawyer present, you can still have the right to stop answering at any time." Did you understand that?

A. Well, at the time — yes, sir.

Certainly it would have been much better if the trial court had made an express finding as to whether defendant knowingly and intelligently waived his right to counsel before answering questions by police. Nevertheless, we hold that defendant did not raise the issue. The crucial question was whether defendant understood his rights *at the time he waived them.* He testified that he did.

[2] By his own assignment of error, defendant contends that the trial court erred in denying his motion to nonsuit the charge of murder. This assignment has no merit.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Davis,* 289 N.C. 500, 223 S.E. 2d 296, *death sentence vacated* 429 U.S. 809 (1976); *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971).

In passing upon a motion for nonsuit in a criminal action, the courts are required to consider the evidence and all reasonable inferences arising therefrom in the light most favorable to the state, and contradictions and discrepancies, even in the state's evidence, are for the jury to resolve. 4 Strong's N.C. Index 3d, Criminal Law § 104. When the evidence in the case at hand is considered in conformity with these principles, we hold that it was sufficient to withstand the motion for nonsuit.

Defendant argues that the state substantially relied upon statements he allegedly made to the police and to the witnesses Drum and Michaels; that many of those statements were exculpatory; and that the state was bound by them.

It is true that the evidence reveals that defendant made many conflicting statements including a statement that Tim was shot in his head by one of the three persons defendant and Tim

met "on the drug deal"; that the shot which defendant fired into Tim's back was an accident; that defendant and Tim were friends; and that he had no reason or motive for killing Tim.

Even so, there was evidence presented by the state tending to show that the shot which defendant admitted firing could not have been accidental; and that while defendant told witnesses he cut Tim "to pieces", there were no knife wounds on Tim's body. Defendant told witnesses that he "thought" he killed Tim, and he definitely stated that he covered Tim with grass or bushes. In talking with his friends Drum and Michaels about what he had done to Tim, defendant did not mention any other persons being with the two of them. In determining defendant's guilt, the jury was not required to find that Tim died from knife wounds rather than the gunshot wound to which the pathologist testified.

As to defendant's motive, the evidence tended to show: that defendant was mad at Tim for entering his apartment and taking his t.v. and stereo; that defendant wanted Tim's Volkswagen; and that he took the car away from Tim, forcing him to sign a "receipt" for it. Although proof of motive is not required to establish guilt of first-degree murder, *State v. Hammonds*, 216 N.C. 67, 3 S.E. 2d 439 (1939), the state presented evidence which tended to show defendant's motive in this case.

We conclude that defendant received a fair trial, free from prejudicial error.

No error.

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

STATE OF NORTH CAROLINA v. LEVI MITCHELL, JR.

No. 22

(Filed 6 November 1979)

Criminal Law §§ 91, 181— application for post-conviction relief—authority to schedule hearing

The district attorney does not have the authority and responsibility to schedule the hearing for an application for post-conviction relief (motion for appropriate relief); rather, the trial judge has the authority and sole responsibility to schedule such a hearing. G.S. 15-217.1.

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

Justice CARLTON concurring.

Chief Justice BRANCH and Justice HUSKINS join in the concurring opinion.

ON petition for a writ of certiorari by the State from the order of *Riddle, S.J.* at the 15 January 1979 Session of RUTHERFORD County Superior Court granting the defendant a new trial. The defendant was charged in three separate indictments, all proper in form, with three counts of forgery and uttering forged checks. On 8 August 1978, defendant pled guilty before *Howell, J.* in Rutherford County Superior Court to three counts of uttering forged checks and was sentenced to imprisonment for ten years on each count with the sentences to run concurrently.

On 2 October 1978, defendant filed an application for a post-conviction hearing (motion for appropriate relief) on the ground that his attorney had promised him that he would be given probation if he pled guilty and would not serve any time in prison. On 1 November 1978, Jackson, J. appointed J. Nat Hamrick of the Rutherford County Bar to represent defendant on his petition and ordered a hearing to be held on 8 November 1978.

Hamrick was not successful in getting the matter heard on 8 November 1978 or for the remainder of 1978. He unsuccessfully attempted to have the district attorney's office set the matter for hearing at the 15 January 1979 Mixed Session of Rutherford County Superior Court. Hamrick asked Riddle, S.J., who was assigned to hold that session of court, to hear the matter and advised the district attorney's office of the request. Riddle, S.J.,

agreed to hear the matter at the conclusion of jury trials for that week. District Attorney Lowe delivered a letter to Riddle, S.J. on 15 January 1979 stating that his office had been advised on 12 January 1979 that Riddle, S.J. had been requested to hear the matter at the 15 January 1979 Mixed Session of Court. Mr. Lowe stated that his office had not scheduled the matter for hearing at the 15 January 1979 Session because he and the members of his staff would be holding a criminal session of court in McDowell County during that week. On that date District Attorney Lowe had three assistants. We take notice of the fact that no criminal court was held in the Twenty-ninth District on Friday, 19 January 1979, in District or Superior Court, except for a criminal session of District Court in Rutherford County. On Thursday afternoon, 18 January 1979, Riddle, S.J. advised Hamrick that he would hear the matter the next day after the conclusion of the last case for that session. Hamrick called the district attorney's office and advised them concerning when Riddle, S.J. planned to hear the matter. There was apparently no further communication from the district attorney's office.

No one from the district attorney's office was present at the hearing. Riddle, S.J. heard the defendant's evidence and granted a new trial. The State petitioned the Court of Appeals for an order granting supersedeas which was denied by that Court. We granted the State's petition for a writ of certiorari.

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

J. Nat Hamrick for the defendant.

COPELAND, Justice.

The sole issue presented in this appeal is whether a trial judge has the authority and responsibility to schedule a matter for hearing or whether all authority and responsibility for scheduling hearings on post-conviction motions rest with the district attorney's office.

G.S. 7A-61 provides that the district attorney "shall prepare the trial dockets." However, that statute does not mean that a judge is without authority to schedule a matter for a hearing in

court. G.S. 15-217.1 speaks specifically to the procedure applicable to the review of criminal trials. It provides in relevant part that:

> "The proceeding shall be commenced by filing with the clerk of superior court of the county in which the conviction took place a petition, with two copies thereof, verified by affidavit . . . .
>
> The clerk shall place the petition upon the criminal docket upon his receipt thereof. The clerk shall promptly after delivery of copy to the district attorney bring the petition, or a copy thereof, to the attention of the resident judge or any judge holding the courts of the district or any judge holding court in the county. *Such judge shall review the petition and make such order as he deems appropriate with respect to* permitting the petitioner to prosecute such action without providing for the payment of costs, with respect to the appointment of counsel, and with respect to *the time and place of hearing upon the petition.*" G.S. 15-217.1 (Emphasis added.)

Therefore, we hold that a trial judge has the authority and sole responsibility to schedule the hearings on these post-conviction motions.

The Criminal Procedure Act provides in relevant part that when a motion for appropriate relief is made in written form and is made more than ten days after entry of judgment, then service of the notice of hearing "must be made not less than five working days prior to the date of the hearing." G.S. 15A-1420(a)(2). The specific date for the hearing in this case was not actually determined until the day before the hearing was held. However, we hold that, on the facts of this case, the district attorney had at least five working day's notice that the trial judge planned to hear the case at the end of the 15 January 1979 session of court.

There was a failure of effective communication in this case. It would have been the better practice for the trial judge to have communicated directly through the court system with the district attorney or a member of his staff rather than indirectly through defense counsel. The notice of hearing should be made orally in court to both parties or in the form of a written order sent to both parties much as Jackson, J. did in his order of 1 November 1978.

The district attorney had the opportunity to be present and to be heard at the hearing but chose not to be there, nor did he request a continuance due to any actual conflict in the scheduled appearances for himself or the members of his staff. There must be cooperation between the district attorney, the trial judge and counsel for the petitioner in these types of hearings in order to make the most effective use of the court's time.

The trial judge held the hearing and granted defendant a new trial. In the actions of the trial judge we find

No error.

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

Justice CARLTON concurring.

I concur with the result reached by the majority for the reasons stated below. I also want to issue a note of caution to those who wish to preserve our present system of preparing criminal calendars.

The procedures for post-conviction relief, now termed by our statutes as "appropriate relief," have been codified in G.S. 15A-1420. G.S. 15A-1420(a)(1) provides that a motion for appropriate relief must be made in writing unless it falls into an exception which is not applicable here. G.S. 15A-1420(a)(2) and (3) further provide that a written notice of motion for appropriate relief must be served and filed "in the manner provided in G.S. 15A-951(b) [and] (c)." Those sections in turn state: "(b) Each written motion must be served on the attorney of record for the opposing party or upon the defendant if he is not represented by counsel . . . . (c) All written motions must be *filed with the court.*" (Emphasis added.) I find no language in those statutes which gives the district attorney any control over the calendaring of this matter for hearing. Indeed, the clear inference of the statutes places such responsibility on the trial judge and the clerk of court.

I also note that while G.S. 15A-1420 largely replaced the former post-conviction relief statutes, G.S. 15-217 *et seq.*, one sec-

tion of the former law, G.S. 15-217.1, has not been repealed. That unrepealed section provides in pertinent part that

> The *clerk* shall place the petition upon the criminal docket upon his receipt thereof. The clerk shall promptly after delivery of copy to the district attorney bring the petition . . . to the attention of the resident judge or any judge holding the courts of the district or any judge holding court in the county. Such judge shall review the petition and make such order as he deems appropriate with respect to . . . *the time and place of hearing upon the petition.* (Emphasis added.)

I do not think the legislature could have stated it more plainly: Not simply the authority but the responsibility for calendaring post-conviction hearings rests upon the trial court and the clerk of court. Conversely, the district attorney has no statutory control over the calendaring of such matters.

This view is buttressed by further language in G.S. 15-217.1 not mentioned by the majority:

> If it appears to the judge that substantial injustice may be done by any delay in hearing upon the matters alleged in the petition, he may issue such order as may be appropriate to bring the petitioner before the court without delay, *and may direct the district attorney* to answer the petition at a time specified in the order, and the court shall thereupon inquire into the matters alleged as directed by the reviewing judge, as in the case of a writ of habeas corpus. (Emphasis added.)

Whether G.S. 15A-1420 and G.S. 15-217.1 are read separately or together, it appears that the district attorney has been given no authority to calendar post-conviction matters even though he obviously should play an important role in this process.

I share with the majority the view that the State's reliance on G.S. 7A-61 is misplaced. That statute provides, *inter alia*, that the district attorney "shall prepare the trial dockets. . . ." A post-trial hearing is not a "trial" and I do not believe that that statute embraces the proceedings to review criminal trials upon motions for appropriate relief. I would further note that a district attorney's power over even the trial docket is not unlimited. G.S. 7A-49.3, which gives important calendaring responsibility to the

district attorney, also provides at subsection (c), "[n]othing in this section shall be construed to affect the authority of the court in the call of cases for trial." While one federal court has held that G.S. 7A-49.3 sanctions the practice in North Carolina of having the district attorney control the criminal calendar, *see Shirley v. North Carolina*, 528 F. 2d 819, 820 (1975), the fact remains that the wording of the statute posits residual power in the trial court to override this practice.

I mention all of this not in an attempt to resolve the continuing controversy in North Carolina over whether calendar control of criminal cases should be in the court or the district attorney. My purpose is to issue a reminder that many, both judges and attorneys, feel the office of district attorney is vested with powers which they perceive to be excessive. *See N.C. Bar Association Foundation, Administration of Justice Study Committee on Case Docketing and Calendaring and Rotation of North Carolina Superior Court Judges*, FINAL REPORT 54-55 (1978). In light of this and the fact that most jurisdictions place all calendar control in the court or its clerk, not the prosecutor, *ABA Project on Standards for Criminal Justice*, STANDARDS RELATING TO SPEEDY TRIAL § 1.2 Commentary (Approved draft 1968); *Note: Calendar Practice in Criminal Courts—Control by Court or Prosecutor?*, 48 COLUM. L. REV. 61 (1948); *see also, North Carolina Bar Association Foundation, Administration of Justice Study Committee*, *supra* at 62, 65, a district attorney risks inviting the legislature to scrutinize his calendaring powers and perhaps diminish them if any untoward event in calendaring trials and motions occurs. It is not for me to say whether the present system of calendaring or any threatened change of that system is good or bad. I simply note that this is the kind of case which causes the criticism of our practice, and thus should be the kind of case to zealously guard against.

There are other troublesome aspects to this case. I cannot understand why Judge Riddle did not hear from the attorney who was charged by the defendant with incompetence. A new trial for the defendant has been ordered without hearing from the one person who supposedly caused a violation of defendant's rights at his original trial. Moreover, as the majority notes, trial judges should not send informal notice of hearings of this nature through

defense counsel. Such a practice appears partisan and is unncessary.

For the above reasons I add my concurrence.

Chief Justice BRANCH and Justice HUSKINS join in this concurring opinion.

OSCAR N. HARRIS AND EDDIE PAT DRAUGHON, PARTNERS D/B/A NATIONAL ESTATES v. JAMES W. LATTA AND GLADYS H. LATTA

No. 17

(Filed 6 November 1979)

Vendor and Purchaser § 2— exercise of option timely—method of computing time

In computing the time for the performance of an act or event which must take place a certain number of days before a known future day, one of the terminal days is included in the count and the other is excluded, unless there is something to show an intention to count only "clear" and "entire" days; therefore, plaintiffs' notice to defendants of intent to purchase certain property was timely given on 15 January 1976 where the parties' contract provided that notice should be given "at least sixty (60) days prior to 15 March 1976," and use of the phrase "at least" did not alter the general rule for computation of time.

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

Justice BRITT dissents.

PLAINTIFFS appeal from decision of the Court of Appeals, 40 N.C. App. 421, 253 S.E. 2d 28 (1979), affirming judgment of *Hobgood, J.*, 16 January 1978 Civil Session, ROBESON Superior Court.

Plaintiffs brought this action for specific performance of an option to purchase certain land and the improvements thereon owned and leased to plaintiffs by defendants.

The lease between the parties is dated 14 March 1974 and grants the lessee, plaintiffs herein, " . . . the option to purchase the leased property, as above described, owned by the lessors at any time prior to March 15, 1976 at a purchase price of Eighty

Thousand Dollars ($80,000.). Said option shall be exercised by lessee giving written notice to lessors of his intent to purchase said leased property at least sixty (60) days prior to March 15, 1976."

Plaintiff hand delivered written notice of intent to purchase on January 15, 1976. Defendant declined to honor the option agreement, contending that the notice of intent to purchase was not timely given. Defendant contends the notice should have been given on or before January 14, 1976.

It should be noted that the year 1976 was a leap year with the month of February containing twenty-nine days.

The trial court held that in ascertaining "at least sixty days prior to March 15, 1976," both terminal days, *i.e.*, January 15, 1976 and March 15, 1976, should be excluded. Judgment was accordingly rendered in favor of defendants. On appeal, the Court of Appeals affirmed with Judge Webb dissenting. Plaintiffs appealed as of right to the Supreme Court pursuant to G.S. 7A-30(2).

Bryan, Jones & Johnson by James M. Johnson, attorneys for plaintiff appellants.

Johnson & Johnson by W. A. Johnson and Sandra L. Johnson, attorneys for defendant appellees.

HUSKINS, Justice.

The sole question on this appeal is whether the terminal days, *i.e.*, March 15, 1976 and January 15, 1976, shall be included or excluded in determining what period of time constitutes "at least sixty (60) days prior to March 15, 1976."

It is a well established general rule in this State and in an overwhelming number of other jurisdictions that in computing the time for the performance of an act or event which must take place a certain number of days before a known future day, one of the terminal days is included in the count and the other is excluded, unless there is something to show an intention to count only "clear" and "entire" days. *Pettit v. Trailer Co.*, 214 N.C. 335, 199 S.E. 279 (1938); *Guilford v. Georgia Co.*, 109 N.C. 310, 13 S.E. 861 (1891); *Taylor v. Harris*, 82 N.C. 25 (1880); *Beasley v. Downey*, 32 N.C. 284 (1849); 86 C.J.S., Time, § 13(1); Annot., 98 A.L.R. 2d 1331,

§ 3 (1964); *cf.* Rule 6(a), Rules of Civil Procedure; G.S. 1-593; G.S. 1-594 (1979 N.C. Adv. Leg. Serv., No. 5 at 267); G.S. 25-9-603(4) (1979 N.C. Adv. Leg. Serv., No. 5 at 267).

In *Beasley v. Downey, supra,* the defendant offered the deposition of a witness taken on December 28, 1847, pursuant to a notice served on plaintiff on December 26, 1847. The statute pertaining to the taking of depositions required three days' notice to be given. Plaintiff's objection to admission of the deposition for lack of timely notice was sustained and the deposition was excluded. On appeal this Court affirmed, saying: "As to the mode of counting the days, the proper rule is to count one day inclusive and the other exclusive. Here, there was one whole day and a part of two other days. If the day on which the notice was given be included, the day on which the deposition is taken should be excluded. This makes the notice short enough; and a good deal might be urged in favor of requiring three whole days; *but we adopt the rule, allowing one day inclusive and the other exclusive, for the sake of having one fixed and uniform rule.*" (Emphasis added.)

In *Taylor v. Harris, supra,* it was held that in computing the ten days before the beginning of a term required for the service of a summons, the rule, settled by long practice, is to include the day of service and exclude the return day. The statutory language being construed by the Court provided in pertinent part that the summons was to be served "*at least* ten days before the beginning of the term to which it is returnable. . . ." (Emphasis added.) It is to be noted that use of the phrase "at least" did not foreclose application of the general rule for computation of time.

G.S. 1-593 provides: "The time within which an act is to be done, as provided by law, shall be computed in the manner prescribed by Rule 6(a) of the Rules of Civil Procedure."

Rule 6(a) of the Rules of Civil Procedure provides, in pertinent part: "In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders or statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period

runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday."

It thus appears with complete uniformity that, absent anything showing an intent to count only clear or entire days, in computing the time for performance of an act which must take place a designated number of days before a known future day, one of the terminal days is included in the count and the other is excluded. Such is the general rule and it is followed in approximately forty states. "For the sake of having one fixed and uniform rule," we adhere to the general rule which has been the law in North Carolina since 1849.

In construing contracts ordinary words are given their ordinary meaning unless it is apparent that the words were used in a special sense. *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966). "The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense." *Weyerhaeuser v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962).

Applying these principles to the language of the option under consideration, we conclude that the able trial judge, and the Court of Appeals as well, erroneously construed the terms of the option. "[A]t least sixty (60) days prior to March 15, 1976" are simple, clear, unambiguous words which have no special meaning. They must therefore be given their ordinary, popular meaning. They show no intention of the parties to alter the general rule for computation of time in this jurisdiction. Therefore, the general rule for computing time applies with the first day of the sixty-day period excluded and the last day included. Beginning with March 15, 1976, which is excluded, and counting backward, sixty days terminates on January 15, 1976. Hence, plaintiff's written notice to defendants of intent to purchase the leased property was timely given on January 15, 1976.

Defendant vigorously contends that use of the phrase "at least" in "at least sixty (60) days prior to March 15" indicates a specific intent to compute the notice period by counting sixty "clear" or "entire" days between March 15 and the date written notice is to be given. We conclude that use of this phrase does not alter the general rule for the computation of time. *Accord, Taylor v. Harris, supra. See generally*, Annot., 98 A.L.R. 2d 1331 § 8. We

stress again that the phrase "at least" is not specially defined in the option contract and therefore must be given its ordinary meaning. *Insurance Co. v. Insurance Co., supra; Weyerhaeuser v. Light Co., supra.* When this is done, it is clear that the phrase "at least" does not specify which *method* of computation is to be used; rather, it merely serves to emphasize that a *minimum* of sixty days' notice must be given, to be computed in the manner in which time is normally reckoned.

It is important to note that the general rule for computation of time in this jurisdiction comports with the manner in which persons of ordinary understanding would determine the time within which an act is to be done. A holding that the parties to this contract contemplated sixty "clear" or "entire" days' notice by the plaintiffs in the exercise of their option would run counter to the ordinary expectations of contracting parties and would do violence to the clear intent of the parties as expressed in the language of the option.

For the reasons stated, the decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to the Superior Court of Robeson County for entry of judgment in accord with this opinion.

Reversed and remanded.

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

Justice BRITT dissents.

RENT-A-CAR COMPANY, INC. v. MARK G. LYNCH, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 55

(Filed 6 November 1979)

Taxation § 31.3— payment of sales taxes on rental of vehicles—sale of vehicles to individuals—no exemption from sales tax

A company engaged in the business of renting and leasing automobiles is not entitled under G.S. 105-164.4(1) to an exemption from sales tax on the sale

of its rental and lease vehicles to private individuals not for resale because it paid sales taxes on the rental and lease of its vehicles.

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

HEARD on discretionary review under G.S. 7A-31 of an opinion and judgment of the Court of Appeals reported at 39 N.C. App. 709, 251 S.E. 2d 917 (1979).

Plaintiff Rent-A-Car Company, Inc. is a North Carolina corporation with its principal place of business in Greensboro, North Carolina. Plaintiff's primary business is the renting and leasing of automobiles. During the period August 1, 1968 through June 30, 1971 plaintiff sold approximately 240 cars that had been in its inventory of cars used for renting and leasing. Fifty-three percent of these sales were to private individuals not for resale with the remainder to retailers for resale. Plaintiff collected no North Carolina sales tax upon the sale of the vehicles. The parties hereto have agreed that no tax was due on the sale of motor vehicles to wholesale and retail car dealers, for such cars were sold for resale. The question which faces us is plaintiff's liability for sales tax on the cars sold to private individuals not for resale.

During the period which these cars were leased by plaintiff Rent-A-Car Company, plaintiff calculated and paid all sales taxes due pursuant to G.S. 105-164.4 for such leases and rentals. After an audit of plaintiff's books, the defendant, Secretary of Revenue, determined that plaintiff was required to pay sales tax on the ultimate sale of the automobiles to individuals not for resale as well as the tax on their rental. On this basis the defendant issued an assessment of proposed deficiencies in sales tax in the amount of $32,808.01 for the period August 1, 1968 through June 30, 1971. Following the assessment, on or about November 9, 1971, plaintiff agreed with defendant that the remaining balance due for the assessed tax was $26,826.67 plus $626.61 accrued interest. This amount allegedly due was to be paid in installments beginning December 1, 1971. There were to be five payments of $3,000 and a final payment of $12,453.28. On 28 March 1972 plaintiff made a written demand for full refund of all payments made in December 1971, and January, February and March 1972. This letter also served as notice to defendant that all such payments were made under protest. Subsequent to this letter plaintiff made another payment on 31 March 1972, and the last installment of $12,453.28

was made on August 10, 1972. This final remittance was accompanied by a second written demand that this payment and all other payments previously made pursuant to the aforesaid sales tax deficiency be refunded.

Judge Brewer at the 30 January 1978 session of Wake County Superior Court determined that plaintiff was entitled to a refund for additional sales taxes assessed and paid for the sale of motor vehicles to individuals not for resale between August 1, 1968 and June 30, 1971 for which timely demand under the provisions of G.S. 105-267 was made. Judge Brewer refused a refund of the taxes paid in December 1971 as well as January and February 1972 for he found plaintiff did not make timely demand therefor as required by G.S. 105-267. The Court of Appeals affirmed the trial court in its decision that the refund was due, however found the demand timely, and determined plaintiff was entitled to a refund of the entire tax paid together with applicable interest.

Attorney General Rufus L. Edmisten by Assistant Attorney General George W. Boylan for the Secretary of Revenue, defendant appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard by Howard L. Williams for plaintiff appellee.

BROCK, Justice.

We disagree with the opinion of the Court of Appeals and therefore reverse its judgment, and remand this cause to the Court of Appeals for further remand to the Superior Court, Wake County, with directions that the judgment for plaintiff be vacated, and for entry of judgment for defendant and dismissal of this action with costs to plaintiff.

In its argument to this Court plaintiff appellee contends it is entitled to a full refund of sales tax paid on the ultimate sale of its lease and rental motor vehicles. It claims an exemption from such tax based on its prior payment of sales tax on the lease and rental of the same automobiles during the period August 1968 through June 1971. The sales tax exemption relied on by plaintiff is contained within N.C.G.S. 105-164.4 and provides as follows:

> "The [sales] tax levied under this subdivision shall not apply to the owner of a motor vehicle who purchases or acquires

> said motor vehicle from some person, firm or corporation, who or which is not a dealer in a new and/or used motor vehicles if *the tax* levied under this Article has been paid with respect to said motor vehicle."[1] (Emphasis added.)

Plaintiff contends the tax paid on the renting of the automobiles is *the tax* under G.S. 105-164.4, and upon its payment it comes within the above exemption and is required to pay no further tax.

In reading this exemption in the context of the remainder of G.S. 105-164.4, it is clear that the purpose of the exemption is to prevent the levying of a second 2% sales tax on a sale by a non-dealer where the same tax has already been imposed on the original retail sale. Here even though sales tax was collected on the lease and rental of the motor vehicles, the ultimate sale of the rental car is nevertheless a separate taxable transaction. Paying a sales tax on the ultimate sale of these automobiles to individuals not for resale does not duplicate the prior tax paid on the renting and leasing, and it is from the duplication of a tax paid earlier which the exemption provides protection.

Plaintiff relies on N.C.G.S. 105-164.3(15) which defines "sale" as follows:

> "any transfer of title or possession or both, exchange, barter, *lease* or *rental* of tangible personal property . . . ." (Emphasis added.)

On the basis of this language which makes a lease a taxable transaction under the Sales and Use Tax Act, plaintiff argues its payment of a tax on the leasing and rental of the cars, constituted *the sales tax* due under N.C.G.S. 105-164.4, and it is therefore within the statutory exemption noted above. G.S. 105-164.2 in defining the purpose of the North Carolina Sales and Use Tax Act notes that, "[t]he taxes herein imposed shall be in addition to all other license, privilege or excise taxes . . . ." In making these sales and use taxes additional taxes, the intent of our legislature was to levy a tax on the full sale price of tangible personal property. In allowing plaintiff to exempt itself from taxation by the prior payment of a sales tax on the leases and rentals, the intent of the legislature is clearly thwarted. "A part of a statute may

1. N.C.G.S. 105-164.3, 164.4, 164.6 were amended and rewritten by 1979 Session Laws, Chapter 48, to become effective July 1, 1979 and as amended are not applicable to this controversy.

not be interpreted out of context so as to render it inharmonious to the intent of the act, but must be construed as a part of the whole." *Canteen Service v. Johnson Comm. of Revenue*, 256 N.C. 155, 160, 123 S.E. 2d 582, 585 (1961). *See also Watson Industries v. Shaw*, 235 N.C. 203, 69 S.E. 2d 505 (1952); *State v. Barksdale*, 181 N.C. 621, 107 S.E. 505 (1921). If we were to interpret the language of 105-164.4 as requested by the plaintiff, the following result is possible: Plaintiff could purchase an entire fleet of automobiles and rent these automobiles for one week paying the sales tax due on the money received from the week's rentals. After renting these vehicles for one week, plaintiff could then proceed to sell these cars to individuals not for resale, and be exempt from payment of further sales tax based on the tax previously paid on the one week's rental. Clearly such a result is incongruous with the purpose of the Sales and Use Tax Act.

As we have previously noted the language of 105-164.3(15) defines a sale as including a lease or rental. By this language a lease is made a taxable event under G.S. 105-164.4, and as the Court of Appeals noted, plaintiff "paid *a* sales tax on the rental transactions." (Emphasis added.) Payment of a tax on the leases and rentals however, was not a prior payment of the sales tax on a retail sale which is required to come within the exemption of G.S. 105-164.4.

Finally, we note that to come within the tax exemption, the burden is on the party claiming to be within the exemption to bring himself within its parameters. *Sabine v. Gill*, 229 N.C. 599, 605, 51 S.E. 2d 1, 5 (1948); *Canteen Service v. Johnson*, 256 N.C. 155, 163, 123 S.E. 2d 582, 587 (1961). We find no evidence in the record as to whether or not sales tax has ever been paid on these motor vehicles [other than on the leases and rentals]. In the absence of such proof plaintiff has failed to meet its burden of bringing itself within the exemption of 105-164.4.

We conclude that the leasing of automobiles and the ultimate sale of the same vehicles to individuals not for resale are two separate transactions; each subject to taxation. We also hold that payment by the plaintiff of a sales tax on the leasing and rental of the automobiles does not exempt it from payment of sales tax upon its ultimate sale to individuals not for resale. Since we have determined that plaintiff is obligated to pay the taxes

assessed, we do not reach the issue of the timeliness of its demand for refund.

Reversed and remanded.

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

THE NORTH CAROLINA STATE BAR v. HARRY DUMONT, ATTORNEY

No. 58

(Filed 6 November 1979)

Appeal and Error § 6.2— lack of jurisdiction alleged—refusal to dismiss—no appeal as matter of right

An order of the hearing commission of the State Bar denying defendant's motion to dismiss on the ground of lack of jurisdiction was interlocutory, and defendant could not appeal therefrom as a matter of right. G.S. 7A-29.

APPEAL by defendant from the disciplinary hearing commission of the North Carolina State Bar.

Harold D. Coley, Jr., for plaintiff-appellee.

McLean, Leake, Talman & Stevenson, by Wesley F. Talman and Joel B. Stevenson, and Adams, Kleemeier, Hagan, Hannah & Fouts, by Charles T. Hagan, Jr., and John P. Daniel, for defendant-appellant.

PER CURIAM.

This cause consists of four consolidated disciplinary actions instituted in September 1978 by plaintiff against defendant, a licensed attorney. The conduct complained of allegedly took place in 1972 and 1974. The actions were brought before the disciplinary hearing commission of the North Carolina State Bar, an administrative agency created pursuant to Chapter 582 of the 1975 Session Laws (G.S. 84-28.1).

Defendant moved to dismiss the actions, one of the grounds being that said commission has no jurisdiction over the person of

defendant or the subject matter of the actions. The commission denied the motions to dismiss and defendant gave notice of appeal to the Court of Appeals.

Record on appeal was filed in the Court of Appeals on 17 April 1979 and the parties filed briefs. On 2 May 1979 defendant filed a petition pursuant to G.S. 7A-31 that the cause be heard by this court prior to determination by the Court of Appeals. On 5 June 1979 we allowed defendant's petition and issued a writ of certiorari ordering that the record be brought before this Court.

Plaintiff contends that the order denying defendant's motions to dismiss is interlocutory and that defendant has no right to appeal from said order. Plaintiff cites G.S. 7A-29 which provides as follows:

> Appeals of right from certain administrative agencies.—From any *final* order or decision of the North Carolina Utilities Commission, the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28 or an appeal from the Commissioner of Insurance pursuant to G.S. 58-9.4, appeal lies of right directly to the Court of Appeals. (Emphasis added.)

Defendant contends that his appeal is authorized by G.S. 1-277 which provides as follows:

> Appeal from superior or district court judge.—(a) An appeal may be taken from every judicial order or determination of *a judge of a superior or district court,* upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.
>
> (b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause. (Emphasis added.)

We hold that an appeal in this cause is controlled by G.S. 7A-29. The order from which defendant attempts to appeal is interlocutory, therefore, he cannot appeal as a matter of right. We also hold that the writ of certiorari from this court was improvidently issued.

Appeal dismissed.

Petition for writ of certiorari denied.

BOARD OF TRANSPORTATION v. RAND

No. 295.

No. 20 (Spring Term).

Case below: 42 N.C. App. 202.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 6 November 1979.

BULLARD v. JOHNS-MANVILLE CORP.

No. 4 PC.

Case below: 42 N.C. App. 370.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 November 1979.

DANIELS v. JONES

No. 35 PC.

Case below: 42 N.C. App. 555.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1979.

DISTRIBUTORS, INC. v. DEPARTMENT OF TRANSPORTATION

No. 48 PC.

Case below: 41 N.C. App. 548.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 November 1979.

DIXON v. REALTY CO.

No. 50 PC.

Case below: 42 N.C. App. 650.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 November 1979.

EQUILEASE CORP. v. HOTEL CORP.

No. 24 PC.

Case below: 42 N.C. App. 436.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 November 1979.

GRAHAM v. CITY OF HENDERSONVILLE

No. 36 PC.

Case below: 42 N.C. App. 456.

Petition by defendants for writ of certiorari to North Carolina Court of Appeals denied 6 November 1979.

HASSELL v. MEANS

No. 41 PC.

Case below: 42 N.C. App. 524.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 November 1979.

HOOPER v. CITY OF WILMINGTON

No. 37 PC.

Case below: 42 N.C. App. 548.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1979.

IFCO v. BANK

No. 26 PC.

Case below: 42 N.C. App. 499.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 November 1979.

IN RE WILLIAMS

No. 8 PC.

Case below: 42 N.C. App. 504.

Petition by Washington Duke Lyon, Jr. for discretionary review under G.S. 7A-31 denied 6 November 1979.

LANGDON v. POWER & LIGHT CO.

No. 68 PC.

Case below: 43 N.C. App. 227.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 November 1979.

MATTHEWS, CREMINS, McLEAN, INC. v. NICHTER

No. 292 PC.

Case below: 42 N.C. App. 184.

Petition by defendant Gaskell for discretionary review under G.S. 7A-31 denied 6 November 1979.

PIERCE v. GADDY

No. 43 PC.

Case below: 42 N.C. App. 622.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 November 1979.

QUIS v. GRIFFIN

No. 20 PC.

Case below: 42 N.C. App. 477.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 November 1979.

ROUSE v. MAXWELL

No. 68.

Case below: 40 N.C. App. 538.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 28 June 1979 (297 N.C. 612) and petition by third-party defendant Simpson for writ of certiorari allowed 30 July 1979 (297 N.C. 698) vacated 6 November 1979. Petition by defendant Maxwell for discretionary review under G.S. 7A-31 filed 7 May 1979 and petition by defendant Simpson for writ of certiorari filed 9 July 1979 denied 6 November 1979. The proceedings in this cause in the Supreme Court dismissed 6 November 1979.

STATE v. BROWN

No. 105 PC.

Case below: 43 N.C. App. 532.

Petition by defendant for discretionary review under G.S. 7A-31 denied 20 November 1979. Petition by defendant for stay of execution of judgment denied 20 November 1979.

STATE v. ENSLIN

No. 40 PC.

Case below: 42 N.C. App. 565.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1979.

STATE v. GUIRGUIS

No. 57 PC.

Case below: 41 N.C. App. 405.

Application by defendant for further review denied 6 November 1979.

STATE v. HOLSCLAW

No. 60 PC.

Case below: 42 N.C. App. 696.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1979. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 6 November 1979.

STATE v. LOCKLEAR

No. 95 PC.

Case below: 41 N.C. App. 292.

Application by defendant for further review denied 20 November 1979.

STATE v. SAWYER

No. 10 PC.

Case below: 42 N.C. App. 731.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1979.

STATE v. SCHOOL

No. 44 PC.

No. 125 (Fall Term).

Case below: 42 N.C. App. 665.

Motion of plaintiff to reconsider allowance of petition for discretionary review under G.S. 7A-31 (298 N.C. 303) denied 8 October 1979. Motion of plaintiff to dismiss appeal denied 8 October 1979.

STATE v. SETZER

No. 13 PC.

Case below: 42 N.C. App. 98.

Application by defendant for further review denied 6 November 1979.

STATE v. SMITH

No. 52 PC.

Case below: 40 N.C. App. 772.

Application by defendant for further review denied 6 November 1979.

STATE v. WHITEHEAD

No. 30 PC.

Case below: 42 N.C. App. 506.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1979. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 6 November 1979.

STATE v. WHITLEY

No. 58 PC.

Case below: 42 N.C. App. 731.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1979. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 6 November 1979.

STATE v. WILLIAMS

No. 54 PC.

No. 23 (Spring Term).

Case below: 42 N.C. App. 662.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 6 November 1979.

STONE v. McCLAM

No. 18 PC.

Case below: 42 N.C. App. 393.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 November 1979.

STATE OF NORTH CAROLINA v. ANTHONY D. NELSON AND JAVAN JOLLY

No. 106

(Filed 4 December 1979)

1. **Searches and Seizures § 3— warrantless inventory search by military authorities of soldier's billet—subsequent "second look" at inventoried items**

A warrantless search by military authorities of a military billet of a soldier detained by civilian authority, or otherwise absent without leave, to make an inventory of his belongings and to secure them for safeguarding pursuant to military regulation without any investigative purpose was not an unreasonable search or seizure proscribed by the Fourth Amendment. Furthermore, a "second look" by military authorities at some of the inventoried and secured items three days later did not constitute another search subject to Fourth Amendment proscriptions.

2. **Criminal Law § 84; Searches and Seizures § 3— inventory search by military authorities—admissibility of items in civilian trial**

Evidence obtained by military authorities in an inventory of soldiers' possessions was not required to be excluded in a civilian criminal trial of the soldiers on the ground that the surrender of the evidence by military to civilian authorities violated the Posse Comitatus Act, 18 U.S.C. 1385, since (1) a violation of the Act would not call for invocation of the exclusionary rule, and (2) such passive activities of military authorities which incidentally aid civilian law enforcement are not precluded by the Act.

3. **Criminal Law § 92— antagonistic defenses by two defendants—test of whether severance required**

The test of whether antagonistic defenses by two defendants required severance of their trials is whether the conflict in defendants' respective positions at trial was of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial.

4. **Criminal Law § 92— two defendants—when severance of trials required**

A severance of the trials of two defendants should ordinarily be granted where their defenses are so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty, or where their defenses are so discrepant as to pose an evidentiary contest more between defendants themselves than between the State and the defendants.

5. **Criminal Law § 92.1— inconsistent testimony by two defendants—severance not required**

Although the two defendants in a rape, burglary and armed robbery trial gave inconsistent testimony as to whether the first defendant loaned the second defendant his car on the date of the crimes and whether jewelry found in the first defendant's locker was sold to him by the second defendant, defendants were not denied a fair trial by the refusal of the trial court to sever their trials since the State itself offered plenary evidence of both defendants' guilt and did not simply stand by and rely on the testimony of defendants to

convict them; neither defendant testified directly to the other defendant's guilt and both defendants denied any participation in the crimes; each defendant was subject to cross-examination by the other; the first defendant could have testified to the same matters tending to implicate the second defendant at a separate trial of the second defendant; and the conflict between each defendant's respective testimony was not of such magnitude when considered in the context of other evidence that the jury was likely to infer from that conflict alone that both were guilty.

6. **Criminal Law § 92.1— joinder of defendants' trials—evidence competent against one considered against both—absence of objection**

Joinder of defendants' trials was not erroneous because evidence competent against only one defendant was allowed to be considered against both and the trial judge, in reviewing the evidence against one defendant, alluded to items of stolen jewelry which the State's evidence tended to show were found in the second defendant's locker, where defendants failed to make timely objection to the evidence and motions for limiting instructions and failed to object to the court's recapitulation of the State's evidence.

7. **Attorneys at Law § 6— codefendant represented by defendant's former counsel—necessity for showing of prejudice**

Prejudice warranting a new trial does not automatically result to a defendant whose codefendant is represented by counsel who formerly represented both defendants when testimonial conflicts between defendants develop at trial. Rather, a new trial is warranted only when defendant can show actual prejudice, which means more than a defendant's having been damaged at trial by the actions of his former attorney and requires that the record show that the attorney took advantage of the former relation in some way at the subsequent trial or that the former relation put the attorney in a better position to inflict the damage than he otherwise would have had.

8. **Attorneys at Law § 6— codefendant represented by defendant's former counsel—absence of prejudice**

Defendant failed to show prejudice arising from having his former lawyer represent his codefendant at trial where questions asked defendant by his former attorney on cross-examination and the former attorney's jury argument did not suggest that they were engendered by information obtained during the former relation or that the former relation put defendant at any other disadvantage at his trial, and where defendant acquiesced in his former attorney's representation of the codefendant by failing to object at trial.

9. **Jury § 9— inability of juror to attend session on Saturday—replacement with alternate juror**

The trial court did not abuse its discretion in excusing a juror and substituting an alternate juror when the juror indicated that she could not attend a session of court on Saturday.

10. **Criminal Law § 33— holster and ammunition in defendant's car—irrelevancy—harmless error**

In this prosecution for burglary, rape and armed robbery in which the victims testified that their assailants were armed with a "short golden type or

silver pistol," evidence that a holster and box of small caliber bullets were discovered in one defendant's car at the time of defendants' arrest six days after the crimes, if irrelevant, was not prejudicial where such evidence constituted only an insignificant part of the State's case, and there is no reasonable basis to believe the jury would have returned a different verdict had the evidence been excluded.

11. Burglary and Unlawful Breakings § 6.4— propriety of instructions on constructive breaking

The trial court properly instructed the jury on constructive breaking in a burglary case where the evidence tended to show that one of the defendants pointed a gun at the male victim as he was standing at the door of his motel room; when the female victim opened the door she saw the gun pointed at the male victim's head; the male victim was then "kind of shoved into the room"; and neither defendant was given permission to enter the room.

12. Burglary and Unlawful Breakings § 7— first degree burglary—refusal to submit lesser offenses

The trial court in a first degree burglary case did not err in refusing to submit the lesser included offense of felonious breaking and entering where the evidence tended to show only a burglarious breaking; nor did the court err in refusing to submit second degree burglary where the uncontradicted evidence showed that the sleeping apartment in question was occupied when defendants gained entry thereto.

13. Burglary and Unlawful Breakings § 6— motel room as "sleeping apartment"—expression of opinion—harmless error

The trial court's statement to the jury that the motel room in question was a "sleeping apartment" for purposes of applying the law of burglary constituted an impermissible expression of opinion or an assumption that a material fact had been proved in violation of G.S. 15A-1232; however, such error was harmless since there can be no serious contention that a motel room, regularly and usually occupied by travelers for the purpose of sleeping, is not in fact a "sleeping apartment" within the meaning of the law of burglary, defendants did not contest the "sleeping apartment" issue at trial other than by their general pleas of not guilty, and there is no reasonable possibility that this error contributed to defendant's conviction.

14. Criminal Law § 33.1— evidence of investigation of another person—absence of prejudice

In a criminal prosecution in which an officer testified that the victims had selected the photograph of a person other than defendant from a police photograph book, defendant was not prejudiced by the officer's irrelevant testimony about his subsequent investigation of the other person since the inference raised by the evidence was favorable to defendant.

15. Criminal Law §§ 84, 89.6— use of suppressed receipt to refresh recollection

The State's presentation to defendant of a receipt which had previously been suppressed *as evidence*, the court having found that it was seized in an unconstitutional search, for the purpose of refreshing his recollection of the

date his car had been repaired did not constitute the use of "tainted evidence" to impeach defendant. Even if showing the receipt to defendant was error of constitutional dimension, the error was harmless since the date defendant's car was repaired was immaterial to the crimes charged and the receipt could not have contributed in any way to defendant's conviction.

16. **Criminal Law §§ 66.6, 66.15— lineup—officer's remark that witness picked "right person"—courtroom identification not tainted**

A witness's courtroom identification of defendant was not rendered inadmissible on the ground of improper out-of-court suggestiveness because an officer had told the witness after she picked defendant in a lineup that she had picked the "right person" since (1) the witness did not make an independent identification of defendant in court but merely identified defendant as the man she chose in the lineup, and the lineup was properly found by the court to be free from undue suggestiveness; (2) even if the identification at issue was an in-court accusatory identification, it was not fatally tainted by pretrial suggestiveness because the officer's remark did not serve in this case to strengthen an initially tentative identification; and (3) even if the comment raised an aura of suggestiveness around the totality of the pre-trial identification process, the suggestiveness did not give rise to a substantial likelihood of misidentification at trial where there was plenary evidence of the inherent reliability of the witness's courtroom "identification" of defendant, and the ample opportunity of the witness to view the events and actors at the time of the crimes supports a conclusion that her in-court "identification" of defendant had an origin sufficiently independent of the taint of a single improper remark.

17. **Criminal Law § 66— touching defendant on shoulder to identify**

The trial court did not err in permitting a witness to touch one defendant on the shoulder to identify the person about whom she was testifying.

18. **Searches and Seizures § 43— motion to suppress at trial not timely**

The trial court did not err in the denial of defendant's motion at trial to suppress a watch seized pursuant to a search warrant where there was no contention that defendant did not have a reasonable opportunity to submit the motion prior to trial as required by G.S. 15A-975, and there was no suggestion that other circumstances existed which, under the statute, would permit a motion to suppress made at trial, it not being impermissible for the State to impose reasonable conditions on the assertion of motions to suppress evidence.

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

APPEAL by both defendants from *Judge Brewer* at the 25 September 1978 Criminal Session of CUMBERLAND Superior Court. Both defendants were convicted of first degree rape, first degree burglary, and armed robbery. Nelson was sentenced to two consecutive life sentences on the rape and burglary charges and to a term of imprisonment of not less than ten nor more than twenty

years on the armed robbery charge to begin at the expiration of the second life sentence. Jolly was sentenced to two consecutive life sentences on the rape and burglary charges and to a term of imprisonment of not less than twenty nor more than twenty-five years on the armed robbery charge to begin at the expiration of the second life sentence. This case was argued as No. 106 at the Spring Term 1979.

Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General, and Grayson G. Kelley, Associate Attorney, for the State.

Neill Fleishman, Attorney for defendant Jolly.

Fred J. Williams, Assistant Public Defender, Attorney for defendant Nelson.

EXUM, Justice.

These appeals present a number of questions, the most important of which are raised by both defendants and involve (1) the legality of a warrantless search of defendants' military billets and seizure therefrom of varous items by military authorities and the ultimate delivery of some of these items to civilian authorities for use as evidence against defendants; and (2) the consolidation for trial of the charges against each defendant. We find no error in these procedures or in any other aspect of the trial.

The evidence for the state tends to show that on 16 December 1977, Margaret and Eugene Macek, who were returning to their home in Newcastle, Pennsylvania, following a honeymoon trip to Florida, stopped for the night at Motel 6 in Cumberland County. After registering they drove their car to a parking place in front of their assigned room. Both went inside briefly. Mr. Macek, after instructing his wife to lock the door and to admit no one other than him, returned to the car to get their luggage. Moments later Mrs. Macek heard a knock at the door, and her husband identified himself. When she opened the door, two black males were standing behind her husband. One of them had a small gun pointed at her husband's head. Both men, forcing Mr. Macek ahead of them, entered the room. They forced Mr. and Mrs. Macek to disrobe and bound and gagged Mr. Macek. The men then forced Mrs. Macek to submit to repeated sexual inter-

course and fellatio with them. They then bound and gagged Mrs. Macek and sexually assaulted her with a tube of toothpaste. The two assailants fled, taking with them money and jewelry belonging to the couple.

Both defendants were arrested on 22 December 1977 in connection with another incident at the Americana Motel involving Evelyn and Morris Friedman.[1] Defendants were soldiers stationed at Ft. Bragg. Items discovered in their billets at Ft. Bragg ultimately linked them to the Macek incident. These items consisted of a watch and jewelry identified by the Maceks as having been taken from them on 16 December. Nelson was identified by both Mr. and Mrs. Macek at separate lineups. Neither could identify Jolly, but his fingerprints were found on the previously mentioned tube of toothpaste.

Jolly testified that he had loaned his car to Nelson on 16 December 1977. He said Nelson sold him the Macek jewelry found among his belongings.

Nelson testified that he asked to borrow Jolly's car but never actually borrowed it. He further testified that he had purchased from an unidentified man Mr. Macek's watch. He said he had not sold the Macek jewelry to Jolly and had never before seen it.

I

[1] After defendants were arrested and confined to the county jail on 22 December 1977 military personnel at Ft. Bragg, pursuant to military regulations,[2] entered their military billets on 24

1. In connection with this incident Jolly was tried and convicted at the 10 July 1978 Session of Cumberland Superior Court of burglary in the first degree and armed robbery. He received a sentence of life imprisonment on the burglary charge and a consecutive sentence of ten to fifteen years imprisonment on the robbery charge. This Court found no error in this proceeding. *State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979).

2. The military regulations relied on are found in U.S. Army Field Manual 27-1, "Legal Guide for Commanders," Paragraphs 2:9(c), 10:6, and 10:7 (September 1974). They provide in pertinent part as follows:

"2:9(c). *Inventories.* When a solider is AWOL, about to be confined, or detained by civilian authorities, an inventory of the soldier's personal belongings is required . . . Evidence obtained as a result of this inventory is admissible in a court martial.

10:6. *General.* Whenever a soldier is absent from his unit under other than normal circumstances, the unit commander has a duty to insure that the personal and organizational property of the soldier is protected from theft, damage, or loss. Even if the absence of the soldier is due to his own misconduct, the duty to protect his property does not change. Remember that failure to comply with army regulations may result in claims against the Army. This duty will require the unit commander to enter the area of the absent soldier and may require him to forcibly enter wall lockers and footlockers so that a complete inventory can be made.

10:7. *AWOL Personnel.* Immediately upon being notified that a member of his unit is AWOL, the commander will select an officer, warrant officer, or noncommissioned officer . . . to inventory all property left behind by the soldier."

December for the purpose of making inventory of their property. Lt. Gorwitz, who conducted the inventory in Nelson's billet, testified, "Every time a person is in confinement or gone for more than 24 hours we are required to inventory the equipment and secure it." Nelson had been gone for more than 24 hours. After being inventoried the property of both Nelson and Jolly was secured.

Lt. Gorwitz and Sgt. Cromartie, both assigned to "C" Battery, 1st Battalion, 39th Field Artillery (Nelson's unit), inventoried Nelson's property on 24 December. After reading a newspaper account of the Macek incident which included a description of some of the jewelry taken from the Maceks, then Lt. Wood, Nelson's Battery Commander,[3] personally viewed on 27 December the items seized from Nelson's billet. He observed "what appeared to him to be some of the items about which he had read." Sgt. Cook, assigned to "B" Battery of the aforementioned battalion, conducted the inventory of Jolly's property on 24 December. Thereafter Jolly's Battery Commander, Lt. Lacek, after having read a newspaper account of the Macek incident, personally viewed on 27 December the items seized from Jolly's billet. He said, "I compared certain items of jewelry in that property with what I had read in the paper." Thereafter both Lt. Wood and Lt. Lacek conferred with higher military authorities for instructions. Civilian authorities were contacted. On 27 December Fayetteville Police Detective Nash, after talking by telephone to both Lt. Wood and Lt. Lacek, told them to keep the property of Jolly and Nelson secure.

On 30 December military personnel in charge delivered the items (except for one item) taken from the billets of Jolly and Nelson to Detective Pearson of the Fayetteville Police. The one item not then delivered, an heirloom pendant taken from Mrs. Macek, was ultimately surrendered to Detective Pronier by Lt. Wood on 3 January 1978. The items—sapphire ring, wedding band, engagement ring, pendant, high school class ring, wedding band, and watch—were all identified at trial by Mr. or Mrs. Macek as having been taken from them on 16 December. Sgt. Cromartie testified that he recognized the pendant and the watch

3. Lt. Wood's later promotion to Captain is reflected at the trial of this case. Although the record is not entirely clear, we believe it supports the fact that Lt. Wood and Lt. Lacek were Battery Commanders, respectively, of "C" and "B" Batteries.

as being among the items which he removed from Nelson's military locker on 24 December. Captain Wood testified that he recognized the pendant and watch as being among the items which he examined together with Sgt. Cromartie on 27 December. Sgt. Cook testified that he recognized the sapphire ring as being among the items he found in Jolly's locker on 24 December. Detective Pearson testified that on 30 December he observed Sgt. Cook deliver all of the jewelry referred to except the watch and the pendant to Sgt. Brunner. He observed Lt. Wood deliver the watch to Sgt. Brunner. Ultimately Pearson obtained possession of everything but the pendant on 30 December. Pearson said that he observed the pendant "in Nelson's property on the 30th but he did not then take it." Detective Pronier testified that he obtained the pendant on 3 January from Lt. Wood.

Prior to trial Judge Maurice Braswell conducted a hearing on defendants' motions to suppress these items on the ground that they were unconstitutionally taken from defendants' military billets. Evidence offered at this hearing does not appear in the record, but Judge Braswell made findings of fact which essentially accord with the above recitation. He denied the motion and the items were ultimately offered in evidence as described.

Defendants, relying on Fourth Amendment proscriptions, assign as error the denial of their motion to suppress and the introduction into evidence of the jewelry. We find no merit in this assignment.

A

[1] The search by military authorities of a military billet of a soldier detained by civilian authority, or otherwise absent without leave, to make inventory of his belongings and to secure them for safeguarding pursuant to military regulation without any investigative purpose is not an *unreasonable* search or seizure proscribed by the Fourth Amendment. Both actions may be consummated without a warrant. This kind of search and seizure is analogous to that permitted of impounded automobiles by police in *South Dakota v. Opperman*, 428 U.S. 364 (1976). The Court there approved a police inventory and seizure of belongings in an impounded automobile without a warrant. Police found marijuana during their inventory of the contents of defendant's car. Defendant, later charged with criminal possession of this mari-

juana, moved to suppress evidence of his crime on the ground that it was obtained in violation of the Fourth Amendment. The United States Supreme Court, disagreeing with the Supreme Court of South Dakota, held that the trial court properly denied this motion. It concluded that "the conduct of the police was not 'unreasonable' under the Fourth Amendment." *Id.* at 376. The Court's opinion observed that (1) persons have a diminished expectation of privacy in automobiles, (2) inventories of impounded cars are routinely conducted pursuant to standardized police procedures without any investigative purpose, and (3) the inventories serve both to protect police against hazardous materials and civil claims for property loss and to protect the public against loss of their property.

This Court recently had occasion to discuss and distinguish *Opperman* in *State v. Phifer,* 297 N.C. 216, 254 S.E. 2d 586 (1979). We noted that *Opperman* stood essentially for the proposition that "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." *Id.* at 220, 254 S.E. 2d at 588. Justice Huskins, for this Court in *Phifer,* wrote, *id.* at 220-21, 254 S.E. 2d at 588:

> "Since an inventory search may be undertaken without a warrent 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, 96 S.Ct. at 3100. (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, 96 S.Ct. at 3092. 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, 96 S.Ct. 3092."

We concluded in *Phifer* that the search could not be justified as a "valid inventory search" because the officers "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)." *Id.* at 221, 254 S.E. 2d at 588.

This case differs from *Opperman* and *Phifer* in that here we deal not with an automobile but with soldiers' billets. Solution here, however, does not depend on the proposition that a soldier has the same "diminished" expectation in his quarters as does a motorist in his car. Whatever a soldier's expectation of privacy in his quarters may be, it is not absolute and must yield to "those intrusions which are reasonably related to a legitimate governmental interest in those quarters." *United States v. Hines*, 5 M.J. 916, 919 (A.C.M.R. 1978). Inventories under certain circumstances of these quarters are justified by the need for safeguarding property owned by or within the control or custody of the government, protecting the government against claims on disputes arising from loss or theft of the property, and protecting against the hazards of storing dangerous materials. *Id.* Such inventory "searches" have been regularly upheld. *See, e.g., United States v. Welch*, 19 C.M.A. 134, 41 C.M.R. 134 (1969); *United States v. Kazmierczak*, 16 C.M.A. 594, 37 C.M.R. 214 (1967).

Judge Braswell found as a fact after hearing evidence on defendants' motion to suppress that the inventories of defendants' belongings conducted on 24 December were: (1) pursuant to military regulation (referring to those sections of Field Manual 27-1, set out at n. 2, *supra*); (2) for the purpose of securing defendants' property for the protection of both the Army and defendants; and (3) routine without any subterfuge, ulterior motive, or investigative purpose. The 24 December warrantless intrusions of defendants' billets and the securing of defendants' property found therein were, consequently, constitutionally permissible.

The 27 December examinations of defendants' property, however, were not neutral of investigatory purpose. Both officers

who then examined the property did so only after reading newspaper coverage of the Macek incident. We recognize that an initial permissible intrusion into a constitutionally protected zone does not *per se* validate a subsequent intrusion.[4]

Here, however, whatever expectations of privacy defendants might legitimately have had in their inventoried and stored belongings on 27 December, Lt. Wood's and Lt. Lacek's examination of the belongings on that date did not constitute a *second* intrusion, search, or seizure. These examinations were merely a second look at items already discovered. Sgt. Cromartie testified at trial that he recognized the pendant and the watch from having seen these items in his 24 December inventory. Likewise Sgt. Cook recognized the sapphire ring as being among the items he found in Jolly's locker on 24 December. Defendants' property, moreover, had been carefully inventoried and each item separately listed on 24 December. Lt. Gorwitz testified that on 24 December, "We then took everything that was in [Nelson's] locker out and wrote down everything that we took out on a piece of paper." Sgt. Cook testified that on 24 December he "inventoried the property" in Jolly's locker and that "after inventoring the property in the locker, I put it in a duffle bag and secured the room with a lock." Thus the 27 December inspections were for the purpose not of discovering anything new but for looking again at items already discovered and inventoried.

The cases generally hold that these kinds of "second looks" at items already once seen are not another search subject to Fourth Amendment proscriptions. In *United States v. Grill*, 484 F. 2d 990 (5th Cir. 1973), *cert. denied*, 416 U.S. 989 (1974) an arrestee's personal effects were inventoried, among them a key. The Court held that it was constitutionally permissible for officers to return for a "second look" at the key, without a warrant, when a federal agent brought a lock to the jail to see if the key would fit. Several courts have held that serial numbers on currency lawfully inventoried could be later examined by police without

4. *See, e.g., Mincey v. Arizona*, 437 U.S. 385 (1978) (initial entry by police to arrest suspect does not legitimize a subsequent warrantless search of apartment on the ground that the initial entry was so great an intrusion as to make the later search constitutionally irrelevant); *Michigan v. Tyler*, 436 U.S. 499 (1978) (warrantless investigatory entries into burned building were constitutionally impermissible when made days after the fire and detached from the exigency of the first entries). In *Brett v. United States*, 412 F. 2d 401 (5th Cir. 1968) an arrestee was searched and his clothing and effects were stored by police. Three days later, without a warrant, police searched his personal effects more thoroughly and found traces of heroin. Held, subsequent search violated Fourth Amendment.

a warrant. *United States v. Lacey,* 530 F. 2d 821 (8th Cir. 1976), *cert. denied,* 429 U.S. 845; *United States v. Jenkins,* 496 F. 2d 57 (2nd Cir. 1974), *cert. denied,* 420 U.S. 925 (1975) (police officers "simply looked again at what they had already-lawfully-seen."); *Westover v. United States,* 394 F. 2d 164 (9th Cir. 1968). In *People v. Rivard,* 59 Mich. App. 530, 230 N.W. 2d 6 (1975), an officer noticed a ring during an inventory of arrestee's personal property. Learning the next day that the ring probably matched a description on a list of stolen property, the officer went back for a "second look." The Court held that no warrant was required, saying, "a search warrant to again look at a ring, already in police custody, does not make sense." Finally, the Supreme Court in *United States v. Edwards,* 415 U.S. 800 (1974), held permissible a warrantless laboratory examination of a suspect's clothing seized from him on the day after the administrative mechanics of arrest and incarceration had been completed saying, "it is difficult to perceive what is unreasonable about the police examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as a result of a lawful arrest." *Id.* at 806.

The statements in *Rivard* and *Edwards* may be rendered too broadly in view of *United States v. Chadwick,* 433 U.S. 1 (1977). There officers lawfully seized a footlocker incident to the arrest of its owners. Having probable cause to believe that the footlocker contained contraband, they searched it without a warrant and discovered marijuana. The Supreme Court held the Fourth Amendment required a search warrant to open the trunk saying, "[t]here being no exigency, it was unreasonable for the Government to conduct this search [of the footlocker] without the safeguards a judicial warrant provides." *Id.* at 11.

In both *Rivard* and *Edwards,* however, the second, warrantless examination was of items already once legitimately seen. So it is here regarding the 27 December examination. It is this feature which distinguishes these cases from *Chadwick.* We find, therefore, no Fourth Amendment infirmity in the 27 December examination of defendants' belongings.

B

[2] Defendants contend finally that surrender of this evidence by military to civilian authorities violated the Posse Comitatus Act,

18 U.S.C. 1385[5] and that the evidence should, therefore, have been excluded. A short answer to this contention is that a violation of the Act would not call for invocation of the exclusionary rule. *United States v. Walden*, 490 F. 2d 372 (4th Cir. 1974), *cert. denied*, 416 U.S. 983; *State v. Danco*, 219 Kan. 490, 548 P. 2d 819 (1976); *Commonwealth v. Shadron*, 370 A. 2d 697 (Pa. 1977).

We find, however, no violation of the Act by military authorities in this case. The legislative purpose of the Posse Comitatus Act is to preclude the direct active use of federal troops in aid of execution of civilian laws. *Gillars v. United States*, 182 F. 2d 962 (D.C. Cir. 1950); *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975). Passive activities of military authorities which incidentally aid civilian law enforcement are not precluded. *United States v. Red Feather*, *supra*. "[T]he statute is limited to deliberate use of armed force for the primary purpose of executing civilian laws more effectively than possible through civilian law enforcement channels, and . . . those situations where an act performed primarily for the purpose of insuring the accomplishment of the mission of the armed forces incidentally enhances the enforcement of civilian law do not violate the statute." Furman, Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act, 7 Mil. L. Rev. 85, 128 (1960).

Here the military authorities' surrender of evidence to civilian authorities for use in a civilian criminal prosecution of soldiers is only a passive involvement in the enforcement of civilian law. The military inventory which led ultimately to the surrender of evidence was initially conducted for military purposes. Only incidentally did it enhance the effectiveness of civilian law enforcement.

Defendants' assignments of error directed to the introduction of items discovered in the inventory of their military billets are, consequently, overruled.

II

Both defendants assign error to the consolidation of their trials and the denial of repeated motions for severance. They

5. This section reads: "*Use of Army and Air Force as posse comitatus.*

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

argue that consolidation should not have been permitted because (a) their defenses were antagonistic and (b) evidence admissible against only one defendant was allowed to be considered against both. Defendant Jolly argues, further, that consolidation permitted his former attorney, Mr. Williams, assistant public defender, now representing Nelson, to cross-examine Jolly on behalf of Nelson's defense. We have carefully considered these arguments and find no error in the consolidation.

One of the statutory bases for joining two or more defendants for trial is that each defendant is sought to be held accountable for the same crime or crimes. G.S. 15A-926(b)(2)a. In such cases public policy strongly compels consolidation as the rule rather than the exception. As said in *Parker v. United States*, 404 F. 2d 1193, 1196 (9th Cir. 1968), *cert. denied*, 394 U.S. 1004 (1969), consolidation

> "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once."

Joinder of defendants should not be permitted, however, if severance is necessary for "a fair determination of . . . guilt . . . ." G.S. 15A-927(c)(2)a and b. *See also* ABA Standards Relating to Joinder and Severance, § 2.3 (Approved Draft, 1968). The propriety of joinder depends upon the circumstances of each case. Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *see also State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976); *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972).

A

[3] Defendants argue that certain inconsistencies in their respective testimony amounted to "antagonistic defenses" requiring that they be given separate trials. They point to Jolly's testimony that he loaned his car to Nelson on 16 December and that certain items of jewelry found in his locker were sold to him by Nelson sometime after that date, and to Nelson's testimony denying the

truth of these statements by Jolly. Defendants rely upon *State v. Madden,* 292 N.C. 114, 121, 232 S.E. 2d 556, 661 (1977), in which this Court approved joinder where neither defendant "attempted to incriminate the other" and their defenses were not "antagonistic." *Madden,* however, does not mean that antagonistic defenses necessarily warrant severance. The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial. G.S. 15A-927(c)(2). In a case where antagonistic defenses were urged as a ground for severance this Court said long ago, "Unless the accused suffered some apparent and palpable injustice in the trial below, this court will not interfere with the decision of the court on the motion for a severance." *State v. Finley,* 118 N.C. 1162, 1163, 24 S.E. 495, 496 (1896).

[4] Prejudice would ordinarily result where codefendants' defenses are so irreconcilable that "the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *Rhone v. United States,* 365 F. 2d 980, 981 (D.C. Cir. 1966). Severance should ordinarily be granted where defenses are so discrepant as to pose an evidentiary contest more between defendants themselves than between the state and the defendants. *See* ABA Standards Relating to Joinder and Severance 41 (Approved Draft 1968). To be avoided is the spectacle where the state simply stands by and witnesses "a combat in which the defendants [attempt] to destroy each other." *People v. Braune,* 363 Ill. 551, 557, 2 N.E. 2d 839, 842 (1936). Many cases illustrative of varying results but generally supporting these principles are collected in Annotation, "Antagonistic Defenses as Ground for Separate Trials of Co-Defendants in a Criminal Case," 82 A.L.R. 3d 245 (1978).

In *Cain v. State,* 235 Ga. 128, 218 S.E. 2d 856 (1975), defendant's testimony that he had never been at the scene of the crime was directly contradicted by his codefendants' story that they had waited in a car while defendant shot and robbed a motel owner. The Georgia Supreme Court found no error in denial of defendant's motion for severance. Although previous Georgia cases had approved joinder on the basis that codefendants' testimony was not "contradictory," *Cain* made it clear that those cases

> "should not be read to mean, as Cain suggests, that if the codefendant's testimony *is* contradictory a severance should be granted. Instead the focus is properly on whether or not the defendant is prejudiced. Since Cain had a chance to cross-examine the codefendant, he was not unfairly prejudiced by the contradictory testimony." 235 Ga. at 130-131, 218 S.E. 2d at 858. (Emphasis original.)

Where other evidence in the case substantially supported the jury's finding of defendants' guilt, the Louisiana Supreme Court held that antagonistic defenses did not result in prejudice; therefore it was not error to deny a motion for severance. *State v. McGraw*, 366 So. 2d 1278 (La. 1978). In *State v. Lee*, 28 N.C. App. 156, 220 S.E. 2d 164 (1975), defendants were jointly tried on charges of armed robbery and kidnapping. Defendant Lee did not testify. Defendant Woodall testified that he was coerced into participating in the crimes by defendant Lee's threats. While noting that Woodall's testimony was antagonistic to Lee's plea of not guilty "[t]hat fact standing alone . . . is not sufficient to require separate trials. All of the competent evidence introduced at the joint trial would have been competent against Lee at a separate trial." 28 N.C. App. at 159, 220 S.E. 2d at 166.

[5] We conclude that defendants here were not denied a fair trial by the joinder notwithstanding the conflicts in their testimony. This is not a case where the state simply stood by and relied on the testimony of the respective defendants to convict them. The state itself offered plenary evidence of both defendants' guilt. Neither defendant testified directly to the other's guilt. Both denied any participation in the crime. Each defendant was subject to cross-examination by the other. Had separate trials been granted, Jolly could have testified to the same matters tending to implicate Nelson at Nelson's separate trial. The conflict between each defendant's respective testimony was not of such magnitude when considered in the context of other evidence that the jury was likely to infer from that conflict alone that both were guilty.

B

[6] Defendants next argue that joinder permitted evidence competent against only one defendant to be considered against the other. This consequence of joinder, they say, was aggravated

because the trial judge in reviewing the evidence against Nelson alluded to items of stolen jewelry which the state's evidence tended to show was found in Jolly's locker.

That the jury might have considered evidence competent only against one defendant as evidence against the other is a consequence defendants might have avoided had they made timely objections and motions for limiting instructions. "Where testimony incompetent as to one defendant is admitted without objection and without request that its admission be limited, an exception thereto will not be sustained." *State v. Case*, 253 N.C. 130, 137, 116 S.E. 2d 429, 434 (1960), *cert. denied*, 365 U.S. 830 (1961). *See also State v. Pierce*, 36 N.C. App. 770, 245 S.E. 2d 195 (1978); *State v. Kessack*, 32 N.C. App. 536, 232 S.E. 2d 859 (1977). In *Pierce* different items of stolen property were shown to have been in the possession of each defendant after a breaking and entering. No limiting instructions were given. The Court of Appeals said that defendants

> "may not now be heard to complain because evidence showing the separate possession of each was admitted generally against both without instructions to the jury to make it clear as against which defendant the evidence might be considered. Prejudice, if any, suffered by the defendants resulted, not because the cases were consolidated for trial, but because defendants' counsel failed to request limiting instructions or to interpose timely general objections requiring them." 36 N.C. App. at 772, 245 S.E. 2d at 198.

This Court has held that even a general objection by a codefendant against whom evidence is inadmissible will suffice to require the trial judge to give limiting instructions. *State v. Franklin*, 248 N.C. 695, 104 S.E. 2d 837 (1958). The record here, however, is devoid of any general objection, much less a request for limiting instructions, by either defendant as to testimony regarding items obtained from their respective lockers. That the evidence might have been generally considered is, therefore, no error. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. Gosnell*, 38 N.C. App. 679, 248 S.E. 2d 756 (1978).

Neither did either defendant object to the trial court's recapitulation of the state's evidence. Generally, objections to misstatements of evidence must be made before the jury retires

in order to give the trial judge an opportunity to make correction. *State v. Hewett,* 295 N.C. 640, 247 S.E. 2d 886 (1978). "It is only where the judge erroneously instructs the jury on a *material fact not in evidence* that the error will be held so prejudicial as to require a new trial notwithstanding defense counsel's failure to make timely objection." *State v. Smith,* 294 N.C. 365, 379, 241 S.E. 2d 674, 683 (1978).

C

Jolly argues that the joint trial permitted his former attorney, Mr. Williams, who represented Nelson at trial, to cross-examine Jolly and argue Jolly's exclusive guilt to the jury on behalf of Nelson. Jolly contends that Mr. Williams actually "prosecuted" him and that to permit such "prosecution" by his former attorney denied him a fair trial.

Mr. Williams, Nelson's trial counsel, had originally represented both Nelson and Jolly as an assistant public defender. On 5 January 1978 the court, after finding that an apparent conflict between the defendants precluded Williams from representing both defendants, appointed Mr. Fleishman as counsel for Jolly. At trial Mr. Williams' cross-examination of Jolly was directed at discrediting Jolly's testimony. Mr. Williams argued to the jury on behalf of defendant Nelson that the evidence tended to show that Jolly and not Nelson was guilty. The record is devoid of any suggestion that Mr. Williams obtained information by way of confidential communications from Jolly during their attorney-client relationship, used such information, or in any way relied on his former representation of Jolly to Jolly's disadvantage at the trial.

Since the cornerstone of Jolly's argument is that it was unfair to his interest[6] for his former attorney to cross-examine him and argue his guilt to the jury, a short answer is that Jolly made no timely opposition to either the cross-examination or the jury

6. Jolly does not argue that his Sixth Amendment right to counsel has been abridged. *Cf., Holloway v. Arkansas,* 435 U.S. 475 (1978) (denial of separate representation to multiple defendants with conflicting interests is a *per se* deprivation of adequate counsel). Such an argument, had it been supported in the record, could have been made by Nelson on the theory that Nelson's counsel, Mr. Williams, was inhibited in his attempts to discredit Jolly's damaging testimony because of his allegiance to his former client. "[T]he evil . . . is in what the advocate finds himself compelled to *refrain* from doing. . . ." *Id.* at 490. *See, e.g., People v. Baxtrom,* 61 Ill. App. 3d 546, 378 N.E. 2d 182 (1978) (Illinois' rule that prejudice will be presumed where record shows defense counsel involved in actual or potential conflict of interest because of duty to former client). Here, however, Jolly argues that the conduct of Nelson's attorney prejudiced *Jolly.*

arguments. Jolly never moved to have Mr. Williams disqualified or removed from the case. Jolly could have properly objected to Williams' questions had they invaded areas covered by the attorney-client privilege. *See, e.g., State v. Hamrick,* 26 N.C. App. 518, 216 S.E. 2d 391 (1975), *cert. denied,* 288 N.C. 246, 217 S.E. 2d 670 (proper to bar cross-examination of a witness as to matters covered by the privilege). Having neither objected nor moved to strike the cross-examination at trial, Jolly cannot directly assign error to the cross-examination on appeal. *State v. Foddrell,* 291 N.C. 546, 231 S.E. 2d 618 (1977). Similarly Jolly's failure to object to Mr. Williams' jury argument in time for corrective action by the trial court precludes his right to complain of it on appeal. Absent gross impropriety in a jury argument, objection to it must be made at trial in order to preserve the error for consideration on appeal. *State v. Smith, supra,* 294 N.C. 365, 241 S.E. 2d 674.

[7] As we understand it, however, Jolly's argument does not attack Mr. Williams' cross-examination or jury argument as such. Jolly urges us instead to hold that prejudice warranting a new trial automatically results to a defendant whose opposing codefendant is represented by counsel who formerly represented both defendants. In effect, Jolly proposes that considerations of ethics and public policy require us (1) to adopt a *per se* rule compelling counsel to withdraw completely from any case wherein a conflict develops between his multiple clients, and (2) to enforce that rule by awarding a new trial if counsel fails to withdraw even in absence of a proper trial motion or showing of actual prejudice. Reason and authority persuade us to reject this proposition.

Not before us is whether Mr. Williams should have voluntarily sought to withdraw from the case[7] or whether, on Jolly's mo-

7. Certain ethics opinions issued by the Council of the North Carolina State Bar suggest that voluntary withdrawal under the circumstances in which Mr. Williams found himself is the proper course in order for an attorney to avoid even the "appearance of impropriety." *See, e.g.,* CPR 195, 19 October 1978 (attorney may not assist in the murder prosecution of one who had previously consulted him about the domestic difficulties which allegedly culminated in murder); CPR 160, 14 April 1978 (attorney should not accept employment in a matter in which a former client will be an adverse party or witness); CPR 155, 27 October 1977 (a public defender may not represent X in a case in which present or former client Y may be a witness for the state); Ethical Opinion No. 548, 13 January 1967 (when attorney in a criminal case discovers that defenses of his several clients may be inconsistent, he should retire completely from the case).

Lawyers' ethics, however, govern the conduct of advocates, not the advocates' forum. While it should be the policy of courts to give them effect, they do not *per se* shape the contours of due process. *See Town of Mebane v. Insurance Co.,* 28 N.C. App. 27, 30, 220 S.E. 2d 623, 625 (1975).

tion, he should have been required to withdraw.[8] The question here presented is whether Mr. Williams' continued representation of Nelson in face of testimonial conflicts between Nelson and Jolly entitles Jolly to a new trial. The answer is no unless Jolly can show actual prejudice accruing from this circumstance. Actual prejudice in this context means more than a defendant's having been damaged at trial by actions of his former lawyer. The actions complained of must have grown out of the former attorney-client relation. The record should show that the attorney took advantage of the former relation in some way at the subsequent trial or that the former relation put the attorney in a better position to inflict the damage than he otherwise would have been. *See generally, United States v. Carroll*, 510 F. 2d 507 (2d Cir. 1975), *cert. denied*, 426 U.S. 923; *United States v. Press*, 336 F. 2d 1003 (2d Cir. 1964), *cert. denied*, 379 U.S. 965 (1965); *People v. Suiter*, 82 Mich. App. 214, 266 N.W. 2d 762 (1978). That there was a former attorney-client relation is not, alone, enough.

[8] Here Jolly has failed to show prejudice arising from having his former lawyer represent his codefendant Nelson at trial. The questions asked Jolly on cross-examination by Mr. Williams and Mr. Williams' argument to the jury carry not the slightest suggestion that they were engendered by information obtained during Mr. Williams' representation of Jolly or that this representation put Jolly at any other disadvantage at his trial. Further defendant's acquiescence in the adverse representation of his former lawyer weighs heavily against him on appeal. *United States v. Press, supra*; *People v. Suiter, supra.* Defendant should make known his objections to the adverse representation of a former lawyer at trial not only to avoid acquiescing in it but also to establish a foundation for his contention of prejudice in the context of a properly conducted *voir dire*. Jolly's assignment of error based on his former representation by Williams is, therefore, overruled.

8. The cases are divided as to whether movant need show upon proper motion (1) that the attorney did in fact use confidences against him, or (2) that the attorney gained confidences which could have been used, or (3) that a prior attorney-client relationship simply existed. *Compare Woods v. Covington County Bank*, 537 F. 2d 804, 813 (5th Cir. 1976) ("we conclude that there must be at least a reasonable probability that some specifically identifiable impropriety did in fact occur."); *State v. Brown*, 274 So. 2d 381 (La. 1973) (district attorney need not be recused merely because of prior involvement or assistance in the defense, absent demonstration that the district attorney gained or used confidential information); *State v. Miner*, 128 Vt. 55, 258 A. 2d 815 (1969) (disqualification not necessary absent showing of violation of confidence); *United States v. Trafficante*, 328 F. 2d 117 (5th Cir. 1974) (need not show acquisition of confidential knowledge in order to disqualify opposing counsel because of former employment); *State ex rel. Moran v. Ziegler*, 244 S.E. 2d 550 (W. Va. 1978) (even the appearance of a conflict of interest will be grounds for disqualification of a prosecuting attorney upon proper motion).

III

[9] Both defendants assign error to the denial of their motions for mistrial made after the trial court excused a juror and substituted an alternate. Before the lunch break on Friday, 29 September 1978, it became obvious that the case could not be concluded by the day's end. The court had already decided not to hold sessions on the next Monday or Tuesday, October 2-3, in deference to Jolly's attorney's request to be excused for Jewish religious holidays. In view of the long break ahead, the trial court asked members of the jury whether they could appear on Saturday. All but Mrs. Henson, Juror No. 11, indicated that they could. The judge excused Mrs. Henson at 4:25 p.m. on 29 September and substituted the alternate juror.

Defendants' contention that the excusal constituted prejudicial error requiring a mistrial is without merit. The trial judge has broad discretion in supervising the selection of the jury to the end that both the state and defendant may receive a fair trial. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated*, 429 U.S. 912 (1976). This discretionary power to regulate the composition of the jury continues beyond empanelment. *State v. Kirkman*, 293 N.C. 447, 238 S.E. 2d 456 (1977). It is within the trial court's discretion to excuse a juror and substitute an alternate at any time before final submission of the case to the jury panel. G.S. 15A-1215. These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error. *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975), *death sentence vacated*, 428 U.S. 904; *State v. McNair*, 36 N.C. App. 196, 243 S.E. 2d 805 (1978).

Here no prejudice, abuse of discretion, or legal error has been shown to result from the excusal of Mrs. Henson. The alternate substituted in her place in accordance with G.S. 15A-1215 had been subject to a challenge, peremptory or for cause, by defendants, G.S. 15A-1217. The alternate was empaneled with the other jurors and heard all the evidence. A defendant "is not entitled to a jury of his choice and has no vested right to any particular juror. So long as the jurors who are actually empaneled are competent and qualified to serve, defendant may not complain . . . ." *State v. McKenna*, *supra*, 289 N.C. at 681, 224 S.E. 2d at 546.

In a related argument Jolly assigns error to the denial of his motion for continuance. Jolly's attorney, Mr. Fleishman, moved for continuance prior to trial on the grounds that it would be impossible to complete trial during the week of 25 September and he would not be present the next Monday or Tuesday because of religious holidays. Jolly now argues in his brief that denial of this motion was an abuse of the trial court's discretion "insofar as this issue relates to [substituting the alternate juror]." Presumably "this issue" refers to the fact that the parties were aware in advance that the trial would last longer than a week and that there would be a long break due to Mr. Fleishman's absence for two days of the second week. In any case, we fail to see how Jolly was prejudiced by denial of the continuance. The prospect of a lengthy break in a lengthy trial was occasioned by Jolly's own attorney's desire, however commendable, to put in an appearance before an authority higher than the secular bench. Jolly should not now be heard to complain of a delay brought about by his own counsel. This assignment is overruled.

IV

[10] Both defendants assign error to the admission in evidence of a black holster and a box of .22 bullets which had been discovered in Jolly's car at the time of defendants' arrest on 22 December. Jolly's contentions that the police searches of his automobile were illegal are without merit, having been previously passed upon adversely to him in *State v. Jolly, supra,* n. 1, 297 N.C. 121, 254 S.E. 2d 1. The only remaining question is whether this evidence was so irrelevant and prejudicial as to make its admission reversible error.

The "test" of relevance is whether an item of evidence tends to shed any light on the inquiry or has as its only effect the exciting of prejudice or sympathy. *See State v. Brown,* 294 N.C. 446, 242 S.E. 2d 769 (1978), and cases cited therein. In the present case, testimony of the Maceks tended to show that their assailants had been armed with a "short golden type or silver pistol" on 16 December. The state contends that the presence of a holster and small caliber ammunition in Jolly's car on 22 December is "of some relevance" in that it shows Jolly probably carried a pistol at one time. It is arguable that the challenged evidence may have some probative value in tending to establish

Jolly's possession of a small gun at *some* time prior to 22 December. "[I]n a criminal case, any evidence which sheds light upon the supposed crime is admissible." *State v. Bundridge*, 294 N.C. 45, 58, 239 S.E. 2d 811 (1978), *citing State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. denied*, 384 U.S. 1020 (1966). "[T]he evidence need not bear directly on the issue and . . . the inference to be drawn need not be a *necessary* one." 1 Stansbury's North Carolina Evidence § 78 (Brandis rev. 1973); *see generally id.* §§ 77, 78, and cases cited therein. In *Bundridge* the trial court in a prosecution for assault and armed robbery allowed in evidence bloodstained clothing seized at defendant's residence *on the night of the crime*, though there was no showing that defendant had worn the clothing at the time in question or that the stains were of the victim's blood. Our Court held the evidence admissible, finding a reasonable connection between the clothing and the crime.

Here, however, the link between holster and ammunition seized from Jolly's car on 22 December and the possession of a gun by the Maceks' assailants some six days earlier is more attenuated than the circumstantial connection in *Bundridge*. Yet even if the evidence here was technically incompetent, defendants have not demonstrated prejudice by its admission. An examination of the entire record reveals that evidence of the holster and bullets constituted an insignificant part of the state's case. The items were used by the state only once at trial and were not mentioned in the judge's review of the evidence. In light of other considerable evidence against defendants, there is no reasonable basis to believe the jury would have returned a different verdict had this particular evidence been excluded. Its admission, if error, was therefore harmless. G.S. 15A-1443; *State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1972), *cert. denied*, 414 U.S. 1160.

V

[11] In their various assignments of error to the trial court's jury instructions, defendants first contend that the instruction defining constructive breaking had no application to the facts of this case.

The court instructed the jury that a "breaking" may be shown where the defendant, by threat or force, inspires such fear as to induce the occupants to allow him to enter. This definition is

in accord with those previously approved by this Court. A "breaking" in the law of burglary constitutes any act of force, however slight, employed to effect an entrance; a constructive breaking occurs where entrance is obtained as a consequence of violence commenced or threatened by defendant. *See State v. Jolly*, supra, 297 N.C. 121, 254 S.E. 2d 1; *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976); *State v. Rodgers*, 216 N.C. 572, 5 S.E. 2d 831 (1939). The evidence here tends to show that one of the defendants pointed a gun at Mr. Macek as he was standing at the door of his motel room. When Mrs. Macek opened the door she saw the gun pointed at her husband's head. Mr. Macek was then "kind of shoved" into the room. Neither defendant was given permission to enter the room. The instructions on constructive breaking were appropriately applied to these facts.

[12] Both defendants next complain that the trial court erred in refusing to submit tendered instructions on lesser included offenses. Jolly contends the court should have instructed on the lesser offense of felonious breaking or entering. Nelson maintains the court should have charged with respect to second degree burglary. Neither proposition is correct. A jury should be instructed on a lesser included offense *only* when there is evidence tending to show that such lesser crime was committed. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). To justify a finding of felonious breaking or entering, there must be evidence tending to show that entry was obtained otherwise than by a burglarious breaking. *State v. Jolly, supra*, 297 N.C. 121, 254 S.E. 2d 1. The evidence here plainly tends to show only a burglarious breaking. To justify a charge on second degree burglary, there must be evidence from which the jury could find that the dwelling house or sleeping apartment in question was unoccupied at the time of the breaking. *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). The uncontradicted testimony of Mrs. Macek was that she was in the motel room at the time the defendants gained entry. These assignments are overruled.

[13] Jolly contends the court erred in telling the jury that the motel room was a "sleeping apartment" for purposes of applying the law of burglary. He correctly points to *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976) where a similar instruction was held to be error, albeit harmless. In *Wells*, a first degree burglary case, the trial court instructed the jury that "[t]he apartment

described for you [in the evidence] . . . is a sleeping apartment." This Court held that such an affirmative statement constituted an impermissible expression of opinion, or an assumption that a material fact had been proved. *See* G.S. 15A-1232, replacing in substance former G.S. 1-180. Here, however, as in *Wells*, such error as is shown by this part of the charge cannot have prejudiced defendant. There can be no serious contention that a motel room, regularly and usually occupied by travelers for the purpose of sleeping, is not in fact a "sleeping apartment" within the meaning of G.S. 14-51 and its predecessors. *See State v. Foster*, 129 N.C. 704, 40 S.E. 209 (1901). Nor did defendants contest the "sleeping apartment" issue at trial, other than by their general pleas of not guilty. Since there is no reasonable possibility that this error contributed to Jolly's conviction or that a different result would have obtained had the language complained of been omitted, the error is harmless. G.S. 15A-1443; *State v. Wells, supra*. Jolly yet urges this Court to grant a new trial as a means of insuring that the trial bench will cease giving this type of erroneous instruction. Judicial enactment of this kind of supervisory rule is unwarranted. "[E]rrors 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." *State v. Jolly, supra*, 297 N.C. at 126, 254 S.E. 2d at 5; *see* G.S. 15A-1442 and 1443(a).

VI

[14] Officer Pronier testified at trial that the Maceks had selected the photo of one James King from a police photograph book. Testimony was admitted over objection concerning the officer's subsequent investigation of King. By his sixth assignment of error, Jolly asserts that such testimony was irrelevant and should have been excluded.

It is true, as Jolly contends in his brief, that the testimony about King "had no tendency to prove the probability or improbability of any fact in issue in this case." As such, its admission cannot have harmed defendant. Even where irrelevant or incompetent evidence is admitted, the burden remains upon appellant to show prejudice. G.S. 15A-1443(a); *State v. Hudson, supra*, 281 N.C. 100, 187 S.E. 2d 756. No prejudice is demonstrated here. If anything, the inference raised by this evidence is favorable, not prejudicial, to Jolly. This assignment is overruled.

VII

[15] Jolly's seventh assignment of error relates to the trial court's denial of his motion for mistrial made after cross-examination by the state. Testifying on his own behalf, Jolly had some difficulty in recollecting whether an automotive repair shop had repaired his car on 14 or 16 December. The state showed him Exhibit No. 50, a dated receipt from the shop, to refresh his recollection. He then testified that the repairs had been made on 14 December. The receipt had previously been suppressed *as evidence* on the grounds that its seizure was the product of an unconstitutional search. Jolly's attorney objected to the use of Exhibit No. 50 for any purpose, and his motion for mistrial was denied.

Jolly's argument that the receipt was "tainted evidence" which was "used to impeach his recollection of events" is simply not supported by the record. The receipt was never admitted into evidence or shown to the jury. Where a writing is used to refresh the recollection of a witness, it is not the writing which is evidence but the testimony of the revived recollection. *State v. Smith, supra*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *see generally* 1 Stansbury's North Carolina Evidence § 32 (Brandis rev. 1973). There is nothing in the record to suggest that presentation of the receipt to defendant "impeached" his credibility in the eyes of the jury. Its use was limited to aiding him to clarify an uncertainty which he had already admitted.

Even if showing the receipt to Jolly was error of constitutional dimension, which we do not decide but which the state concedes, the error was harmless. The crime was committed on the night of 16 December. Whether defendant's car was repaired 14 or 16 December was immaterial. Had the suppressed receipt been fully admitted into evidence, its presence would have added nothing to the state's case. Since the receipt contributed in no way to Jolly's conviction, we are satisfied that the state has demonstrated, as it has the burden to do, that error in its use was harmless beyond a reasonable doubt. G.S. 15A-1443(b); *see Chapman v. California*, 386 U.S. 18 (1967); *State v. Shutt*, 279 N.C. 689, 185 S.E. 2d 206 (1971), *cert. denied*, 406 U.S. 928 (1972). In the absence of a showing of prejudicial error, the trial court properly denied the motion for mistrial. G.S. 15A-1061; *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978).

VIII

[16] By his third and fourth assignments of error, Nelson *seems* to argue that the pre-trial lineup at which he was identified was constitutionally defective, and that the trial court erred in allowing Mrs. Macek to identify him in court by touching him on the shoulder.

Both of the Maceks independently selected Nelson from a lineup of six black males of substantially similar height and weight and wearing identical clothing. Both of the Maceks then witnessed a second lineup, similar in procedure. Jolly but not Nelson was in the second lineup. The Maceks selected someone other than Jolly. After completion of both lineups Detective Nash told the Maceks that they picked the "right person" in the first lineup but not in the second.

A careful study of Nelson's brief reveals that although Nelson argues that his lineup was impermissibly suggestive, no attempt is made to controvert the trial court's finding that the lineup was entirely proper. Instead, Nelson submits that the detective's comment after the lineup identification procedure must be considered together with the lineup as part of "the totality of the out-of-court procedures which in any way affected the witness' in-court identification." It is contended that because of improper out-of-court suggestiveness on the part of the police detective in making the comment, Mrs. Macek should not have been permitted to make her courtroom identification of Nelson. This argument fails in at least two respects.

In the first place, defendant seeks to apply the right law to the wrong facts. It is true that where the setting for pre-trial confrontation is found to have been unnecessarily suggestive and conducive to mistaken identification, a subsequent in-court identification will be rendered inadmissible unless it is first determined (usually upon *voir dire*) that the courtroom identification is of independent origin. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974). The evil sought to be remedied by this exclusionary rule is the "substantial likelihood of *irreparable* misidentification," *Simmons v. United States*, 390 U.S. 377, 384 (1968). (Emphasis added.) Irreparability arises because the witness is apt to retain in his memory the image of a photograph or lineup participant rather than of the person actually seen committing the

crime. In effect, when police manipulate suggestive elements of an identification procedure to convince a witness that "there is the man," the reliability of the witness' subsequent identification of the defendant in court can be so undermined as to violate due process. *See Foster v. California*, 394 U.S. 440 at 443 (1969).

These principles of constitutional law do not apply to the facts of this case. The courtroom identification at issue here, indeed the *only* specific witness identification of either defendant in the entire record, occurred in the course of Mrs. Macek's testimony *about the pre-trial lineups.*[9]

Mrs. Macek: "I selected number four from the first lineup. I told Detective Nash that number four was the man that I had picked out as having been in my room.

Q: All right. Do you know whether or not you see that man in court now?

A: Yes.

Q: And who is it?

A: He's sitting right there with Mr. Williams (indicating)."

Upon objection by Nelson's attorney, the trial court intervened and asked Mrs. Macek to touch the person she was identifying on the shoulder. She left the stand and touched Nelson. By doing so, she did no more than identify Nelson as the man she had picked from the first lineup. Hence we are not faced with the sort of in-court "identification" which may suffer from the dubious ancestry of pre-trial suggestiveness. Mrs. Macek's identification of Nelson as the man she chose from the lineup is merely a part of her general testimony about the lineup itself. Its admissibility stands or falls with the admissibility of other testimony regarding the lineup. Having properly found that the lineup itself was free from undue suggestiveness, the trial court did not err in permitting the challenged testimony.

9. Nowhere in the record do either of the prosecuting witnesses directly point out Nelson or Jolly as the men in their motel room on the night of the 16th. There is, however, ample evidence of defendants' possession of recently stolen goods, coupled with other strong circumstantial evidence tending to show defendants' guilt.

Second, assuming for the sake of argument that the identification at issue was an in-court, accusatory identification, we need not necessarily conclude that it was fatally tainted by pre-trial suggestiveness. It may be questioned at the outset whether a post lineup remark that the witness picked "the right person" was suggestive at all, or merely served to confirm what the witness already knew. *Cf.*, *United States v. Person*, 478 F. 2d 659 (D.C. Cir. 1973) (remark to witness after lineup that she had "done well" in picking defendant does not materially affect the certainty of the in-court identification); *Jackson v. State*, 361 So. 2d 1152 (Ala. Cr. App. 1977) (officer's statement after lineup identification of "that is the man we are looking for" not unduly suggestive). In any case, the remark complained of can be viewed as impermissibly suggestive only to the degree that it served to strengthen an identification which was initially tentative. The record here indicates the contrary. Mrs. Macek testified, "After Mr. Nash told us that we had picked out the wrong man [in the second lineup] I was not sure that we had picked out the right man [in the first]."

Even if Nash's comment were such as to raise an aura of suggestiveness around the totality of the pre-trial identification process, the question remains whether the suggestiveness gave rise to a substantial likelihood of misidentification at trial. *See Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1976). It is the strong probability of misidentification which violates a defendant's right to due process. Unnecessarily suggestive circumstances alone do not require the exclusion of identification evidence. The factors to be considered in evaluating the inherent reliability of the contested identification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention during the commission of the crime; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the challenged confrontation; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, *supra*. Against these factors must be weighed the "corrupting influence" of any suggestive circumstances leading to and surrounding the contested identification. *See Manson v. Brathwaite*, *supra*.

Applying these standards, we find plenary evidence of the inherent reliability of Mrs. Macek's assumed courtroom identification of Nelson. It cannot be said that she suffered from lack of attention on the night of 16 December, or that she had little opportunity to view her rapists. "She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes." *Neil v. Biggers, supra,* 409 U.S. at 200. Although her eyes were shut during some moments of the sexual assaults, they were open well enough to see the man later identified from the lineup as Nelson: "I had a good view of his face as it was only a couple of inches from mine." She saw his clothes and the build of his legs. She later gave a fairly complete description of his age, height, weight, complexion, and other physical characteristics. This description matched well the characteristics exhibited by Nelson around the time of his arrest. There was no uncertainty manifested in court. Although there was a gap of over nine months between the crime and the courtroom confrontation, the negative force of this factor is lessened by the certainty of the first confrontation two weeks after the crime—a valid lineup in which the witness took "approximately one minute and three seconds" to pick out Nelson. Weighing this "totality of circumstances" against the possible suggestiveness of a single post lineup comment, it can hardly be said that Mrs. Macek's courtroom testimony was less than reliable. The ample opportunity of the victim to witness the events and actors of the night of 16 December supports a conclusion that her in-court "identification" of defendant Nelson had an origin sufficiently independent of the taint of a single improper remark.

[17] Nor can there be error in the trial court's allowing the witness to touch Nelson on the shoulder. The touching of defendant simply served to remove any possibility of doubt as to the man about whom the witness was testifying. There is nothing improper or prejudicial in the trial court's insistence on certainty. *See, e.g., State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104 (1972) (no error to allow an eight-year-old rape victim to identify defendant by touching him).

IX

[18] Nelson's assignments of error 6 and 7 contest the trial court's denial of a motion to suppress State's Exhibit No. 25, a

watch which had been seized from the Cumberland County jail pursuant to a search warrant.

Nelson's brief admits that in February, 1978, the state gave Nelson's counsel notice of its intention to use the watch as evidence. For "some reason . . . which this attorney cannot explain to this Court," Nelson's Brief, p. 14, Nelson never moved prior to trial to suppress the watch as required by G.S. 15A-975. Nelson's motion to suppress at trial was denied for the reason that it was not timely.

No contention is made that Nelson did not have reasonable opportunity to submit the required motion prior to trial. Nor is there any suggestion that other circumstances existed which, under the statute, would permit a motion to suppress to be made at trial. Thus there is no error in the trial court's denial of the motion or in the failure to conduct a *voir dire* hearing. *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978). Nelson's argument that the procedure provided by G.S. 15A-975 cannot take precedence "over a constitutional right" is without merit. Far from displacing any constitutional right, the statute merely provides for their timely assertion. It is not impermissible for a state to impose reasonable conditions on the assertion of motions to suppress evidence. *See Wainwright v. Sykes*, 433 U.S. 72 (1977).

These assignments of error are overruled.

In the trial of these defendants we find

No error.

Justice CARLTON did not participate in the consideration and decision of this case.

STATE OF NORTH CAROLINA v. REBECCA CASE DETTER

No. 2

(Filed 4 December 1979)

1. **Constitutional Law § 30— list of State's witnesses—bill of particulars properly denied**

The trial court did not err in denying defendant's motions for a bill of particulars since all of the information sought in defendant's first motion was contained in material which she received during pretrial discovery, and since her second motion was for a list of the State's witnesses which was information to which defendant was not entitled.

2. **Constitutional Law § 30— statements by defendant to witnesses—pretrial discovery**

The trial court erred in requiring the State to disclose to defendant before trial statements by witnesses containing remarks made to them by defendant, and since such error was favorable to defendant, she cannot complain that it was error for the trial judge to refuse to order disclosure by the State of the time and place where and to whom they were made; moreover, defendant's argument that nondisclosure of this information denied her her constitutional right to effective assistance of counsel was misplaced since (1) discovery issues that rise to the level of a constitutional issue are generally considered under the due process clause, and (2) when defendant is constitutionally entitled to disclosure of evidence favorable to him that is material to his guilt or punishment, such disclosures must be made only at trial, while the problem in this case involved pretrial discovery.

3. **Criminal Law § 70; Constitutional Law § 43— conversation recorded during investigatory stage—no right to counsel**

The trial court in a homicide prosecution did not err in admitting into evidence a tape recorded conversation between defendant and a witness where the conversation occurred during the investigatory stage of the case before arrest was made; no critical stage had been reached at the time the tape was made so that the Sixth Amendment right to counsel had not yet attached; and use of the tape at trial violated none of defendant's constitutional rights.

4. **Criminal Law § 70; Constitutional Law § 43— defendant's appearance before district court judge—subsequent conversation recorded—no necessity for counsel**

The trial court in a first degree murder case did not err in allowing into evidence a recorded statement by defendant to a witness which was made after defendant's initial appearance before a district court judge but before the probable cause hearing, indictment and arraignment, since defendant's initial appearance before the district court judge was not a critical stage of the proceedings, and the Sixth Amendment was therefore inapplicable because the right to counsel had not yet attached. G.S. 15A-601(a).

5. Criminal Law § 70— tape recordings—requirements for authentication

To insure proper authentication of a tape recording the State must show that the recorded testimony was legally obtained and otherwise competent; the mechanical device was capable of recording testimony and it was operating properly at the time the statement was recorded; the operator was competent and operated the machine properly; the identity of the recorded voices; the accuracy and authenticity of the recording; defendant's entire statement was recorded and no changes, additions or deletions have since been made; and custody and manner in which the recording has been preserved since it was made.

6. Criminal Law § 70— tape recordings—authentication evidence sufficient

Tapes of conversations between defendant and witnesses were properly authenticated where the evidence tended to show that an officer showed the witness how to operate the machine and checked to see that it was operating properly; he was with the witness when the recording was made; the recorder was properly activated at the beginning of the conversation; they played the tape immediately after the conversation was recorded to check for accuracy; the officer had operated the machine many times in the past; the requisite holes had been knocked out on each side of the tape to prevent erasure; the officer had custody of the tape from the time it was made until trial; the witness identified the voices on the tape and testified that the tape contained the exact conversation she had with defendant; and basically similar testimony was given by the officer and another witness concerning the recorded conversation between defendant and that witness.

7. Criminal Law § 117.1— prior consistent statements—jury instructions proper

The trial court properly instructed the jury to consider prior consistent statements only for the purpose of corroborating the witness's testimony at trial if the jury found that the prior statements did corroborate the trial testimony, but it was not prejudicial error for the court on other occasions to omit the words, "if you find that this statement does corroborate his/her testimony," nor was it error for the court on other occasions to fail to instruct with respect to prior consistent statements in the absence of request by defendant; furthermore, there was no merit to defendant's contention that the trial judge failed to charge the jury adequately on the nature and weight to be given the prior consistent statements used to corroborate the witness's testimony at trial.

8. Criminal Law § 113.1— jury instructions—summary of testimony

The trial judge did not commit prejudicial error in instructing the jury that "you are to rely on your own recollection as to what a witness said or didn't say."

9. Criminal Law § 42.6— body samples from deceased—chain of custody—test results admissible

In a prosecution of defendant for the first degree murder of her husband by poisoning, there was no merit to defendant's contention that results from tests performed on specimens from deceased's body were improperly introduced into evidence because a sufficient chain of custody was not established,

since the evidence tended to show that the pathologist who performed the autopsy on deceased removed specimens from the body, placed them in sealed containers which he then placed in mailing containers, and mailed them to the State Toxicology Laboratory; one of the laboratory personnel picked up the samples from the Post Office and took them to the laboratory; the samples were placed on a bench over which five or six persons had supervision; and the possibility that the specimens from deceased were interchanged with those from another body was too remote to require exclusion of the evidence.

10. Homicide § 21.6— death by poisoning—sufficiency of evidence

There was sufficient evidence of first degree murder by means of poisoning to take the case to the jury where it tended to show that, over a period of time, defendant sought ways to kill her husband and that an eyewitness saw her put arsenic poisoning in deceased's tea, food and ice cream in January, February and March of 1977 through use of Terro Ant Killer which contains a lethal dosage of arsenic; deceased died in June 1977; and in the opinion of medical experts he died of arsenic poisoning.

11. Constitutional Law § 33: Homicide § 31.1— murder by poisoning—dates of murderous acts—ex post facto punishment—death penalty improperly imposed

For purposes of the prohibition against *ex post facto* legislation, the dates of the murderous acts rather than the date of death is the date the murder was committed; therefore, where defendant administered poison to her husband on three occasions, all before 1 June 1977, at a time when the maximum punishment for first degree murder was life imprisonment, then imposition of the sentence of death under G.S. 15A-2002 violated the prohibition against imposition of an *ex post facto* punishment.

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

ON appeal by defendant from *Wood, J.*, 26 September 1978 Session of FORSYTH County Superior Court.

Defendant was charged in an indictment, proper in form, with first-degree murder in the death of her husband, Don Gene Detter. The primary evidence for the State was presented through the testimony of five lay witnesses and four doctors.

Joan Ladale Brooks, a friend and neighbor of the Detter family, visited the Detters in their home at 5301 Prince Charles Drive, Kernersville, in January, 1977. During the visit, defendant mentioned how cruel her husband was to the family and stated that she had had something done to the brakes of her husband's car "to either hurt him or harm him." In late January or early February, 1977, Brooks went with the defendant to the Crown Drug Store. There, the defendant gave Brooks some money and

asked her to purchase a bottle of Terro Ant Killer for her which Brooks did. Dr. McBay, Chief Toxicologist of North Carolina, testified that one bottle of Terro Ant Killer contains 300 milligrams of arsenic. A lethal dose of arsenic is between 100 milligrams and 300 milligrams.

During this same period of time, Brooks accompanied the defendant to the home of James Thomas Holly, Jr. During the visit the defendant asked Holly "what lead or lead poisoning would do to someone" and "where she could get some." Holly advised the defendant that lead "would most likely kill somebody." After returning home, Brooks observed the defendant go to a storage area, get some lead weights from a fishing tackle box, place them in a cooking pot half full of water, boil it down so that there was only a few drops of water left, and then observed the defendant pour the drops of water into a liquor bottle. Other evidence disclosed that the deceased was a heavy drinker and that he consumed three to four fifths of liquor per week.

Approximately one week later, Brooks observed the defendant pour the contents of a bottle of Terro Ant Killer into a glass of ice tea which defendant then gave to her husband which he drank. On her next visit to the Detter's house, Brooks heard the defendant remark that she "had asked her husband for a divorce and he wouldn't give her one . . . and she would be glad when everything was over and she wouldn't have to put up with Mr. Detter anymore."

In late March or early April, 1977, Brooks accompanied the defendant's son, Ted, to the Crown Drug Store, where he purchased two bottles of Terro Ant Killer which he then took home and gave to his mother. On several occasions in the latter half of March, 1977, Brooks observed the defendant place Terro Ant Killer in ice tea and give it to the deceased. On one occasion, Brooks observed the defendant pour Terro Ant Killer over a dish of ice cream and give the ice cream to the deceased.

In February, 1977, defendant and her son, Ted, visited Holly and defendant asked Holly if he "would be interested in killing her husband for Five Thousand Dollars." Holly declined the offer. On a later occasion Ted bought some "PCP" which is also known as "Angel Dust" from Holly. Two weeks later defendant accused Holly of "ripping her off." She stated that she put the drugs in

her husband's food but they "did nothing but make him happy." Defendant advised Holly that she wanted the drugs "to kill her husband." Holly also sold the defendant some cocaine and some "acid." Holly's wife testified that defendant asked Holly "how could she kill somebody with a needle and air?" Holly told the defendant that "an air bubble . . . in your vein . . . could kill you instantly." On a later occasion defendant told Holly that the drugs were not working and she did not understand why because she had placed the "PCP," cocaine and "acid" in her husband's food and in his liquor. Defendant stated that she was going to the Magic Market to meet someone "who could help her" and Holly did not see the defendant again.

In January, 1977, the defendant talked to Gregory Wayne Boyd and showed him a plastic bag which contained a pale brown powder. Defendant asked Boyd if he thought the powder would kill her husband. Defendant asked Boyd if he knew anybody who would kill her husband for five thousand dollars, and defendant offered to pay Boyd five thousand dollars if he would kill her husband.

In November or December, 1976, defendant met her hairdresser, Pamela Christy, at a restaurant in Kernersville for lunch. During lunch defendant asked Christy if she or her husband could "get some dope" for her; that she wanted the dope "to kill her husband." In January and February, 1977, defendant told Christy that she had put "some stuff" in her husband's food and he ate it but it didn't do anything to him.

The deceased was hospitalized from 30 March 1977 until 13 April 1977 and from 17 May 1977 until his death on 9 June 1977. During the first period of hospitalization, Dr. William Joseph Spencer tested deceased's urine for heavy metal poisoning and the results were negative. Dr. Spencer's diagnosis was that deceased was suffering from "peripheral neuropathy resulting from excessive alcohol intake." During the second period of hospitalization, Dr. Spencer noticed white lines across deceased's fingernails and he noticed a thickening of the skin over deceased's hands for which the medical term is hyperkeratosis, both symptoms of arsenic poisoning. A test for heavy metal poisoning was positive and deceased was treated with British Anti-Lewisite, a drug to combat arsenic poisoning. Dr. Spencer testified that

arsenic poisoning is also a cause of peripheral neuropathy and in his opinion, as an expert in internal medicine, deceased died as a result of arsenic poisoning.

Dr. James Alvis McCool performed the autopsy on deceased on the day of his death. Samples of hair, fingernails, bile, liver, blood, kidney, urine, stomach content and small bowel content were taken by Dr. McCool and mailed to Dr. Arthur J. McBay, Chief Toxicologist for the State of North Carolina. Test results at the State Laboratory showed that these specimens from deceased's body contained approximately ten times the normal amount of arsenic. In response to a hypothetical question, Dr. McBay stated that in his opinion deceased died of arsenic poisoning.

Defendant testified that neither she nor her son asked Brooks to purchase Terro Ant Killer or purchased any themselves. On one occasion, Brooks and her son did go to the drugstore to pick up a prescription for her. She never talked to Brooks about poisoning or wanting to kill her husband.

Defendant testified that she went to see Pamela Christy only to have her hair fixed; that she never stated to Christy that she wanted to kill her husband or wanted Christy or Christy's husband to buy drugs for her so that she could kill her husband; and that during her luncheon meeting with Christy at a restaurant they talked only about the defendant taking diet pills and not about her husband. Defendant denied that she ever purchased drugs from Holly or solicited him to murder her husband. She visited the Hollys in order to see their children and to attempt to get them to go to church. She also denied talking to Boyd about lead poisoning or about killing her husband and stated that she never tampered with the brakes on her husband's car or poisoned or drugged him in any way.

She stated that her husband was a very heavy drinker and that she was told by Dr. Spencer that her husband suffered from peripheral neuropathy because he drank so heavily. She was of the opinion that her husband somehow "received arsenic at the hospital" and that she "suspicioned he may have committed suicide." Alma Bailiff, a registered nurse, testified that she entered a notation in the hospital records on 22 May 1977 that she heard the deceased repeatedly say, "I did it and I'm sorry."

Several witnesses acquainted with the defendant testified that they had never heard her talk of wanting to or trying to kill her husband and that they had never seen her put any poisons in her husband's food. Also, several witnesses testified that the defendant had a good reputation in her community and in her church.

At the guilt-determination phase of the trial, the jury found the defendant guilty of first-degree murder. At the sentencing phase, the jury found that the murder committed by the defendant was especially heinous, atrocious, or cruel. As a mitigating circumstance, the State conceded and the jury found that the defendant had no significant history of prior criminal activity. The jury found that the mitigating circumstance was insufficient to outweigh the aggravating circumstance, and the jury found beyond a reasonable doubt that the aggravating circumstance was sufficiently substantial to call for imposition of the death penalty. The jury recommended the death sentence and pursuant to G.S. 15A-2002, the trial judge imposed that sentence. Defendant appealed to this Court.

Other facts relevant to the decision of this case will be related in the opinion.

John J. Schramm, Jr. and David B. Hough for the defendant.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Isaac T. Avery III and Assistant Attorney General Joan H. Byers for the State.

COPELAND, Justice.

Defendant has properly presented twenty-three assignments of error to this Court.

[1] By her first assignment of error, defendant contends that the trial judge erred in denying her two motions for a bill of particulars pursuant to G.S. 15A-925.

G.S. 15A-925 provides in relevant part that:

> "(b) A motion for a bill of particulars must request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the

pleading, and must allege that the defendant cannot adequately prepare or conduct his defense without such information.

(c) If any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, the court must order the State to file and serve a bill of particulars. Nothing contained in this section authorizes an order for a bill of particulars which requires the State to recite matters of evidence."

With respect to a motion for a bill of particulars, we have stated that under G.S. 15A-925:

"The function of such a bill of particulars is (1) to inform the defense of the specific occurrences intended to be investigated on the trial and (2) to limit the course of the evidence to the particular scope of inquiry. [Citations omitted.]

The granting or denial of motions for a bill of particulars is within the discretion of the court and is not subject to review except for palpable and gross abuse thereof." *State v. Swift*, 290 N.C. 383, 391, 226 S.E. 2d 652, 660 (1976), *quoting State v. McLaughlin*, 286 N.C. 597, 603, 213 S.E. 2d 238, 242 (1975), *death sentence vacated*, 428 U.S. 903 (1976).

In her first motion for a bill of particulars defendant sought disclosure of the date of her husband's death; the cause of death; the method and manner in which the State alleges the murder occurred; the identity of the murder weapon; the time and place of any overt acts of the defendant alleged to have resulted in her husband's death; the time, location and parties involved in the acts which were the proximate cause of his death; the source and brand name of any poisons administered to him; how such poison was administered; whether the poison was administered in one dose or several doses; and what particular doses the State alleges the defendant administered.

Defendant's contention that it was erroneous for the trial judge to deny this motion has no merit whatsoever. The record discloses that on 17 March 1978 the trial judge granted in part defendant's discovery motion and ordered the State to disclose the following: All statements, written or oral, made by defendant

to police officers and any other person; a transcript of recorded statements made by defendant; tangible physical evidence in the State's possession which it intended to introduce into evidence; results of all tests conducted on the deceased's body samples and on any other physical or tangible evidence the State intended to introduce into evidence; and the complete autopsy report. The order also required the State to make available to defendant, and any medical experts retained by her, the deceased's body samples for testing at the State Toxicology Laboratory. All the information requested by defendant in her first motion for a bill of particulars was contained in the above material that she received during pretrial discovery.

For example, the date and cause of death are listed in the autopsy report. The murder weapon (arsenic), the method and manner in which the killing occurred, the brand name and source of arsenic (Terro Ant Killer), the parties involved, and the fact that the arsenic was administered by defendant by placing it in his food and in his ice tea were all discussed in the tape recorded conversations defendant had with witness Brooks and witness Christy. Information on the levels of arsenic detected in the deceased's body samples are contained in the autopsy report and the laboratory test results. Defendant obtained this wealth of information during discovery and certainly she was fully aware of the "specific occurrences intended to be investigated on the trial." *State v. Swift, supra* at 391, 226 S.E. 2d at 660, *quoting State v. McLaughlin, supra* at 603, 213 S.E. 2d at 242. She had the information she needed to adequately prepare and conduct her defense as required by G.S. 15A-925. *See, State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967), in which we held that since defendant was given copies of the autopsy report and other documents which adequately disclosed the basis of the State's case it was not error for the trial judge to deny the motion for a bill of particulars.

In defendant's second motion for a bill of particulars, she sought disclosure of a list of witnesses that the State intended to call at trial. Defendant is not entitled, under G.S. 15A-903 or any former statute or the common law, to a list of State's witnesses. *State v. Sledge,* 297 N.C. 227, 254 S.E. 2d 579 (1979); *State v. Abernathy,* 295 N.C. 147, 244 S.E. 2d 373 (1978); *State v. Carter,* 289 N.C. 35, 220 S.E. 2d 313 (1975), *death sentence vacated,* 428 U.S. 904 (1976); *State v. Spaulding,* 288 N.C. 397, 219 S.E. 2d 178

(1975), *death sentence vacated,* 428 U.S. 904 (1976). This assignment of error is overruled.

[2] By her third assignment of error, defendant contends that the trial judge committed prejudicial error in limiting the discovery of the statements made by defendant. Witnesses Brooks, Holly, Christy and Boyd gave statements to Officer Grindstaff. The trial judge, presumably pursuant to G.S. 15A-903(a)(2), ordered that those witnesses' statements be disclosed to defendant to the extent they contained remarks made by defendant to those witnesses. Defendant obtained a list of remarks she had allegedly made to those witnesses concerning her desire to kill her husband but she did not obtain any information regarding the time of or place where the statements were made nor was there any indication as to whom each statement was allegedly made. Defendant contends that it was error to so limit this discovery of statements made by defendant.

G.S. 15A-903(a)(2) requires disclosure of "any oral statement made by the defendant which the State intends to offer in evidence at the trial." G.S. 15A-904(a) states that, "Except as provided in G.S. 15A-903(a), (b), (c) and (e), this Article does not require the production of . . . statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State." This statute is an express restriction on pretrial discovery of witnesses' statements that a trial judge has no authority to exceed in his discovery order. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977).

Of course, if a witness' statement is discoverable under G.S. 15A-903(a), (b), (c) or (e), then it is discoverable under G.S. 15A-904 (a) due to the qualifying clause expressly contained in G.S. 15A-904(a). Here, the trial judge ordered that the State disclose to the defendant, "A written copy of any and all statements, written or oral, *made by the defendant to* investigating officers or *any other person or persons.*" Thus, the question presented is whether these witnesses' statements are discoverable under G.S. 15A-903 (a)(2), and thus are taken out of the express restriction on discovery of witnesses' statements contained in G.S. 15A-904(a) to the extent that the witnesses' statements contained remarks made to that witness by the defendant.

In a recent decision we addressed this very question and there held with respect to G.S. 15A-903(a)(2) that, "the intent of the Legislature was to restrict a defendant's discovery of his oral statements to those *made by him to persons acting on behalf of the State.*" *State v. Crews*, 296 N.C. 607, 620, 252 S.E. 2d 745, 754 (1979). (Emphasis added.) *See, State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978). Therefore, in the instant case, the able trial judge exceeded his authority to the extent that he ordered disclosure by the state of "any and all statements, written or oral, made by the defendant to . . . any other person or persons." We expressly interpreted G.S. 15A-903(a)(2) not to include discovery of such statements in *State v. Crews, supra.* Therefore, these witnesses' statements are expressly shielded from discovery by G.S. 15A-904(a). Finally, we note that G.S. 15A-904(a) shields these statements only from *pretrial* discovery. G.S. 15A-904(a) does not bar the discovery of prosecution witnesses' statements *at trial. State v. Hardy, supra.*

Here, the trial judge's error was in favor of the defendant. She certainly suffered no prejudice in having these statements disclosed to her during pretrial discovery. Since defendant was not entitled to have received them, she cannot now be heard to complain that it was error for the trial judge to refuse to order disclosure by the State of the time and place where and to whom they were made. Indeed, disclosure of the statements alone without this additional information is one of the factors that led us to the conclusion in *State v. Crews, supra* that disclosure of witnesses' statements (even to the extent they contain statements made by the defendant to the witness) is not required by G.S. 15A-903(a)(2).

> " '[I]t would be illogical to assume the Act intended to require discovery of remarks of the defendant to bystander witnesses but not disclosure of the witnesses' names.' 45 N.C.A.G. 60 (1975) 'Where possible, the language of a statute will be interpreted so as to avoid an absurd consequence.' *State v. Hart*, 287 N.C. 76, 80, 213 S.E. 2d 291, 295 (1975).. Furthermore, it is anomalous to think the Legislature granted a defendant indirect access to the names of the State's witnesses when it denied his right to this information directly." *State v. Crews, supra* at 620, 252 S.E. 2d at 754.

Defendant claims that nondisclosure of this information denied her her constitutional right to effective assistance of counsel. Defendant's argument is misplaced for two reasons. First, discovery issues that rise to the level of a constitutional issue are generally considered under the due process clause. *See, e.g., State v. Hardy, supra; State v. Abernathy, supra; State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976); *United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976); *Moore v. Illinois*, 408 U.S. 786, 33 L.Ed. 2d 706, 92 S.Ct. 2562, *rehearing denied*, 409 U.S. 897 (1972); *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963). Second, it appears that when defendant is constitutionally entitled to disclosure of evidence favorable to him that is material to defendant's guilt or punishment, such disclosure must be made only *at trial*, *State v. Abernathy, supra*, and cases cited therein, and here, as noted above with respect to G.S. 15A-904(a), we are dealing with *pretrial* discovery. *State v. Hardy, supra.* This assignment of error is overruled.

By her fifth assignment or error, defendant contends that the trial judge erred in allowing witnesses Brooks and Boyd to testify concerning statements attributed to the defendant which were not disclosed to defendant prior to trial, in compliance with the trial judge's pretrial discovery order. For the reasons discussed above we have held that defendant was not entitled to receive disclosure of any of these statements prior to trial. Therefore, defendant cannot now be heard to complain that she received some of these statements but not others since she was not entitled to receive any of them under G.S. 15A-904(a).

Additionally we note that the testimony of Brooks that went beyond her pretrial statement was ordered stricken from the record, and the jury was instructed to disregard it and that the portion of Boyd's testimony that defendant objected to at trial was not contained in his pretrial statement so the district attorney was not in a position to disclose it before trial. Even if there had been a violation of the pretrial discovery order in this case, defendant's remedy is not necessarily a new trial. Her remedy would be to pursue the sanctions set forth in G.S. 15A-910. *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978). Imposition of the sanctions of that statute is within the discretion of

the trial judge. *State v. Jones, supra; State v. Stevens, supra.* This assignment of error is overruled.

By her seventh and eighth assignments of error, defendant contends that the trial judge erred in admitting into evidence the tape recorded conversations between defendant and witness Brooks and between defendant and witness Christy and playing the recordings in the presence of the jury. Defendant contends that the tape recordings were not properly authenticated and that the manner in which they were obtained violated defendant's constitutional right to counsel. These assignments of error are without merit.

G.S. 15A-975(a) provides that, "[i]n superior court, the defendant may move to suppress evidence *only prior to trial* unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c)." (Emphasis added.) When no exception to making the motion to suppress before trial applies, failure to make the pretrial motion to suppress waives any right to contest the admissibility of the evidence at trial on constitutional grounds. *State v. Hill,* 294 N.C. 320, 240 S.E. 2d 794 (1978). *See also, Wainwright v. Sykes,* 433 U.S. 72, 53 L.Ed. 2d 594, 97 S.Ct. 2497, *rehearing denied,* 434 U.S. 880 (1977), in which the United States Supreme Court held that it is not impermissible for a state to impose reasonable conditions on the assertion of motions to suppress evidence.

The exceptions to making the motion to suppress evidence prior to trial appear in subsections (b) and (c) of G.S. 15A-975. More specifically, G.S. 15A-975(b)(1) allows the motion to suppress to be made for the first time at trial if the State has failed to give notice sooner than 20 working days before trial of its intention to use as evidence a statement made by the defendant. As of 19 February 1978 defendant had received no such notice of the State's intention to use the tape recordings at trial. On that date, defendant filed a pretrial motion to suppress "the introduction into evidence of any oral or recorded statements of the defendant within the possession or control of the State of which copies or the contents of such statements have not been divulged to the defendant." Defense counsel stated in the motion that he was "unable to particularize further the grounds for this motion"

because it was not known what evidence the State had or intended to use at trial. Defendant moved that,

> "[T]he State be required to inform the defendant, Rebecca Case Detter, of the specific evidence it intends to introduce so that appropriate motions to suppress this evidence, if any evidence does in fact exist, may be made within the requirements of the criminal procedure act of North Carolina.
>
> WHEREFORE the defendant requests a pretrial hearing to determine the admissibility into evidence of any evidence as is set out in the above paragraphs. Defendant requests that Court exclude from evidence at trial any evidence that the State does not give the defendant timely motion of notice to introduce. Defendant requests that she be allowed to supplement this motion at such time as she is provided with discovery as provided by N.C.G.S. 15A-900 *et seq.* and with proper notice of intention to introduce evidence at trial by the State."

The pretrial hearing requested by defendant was held at the 27 February 1978 Criminal Session of Forsyth County Superior Court. At the conclusion of this hearing, McConnell, J. advised that he would not rule on motions directed toward the suppression of evidence because he felt that the judge who ultimately tried the case should have an opportunity to rule on such motions.

At the pretrial hearing, defendant was also heard on her 10 February 1978 motion to compel discovery. The discovery order entered by McConnell, J. on 17 March 1978 included the requirement that the State disclose to defendant the "transcript of any recorded statements made by the defendant." The correctness of this portion of the discovery order, presumably made pursuant to G.S. 15A-903(a)(1), ordering disclosure of *recorded* statements made by defendant *to witnesses*, is questionable due to our holding above and our holding in *State v. Crews, supra* that G.S. 15A-903(a)(2) (disclosure of *oral* statements made by defendant) permits disclosure only of statements made by defendant *to police officers.* Statements made by defendant *to witnesses* are shielded from discovery by G.S. 15A-904(a) even when those statements contain remarks made by defendant to those witnesses. *See also, State v. Hardy, supra.* G.S. 15A-975(b)(1) does not even *require* that the State give notice before trial of its in-

tention to use statements made by the defendant at trial. That statute merely states that *if* such notice of intention is not given sooner than twenty working days prior to trial, then defendant may make his motion to suppress those statements for the first time at trial.

Although the discovery order appears to be erroneous in ordering disclosure of the recorded statements, the fact remains that pursuant to that order defendant received more than notice of the State's intention to use the recorded statements at trial; the transcripts of those statements were actually disclosed to defendant before trial. Therefore, while defendant was in no position to make a pretrial motion to suppress the recorded statements on constitutional grounds on 19 February 1978 (and had to move to be allowed to supplement that motion to suppress at a later date), defendant was in a position to make a pretrial motion to suppress at all times after the State complied with the discovery order in this case which was sooner than twenty working days prior to trial. Thus the exception to making the pretrial motion to suppress contained in G.S. 15A-975(b)(1) does not apply. Defendant never made a pretrial motion to suppress the recorded statements *on constitutional grounds* although she had reasonable opportunity to do so and the exceptions set forth in subsections (b) and (c) of G.S. 15A-975 do not apply. It appears that defendant has waived any right to contest the admissibility of these recorded statements at trial on constitutional grounds. *State v. Hill, supra; see, Wainwright v. Sykes, supra.*

It is an established principle of appellate review that this Court will refrain from deciding constitutional questions when there is an alternative ground available upon which the case may properly be decided. *State v. Goodman,* 298 N.C. 1, 257 S.E. 2d 569 (1979); *State v. Jones,* 296 N.C. 495, 251 S.E. 2d 425 (1979); *State v. Crabtree,* 286 N.C. 541, 212 S.E. 2d 103 (1975).

However, we cannot ignore the fact that McConnell, J. stated at the pretrial hearing that he would not rule on any pretrial motions to suppress. Also, the following statement appears of record in this case, "Judge Wood [the judge who tried this case], in his discretion, elected to rule on the admissibility of evidence at such time as the same was introduced during the course of the trial." The date on which this statement was made does not appear in

the record. The record in this regard, as in many other instances in this case, was poorly prepared requiring an inordinate investment of the Court's time to discern what happened and when, in order to decide this case. A great deal more care should have been exercised in preparing this record on appeal. We also note in passing that it is the better practice for the appellee's brief to use the same numbering system for the questions presented as the appellant's brief. The State's failure to do so has further complicated our review in this case. *See, State v. Siler,* 292 N.C. 543, 234 S.E. 2d 733 (1977).

Defendant requested in her pretrial motion to suppress that she be allowed to supplement that motion once she determined what evidence the State possessed and intended to use at trial. However, no further motions to suppress on constitutional grounds were ever filed due either to neglect or to reliance on the statements of McConnell, J. and Wood, J. that any motions to suppress evidence would be considered only at trial. At trial, defendant's motions to suppress these recorded statements were not overruled because they were not timely made; instead, they were considered and overruled on their merits. In fairness to the defendant under the peculiar facts of this case, we believe it to be necessary to reach the constitutional question on this issue.

Defendant maintains that introducing the recorded conversations into evidence violated her Sixth Amendment right to counsel under the decisions in *Brewer v. Williams,* 430 U.S. 387, 51 L.Ed. 2d 424, 97 S.Ct. 1232, *rehearing denied,* 431 U.S. 925 (1977) and *Massiah v. United States,* 377 U.S. 201, 12 L.Ed. 2d 246, 84 S.Ct. 1199 (1964). This contention is without merit.

The Sixth Amendment right to counsel has been made applicable to the states through the Fourteenth Amendment. *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963). No person may be imprisoned for any offense, absent a knowing and intelligent waiver, unless he was represented by counsel at his trial. G.S. 7A-451(a)(1); *Argersinger v. Hamlin,* 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972). The right to counsel applies at the taking of a guilty plea. *Id.* Also, the right to counsel attaches and applies not only at trial but also at and after any pretrial proceeding that is determined to constitute a critical stage in the proceedings against the defendant. *Brewer v.*

Williams, supra; Hamilton v. Alabama, 368 U.S. 52, 7 L.Ed. 2d 114, 82 S.Ct. 157 (1961); *Powell v. Alabama,* 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932).

Whether a critical stage has been reached depends upon an analysis of "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *United States v. Wade,* 388 U.S. 218, 227, 18 L.Ed. 2d 1149, 1157, 87 S.Ct. 1926, 1932 (1967). A critical stage has been reached when constitutional rights can be waived, defenses lost, a plea taken or other events occur that can affect the entire trial. *Hamilton v. Alabama, supra.* A preliminary hearing, though not in itself constitutionally required, is, when given, a critical stage requiring the assistance of counsel or a valid waiver of that right. *Coleman v. Alabama,* 399 U.S. 1, 26 L.Ed. 2d 387, 90 S.Ct. 1999 (1970). A pretrial post-indictment lineup is a critical stage requiring the presence and assistance of counsel. *United States v. Wade, supra.* The United States Supreme court also addressed the issue of what constitutes a critical stage before trial in *Escobedo v. Illinois,* 378 U.S. 478, 12 L.Ed. 2d 977, 84 S.Ct. 1758 (1964), and there held that,

> "[W]here . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment' . . . ." *Id.* at 490-91, 12 L.Ed. 2d at 986, 84 S.Ct. at 1765.

In *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, *rehearing denied sub nom.,* 385 U.S. 890 (1966), the United States Supreme Court stated that an in-custody police interrogation is inherently intimidating. Decision in *Miranda* was placed on the Fifth rather than the Sixth Amendment but, in order to secure defendant's constitutional right against compulsory self-incrimination, which has been made obligatory on the states by

the Fourteenth Amendment, *Malloy v. Hogan,* 378 U.S. 1, 12 L.Ed. 2d 653, 84 S.Ct. 1489 (1964), the police must specifically inform defendant that he has the right to have an attorney, to have one appointed for him if he cannot afford one, and to have the attorney present during questioning. *Miranda v. Arizona, supra.* Since the approach in *Miranda* to the issue of securing a defendant's constitutional rights during an in-custody police interrogation was based on the Fifth Amendment, the decision in *Escobedo,* which approached the same issue on the basis of a critical stage analysis under the Sixth Amendment, has been limited to its specific facts. *Kirby v. Illinois,* 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877 (1972); *Johnson v. New Jersey,* 384 U.S. 719, 16 L.Ed. 2d 882, 86 S.Ct. 1772, *rehearing denied sub nom.,* 385 U.S. 890 (1966). Also, the United States Supreme Court has, "in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda,* 'to guarantee full effectuation of the privilege against self-incrimination . . . .' " *Kirby v. Illinois, supra* at 689, 32 L.Ed. 2d at 417, 92 S.Ct. at 1882, *quoting Johnson v. New Jersey, supra* at 729, 16 L.Ed. 2d at 890, 86 S.Ct. at 1779. Therefore, with the exception of *Escobedo,* the Sixth Amendment right to counsel has in "*all* . . . cases . . . involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois, supra* at 689, 32 L.Ed. 2d at 417, 92 S.Ct. at 1882; *Brewer v. Williams, supra; Massiah v. United States, supra; cf., Pointer v. Texas,* 380 U.S. 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065 (1965); *see also,* 21 Am. Jur. 2d *Criminal Law* § 313 (Supp. 1979) and cases cited therein; Annot., 5 A.L.R. 3d 1269 (1966) and cases cited therein.

Once a critical stage has been reached, such as an arraignment in *Brewer v. Williams, supra,* the police may not question a defendant, absent a valid waiver, without the presence and assistance of counsel, *id.,* and the police may not do indirectly through an informer that which they cannot do themselves. That is, once a critical stage has been reached, such as an indictment in *Massiah v. United States, supra,* the police may not use an informer, absent a valid waiver, to conduct a secret interrogation in the absence of counsel. *Id.* The investigation may continue after a critical stage has been reached, but the defendant's own in-

criminating statements so obtained through use of an informer may not be used against him at his trial. *Id.*

However, if no critical stage has yet been reached then the Sixth Amendment is inapplicable because the right to counsel has not yet attached. During this period of time, when the police are in the investigatory stage (unless the police bring the defendant in for an in-custody interrogation which would require that the *Miranda* warnings be given which, of course, includes, under the Fifth Amendment, the right to have counsel present during questioning), the decisions turn on application of the Fourth and Fifth Amendments rather than the Sixth Amendment unless the case presents exactly the same fact situation as *Escobedo.* In order to invade a defendant's reasonable expectation of privacy to conduct a search under the Fourth Amendment for oral statements by using an electronic eavesdropping device, the police must have probable cause and comply with the requirements in *Katz v. United States,* 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967), and the Fourth Amendment has been made obligatory on the states through the Fourteenth Amendment. *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961). However, if the police use an informer to overhear defendant's statements there is no Fourth Amendment violation because no surreptitious search for oral statements has been conducted; instead, the defendant has talked freely and voluntarily to someone in whom he has simply misplaced his confidence. *Hoffa v. United States,* 385 U.S. 293, 17 L.Ed. 2d 374, 87 S.Ct. 408 (1966), *rehearing denied,* 386 U.S. 940 (1967). The use of informers has been approved from time immemorial and defendant takes the risk that the person to whom he is talking is a police informer whether by the informer's voluntary action or at the instigation of the police. *Id.* The risk is not increased when the informer is also wired for sound so that the defendant's statements have been recorded or simultaneously transmitted to police and there is still no Fourth Amendment violation. *United States v. White,* 401 U.S. 745, 28 L.Ed. 2d 453, 91 S.Ct. 1122 (1971) (*Katz* specifically distinguished), *rehearing denied,* 402 U.S. 990 (1971).

The same is true under Fifth Amendment analysis. When no critical stage has been reached triggering application of the Sixth Amendment (and the police are not themselves conducting an in-custody interrogation directly within the fact situation of *Escobedo*), then the case is analyzed under the Fifth Amendment.

The police may not interrogate the defendant themselves without giving defendant his *Miranda* warnings (including the right to counsel), *Miranda v. Arizona, supra,* but the police may use an informer and there has been no violation of the Fifth Amendment in such a situation because the defendant was under no compulsion to speak. *Hoffa v. United States, supra.* When the police conduct the interrogation, the situation is inherently coercive and intimidating, *Miranda v. Arizona, supra,* but there is no such compulsion to speak when an informer is used. *Hoffa v. United States, supra.* (*Miranda* specifically distinguished.) Instead, defendant has talked freely and voluntarily to someone in whom he has misplaced his confidence. Defendant takes the risk that the person in whom he voluntarily confides is a police informer and there is no Fifth Amendment violation. *Id.*

Here, the defendant was arrested on 22 November 1977, and she was released on bail on that date. She had her initial appearance before a district court judge (there was no initial appearance before a magistrate) on 23 November 1977. Her probable cause hearing was held on 12 January 1978. She was indicted at the 30 January 1978 session of the grand jury and was arraigned on 27 February 1978. The tape recorded conversation between defendant and Christy occurred on 15 September 1977 and the tape recorded conversation between defendant and Brooks occurred on 11 January 1978.

[3] The conversation between defendant and Christy clearly occurred during the investigatory stage of this case before the arrest was even made. Therefore, use of this tape at defendant's trial is controlled by the decisions in *Hoffa* and *White* as opposed to *Brewer* and *Massiah* as discussed at length above. No critical stage had been reached at the time this tape was made so the Sixth Amendment right to counsel had not yet attached and there were no Fourth or Fifth Amendment violations. The police did not themselves conduct an in-custody interrogation so *Escobedo* and *Miranda* are inapplicable. Use of this tape at trial violated none of defendant's constitutional rights. *Hoffa v. United States, supra; United States v. White, supra.*

[4] The conversation between defendant and Brooks occurred after defendant had been arrested and released on bail and after defendant's initial appearance before a district court judge but

before the probable cause hearing, indictment and arraignment. Therefore, the question presented at this point is whether the initial appearance before a district court judge is a critical stage triggering application of the Sixth Amendment. If it is, then use of this tape at defendant's trial violated her Sixth Amendment right to counsel under *Massiah;* if it is not, then the right to counsel had not yet attached and use of the tape at trial violated none of defendant's constitutional rights according to the decisions in *Hoffa* and *White.*

We held in *State v. Hairston,* 280 N.C. 220, 185 S.E. 2d 633, *cert. denied sub nom.,* 409 U.S. 888 (1972), that G.S. 7A-451(b)(4) provides and the Sixth Amendment requires that defendant be informed of his right to counsel at a *preliminary hearing* and that he be provided with counsel if he is indigent unless he validly waives this right. Under our Criminal Procedure Act of 1975, Chapter 15A, effective 1 July 1975, the preliminary hearing has been divided into two parts. The Official Commentary to Article 30 of Chapter 15A states that, "This code has *two preliminary hearings* before a judge in district court: *the first appearance before a district court judge and the probable-cause hearing.*" (Emphasis added.) Since the effective date of the Criminal Procedure Act of 1975 we have held that the *probable cause hearing* is a critical stage triggering application of the Sixth Amendment right to counsel. *State v. Cobb,* 295 N.C. 1, 243 S.E. 2d 759 (1978).

The question here is whether the reference in G.S. 7A-451(b)(4) to a *prelimintary hearing* means that a defendant has a Sixth Amendment right to counsel at the *initial appearance before the district court judge.* We have specific statutory language on this question. G.S. 15A-601(a) provides, "This first appearance before a district court judge is not a critical stage of the proceedings against the defendant."

It is apparent from the relevant case law that the initial appearance before a district court judge is not a critical stage because it is not an adversarial judicial proceeding where rights and defenses are preserved or lost or a plea taken. *White v. Maryland,* 373 U.S. 59, 10 L.Ed. 2d 193, 83 S.Ct. 1050 (1963) (*per curiam*); *Hamilton v. Alabama, supra; Kirby v. Illinois, supra.* The relevant functions of the district court judge at the initial appearance are to determine the sufficiency of the charges, G.S.

15A-604; to inform the defendant of the charges against him and to furnish him a copy of same, G.S. 15A-605(1) and G.S. 15A-605(2); to assure defendant's right to counsel for the next stages of the proceedings, G.S. 15A-603; to obtain either a demand for or waiver of the probable cause hearing, G.S. 15A-606; and to determine or review the defendant's eligibility for release on bail, G.S. 15A-605(3).

The sufficiency of the charges, G.S. 15A-604, is not determined in an adversarial setting through the introduction of evidence with examination and cross-examination of witnesses. Instead, that statute simply recognizes that much time and trouble can be saved if the district court judge has the authority at the initial appearance to dispose of cases where it is obvious from the relevant process papers that they are insufficient on their face to adequately bring a charge against the defendant. *See*, Official Commentary to G.S. 15A-604. The taking of testimony in an adversarial judicial setting is reserved for the probable cause hearing. Waiver of the right to counsel, G.S. 15A-603, and waiver of the probable cause hearing which is a statutory right, G.S. 15A-606, and not a constitutional right, *State v. Hairston, surpa*, do not require the assistance of counsel. *See, e.g., Johnston v. Zerbst*, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938) (waiver of constitutional right to counsel); *Miranda v. Arizona, supra* (waiver of defendant's constitutional rights under *Miranda*). Furthermore, at the initial appearance, defendants are informed of their right against self-incrimination. G.S. 15A-602. Thus, it is apparent that the purpose of the initial appearance is to aid and prepare the defendant *for the further proceedings* which will be adversarial in nature principally by informing him of his constitutional rights and informing him of the charges against him. G.S. 15A-605.

The initial appearance before a district court judge is not a trial-like confrontation requiring the guiding hand of counsel to help the defendant meet his adversary. *See, United States v. Ash*, 413 U.S. 300, 37 L.Ed. 2d 619, 93 S.Ct. 2568 (1973) (a post-indictment photographic display is not a critical stage). The constitutional right that is applicable at this point that we must insure is afforded the defendant is the right to remain silent and the judge at the initial appearance has the duty to inform defendant of this right. G.S. 15A-602.

Thus, use of the Brooks' tape at defendant's trial violated none of her constitutional rights. No critical stage had yet been reached triggering application of the Sixth Amendment; the police did not themselves conduct an in-custody interrogation so *Escobedo* and *Miranda* do not apply; and there were no Fourth or Fifth Amendment violations. *Hoffa v. United States, supra; United States v. White, supra.*

Additionally, we note that G.S. 7A-451(b)(3) (Cum. Supp. 1977) provides that "[a] hearing for the *reduction* of bail, or to fix bail *if bail has been earlier denied*" (emphasis added) is a critical stage requiring the assistance of counsel. We need not deal with this subsection of the statute because it does not apply in this case. Defendant was released on bail on the day she was arrested. There was no bail *reduction* hearing or a bail hearing *after bail had earlier been denied.*

Also, defendant employed counsel early after her arrest and before 11 January 1978. In this situation, the constitutional issue concerns the use of an informer to directly invade confidential communications between a defendant and his attorney. *See, Weatherford v. Bursey,* 429 U.S. 545, 51 L.Ed. 2d 30, 97 S.Ct. 837 (1977) and *Hoffa v. United States, supra; see also,* Annot., 5 A.L.R. 3d 1360 (1966) and cases cited therein dealing with the restrictions on and limitations on the interference of the right to communicate with counsel *assuming* that the constitutional right to counsel has attached. There was no direct invasion of any confidential communications between defendant and her counsel in this case.

In any event, use of the Brooks' tape as substantive evidence of defendant's guilt was harmless beyond a reasonable doubt. G.S. 15A-1443(b); *see, State v. Shutt,* 279 N.C. 689, 185 S.E. 2d 206 (1971), *cert. denied,* 406 U.S. 928 (1972); *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, *rehearing denied,* 386 U.S. 987 (1967); *Moore v. Illinois, supra* and *Coleman v. Alabama, supra* (the last two cases remanded by the United States Supreme Court for determination as to whether absence of counsel at the preliminary hearing was harmless error).

Here, defendant's statements during her conversation with Brooks were in no manner incriminatory. During the conversation, she emphatically denied any and all connection with her hus-

band's death. As such, those statements corroborated her testimony at trial that she had nothing to do with her husband's death. Indeed, defendant was the first to bring out the contents of this tape during the cross-examination of Brooks. The trial judge then decided that the jury could get a more accurate picture of this conversation between defendant and Brooks if the tape was played to the jury. Defendant objected but her objection was overruled. Defendant's statements on the tape were considered by the jury as substantive evidence of her guilt. We are convinced beyond a reasonable doubt that there is no reasonable possibility that defendant's statements on the Brooks' tape contributed to her conviction. *Chapman v. California, supra.*

Also, Brooks' statements on the same tape were, under the trial judge's specific instructions, considered by the jury only to the extent they corroborated Brooks' testimony at trial. This certainly was proper. *State v. Medley,* 295 N.C. 75, 243 S.E. 2d 374 (1978); *State v. Hopper,* 292 N.C. 580, 234 S.E. 2d 580 (1977); 1 Stansbury's N.C. Evid. § 51 (Brandis rev. 1973) and cases cited therein.

[5] Tape recorded evidence must be properly authenticated before it can be introduced into evidence and defendant contends that there is insufficient evidence in the record to support the trial judge's findings that the two recordings were properly authenticated as required by *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971).

In *State v. Godwin,* 267 N.C. 216, 147 S.E. 2d 890 (1966), Justice Pless, speaking for the Court, held that tape recordings of telephone conversations between defendant and a prosecuting witness are properly authenticated when the prosecuting witness identifies the voices on the tapes and states that the tapes are a fair and accurate representation of the conversations. In *State v. Lynch, supra,* Justice Sharp (later Chief Justice), speaking for the Court, held that to lay a proper foundation for the admission of a defendant's recorded confession or incriminating statement made to police officers, the State must show:

> "(1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded; (3) that the

operator was competent and operated the machine properly; (4) the identity of the recorded voices; (5) the accuracy and authenticity of the recording; (6) that defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and (7) the custody and manner in which the recording has been preserved since it was made. *Id.* at 17, 181 S.E. 2d at 571. (Citations omitted.)

The State urges us in its brief to hold that *Godwin* applies when a conversation between defendant and a *witness* is recorded and that *Lynch* applies when a conversation, confession or interrogation between defendant and a *police officer* or government agent is recorded. There are differences in the two circumstances because, for a confession to be admissible, the *Miranda* warnings must be given, a valid waiver obtained and the confession must be voluntary. However, there is no difference between the two situations as far as the authenticity of the recording is concerned. Whenever a recorded statement is introduced into evidence the seven steps set forth in *Lynch* should be followed to insure proper authentication of that recording. 29 Am. Jur. 2d *Evidence* § 436 (1967); Annot., 58 A.L.R. 2d 1024, § 4 (1958) and cases cited therein. It is apparent, from a close reading of both *Godwin* and *Lynch*, that the seven steps enumerated in *Lynch* are but a further breakdown and more precise statement of the requirements for authentication that are subsumed within the second requirement in *Godwin* that the recording be a "fair and accurate representation of the conversations." *State v. Godwin, supra* at 218, 147 S.E. 2d at 891.

[6] Here, the trial judge conducted a *voir dire* with respect to each tape recorded conversation and made findings of fact that complied with all of the requirements set forth in *Lynch*. Defendant contends that there is insufficient evidence in the record to support the trial judge's findings. However, upon careful scrutiny of the record, we find that there is sufficient evidence to support his findings.

With respect to the recorded conversation between defendant and Brooks, Officer Grindstaff testified that he held a meeting with Brooks beforehand to show her how to operate the tape recording machine and to check whether the machine was operating properly; that he was with Brooks when the recording

was made; that the recorder was properly activated at the beginning of the conversation; that they played the tape immediately after the conversation was recorded to check for accuracy; that he has operated the machine many times in the past; that the requisite holes had been knocked out on each side of the tape to prevent erasure; and that he had custody of the tape from the time it was made until trial. Brooks identified the voices on the tape and testified that the tape contains the exact conversation she had with the defendant and that nothing has been added to it. Upon close scrutiny of the record, we find that sufficiently similar testimony was given by Officer Grindstaff and witness Christy as to the recorded conversation between defendant and Christy. Clearly, there is abundant evidence in the record to support the trial judge's findings and the findings of fact meet all of the requirements of *Lynch* with respect to both recorded conversations. Therefore, the tapes of both conversations were properly authenticated before being introduced into evidence.

Defendant also maintains with respect to the Brooks' tape that the voices on the tape were distorted because the cold weather affected the making of the tape by causing the batteries to lose power. There is no evidence on the record that any portion of the tape was inaudible on *voir dire* or when played to the jury. Even if a portion had been inaudible it would still be admissible. *Searcy v. Justice*, 20 N.C. App. 559, 202 S.E. 2d 314 (1974) and cases cited therein; 29 Am. Jur. 2d, *Evidence* § 436 (1967) and cases cited therein. These assignments of error are overruled.

[7] By her ninth, tenth, eleventh and twelfth assignments of error, defendant contends that the trial judge failed to give correct instructions on the admissibility of prior consistent statements of witnesses for purposes of corroboration only. These assignments are without merit.

On several occasions, the trial judge instructed the jury to consider prior consistent statements only for the purpose of corroborating the witness' testimony at trial if the jury found that the prior statements did corroborate the trial testimony. This instruction was proper. *State v. Medley, supra; State v. Hopper, supra.*

On other occasions when the instruction was given, the latter part of the instruction, to-wit, "if you find that this statement does corroborate his/her testimony," was omitted. This instruction, while not as complete as it should have been, does not amount to prejudicial error because it is always a question for the jury to determine whether or not the prior consistent statement does in fact corroborate the witness' testimony at trial. *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. denied*, 365 U.S. 830 (1961).

When the prior consistent statements of Boyd were introduced the trial judge instructed the jury only with respect to prior inconsistent statements and not prior consistent statements. At this point, defense counsel did not request a limiting instruction with regard to prior consistent statements. When the limiting instruction is not requested, it is not error if it is not given. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied sub nom.*, 410 U.S. 958 (1973), *cert. denied sub nom.*, 410 U.S. 987 (1973). These assignments of error are overruled.

By her twenty-seventh assignment of error, defendant contends that the trial judge failed to adequately charge the jury on the nature and weight to be given the prior consistent statements used to corroborate the witness' testimony at trial and presents three arguments under this assignment. First, defendant argues that the trial judge should have stated that the evidence was not to be received as substantive evidence. The trial judge did instruct the jury that, "[y]ou must not consider such earlier statements as evidence of the truth of what was said at that earlier time because the statement was not made under oath at this trial." We held in *State v. Lee*, 248 N.C. 327, 103 S.E. 2d 295 (1958), that it is not error, in the absence of a special request, for the trial judge to fail to explain in his charge to the jury the difference between corroborative evidence and substantive evidence. Here, the purpose for which the jury could consider the evidence was adequately explained to the jury during the charge and defendant made no special request for further instructions.

Second, defendant argues that the jury was not instructed that it was the sole determinant of whether the evidence did in fact corroborate the testimony of the witnesses at trial. The judge did instruct the jury that,

> "*If you believe* that such earlier statement was made and that it is consistent with the testimony of the witnesses at this trial, then *you may consider* this together with all other facts and circumstances bearing upon the witness' truthfulness *in deciding whether you will believe or disbelieve the witness' testimony at this trial.*" (Emphasis added.)

We held in *State v. Case, supra*, that it is not error for the trial judge to fail to include the following part of the instruction on corroborative evidence, "if it does so corroborate her testimony." Here, the jury was adequately instructed that it was the sole determinant of whether or not the prior statements corroborated the witnesses' testimony at trial.

Third, defendant argues that it was error for the trial judge to fail to instruct the jury that it should determine whether the prior statements contained any prior inconsistent statements which would impeach the trial testimony of these witnesses. Such an instruction was given during the trial when the statements were introduced; however, the instruction was not given during the jury charge. Prior inconsistent statements relate to impeaching the credibility of a witness and charging on how evidence relating to the credibility of a witness should be considered is a subordinate feature of the case; therefore, the trial judge is not required to instruct on this feature absent a request for special instruction. *State v. Hart*, 256 N.C. 645, 124 S.E. 2d 816 (1962); *State v. Howard*, 35 N.C. App. 762, 242 S.E. 2d 507 (1978); 4 Strong's N.C. Index 3d, *Criminal Law* § 113.3 and cases cited therein. This assignment of error is overruled.

By her twenty-sixth assignment of error, defendant contends that the trial judge committed prejudicial error in charging the jury that,

> "[B]efore you may rely upon circumstantial evidence, to find the defendant guilty, you must be satisfied beyond a reasonable doubt that not only is the circumstantial evidence relied upon by the State is consistent with the defendant being guilty but that it is inconsistent with her being *guilty*." (Emphasis added.)

Of course, the instruction should have ended, "inconsistent with her being *innocent*." The jury was not misled nor the defendant prejudiced by this slight error.

Immediately preceding the above quoted instruction the judge charged the jury as follows:

> "If you have a reasonable doubt as to any one or several of the links [in the chain of circumstantial evidence], then the chain is broken and you would return a verdict of not guilty. The State must prove to you beyond a reasonable doubt each and every link of the chain of circumstances upon which it relies in order for you to return a verdict of guilty as charged.
>
> . . . All of them [independent circumstances] taken together may be strong enough to prove the guilt of the defendant or they may establish her innocence or raise in your mind a reasonable doubt as to her guilt."

Construing the charge contextually, we find no prejudicial error. *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 409 U.S. 948 (1972). Defendant is alleging a technical, insubstantial error that could not have affected the result of the trial, *State v. Gatling*, 275 N.C. 625, 170 S.E. 2d 593 (1969); therefore, this assignment of error is overruled.

[8] By her twenty-ninth assignment of error, defendant contends that the trial judge committed prejudicial error in instructing the jury that, "you are to rely on your own recollection as to what a witness *said or didn't say*." Defendant argues that the last four words of that portion of the charge amount to a grant of authority for the jury to consider any and everything that might have come to their attention during the trial by means other than evidence formally introduced at trial. The defendant does not point out anywhere in the record where anything not formally in evidence was brought before the jury. Also, it is helpful to read the relevant instruction on this point in its entirety which is as follows:

> "I am going to summarize *the evidence in this case*. . . . Let me say to you that you are to rely on your own recollection as to what a witness said or didn't say." (Emphasis added.)

This assignment of error, being absolutely devoid of merit, is overruled.

[9] By her sixteenth, seventeenth and eighteenth assignments of error, defendant contends that test results of and written documents from the State Toxicology Laboratory concerning tests performed on specimens from deceased's body were improperly introduced into evidence because a sufficient chain of custody was not established.

Dr. McCool testified that he is a licensed clinical, anatomical and radioisototic pathologist practicing at Forsyth County Memorial Hospital. On 9 June 1977, he performed an autopsy on the deceased, Don Gene Detter, and he personally removed from the deceased's body samples of hair, fingernails, bile, liver, blood, kidney, urine, stomach content and small bowel content. He placed these specimens in plastic, inner containers and sealed them. These inner containers were placed in pre-labeled mailing containers, sealed and mailed on 13 June 1977 to Dr. McBay, State Toxicology Laboratory, Chapel Hill, North Carolina. Each specimen was sealed in a separate, plastic, inner container but more than one plastic container was placed in some of the mailing containers. The containers were labeled, "Don Gene Detter."

A request form for test analysis, which also contained a written statement of findings by Dr. McCool, was enclosed in one of the mailing containers. It listed the name of the deceased, the origination of the sample (Forsyth County Memorial Hospital), the samples that were sent, the quantity of each sample, the request for analyses, and the date of deceased's death. This form was damaged in the mail due to a leakage from one of the plastic, inner containers. Therefore, a carbon copy of this form was made at the State Laboratory (exhibit 15). This same information was also handwritten on a separate sheet of paper (exhibit 16), and on this exhibit notations of the test results were made as the tests were performed. The original transmittal request form was then destroyed.

Dr. McBay testified that the customary procedure, which was followed in this case, is for one of the laboratory personnel to pick up mailed samples from the Post Office, carry them directly to the State Laboratory and place them on a bench in one of the rooms at the Laboratory. The samples are then opened, removed

from the mailing containers, and matched with the transmittal sheet(s) accompanying them. Dr. McBay then determines what work is to be done and who is to do it. Four or five persons plus Dr. McBay have supervision over and access to the bench where the samples are first placed. The individuals assigned to do the work then remove the samples from the bench, take them to their work area, perform the test(s) and make notations of test results. Here, Dr. McBoling, Jr. performed many of the tests on the deceased's body samples and the notations of test results were made on exhibit 16.

Defendant argues that a chain of custody was not sufficiently established because it is not known exactly which laboratory employee picked up the samples at the Post Office and because several people have supervision over the bench where samples are first placed. This assignment is without merit.

From the above summary of the chain of custody of the deceased's specimens, it is clear that the possibility that the specimens were interchanged with those from another body is too remote to have required ruling this evidence inadmissible. *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976). An adequate chain of possession, delivery, transporting and safekeeping of these specimens was shown in order to prove that the test results testified to at trial were the results of tests performed on specimens from the body of Don Gene Detter. *State v. Hunt*, 297 N.C. 258, 254 S.E. 2d 591 (1979) (results of tests for arsenic poisoning performed at this same laboratory were properly admitted). Defendant's showings on cross-examination of potential weak spots in the chain of custody relate then only to the weight to be given this testimony. *State v. Montgomery, supra.* This assignment of error is overruled.

By her nineteenth assignment of error, defendant contends that a hypothetical question asked of Dr. McBay by the district attorney did not contain all material facts because the question is devoid of any recitation of fact concerning tests performed on the deceased's body specimens.

The applicable portion of the hypothetical question states:

> "Further, that the liver, hair, etc., were taken from Don Detter's body and carried to you *and from the clinical*

> *analysis made, and the amount of arsenic found, you found in those organs of Don Gene Detter*, have you a medical opinion, satisfactory to yourself, *based on the above clinical observations and findings and based on the laboratory findings* . . . ." (Emphasis added.)

Therefore, we hold that the laboratory tests and results were included in the list of material facts given the jury in the question.

In *State v. Hensley*, 294 N.C. 231, 240 S.E. 2d 332 (1978), we held that it is not prejudicial error for an opinion by a medical expert to be based upon facts testified to by another witness even if no hypothetical question is asked. In the case *sub judice*, the question was posed in hypothetical terms because the entire series of material facts was prefaced by the statement, "*assuming* the jury should find from the evidence and beyond a reasonable doubt that . . . ." (Emphasis added.)

In *Hensley* we also held that the correct manner in which to ask a hypothetical question is as follows: "Assuming that the jury should believe [the other witness' testimony] . . . ." *State v. Hensley, supra* at 236, 240 S.E. 2d at 335. The references to "you" in the above quoted hypothetical question asked of Dr. McBay in this case ("carried to you" and "you found") appear to be references to the State Toxicology Laboratory. Even if the references are to Dr. McBay individually which would make the statements incorrect since Dr. McBay did not personally perform the tests, the error was nonprejudicial. *See, State v. Hensley, supra.* Here, as in *Hensley*, the correct manner to have asked a hypothetical question of Dr. McBay (rather than simply referring to "you found") would have been to state, "assuming that the jury should believe *the testimony of Dr. McBoling, Jr.* regarding the results of tests performed on deceased's body samples, do you have an opinion . . . ?" Since the error, if any, was nonprejudicial, *id.*, this assignment of error is overruled.

By her sixth assignment of error, defendant contends that the trial judge impermissibly expressed an opinion in violation of G.S. 15A-1222 and G.S. 15A-1232 when he stated during defense counsel's cross-examination of Brooks regarding prior inconsistent statements,

> "Ladies and gentlemen, I ask you to consider the answer the witness on the witness stand [sic] and not the way the

question is framed. The questions are leading and it is cross examination; and a lawyer on cross examination has a lot more leeway to lead a witness. You will consider as evidence in this case what the witness says under oath and not the questions as it is asked."

Defendant contends that this instruction to the jury conveyed an opinion by the judge to the jury that what defense counsel was doing was unsound and unworthy of belief or credibility. The entire instruction is a correct proposition of law and as such was an *explanation* to the jury of the applicable law and was not a statement of an opinion. There was no prejudicial error in this remark. *State v. Green*, 268 N.C. 690, 151 S.E. 2d 606 (1966); *see, State v. Best*, 280 N.C. 413, 186 S.E. 2d 1 (1972) (telling the jury to "step into your room, I hate to bother you," was not an expression of an opinion that defendant's position was unsound). This assignment of error is overruled.

[10] By her twentieth and twenty-third assignments of error, defendant contends that there was insufficient evidence to take this case to the jury on a charge of first-degree murder. Considering the evidence in the light most favorable to the State, there is ample evidence that, over a period of time, defendant sought ways to kill her husband and that an eyewitness saw her put arsenic poisoning in deceased's tea, food and ice cream in January, February and March, 1977, through use of Terro Ant killer which contains a lethal dosage of arsenic (300 milligrams). Deceased died on 9 June 1977 and in the opinion of Drs. McBay and Spencer he died of arsenic poisoning. This is sufficient evidence of first-degree murder by means of poisoning to take this case to the jury. G.S. 14-17. (Cum. Supp. 1977). This assignment of error is overruled.

[11] By her twenty-fourth assignment of error, defendant contends that imposition of the death penalty in this case violates the proscription against *ex post facto* laws contained in the United States and North Carolina constitutions. We agree; therefore, the death sentence imposed in this case must be and is vacated and the case is remanded to the Superior Court of Forsyth County for imposition of a life sentence.

Article 1, § 10 of the United States Constitution forbids any state to pass an *ex post facto* law. Article 1, § 16 of the North

Carolina Constitution forbids *ex post facto* laws in this State. The prohibition against *ex post facto* legislation includes the prohibition against passage of a law that changes the punishment for a crime, and inflicts a greater punishment than the law annexed to the crime when committed. *Calder v. Bull,* 3 U.S. 386, 1 L.Ed. 648 (1798). In *State v. Pardon,* 272 N.C. 72, 157 S.E. 2d 698 (1967), our Court, speaking through Justice (later Chief Justice) Sharp, said:

> "Statutes are frequently adopted which change the degree and kind of punishment to be imposed for a criminal act. Where the punishment is increased, and the old law is not expressly or impliedly repealed by the new, which is prospective only in its application, punishment will be imposed under the prior law. (Citations omitted.) Any statutory attempt to increase the punishment of a crime committed before its enactment is of course, invalid as *ex post facto* legislation. (Citations omitted.) . . . The rule is, not that the punishment cannot be *changed,* but that it cannot be *aggravated.*" (Citations omitted.) (Emphasis in original.) *Id.* at 75-76, 157 S.E. 2d at 701.

Here, defendant committed all of her efforts to kill her husband in January, February and March, 1977. At that time, the penalty in this State for first-degree murder was life imprisonment as a result of the United States Supreme Court's decision in *Woodson v. North Carolina,* 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976) which declared G.S. 14-17 (1974) (automatic death penalty for first-degree murder) unconstitutional. The deceased died on 9 June 1977. Our new death penalty statute, G.S. 15A-2000 *et seq.* became effective 1 June 1977. As of that date, the punishment for first-degree murder became death or life imprisonment as determined in accordance with G.S. 15A-2000. G.S. 14-17 (Cum. Supp. 1977); *State v. Barfield,* 298 N.C. 306, 259 S.E. 2d 510 (1979). As part of that legislation, 1977 N.C. Sess. Laws, Ch. 406, s. 8 provides: "The provisions of this act shall apply to murders committed on or after the effective date of this act."

Therefore, the question presented is whether this murder was committed when the murderous acts were performed so that the punishment is life imprisonment or whether this murder was committed when death resulted so that the sentence of death imposed pursuant to G.S. 15A-2002 is constitutionally permissible

under the *ex post facto* provisions of the United States and North Carolina constitutions. It is true that the definition of murder includes the unlawful killing of a human being with malice aforethought by means of poisoning, in which case premeditation and deliberation are presumed. G.S. 14-17 (Cum. Supp. 1977); *State v. Dunheen*, 224 N.C. 738, 32 S.E. 2d 322 (1944). Therefore, murder is a crime requiring both an act and a result. We held in *State v. Williams*, 229 N.C. 348, 49 S.E. 2d 617 (1948), that one who rendered aid after the fatal blow was struck but before the resulting death could not be convicted of accessory after the fact to murder because the crime of murder was not complete until the resulting death occurred.

However, when it becomes necessary to choose between the time the fatal blow is struck or the time of death for some special purpose, such as accessory after the fact to murder or to determine if a certain punishment is barred by the *ex post facto* clause, the choice should be dictated by the nature of the inquiry. Perkins, Criminal Law (2d ed. 1969). Therefore, our decision in *State v. Williams, supra*, in which we chose the time of death as the time the murder was committed for the purpose of deciding if defendant was an accessory after the fact to murder, is sound, although, for purposes of the prohibition against *ex post facto* legislation, we hold that the date(s) of the murderous acts rather than the date of death is the date the murder was committed. The scant authority that exists on this question is in accord with our holding here. *People v. Gill*, 6 Cal. 637 (1856); *Debney v. State*, 45 Neb. 856, 64 N.W. 446 (1895); *Perkins, supra*; LaFave & Scott, Criminal Law § 12 (1972); 40 Am. Jur. 2d *Homicide* § 3.

Therefore, for purposes of this decision and application of the prohibition against *ex post facto* legislation, we hold that the date the murderous acts were performed is the date the murder was committed. All of the murderous acts here were committed before 1 June 1977 at a time when the maximum punishment for first degree murder was life imprisonment. Therefore, imposition of the sentence of death under G.S. 15A-2002 in this case violates the prohibition against imposition of an *ex post facto* punishment and the sentence is therefore, vacated. The legislature has provided that when application of the death penalty to a defendant is declared unconstitutional for any reason, then the punishment is life imprisonment. 1977 N.C. Sess. Laws, Ch. 406, s. 6.

Accordingly, this case is remanded to the Superior Court of Forsyth County with directions (1) that the presiding judge, without requiring the presence of defendant, enter judgment imposing life imprisonment for the first-degree murder of which defendant has been convicted, and (2) that, in accordance with this judgment, the clerk of the superior court issue commitment in substitution for the commitment heretofore issued. It is further ordered that the clerk furnish to the defendant and her attorney a copy of the judgment and commitment as revised in accordance with this opinion. *See*, *State v. Harding*, 291 N.C. 223, 230 S.E. 2d 397 (1976).

Due to our holding under the *ex post facto* clauses of the North Carolina and United States constitutions and our remand of this case to the Superior Court of Forsyth County for imposition of a life sentence, it is unnecessary for us to discuss defendant's thirty-third, thirty-fourth and thirty-fifth assignments of error which relate to alleged errors committed during the sentencing phase of her bifurcated trial at which the death sentence was imposed.

Defendant's remaining twelve assignments of error were not brought forward and discussed or argued in her brief; therefore, they are deemed abandoned. Rule 28(a), (b)(3), Rules of Appellate Procedure; *State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974), *death sentence vacated*, 428 U.S. 904 (1976); 4 Strong's N.C. Index 3d, *Criminal Law* § 166 and cases cited therein.

Due to the seriousness of the charge and conviction in this case we have combed the entire record carefully and exhaustively and find that defendant's trial was conducted free of prejudicial and constitutional error except with respect to defendant's argument concerning the *ex post facto* clause. Accordingly we hold:

Guilt determination phase: No error.

Sentencing phase: Death sentence vacated; case remanded for imposition of life sentence.

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

IN THE MATTER OF JERRY WAYNE VINSON

No. 30

(Filed 4 December 1979)

1. **Infants § 15— juvenile delinquent—photographing and fingerprinting prohibited**

The intent of the legislature in enacting G.S. 15A-502 was to prohibit the fingerprinting and photographing of any delinquent child, as defined by G.S. 7A-278(2), except in those limited cases where the child had been transferred to the superior court pursuant to G.S. 7A-280.

2. **Infants § 18— juvenile delinquency proceeding—photographs of juvenile—other basis for identification testimony—admissibility**

Where the Greensboro Police Department improperly photographed the 13 year old respondent, it would have been error for the trial court to allow admission of any testimony resulting from this illegal procedure into evidence at hearing; however, the trial court did not err in failing to suppress identification testimony based on the witness's prior knowledge of respondent and not on the basis of the illegal photographs, and evidence was sufficient to support the court's finding as to the basis of the identification testimony.

3. **Infants § 18— juvenile delinquency proceeding—sufficiency of evidence—applicable rules**

A juvenile respondent is entitled to the application of the same rules in weighing the evidence against him on a motion for nonsuit or to dismiss as if he were an adult criminal defendant.

4. **Infants § 18— juvenile charged with armed robbery—insufficiency of evidence**

In a juvenile delinquency proceeding where the juvenile was charged with armed robbery, the evidence raised no more than a suspicion or conjecture as to the identity of respondent as the perpetrator, since expressions by the only eyewitness to the crime indicated serious doubt, and the trial court therefore erred in denying respondent's motions for nonsuit.

5. **Infants § 18— juvenile delinquency proceeding—quantum of proof required**

The quantum of proof required in a juvenile case is proof beyond a reasonable doubt.

6. **Infants § 20— juvenile delinquency proceeding—dispositional hearing—no postponement to receive further evidence**

In a juvenile case where respondent is accused of a serious crime, and particularly when the juvenile requests it, the better practice is for the trial court to postpone the dispositional hearing until all available information is at hand; however, while the trial court's speedy denial of respondent's request for a psychological report in this case may not have been the better practice under G.S. 7A-285, it was not so irregular as to be improper.

7. **Infants § 20— juvenile delinquency proceeding—dispositional hearing—consideration of unadjudicated acts**

Under present law with respect to juvenile delinquents and the new Juvenile Code, effective 1 January 1980, trial courts giving consideration at a dispositional hearing to unadjudicated acts allegedly committed by a juvenile, unrelated to that for which he stands petitioned, must first determine that such information is reliable and that it was competently obtained.

8. **Infants § 20— juvenile delinquency proceeding—final commitment order—alternative methods of rehabilitation—showing required**

While the final commitment order in a juvenile proceeding need not formally state all the alternatives considered by a trial judge in committing a child, a finding that alternatives are inappropriate must be supported by some showing in the record that the sentencing authority at least heard or considered evidence as to what those alternative methods of rehabilitating were; the evidence in this case was insufficient to support the trial court's finding that the four enumerated factors in G.S. 7A-286(5) had been met.

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

Chief Justice BRANCH concurring in result.

Justices COPELAND and EXUM join in the concurring opinion.

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from a decision of the North Carolina Court of Appeals finding no prejudicial error in the proceedings before *Pfaff, Judge*, Juvenile Session, District Court, GUILFORD County on 5 July 1978. Court of Appeals' decision, one judge dissenting, is printed at 40 N.C. App. 423, 252 S.E. 2d 854 (1979).

A juvenile petition was filed on 7 June 1978, alleging that the child was delinquent as defined by G.S. 7A-278(2) in that he committed armed robbery, a violation of G.S. 14-87, on 8 May 1978. The child at that time was a 13-year-old male.

While the child was tried only for the allegation noted above, and appeals from the finding of delinquency therein, it is apparent from the record before us that the child was alleged to have committed several serious delinquent acts during early May, 1978, and that he had a long record of juvenile delinquency. For a full understanding of this decision, it is necessary to summarize the entire record before us.

The record discloses that several motions were filed on behalf of the child prior to 7 June 1978, the date this petition was filed. On 26 May 1978, counsel for the child filed a motion for a

lineup alleging that a petition had been filed against the child on 11 May 1978 alleging the child to be delinquent for committing the crime of robbery on 10 May 1978. The motion was filed by Wallace C. Harrelson, Public Defender of the Eighteenth Judicial District. The motion alleged that counsel had been "led to believe" soon after his appointment that the child was "probably" not guilty of any delinquent act but that another individual was "probably" responsible for the charge against this child. Further, that counsel then contacted Judy W. Allen, a detective with the Greensboro Police Department, advised her of his concern and requested her to further investigate the case. It was, the child's counsel alleges, at that time agreed between Detective Allen, an assistant district attorney, and counsel for the child that a lineup would be conducted on 16 May 1978 in which the child would participate. However, subsequent to that conversation and prior to 15 May 1978 (and unknown to the child or his counsel) Detective Allen took photographs of the respondent and others and showed the photographs to the alleged victim of that crime, Genelia Breedlove. Upon contacting Detective Allen on 15 May 1978, counsel was advised that no lineup would be held since the detective had shown the victim photographs of the child and that he had been identified by the victim. The motion then prayed that an order be issued requiring the State to conduct identification procedures as provided by G.S. 15A-281.

On 6 June 1978, counsel for the child filed another motion and this time alleged that the child had been charged with the following deliquent acts: (1) larceny on 2 May 1978, (2) armed robbery (the present charge) on 8 May 1978 and, in the same petition, crime against nature on 10 May 1978, and (3) larceny on 3 May 1978 and the taking of personal property on 2 May 1978. It was then alleged that all of the petitions noted above were contained in the same file in the office of the Clerk of Superior Court of Guilford County and that such filing of allegations had previously been held to be unconstitutional.

On 7 June 1978, Judge Gentry entered an order finding that the child was charged with various petitions noted above and that they were kept in the same file bearing the heading of "Juvenile Petition or Motion for Review." The trial court entered findings of fact and conclusions of law and ordered, *inter alia*, that (1) the petitions against the child be dismissed, (2) that should the

district attorney desire to file new petitions for these same charges, only the word "petition" should appear on the new documents, (3) that any and all charges which might be brought against the child be in separate petitions and in separate file folders, (4) that no numbering system on any new charges should be used which would in any way indicate that the child had a previous record within the juvenile court of the Eighteenth Judicial District, (5) that any new petitions be forwarded to the chief district judge for hearing by him or some other judge assigned by him to hear such petitions, and (6) that under no circumstances should any petitions other than new petitions filed in accordance with this order be transferred to the chief district judge and that a copy of the order not be transferred to him.

On 15 June 1978, another order was entered by the district court extending the previous order to include other charges pending in the child's file.

Meanwhile, on 7 June 1978, a new juvenile petition was obtained in the case at bar, a summons was issued, and the child was ordered detained for five days. On 8 June 1978, the public defender was appointed to represent the child. The child's detention order was extended pending hearing on the delinquency petition.

On 15 June 1978, the public defender filed a motion for severance of offenses. He listed offenses noted above and, in addition thereto, the charge of rape alleged to have been committed by the child on 10 May 1978, the motion noting that a separate motion had been filed in which the child moved for dismissal since he was only 13 years of age and was, under the law of the State of North Carolina, incapable of rape.

Also on 15 June 1978, the public defender filed a motion to suppress identification. This motion disclosed that pursuant to the district court order noted above the child had been charged in new petitions with the following charges in addition to that at bar: (1) Crime against nature on 10 May 1978, (2) rape on 10 May 1978, (3) larceny on 2 May 1978, (4) armed robbery on 10 May 1978, (5) larceny on 3 May 1978, and (6) armed robbery on 8 May 1978.

This motion alleged that the Greensboro Police Department violated G.S. 15A-502(c) in taking photographs of this 13-year-old child. It also alleged that actions of Detective Allen, in showing photographs of the child, had unnecessarily tainted the identification by the alleged victims if they had in fact identified the child.

On 3 July 1978, an order ruling on these motions was entered in open court. The court ordered, *inter alia*, that (1) a 13-year-old child cannot be charged with the crime of rape in North Carolina, (2) the child was entitled to have the petitions tried and adjudicated separately from each other, (3) the motion for different trial judges for each petition was reserved pending the particular judge's determination as to whether a fair trial could be held and (4) the child's statement was suppressed on the ground that the child was made to believe that he had been abandoned to the police by hostile and nonsupportive parents and that police had not obtained an affirmative waiver of child's right to counsel. The court reserved ruling on the motion to suppress the identification. The court's findings of fact indicated that the child had been apprehended by Detective Allen, was placed in handcuffs and taken to the Greensboro Police Department at 9:40 p.m. on 10 May 1978. The parents stated in the presence of the child that they wanted nothing further to do with him, and that the police could take him because they "knew that he would steal." The child remained at the police station until 11:30 p.m. when he signed the police waiver form and was then questioned by Detective Allen until approximately 1:30 a.m. Detective Allen did advise the parents and the child of their constitutional rights but at no time asked for or received an affirmative waiver of the child's right to an attorney.

At the delinquency hearing on this armed robbery petition on 16 June 1978, counsel again moved to suppress the identification of the child by the prosecuting witness, Mrs. Maude Vaden, prior to any evidence presented by the State. Evidence at the *voir dire* tended to show:

Detective Allen testified that she did exhibit several photographs, including this child's, to Mrs. Vaden; that Mrs. Vaden identified the child upon reaching his photograph in the group of pictures; that Mrs. Vaden stated she had known the child's mother since before he was born and that she had "sold Mrs. Vinson the sheets that was used when Jerry was born;" that

she didn't know him by name but knew he was Mr. and Mrs. Vinson's child. On cross-examination the detective stated that she was aware of the State law preventing the photographing of children but she "did it anyway;" that the usual procedure of the Greensboro Police Department is to photograph only the juveniles involved in serious offenses; that she recalled talking to the public defender about a lineup but did not recall agreeing to one on any particular date. On redirect she stated that she considered she had authority to take the photographs pursuant to a Greensboro City Ordinance; and that Captain S. B. Simpson had told her the city ordinance would supersede the State statute.

Mrs. Vaden testified that she had known the child's parents for 20 or 25 years; that she had seen the child at his home; that he had been to her house twice; that he came to her house and beat her over the head so that it was difficult for her to remember anything; that she did select the child's picture from the group given to her by Detective Allen; that she later went to a lineup at the police department and identified the child from the group. On cross-examination Mrs. Vaden was shown the respondent and testified, *inter alia*, as follows:

> He looks exactly like the boy but I was thinking he was a little bit taller than that but I think that was the boy. I am not sure.
>
> . . . .
>
> Well, if that is the boy, it is not him. It is his brother but —. Yes, the Vinsons have several children. Some of them are about the same age and they look very much alike. I am not sure that this is the boy. His hair is different or something. Some changes have been made in him, if it is him. I am not sure that it is him. But it's bound to be his brother.
>
> . . . .

Following this *voir dire* testimony, the court denied the child's motion to suppress Mrs. Vaden's identification on the ground that the identification was made from prior knowledge of him.

The court then proceeded to hearing. Mrs. Vaden testified that the child came to her door on 10 May 1978 and told her that

he wanted a drink of water; that she took him down the hallway, went to the refrigerator and gave him a glass of water when her phone rang; that she went to answer the phone and left some money on top of the refrigerator; that it was gone the next day and no one had been in her kitchen but him; that as she went to the living room, the child pulled her over in front of the fireplace and tied a dish towel around her eyes and pushed her over and beat on her and hit her on the head; that he took her down the hallway to her bedroom and threw her down on the bed and "pulls my clothes, dress over my face and removed the rest of it and I [kept] kicking and kicking and pushing him away from me;" that "he tried to compel me and threatened killing me unless I used my mouth, if you know what I mean;" that when he first started abusing her, he made her give him $200.00 from her pocketbook; that he put something cold next to her head and told her that it was a gun and that if she screamed or told anyone he would kill her and started beating on her again; and that she fell to the floor unconscious. When she woke up, he was gone. He had on "what boys that age ordinarily wear, but he unzipped his pants and pushed them down over his knees and his underwear;" that he cut her telephone line with a pair of scissors. Mrs. Vaden's testimony concerning the identification of the child at hearing was essentially the same as that adduced on the *voir dire*.

Child's counsel moved for nonsuit which was denied. Child presented no evidence. The trial court adjudicated the child delinquent for committing the acts alleged in the petition.

The trial court then inquired of counsel if he was ready to proceed with the disposition stage of the hearing. The public defender replied that he would like to produce information from a mental health clinic but that it was not ready at that time. Counsel also objected to the trial court's considering any accusation at disposition for which there was no adjudication of delinquency. The trial court, however, proceeded to the disposition hearing and specifically asked the district attorney, "[H]ow many matters have been retained by the Greensboro Police Department regarding Jerry Vinson?"

The assistant district attorney then told the court of the various charges pending against the child including assault, larceny and receiving. The court inquired about another rape

charge and was told it had been dismissed. The court was also advised that the child had been previously placed on probation. Detective Allen told the court the statements made to her by the child concerning his sexual acts with Mrs. Vaden and Mrs. Breedlove. The court was further advised that the child had been adjudicated a delinquent for glue sniffing by a previous judge. The public defender once again unsuccessfully requested the trial court for an opportunity to send for people from the mental health center.

At the conclusion of this, the trial court ordered:

> On disposition, I am going to find that the child's behavior constitutes a severe threat to the persons and property in this community; that there is no community based resources including community based residential care which would be successful considering the nature and severity of the offenses committed and likewise that he could not adjust in his own home or on probation and I am going to commit him to the Department of Human Resources . . . and order that he not be released prior to his 18th birthday. I am going to order that they give him any and all necessary psychological counselling and treatment while he is there and pending his being transported to the appropriate facility by the Court Counsellor he is to remain in the custody of the Court.

A written commitment order was entered accordingly. In the written order, the court entered findings of fact "that the child began committing sexual assaults at age 9; that he has continued to commit crimes of a sexual nature including the rape and attempted rape of elderly women; and that he is a dangerous and vicious sex offender, despite his being only 13 years of age."

Following entry of the foregoing judgment, the child entered notice of appeal to the North Carolina Court of Appeals and the public defender was appointed to represent him on appeal. The Court of Appeals found, one judge dissenting, only that Mrs. Vaden's identification of respondent was sufficient to survive nonsuit. The Court of Appeals did not address the procedural irregularities brought forward on this appeal.

Attorney General Rufus L. Edmisten by Associate Attorney Steven Mansfield Shaber for the State.

Public Defender Wallace C. Harrelson for the respondent.

CARLTON, Justice.

Respondent attacks both the adjudicatory and dispositional stages of his proceeding. With respect to the adjudicatory hearing, respondent presents essentially three issues: (1) Did the trial court err in allowing testimony at *voir dire* about identification of respondent by photograph? (2) Did the trial court err in denying his motion for nonsuit? (3) Did the trial court err in adjudicating respondent as a delinquent child?

With respect to the dispositional hearing, respondent presents again essentially three issues: (1) Did the trial court err in immediately proceeding to the dispositional stage over respondent's objection? (2) Did the trial court err in hearing evidence about acts of respondent which had not been adjudicated delinquent acts? (3) Did the trial court fail to make sufficient findings of fact to support its commitment order?

We discuss these issues in order and, for the reasons stated, reverse the Court of Appeals' decision which affirmed the proceedings in the trial court.

I

The issues raised by respondent's appeal strike at the heart of our juvenile justice laws. To address these contentions with the gravity they merit, it is first necessary to investigate the history and policy behind North Carolina's Juvenile Code. The present Juvenile Code is codified at G.S. 7A-277 through G.S. 7A-289.34. We note at the outset that these and other statutes pertaining to juveniles have been repealed by the 1979 General Assembly effective 1 January 1980 at which time they will be replaced by a new North Carolina Juvenile Code codified as G.S. 7A-516 through G.S. 7A-740. Realizing that our decision will be filed shortly before implementation of the new Juvenile Code, this opinion will, at times, discuss both present law and the implications of the new Code on the issues raised.

The predecessor to our Juvenile Code was enacted into our law in 1919, following a prototype begun in Cook County, Illinois. That prototype introduced an innovation into juvenile law at the time—juveniles were to be separated from adult criminals and dealt with in a separate, more flexible system. M. Thomas, Juvenile Corrections: A Brief History and Juvenile Jurisdiction: North Carolina's Laws and Related Cases 6-8 (1972). *See also State v. Monahan*, 15 N.J. 34, 104 A. 2d 21 (1954); 48 A.L.R. 2d 663, 665.

The reason for this separation was clear to courts of the time. Reviewing our own Juvenile Code statutes in 1920, Justice Hoke stated:

> [S]uch legislation deals and purports to deal with delinquent children not as criminals, *but as wards* and undertakes rather to give them the control and environment that *may lead to their reformation* and enable them to become law-abiding and useful citizens . . . . (Emphasis added.)

State v. Burnett, 179 N.C. 735, 742, 102 S.E. 711, 714 (1920).

This view of the state as *parens patriae* to a delinquent child has continued for the most part unabated in the 60 years since those words were first written. Thus, in 1969, Justice Huskins speaking for this Court, wrote in *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969), *aff'd sub nom., McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed. 2d 647 (1971), that under the Juvenile Code, the court owed "the constant duty . . . to give each child subject to its jurisdiction such oversight and control as will *conduce to the welfare of the child* and to the best interest of the State [Citation omitted]." (Emphasis added.) *Id.* at 531, 169 S.E. 2d at 887-88.

The once innovative and idealistic spirit of juvenile codes, however, has been strongly criticized in its application. In 1970, while reviewing *In re Burrus*, *supra*, and upholding the decision of this Court, the United States Supreme Court wrote:

> [T]he fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized. The devastating commentary upon the

> system's failure as a whole . . . reveals the depth of disappointment in what has been accomplished.

McKeiver v. Pennsylvania, supra at 543-44, 91 S.Ct. at 1985, 29 L.Ed. 2d at 660.

And in a footnote it quoted a juvenile justice task force report of the 1967 President's Commission on Law Enforcement:

> "In fact [the juvenile justice system] frequently does nothing more nor less than deprive a child of liberty without due process of the law—knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's. In theory it was to exercise its protective powers to bring an errant child back into the fold. In fact there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses . . . ."

403 U.S. at 544, 91 S.Ct. at 1986, 29 L.Ed. 2d at 660, note 5. *See also Kent v. United States*, 383 U.S. 541, 556, 86 S.Ct. 1045, 1054, 16 L.Ed. 2d 84, 94 (1966).

To correct these abuses, the Supreme Court in a series of decisions has introduced a far more formal element in juvenile proceedings and has held that due process mandates that a juvenile must be convicted beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); that a juvenile has the right to counsel, the right to be properly notified of the charges against him or her, the right to confront and cross-examine witnesses and the privilege against self-incrimination. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967); and that a juvenile has the right not to be subjected to double jeopardy. *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed. 2d 346 (1975).

The trend of our courts in insisting on more stringent due process requirements for juveniles has not resulted, as is sometimes argued, from a softened attitude that children cannot commit violent acts. Indeed, we believe this trend has resulted from an increasing awareness that youth crime is serious and widespread and that society demands that courts deal strictly with violent youth offenders. It has been stated that the juvenile crime rate is the most serious problem confronting the juvenile

justice system today. Of all those arrested in North Carolina for crimes committed in 1978, 58.4% were 29 years of age and under, 41.8% were 24 and under, 32.9% were 21 years of age and younger, and 8.89% were 16 and under. N.C. Department of Justice, Police Information Network, *Crime in North Carolina: 1978 Uniform Crime Report* 110-111 (1979). National statistics reveal that while young offenders from ages 15 to 18 comprise 7% of the total population, they account for 16% of all violent crime arrests and 46% of arrests for major crimes against property. North Carolina Department of Crime Control and Public Safety, *A Crime Control Agenda for North Carolina* 338 (1978).

Our own General Assembly has responded to these alarming statistics. A new Juvenile Code was enacted by the 1979 General Assembly providing stricter measures for dealing with serious youth crime. For example, as discussed below, the fingerprinting and photographing of serious youth offenders under specified procedures will be permissible effective 1 January 1980. This will allow our criminal justice system to more easily identify and track serious youth offenders.

Commensurate with this toughened attitude towards youth crime is the court system's responsibility to assure due process proceedings for youthful offenders. Court decisions in recent years have recognized the gap between the original conception of the system "and its realities." "With the exception of *McKeiver v. Pennsylvania, [supra,]* the Court's response to that perception has been to make applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions."[1] *Breed v. Jones*, 421 U.S. at 528-29, 95 S.Ct. at 1785, 44 L.Ed. 2d at 355. Thus, in *In re Gault, supra*, the Court concluded that a delinquency proceeding subjecting a juvenile to the loss of his liberty for years is comparable in seriousness to a felony prosecution, stating that the term "delinquent" had "come to involve only slightly less stigma than the term 'criminal' applied to adults." 387 U.S. at 24, 87 S.Ct. at 1441, 18 L.Ed. 2d at 544.

1. We note that in at least one recent United States Supreme Court case, *Fare v. Michael C.*, --- U.S. ----, 99 S.Ct. ----, 61 L.Ed. 2d 197 (1979), the Court has held a juvenile has no constitutional right to consult with his or her probation officer prior to questioning by the police. The case, however, re-emphasized the *Gault* holding that the juvenile has a right to counsel at these times and distinguished probation officers as being people not within the purview of 'counsel.' We feel this in no way erodes due process rights of juveniles. *See also*, *Riley v. Illinois*, 435 U.S. 1000, 98 S.Ct. 1657, 56 L.Ed. 2d 91 (1978) (mem.).

There is very little to distinguish a hearing such as that held in the case at bar from a traditional criminal prosecution. Indeed, in view of the seriousness of the acts allegedly committed by this respondent and the possibility of long term institutionalization, society should demand a formal adversarial proceeding. In such a case, it becomes incumbent upon the court system to safeguard the rights of those alleged to be delinquent just as much as it would protect the rights of any adult person facing a possible prison sentence. Those who cry for harsher treatment of youthful offenders can surely not argue that accused children should have fewer rights than adult offenders when they risk much the same penalties.

We address the issues raised by this appeal with these factors in mind. Our attempt is to carefully balance the State's police power interest in preserving order and its *parens patriae* interest in a delinquent child's welfare with the child's constitutional right to due process.

II.

ADJUDICATORY HEARING

A.

[1] Respondent first contends that the trial court erred in allowing testimony of a photographic lineup in which his photograph was displayed. He relies on G.S. 15A-502 which, at the time, provided:

> § 15A-502. Photographs and fingerprints.—(a) A person charged with the commission of a felony or a misdemeanor may be photographed and his fingerprints may be taken for law-enforcement records only when he has been:
>
> (1) Arrested or committed to a detention facility, or
>
> (2) Committed to imprisonment upon conviction of a crime, or
>
> (3) Convicted of a felony.
>
> (b) This section does not authorize the taking of photographs or fingerprints when the offense charged is a misdemeanor under Chapter 20 of the General Statutes,

"Motor Vehicles," for which the penalty authorized does not exceed a fine of five hundred dollars ($500.00), imprisonment for six months, or both.

(c) *This section does not authorize the taking of photographs or fingerprints of a "child" as defined for the purposes of G.S. 7A-278(2), unless the case has been transferred to the superior court division pursuant to G.S. 7A-280.*

(d) This section does not prevent the taking of photographs, moving pictures, video or sound recordings, fingerprints, or the like to show a condition of intoxication or for other evidentiary use.

(e) Fingerprints or photographs taken pursuant to subsection (a) may be forwarded to the State Bureau of Investigation, the Federal Bureau of Investigation, or other law-enforcement agencies. (Emphasis added.)

The State argues that the statute prevents the taking of photographs or fingerprints of children only for "law-enforcement records" as noted in subsection (a). It asserts that subsection (d) expressly exempts the restriction from situations where the photographs or fingerprints would be for "other *evidentiary* use." Here, State argues, respondent's photograph was obviously for an "evidentiary use," and suggests that while the statute does not *authorize* the taking of photographs or fingerprints of children, neither does it *prohibit* the practice. We do not agree with any such interpretation of the statute. The obvious and unambiguous intent of our legislature was to prohibit the fingerprinting and photographing of any delinquent child, as defined by G.S. 7A-278(2), except in those limited cases where the child had been transferred to the superior court pursuant to G.S. 7A-280.

[2] However, it is *not* our holding, on the record before us, that the trial court erred in failing to suppress the victim's identification of the child. The trial court found that Mrs. Vaden's identification was made on the basis of her prior knowledge of respondent and not on the basis of the illegal photographs. There is sufficient evidence in the record to support this finding and it is therefore binding on us on appeal. However, we note that the Greensboro Police Department improperly photographed respondent and it would have been error for the trial court to allow ad-

mission of any testimony resulting from this illegal procedure into evidence at hearing.

As part of the total revision of the North Carolina Juvenile Code, we also further note that our legislature has recently amended G.S. 15A-502(c). That subsection now provides, "This section does not authorize the taking of photographs or fingerprints of a juvenile except under G.S. [7A-596] through G.S. [7A-602]."

This amendment became effective upon ratification, 8 June 1979. The new Juvenile Code is not effective until 1 January 1980. 1979 Session Laws, Chapter 815, Section 5. It is obvious therefore that an ambiguity exists in our law in this area until 1 January 1980 since the referenced sections of the new Juvenile Code are not yet the law. We think the better practice would be for law enforcement agencies and the trial courts to abide by the provisions of former G.S. 15A-502(c), keeping in mind the new Code changes, until the new Code is effective. Indeed, new Code provisions on this question are extensive. Nontestimonial identification is defined by new G.S. 7A-596 to include identification "by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar identification procedures requiring the presence of a juvenile."[2] The statute provides that nontestimonial identification procedures "shall not be conducted on any juvenile without a court order issued pursuant to this Article." The authorized order may be issued by any judge of the district court or of the superior court "*upon request of a prosecutor.*" (Emphasis added.) G.S. 7A-596. The request for the order may be made (1) prior to taking a juvenile into custody, and (2) after custody and prior to the adjudicatory hearing, or (3) prior to trial in superior court where a case is transferred to that court. G.S. 7A-597.

New G.S. 7A-598 provides that the order may issue *only* on affidavit(s) *sworn to* before the judge which establish the following grounds: (1) that there is probable cause to believe that an of-

2. We note that the statute neither authorizes nor forbids the use of the breathalyzer test or polygraph. *Cf.* North Carolina Juvenile Code Revision Committee, 1979 Report 185 (1979) (Citing rationale for this silence).

fense has been committed which would be punishable by imprisonment for more than two years if committed by an adult, that is, this procedure is specifically limited to situations which would constitute a general misdemeanor or felony, or (2) that there are reasonable grounds to suspect that the juvenile named or described in the affidavit committed the offense, and (3) "that the results of specific nontestimonial identification procedures will be of material aid in determining whether the juvenile named in the affidavit committed the offense."

New G.S. 7A-599 provides that, upon a showing that the grounds specified above exist, the judge may issue the order but only in accordance with the procedures set forth in Article 14 of Chapter 15A of the General Statutes which delineate procedures used for adult defendants. Reference to the designated statutes in Article 14 of Chapter 15A for adult defendants is essential to comply with the new Code provisions for juveniles. For example, trial judges should pay particular attention to G.S. 15A-278 which specifies the necessary contents for the order. G.S. 15A-278(5) provides that the juvenile would be entitled to be represented by counsel at the procedure and would be entitled to the appointment of counsel if he cannot afford to retain one. Law enforcement should note that G.S. 15A-278(6) requires that the child would not be subjected to any interrogation or asked to make any statement during the period of his appearance except that required for voice identification.

New G.S. 7A-600 provides that a juvenile in custody for or charged with an offense which would be punishable by imprisonment for more than two years if committed by an adult may request that nontestimonial identification procedures be conducted upon himself. Should the trial court determine that such a procedure would be a material aid to the juvenile's defense, he must order the State to conduct the procedures.

New G.S. 7A-601 provides detailed instructions for the destruction of records resulting from nontestimonial procedures in certain situations.

While our legislature has wisely provided a sensible procedure for nontestimonial identification procedures for juveniles

in light of the substantial percentage of crimes being committed by young people and the necessity for tracking serious youth offenders, it has also indicated its clear intent that only those procedures authorized by this new statute will be tolerated. New G.S. 7A-602 provides, "Any person who willfully violates provisions of this Article which prohibit conducting nontestimonial identification procedures *without an order issued by a judge shall be guilty of a misdemeanor.*" (Emphasis added.) Although our legislature has responded to the demands of the law enforcement community in providing a means for the fingerprinting and photographing of juveniles along with 23 other states which have recently enacted similar legislation, it is clear from the last-quoted statute that our law will not tolerate nontestimonial identification procedures inconsistent with the guidelines provided by the new Juvenile Code.

B.

Respondent next contends that the trial court erred in denying his motion for nonsuit or dismissal at the conclusion of the State's evidence and at the conclusion of all the evidence. He argues that the testimony of Mrs. Vaden raised only a suspicion or conjecture as to his identity. We agree.

[3] A juvenile respondent is entitled to the application of the same rules in weighing the evidence against him on a motion for nonsuit or to dismiss as if he were an adult criminal defendant. *In re Alexander,* 8 N.C. App. 517, 174 S.E. 2d 664 (1970). The applicable rules are well established: Upon a motion for judgment of nonsuit in a criminal action, the evidence must be considered by the court 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. Bruton,* 264 N.C. 488, 142 S.E. 2d 169 (1965). When all of the evidence is considered, the question for the court is whether there is substantial evidence to support a finding both that an offense charged in the warrant or bill of indictment has been committed and that the defendant committed it. *State v. Bass,* 253 N.C. 318, 116 S.E. 2d 772 (1960). If, when the evidence is so considered, it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the

identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. *State v. Guffey*, 252 N.C. 60, 112 S.E. 2d 734 (1960). This is true even though the suspicion so aroused by the evidence is strong. *State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340 (1967).

In its opinion, the Court of Appeals addressed only this assignment of error and affirmed the trial court's denial of respondent's motion for judgment of nonsuit. The majority found the evidence sufficient to connect respondent with the commission of the offense. Judge Webb dissented, stating his belief that Mrs. Vaden did not sufficiently identify the respondent to support a finding that he was the person who assaulted her.

[4] We agree with Judge Webb's dissent. The evidence raises no more than a suspicion or conjecture as to the identity of respondent as the perpetrator. While she stated at one point that respondent looked just like the boy that robbed her, most of her expressions indicated serious doubt. For example, at one point she stated, "I am not sure that this is the boy."

We hold that the State's evidence created only a suspicion that respondent had committed the act with which he was charged. The motion for nonsuit or dismissal should have been allowed. *See In re Byers*, 295 N.C. 256, 244 S.E. 2d 665 (1978); *State v. Clyburn*, 273 N.C. 284, 159 S.E. 2d 868 (1968); *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Hewitt*, 34 N.C. App. 109, 237 S.E. 2d 311 (1977), *aff'd*, 294 N.C. 316, 239 S.E. 2d 833 (1978).

C.

[5] By his next assignment of error, respondent "submits that the law in this State on the degree of proof required in a juvenile case is very vague and has never been discussed by this . . . Court." We do not believe that any serious doubt remains in North Carolina on the question of the quantum of proof required in a juvenile delinquency proceeding. The issue was resolved by the United States Supreme Court nearly a decade ago in *In re Winship*, *supra*. There, it was said: "In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required

during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* . . . ." 397 U.S. at 368, 90 S.Ct. at 1075, 25 L.Ed. 2d at 377.

The rule has been followed in North Carolina. *See, e.g., In re Gooding*, 23 N.C. App. 520, 209 S.E. 2d 295 (1974); *In re Owens*, 22 N.C. App. 313, 206 S.E. 2d 342 (1974); *In re Roberts*, 8 N.C. App. 513, 174 S.E. 2d 667 (1970); *In re Alexander, supra.*

We also note that G.S. 7A-635 of the new Juvenile Code provides that "[t]he allegations . . . alleging the juvenile is delinquent shall be proved beyond a reasonable doubt."

We think the trial judge in the instant case correctly understood the required quantum of proof. His order expressly stated his findings "beyond a reasonable doubt."

III.

DISPOSITIONAL HEARING

A.

[6] Respondent next contends that the trial court erred in immediately proceeding to the dispositional stage of the proceedings over his objection.

The record discloses the following exchange between the trial court and counsel for respondent:

> COURT: Motion denied. For the record, at this time the Court adjudicates the child to be delinquent in that he did commit the acts as alleged in the petition. *Are we ready to proceed with the disposition?* (Emphasis added.)
>
> . . . .
>
> MR. HARRELSON [respondent's counsel]: Judge, from our standpoint, I have been attempting to get a report from the Mental Health Clinic which I think Your Honor would want to hear prior to hearing the matter of disposition. Mr. Byrd advises me that it is not ready. Would you enlighten us as to when it might be ready?

MR. BYRD: I am not sure. He has been seen by two of the doctors there. I called a few minutes ago. He said it was not ready. I don't know whether that means later today or one day next week.

. . . .

MR. HARRELSON: Judge, we would like an opportunity if Your Honor can see fit, to present the testimony of the people from the Mental Health prior to any disposition.

. . . .

COURT: Is there anything on disposition for the child?

. . . .

MR. HARRELSON: Nothing other than we would like the opportunity to get the people from Mental Health here or their report, as the case may be, Your Honor please.

The record indicates that the court immediately proceeded to the dispositional phase of the proceeding and entered the order committing the child to the Division of Youth Services, Department of Human Resources. It is without question from the record that counsel for respondent indicated to the trial court that respondent wished to present evidence prior to disposition and that the trial court proceeded over respondent's objections. The question posed is whether such procedure was proper.

We think the confusion in this area results from the wording of the present version of G.S. 7A-285. One paragraph in that statute provides that:

> At the conclusion of the adjudicatory part of the hearing, the court may proceed to the disposition part of the hearing, or the court may continue the case for disposition after the juvenile probation officer or family counselor or other personnel available to the court has secured such social, medical, psychiatric, psychological or other information as may be needed for the court to develop a disposition related to the needs of the child or in the best interest of the State. The disposition part of the hearing may be informal, and the court may consider written reports or other evidence concerning the needs of the child.

Another paragraph in that same statutory section provides, "The child or his parents . . . shall have an opportunity to present evidence if they desire to do so, or they may advise the court concerning the disposition which they believe to be in the best interest of the child."

Hence, G.S. 7A-285 appears to establish three inconsistent standards: (1) The court *may* immediately proceed to disposition, (2) the court has the *discretion* to hear psychological reports, and (3) the child has the absolute *right* to present evidence prior to disposition. In the case at bar, respondent expressed his obvious desire to present psychological evidence which was not yet in final form. The trial judge refused to wait. This refusal, respondent argues, constitutes an abuse of the trial court's discretion.

We are aware that in many juvenile cases, perhaps in a substantial majority of them, little purpose would be served by postponing the dispositional hearing. In those situations, the trial court has before it all the helpful information needed by it to reach an appropriate disposition. However, in a case even approaching the seriousness of that disclosed by the record before us, and most particularly when the juvenile requests it, we believe the better practice is for the trial court to postpone the dispositional hearing until all available information is at hand.

Such a practice would clearly fit into the trend emerging throughout the country. We note that the American Bar Association advocates a *formal* disposition hearing in juvenile cases with written notice to the parties concerning the time, place and date sufficiently in advance of the hearing to allow adequate time for preparation. Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Project, *Standards Relating to Dispositional Procedures* § 6.1. The National Advisory Commission on Criminal Justice Standards and Goals goes further and recommends that dispositional hearings be separate and distinct from adjudicatory hearings. National Advisory Commission on Criminal Justice Standards and Goals, *Courts* § 14.5 (1973). Indeed, our own legislature has recently seen fit to provide for a predispositional investigation to *ensure* that a judge base his dispositional decision on those social and psychological reports. *See* 1979 N.C. Session Laws, Chapter 815 to be codified as G.S. 7A-639 effective 1 January 1980. Obviously, however, this

newly enacted statute has no application to the case at bar and our holding must be based on an evaluation of the trial court's compliance with our present G.S. 7A-285.

Respondent here *was* provided his statutory right to be heard but wished to be heard on evidence not yet available. While the trial court's speedy denial of respondent's request for a psychological report may not have been the better practice under G.S. 7A-285, it was not so irregular as to be improper. On the basis of the facts before us and our interpretation of our present statute, therefore, this assignment of error is overruled.

Realizing again the our decision will be made public in close proximity to the time of implementation of the new North Carolina Juvenile Code, we deem it necessary to comment on the statutes of the new Code which would be applicable to this assignment of error. This is particularly so since we perceive that our holding under this assignment of error would have been different had the new Code been in effect at the time of this respondent's hearing.

New G.S. 7A-639, effective 1 January 1980, provides in pertinent part:

> The judge shall proceed to the dispositional hearing upon receipt of sufficient social, medical, psychiatric, psychological, and educational information. No predisposition report shall be submitted to or considered by the judge prior to the completion of the adjudicatory hearing. The judge shall permit the juvenile to inspect any predisposition report to be considered by him in making his disposition unless the judge determines that disclosure would seriously harm his treatment or rehabilitation or would violate a promise of confidentiality. *Opportunity to offer evidence in rebuttal shall be afforded the juvenile and his parent, guardian, or custodian at the dispositional hearing* . . . .

New G.S. 7A-640, also effective on 1 January 1980, provides that:

> The dispositional hearing may be informal, and the judge may consider written reports or other evidence concerning the needs of the juvenile. The juvenile and his parent, guard-

> ian, or custodian *shall have an opportunity to present evidence,* and they may advise the judge concerning the disposition they believe to be in the best interest of the juvenile. (Emphasis added.)

While the legislature, in enacting the new Juvenile Code, did not make crystal clear the extent to which the trial court must postpone the dispositional hearing in order to give the juvenile an opportunity to be heard, we think the emphasized portions of the statutes noted above make clear the legislative intent that the dispositional hearing *must* be continued for the respondent to present evidence when he requests such a continuance. This is particularly so since new G.S. 7A-632 provides, "The judge may continue at any time any case to allow additional factual evidence, social information or other information needed in the best interest of the juvenile or in the interest of justice."

Again, we realize that a continued dispositional hearing will be unnecessary in the vast majority of cases. We do not seek here to diminish the trial court's much-needed discretion in those cases. We merely suggest that effective 1 January 1980, before a trial court can commit a juvenile adjudicated delinquent to a State training school, it must, upon specific request of the juvenile or his counsel, continue the dispositional hearing for a reasonable time to allow the juvenile to present evidence to the court about his disposition. The period of time required for the continuance is a matter in the trial court's discretion but we believe it should take into account the source of the evidence which the juvenile seeks to present. This does not, of course, alter the trial court's authority to retain the juvenile in custody pending the dispositional hearing, pursuant to other statutory authority.

The statutory right for the juvenile to present evidence before his disposition is meaningless unless he is given time to prepare it. Before the critical decision to remove a child from society is made, we believe the child's right to present evidence should be zealously guarded This is not a 'grudging gesture to a ritualistic requirement.' It is 'of the essence of justice.' *Cf. Kent v. United States*, 383 U.S. 541, 561, 86 S.Ct. 1045, 1057, 16 L.Ed. 2d 84, 97 (1966) (Speaking of the child's right to counsel).

B.

Respondent next contends that the trial court erred at the dispositional hearing in hearing evidence about acts for which he had not been adjudicated delinquent.

Respondent's concern over the trial court's handling of his dispositional hearing is best understood by quoting an exchange between the court and counsel. Following the trial court's adjudication that respondent was a delinquent child, the record discloses in pertinent part the following exchange:

COURT: Does he have a prior juvenile record?

MR. BYRD: Your Honor, he had been placed on probation a month prior to the date of this incident, so I had known him for about three weeks to a month prior to this incident and he was placed on probation for shoplifting, took two electric auto-race games from Jordan Marsh at Four Seasons valued at $4.30.

MR. MOORE: Wasn't there some other articles he took too?

MR. BYRD: Two entail racing games—I am sorry—three tubes of glue, that's what it was. Would you care to see that Order?

COURT: All right.

MR. HARRELSON: Judge, we would like an opportunity, if Your Honor can see fit, to present the testimony of the people from the Mental Health prior to any disposition.

COURT: Do you have an (sic) evidence as to disposition?

MR. MOORE: Your Honor, please, except for the Court Order that stands, we have several matters retained by the Greensboro Police Department.

MR. HARRELSON: We OBJECT to anything on disposition, if Your Honor please, unless be adjudication of delinquency.

COURT: Well, OBJECTION OVERRULED.

Q. Detective Allen, would you tell the Court any matters that were—how many matters have been retained by the Greensboro Police Department regarding Jerry Vinson?

MR. HARRELSON: OBJECTION.

COURT: I am not sure I understand the question.

MR. MOORE: Let me rephrase the question.

Q. Detective Allen, have there been any charges, any allegations of delinquency that have been retained by the Greensboro Police Department, Juvenile Division?

MR. HARRELSON: OBJECTION.

COURT: OVERRULED.

A. Yes, there have.

Q. How many have there been?

MR. HARRELSON: OBJECTION.

COURT: OVERRULED.

A. Three others.

Q. What were those specific allegations?

MR. HARRELSON: OBJECTION.

COURT: OVERRULED.

A. There was an assault, a larceny and receiving, and a larceny.

MR. MOORE: And would Your Honor care to hear any particulars of the matters?

COURT: Was obviously more than that. Obviously more than the larceny and receiving and assault.

A. There was one larceny, 7/20/76; one larceny and receiving 12/12/77; and one assault, 4/10/74; and then, of course, the larceny, shoplifting which was adjudicated February 16, '78.

MR. HARRELSON: I OBJECT, move to strike all of this. No evidence he was convicted of any of this other than the one which was handed up to Your Honor.

COURT: Was there not a rape charge contained by the Police Department?

A. There was a petition filed.

COURT: Petition filed?

A. Yes, sir.

COURT: That has been dismissed?

A. Yes, sir.

COURT: That matter cannot be adjudicated?

A. Yes, sir. And with Mrs. Vaden he stated that he also had sexual intercourse with her and I asked him to describe what sexual intercourse was with Mrs. Vaden as I had with Mrs. Breedlove. Again, he stated that he took his thing and put it in her hole and he also tried to get her to suck his thing.

COURT: How old was he at that time, 13?

A. Yes, sir.

COURT: Anything further on disposition?

Q. Did he say anything in the statements about Mrs. Breedlove about the bathtub?

A. Yes, sir, he did.

. . . .

COURT: Is there anything on disposition for the child?

MR. HARRELSON: Nothing other than we would like the opportunity to get the people from Mental Health here or their report, as the case may be, Your Honor please.

Following this exchange, the court then made findings and committed the child to the Division of Youth Services, Department of Human Resources for placement in a State training school.

The trial court's order found "[t]hat the child began committing sexual assaults at age 9; that he has continued to commit crimes of a sexual nature including the rape and attempted rape

of elderly women; and that he is a dangerous and vicious sex offender, despite his being only 13 years of age." Respondent correctly states that there is nothing in the record to substantiate these findings other than the inquiries allowed on disposition, as noted above.

The general rule in North Carolina for adult sentencing is that the trial court has wide latitude to hear evidence at disposition. *State v. Perry*, 265 N.C. 517, 144 S.E. 2d 591 (1965); *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962). If the punishment imposed is within statutory limits, there is a presumption that the sentence is regular and valid. That presumption, however, is not conclusive and if the judge by his own pronouncement shows clearly that he imposed the sentence for a cause not embraced within the indictment and the plea, the presumption is overcome and the sentence is in violation of defendant's rights. *State v. Swinney*, 271 N.C. 130, 155 S.E. 2d 545 (1967).

Disposition of a juvenile, however, involves a philosophy far different from adult sentencing. *In re Burrus, supra*, makes clear that a delinquent child is not a "criminal." The inference is that a juvenile's disposition is not intended to be a punishment but rather an attempt to rehabilitate him.

G.S. 7A-286 provides in pertinent part that, "[t]he judge shall select the disposition which provides for the protection, treatment, rehabilitation or correction of the child after considering the factual evidence, the needs of the child, and the available resources, as may be appropriate in each case." We also note that the new Juvenile Code adds little guidance with respect to the trial court's authority to hear matters on disposition such as those disclosed by this record. The new Code provides at G.S. 7A-640 only that, "[t]he dispositional hearing may be informal, and the judge may consider written reports or other evidence concerning the needs of the juvenile." New G.S. 7A-646 provides, "The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction."

With correction foremost in mind, it has been the practice in this jurisdiction to consider all manner of evidence at the dispositional stage. Indeed, the *Rules of Procedure Applicable to*

Children in the District Court, commonly referred to as the *Brown Book*, states that "[e]vidence that is material and relevant, including hearsay and opinion, is admissible [at disposition], and entitled to such weight as the judge may deem proper." N.C. Administrative Office of the Courts, *Rules of Procedure Applicable to Children in the District Court* 50 (1977).

The practice of considering a broad spectrum of information at disposition is not unique to North Carolina juvenile law. The pertinent ABA Juvenile Justice Standard recommends:

> 2.3 Information Base.
>
> A. The information essential to a disposition should consist of the juvenile's age; the nature and circumstances of the offense or offenses upon which the underlying adjudication is based, such information *not being limited to that which was or may be introduced at the adjudication*; and any prior record of adjudicated delinquency and disposition thereof. (Emphasis added.)

IJA / ABA Juvenile Justice Standards Project, *supra* at 31.

The commentary to this section explains:

> The kind of information that is relevant and helpful in arriving at a suitable disposition cannot be separated from the goal or goals sought by the disposition and, to some extent, the nature of the dispositional discretion afforded the judge. As a general proposition, it can be said that the stronger the commitment to a benevolent or therapeutic objective, the stronger the claim to broader information about the juvenile and his or her situation. On the other hand, the stronger the commitment to a disposition fashioned on "just desserts" principles, the less need for information, beyond the nature and circumstances of the offense, age, and the prior record of adjudicated delinquency.

Id. at 31-32.

North Carolina, with its strong commitment to a *parens patriae* "benevolent objective" thus may properly consider a wide variety of information at disposition. Here, however, respondent argues in effect that consideration of unadjudicated delinquent acts, allegations without proof, transcends the *parens patriae* in-

terest of the State and violates his right to fundamental fairness, as that right has been posited in *In re Winship, supra.*

The same ABA commentary that explains Standard 2.3 goes on to say:

> Nothing in subsections B. and C. prohibits the inclusion of other information relating to prior delinquency. However, such items as "warnings" and arrests, or conclusions about being an important member of a gang—*cf. United States v. Weston,* 448 F. 2d 626 (9th Cir. 1971) (an unsupported charge that the defendant was the chief supplier of heroin for the area led to vacation of the sentence)—should be carefully scrutinized both for accuracy and weight. Since disclosure of all dispositional information is mandatory under Standard 2.4, the risks of false or misleading information are minimized.
>
> The dispositional judge should be cautious, therefore, in drawing conclusions of previous misconduct from information that has not resulted in official action. In *Townsend v. Burke,* 334 U.S. 736 (1948), the Court invalidated a sentence imposed on an uncounseled defendant where the trial judge relied on misinformation, or on an erroneous reading of the defendant's prior record. Where a judge relied on a prior conviction obtained in violation of *Gideon v. Wainwright,* 372 U.S. 335 (1963) for sentencing purposes, the Court once again reversed, *Tucker v. United States,* 404 U.S. 443 (1972). These decisions would appear to have equal applicability in the juvenile delinquency process.

IJA / ABA Juvenile Justice Standards Project, *supra* at 32.

Here, the trial judge apparently considered nonadjudicated matters reaching back to the time respondent was nine years of age. The record is devoid of the source of some of the information and is also devoid of any finding that this information was accurate. While neither the present statute nor the new Code prohibits the consideration of these matters on disposition, we cannot believe that such a consideration was in conformity with the due process rights with which respondent is invested. We think it the far better practice to limit consideration of past delinquent acts in a dispositional hearing to those which have been adjudicated or, at the very least, formally petitioned.

[7] In light of other errors found in respondent's hearing, it is unnecessary for us to determine whether he would be entitled to a new dispositional hearing on the facts before us. However, for the guidance of trial courts henceforth, we hold that, under both present law and the new Juvenile Code, effective 1 January 1980, trial courts giving consideration at a dispositional hearing to unadjudicated acts allegedly committed by a juvenile, unrelated to that for which he stands petitioned, must first determine that such information is reliable and accurate and that it was competently obtained. We do not mean to imply that a full "trial" must be held to make the required determination about the unrelated acts. The trial court should have wide discretion in making the required determination from the sources available to it, but it must make the determination.

C.

Respondent finally contends that the trial court failed to make adequate findings of fact to support the disposition order.

Present G.S. 7A-286 provides in pertinent part:

(5) In the case of a child who is delinquent, the court may commit the child to the Department of Human Resources, for placement in one of the residential programs operated by the Department, provided the court finds that such child meets each of the following four criteria for commitment to an institution and supports such finding with appropriate findings of fact in the order of commitment as follows:

a. The child has not or would not adjust in his own home on probation or while other services are being provided;

b. Community-based residential care has already been utilized or would not be successful or is not available;

c. The child's behavior constitutes some threat to persons or property in the community or to the child's own safety or personal welfare.

d. If the child is less than 10 years of age or his offense would not be a crime if committed by an adult, the

> court must find that all community-level alternatives for services and residential care have been exhausted.
>
> . . .

In the present case, the trial court entered its findings by simply reciting the statutory language. Respondent argues that the court erred in finding he was not capable of being rehabilitated in the community pursuant to G.S. 7A-286(5)(a) primarily because it did not wait to consider the proffered but unfinished psychological report.

Sufficiency of fact finding under G.S. 7A-286 has frequently been challenged. In *In re Steele*, 20 N.C. App. 522, 201 S.E. 2d 709 (1974), the Court of Appeals upheld the sufficiency of a commitment order nearly identical with this one. There, the juvenile had appealed saying that, while the judge may have found as a fact that community resources were insufficient, he had not considered evidence of that finding. The Court of Appeals said in a one paragraph decision:

> We agree that the statute gives the trial judge ample tools to make a study in order to dispose of the case "to provide such protection, treatment rehabilitation or correction as may be appropriate in relation to the needs of each child subject to juvenile jurisdiction and the best interest of the State." We do not think, however, that it is incumbent upon the trial judge to incorporate detailed findings of fact in his order. We think the order in the instant case was adequate and was supported by the evidence.

Id. at 525, 201 S.E. 2d at 711-12.

This opinion of our Court of Appeals, which allows fairly relaxed formal fact finding, did not occur in a vacuum. Fact finding has long been a troublesome issue for juvenile judges. This is so in many instances simply because the judge does not have the necessary clerical help to have an order prepared. In a recent survey, fully 32% of juvenile commitment orders reviewed in North Carolina contained no findings of fact.[4] While we find such an absolute omission disturbing, as it makes appellate review nearly impossible, we do not believe the fact-finding order need

4. Study done by Diane Porter of the Division of Youth Services, reported in the minutes of the Juvenile Code Revision Committee, 31 March 1978.

be as detailed as that advocated by the IJA / ABA Standards which advise:

> 7.1 Findings of fact and formal requisites.
>
> A. The judge should determine the appropriate disposition as expeditiously as possible after the dispositional hearing, and when the disposition is imposed,
>
> 1. make specific findings on all controverted issues of fact, and on the weight attached to all significant dispositional facts in arriving at the disposition decision;
>
> 2. state for the record, in the presence of the juvenile, the reasons for selecting the particular disposition and the objective or objectives desired to be achieved thereby;
>
> 3. when the disposition involves any deprivation of liberty or any form of coercion, indicate for the record those alternative dispositions, including particular places and programs, that were explored and the reason for their rejection; . . . .

IJA / ABA Juvenile Justice Standards Project, *supra* at 51.

This standard was considered by the drafters of the new Juvenile Code and rejected in favor of a more flexible fact finding order. New G.S. 7A-651 and 7A-652, effective 1 January 1980, provide:

> § 7A-651. *Dispositional order.* —The dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The judge shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.
>
> § 7A-652. *Commitment of a delinquent juvenile to the Division of Youth Services.*—(1) A delinquent juvenile 10 years of age or more may be committed to the Division of Youth Services for placement in one of the residential facilities operated by the Division if the judge finds that the

> alternatives to commitment as contained in G.S. 7A-583 [to be codified as 7A-649] have been attempted unsuccessfully or are inappropriate and that the juvenile's behavior constitutes a threat to persons or property in the community.

The required findings, therefore, pursuant to new G.S. 7A-652 are that (1) alternatives to commitment available in G.S. 7A-649 have been unsuccessfully attempted *or* are inappropriate, *and* (2) the juvenile's behavior is a threat. We note that the requirements for commitment are far more stringent under the new Juvenile Code because more dispositional alternatives are available under new G.S. 7A-649.

[8] We encourage juvenile judges to make the findings required by the statutes to support orders of commitment to the Department of Human Resources, Division of Youth Services. However, the essential element in the commitment order is not that it recites detailed findings beyond the four enumerated by G.S. 7A-286(5) or the two tests enumerated in new G.S. 7A-652, but that those enumerated findings are supported by *some evidence in the record of the dispositional hearing*. This is necessary because of the seriousness of the ordered disposition and the probability of review at the appellate level. We therefore hold that, while the final commitment order need not *formally* state all the alternatives considered by a trial judge in committing a child, a finding that alternatives are inappropriate must be supported by some showing in the record that the sentencing authority at least heard or considered evidence as to what those alternative methods of rehabilitating were.

From the record before us, we are unable to find evidence to support the trial court's finding that the four enumerated factors in G.S. 7A-286(5) had been met. This assignment of error is therefore sustained.

Since the motion for nonsuit should have been allowed, we reverse the Court of Appeals and order this proceeding dismissed.

Reversed.

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

Chief Justice BRANCH concurring in result.

I am of the opinion that the crucial questions determinative of this appeal are (1) whether the trial court erred in allowing testimony of a photographic lineup in which the child's photograph was displayed and (2) whether the trial court erred in denying the child's motion for nonsuit. I agree with the holding of the majority on both of these questions. However, the majority of the twenty-seven page opinion is devoted to a discussion of statutes which do not become effective until 1 January 1980. All such discussion is, of course, dictum. I do not believe that this Court should adopt a policy of considering matters which are not properly before it. Admittedly, the content of the majority opinion is a learned and complete consideration of matter which might properly come before us at some future date. However, I do not believe that it is the function of this Court to anticipate questions of law and to deliver, in effect, advisory opinions which cannot have the force of precedent.

Justices COPELAND and EXUM join in this concurring opinion.

STATE OF NORTH CAROLINA v. HORACE THEADOR ATKINSON

No. 4

(Filed 4 December 1979)

1. **Criminal Law § 61.2— shoe print comparison—nonexpert testimony**

The trial court properly permitted a police officer, a nonexpert witness, to testify that bloody shoe prints found in a grocery store where a robbery-murder occurred were similar to impressions found on the soles of shoes belonging to defendant where the evidence tended to show that (1) the shoe prints were found at or near the crime scene, (2) the shoe prints were made at the time of the crimes, and (3) defendant was wearing the shoes in question at the time of the crimes.

2. **Homicide § 21.2— causal connection between assault and death**

The State's evidence sufficiently established a causal connection between the victim's death and an assault on the victim by defendant's companion with

a baseball bat during a robbery to support defendant's conviction of first degree murder where testimony by the State Medical Examiner tended to show that the victim was unable to withstand the shock of the assault because of preexisting heart disease and that the injuries and stress from the assault contributed to and accelerated the victim's death by heart attack.

3. **Homicide § 21.2— preexisting physical condition—assault as contributing cause of death**

The consequences of an assault which is the direct cause of death of another are not excused, nor is the criminal responsibility for the death lessened, by a preexisting physical condition which made the victim unable to withstand the shock of the assault and without which preexisting condition the blow would not have been fatal.

4. **Robbery § 3— sums customarily kept by victim—irrelevancy—harmless error**

While testimony that a robbery-murder victim customarily kept large sums of money on his person was irrelevant since there was no evidence suggesting that defendant and his companion knew of this practice, the admission of such testimony over objection did not constitute prejudicial error where defendant failed to show that a different result would have ensued if the testimony had been excluded, and where similar testimony had been elicited from another witness without objection.

5. **Criminal Law § 11— failure to submit issue as to accessory after the fact**

In a prosecution for attempted armed robbery and first degree murder, the trial court did not err in failing to submit issues as to defendant's guilt of being an accessory after the fact to those crimes where defendant's own testimony showed that he aided in the actual perpetration of the robbery-murder in that his companion informed him of the planned robbery and instructed him as to what to do, and defendant complied with those instructions.

6. **Criminal Law § 138.1— more lenient sentence to codefendant**

Defendant's sentence of life imprisonment for first degree murder did not constitute cruel and unusual punishment or a denial of equal protection because his codefendant was permitted to plead guilty to second degree murder and was sentenced to a prison term of 60 to 80 years.

7. **Criminal Law § 26.5; Homicide § 31.1— felony murder—no separate punishment for felony**

A defendant who is convicted of first degree murder on the theory of felony murder cannot be subjected to additional punishment for the underlying felony as an independent criminal offense.

APPEAL by defendant from *Wood, J.*, 8 October 1978 Conflict Session, HALIFAX Superior Court.

Upon pleas of not guilty, defendant was tried upon bills of indictment proper in form which charged him with robbery with a dangerous weapon and the murder of Wilbur Faulk Williamson.

The trial was conducted in the bifurcated manner mandated by G.S. § 15A-2000 et seq. Phase one of the trial determined the guilt or innocence of defendant. Phase two of the trial was held to determine his sentence for first-degree murder following his conviction on that charge.

During the guilt determination phase of the trial, the state introduced evidence summarized in pertinent part as follows:

Prior to 14 July 1978, Wilbur Faulk Williamson owned and operated a business known as the Gold Hill Grocery. The store was located on North Carolina Highway 48 near Glenview, North Carolina, in Halifax County.

At approximately 9:30 a.m. on 14 July 1978, Williamson was found by a passerby sitting in front of his store near a ditch. Dressed in his underclothes, Williamson was bleeding profusely about his head as well as through his nose and mouth. His clothing was soaked with blood. Gurgling sounds in Williamson's throat prompted Deputy Sheriff William T. Harper to clear an air passageway in Williamson's mouth and throat. Williamson told those who had gathered about him that he had been robbed, but he was unable to supply any details of what had happened. When a unit of the Roanoke Valley Rescue Squad arrived at the store, Williamson was sitting on the ground, propped up by a 55 gallon barrel that had been found nearby. He was taken to Halifax Memorial Hospital in Roanoke Rapids where he later died.

Upon securing the area detectives from the Halifax County Sheriff's Department proceeded to conduct an investigation. From Highway 48 to the front of the store there was a trail of blood. There was a pool of blood where Williamson had been sitting propped up by the barrel. The trail of blood continued from the pool toward the store, going beside a set of gasoline pumps located in front of the store. The trail of bloodstains led into the store itself.

The glass on the storm door on the front of the building had been knocked out. Glass from the broken window littered the area in front of the store as well as an area immediately inside the front portal of the building.

The interior of the store was in disarray. There was blood on the floor inside the store. On the right just as one enters the

store there was another pool of blood. On the floor there was an oil can which had oil still running out of it. Beside the can there was a pair of wire rimmed glasses. Both the oil can and the pair of glasses were located at the base of a drink box. The cash register was on the floor behind the counter. It had not been opened. There was a baseball bat lying beside the cash register. On top of the counter there was a broken pair of sunglasses. There was a shoe track on top of the counter in blood. Throughout the store, there were bloody shoe tracks in the aisles. There was blood on various items on shelves as well as on a freezer door whose glass had been broken out. The floor of the grocery was wet from broken bottles of vinegar.

At about the same time Williamson was found in front of his store, an orange Pontiac Firebird automobile was seen in the vicinity of the Gold Hill Grocery travelling at a high rate of speed. At approximately 10:00 or 10:30 a.m. the automobile was involved in a traffic accident in Wilson, North Carolina. The car was heavily damaged on the right side near the door and the right rear fender. When he arrived on the scene Officer B. E. Edwards of the State Highway Patrol observed defendant sitting in the front passenger seat of the car. Defendant was cut on his forehead and on his hand. Defendant identified himself as the driver of the Pontiac saying that he had cut his head on the mirror and hurt his hand on the dashboard of the car. Officer Edwards asked defendant if he would like to go to the hospital for treatment of his injuries. When defendant replied affirmatively Officer Edwards directed him to go with Officer James H. Smith of the Wilson Police Department. Officer Smith then took defendant to the emergency room of Wilson Memorial Hospital where his cuts were stitched and bandaged. At the time he instructed defendant to go to the hospital with Officer Smith, Officer Edwards also asked him to go to the Wilson Police Department to fill out the accident report. Defendant agreed that he would do so.

After providing for medical attention for defendant and asking him to go to the police station, Officer Edwards remained at the scene of the accident, on North Carolina Highway 58 south of Wilson, until a wrecker arrived to remove the automobile. After the car was taken away, Officer Edwards left the scene and went to lunch, not knowing anything about the robbery of the Gold Hill Grocery or the killing of Williamson. After he ate lunch and

checked back onto the radio, he heard a highway patrol bulletin about the incident at the grocery. He then returned to the place on Highway 58 where the Firebird had been sitting. The patrolman searched the ditches along the road and in the wooded area nearby. After searching approximately fifteen to twenty minutes, he found some clothing lying near a tree and a clump of bushes. At trial Officer Edwards estimated that he found the items approximately fifteen steps from where the Pontiac had been parked. He found a pair of fatigue pants with other items of clothing stuffed into one of the pant legs, including a pair of shoes as well as a tan and mustard colored shirt. Upon touching the shirt Officer Edwards found that it bore bloodstains which were still wet. Thereupon, he left the items where they were and went to his patrol car where he called for assistance from the Halifax County Sheriff's Department. Officers from that department soon arrived on the scene and were led to the items by Officer Edwards. Photographs were taken and the items were removed.

On the evening of 14 July 1978 defendant was returned to Halifax County in the custody of Officer Warren and Sheriff William C. Bailey. Before they removed defendant from the Wilson Police Department the officers advised him of his constitutional rights. When they returned to the Halifax County Jail, the officers took defendant to Officer Warren's office for questioning where he then made a statement.

In his statement defendant stated that he and Tommy Boyd had left Maryland at approximately 2:00 a.m. on 14 July 1978 on a trip to South Carolina; that he was driving a 1972 orange Pontiac Firebird; that when the car began to run low on gasoline with them out of money they decided to find a place in the country to rob; that they stopped at a store (the Gold Hill Grocery); that they asked the man who was there to fill up their car; that Boyd had gone into the store with a baseball bat; that the man went inside also; he remained outside the store until he heard "glass breaking and things falling . . . and Tommy calling" for him; that he then ran inside the store where he saw Boyd and the man struggling; and that he ran between the two men and took the baseball bat away from them.

Defendant admitted further that he was driving the car when they left the store; that after the car was involved in an accident,

he and Boyd went into some woods where they changed their clothes; and that they left the clothes which were bloody in the woods where they changed.

During the interrogation defendant identified for the officers a number of items that had been taken from the store and recovered from the woods near where the Pontiac had been parked after the accident. As well as identifying clothing and other items belonging to Tommy Boyd defendant proceeded to identify items which belonged to him: a shirt, a pair of pants, and a pair of shoes.

The state presented expert testimony of Dr. Page Hudson, Chief Medical Examiner of the State of North Carolina. Dr. Hudson performed an autopsy on the body of Williamson and detailed the extent of the injuries he suffered in the incident at the grocery store. He testified that the autopsy revealed that Williamson suffered from a very severe hardening of the arteries, and that there was evidence which indicated that he had suffered a previous heart attack. He further testified that it was his opinion that the lacerations and contusions which he found to be present on Williamson's body could have been caused by blows of a baseball bat; and that it was his opinion that the injuries which Williamson received would have enormously stimulated the heart and his blood pressure and that Williamson's death was accelerated by this stress. On cross-examination the pathologist testified that Williamson's heart was "in terrible condition." He stated further that any severe stress could have caused Williamson's heart to stop.

At the close of the state's evidence defendant made a motion to dismiss. Upon the court's denial of that motion, defendant took the stand on his own behalf against the advice of his attorney.

Defendant testified generally consistently with the statement he had given to the officers. His testimony differed from his statement in that he testified that Boyd suggested that they rob a store but that defendant told Boyd that he "knew better, but we were both together and he knew what he could do." Defendant denied having hit Williamson with the baseball bat, insisting that he went into the store to separate Williamson and Boyd as they fought over the bat.

The jury returned a verdict finding defendant guilty of attempted armed robbery with a dangerous weapon as well as first-degree murder in the perpetration of a felony.

The court then proceeded to conduct the sentencing phase of the trial before the same jury pursuant to G.S. § 15A-2000 et seq. to determine if defendant's sentence on the murder conviction would be death or life imprisonment. The state offered as evidence additional testimony by Officer E. C. Warren, Chief Investigator for the Halifax County Sheriff's Department. Officer Warren testified only to the physical characteristics of defendant. Defendant again took the stand on his own behalf against the advice of his attorney. Defendant testified that he did not feel that he had gotten a fair trial, saying that he had tried to help Williamson, not hurt him, when he went into the store.

As to aggravating circumstances, the jury found that the murder was committed while defendant was attempting to commit a robbery that the murder was especially heinous, atrocious or cruel. The jury found only one mitigating circumstance—that defendant had no significant history of prior criminal activities. It further found that while the mitigating circumstances were insufficient to outweigh the aggravating circumstances, the latter were not sufficiently substantial to call for the imposition of the death penalty.

The jury recommended that a sentence of life imprisonment be imposed. Pursuant thereto the court entered judgment providing that defendant be imprisoned for life, that sentence to run concurrently with another life sentence which had already been imposed upon defendant upon his conviction of attempted armed robbery.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Daniel F. McLawhorn, for the State.

Charles D. Clark, Jr., and W. Brian Howell for defendant-appellant.

BRITT, Justice.

[1] By his first assignment of error defendant contends that the trial court erred in admitting opinion evidence that prints from

his shoes were found in several areas of the Gold Hill Grocery for the reason that the evidence was elicited from a nonexpert witness. This assignment is without merit.

At trial, Deputy Sheriff Warren testified over objection that he observed several distinctive shoe prints in several aisles of decedent's store. State's exhibit number seven was identified by Officer Warren as a pair of shoes belonging to defendant, the shoes having been identified by defendant during his interrogation. He further testified that during the course of investigating the attempted robbery and the murder of Mr. Williamson, he observed a number of shoe prints in aisles in the store which had the impression of a "swiggly-type sole"; and that the impressions he observed in the store aisles were similar to those found on the soles of defendant's pullover shoes. At no time during his testimony was Deputy Warren qualified as an expert in the identification of shoe prints.

"Tangible traces of various sorts may indicate the presence of a person or the happening of an event of a certain character at a particular place, and evidence of them is therefore admissible if the inference sought is a reasonable one." 1 Stansbury's North Carolina Evidence § 85 at p. 263 (Brandis Rev. 1973). Evidence of shoe prints has no logical tendency to identify a defendant as the perpetrator of a crime unless a three-pronged inference is established: (1) The shoe prints were found at or near the scene of a crime; (2) the shoe prints were made at the time of the crime; and (3) the shoe prints correspond to the shoes worn by the accused at the time of the crime. *State v. Pinyatello*, 272 N.C. 312, 158 S.E. 2d 596 (1968); *State v. Palmer*, 230 N.C. 205, 52 S.E. 2d 908 (1949). It is not necessary that a witness be qualified as an expert to entitle him to testify as to the identification of shoe prints and their correspondence with the shoes worn by a defendant. *State v. Morris*, 84 N.C. 756 (1881); *State v. Reitz*, 83 N.C. 634 (1880). *See also State v. Pinyatello, supra;* 2 Jones on Evidence § 14:45 (6th ed. 1972); 1 Stansbury's North Carolina Evidence § 129 (Brandis Rev. 1973); Wharton's Criminal Evidence §§ 193, 610 (13th ed. 1972). The bare opinion of a witness as to the identity of shoe prints is incompetent as evidence. However, when a witness is able to explain the basis upon which he draws his conclusion, such an opinion is admissible and the weight that is to be

accorded to it is a matter for the jury to decide. *State v. Pinyatello, supra; State v. Palmer, supra; State v. Reitz, supra.*

As we observed above there is no requirement in our cases that a witness must be qualified as an expert before he may state an opinion as to the identification of shoe prints. It remains necessary for us to determine whether the three prerequisites of admissibility which were enunciated in *State v. Palmer, supra,* have been satisfied. We hold that they have been met satisfactorily. It is apparent that the shoe prints were found at or near the scene of the crime in that a number of witnesses, including Officer Warren, testified that there were bloody shoe prints throughout the Gold Hill Grocery. Evidence that indicates that a baseball bat covered with blood was found on the floor near the counter in the store tends to show that the tracks were made at the time of the commission of the crime. This inference is strengthened by defendant's statement to the authorities that when he ran into the store, he saw his companion, Tommy Boyd, struggling with a bleeding man. Defendant said that he saw the baseball bat between the two men. Evidence which indicates that defendant and his companion, Boyd, changed clothes and left their bloody garments in the woods near Highway 58, as well as defendant's own identification of the shoes recovered from near the highway, tends to establish that they were worn by defendant at the time of the crime.

[2] By his second assignment of error, defendant contends that the trial court erred in denying his motion for nonsuit (now denominated a motion to dismiss under G.S. § 15A-1227) for the reason that the state failed to establish a causal relationship between the assault perpetrated by the co-defendant and the death of Mr. Williamson. In a related argument, defendant contends that the trial judge failed to adequately instruct the jury with respect to the requisite causal connection between the perpetrated assault and the death of decedent. Neither contention is meritorious.

During the state's case-in-chief, Dr. Page Hudson, Chief Medical Examiner of the State of North Carolina, detailed the nature and extent of injuries suffered by Mr. Williamson which he observed in the course of an autopsy which he conducted on deceased's body. In addition to direct indications of both internal

and external injuries resulting directly from blows inflicted during the course of the attempted robbery, Dr. Hudson's internal examination of decedent's body revealed severe ateriosclerosis in the heart and the arteries of the heart as well as scar tissue in the heart muscle itself indicating that decedent had suffered a prior heart attack. Dr. Hudson observed that the injuries which decedent incurred would have stimulated the heart enormously, providing a great deal of stress to the heart and his blood pressure level. Dr. Hudson testified that he was of the opinion that the injuries and the stress which they brought about contributed to and in fact accelerated Mr. Williamson's death. On cross-examination, the doctor testified that "[I] would say that this man's heart was in terrible condition. . . . In part this man died from a heart attack . . . . Based upon my autopsy this man was a walking bombshell. Any severe stress could have caused his heart to stop . . . . His heart condition was such that he would have been susceptible to have his heart stop . . . if his heart was bothered, stimulated or irritated."

[3] A person is criminally responsible for a homicide only if his act caused or directly contributed to the death of the victim. *State v. Jones*, 290 N.C. 292, 225 S.E. 2d 549 (1976); *State v. Luther*, 285 N.C. 570, 206 S.E. 2d 238 (1974); *State v. Horner*, 248 N.C. 342, 103 S.E. 2d 694 (1958). The consequences of an assault which is the direct cause of the death of another are not excused nor is the criminal responsibility for the death lessened by a preexisting physical condition which made the victim unable to withstand the shock of the assault and without which preexisting condition the blow would not have been fatal. *State v. Luther, supra; State v. Knight*, 247 N.C. 754, 102 S.E. 2d 259 (1958); *see generally* W. LaFave & A. Scott, Handbook on Criminal Law § 35 (1972); 2 Wharton's Criminal Law § 115 (14th ed. 1979). The testimony of Dr. Hudson, coupled with the testimony of decedent's wife which outlined her husband's history of high blood pressure, was sufficient for the state's case to withstand defendant's motion for nonsuit.

The second question presented by this assignment of error concerns the instructions of the trial court to the jury. The presiding judge instructed the jury that if they were to find defendant guilty of first-degree murder in the perpetration of a

felony, the state must have proven beyond a reasonable doubt, *inter alia*,

> . . . that the beating was a proximate cause of Wilbur Faulk Williamson's death. A proximate cause is a real cause without which Wilbur Faulk Williamson's death would not have occurred.
>
> The defendant's act need not have been the only cause or the last or nearest cause. It is sufficient if it concurred with some other cause, acting at the time which in combination with it, caused the death of Wilbur Faulk Williamson.

In light of our discussion of the law above, this charge was sufficient.

[4] By his third assignment of error, defendant contends that the trial court erred in admitting over objection evidence which tended to show that the decedent was accustomed to keeping large sums of money on his person. This contention is without merit.

Decedent's wife testified that he was usually in possession of large sums of money, carrying it in his wallet and in a money clip; that he kept "several hundred dollars in his billfold" to cash checks and make change; and that he never carried less than a thousand dollars in his money clip which he used for "personal reasons."

Relevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the party who offers it. *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978); *State v. Lee*, 293 N.C. 570, 238 S.E. 2d 299 (1977). However, if the only effect of the evidence is to excite prejudice or sympathy, its admission *may* be grounds for a new trial. *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971); *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967). Ordinarily, however, the reception of irrelevant evidence is considered harmless error. *See generally* 1 Stansbury's North Carolina Evidence § 9 (Brandis Rev. 1973). The burden is on the party who asserts that evidence was improperly admitted to show not only error but also to show that he was prejudiced by its admission. *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684 (1978); *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973).

While we are unable to perceive any grounds upon which the testimony in question was relevant to the issues in the case

against defendant, defendant has not carried his burden of showing that the evidence was so prejudicial that had it not been for the admisison of the irrelevant evidence a different result would have ensued. *See State v. Cross, supra.* Furthermore, earlier in the trial, Officer Charles E. Ward, a detective with the Halifax County Sheriff's Department, was permitted to testify without objection that in the course of his investigation of the crimes he had the occasion to examine the clothing of the decedent; and that Mr. Williamson was carrying on his person at the time of the attempted robbery the sum of $1,630 in his billfold and his money clip. While the testimony of Mrs. Williamson on this point was irrelevant because there was no other evidence which suggested that defendant and Boyd knew of decedent's practice, testimony of a similar nature had already been elicited from Detective Ward and had been placed before the jury for its consideration.

By his fourth assignment of error, defendant contends that the trial court committed error by failing to adequately state the contentions of defendant and by failing to instruct the jury on lesser included offenses which were raised by the evidence. Neither contention is meritorious.

Defendant asserts that in submitting the case to the jury, the trial judge failed to address his contention that the decedent died not from the perpetrated assault but from a preexisting heart condition. He further argues that the judge failed to state any of his contentions regarding the relationship between the assault perpetrated upon the victim and the ultimate cause of his death. Defendant misconstrues the judge's charge. At no point did the judge attempt to summarize the contentions of either the state or of the defendant. In fact, he pointed out his failure to do so to the jury, instructing them that it was their " . . . duty to not only consider all of the evidence, but also to consider all of the arguments, the contentions and positions urged by the state's District Attorney and the defendant's attorney in their speeches . . . and any other contentions that arise from the evidence . . . ." The trial judge is not required to state the contentions of litigants. *State v. Hewett,* 295 N.C. 640, 247 S.E. 2d 886 (1978); *State v. Dietz,* 289 N.C. 488, 223 S.E. 2d 357 (1976).

[5] In submitting the case to the jury, the trial judge submitted two possible verdicts as to each charge which defendant faced.

The jury was given the option of finding defendant guilty of attempted armed robbery with a dangerous weapon or not guilty of that charge; and guilty of first-degree murder or not guilty of that charge. Defendant argues that the evidence in the light most favorable to him could have permitted the jury to conclude that his role in the case was that of an accessory after the fact of robbery with a dangerous weapon.

There is no error in a failure to instruct a jury on the crime of being an accessory after the fact where all of the evidence construed together tends to show actual participation in the substantive crime charged. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). An accessory after the fact is an individual who, after a felony has been committed, with knowledge of its commission, renders personal assistance to the felon in any manner to aid him to escape arrest or punishment. *State v. Potter*, 221 N.C. 153, 19 S.E. 2d 257 (1942); *State v. Dunn*, 208 N.C. 333, 180 S.E. 708 (1935). There is nothing in the record of this case which indicates that there was any evidence upon which the jury could conclude that defendant was an accessory after the fact. His own testimony indicates that Boyd informed him of the planned robbery and instructed him as to what he was to do. Defendant complied with those instructions. By his own statements, therefore, defendant acknowledged that he aided in the actual perpetration of the crime.

[6] By his sixth assignment of error, defendant contends that the trial court erred in sentencing him to life imprisonment, alleging cruel and unusual punishment and a denial of the equal protection of the laws in light of the subsequent imposition upon his codefendant of a sentence of sixty to eighty years imprisonment. This contention is without merit.

The trial court, upon conviction of defendant on both the attempted armed robbery charge and the murder charge, conducted a sentencing hearing for the determination of defendant's punishment for the capital felony of first-degree murder. At the close of the proceeding, the jury recommended that defendant be sentenced to life imprisonment on the murder conviction. Defendant had been previously sentenced to life on the attempted armed robbery charge. At a subsequent session of the court the codefendant, Thomas Boyd, was permitted to plead guilty to second-

degree murder and he was sentenced to a term of sixty to eighty years in prison.

If the recommendation of the jury in the sentencing phase of a capital case is that the defendant be imprisoned for life, the trial judge is obligated to impose that sentence. G.S. § 15A-2002. In that instance, he has no discretion to exercise in the imposition of sentence. Punishment which does not exceed the limits fixed by statute cannot be classified as cruel and unusual punishment in the constitutional sense unless the punishment provisions of the statute itself are unconstitutional. *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978); *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296, *cert. denied* 409 U.S. 1047, 34 L.Ed. 2d 499, 93 S.Ct. 537 (1972). Life imprisonment for first-degree murder does not constitute cruel and unusual punishment. *Compare*, *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859, 96 S.Ct. 2909 (1976); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979). A mere disparity in the sentences imposed upon codefendants is not sufficient to amount to cruel and unusual punishment in the constitutional sense. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970).

[7] By his fifth assignment of error, defendant contends that the trial court erred in failing to arrest judgment entered on the conviction of attempted armed robbery; he argues that it merged into the first-degree murder charge because the state proceeded on the theory of felony murder. The state concedes error on this point. We agree.

The indictment which charged defendant with the first-degree murder of Wilbur Faulk Williamson alleged that he "feloniously, wilfully, and of his malice aforethought, deliberately and premeditately did kill and murder" decedent. The state proceeded at trial on the theory of felony murder. The case was submitted to the jury after a charge on the elements of felony murder which included a requirement that the state prove beyond a reasonable doubt that the defendant attempted to commit robbery.

That there is such a variance is not fatal to the conviction. Notwithstanding the allegation contained in the indictment pertaining to a killing with malice after premeditation and deliberation, a conviction of first-degree murder will be sustained if the evidence shows and the jury finds that the killing was done in the

perpetration of or in the attempt to perpetrate a felony. *State v. Moore*, 284 N.C. 485, 202 S.E. 2d 169 (1974). A defendant who is convicted of first-degree murder on the theory of felony murder cannot be subjected to additional punishment for the underlying felony as an independent criminal offense. *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977); *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1208, 96 S.Ct. 3206 (1976); *State v. Moore, supra.* Accordingly, the judgment imposed on the verdict finding defendant guilty of attempted armed robbery with a dangerous weapon is arrested.

In defendant's trial and the judgment entered for first-degree murder, we find no error.

In the armed robbery case, the judgment is arrested.

STATE OF NORTH CAROLINA v. ROBERT GRADY BOYKIN

No. 62

(Filed 4 December 1979)

1. **Criminal Law § 74— admissibility of written summarization of confession**

   It is not required by law that the statement or confession of an accused be in his own handwriting or that the person taking the statement repeat the exact words of the accused, but a summary statement of an accused reduced to writing by another person is admissible against the accused where it was freely and voluntarily made and was read to or by the accused and signed or otherwise admitted by him as correct. Therefore, an officer's written summarization of defendant's statement to him was admissible in evidence where defendant adopted the statement as his own by reading it, circling a minor incorrect portion, and initialing it.

2. **Constitutional Law § 28— inconsistencies in testimony at trial and preliminary hearing—no knowing use of false testimony by State**

   The State did not knowingly use false testimony in violation of defendant's right to due process by presenting a witness whose trial testimony was inconsistent in non-substantive respects with his testimony at the preliminary hearing.

3. **Constitutional Law § 70; Criminal Law § 88.1— cross-examination of rebuttal witness—no denial of right of confrontation**

Defendant's constitutional right of confrontation was not violated when the court limited defendant's cross-examination of the State's rebuttal witness to evidence presented in the rebuttal testimony and refused to permit defendant to cross-examine the witness further about his earlier testimony where defense counsel extensively cross-examined and recross-examined the witness when he earlier testified for the State, and defendant reserved the right to recall the witness but failed to do so.

4. **Criminal Law §§ 75.9, 76.2— volunteered statements—finding of voluntariness unnecessary—subsequent voir dire**

An officer's testimony as to incriminating statements made to him by defendant when he went to defendant's home in response to a telephone call from defendant was properly admitted by the trial court without making a finding as to the voluntariness of the statements where defendant was under no pressure of any kind, volunteered the statements to the officer, and was not subjected to an in-custody interrogation. Furthermore, any error in the admission of the statements without a voir dire hearing to determine their voluntariness was cured when the court thereafter held such a hearing at the time of the officer's rebuttal testimony and found upon supporting evidence that the statements were made knowingly and voluntarily without any threat or promise.

5. **Criminal Law § 93— rebuttal testimony—new evidence**

The trial court did not abuse its discretion in permitting new evidence to be introduced in the State's rebuttal testimony.

6. **Criminal Law § 88.1— exclusion of questions on cross-examination**

The trial court did not err in sustaining objections to defendant's cross-examination of two witnesses where the questions to which objections were sustained went beyond the scope allowable for cross-examination of a rebuttal witness, called for hearsay answers or were repetitious, called for answers already in evidence, or were irrelevant.

7. **Criminal Law § 100— private prosecution in capital case**

There is no merit in defendant's contention that private prosecution should not be permitted in a first degree murder case because the private prosecutor is hired by the decedent's family to seek the death penalty rather than to see that justice is done.

8. **Criminal Law § 100— private prosecutor—potential witness for defense**

The trial court in a murder case did not abuse its discretion in permitting private prosecution by an attorney who defendant contended was potentially a material witness for defendant where the attorney was not subpoenaed by defendant until 4:30 p.m. on Friday afternoon before the trial on Tuesday; at no time, before or after defendant's motion to prohibit private prosecution, did defendant indicate that he really intended to call the attorney as a witness; counsel for defendant at no time discussed with the attorney what he wanted to know or requested a voir dire for that purpose; the attorney stated that he was willing to withdraw as private prosecutor if he were assured that he

would be called as a witness; and the attorney was not in fact called upon to testify for the defendant.

9. **Criminal Law § 135.3; Jury § 7.11— bifurcated trial in capital case—exclusion of jurors for capital punishment beliefs**

The trial court can properly excuse jurors for cause on the basis of their capital punishment beliefs in a bifurcated trial in a capital case.

10. **Criminal Law § 132— motion to set aside verdict—discretion of court**

A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial judge and is not reviewable on appeal in the absence of abuse of that discretion.

DEFENDANT appeals from judgment of *Brown, Judge,* at the 2 January 1979 Criminal Session of NASH County Superior Court.

Defendant was charged in separate indictments, proper in form, with the murders of Julius Randolph Murray, Jr. and John Gregory Stone on 22 August 1978. He entered pleas of not guilty and was found guilty by a jury of second degree murder of Murray and voluntary manslaughter of Stone. For the conviction of second degree murder, defendant was sentenced to prison for the term of his natural life. For the conviction of voluntary manslaughter, he was sentenced to 10 years imprisonment to begin at the expiration of the life sentence. Defendant appealed his life sentence directly to this Court as a matter of right pursuant to G.S. 7A-27(a). We allowed defendant's motion to bypass the Court of Appeals on the voluntary manslaughter conviction pursuant to G.S. 7A-31(a) on 3 July 1979.

EVIDENCE FOR THE STATE

Evidence for the State tended to show that defendant and decedents Stone and Murray were riding together in Murray's car on 22 August 1978. They stopped to get beer at a gas station in Middlesex at approximately 4:30 p.m. and were later seen parked off State Highway 264 near some railroad tracks in Nash County around 5:15 p.m. Residents of the area reported hearing several shots fired from the vicinity of the car soon after.

Sometime later, Ralph Edwards, a farmer, reported that he drove by the area and saw decedent Murray lying on the hood of a car and decedent Stone, face down, stretched out beside the car on the left-hand side. Edwards did not stop but drove on to get help. A little beyond the car, he picked up the defendant and

asked him what had happened. Defendant replied, "Well both the damned son-of-bitches been beating on my head and [I] hope both of them were dead." Edwards took defendant home, noticing that defendant did not have any cuts, bruises or bleeding about his body. Edwards did not see a gun on defendant.

At approximately 5:30 p.m. that same day, Nash County Deputy Sheriff Glen Driver received a call from defendant, an acquaintance. Defendant told Driver that he was at home but that he had just shot Murray and Stone. After advising defendant to remain where he was, Driver proceeded to the crime scene and found Murray dead and Stone dying. He also found two spent .25 cartridges near Stone.

Driver went on to the defendant's residence. There, the deputy testified, "Grady [defendant Robert Grady Boykin] wanted to tell me what occurred at the scene of the shooting. I told [him] that he didn't have to tell me anything. [He] stated to me that he knew his rights and he wanted to tell about it anyway." Defendant told the deputy that he had shot the decedents with a Colt .25. When Deputy Driver told defendant that Murray was dead and Stone was dying, defendant replied, "I hope so." Driver took defendant to the Nash County Sheriff's Office.

Lieutenant Milton Reams of the Nash County Sheriff's Department read defendant his rights at 7:10 p.m. Defendant stated he understood them and initialed a rights waiver. However, defendant refused to let Reams write as defendant spoke, so Reams transcribed what he remembered of the account after defendant finished speaking. Defendant read the written statement, circled one part that was incorrect, and signed it.

The gist of the statement was that defendant and decedents Murray and Stone had had some recent trouble between them. Murray and Stone had shot up defendant's business and new truck, but were negotiating restitution. All three had been together that day pricing new trucks for decedents to buy for defendant. They returned, changed cars and drank. Defendant drove decedent Murray's car. After they purchased beer at the Middlesex gas station at about 4:30 p.m., they went to Rural Paved Road 1118 beside the railroad tracks, drank and talked. At one point Stone told defendant, "I could have your arm broke for $100.00." Defendant replied, "Well, why don't you have both of

them broke for $175.00 and get a discount?" Defendant also stated that Stone said he could rape defendant's daughter. Defendant said the rape statement "turned him on," that Stone then winked at Murray and Murray "lunged" at the defendant. Defendant took his weapon and fired twice at Murray and Stone.

In the course of giving this statement, defendant told Deputy Reams, "Reams, you know I'm a good shot. I did not have to shoot them in the head like that. I could have shot them in the leg, or something like that . . . I meant to kill them two son-of-bitches and that's what I did." Reams asked defendant if the decedents had hurt him in any way and defendant replied no.

Medical testimony established that each of the decedents had been shot twice, with the lethal shot in each case being a wound to the back of the head. The bullets taken from Stone's head were fired from defendant's .25 caliber pistol.

The State rested and the defendant moved to dismiss the charge of murder in the first degree. The motion was denied.

EVIDENCE FOR THE DEFENDANT

Evidence for the defendant traced the trouble between defendant and decedents back to 20 July 1978. On that date, defendant and decedents were involved in a fight at defendant's place of business, a bar and poolroom, and defendant forbade decedents to come to his place again. Two witnesses testified they subsequently heard decedents say that they were going to shoot or "mess up" defendant. Defendant was told of these threats. Over a week later, on 28 July 1978, decedents shot defendant's new truck 31 times using .30-06 and .22 caliber rifles. Defendant swore out a warrant for their arrest, but a district court hearing was continued twice while the parties negotiated private restitution.

Defendant testified on his own behalf as to the events on the day of the killings. The three had been drinking for some time when they got to the railroad tracks. Once there, an argument ensued and decedent Stone stated that he was going to go back and shoot defendant's truck again. Stone also said he was going to rape defendant's daughter. Decedents told defendant that they were going to break his leg for $100.00. Decedent Murray "jumped" defendant while decedent Stone had his hands in his

pockets. Defendant was shoving Murray off and Stone was coming toward him so defendant fired at Murray, got loose from him and turned to face Stone. Defendant testified,

> I thought at the time I fired the gun twice. Murray just went away. I don't know if Greg [Stone] heard the gun fire or saw me turn but just as I turned, he turned his head. I thought I fired the gun twice at Stone. I did not aim the gun. I just fired at what I saw. At the time they were jumping me, I thought they were going to kill me. I was very afraid.

Both the State and defendant presented rebuttal evidence.

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

Thomas W. Henson for the defendant.

CARLTON, Justice.

The record discloses that the trial of this criminal action began on Wednesday, 3 January 1979, and lasted through Saturday, 20 January 1979. The record presented by this appeal is 367 pages in length and does not include the judge's charge to the jury or argument of counsel. Defendant has grouped 216 exceptions into 49 assignments of error. In his 92-page brief, defendant brings forward 38 assignments of error under 14 "questions presented." The remaining assignments of error are deemed abandoned, North Carolina Rules of Appellate Procedure, Rule 28. We find no merit in any of defendant's assignments of error and affirm the trial court.

[1] Defendant first assigns as error the admission into evidence of the in-custody statement and written confession he gave to Deputy Reams at the Nash County Sheriff's Office. Defendant relies on our decision in *State v. Walker,* 269 N.C. 135, 152 S.E. 2d 133 (1967). There, this Court held that where the evidence established that a confession signed by the defendant was not read to or by him, admission of the confession constituted prejudicial error. The written statement in *Walker,* as here, was summarized by the officer and was not a verbatim recitation of defendant's account. *Walker,* however, is distinguishable from the case at bar. Here, the evidence clearly establishes that Deputy Reams handed the statement to the defendant who read it after

Reams had prepared it. At the time, Reams also asked the defendant to initial anything incorrect in the written account so that it could be changed. Defendant circled one part which he indicated was incorrect but then indicated that the incorrect portion was minor and of no consequence. After reading the statement, defendant initialed it. Clearly, defendant adopted the statement as his own.

Furthermore, the only reason the statement was not a verbatim account was because Defendant would not allow Deputy Reams to write while defendant spoke.

We think the facts here are more closely akin to those disclosed in *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978). There, on facts similar to those before us here, this Court stated:

> The written statement, which Officer Lovette testified he compiled from notes made by him of Burden's oral statements, was shown to Burden and, according to the testimony of the officers, signed by Burden. Under these circumstances, it is immaterial that the written statement was not, word for word, identical with the oral statement.

Id. at 461, 242 S.E. 2d at 778.

We hold again that it is not required by law for the statement or confession of an accused to be in his own handwriting or that the person taking the statement be required to repeat the exact words of the defendant. The summary statement of an accused reduced to writing by another person, where it was freely and voluntarily made, and where it was read to or by the accused and signed or otherwise admitted by him as correct shall be admissible against him. *See generally* 23 C.J.S., Criminal Law § 833(a) at 236 (1961 & Cum. Supp. 1979).

[2] Defendant also contends that even assuming we find no error in the preparation of the statement, it is apparent from the record that Deputy Reams' trial testimony was perjurious and presented in bad faith by the State. The record discloses that Deputy Reams had stated at the preliminary hearing that defendant's statement was in his own words, yet Reams conceded at trial that the statement was actually a summary of what defendant told him. In raising this assertion, defendant relies primarily on the decision of the United States Supreme Court in *Napue v.*

Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959). There, the Court held that where, in a murder prosecution, an important witness for the state falsely testified that he had received no promise of consideration in return for his testimony, though in fact the assistant state's attorney had promised such consideration and did nothing to correct the false testimony of the witness, defendant was denied due process of law in violation of the fourteenth amendment to the United States Constitution. The Court cited the well-established rule that a conviction obtained through use of false evidence, known to be such by representatives of the state, must fall under the fourteenth amendment. The Court also noted that this principle does not cease to apply merely because the false testimony goes only to the credibility of the witness. The Court stated:

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Id. at 269, 79 S.Ct. at 1177, 3 L.Ed. 2d at 1221.

The principles recited in *Napue* are laudable and firmly established. Obviously, this Court would not condone the practice of allowing the State to introduce at trial testimony which the State knew to be false. This would be true even though the State did not solicit the false evidence but allowed it to go uncorrected when it appeared. *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed. 2d 9 (1957) (per curiam). Clearly, however, the holding in *Napue* does not embrace the facts disclosed by the record before us. There, it was abundantly clear that the state permitted testimony knowing it to be false. Here, however, the State has simply presented a witness whose testimony is inconsistent in non-substantive respects with that given at the preliminary hearing. For example, the witness testified at the preliminary hearing that one of the decedents "jumped" the defendant, while at trial he testified that the decedent "lunged" at defendant. The various inaccuracies and inconsistencies by the witness are clearly not of the nature or severity as to indicate bad faith on the part of the State.

Defendant's first assignment of error is overruled.

[3] Defendant next contends that the trial court committed error in restricting his right to cross-examine Deputy Driver. The record reveals that at the conclusion of the defendant's evidence, the State recalled Driver to rebut testimony of the defendant. Driver had previously testified for the State and was extensively cross-examined and recross-examined at that time by defense counsel. On rebuttal, the court limited defendant to cross-examination only on the evidence presented in rebuttal testimony and not on Driver's earlier testimony. Defendant asserts this limitation was a violation of his constitutional right to confront the witnesses against him.

We are sensitive to the long-standing guarantee of the right to cross-examine one's adversarial witnesses. This right to confront is guaranteed by the sixth amendment to the United States Constitution, which is made applicable to the states by the fourteenth amendment, *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965), and by Article 1, Section 23 of the North Carolina Constitution. The constitutional right to confront affirms the common law rule that in criminal trials by jury the witness must be present and subject to cross-examination under oath. *State v. Perry*, 210 N.C. 796, 188 S.E. 639 (1936).

However, it is also well established that the United States Supreme Court will not encroach upon the power of the states to make their own rules of evidence in their own courts so long as they serve a legitimate state purpose not prohibited by the provisions of the United States Constitution. *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed. 2d 606, *reh. denied*, 386 U.S. 969, 87 S.Ct. 1015, 18 L.Ed. 2d 125 (1967); *State v. Bumper*, 275 N.C. 670, 170 S.E. 2d 457 (1969). The rule in North Carolina which allows the trial judge to exercise his discretion in limiting cross-examination for the purpose of impeachment when it becomes repetitious or argumentative does not violate any provision of the United States Constitution. *State v. Bumper, supra.*

It is obvious from the record that the defendant was permitted to cross- and recross-examine this witness prior to the witness' rebuttal testimony. It is also obvious defendant reserved the right to recall this witness and did not do so. Thus defendant had *more* than ample opportunity to confront his witness. Any further cross-examination on rebuttal about Driver's original

testimony promised to be repetitious or argumentative. We find no abuse of the trial court's discretion to insure an orderly trial. Defendant's right to confront was amply protected. This assignment of error is overruled.

[4] In his third assignment of error defendant contends that the trial court committed prejudicial error in allowing Deputy Driver to testify about statements defendant made to him.

On direct examination, the witness Driver was allowed to testify that he received a telephone call from the defendant in which defendant told him about shooting the decedents and in which he gave Driver the decedents' location. Driver later testified as to other statements made to him by defendant. Defendant here argues that the witness was improperly allowed to testify to these statements because the court failed to make a finding of voluntariness as required by the United States Supreme Court in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964). We disagree. Our rule was stated in *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970) as follows:

> The defendant misinterprets the necessity for the voir dire examination to determine the voluntariness of his admissions. . . . As a general rule, voluntary admissions of guilt are admissible in evidence in a trial. To render them inadmissible, incriminating statements must be made under some sort of pressure. Here we quote from the Supreme Court of the United States in *Hoffa v. United States*, 385 U.S. 293, [87 S.Ct. 408,] 17 L.Ed. 2d 374: "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. . . .

Id. at 345, 172 S.E. 2d at 546.

Here, defendant was plainly under no pressure of any kind and voluntarily made his statements to the witness Driver. It is apparent from the record that Deputy Driver at no time attempted to interrogate the defendant, and, in fact, warned defendant that he did not have to tell the witness anything. Defendant replied that he knew his rights and still wanted to talk. It is abundantly clear that defendant was not subjected to an in-custody interrogation.

Moreover, the United States Supreme Court has held:

> Even if the trial procedure was flawed with respect to the challenged confession, *Jackson v. Denno* does not entitled [a defendant] to a new trial if the State subsequently provided him an error-free judicial determination of the voluntariness of his confession—error-free in that the determination was procedurally adequate and substantively acceptable under the Due Process Clause. . . .

Swenson v. Stidham, 409 U.S. 224, 229, 93 S.Ct. 359, 363, 34 L.Ed. 2d 431, 436 (1972), *mod. on other grounds*, 410 U.S. 904, 93 S.Ct. 955, 35 L.Ed. 2d 266 (1973).

While the trial court here did not hold a *voir dire* hearing to determine the voluntariness of Driver's statement at the time of his direct testimony, it did hold one at the time of his rebuttal testimony and, after making adequate findings of fact, concluded that the statement made by defendant to Driver "was made voluntarily and knowingly, without any threat or promise to induce the defendant to make a statement. . . ." The findings and conclusions by the trial court are amply supported by the evidence and are therefore binding on this appeal. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971); *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. denied*, 386 U.S. 911, 87 S.Ct. 860, 17 L.Ed. 2d 784 (1967). We agree with the trial court's findings that Deputy Driver went to the defendant's home in response to a telephone call, that Driver first saw defendant in the bedroom of his home where defendant started to talk with Driver about the shootings, that Driver interrupted the defendant to tell him he did not have to say anything and that defendant replied that he knew his rights and wanted to tell about it, that Deputy Driver never asked defendant any questions and never indicated he wanted defendant to tell him anything about the shootings, that Driver did not make any promise to the defendant and did not threaten him in any way and that Driver had intended to warn defendant of his full *Miranda* rights but defendant prevented him from doing so by continuing to talk about the shootings.

Defendant also argues under this assignment of error that some of the questions by the State on rebuttal were leading. It is well established that this is a matter within the discretion of the

trial court, *State v. Hood*, 294 N.C. 30, 239 S.E. 2d 802 (1978); *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, *cert. denied*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed. 2d 301 (1976), and we find no abuse of that discretion.

[5] Defendant further contends that the trial court erred in allowing Driver's rebuttal testimony because new evidence was introduced in the rebuttal testimony. Assuming this is so, again it is well settled that order of proof of a matter is within the trial court's discretion and we find no abuse of that discretion from the record before us. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977). Defendant's contention that the rebuttal testimony constituted improper impeachment of his character is also clearly without merit.

This assignment of error is overruled.

Defendant next asserts that because the confession to Deputy Driver was involuntary, this influence continued to operate on the defendant so that his subsequent confession to Deputy Reams was also involuntary. Defendant relies on cases such as *Beecher v. Alabama*, 389 U.S. 35, 88 S.Ct. 189, 19 L.Ed. 2d 35 (1967) and 408 U.S. 234, 92 S.Ct. 2282, 33 L.Ed. 2d 317 (1972); and *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). In those cases, a confession subsequent to an illegally obtained initial confession was ruled inadmissible when there was no appreciable "break in the stream" between the first and second statements. Having previously held that defendant's statements to Deputy Driver were not involuntary and therefore legally admissible, this contention by defendant is clearly meritless.

[6] In his sixth argument, defendant groups five assignments of error and 92 exceptions in contending that the trial court committed error in sustaining objections to defendant's cross-examination of the witnesses Driver and Reams. We have carefully reviewed each of the sustained objections and find that defendant's questions eliciting those objections (a) went beyond the scope allowable for cross-examination of a rebuttal witness, (b) called for speculation or legal conclusions, (c) called for hearsay answers or were repetitious, (d) called for answers already in evidence from other testimony or (e) were clearly irrelevant. Moreover, it is well established that the burden is on the defendant not only to show error, but to show prejudicial error. The

answers the witnesses would have given must be placed in the record in order to determine the alleged error was prejudicial. *State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977); *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335, *cert. dismissed*, 423 U.S. 918, 96 S.Ct. 228, 46 L.Ed. 2d 367 (1975). In many instances, the answers the witnesses would have given were not reported in the record. We find no prejudicial error with respect to any of the noted exceptions and these assignments of error are overruled.

Defendant next contends that the trial court committed error in sustaining numerous objections by the State to the testimony of several defense witnesses. Again we have reviewed each of these numerous exceptions and hold that the defendant has shown no prejudicial error.

[7] Defendant next contends that the trial court erred in denying his motion to prevent private prosecution. He first argues that the State should be prevented from allowing private prosecution employed by the families of the deceased. He argues that the client of the private prosecutor is the family of the decedent and that such an attorney, in a case like this, is employed to seek the death penalty on behalf of his client. The State's prosecutor, on the other hand, has the paramount duty of seeing that justice is done, not that someone is vigorously prosecuted for murder in the first degree so that the families can be satisfied that they have exacted a vigorous prosecution. This Court has long rejected the argument that there is a conflict between these dual roles. The employment of private prosecution is a discretionary practice which has long been approved in North Carolina. *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907, 97 S.Ct. 2971, 53 L.Ed. 2d 1091 (1977); *State v. Best*, 280 N.C. 413, 186 S.E. 2d 1 (1972).

The trial court's discretion in allowing or disallowing private prosecution will be interfered with only upon a showing of abuse. *State v. Carden*, 209 N.C. 404, 183 S.E. 898, *cert. denied*, 298 U.S. 682, 56 S.Ct. 960, 80 L.Ed. 1402 (1936).

[8] Here, the defendant contends that the trial court abused its discretion in allowing the employment of attorney Larry Diedrick because at the time attorney Diedrick was acting as private prosecutor, he was at the same time potentially a material witness for the defendant. Defendant argues that Mr. Diedrick had been

subpoenaed by him as a material witness in the case. Diedrick had represented the two deceased men in the shot-up truck episode and in the process had negotiated with defendant and decedents. Indeed, attorney Diedrick had negotiated and talked with the defendant and the decedents in court on the day of the shooting and, defendant argues, as a result was in a position to explain "the tenor of the conversation and the state of mind of the deceased men and defendant a few hours before the shooting."

Unquestionably, had attorney Diedrick been a material witness for the defense, it would have been improper for him to remain as private prosecution with the State. The conflict this would present deserves no extensive discussion. After hearing arguments of counsel, however, the trial court denied defendant's motion to prevent private prosecution and we think, on the facts disclosed by the record before us, that it did not abuse its discretion in so doing.

In the first place, the record discloses that attorney Diedrick was not subpoenaed as a witness by the defendant until 4:30 p.m. on Friday afternoon prior to the time this case was scheduled for trial the following Tuesday. While the trial court was hearing arguments on the motion, attorney Diedrick stated *inter alia*, to the court:

> I tell the [c]ourt very candidly that if I am a material witness as he maintains and an important witness to the defense and I am assured I will be called to testify, I have no desire to appear in the prosecution of the case. I agree with him, I don't think it would be proper for me to do that. But we are talking about something that is very speculative, Your Honor. I will be glad to tender myself for an interview by defense counsel or for a voir dire examination by the [c]ourt to make that determination now. . . . Let me say this without any reservation, Your Honor, I have got no qualms whatsoever about making full disclosure to the court or anyone who wants to know the entire extent of my knowledge of what transpired on that date. I have no reservation about that whatsoever.
>
> . . . .

> Again, if I was assured I would in fact be called, I will voluntarily withdraw from the case. I think that is the proper thing for me to do, Your Honor. I have no reservations about that but I want to be assured that this is what is going to happen because there has been a great deal of work and time and effort already put into the case by me.

At no time, before or after the motion, did the defendant indicate that he really intended to call attorney Diedrick as a witness. At no time, according to the record, did counsel for the defendant discuss with Mr. Diedrick what he wanted to know or request a *voir dire* for that purpose. Attorney Diedrick made it abundantly clear that he was willing to withdraw if he were assured that he would be called as a witness. The record also reveals that throughout the entire course of the trial attorney Diedrick was never called upon to testify on behalf of the defendant. Clearly, the defendant could have done so at any time and we have no doubt but that the trial court would have immediately ordered attorney Diedrick to withdraw from further participation in the case.

The State argues, not at all unpersuasively, that defendant subpoenaed attorney Diedrick as a witness not in an effort to secure testimony but in an attempt to prevent him from aiding in the prosecution of the case. We, of course, are in no position to make that final judgment. However, for the reasons stated above, and for the further reason that defendant has shown no prejudice, this assignment of error is overruled.

[9] Defendant next contends that the trial court erred in denying his motion that the State be prevented from questioning potential jurors on *voir dire* whether they were conscientiously opposed to capital punishment. He also argues that the trial court erred in excusing certain jurors for cause under North Carolina's present bifurcated trial scheme in capital cases under G.S. 15A-2000. Suffice it to say that the United States Supreme Court has approved a bifurcated trial procedure similar to ours where a single jury decides guilt or innocence in one phase of the trial and punishment in a separate phase. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913, *rehearing denied*, 429 U.S. 875, 97 S.Ct. 198, 50 L.Ed. 2d 158 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859, *rehearing denied*, 429 U.S. 875, 97

S.Ct. 197, 50 L.Ed. 2d 158 (1976). Moreover, our review of the record indicates that the questions asked the potential jurors in this case concerning their belief about capital punishment and the trial court's rulings thereon were in full compliance with the mandate of the United States Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968). Defendant's assignments of error grouped under this contention are overruled.

[10] We finally discuss defendant's last contention that the trial court erred in denying his motion to set aside the verdict as being against the greater weight of the evidence. In doing so, we say for the benefit of counsel for the defendant, that we have complied with his request that the entire record of this proceeding be read. It has been read more than once. We glean from the record before us that the two men killed by this defendant had been guilty themselves of violent behavior in the past. It is also apparent that extreme hostility existed between the decedents and this defendant. The evidence presented to the jury by the State, however, pointed to the guilt of this defendant. Medical evidence established that both decedents were killed by shots in the back of their heads. No weapons were found in the area or on either of the victims. The evidence established defendant demonstrated no remorse at the death of the victims and, indeed, indicated his approval of their condition. A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial judge and is not reviewable on appeal in the absence of abuse of that discretion. *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978); *State v. Vick*, *supra*. Here, no abuse of discretion has been shown. The jury was properly presented with evidence of both the State and the defendant and rendered its verdict for the State.

We have carefully reviewed the defendant's many assignments of error, those discussed and those deemed unworthy of discussion, and find all of them devoid of merit. We think defendant had a fair trial, free from prejudicial error.

No error.

NORTH CAROLINA NATIONAL BANK, A NATIONAL BANKING ASSOCIATION v. M. T. HAMMOND, AND FEDERAL RESERVE BANK OF RICHMOND

No. 41

(Filed 4 December 1979)

1. **Uniform Commercial Code § 36— check—allegations of forgery—insufficiency to prove breach of warranty of good title**

Unproven and contested allegations of forged endorsement on a check are insufficient as a matter of law to breach a warranty of good title under G.S. 25-4-207.

2. **Principal and Agent § 4— endorsement of check for another person—issue as to agency—summary judgment improper**

Though one defendant alleged that a second defendant had given him an oral "power of attorney" to endorse a check for loan proceeds written by plaintiff bank, defendant's version of the facts indicated that he was acting as the second defendant's general agent, and it was not necessary that the agency be under a written grant of authority; therefore, whether defendant endorsed the check as real or implied agent of the second defendant and the endorsement was therefore valid and not a forgery was a question of fact for the jury, and the trial court erred in granting summary judgment for plaintiff.

DEFENDANT Federal Reserve Bank of Richmond appeals from the decision of the Court of Appeals, 40 N.C. App. 34, 252 S.E. 2d 104 (1979), affirming an order by *Collier, Judge*, in Chambers, Superior Court, IREDELL County, 30 December 1977, granting summary judgment for the plaintiff.

On 5 May 1976, a Statesville branch of plaintiff NCNB loaned $30,000 to one M. T., "Bill," Hammond. Hammond signed a 68-day promissory note in that amount with interest at the prime rate plus one percent. The note was due and payable 12 July 1976. Plaintiff NCNB issued a check for the $30,000 loan proceeds minus interest costs payable to M. T. Hammond on 5 May 1976.

The loan proceeds check was initially deposited in an Alabama bank indorsed "to order of Energon, Inc., M. T. (Bill) Hammond, P.A." and "for deposit only Energon, Inc. by Charlie T. Daniels." The Alabama bank negotiated the check into the federal reserve system for collection. The last collecting bank, the Federal Reserve Bank of Richmond, presented the check to plaintiff NCNB for payment and NCNB paid the Federal Reserve Bank of Richmond the face amount of the check. All prior collecting

banks had stamped the check "PEG" or "prior endorsement guaranteed," pursuant to federal reserve banking regulations.

Hammond never repaid the note. Plaintiff NCNB sued for the $30,000 plus interest and attorney's fees on 3 November 1976. In answer to the complaint, defendant Hammond denied ever having received the $30,000 and later stated that his indorsement on the loan check was neither genuine nor authorized.

Plaintiff NCNB then made timely demand on the last collecting bank, Federal Reserve Bank of Richmond, for the amount of the check. NCNB based its claim on G.S. 25-4-207. If the check was forged, NCNB asserted, the Federal Reserve Bank of Richmond (or Bank) did not have "good title" to it, and had therefore breached the warranty contemplated by G.S. 25-4-207 rendering it liable to NCNB who had ultimately paid funds over the forgery. When the Bank refused the demand, NCNB amended its complaint, making the Bank an additional defendant.

In its answer, the Bank asserted upon information and belief that the indorsement which defendant Hammond claimed was forged had been made at his instruction and by his authorization. It therefore denied liability.

After a period of discovery, plaintiff NCNB moved for summary judgment, attaching to its motion an affidavit of defendant Hammond which stated that the signature on the check indorsement was not his and had not been made at his authorization. NCNB also included an affidavit of a handwriting expert stating that, in his opinion, the signature on the indorsement was not defendant Hammond's.

In its reply to the motion, defendant Bank attached the affidavit and deposition of Raymond M. Robbins, Jr., which stated, *inter alia,* that Robbins and Hammond were involved in beginning some kind of mining operation in Alabama apparently called Energon, Inc., that Robbins was unable to raise capital for the venture, that defendant Hammond had agreed to borrow the needed amount and that NCNB was then approached about the loan. Robbins further averred that Hammond had signed the NCNB note some time in advance of 5 May 1976 and had gone on a Hawaiian vacation soon after. On 5 May, when the loan was approved, Robbins had received the loan proceeds check from NCNB in States-

ville and delivered the check to defendant Hammond at the Birmingham, Alabama, airport. Hammond was en route home to Statesville from his Hawaiian vacation. Robbins asserted that neither he nor defendant Hammond had a pen at that time and that defendant Hammond expressly gave him permission to indorse the check, along with instructions to deposit it to the account of Energon, Inc., and to use it to pay two outstanding bills of the company. Robbins stated that he returned from the airport and indorsed the check in the presence of two other shareholders in Energon, one of whom, Charlie Daniels, then indorsed the check to the deposit of Energon and deposited it.

Defendant Bank, in addition to Robbins' deposition, included portions of a deposition of defendant Hammond wherein Hammond stated that at one time he was president of Energon and was still a shareholder of the corporation but that he had not been president of the company on the date the loan check was indorsed with his name.

Based on these affidavits and depositions, NCNB again moved for leave to amend their complaint to join Robbins as a defendant. The trial judge allowed joinder of defendant Robbins and granted summary judgment for plaintiff NCNB against the defendant Bank, finding as a matter of law that under G.S. 25-4-207, the Federal Reserve Bank of Richmond warranted and represented to the plaintiff NCNB that as a collecting bank, it had good title to the check and that all indorsement signatures thereon were genuine or authorized; that the Federal Reserve Bank of Richmond did not have good title to the check because of the alleged forgery which "therefore meant that it did not have a marketable title, which was free from reasonable doubt;" and that it was liable under this breach of warranty. It ordered defendant Bank to pay plaintiff NCNB the amount of the check plus interest, costs and attorneys' fees.

Defendant Bank appealed. The Court of Appeals affirmed the judgment of the trial court. Citing the language of G.S. 25-4-207 (2), that court reasoned that defendant Bank had breached its warranty of good title to the loan check, first because it presented as genuine an indorsement about which there was enough dispute to cloud the title, rendering it nonmarketable, and second, because the provisions of G.S. 47-115.1 and this Court's decision in *O'Grady v. First Union National Bank*, 296 N.C. 212,

250 S.E. 2d 587 (1978), mandated that any indorsement of a check by one possessing a power of attorney must be done only with written authorization. As neither party had ever suggested that any disputed authorization was anything but oral, the Court of Appeals concluded this case did not involve any genuine issue of material fact and held that summary judgment for the plaintiff NCNB was properly granted by the trial court. Defendant Bank moved for discretionary review and this Court granted that motion on 1 May 1979.

Robert H. Gourley for plaintiff appellee.

William E. Crosswhite for defendant appellant Federal Reserve Bank of Richmond.

CARLTON, Justice.

The sole question for determination is whether summary judgment was properly allowed against defendant Federal Reserve Bank of Richmond (or Bank). We think the Court of Appeals erred in affirming the trial court's order and reverse.

We are confronted with the same contentions presented to the Court of Appeals. Defendant Federal Reserve Bank of Richmond argues that nothing in North Carolina law requires a written power of attorney to indorse a check for another and asserts that the question of Robbins' authority to indorse is a genuine issue of material fact which must be resolved, making summary judgment erroneous. *Cf. Kessing v. National Mortgage Corporation*, 278 N.C. 523, 180 S.E. 2d 823 (1971) (setting forth the standard for summary judgment).

Plaintiff NCNB argues that, regardless of the question of written or oral authority, the very existence of the alleged forgery clouds the validity of the indorsement chain, thus breaching the good title warranty of G.S. 25-4-207 and making summary judgment appropriate. It cites *American National Bank of Powell v. Foodbasket*, 493 P. 2d 403 (Wyo. 1972) as authority for the proposition that the definition of good title contemplated by G.S. 25-4-207 is the same concept of good title encountered in property law, that is, a marketable title free from reasonable doubt. We deal first with the assertion that a mere allegation of forgery is enough to breach the warranty of good title under G.S. 25-4-207.

I. Warranty of Good Title under G.S. 25-4-207

Article Four of the Uniform Commercial Code, codified in our statutes as G.S. 25-4-101 *et seq.*, contemplates a relatively simple scheme of check negotiation through commercial banking channels. A *drawer* of a check, that is one who signs it as a draft upon his own bank account at a drawee bank, G.S. 25-3-413 (2); J. White & R. Summers, *Handbook of the Law under the Uniform Commercial Code* § 13-1 at 398 (1972), makes the check out to the order of a *payee*. Here NCNB, as drawer of the check, made it out to the payee Hammond. The *drawee* of the check, that is the ultimate bank which will pay out the amount of the check and debit its drawer customer's account, in this situation was also NCNB.

The drawer of the check, the person making it out, then delivers the check in some manner to the payee. Alleged delivery here was through the purported agency of defendant Robbins. Under normal circumstances, the payee indorses the check and presents it to a bank known under Code terminology as a *depository bank*, G.S. 25-4-105(a), for money or a credit deposited to his account at that bank. The depository bank in turn begins negotiating the check through normal banking channels back to the original drawee bank by presenting the check to a collecting bank. G.S. 25-4-105(d). Over the depository bank's indorsement, the collecting bank then gives or credits the depository bank the face value of the check and takes possession of it. The collecting bank in turn indorses the check and negotiates it through another collecting bank. Eventually the check, indorsed at each step along the chain, is presented to the original drawee bank which is also known in Article Four terms as the payor bank, G.S. 25-4-105(b) and Comment (2). The drawee/payor bank pays out the value of the check to the last collecting bank, takes possession of the check and debits the account of the original drawer of the draft. Here, the drawer of the check and the eventual drawee/payor bank were the same entity, plaintiff NCNB.

Under the Uniform Commercial Code, allocation of liability for a forged indorsement along this chain of negotiation is predicated on a theory of warranty. The parties and the Court of Appeals here mistakenly rely on G.S. 25-4-207(2). Commentators make clear that the warranties embodied in G.S. 25-4-207(2) do not

run to payor banks from previous collecting banks. J. White & R. Summers, *supra* § 15-5 at 511, citing Comment 4 to G.S. 25-4-207. Here, plaintiff NCNB, as a payor bank suing a collecting bank, is in reality relying upon G.S. 25-4-207(1) which provides:

> (1) Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that
>
> (a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title; and
>
> (b) he has no knowledge that the signature of the maker or drawer is unauthorized. . . .

In fairness, we note the foregoing only as a technical clarification, as reliance on either G.S. 25-4-207(1) or (2) will not change the result in this case.

Any adjudicated or noncontested forgery triggers this warranty. Thus, if a payor/drawee bank suffers a loss by paying a check over a proven forged indorsement, it may sue the collecting bank which presented the check to it on a theory of breach of warranty of good title. That collecting bank in turn may sue the next collecting bank and so on down the collection chain. Final liability for the check with a forged indorsement under the Uniform Commercial Code rests ultimately on the initial depository bank which presumably could have guarded against the loss by inspecting the indorsement more closely. *Maddox v. First Westroads Bank*, 199 Neb. 81, 256 N.W. 2d 647 (1977), and cases cited therein; J. White & R. Summers, *supra* § 15-5 at 509-10 (1972); Note: Commercial Transactions—Commercial Paper—Allocation of Liability for Checks Bearing Unauthorized Indorsements and Unauthorized Drawer's Signatures, 24 Wayne L. Rev. 1077 (1978); Clarke, Bailey & Young, *Bank Deposits and Collections* 130 (4th ed. 1972) (Uniform Commercial Code Practice Handbook 3).

The Code scheme of making the initial depository bank liable on a forged indorsement parallels common law. Pre-Code cases allowed the drawee bank to obtain restitution from prior indorsers usually on the quasi-contractual theory that these prior

indorsers had been unjustly enriched by receiving money paid on a mistaken belief that an endorsement was genuine. *See, e.g., Clearfield Trust Company v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943); *First National Bank v. City National Bank*, 182 Mass. 130, 65 N.E. 24 (1902); W. Britton, *Handbook of the Law of Bills and Notes* § 139 (2d ed. 1961). The Code, by relying on warranty rather than quasi-contract, adopted a minority theory, *see, e.g., Leather Manufacturers' Bank v. Merchants' Bank*, 128 U.S. 26, 9 S.Ct. 3, 32 L.Ed. 342 (1888); *Security Savings Bank v. First National Bank*, 106 F. 2d 542 (6th Cir. 1939); *Corn Exchange Bank v. Nassau Bank*, 91 N.Y. 74 (1883); *Note: Commercial Transaction, supra* at 1080-81, but preserved the general principle that liability for forged indorsements will rest on the party most able to guard against it, the party taking the instrument from the forger himself.[1]

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1. Liability is allocated far differently when the forgery is not on an indorsement but on an actual drawer's signature on the face of the check. There are two factual variations of this situation. In the first, if the drawer's signature is forged but the check is made out to the order of a real person who indorses it, the old rule of *Price v. Neal*, 3 Burr. 1354, 97 Eng. Rep. 871 (K.B. 1762) posits liability on the drawee bank. *Accord, Woodward v. Savings & Trust Company*, 178 N.C. 184, 100 S.E. 304 (1919); *Yarborough v. Banking, Loan & Trust Company*, 142 N.C. 377, 55 S.E. 296 (1906). The Uniform Commercial Code follows the rule in *Price v. Neal*. In Article Three, G.S. 25-3-418 provides:

> Except for recovery of bank payments as provided in the article on bank deposits and collections (article 4) and except for liability for breach of warranty on presentment under the preceding section [§ 25-3-417], payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

The commentary to this section explains:

> The section follows the rule of *Price v. Neal*, 3 Burr. 1354 (1762), under which a drawee who accepts or pays an instrument on which the signature of the drawer is forged is bound on his acceptance and cannot recover back his payment. Although the original Act is silent as to payment, the common law rule has been applied to it by all but a very few jurisdictions. The traditional justification for the result is that the drawee is in a superior position to detect a forgery because he has the maker's signature and is expected to know and compare it; a less fictional rationalization is that it is highly desirable to end the transaction on an instrument when it is paid rather than reopen and upset a series of commercial transactions at a later date when the forgery is discovered. . . .

The terms of Article Four buttress this provision. A drawee bank cannot debit its drawer customer's account for an improperly paid item, G.S. 25-4-401, of which payments of a forged check is presumably one species. And because title warranties under G.S. 25-4-207 apply only to indorsements, not signatures, White & Summers, *supra* at 510; Clarke et al, *supra* at 130, the drawee bank is left without recourse against any collecting banks which negotiated the forged check prior to presenting it to the drawee bank.

In the second factual variation of a forged signature on a check, the check is made out to a "fictitious payee," that is a person who does not exist or one whom the check signer does not intend to benefit, and such fictitious payee or anyone else indorses and negotiates the check. Liability under these circumstances rests on the drawer himself, presumably under the notion that he, rather than a depository bank, is most able to guard against making a check out to a fictitious payee. G.S. 25-3-405. *See also Perini Corporation v. First National Bank*, 553 F. 2d 398 (5th Cir. 1977); *Franklin National Bank v. Shapiro*, 7 UCC Rep. Serv. 317 (N.Y. Sup. Ct. Nassau Cty, 1970); *Modern Homes Construction Company v. Tryon Bank & Trust Company*, 266 N.C. 648, 655, 147 S.E. 2d 37 and 386, 43 (1966) (decided under Negotiable Instrument Law).

In neither of these factual variations will the initial depository bank in a chain of check negotiation be liable for losses due to forged *signatures* on the face of the check, as opposed to forged indorsements on the back of the check.

Allegation of breach of this warranty before an indorsement is proven forged, however, presents a rather different question. In the case *sub judice*, plaintiff argues that the mere allegation of forgery is enough to breach the warranty of good title, rendering any collecting bank liable on its indorsement. Plaintiff relies on an analogy to property law and asserts that a warranty of good title under the Code means a warranty of marketability or non-clouded title, as that term is understood in land transactions.

Although we agree that determination of what "good title" means under G.S. 25-4-207 is essential to deciding whether to impose liability on a collecting bank at summary judgment, we think the analogy to property law is entirely inappropriate.

The Code is silent as to what "good title" means under G.S. 25-4-207. The weight of authority, however, supports a specialized construction limiting good title to the apparent validity of the chain of indorsements.

The official commentary to G.S. 25-4-207 explains: "[T]he warranties and engagements to honor in this section are identical in substance with those provided in the Article on Commercial Paper (Article 3). . . . For a more complete explanation of the purposes of these warranties and engagements see the Comments to Sections 3-414 and 3-417."

The official commentary to G.S. 25-3-417 further provides: "[The warranty section] retains the generally accepted rule that the party who accepts or pays does not 'admit' the genuineness of indorsements, and may recover from the person presenting the instrument when they turn out to be forged."

Thus under the explanation provided by the Code framers, a warranty of "good title" means only that a collecting bank is warranting that it is presenting a check whose indorsements appear to be genuine. If in fact such indorsement is not genuine, then the collecting bank is not admitting strict liability for its breach of warranty, but can in turn sue the previous collecting bank. Courts have generally supported this construction. *See, e.g., Bagby v. Merrill, Lynch, Pierce, Fenner & Smith, Incorporated*, 491 F. 2d 192, 199 (8th Cir. 1974); *Federal Insurance Company v. Groveland State Bank*, 37 N.Y. 2d 252, 260, 333 N.E. 2d 334, 338, 372 N.Y.S. 2d 18, 24 (1975); *Insurance Company of North America v. Atlas*

Supply Company, 121 Ga. App. 1, 172 S.E. 2d 632 (1970); *First Pennsylvania Banking & Trust Company v. Montgomery County Bank & Trust Company*, 29 Pa. D. & C. 2d 596 (Comm. Pl. 1962); *Aetna Life and Casualty Company v. Hampton State Bank*, 497 S.W. 2d 80, 84-85 (Tex. Civ. App. 1973); Whaley, Forged Indorsements and the U.C.C.'s "Holder," 6 Ind. L. Rev. 45, 59-61 (1972).

The purpose of such a specialized construction of "good title" under the banking article of the Code has been stated to be "to speed up the collection and transfer of checks and to take the burden off each bank to meticulously check the indorsements of each item transferred." *Federal Deposit Insurance Corporation v. Marine National Bank*, 303 F. Supp. 401, 403 (M.D. Fla. 1969), *aff'd*, 431 F. 2d 341 (1970); *Sun 'N Sand, Incorporated v. United California Bank*, 21 Cal. 3d 671, 685, 582 P. 2d. 920, 930, 148 Cal. Rptr. 329, 339 (1978); Clarke et al, *supra* at 130.

A construction of good title consistent with the notion of marketable title in property law is therefore inherently inappositive to the Code's provision for the needs of a flexible banking enterprise. The only case brought to our attention which held that good title under Article Four of the Code meant marketable title as found in property law, and a case relied upon by plaintiff NCNB here, *American National Bank of Powell v. Foodbasket*, *supra*, was vacated by the same court that originally decided it several months after first consideration. *See American Bank of Powell v. Foodbasket*, 497 P. 2d 546 (Wyo. 1972).

The inadvisability of such a construction can be seen in the facts here. If an unproven allegation of a forged indorsement on a check is enough to make a collecting bank liable on its warranty of good title, it is entirely possible that the depository bank, the initial bank in a chain of collection, will be left liable for paying a check when in fact no forgery has occurred. For example, in this case, if we were to allow summary judgment for plaintiff NCNB based on a theory of breach of a good title warranty, defendant Federal Reserve Bank of Richmond would in turn sue the next collecting bank which had negotiated the check and so on down the line. At the end of the collection chain, the last lawsuit would presumably involve actual factual adjudication of the alleged forgery since a proven genuine indorsement would be an absolute

defense to any depository bank sued for breach of warranty under a theory of "marketable" good title. At that point, either the depository bank or the next collecting bank up the chain will have paid out the amount of the check in a summary judgment on a previous lawsuit when in fact it could not recover from either the indorsers on the check or the depository bank since the indorsement was not in fact forged. While in usual circumstances, such a bank might be able to simply renegotiate the check back to the drawee over a now-proven genuine indorsement, we are not certain such would occur here. Any attempt to renegotiate this check back to its original drawee, plaintiff NCNB, would be met with NCNB's resistance, given the stormy history of this loan agreement. It is entirely possible the depository bank would be left entangled in a needless web of lawsuits to get its money back when in fact it did nothing negligent or untoward and the real dispute is between plaintiff NCNB and its original debtor Hammond. Indeed, under both the Uniform Commercial Code and prior common law, proof of loss caused by the forged indorsement is important to indemnification, First Pennsylvania Bank, *supra*; Note: Commercial Transactions, *supra* at 1083, and cases cited therein. Here, because there has been no determination of actual default on the underlying debt, as well as no adjudication of the forgery, it may well be that plaintiff NCNB has not suffered a loss but can still recover against the original defendant, M. T., "Bill," Hammond. In such a case, it would be inappropriate to grant summary judgment for NCNB when the facts of its injury remain unresolved.

Furthermore, we believe that to permit a chain of lawsuits back to the original depository bank posited on an unproven allegation of forgery would be a grave misuse of judicial time and resources.[2]

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2. We note in passing that the majority of other jurisdictions would allow NCNB as drawer of the check here to sue the depository bank directly and avoid the domino row of lawsuits down a collection chain. *See* Note: *Drawer v. Collecting Bank for Payment of Checks on Forged Indorsements*—Direct Suit Under the Uniform Commercial Code, 45 Temple L.Q. 102 (1971); Annot., 99 A.L.R. 2d 637 (1965).

We further note that where, unlike here, the drawer and drawee are not the same entity, the better practice for a collecting bank sued by a drawee may be to implead the original depository bank under North Carolina Rules of Civil Procedure, Rule 14(a). Furthermore, Comment 2 to G.S. 25-4-207 provides in part: "Further, the warranties and engagements run with the item with the result that a collecting bank may sue a remote prior collecting bank or a remote customer and thus avoid multiplicity of suits. Presumably, plaintiff NCNB did not take advantage of this because it was a payor, not a collecting, bank, *see*, G.S. 25-4-105(d).

[1] We therefore hold that unproven and contested allegations of forged indorsement are insufficient as a matter of law to breach a warranty of good title under G.S. 25-4-207.

II. Agent's Authority to Indorse a Check

[2] Defendant Robbins in his affidavit alleged that defendant Hammond gave him an oral "power of attorney" to indorse the loan proceeds check. In affirming summary judgment for plaintiff NCNB, the Court of Appeals held that this oral authority was insufficient as a matter of law to create an agency to indorse a check, citing G.S. 47-115.1 and *O'Grady v. First Union National Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978).

A power of attorney is an instrument in writing granting power in an agent to transact business for his principal out of court. *Howard v. Boyce*, 266 N.C. 572, 146 S.E. 2d 828 (1966); 3 Am. Jur. 2d, Agency § 23 and cases cited therein. G.S. 47-115.1 codifies a particular subset of powers of attorney—those powers of attorney which may be continued in effect in the event of incapacity or mental incompetence of the principal—but does not change the requirement that written authority is necessary for a power of attorney. *Id.* at -115.1(b). *O'Grady v. Bank*, *supra*, involved a case where an agent, operating under a written power of attorney which limited his authority to contract for the purchase of land to one county in North Carolina, signed a note financing the purchase of land in two additional locations. Plaintiffs in that suit were the agent's principals who were attempting to avoid liability on the signed instruments in a lawsuit against the defendant bank. In stating that a defendant bank could not avail itself of the agent's apparent authority because it knew of the written power of attorney, this Court emphasized that *if* a written document granting a power of attorney existed, then all parties would be held to the terms of that document if they had constructive notice of it. *O'Grady* said nothing about the need for written authority to sign a check for a principal as a matter of agency law.

Thus, we do not think the terms of G.S. 47-115.1 or our holding in *O'Grady v. Bank*, *supra*, are appositive to the facts here. Although defendant Robbins termed himself holder of a "power of attorney," we believe construing the facts in a light most favorable to defendant Bank, that Robbins was in reality an

agent of defendant Hammond. With Hammond, Robbins was involved in negotiations for the loan. In Hammond's absence he delivered the signed note to the bank, took possession of the loan proceeds check, delivered the check to Hammond and generally was heavily involved in financial negotiations for Hammond and their common business interest, Energon. We should not let his mistake of fact in calling himself a holder of a "power of attorney" govern our deliberations when his version of the facts indicates he was acting as Hammond's general agent.

Nor is the fact his agency was not under a written grant of authority determinative of the question here. G.S. 25-3-403(1) provides that in the case of drafts (bank checks) and notes, "A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. *No particular form of appointment is necessary to establish such authority.*" (Emphasis added.)

The official commentary to this section further provides:

> The power to sign for another may be an express authority, or it may be implied in law or in fact, or it may rest merely upon apparent authority. It may be established as in other cases of representation, and when relevant parol evidence is admissible to prove or to deny it.

This proposition has long been recognized in North Carolina law. In *Midgette v. Basnight*, 173 N.C. 18, 91 S.E. 2d 353 (1917), defendant drawer of a check argued that his motion for nonsuit was improperly denied where plaintiff sued him to recover money it had paid out on an indorsed check to one whose apparent authority entitled him to indorse the check as agent for the plaintiff. The Court reasoned that indorsement on a check may be made by an agent duly authorized and that agency can be an inference from the facts presented. *Cf.* Modern Homes Construction, *supra* (discussing general agency principles in contested indorsement cases); *Nationwide Homes of Raleigh v. First-Citizens Bank & Trust Company*, 262 N.C. 79, 136 S.E. 2d 202 (1964) (discussing agency law in conjunction with drawing, not indorsing a check, but warning that a bank must ascertain the extent of the agent's authority).

The same principles apply here. If Robbins indorsed the check as real or implied agent of the defendant Hammond, then the indorsement is valid and no forgery is involved. Furthermore, under the terms of the Code, if the indorsement was initially without authority but if defendant Hammond subsequently ratified the indorsement or accepted some benefit from the money paid for the check, he could not use forgery as a defense to plaintiff NCNB's suit against him. *See* G.S. 25-3-404(2); *McKaughan v. Trust Company*, 182 N.C. 543, 109 S.E. 355 (1921) (decided under pre-Code law). Such determinations, however, involve questions of fact better left to the judgment of a jury. We therefore conclude that summary judgment was improperly granted in this case. The question whether Robbins had authority to indorse the check in question is obviously a genuine issue as to a material fact. The decision of the Court of Appeals, affirming such summary judgment is reversed, and the matter is remanded to the Court of Appeals with directions to remand this action to the Superior Court of Iredell County for further proceedings consistent with this opinion.

Reversed and remanded.

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

MARY ALICE PRESNELL v. JOE A. PELL, JR.; CLINTON W. MOSELEY; GROVER W. HANES, JR.; JAMES R. MARION; CLAUDE V. AYERS; FRED A. HOLDER; BILLY SMITH; DOYLE KEY; TALMAGE CROUSE; JAMES S. NIXON; INDIVIDUALS AND SURRY COUNTY BOARD OF EDUCATION; DENNIS SMITHERMAN, INDIVIDUALLY AND AS PRINCIPAL OF MOUNTAIN PARK ELEMENTARY SCHOOL; AND CHARLES C. GRAHAM, INDIVIDUALLY AND AS THE SUPERINTENDENT OF SURRY COUNTY SCHOOL SYSTEM

No. 38

(Filed 4 December 1979)

1. Libel and Slander §§ 5.2, 9.1— allegations of slander per se—no qualified privilege

Plaintiff's complaint stated a claim for slander *per se* against defendant school principal where it alleged that defendant falsely accused plaintiff, a school cafeteria manager, of distributing alcoholic beverages on the school

premises, and that notwithstanding plaintiff's vigorous denial of these accusations and the rumors upon which they were based, defendant then maliciously and recklessly published the rumors to plaintiff's fellow employees. Furthermore, the complaint did not show that defendant's actions were qualifiedly privileged where it failed to reveal any facts which disclosed any duty on plaintiff's fellow employees who received the defamatory communication to inquire into and communicate about plaintiff's rumored conduct, and where allegations that defendant's actions were malicious and in bad faith served to negate the good faith element of qualified privilege.

2. **Libel and Slander § 13.2; Schools § 11— slander by school principal—no liability by superintendent and school board**

Where allegations of defamation related solely to the conduct of defendant school principal, the complaint was insufficient to impute liability to defendant school superintendent or to individual members of the county school board. Nor was the complaint sufficient to join defendant school board on the defamation claim under the doctrine of *respondeat superior* where there was no allegation that the school board had waived its immunity by procuring an applicable policy of liability insurance.

3. **Administrative Law § 2— exhaustion of administrative remedies**

As a general rule, when the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts, especially where the statute establishes a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose.

4. **Schools § 13.2— actions by school employees—administrative procedures—appeal to superior court**

Under G.S. 115-34, a party entitled to its provisions must first challenge action taken by school personnel by way of an appeal to the appropriate county or city board of education, and after a decision by the board "affecting one's character or right to teach," a party may then invoke the appellate jurisdiction of the superior court.

5. **Schools § 13.2— discharge of school employee—failure to exhaust administrative remedies—no jurisdiction in superior court**

The superior court had no jurisdiction to entertain plaintiff's claim for wrongful discharge from her employment as a school cafeteria manager where the alleged action of school personnel affected plaintiff's character, plaintiff was therefore entitled to invoke the hearing and appellate procedures provided by G.S. 115-34, and no appeal from the decision of the district school committee to terminate plaintiff's employment was taken to the county board of education.

6. **Constitutional Law § 23.4; Schools § 13.2— dismissal of school cafeteria manager—no proprietary interest affected**

The mere dismissal of plaintiff from her employment as a school cafeteria manager without a pre-termination hearing did not abridge a proprietary interest encompassed within the Due Process Clause of the Fourteenth Amendment.

7. Constitutional Law § 23.4; Schools § 13.2— defamation related to dismissal of school employee—liberty interest—due process—right to hearing—procedures of G.S. 115-34

By alleging acts of defamation concurrent with and related to the termination of her employment as a school cafeteria manager, plaintiff's complaint sketched a colorable claim that a constitutionally protected "liberty" interest—the freedeom to seek further employment—may be at stake and may have stated a claim of right to an opportunity to be heard in a meaningful time, place and manner. However, due process is satisfied under these circumstances by providing plaintiff an opportunity to clear her name in a hearing of record *either* before her discharge *or* within a reasonable time thereafter, and the hearing and appeal procedures of G.S. 115-34 provided plaintiff a constitutionally effective set of administrative and judicial remedies.

APPEAL by plaintiff from dismissal of her complaint pursuant to G.S. 1A-1, Rule 12(b), by *Judge Kivett* at the 10 February 1978 Session of SURRY Superior Court. The dismissal was reversed by the Court of Appeals, opinion by *Judge Mitchell,* 39 N.C. App. 538, 251 S.E. 2d 692 (1979). Petition for discretionary review allowed pursuant to G.S. 7A-31 on 1 May 1979.

Franklin Smith, Attorney for plaintiff-appellee.

Faw, Folger, Sharpe and White by Frederick G. Johnson, Attorneys for defendant-appellants.

Tharrington, Smith, and Hargrove, by George T. Rogister, Jr., and Carlyn G. Poole, Attorneys for North Carolina School Boards Association, Inc., amicus curiae.

EXUM, Justice.

This is an action for slander and wrongful discharge from employment. The questions presented are whether (1) the complaint states a claim for relief for defamation and (2) the claim for wrongful discharge was properly dismissed for want of original jurisdiction. We answer both in the affirmative.

Plaintiff alleges by her complaint: Before her discharge on 13 December 1976 she was employed by defendant Surry County Board of Education as manager of the cafeteria at Mountain Park Elementary School. She had held this position for some fourteen years. During the first part of December, 1976, defendant Dennis Smitherman, principal of the elementary school, "falsely and with reckless disregard of the consequences" accused plaintiff of hav-

ing brought "liquor" onto the school premises and distributing it to painters then employed in the school cafeteria. Plaintiff denied the accusations and requested a confrontation with Smitherman's sources of information. Smitherman refused to identify his sources. Sometime before 13 December, Smitherman and defendant Charles Graham, Superintendent of the Surry County School System, called a meeting of the district school committee to discuss plaintiff's purported misconduct. Plaintiff was given no notice of this meeting. It was decided at the meeting to terminate plaintiff's employment. Plaintiff was dismissed by Smitherman on 13 December 1976. On or about the same date, Smitherman, "in bad faith, with malice, and with reckless disregard to the consequences" allegedly published the rumors regarding plaintiff to plaintiff's fellow employees. At no time prior to her discharge was plaintiff afforded a hearing.

Plaintiff filed this action on 22 March 1977 against defendants in their individual and official capacities seeking injunctive relief and damages for defamation and wrongful discharge. Instead of filing a responsive pleading to the complaint, defendants moved to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6) for failure of the complaint to state a claim upon which relief could be granted, and pursuant to G.S. 1A-1, Rule 12(b)(1) for lack of jurisdiction over the subject matter. The Superior Court, Judge Kivett presiding, granted both motions, holding: (1) the complaint failed to state a claim for defamation and (2) the court lacked subject matter jurisdiction over the claim for wrongful discharge in that the complaint revealed that plaintiff failed to comply with the provisions of G.S. 115-34.[1]

The Court of Appeals reversed. In an opinion by Judge Mitchell, that court held that plaintiff's complaint sufficiently set forth a claim for defamation. We agree that the complaint states a claim for defamation against Smitherman and accordingly remand

1. This statute provides:

"*Appeals to board of education and to superior court.*—An appeal shall lie from the decision of all school personnel to the appropriate county or city board of education. In all such appeals it shall be the duty of the board of education to see that a proper notice is given to all parties concerned and that a record of the hearing is properly entered in the records of the board conducting the hearing.

The board of education may designate hearing panels composed of not less than two members of the board to hear and act upon such appeals in the name and on behalf of the board of education.

An appeal shall lie from the decision of a county or city board of education to the superior court of the State in any action of a county or city board of education affecting one's character or right to teach."

the cause for further proceedings against Smitherman only. The Court of Appeals further held that plaintiff need not have followed the appeal procedures set out in G.S. 115-34 inasmuch as plaintiff was constitutionally entitled to notice and hearing *prior to* termination of her employment. We disagree. We hold that under the facts alleged by her complaint plaintiff has no constitutional right to an administrative hearing *prior to* discharge and that the procedures provided in G.S. 115-34 accord plaintiff due process.

A complaint is deemed sufficient to withstand a motion to dismiss under Rule 12(b)(6) where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). A claim for relief should not suffer dismissal unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). Guided by these rules, we proceed to examine plaintiff's allegations underlying her claim for defamation.

[1] The complaint alleges in substance: Smitherman falsely accused plaintiff of distributing alcoholic beverages on the school premises. Notwithstanding plaintiff's vigorous denial of these accusations and of the rumors upon which they were based, Smitherman then maliciously and recklessly published the rumors to plaintiff's fellow employees.

Taking these allegations to be true for the limited purpose of testing the adequacy of the complaint, we find that the plaintiff has stated a claim for slander *per se*. The rumors and accusations imputed reprehensible conduct to plaintiff and tended to prejudice her standing among her fellow workers, stain her character as an employee of the public school system, and damage her chances of securing other public employment in the future. Smitherman's alleged publication of the rumors was thus actionable *per se*. *Badame v. Lampke*, 242 N.C. 755, 89 S.E. 2d 466 (1955).

Defendants respond however that the principal's communication with plaintiff's fellow employees, if slanderous at all, was qualifiedly privileged. This contention fails in at least two respects.

The defense of qualified or conditional privilege arises in circumstances where (1) a communication is made in *good faith*, (2) the subject and scope of the communication is one in which the party uttering it has a valid interest to uphold, or in reference to which he has a legal right or duty, and (3) *the communication is made to a person or persons having a corresponding interest, right, or duty. Stewart v. Check Corp.*, 279 N.C. 278, 182 S.E. 2d 410 (1971); *see also Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979); *Hartsfield v. Hines*, 200 N.C. 356, 157 S.E. 16 (1931). If we assume arguendo that it may be inferred from the face of plaintiff's complaint that Smitherman had a duty as principal of the elementary school to inquire into and communicate about plaintiff's rumored misconduct, the complaint yet fails to reveal any facts which disclose a corresponding duty on the part of plaintiff's fellow employees, the alleged recipients of the defamatory communication. The complaint itself thus falls short of describing an occasion of qualified privilege. *See Stewart v. Check Corp., supra.* If the privilege applies at all in this case, the facts upon which it may be predicated must be specifically pleaded by way of affirmative defense in defendant's answer. *Stewart v. Check Corp., supra*; *R. H. Bouligny, Inc. v. United Steelworkers of America*, 270 N.C. 160, 154 S.E. 2d 344 (1967).

More importantly, the complaint in the instant case specifically alleges that the actions of the principal were taken maliciously and in bad faith. Such an allegation at the pleading stage serves to negate the good faith element of qualified privilege. A communication made under circumstances which otherwise support a finding of conditional or qualified privilege is nevertheless actionable upon a showing of express or actual malice. *Ramsey v. Cheek*, 109 N.C. 270, 13 S.E. 775 (1891). Plaintiff's complaint therefore states a claim against Smitherman for slander.

[2] The complaint does not suffice, however, to impute liability for defamation to defendants other than Smitherman. The allegations of defamation relate solely to the conduct of Smitherman. No affirmative action or personal involvement in the alleged defamatory publication is charged to any of the other named defendants. Neither Superintendent Graham, the individual members of the county school board, nor the district school committee may be held individually accountable for actions taken by Smitherman alone. Nor is the complaint effective to join the cor-

porate school board, the immediate employer of Smitherman, as a party defendant on the defamation claim. Unless and until a school administrative unit has waived its immunity by procuring an applicable policy of liability insurance, it may not be held responsible under *respondeat superior* for the intentional torts of its employees. G.S. 115-53; *Clary v. Board of Education*, 285 N.C. 188, 203 S.E. 2d 820 (1974). There being no allegations in the complaint of such a waiver via insurance procurement, the complaint fails to state a claim for defamation against the school board. *Fields v. Board of Education*, 251 N.C. 699, 111 S.E. 2d 910 (1960).

Plaintiff's complaint also encompasses claims for actual and punitive damages for wrongful discharge. This aspect of the complaint was dismissed in superior court pursuant to G.S. 1A-1, Rule 12(b)(1), for lack of jurisdiction over the subject matter. Judge Kivett noted in his order of dismissal that plaintiff had failed to comply with the appellate procedures of G.S. 115-34. That statute provides for a two step appeal process by which a party may first appeal "from the decision of all school personnel to the appropriate county or city board of education" and then from the resulting decision of the appropriate board "to the superior court . . . in any action . . . *affecting one's character* or right to teach." (Emphasis supplied.) Defendants contend this statute deprives the superior court of original jurisdiction over plaintiff's challenge to what is essentially an administrative decision by school personnel. Therefore the claim for wrongful discharge was properly dismissed under Rule 12(b)(1). We agree.

[3] As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts. *King v. Baldwin*, 276 N.C. 316, 172 S.E. 2d 12 (1970); *Church v. Board of Education*, 31 N.C. App. 641, 230 S.E. 2d 769 (1976), *cert. denied*, 292 N.C. 264, 233 S.E. 2d 391 (1977). This is especially true where a statute establishes, as here, a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose. In such a case, the legislature has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the

courts be available to review the sufficiency of its process. An earlier intercession may be both wasteful and unwarranted. "To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies." *Elmore v. Lanier*, 270 N.C. 674, 678, 155 S.E. 2d 114, 116 (1967); *see also McKart v. United States*, 395 U.S. 185, 193-95 (1969).

[4] The avoidance of untimely intervention in the administrative process is a long recognized policy of judicial restraint. This policy acquires the status of a jurisdictional prerequisite when the legislature has explicitly provided the means by which a party may seek effective judicial review of particular administrative action. Thus, "[w]hen a statute under which an administrative board has acted provides an orderly procedure for an appeal to the superior court for review of the board's action, this procedure is the exclusive means for obtaining such judicial review." *Snow v. Board of Architecture*, 273 N.C. 559, 570-71, 160 S.E. 2d 719, 727 (1968); *compare*, however, *Lloyd v. Babb*, 296 N.C. 416, 251 S.E. 2d 843 (1979) (original jurisdiction of superior court upheld in absence of effective administrative remedy). We read G.S. 115-34 to require that a party entitled to its provisions must first challenge action taken by school personnel by way of an appeal to the appropriate county or city board of education. After a decision by the board "affecting one's character or right to teach," a party may *then* invoke the appellate jurisdiction of the superior court.

The action of school personnel as alleged in this case affected plaintiff's character as we have already shown. Plaintiff therefore was entitled to invoke not only the hearing but also the appellate procedures provided by G.S. 115-34. Furthermore in this instance, as will be shown, G.S. 115-34 provides an effective administrative remedy followed by effective judicial review.

[5] Since plaintiff's complaint affirmatively discloses that no appeal from the decision of the district school committee to terminate her employment was taken to the Surry County Board of Education, Judge Kivett was correct in concluding that he had no jurisdiction to entertain the claim for wrongful discharge.[2]

2. As an "appeal . . . from the decision of . . . school personnel," the claim for wrongful discharge is not cognizable in the superior court prior to its adjudication by the County Board of Education. Should the County

The Court of Appeals nevertheless decided that G.S. 115-34 failed to afford plaintiff an "effective" administrative remedy in that the statute gave authority only for a hearing *after* plaintiff had been discharged, whereas plaintiff had a constitutional due process right to a hearing *prior* to discharge. Since the procedures mandated by G.S. 115-34 were therefore not constitutionally "effective" in this case, concluded the Court of Appeals, the plaintiff need not have followed the statutory avenues for relief. This analysis is incorrect.

The proscription of the Fourteenth Amendment that no state shall "deprive any person of life, liberty, or property, without due process of law" applies in the instant case only to the degree that plaintiff's complaint reveals a colorable claim that a "property" or "liberty" interest was violated by the procedures attendant to plaintiff's discharge. The due process sufficiency of the procedures employed must be evaluated in light of the parties, the subject matter, and the circumstances involved. *Grimes v. Nottoway County School*, 462 F. 2d 650, 653 (4th Cir. 1972), *cert. denied*, 409 U.S. 1008.

[6] Plaintiff's complaint alleges that plaintiff was employed for eighteen years "by contract in accordance with the customs and usages of the public schools of the State of North Carolina, to continue from year to year." These allegations are insufficient to show a Fourteenth Amendment "property" right or vested interest in plaintiff's continued employment. Such an interest can arise from or be created by statute, ordinance, or express or implied contract, the scope of which must be determined with reference to state law. *Bishop v. Wood*, 426 U.S. 341 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972). Nothing else appearing, an employment contract in North Carolina is terminable at the

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Board refuse to entertain the appeal, however, the superior court would have jurisdiction to issue a writ of mandamus compelling the Board to pass upon plaintiff's claim. Although the complaint *sub judice* does pray for an "injunction" to require defendants to provide plaintiff a "proper hearing" pursuant to G.S. 115-34, it fails to allege that defendants have refused such a hearing or even that plaintiff has ever requested one. Since the extraordinary remedy of mandamus will not be granted absent allegation and proof that defendants have refused to perform a personal duty which plaintiff has a clear legal right to have them perform, the complaint fails to state a claim for the relief of the writ. *See Sutton v. Figgatt*, 280 N.C. 89, 185 S.E. 2d 97 (1971).

We note further that the brief submitted to us by defendant appellants pursuant to App. Rule 14(d) asserts for the first time that plaintiff was in fact given a hearing before the Surry County Board of Education on 22 March 1977. The written findings of the Board resulting from this hearing purportedly upheld plaintiff's dismissal. The record of that hearing is not before us for review nor was it before the Court of Appeals. Our decision today is limited to the determination of whether there was error in the decision of the Court of Appeals. App. Rule 16. If plaintiff wishes to challenge the result of her post-termination hearing, her proper course is to appeal to the superior court for judicial review of the school board's decision. G.S. 115-34.

will of either party. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971). The fact that plaintiff was employed by a political subdivision of the state does not itself entitle her to tenure, nor does the mere longevity of her prior service. *Nantz v. Employment Security Commission*, 290 N.C. 473, 226 S.E. 2d 340 (1976). We conclude that the mere dismissal of plaintiff without a pre-termination hearing did not abridge a proprietary interest of constitutional magnitude.

[7] Plaintiff's complaint does however sketch a colorable claim that a constitutionally protected "liberty" interest may be at stake. One of the liberty interests encompassed in the Due Process Clause of the Fourteenth Amendment is the right "to engage in any of the common occupations of life," unfettered by unreasonable restrictions imposed by actions of the state or its agencies. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Truax v. Raich*, 239 U.S. 33 (1915). The right of a citizen to live and work where he will is offended when a state agency unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities. *Board of Regents v. Roth, supra.* Thus, where a state agency publicly and falsely accuses a discharged employee of dishonesty, immorality, or job related misconduct, considerations of due process demand that the employee be afforded a hearing in order to have an opportunity to refute the accusation and remove the stigma upon his reputation. *Codd v. Velger*, 429 U.S. 624 (1977); *Cox v. Northern Virginia Transportation Comm'n*, 551 F. 2d 555 (4th Cir. 1976).

By alleging acts of defamation concurrent with and related to the termination of her employment, plaintiff's complaint does no more than state a claim of right to an *opportunity* to be heard in a meaningful time, place, and manner. The liberty interest here implicated—the freedom to seek further employment—was offended not by her dismissal alone, but rather by her dismissal based upon alleged unsupported charges which, left unrefuted, might wrongfully injure her future placement possibilities. Due process is satisfied under these circumstances by providing plaintiff an opportunity to clear her name in a hearing of record *either* before her discharge *or* within a reasonable time thereafter. Since the purpose of such a hearing is to provide plaintiff a chance to remove the blemish on her reputation, *see Board of Regents v. Roth, supra*, 408 U.S. at 573, n. 12, it is clear that "a hearing af-

forded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." *Arnett v. Kennedy*, 416 U.S. 134, 157 (1974).

Measured in this light, the hearing and appeal procedures contemplated by G.S. 115-34 provided plaintiff a constitutionally "effective" set of administrative and judicial remedies. Her failure to invoke these remedies appearing on the face of the complaint left her claim for wrongful discharge vulnerable to dismissal under Rule 12(b)(1). The trial court did not err in granting defendants' motion to dismiss on this ground.

For the reasons stated, the Court of Appeals' decision that plaintiff's claim for wrongful discharge should not have been dismissed is reversed. The Court of Appeals' holding that the complaint states a claim for defamation is affirmed only with respect to the claim against defendant Smitherman. The case is remanded to the Court of Appeals for remand to the superior court for further proceedings against defendant Smitherman only.

Reversed in part.

Affirmed in part and remanded.

STATE OF NORTH CAROLINA v. THOMAS LEE DUNLAP

No. 63

(Filed 4 December 1979)

1. **Criminal Law § 66.20— identification of defendant—findings on voir dire—summarization of all facts unnecessary**

There was no merit to defendant's contention that he was denied a fair hearing on his motion to suppress identification testimony because the trial judge in his findings of fact failed to mention the publicity surrounding defendant's arrest, since the trial court conducted a lengthy voir dire and thereafter entered extensive findings of fact and concluded that each of the three witnesses had ample and sufficient opportunity to see, observe and know defendant as a customer of the finance company which employed them prior to the time of the robbery; their in-court identification was based on their independent knowledge of defendant and was not tainted by subsequent events; the photographic lineup procedures used in identifying defendant were not impermissibly suggestive; and the trial court was not required to summarize every single fact presented at voir dire.

2. **Criminal Law § 66.9— photographic identification—no suggestiveness**

In a prosecution of defendant for the armed robbery of finance company employees, the fact that each of three identifying witnesses, prior to selecting defendant's picture from a photographic lineup, had either heard defendant's name on the radio or read it in the newspaper as being a suspect in the case and the fact that defendant was a former customer at the finance company did not render the photographic identification procedures impermissibly suggestive, since the witnesses had ample opportunity to view defendant for at least ten minutes at the time of the crime; they could describe his appearance in great detail; each of the witnesses' prior descriptions of defendant was accurate and conformed both to the real evidence confiscated and to each other's testimony; each demonstrated certainty in identifying defendant's photograph and person; and the length of time between the crime and the confrontation was brief, being a matter of three days between the crime and the photographic lineup and three months from crime to trial.

3. **Criminal Law § 66.9— photographic identification—no suggestiveness**

There was no merit to defendant's contention that out-of-court identification procedures were unduly suggestive because the witnesses were told a suspect was in the photographic lineup prior to their viewing it.

4. **Criminal Law § 66.1— no pretrial identification procedures—identification at trial proper**

In a prosecution of defendant for armed robbery of finance company employees, the trial court did not err in allowing a customer who had witnessed the robbery to identify defendant at trial as the perpetrator without having earlier been tested by a photographic or physical lineup.

5. **Constitutional Law §§ 28, 79; Criminal Law § 138.2— armed robbery—life sentence without parole—no denial of equal protection—no cruel and unusual punishment**

Where defendant was convicted of two counts of assault with a firearm upon a law enforcement officer and one count of robbery with a firearm, second offense, the sentence of life imprisonment without benefit of parole was not a denial of equal protection and did not constitute cruel and unusual punishment, since (1) the punishment statute involved did not prescribe different punishment for the same acts committed under the same circumstances by persons in like situations and thus did not deny defendant equal protection of the laws, and (2) the punishment imposed was that prescribed by G.S. 14-87, and a sentence within the maximum authorized by law is not cruel and unusual punishment.

6. **Criminal Law § 134.1— sentence without parole—remand for clarification of sentence**

Where the jury clearly found defendant guilty of armed robbery, second offense, and G.S. 14-87(b) provides that one so convicted shall be sentenced without benefit of parole, but the judgment and commitment order made no mention of sentence without parole and did not specify the subsection under which defendant was sentenced, the case is remanded for a clarification of the sentence.

DEFENDANT appeals from judgment of *Kirby, Judge*, entered at the 22 January 1979 Schedule "A" Session of Superior Court, MECKLENBURG County.

Defendant was indicted and convicted of two counts of assault with a firearm on a law enforcement officer and one count of armed robbery, second offense. The charges were consolidated for judgment and defendant was sentenced to imprisonment for the term of his natural life.

Evidence for the State tended to show that at approximately 1:30 p.m. on 27 October 1978, a black male entered the offices of C & S Finance Services Company in Charlotte wearing a navy blue toboggan, sunglasses, a light-colored smock over a dark sweater and blue and white checked polyester pants. The man stated that he wished to apply for a loan and was told to wait until the office manager, Reid W. Carter, could speak with him. When Carter was able to talk, some ten minutes later, the robber went into Carter's office, pulled a handgun and herded Carter and another employee, Don Bowen, out of their cubicles into the outer office where the cashier, Mary Ann Le Carpentier, was sitting. When Ms. Le Carpentier saw the robber pull his gun, she hit a silent alarm button under her desk. Lester Horton, a customer of C & S who had been sitting in Bowen's office, was told to remain where he was by the gunman. He did so and observed subsequent events from this inner office.

At gunpoint, Carter gave the robber approximately $300.00 out of the office cash drawer. When the robber threatened to kill Ms. Le Carpentier, Carter and Bowen gave him money from their billfolds. Le Carpentier, Carter, Bowen and Horton all identified defendant as the robber. Le Carpentier, Carter and Bowen remembered him as a previous customer of C & S Finance.

At 1:40 p.m., Officer J. D. Ensminger received a call on his car radio that a robbery was in progress at C & S Finance. He proceeded in that direction, parked his car in front of the business, got out and approached the front door. He saw a black male standing inside the office with his back to the officer and his arms forward. The man spun around to his left, came "centerways into the door," brought his snub-nose revolver down, and pointed it at the officer. Shouting "Freeze," he fired one shot from about a three foot distance at Ensminger. Ensminger turned

and ran along the side of the office building while the gunman fired a second shot at him. Ensminger then circled the building and saw a black male wearing a white top, blue toboggan and sunglasses run across the street. As the officer followed this man, he saw another policeman, K. D. Helms, drive up in a patrol car. Officer Ensminger went on, rounded another building on foot, and saw a bluish-gray Camaro angle parked behind that building. A man wearing a blue sweat suit with red stripes and a toboggan was about 40 feet away from the car. Next to the car, standing at the left rear, was a man with a snub-nose revolver in his hand. Ensminger saw this man squat down behind the quarter panel of the Camaro and aim in the direction of Officer Helms who had just driven around in the patrol car. Ensminger cocked his revolver and aimed at the back of the gunman's head but apparently did not shoot. The gunman got into the driver's door of the automobile and Ensminger dodged behind a car approximately two spaces north. The gunman fired his weapon at Officer Helms. As Officer Helms returned the fire, Ensminger, unobserved by the gunman, moved against the wall of a building some 18 feet away and fired three times at the suspect. The person in the Camaro looked over at him and they, too, exchanged shots. Ensminger was wounded in the exchange. Officer Helms then fired a shotgun at the car and the suspect's body slumped over the steering column and rolled out onto the pavement. After waiting two or three minutes, the officers went up to the person who had fallen from the car and found him to be the defendant, Thomas Lee Dunlap.

A .38 caliber revolver with five spent rounds, a pair of blue and white checked pants, a ski mask and a jacket with $327.00 in the pocket were recovered from the car. Testimony indicated that the defendant had once been employed at the Radisson Plaza Hotel as a cook. The smock-type jacket and trousers used in the robbery and found inside the Camaro were the same uniform items worn by cooks at the Radisson when defendant worked there.

A certified copy of defendant's prior conviction of armed robbery in Richmond County was also entered into evidence.

The defendant testified that he did not rob the C & S Finance Company, but that he had been napping in his car when

another man ran up and threw the clothes and other things into his car. He admitted he had been convicted of armed robbery in Richmond County.

Attorney General Rufus L. Edmisten by Assistant Attorney General Amos C. Dawson III for the State.

Tom Dickinson, Assistant Public Defender, for the defendant.

CARLTON, Justice.

On appeal, defendant presents four assignments of error: (1) The trial court erred in denying defendant's motions to suppress the out-of-court and in-court identifications of the defendant by Le Carpentier, Carter and Bowen, (2) the trial court erred in denying defendant's motion to suppress the in-court identification of the defendant by the witness Horton, (3) the sentence of life imprisonment without benefit of parole constitutes a denial of defendant's rights to equal protection of the law, (4) and constitutes cruel and unusual punishment. We reject the defendant's contentions and affirm the trial court.

I.

Defendant attacks both the substance and the procedure in the trial court's ruling the witnesses' identification of him admissible. Defendant first contends that pretrial publicity tainted identification procedures, raising the strong likelihood of misidentification by the witnesses Le Carpentier, Carter, and Bowen. All three recognized the robber as someone they had seen before in the C & S office; all three heard or read defendant's name in news reports as the man arrested for the crime and all three recognized the name as being one of their customers. Each subsequently identified a photograph of defendant as being the robber. In addition, prior to her identification of defendant's picture in a photographic lineup, Le Carpentier pulled defendant's customer file at C & S. The file did not contain a photograph. Defendant argues that because they recognized his name as that of a customer, these witnesses were predisposed to pick defendant out of a photographic lineup as the robber.

[1] Defendant additionally contends he was denied a fair hearing on his suppression motion because the trial judge in his findings of fact failed to mention the publicity surrounding defendant's ar-

rest. Defendant argues this means the trial court failed to make findings of fact sufficient to support his ruling the identification evidence was admissible.

We first expressly reject defendant's argument that he was denied a fair hearing on the suppression motions. The record before us discloses that the trial court conducted a lengthy *voir dire* hearing and thereafter entered extensive findings of fact and concluded that first, each of the three witnesses had ample and sufficient opportunity to see, observe and know the defendant as a customer of C & S prior to the time of the robbery; second, that their in-court identification was based on their independent knowledge of the defendant and was not tainted by subsequent events; and further that the photographic lineup procedures used in identifying the defendant were not impermissibly suggestive.

The fact that these findings and conclusions did not mention publicity surrounding defendant's arrest is not, as the defendant contends, reversible error.

> When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts.

State v. Covington, 290 N.C. 313, 322, 226 S.E. 2d 629, 637 (1976); *State v. Tuggle*, 284 N.C. 515, 520, 201 S.E. 2d 884, 887 (1974); *State v. McVay* and *State v. Simmons*, 277 N.C. 410, 417, 177 S.E. 2d 874, 878 (1970).

This does not mean that the findings of fact must summarize *all* the evidence presented at *voir dire*. Indeed, if there is no conflicting testimony about the facts alleged, it is permissible for the judge to admit identification evidence without making specific findings of fact at all, although it is the better practice for him to make them. *State v. Covington, supra* at 325, 226 S.E. 2d at 638. *See also*, *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971) (admissibility of a confession); *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968) (same). In light of such a rule, we see no reason why

a trial judge should be compelled to summarize every single fact presented at *voir dire*. It is enough that the findings and conclusions are supported by substantial and uncontradicted evidence as they are here. In such a case, the findings are binding on us on appeal. *State v. Tuggle, supra.*

Defendant's other contention under this assignment of error is that the identification testimony of witnesses Le Carpentier, Carter and Bowen was inadmissible because as a matter of law it was elicited under conditions violating his due process rights. Defendant relies on the principle established by the United States Supreme Court in *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968). There, the standard to be applied in determining the admissibility of an in-court identification which is preceded by a pretrial photographic identification was stated to be whether the pretrial procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 384, 88 S.Ct. at 971, 19 L.Ed. 2d at 1253. *See also Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967); *State v. Long*, 293 N.C. 286, 237 S.E. 2d 728 (1977); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3202, 49 L.Ed. 2d 1205 (1976). The rule is equally applicable to all pretrial identification procedures. *State v. Cobb*, 295 N.C. 1, 8, 243 S.E. 2d 759, 764 (1978).

[2] Defendant essentially asserts there were two instances of prejudicially suggestive behavior on the part of police in the pretrial identification process. First, he argues that each of these three witnesses, prior to selecting defendant's picture from a photographic lineup, had either heard defendant's name on the radio or read it in the newspaper as being a suspect in the case. Because defendant had been a customer at C & S in the past and because each of the three witnesses had seen him on previous occasions, he argues that each of the witnesses "[was] primed to pick out the man who had made previous visits to the office and had his account flagged." Brief for Defendant at 9.

The analysis used in determining admissibility of identification testimony where the defendant protests was articulated in *State v. Legette*, 292 N.C. 44, 231 S.E. 2d 896 (1977). There, following the holding of the United States Supreme Court in *Neil v.*

Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972), we stated,

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

State v. Legette, supra at 51, 231 S.E. 2d at 900-01. *Accord, State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975); *State v. Henderson, supra.*

This five-factor analysis applied to the facts in this record reveals: (1) These witnesses had ample opportunity to view the defendant for at least ten minutes in clear and unobstructed circumstances, (2) their testimony indicates that even though they may have been very concerned about the gun the robber brandished, each of them also demonstrated attentiveness to his physical characteristics and could describe him, even to the kind of beard growth he had on his face, (3) each of the witnesses' prior descriptions of the defendant was accurate and conformed both to the real evidence confiscated and to each other's testimony, (4) each of the witnesses demonstrated certainty at all times in identifying the defendant's photograph and person, and (5) the length of time between the crime and the confrontation was brief, being a matter of some three days between the crime and the photographic lineup and three months from crime to trial.

Furthermore, neither news media accounts nor defendant's file at C & S contained photographs. The publicity merely allowed the witnesses to recall defendant's name, not his physical identity. There is simply nothing to suggest that the pretrial photographic identification procedures were so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

[3] Defendant's second contention under this point is that out-of-court identification procedures were unduly suggestive because the witnesses were told a suspect was in the photographic lineup prior to their viewing it. We do not agree. It is inconceivable that

any witness called to view a lineup, photographic or in person, would not assume that the police have a suspect in the group. "A mere confirmation of this assumption does nothing to indicate to the witness which of the participants the suspect is. Standing alone, it does not taint the legality of the lineup." *State v. Davis*, 297 N.C. 566, 571-72, 256 S.E. 2d 184, 187 (1979). Defendant's motion to suppress the identification testimony of these three witnesses was properly denied and their identification evidence properly admitted.

II.

[4] Defendant next contends that the trial court erred in denying his motion to suppress the identification testimony of Lester Horton, a customer of C & S at the time of the robbery. This witness testified that he looked at some photographs the same day as the robbery but picked out no one, that he had not talked to any police officer since that day, and that the first time he had seen defendant since the day of the robbery was in court at the time of trial. Defendant argues that since this witness had never been tested by a photographic or physical lineup prior to the *voir dire* hearing, his in-court identification of defendant was the result of defendant's being shown to a person *singly* for purposes of identification. This violates the principle stated in *Stovall v. Denno, supra,* that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." 388 U.S. at 302, 87 S.Ct. at 1972, 18 L.Ed. 2d at 1206. *See also U.S. v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967).

Defendant's contention here was expressly rejected by this Court in *State v. Tyson*, 278 N.C. 491, 180 S.E. 2d 1 (1971). There, witnesses had seen neither defendant prior to trial except at the preliminary hearing some weeks before. At the preliminary hearing, both recognized one of the defendants as he entered the courtroom with a deputy sheriff and took his seat alone in the prisoner's box. In rejecting defendant's argument in *Tyson* that this was impermissibly suggestive, this Court stated,

> To accept [defendant's contention] as a correct application of the Fourteenth Amendment to the United States Constitution would, of course, make it impossible for the victim or any other eye witness to a crime to testify that he recognizes

> the defendant as its perpetrator, without first having, for each witness, some sort of line-up procedure to test his recollection of the perpetrator's appearance. This is not required.

Id. at 496, 180 S.E. 2d at 4.

Defendant concedes that this case is indistinguishable from *Tyson, supra.* He requests, however, that we overrule *Tyson.* This we refuse to do. It would be patently absurd for us to hold in effect that witnesses come to court predetermined to identify whoever sits at defense table as the perpetrator of a crime which they witnessed. Such a position overlooks, as stated in *Tyson,* "the obvious truth that when the victim of a crime comes to court to testify, his motivation is his desire to bring the actual wrongdoer to justice, which purpose would be defeated by his identification of someone else as the perpetrator of the crime." 278 N.C. at 496, 180 S.E. 2d at 4.

The trial court held a lengthy *voir dire* on this question and made extensive findings of fact and conclusions of law supported by adequate and uncontradicted evidence which are binding upon us on appeal. *State v. Tuggle, supra.*

This assignment of error is overruled.

III.

[5] We now turn to defendant's final two contentions that his sentence of imprisonment for life without benefit of parole is a denial of equal protection and constitutes cruel and unusual punishment. The record discloses that defendant's convictions of two counts of assault with a firearm upon a law enforcement officer and one count of robbery with a firearm, second offense, were consolidated for judgment and defendant was sentenced to the State's prison for the term of his natural life. While the judgment and commitment made no reference to parole eligibility, they did indicate that defendant was convicted of a violation of G.S. 14-87 and G.S. 14-34.2. G.S. 14-87(a) provides that any person convicted of robbery with a firearm "shall be punished by imprisonment for not less than seven years nor more than life imprisonment in the State's prison." Subsection (b) of this statute[1]

1. We note that G.S. 14-87 has been repealed and replaced effective 1 July 1980. 1979 Session Laws c. 760, s. 5; 1979 Adv. Legis. Serv., Pamphlet 7 at 138.

provides that any person who has been previously convicted of robbery with a firearm or other dangerous weapon, either in this State or in any other state or the District of Columbia, "upon conviction for a second or subsequent violation of G.S. 14-87(a), shall be guilty of a felony and shall be punished without benefit of parole, probation, suspended sentence, or any other judicial or administrative procedure except such time as may be allowed as a result of good behavior. . . ." Defendant contends that we should declare subsection (b) unconstitutional as a denial of equal protection and as constituting cruel and unusual punishment in violation of the eighth amendment.

No such constitutional violations are present here. This Court has previously upheld the constitutionality of G.S. 14-87. In *State v. Legette, supra,* and *State v. Jenkins,* 292 N.C. 179, 232 S.E. 2d 648 (1977), defendants, as here, attacked G.S. 14-87(b) as being cruel and unusual punishment in violation of the eighth amendment. We held that where a sentence is within the maximum authorized by law, the sentence is not cruel and unusual punishment. *See also State v. Cameron,* 284 N.C. 165, 200 S.E. 2d 186 (1973), *cert. denied,* 418 U.S. 905, 94 S.Ct. 3195, 41 L.Ed. 2d 1153 (1974); *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296, *cert. denied,* 409 U.S. 1047, 93 S.Ct. 537, 34 L.Ed. 2d 499 (1972); *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34 (1967). In *State v. Jenkins, supra,* defendant further attacked his sentence as being a denial of equal protection. We held, under the circumstances of that case, that punishment imposed under G.S. 14-87 was not a violation of equal protection.

Defendant would undoubtedly contend that the cited cases did not deal expressly with his argument concerning the denial of parole eligibility when sentence imposed was life. We dispose of that contention on cruel and unusual punishment grounds by simply noting that it is the punishment fixed by the applicable statute and that the punishment is not disproportionate to the offense for which defendant was convicted. *See, e.g., State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970). As to the contention that punishment without parole eligibility denies defendant equal protection of the laws, the rule is well established that "equal protection of the laws is not denied by a statute prescribing the punishment to be inflicted on a person convicted of a crime unless it prescribes different punishment for the same acts committed

under the same circumstances by persons in like situations." *State v. Benton, supra* at 659-60, 174 S.E. 2d 793, 805 (1970), and authority cited therein. G.S. 14-87(b) denies parole eligibility for *all* those convicted of a second or subsequent violation of G.S. 14-87(a). It is the province of the General Assembly, not ours, to prescribe this special punishment for this validly selected class of crimes. This assignment of error is overruled.

[6] We do note from the record, however, that the judgment and commitment order makes no mention of sentence without parole. Indeed, it does not specify the subsection under which defendant was sentenced, even though the jury clearly found defendant guilty of armed robbery, *second offense*, and G.S. 14-87(b) provides that one so convicted *shall* be sentenced without benefit of parole. In light of this we cannot be certain that the trial court was aware of the denial of parole eligibility in G.S. 14-87(b), and so may have imposed a longer sentence than it intended. In other words, we are uncertain that the trial court intended to impose a life sentence without benefit of parole. We therefore remand to the Superior Court of Mecklenburg County. That court is directed to bring defendant before Judge Kirby for clarification of defendant's sentence.

We finally note that while we have discussed each of defendant's assignments of error due to the seriousness of his sentence, and have addressed the merits of each, defendant has failed to comply with the requirements of Rule 28(b)(3) of the North Carolina Rules of Appellate Procedure by failing to set forth after each question presented a reference to the assignments of error and exceptions pertinent to the question. We remind the Bar that the Rules of Appellate Procedure are mandatory and that an appeal may be dismissed for failure to comply with them. *See State v. Benton, supra.*

In the trial below, we find

No error in guilt determination.

Remanded for clarification of sentence.

STATE OF NORTH CAROLINA v. JOHN C. FERDINANDO

No. 75

(Filed 4 December 1979)

1. **Criminal Law § 91— speedy trial under Interstate Agreement on Detainers— request for trial before detainer filed**

Defendant was not denied his right to a speedy trial under the Interstate Agreement on Detainers, G.S. 15A-761, Art. III(a), because he was not brought to trial within 180 days of his first request for a speedy trial where defendant first requested a speedy trial while he was in custody in New York awaiting trial in that state but before a detainer had been filed against him, and the period from the date a detainer was filed against defendant after his conviction in New York and his trial was less than 180 days.

2. **Criminal Law § 89.3— corroboration—prior consistent statements**

Prior consistent statements of a witness to police officers were properly admitted for the purpose of corroborating the witness's trial testimony.

3. **Homicide § 21.5— premeditation and deliberation—sufficiency of evidence**

There was sufficient evidence of premeditation and deliberation to support defendant's conviction of first degree murder where the State's evidence tended to show that defendant choked the deceased, pushed her out of a car, and ran over her several times with the car.

4. **Criminal Law § 86.5— cross-examination of defendant—misconduct after crime in question**

A defendant who took the stand could be cross-examined about specific acts of misconduct which occurred prior to the trial but subsequent to the commission of the crime in question.

5. **Homicide § 30— first degree murder trial—choking and running over victim—failure to instruct on second degree murder and manslaughter**

In this prosecution for first degree murder, the trial court did not err in failing to instruct the jury that defendant could be guilty of no more than second degree murder or manslaughter if he first choked the victim without malice or without premeditation or deliberation or in the heat of passion and then, believing the victim to be dead, ran over her body, where defendant's evidence tended to show that he was not present when the victim was killed, the State's evidence tended to show that defendant told a witness that he did not know whether the victim was alive or dead when he stopped choking her and proceeded to run over her, and there was thus no evidence tending to show that defendant believed the victim to be already dead when he allegedly ran over her.

APPEAL by defendant from *Small, J.*, 5 February 1979 Session of NEW HANOVER Superior Court.

Defendant was charged in an indictment proper in form with the first degree murder of Barbara Jean Davis Grossnickle. Defendant entered a plea of not guilty.

The State's evidence at trial tended to show the following:

On the evening of 3 March 1978, the deceased, Barbara Jean Davis Grossnickle, her brother, Jimmy Davis, and Patricia Baker were at a tavern in Wilmington, North Carolina. Defendant approached the group and talked with them until the bar closed at 1:30 a.m. Ms. Grossnickle left with defendant in his automobile en route to Ms. Baker's trailer. They did not get out when they arrived at the trailer, but instead drove off together.

On the following day, Ms. Grossnickle's partially clothed body was discovered near the sixth green of Echo Farms Country Club. There was expert testimony, based upon an autopsy, that the deceased had been run over by a car several times and that she was alive at the time she was run over.

At about 8:00 a.m. on 4 March 1978, Mr. Glenn Sneedon, proprietor of Sneedon's Trading Post, observed defendant just outside the store washing the right front portion of his automobile. When defendant entered the store, Mr. Sneedon noticed reddish-brown stains on defendant's clothing and inquired about them. Defendant made no reply but left the store and came back in about ten minutes wearing different clothes. Defendant then told Mr. Sneedon he had hit a girl, but that he did not remember what had happened. Defendant's soiled clothes were later found in trash barrels at Mr. Sneedon's store. The stains proved to be bloodstains which matched the blood type of deceased.

On 6 March 1978, defendant called a friend, Ms. Betty Gerow, and told her he had "messed up this time." He stated that he had driven with a girl to a golf course where he had fallen asleep. When he woke up, his keys, money, gun, and knife were gone. Defendant told Ms. Gerow that the girl started to fight with him and he began to choke her. According to defendant's statement to Ms. Gerow, he then panicked, pushed the girl out of the car, and ran over her with the car. He stated that he did not know whether she was alive or dead when he ran over her.

Defendant's automobile was found abandoned in Charlotte. Human hairs on the underside of the car matched characteristics of deceased's hair.

Defendant testified at trial that he did not harm Ms. Grossnickle. He stated that he left her with her brother at the golf course and that when he returned later, she was dead.

The jury returned a verdict of guilty of first degree murder. Upon the sentencing phase, the jury found as a mitigating circumstance that the crime was committed while the defendant was under the influence of mental or emotional disturbance. The jury recommended life imprisonment and judgment was entered accordingly. Defendant appealed.

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

Elton G. Tucker for defendant appellant.

BRANCH, Chief Justice.

[1] Defendant first assigns as error the denial of his motion to dismiss the indictment for failure of the State to grant a speedy trial. Defendant does not allege a violation of his constitutional right to a speedy trial but instead contends that under the Interstate Agreement on Detainers, G.S. 15A-761, Article III(a), he was entitled to be brought to trial within 180 days of his first request for a speedy trial.

The record discloses that defendant first requested a speedy trial on 15 March 1978, eleven days following the death of Barbara Grossnickle. He continuously made similar requests during the months following this initial request. At the time of his first request, defendant was in custody in the State of New York on three charges of attempted murder. On 20 March 1978, defendant was indicted by a grand jury in New Hanover County, and on 3 April 1978, the North Carolina Governor's Office mailed a Requisition for the defendant to the New York Governor's Office. New York authorities responded that the defendant would be tried there prior to being released to North Carolina. On 8 September 1978, North Carolina officials were notified that defendant had been convicted and sentenced to a term of imprisonment in New York. At that time, the New Hanover County District Attorney's

Office requested custody of defendant pursuant to the Interstate Agreement on Detainers. Defendant was returned to North Carolina. He moved to dismiss the indictment for failure of the State to grant a speedy trial. That motion was denied in an order dated 1 December 1978. Defendant was brought to trial on 5 February 1979.

The pertinent language of the Interstate Agreement on Detainers reads as follows:

> (a) Whenever a person *has entered upon a term of imprisonment* in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint *on the basis of which a detainer has been lodged against the prisoner*, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint . . . . [Emphasis added.]

The Agreement permits officials in one state to lodge a detainer and obtain custody of a person in another state only when that person "has entered upon a term of imprisonment in a penal or correctional institution of a party state." Further, the right of a prisoner to request a final disposition under the statute arises only after "a detainer has been lodged against the prisoner." In the instant case, New York officials notified New Hanover officials on 8 September 1978 that defendant had been convicted and sentenced to a term of imprisonment in New York. At that time, officials here were informed that they could proceed under the Agreement to lodge a detainer. On 14 September 1978, North Carolina authorities mailed their request for custody of defendant, and on 21 September 1978, New York authorities acknowledged receipt of that request. Defendant's requests for a speedy trial made prior to the time the detainer was lodged were ineffectual. Even assuming that the detainer was "lodged" in this case upon the mailing of the request for custody on 14 September 1978, and that defendant made a request on that same day, the period from that date until defendant was brought to trial on 5

February 1979 was less than 180 days. We, therefore, hold that defendant's rights under the Interstate Agreement on Detainers were not violated.

[2] Defendant next assigns as error the admission of prior consistent statements of a witness for purposes of corroboration. The State introduced, for purposes of corroborating Ms. Gerow's testimony, a statement which she had made to police officers concerning her telephone conversation with defendant on 6 March 1978. Although defendant did not request such an instruction, the trial judge correctly charged that this evidence was admitted solely for the purpose of corroborating the testimony of the witness, Ms. Gerow.

It is well settled in this state that prior consistent statements of a witness are admissible for purposes of corroboration. 1 Stansbury's N.C. Evidence (Brandis Rev. 1973), secs. 50-52 and cases cited therein. This assignment is overruled.

[3] Defendant assigns as error the trial court's denial of his motions for judgment as of nonsuit and for a directed verdict on the charge of first degree murder. In support of this assignment of error, defendant argues that there was insufficient substantial evidence to support a jury finding of premeditation and deliberation.

Murder in the first degree is an unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Brown*, 249 N.C. 271, 106 S.E. 2d 232 (1958). An unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time. *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, *cert. denied*, 368 U.S. 851, 7 L.Ed. 2d 49, 82 S.Ct. 85 (1961). Generally, it is not possible to show premeditation and deliberation by direct evidence, but such elements must be established by proof of circumstances from which they may be inferred. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). In the instant case, the State presented evidence tending to show that defendant choked the deceased, pushed her out of the car, and ran over her several times. The requisite premeditation and deliberation could be inferred from the brutal nature of the assault, the use of grossly excessive force, or the "dealing of lethal blows after the

deceased had been felled." *State v. Buchanan, supra*; *State v. Duboise, supra.* We hold that there was plenary evidence to support a jury finding that defendant killed Ms. Grossnickle with premeditation and deliberation.

[4] Defendant next contends that the trial court erred in permitting cross-examination of defendant regarding specific acts of misconduct. Defendant was questioned on cross-examination about specific acts of misconduct which occurred in New York prior to his trial in this case, but subsequent to the commission of the crime involved here. Defendant concedes that by taking the stand, he was subject to cross-examination regarding his prior acts of misconduct. Defendant argues, without citation of authority, that the acts must have occurred *prior* to the commission of the crime for which he is on trial, and that it was, therefore, impermissible to inquire about subsequent acts.

We have consistently held that a defendant who takes the stand to testify may be asked about prior acts of misconduct for purposes of impeachment and that "*[a]ny* act of the witness which tends to impeach his character may be inquired about or proven by cross-examination." *State v. Simms*, 213 N.C. 590, 197 S.E. 176 (1938) (emphasis added). Where the veracity of a witness is in question, the relevant inquiry concerns his credibility at the time of testifying, and *any acts prior to trial* which tend to shed light on his credibility as a witness are properly admissible for purposes of impeachment. Stansbury, *supra*, sec. 116. We find no merit in defendant's fourth assignment of error.

[5] Finally, defendant contends that the trial court erred in failing to instruct the jury that, if the defendant first choked the victim without malice or without premeditation or deliberation or in the heat of passion and then, believing the victim to be dead, ran over the body, the defendant could be guilty of no more than manslaughter or second degree murder.

It is the duty of the trial court in instructing the jury to "declare and explain the law arising on the evidence." G.S. 15A-1232; *State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977). It is error for the court to instruct upon a set of hypothetical facts not presented by the evidence. *State v. Hopper, supra.*

In the present case, defendant's evidence tended to show that he was not present when the deceased was killed. Defendant

maintained that he neither choked nor ran over the deceased. The State's evidence consisted in large part of the testimony of Ms. Gerow concerning a telephone conversation with defendant on 6 March 1978. According to her statement, defendant told her that he *did not know* whether Ms. Grossnickle was alive or dead when he stopped choking her and proceeded to run over her. There is no evidence in the case tending to show that defendant believed Ms. Grossnickle to be already dead when he allegedly ran over her. Thus, we hold that the instruction tendered by defendant was not warranted since there was no evidence to support it.

The trial court in this case correctly and adequately charged the jury on the law as it applied to the facts of this case.

Defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. ROGER LAWRENCE WETMORE

No. 46

(Filed 4 December 1979)

1. **Criminal Law § 5— insanity—burden of proof on defendant**

The burden of proving insanity is properly placed on the defendant in a criminal trial.

2. **Homicide § 23— instructions—no prejudice to defendant**

In a prosecution of defendant for the murder of his father, defendant was not prejudiced by the trial court's use of the disjunctive "or" instead of the conjunctive "and" in connecting the elements of intent to kill and premeditation while instructing on first degree murder since the jury convicted defendant only of second degree murder; and defendant was not entitled to instructions on voluntary manslaughter or self-defense, and any error in those instructions given by the court therefore could not have been prejudicial to defendant.

DEFENDANT appeals from *Judge Hal Walker* at the 27 November 1978 Session of RANDOLPH Superior Court. Placed on trial for the first degree murder of his father, Edwin Hall Wetmore, defendant was convicted by a jury of second degree murder

and sentenced to life imprisonment.[1] He appeals pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by William Woodward Webb, Assistant Attorney General, for the State.

Robert M. Davis, Attorney for defendant appellant.

EXUM, Justice.

The principal questions presented on this appeal are whether Judge Walker erred in placing the burden upon the defendant of proving insanity to the satisfaction of the jury and whether there was error in the instructions on voluntary manslaughter. Defendant also assigns as error various other portions of Judge Walker's jury instructions. On the insanity question we find no error in the instructions. On the other points we conclude that any error committed could not have prejudiced defendant in light of the evidence adduced and the verdict rendered.

The state's evidence tends to show that on the evening of 8 February 1974 after his parents had retired to their bedroom, defendant entered the bedroom and brutally stabbed his father to death with a hunting knife. He then dragged the body outside where he loaded it on a pickup truck. After placing his father's body in the truck, defendant, believing his father was not yet dead, attempted to decapitate the body with an ax. With his mother following in a car, defendant then drove the truck to Kelsey Park, a vacant area near the Veterans Administration Hospital in Salisbury. The body was left in the pickup truck at Kelsey Park in order to make it appear that a mental patient had killed defendant's father. Defendant's brother, Jerry Wetmore, accompanied by defendant, located the body on 11 February 1974 and reported the matter to the Salisbury Police Department.

Defendant's evidence as to what happened does not conflict with that of the state. He relies entirely on the defense of insani-

1. This is defendant's second appeal from his second trial. At the July 1974 Session of Rowan Superior Court before Judge Peele, defendant was convicted of murder in the first degree and sentenced to death. A majority of this Court found no error in these proceedings. *State v. Wetmore*, 287 N.C. 344, 215 S.E. 2d 51 (1975). The United States Supreme Court, on defendant's petition for certiorari, vacated the judgment of this Court insofar as it left undisturbed the death penalty and ordered that the case be remanded to this Court "for further proceedings in light of *Mullaney v. Wilbur*, 421 U.S. 684 (1975)." *Wetmore v. North Carolina*, 428 U.S. 905 (1976). This Court on 12 September 1977, having reconsidered the case in light of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Hankerson v. North Carolina*, 432 U.S. 233 (1977), ordered that defendant be awarded a new trial. *State v. Wetmore*, 293 N.C. 262, 248 S.E. 2d 338 (1977). Defendant's present appeal is from the new trial so ordered.

ty. Defendant, himself, testified that he "received orders and directions from Major Richard Ziron to kill my father." He claimed that he did not know whether it was right or wrong to kill his father "because of Warren Ziron" and that "Warren Ziron had control of me and I was not able to know right from wrong at the time this happened." Dr. Richard Felix testified that he was a staff psychiatrist at Central Prison where he had occasion to observe defendant from July 1975 to about June 1977. In his opinion defendant suffered from chronic and severe schizophrenia. Dr. Bob Rollins, Director of Forensic Psychiatry at Dorothea Dix Hospital and Director of Forensic Services, Division of Mental Health Services, North Carolina Department of Human Resources, testified that he had observed and examined defendant on two occasions at Dorothea Dix. In his opinion defendant on 9 February 1974 was unable to know the difference between right and wrong and to know that the killing of his father was wrong.

The state, in rebuttal, offered testimony of defendant's mother, and brother, Jerry. Defendant's mother said that at the time of the killing she did not observe any "abnormal behavior of any sort" on defendant's part and that she believed defendant knew what he was doing and was capable of distinguishing right from wrong. Defendant's brother, Jerry, testified that in his opinion defendant at the time in question "was very capable of knowing right from wrong." He further testified that he asked defendant at Dorothea Dix Hospital, "Are you going to try to beat the rap by playing insane?" The defendant's reply was, "Yes, wouldn't you?"

[1] In his instructions to the jury Judge Walker placed the burden on the defendant of proving insanity to the satisfaction of the jury. Defendant excepts to this instruction and assigns it as error on appeal.

Defendant recognizes that "in this jurisdiction insanity is an affirmative defense which must be proved to the satisfaction of the jury by every accused who pleads it." *State v. Caldwell*, 293 N.C. 336, 237 S.E. 2d 742 (1977), *cert. denied*, 434 U.S. 1075 (1978). Defendant also concedes there is no constitutional due process requirement that the burden of disproving insanity, or proving sanity, be placed on the state under the doctrine of *Mullaney v. Wilbur*, 421 U.S. 684 (1975). This argument was rejected by us in

Caldwell wherein, 293 N.C. at 340, 237 S.E. 2d at 744, we relied on the following language of the United States Supreme Court in *Patterson v. New York*, 432 U.S. 197, 205 (1977):

> "[I]n *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court further announced that under the Maine Law of homicide, the burden could not constitutionally be placed on the defendant of proving by a preponderance of the evidence that the killing had occurred in the heat of passion on sudden provocation. The Chief Justice and Mr. Justice Rehnquist, concurring, expressed their understanding that the *Mullaney* decision did not call into question the ruling in *Leland v. Oregon*, supra, with respect to the proof of insanity.
>
> Subsequently, the Court confirmed that it remained constitutional to burden the defendant with proving his insanity defense when it dismissed, as not raising a substantial federal question, a case to which the appellant specifically challenged the continuing validity of *Leland v. Oregon*. This occurred in *Revera v. Delaware*, 429 U.S. 877 (1976), an appeal from a Delaware conviction which, in reliance on *Leland*, had been affirmed by the Delaware Supreme Court over the claim that the Delaware statute was unconstitutional because it burdened the defendant with proving his affirmative defense of insanity by a preponderance of the evidence. The claim in this Court was that *Leland* had been overruled by *Winship* and *Mullaney*. We dismissed the appeal as not presenting a substantial federal question. Cf. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)."

Defendant here contends that as a matter of sound policy in the prosecution and defense of criminal cases this Court ought to change the rule so that the state must bear the burden of proving defendant's sanity in any case in which the issue is properly presented. We decline to change the rule. Our holding in *Caldwell*, based itself on numerous prior holdings, was reaffirmed in *State v. Connley*, 295 N.C. 327, 245 S.E. 2d 663 (1978), *vacated on other grounds and remanded*, 99 S.Ct. 2046 (1979), and *State v. Leonard*, 296 N.C. 58, 248 S.E. 2d 853 (1978). In *Leonard*, *id.* at 64, 248 S.E. 2d at 856, this Court unanimously stated:

> "We have repeatedly held, and we again reiterate the rule, that the burden of proving insanity is properly placed

on the defendant in a criminal trial. Furthermore, a defendant must establish his insanity to the satisfaction of the jury if it is to provide a defense to a criminal charge."

We continue to adhere to this view. We recognize that reasonable arguments can be made for the rule for which defendant contends as well as against it. Some of these are set out with supporting authorities in the majority and dissenting opinions in *Bradford v. State*, 234 Md. 505, 200 A. 2d 150, 17 A.L.R. 3d 134 (1964). The matter is given full treatment in Annot., "Modern Status of Rules as to Burden and Sufficiency of Proof of Mental Irresponsibility in Criminal Case," 17 A.L.R. 3d 146 (1968), as supplemented to August 1979. This Annotation as supplemented demonstrates that our sister states are about evenly divided on the question with no observable trend in one direction or the other. Policy arguments on the question seem to be fairly balanced and do not in themselves clearly favor one approach over another. Therefore, while we prefer our long standing, common law rule as being much the sounder and do not wish that it be changed at all, any suggestion that it be changed is more appropriately addressed to the Legislature. This assignment of error is overruled.

Defendant also assigns as error several other portions of Judge Walker's jury instructions. His brief on these points is so cryptic and lacking in authority that it is difficult to ascertain precisely what his arguments are. He seems to contend that Judge Walker: (1) improperly defined first degree murder; (2) failed to place the burden of proof on the state as to the elements of first degree murder in one portion of his instructions; (3) confused first and second degree murder so that the jury could have convicted defendant of first degree murder upon finding only the elements of second degree murder; and (4) improperly instructed the jury on voluntary manslaughter so as to confuse this crime with involuntary manslaughter.

On oral argument defendant's counsel conceded that the more he studied Judge Walker's instructions on the contested points, the less persuasive he found his arguments against them to be. So it has been with our own analysis.

[2] We have carefully reviewed the entire charge. When viewed contextually, particularly in the light of the evidence presented

and the real dispute existing in this case, Judge Walker's jury instructions were not prejudicially erroneous. It is true that in listing the elements of first degree murder Judge Walker used the disjunctive "or" instead of the conjunctive "and" in connecting the elements of intent to kill and premeditation. His instructions on what the jury must find in order to convict the defendant of voluntary manslaughter were confusing.[2] We suggest that the instructions on this phase of the case would have been clearer if given as follows:

> "If you do not find the defendant guilty of second degree murder, you must consider whether he is guilty of voluntary manslaughter. As to this, if you find from the evidence beyond a reasonable doubt that on or about 9 February 1974 Roger Wetmore intentionally and without justification or excuse stabbed Edwin Wetmore and thereby proximately caused Edwin Wetmore's death, you would return a verdict of guilty of voluntary manslaughter. Such a finding on your part would mean that the state has failed to prove beyond a reasonable doubt that the defendant acted with malice, that is, not in the heat of passion upon adequate provocation.
>
> You would also return a verdict of guilty of voluntary manslaughter upon finding beyond a reasonable doubt that Roger Wetmore intentionally stabbed his father, Edwin Wetmore, and thereby proximately caused his father's death even if the state has failed to prove beyond a reasonable doubt that Roger Wetmore did not act in self-defense, provided that the state has proved beyond a reasonable doubt that in the exercise of self-defense Roger Wetmore used excessive force or was the aggressor although without murderous intent, in bringing on the affray with his father.

2. He said:

"Then you must determine if he is guilty of voluntary manslaughter. If you find from the evidence beyond a reasonable doubt, that on or about the 9th day of February, 1974, Roger Wetmore intentionally and without justification or without excuse stabbed, or cut, or hacked Edwin Wetmore, thereby proximately causing Edwin Wetmore's death on or about the 9th of February, 1974, but the State has failed to satisfy you beyond a reasonable doubt that he acted with malice, if it has failed beyond a reasonable doubt that Roger Lawrence Wetmore did not act in the heat of passion upon adequate provocation, or if it failed to satisfy you beyond a reasonable doubt that Roger Wetmore did not act in self-defense, but the State has proved beyond a reasonable doubt that Roger Wetmore used excessive force in his self-defense, or if he was the aggressor in bringing on the dispute with his father it would be your duty to return a verdict of guilty of voluntary manslaughter. If you have a reasonable doubt as to one of those things, you would not return a verdict of guilty of voluntary manslaughter, but you would return the fourth verdict of not guilty."

If, however, you do not find beyond a reasonable doubt that Roger Wetmore either intentionally stabbed his father or that such stabbing was a proximate cause of his father's death you would return a verdict of not guilty. Likewise if the state has failed to prove beyond a reasonable doubt that Roger Wetmore did not act in self-defense and has likewise failed to prove beyond a reasonable doubt that he used excessive force or was the aggressor, you would return a verdict of not guilty."

The propriety of this instruction is predicated, of course, on the assumption that all terms of art have been appropriately defined and there is evidence in the case of heat of passion on adequate provocation and self-defense.

Because of his long experience and ability we are satisfied that Judge Walker's instructions as they appear in the record have suffered in transcription.[3] Be that as it may we find no prejudicial error in these instructions.

Defendant's own testimony makes out a classic case of first degree murder if one assumes, of course, that defendant was sane at the time he committed the acts. He testified:

"I laid there for an hour and considered it before I took the knife into my father's bedroom. I was debating whether or not to do it for about an hour. At the time I went in the room with the knife I intended to kill my father. He was buried. I killed him. I knew he should be dead when I stabbed him the seventh time in the heart area and twisted the knife."

And further:

"Before I killed my father I thought all of these things out as to how I was going to dispose of the body. When I knocked on my father's door that night I told him he had a phone call and to get up that he had to go to the hospital. The reason for that was he had his pajamas on and I wanted him to put his work clothes on. After he put his work clothes on I at-

3. On oral argument defendant's counsel in response to a question from the bench on this point conceded that the court reporter for this case was new and inexperienced. Shortly after this trial she moved to another jurisdiction and defendant had considerable difficulty in obtaining the transcript.

> tacked him, stabbed him and chopped his head off. My mother washed the shoes that I had on to get the blood off of them."

While this testimony makes out all the elements of first degree murder, the jury convicted defendant only of second degree murder. Consequently defendant could not have been prejudiced by error, such as there was, on the instructions relating to first degree murder. The jury, in effect, acquitted him of that charge.

Defendant was not entitled to the instructions on voluntary manslaughter. There is no evidence in the case that defendant acted either in the heat of passion on adequate provocation or in self-defense. There is some evidence offered by the state tending to show that defendant and his father fought before the killing took place. This evidence appears from the testimony of defendant at his former trial offered by the state against him here. Even so all of the evidence indicates that defendant was the aggressor in bringing on the fight with his father, if one occurred, and that he intended to kill his father at the time he entered into the affray. We said in *State v. Potter*, 295 N.C. 126, 144, 244 S.E. 2d 397, 409, n. 2 (1978), relying on *State v. Crisp*, 170 N.C. 785, 790, 87 S.E. 511, 513 (1916):

> "If . . . one brings about an affray with the intent to take life or inflict serious bodily harm, he is not entitled even to the doctrine of imperfect self-defense; and if he kills during the affray he is guilty of murder. '[I]f one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy into which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter.' *State v. Crisp* . . . 170 N.C. at 793, 87 S.E. at 515."

That Judge Walker thought he should give the defendant the benefit of instructions on voluntary manslaughter and self-defense is understandable. Such instructions were given at defendant's first trial. We ordered a new trial for defendant because of a

Mullaney error in these very instructions. *See* n. 1, *supra*. Evidence, however, at defendant's first trial was somewhat different from the evidence presented here. As described in this Court's recitation of the facts in the former proceeding, 287 N.C. at 346, 215 S.E. 2d at 52, the state's evidence tended to show that the deceased and his wife went to bed about 9:00 or 9:30 p.m. on 8 February 1974. "About 11:30 p.m. they were awakened by defendant's knocks on their locked bedroom door. When the door was opened, defendant entered and told his father to put on his clothes because they were going to the VA Hospital. Defendant called his father a 'queer' and they began fighting. At first the two men fought with their fists, but defendant procured a scout knife and stabbed his father 'more than once.'" This evidence would have required instructions on at least a killing in the heat of passion if not also on self-defense.

In the instant record the state's evidence comes in differently. The state does not offer in its case in chief the testimony of defendant's mother as it did at the prior trial. In order to establish what happened when defendant entered his father's bedroom, the state here relies on defendant's out-of-court statements to investigators and his testimony at his former trial. According to defendant's out-of-court statement, related here by State Bureau of Investigation Special Agent Jack B. Richardson, defendant "said he went and knocked on the door of his father's bedroom and that his father came to the door; and that he told his father to put on his clothes that they were going somewhere; and that his father put his clothes on; that he, his father, put his clothes on and when he did that, he started hitting his father and his father fell to the floor and he began crying like a baby; he stated, 'I then butchered him up; I used my hunting knife.'" According to defendant's testimony at his prior trial, offered here by the state, the event occurred as follows: "On the night of February 8, 1974 . . . I was at home with my mother and my stepfather. About midnight I got up and knocked on their door. I did not have a knife with me then. My stepfather came to the door. I don't remember what I said. I went to the door for the purpose of killing him."

There is, consequently, no evidence in this record offered either by the state or defendant which entitles defendant to the benefit of instructions on voluntary manslaughter or self-defense.

Any error in these instructions, consequently, could not be prejudicial. *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969).

Defendant's assignments of error relating to these portions of the instructions are, consequently, overruled. In the trial we find

No error.

STATE OF NORTH CAROLINA v. CARLTON DONNELL MONTAGUE

No. 64

(Filed 4 December 1979)

1. **Homicide § 28.1— self-defense—instruction not required**

The trial court in a homicide prosecution properly refused to instruct on self-defense where the evidence tended to show that when four college students, including the two victims, first passed defendant and his two companions, defendant produced a pistol and said, "Well, if they really want to start something, I got something too"; and when the students passed defendant and his companions a second time, defendant willingly left his place of safety on a wall and aggressively entered a fight among the students and his companions without lawful excuse or adequate provocation.

2. **Homicide § 30.3— lesser offense of voluntary manslaughter—instruction not required**

The trial court in a first degree murder prosecution did not err in failing to instruct on the lesser included offense of voluntary manslaughter, since the State's evidence did not permit a reasonable inference that the killings resulted from such provocation as would temporarily dethrone reason and displace malice, and defendant's evidence tended to show that he did not intentionally assault anyone with a deadly weapon and if anyone was fatally injured by the use of his weapon, it was accidental or at most the injury proximately resulted from his culpable negligence; furthermore, there was no merit to defendant's contention that the element of malice was rebutted by his evidence even though it did not fall within the definition of self-defense or heat of passion.

APPEAL by defendant from *Braswell, J.*, 15 January 1979 Criminal Session of WAKE Superior Court.

Defendant was charged in separate bills of indictment with the crime of first-degree murder. In Case No. 78CRS51221, he was

charged with the first-degree murder of Geoffrey Michael McArthur, and in Case No. 78CRS51222, defendant was charged with the first-degree murder of Farley Delano Chesley. Defendant entered a plea of not guilty in each case, and the cases were consolidated for trial.

The State offered evidence tending to show that in the early morning hours of 24 August 1978, four Shaw University students Farley Chesley, Geoffrey McArthur, Derrick Owens and Greg Haley left the University campus and walked down Smithfield Street in route to Vedie's Store which was located on the corner of Smithfield and Bloodworth Streets. They passed three men later identified as Elvin Edward Poole, Joseph Norris and Carlton Donnell Montague, the defendant herein. McArthur asked one of the men if he got the change that he wanted, and one of the other group said that he did not know what he was talking about. After the students proceeded toward the store, Norris hid a pole in the bushes to be used "if they start something." Defendant produced a pistol from an Army backpack and said, "Well, if they really want to start something, I got something, too."

As the Shaw students returned from the store, McArthur and Owens were walking together in front of Chesley and Haley. When they approached the corner, Norris was standing near a wall, and defendant and Poole were seated on the wall. At this point, McArthur said, "Later, brothers," to which Norris responded, "I ain't your g--d--- brother." Chesley then stopped, and after an exchange of words, he removed his coat, handed it to Haley and started to walk toward Norris. At this time, there had been no words or acts directed toward defendant; however, as Chesley moved toward Norris, defendant shouted, "Y'all call your home, boy." He then took the pistol from the backpack and hid it behind his leg. When defendant moved, Chesley took about two steps toward him whereupon defendant ran into the street behind Norris and toward the Shaw students. He then proceeded around Norris to a position in the middle of the street where he fired five shots. One shot fatally injured Farley Chesley, and another shot struck and killed Geoffrey McArthur, who was standing on the sidewalk beyond Chesley. McArthur had never made any move toward defendant. There was evidence that during the course of the evening defendant had drunk "a dollar" shot of liquor and

smoked about seven "joints" of marijuana. The State also offered corroborative evidence consistent with the above-stated facts.

Defendant testified and the essence of his defense is contained in the following portion of his testimony:

> . . . I ran into the street because all of them was coming, they was coming back down the street. I ran into the street because if a fight was going to start I won't going to be right there. They were going to beat us up.
>
> . . . When I started to go into the street, I put the pistol in my back pocket. I put it there to protect myself. If they was all coming back down the street, I just stuck it in my back pocket and I ran out into the street and I was running up the street. And that's when I heard some footsteps running behind me. Some high-heel shoes running behind me. So I turned around. I was scared because I figured all of them was right behind me. I was trying to get all of them from coming back down the street, away from Junior and Little Joe. So when I ran and heard the footsteps, I turned around and I shot the gun into the pavement. I did not shoot at anybody with the shot. I know that bullet hit the pavement, because it made a sping noise. When I shot into the street, I was nervous. It scared me and I was just scared.
>
> I did not at any time point the pistol at any one of the four boys and intentionally try to shoot them. . . . I fired into the street to keep the guys from coming at me.

In addition to his testimony, defendant offered several witnesses who testified to his good character.

Judge Braswell submitted to the jury the possible verdicts of guilty of first degree murder, guilty of second degree murder, guilty of involuntary manslaughter and not guilty. The jury returned a verdict of murder in the second degree in each case. Defendant appealed from judgments imposing a life sentence in each case.

Rufus L. Edmisten, Attorney General, by Thomas J. Ziko, Associate Attorney, for the State.

W. G. Ransdell, Jr., for defendant appellant.

BRANCH, Chief Justice.

[1] Defendant first assigns as error the failure of the trial judge to charge on self-defense.

The court is required to charge on all substantial and essential features of a case which arise upon the evidence, even absent a special request for the instruction. When supported by the evidence, self-defense is a substantial and essential feature of a criminal case. *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974). Therefore, the answer to this assignment of error lies in whether there was sufficient evidence to support an instruction on self-defense. In resolving this question, the facts must be interpreted in the light most favorable to defendant, and when his evidence is sufficient to invoke the doctrine of self-defense, the instruction must be given even though the State's evidence is contradictory. *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973).

"One may kill in self-defense if he is without fault in bringing on the affray, and it is necessary or appears to him to be necessary to kill his adversary to save himself from death or great bodily harm the reasonableness of his apprehension being for the jury to determine from the circumstances as they appeared to him." 6 Strong's N.C. Index 3d, *Homicide*, sec. 9 (1978). Thus, if a person willingly and aggressively without legal provocation or excuse enters into a fight, he cannot invoke the doctrine of self-defense. *State v. Watkins, supra*; *State v. Randolph*, 228 N.C. 228, 45 S.E. 2d 132 (1947).

Here the evidence discloses that when the Shaw students first passed defendant and his companions, defendant produced a pistol and said, "Well, if they really want to start something, I got something too." When the students returned from the store on the way to the Shaw campus, McArthur and Norris exchanged some insulting words and Chesley walked toward Norris. At this point, no one had spoken to or in any way threatened defendant. Even so, from his place of safety on the wall, he shouted, "Y'all call home boy," and thereupon took his pistol from his backpack. After defendant moved to obtain his pistol, Chesley took two or three steps toward defendant. Defendant then ran behind Norris into the street and fired the fatal shots. It appears from the evidence that defendant left a place of safety and aggressively and willingly entered into a fight without lawful excuse or ade-

quate provocation. The trial judge, therefore, correctly refused to instruct on self-defense.

[2] Defendant next assigns as error the failure of the trial judge to submit and instruct on the lesser included offense of voluntary manslaughter.

Voluntary manslaughter is a lesser included offense of murder in the first degree, and when there is evidence to support the lesser included offense, defendant is entitled to have voluntary manslaughter submitted to the jury under proper instructions. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617 (1924).

We need not consider defendant's argument that defendant was entitled to this instruction on the ground that while acting in self-defense, he used excessive force since we have held that his evidence does not support a claim of self-defense. However, defendant strongly argues that voluntary manslaughter should have been submitted to the jury on the theory that defendant fired the fatal shots while under the influence of sudden passion aroused by adequate provocation.

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. Presumptions that a homicide was unlawful and done with malice arise upon proof or admission of an intentional killing with a deadly weapon and also when the defendant intentionally assaults another with a deadly weapon and thereby proximately causes the death of the person assaulted. *State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971); *State v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322 (1955).

> Voluntary manslaughter is the unlawful killing of a human being without malice, express or implied, and without premeditation or deliberation. (Citations omitted.) One who kills a human being while under the influence of passion or in the heat of blood produced by adequate provocation is guilty of manslaughter. (Citations omitted.)

State v. Wynn, 278 N.C. 513, 518, 180 S.E. 2d 135, 139 (1971).

In order for a homicide to be reduced from second-degree murder to voluntary manslaughter on the theory that a defendant

acted under the influence of sudden passion, the heat of passion suddenly aroused by provocation must be of such nature as the law would deem adequate to temporarily dethrone reason and displace malice. *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407 (1974), *modified*, 428 U.S. 903, 49 L.Ed. 2d 1207, 96 S.Ct. 3206 (1976). Mere words however abusive are not sufficient provocation to reduce second-degree murder to manslaughter. Legal provocation must be under circumstances amounting to an assault or threatened assault. *State v. Watson*, 287 N.C. 147, 214 S.E. 2d 85 (1975).

The State's evidence was sufficient to make out a case of second-degree murder. The State's evidence does not permit a reasonable inference that the killings resulted from such provocation as would temporarily dethrone reason and displace malice. Defendant's evidence tended to show that he did not *intentionally* assault anyone with a deadly weapon and if anyone was fatally injured by the use of his weapon, it was accidental or at most the injury proximately resulted from his culpable negligence. Therefore, defendant's evidence, if believed, would support a verdict of not guilty by reason of accident or a verdict of involuntary manslaughter, both of which were properly submitted by the trial judge. His evidence was not consistent with a mitigation of second-degree murder to voluntary manslaughter on the ground that he acted under the influence of heat of passion upon sudden provocation.

Defendant contends that the element of malice was rebutted by his evidence even though it did not fall within the definition of self-defense or heat of passion. In support of his position, defendant relies upon *State v. Childress*, 228 N.C. 208, 45 S.E. 2d 42 (1947), and *State v. Staton*, 227 N.C. 409, 42 S.E. 2d 401 (1947).

In *Staton* defendant was hidden in a corncrib in an attempt to catch an intruder who had been going into his barn. On that night, a person approached the cow stall, and despite defendant's repeated calls of "who is there," the intruder proceeded to undo the rope securing the cow stall. Defendant thinking his own life was in danger fired and killed his own brother-in-law. The Court found error in the trial in that the lesser included offense of manslaughter was not submitted to the jury. In so holding, the Court failed to state whether the lesser included offense to be

submitted was the offense of voluntary manslaughter or involuntary manslaughter. Obviously, the Court concluded that defendant was acting in self-defense and that the jury should have considered the question of whether defendant used excessive force so as to require the submission of voluntary manslaughter as a possible verdict.

In *Childress* defendant, a taxi driver, came home from work and was met at the front door by his wife who had been eating supper with her mother. Defendant and his wife went to their bedroom, and in about four or five minutes, defendant's mother-in-law heard a gun fire and then heard her daughter call for her. Upon entering the bedroom, she observed the defendant and his wife standing erect; defendant was holding his wife's arm with one hand and was pointing a pistol toward her with his other hand. Defendant's wife was fatally wounded by the gunshot wound. Defendant testified that the pistol accidentally discharged when he attempted to throw it on the bed. In ordering a new trial, this Court held that the lesser included offense of manslaughter should have been submitted to the jury. Again, the Court failed to state whether voluntary manslaughter or involuntary manslaughter should have been submitted; however, the evidence would have supported a verdict of not guilty on the theory of accident or a verdict of involuntary manslaughter on the grounds of culpable negligence.

We are unable to find any cases in this jurisdiction in which the presumption of malice arising from the intentional assault of another with a deadly weapon may be rebutted except in cases involving self-defense or heat of passion. Neither *Staton* nor *Childress* controls the factual situation in the case before us for decision.

The defendant received a fair trial free of prejudicial error.

No error.

JOHN C. BROOKS, COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA v. TAYLOR TOBACCO ENTERPRISES, INC., AND GEORGE RONALD TAYLOR

No. 37

(Filed 4 December 1979)

Searches and Seizures § 31— OSHA inspection warrant—objects of inspection—insufficiency of warrant

An administrative inspection warrant which authorized agents of the N. C. Department of Labor to inspect defendants' premises "to determine the presence of violations, if any, of the Occupational Safety and Health Act of North Carolina and regulations promulgated thereunder" was invalid where the warrant failed to indicate "the conditions, objects, activities or circumstances" which the inspection was intended to check or reveal as required by G.S. 15-27.2(d)(3), and there was nothing in the warrant which incorporated by reference that portion of the underlying affidavit which indicated such "conditions, objects, activities or circumstances."

ON petition for discretionary review of the decision of the Court of Appeals, 39 N.C. App. 529, 251 S.E. 2d 656 (1979), affirming judgment in favor of petitioner entered by *Herring, J.*, at the 21 April 1978 Session of BLADEN Superior Court.

Respondent Taylor Tobacco Enterprises, Inc., is a North Carolina corporation and is subject to the Occupational Safety and Health Act of North Carolina ("OSHA"), G.S. §§ 95-126 to -155, and is subject to administrative inspection thereunder pursuant to G.S. § 95-136. On 29 December 1977, respondents refused to submit to a warrantless inspection of their premises by agents of the North Carolina Department of Labor. On 21 March 1978, an administrative inspection warrant was issued and properly served on respondents at the situs of the corporate respondent. Upon service of the search warrant, the individual respondent, while acting in his capacity as an officer of the corporate respondent, stated to the OSHA inspectors present that he would prevent them from inspecting the premises and acted in such a way as to lead the inspectors to reasonably believe that force might be used if they attempted to conduct the inspection purportedly authorized by the warrant.

On its face the warrant indicated that it was based on "probable cause to believe that violations of the Occupational Safety

and Health Act . . . are present at the situs of the property described above." It directed authorized agents of the North Carolina Department of Labor ". . . to inspect the property described in the attached affidavit to determine the presence of violations, if any, of the Occupational Safety and Health Act of North Carolina and regulations promulgated thereunder."

On 24 March 1978 the Department of Labor filed a petition in Bladen Superior Court seeking an order directing respondents to show cause why they should not be held in civil contempt of court for refusing to honor the administrative inspection warrant. Judge Giles M. Clark found probable cause to believe that respondents were in civil contempt of court and directed them to appear for a hearing on 10 April 1978. At that hearing, Judge Herring denied respondent's motions to dismiss, for summary judgment, and for judgment on the pleadings. After hearing evidence in the case, Judge Herring entered judgment holding both respondents to be in civil contempt of court, assessing a $500 fine to each, and ordering them to submit to an administrative inspection within ten days of entry of judgment. Respondents appealed and the Court of Appeals affirmed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Paderick, Warrick, Johnson & Parsons, P.A., by Dale P. Johnson, for defendant-appellants.

BRITT, Justice.

Respondents contend that the Court of Appeals erred in upholding the trial court's denial of their motions to dismiss and for judgment on the pleadings and in affirming the judgment appealed from. This contention is based on respondent's insistence that "the Administrative Inspection Warrant is unconstitutional on its face" in light of Article I, Section 20 of the North Carolina Constitution which prohibits the granting of general warrants; that the provisions of G.S. 15-27.2(c)(1) which permit a magistrate to issue an administrative inspection warrant upon making an independent determination that the target property is "to be searched as part of a legally authorized program of inspection which naturally includes that property" or that there is probable cause justifying an administrative inspection are unconstitutional-

ly void for vagueness; and that the administrative warrant does not comply with the requirements of G.S. 15-27.2(d)(3).

In light of the disposition of this appeal hereinafter set forth, we decline to pass upon the constitutional questions raised. It is an established principle of appellate review that this court will refrain from deciding constitutional questions when there is an alternative ground available upon which the case may properly be decided. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979); *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979); *State v. Crabtree*, 286 N.C. 541, 212 S.E. 2d 103 (1975).

We hold that the administrative inspection warrant is invalid on its face because it fails to comply with the explicit language of the authorizing statute.

G.S. § 15-27.2(d) provides that an administrative inspection warrant

> . . . shall be validly issued only if it meets the following requirements:
>
> (1) It must be signed by the issuing official and must bear the date and hour of its issuance above his signature with a notation that the warrant is valid for only 24 hours following its issuance;
>
> (2) It must describe, either directly or by reference to the affidavit, the property where the search or inspection is to occur and be accurate enough in description so that the executor of the warrant and the owner or possessor of the property can reasonably determine from it what person or property the warrant authorizes an inspection of;
>
> (3) It must indicate the conditions, objects, activities or circumstances which the inspection is intended to check or reveal;
>
> (4) It must be attached to the affidavit required to be made in order to obtain the warrant.

Since the power of the State to conduct searches and seizures is in derogation of the guarantees of the Fourth Amendment to the United States Constitution as well as those of Article

One, Section 20 of the North Carolina Constitution, statutes which authorize or regulate such activities ought to be strictly construed against the state and liberally construed in favor of the defendant. *See Benton v. United States*, 70 F. 2d 24 (4th Cir.), *cert. denied*, 292 U.S. 642, 78 L.Ed. 1494, 54 S.Ct. 778 (1934); *Pass v. State*, 193 So. 2d 119 (Miss. 1966); *Murphy v. State*, 95 Okla. Crim. 333, 245 P. 2d 741 (1952). *See also Sgro v. United States*, 287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 75 L.Ed. 374, 51 S.Ct. 153 (1931). A related principle requires that a search warrant itself must be strictly construed. *United States v. Wright*, 468 F. 2d 1184, 1185 (6th Cir. 1972), *cert. denied*, 412 U.S. 938, 37 L.Ed. 2d 397, 93 S.Ct. 2771 (1973); *Keiningham v. United States*, 109 U.S. App. D.C. 272, 287 F. 2d 126 (1960); *Empire Steel Mfg. Co. v. Marshall*, 437 F. Supp. 873 (D. Mont. 1977); *McCormick v. State*, 388 P. 2d 873 (Okla. Crim. App. 1964). A search warrant must particularly describe the place to be searched, *Steele v. United States*, 267 U.S. 498, 69 L.Ed. 757, 45 S.Ct. 414 (1925), as well as the activities and objects which are the subjects of the proposed search. *See Stanford v. Texas*, 379 U.S. 476, 13 L.Ed. 2d 431, 85 S.Ct. 506 (1965); *Marcus v. Search Warrant of Property*, 367 U.S. 717, 6 L.Ed. 2d 1127, 81 S.Ct. 1708 (1961); *Marron v. United States*, 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74 (1927). The requirements of particularity of descriptions are met when the warrant on its face leaves nothing to the discretion of the officer executing the warrant as to the premises to be searched and the activities or items which are the subjects of the proposed search. *Marron v. United States*, *supra*.

The warrant which is in issue in this case directs agents of the North Carolina Department of Labor ". . . to inspect the property described in the attached affidavit to determine the presence of violations, if any, of the Occupational Safety and Health Act of North Carolina and regulations promulgated thereunder." It is this language which we find to render the warrant invalid on its face. The warrant nowhere indicates "the conditions, objects, activities or circumstances" which the proposed inspection was intended to check or reveal. In this manner, the warrant fails to comport with the requirements of G.S. § 15-27.2 (d)(3).

A properly drawn and executed administrative inspection warrant must advise the owner or possessor of the property proposed to be searched of the scope and objects of the search, beyond which limits the inspector may not go. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 56 L.Ed. 2d 305, 98 S.Ct. 1816 (1978). These are important functions for a warrant to perform, functions which should underlie any determination of the validity of an administrative inspection warrant. *See Camara v. Municipal Court*, 387 U.S. 523, 18 L.Ed. 2d 930, 87 S.Ct. 1727 (1967); *See v. Seattle*, 387 U.S. 541, 18 L.Ed. 2d 943, 87 S.Ct. 1737 (1967). Unless an administrative inspection warrant serves these functions of notice and limitation, it does not meet the requirements of the enabling statute, G.S. § 15-27.2(d)(3). In short, a valid search warrant serves not only to authorize a search of premises but also to afford reasonable notice to the possessor of property of the nature and extent of any search that is to be conducted. The warrant which is in issue in this case failed to give such notice.

It is true that a warrant may properly be construed with reference to the supporting affidavit for the purpose of sustaining the particularity of the description of the premises to be searched and the items which are sought. *United States v. Klein*, 565 F. 2d 183 (1st Cir. 1977); *United States v. Womack*, 166 U.S. App. D.C. 35, 509 F. 2d 368 (1974), *cert. denied*, 422 U.S. 1022, 45 L.Ed. 681, 95 S.Ct. 2644 (1975); *United States v. Lightfoot*, 165 U.S. App. 177, 506 F. 2d 238 (1974); *Moore v. United States*, 149 U.S. App. D.C. 150, 461 F. 2d 1236 (1972). Such incorporation is proper, provided that the affidavit accompanies the warrant, and, in addition, the warrant uses suitable words of reference which will provide notice that the two documents are to be construed together so as to provide the requisite particularity of description. *Huffman v. United States*, 152 U.S. App. D.C. 238, 470 F. 2d 386 (1971), *rev'd on other grounds*, 502 F. 2d 419 (D.C. Cir. 1974); *Moore v. United States, supra.* This rule of incorporation must be carefully applied in that there is a fundamental distinction between a warrant and its supporting affidavit. *Moore v. United States, supra.* As we noted earlier, a warrant is designed to provide authorization for a search as well as a limitation upon its extent. A supporting affidavit is intended to "freeze" the record of the evidence upon which the application for a warrant was issued. *Cf. Lowrey v. United States*, 161 F. 2d 30 (8th Cir.), *cert. denied*, 331 U.S. 849,

91 L.Ed. 1858, 67 S.Ct. 1737 (1947). (The affidavit is required to establish the grounds for issuing the warrant and to show probable cause therefor.)

We do not mean to suggest that we are in disagreement with the practice of incorporating the underlying affidavit by reference to it in the search warrant itself. *See e.g., State v. Shanklin,* 16 N.C. App. 712, 193 S.E. 2d 341 (1972), *cert. denied,* 282 N.C. 674, 194 S.E. 2d 154 (1973); *State v. Flowers,* 12 N.C. App. 487, 183 S.E. 2d 820, *cert. denied,* 279 N.C. 728, 184 S.E. 2d 885 (1971). The statute which authorizes the granting of administrative inspection warrants implicitly provides for such incorporation by stating "[I]t [the administrative inspection warrant] must be attached to the affidavit required to be made in order to obtain the warrant." G.S. § 15-27.2(d)(4). Otherwise, it is invalid.

In the present case, the supporting affidavit was attached to the warrant when it was served. However, there was nothing in the warrant itself which incorporated that portion of the affidavit which indicated "the conditions, objects, activities or circumstances which the inspection [was] intended to check or reveal." *See* G.S. § 15-27.2(d)(3). It is not enough that a warrant and its supporting affidavit be served together as a unit for the affidavit to serve to uphold the validity of the warrant. If the warrant and the affidavit are to be construed together to provide sufficient proof of authority and notice of the extent of the proposed search, there must be an express reference to the affidavit in the warrant which is sufficient to put a reasonable person on notice of its incorporation.

For the reasons stated, we hold that the trial court erred in entering judgment for petitioner, hence the decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. DIANA PERSON

No. 36

(Filed 4 December 1979)

1. **Burglary and Unlawful Breakings § 1— first degree burglary—elements**

The constituent elements of burglary in the first degree are the breaking and entering in the nighttime into a dwelling house or a room used as a sleeping apartment which is actually occupied at the time of the offense with the intent to commit a felony therein.

2. **Burglary and Unlawful Breakings § 5.1— first degree burglary—defendant as perpetrator—sufficiency of evidence**

In a prosecution for first degree burglary the evidence as to the identity of defendant as the burglar was sufficient to carry the case to the jury where it tended to show that the victims were awakened by the presence of a woman in their bedroom; she was carrying their jewelry box and fled when they awakened; within fifteen minutes defendant was seen standing across the street from the victims' house; defendant was wearing the same clothing as the intruder; defendant's purse was found in the victims' living room; one victim's knife had been taken from his pants pocket by the intruder and was found with one of defendant's shoes in a ditch near the house; defendant's other shoe was found at the point where she was standing when discovered; and the jewelry box was found on the porch with jewelry scattered in the yard.

3. **Criminal Law § 97— reopening case—pocketbook admitted—opportunity to offer rebuttal evidence**

Defendant in a first degree burglary prosecution was not prejudiced where the court permitted the State to reopen the case and offer into evidence defendant's pocketbook found in the victims' living room, and defendant was not denied the opportunity of introducing rebuttal evidence where failure to introduce the pocketbook before resting was a mere inadvertence on the part of the prosecution; witnesses had already identified the pocketbook and defendant could have cross-examined them; and defendant could have introduced rebuttal evidence had she informed the court of any desire to do so, but defense counsel admitted that defendant had no rebuttal evidence to offer.

4. **Criminal Law § 131.2— knife in defendant's pocketbook—newly discovered evidence—new trial denied**

In a prosecution for first degree burglary where defendant's pocketbook, which was found in the victims' living room, was introduced into evidence, defendant was not entitled to a new trial on the ground of newly discovered evidence because defense counsel, during closing arguments, discovered a large knife inside the pocketbook, since the jury never saw the knife and never knew it existed; defendant did not show that the knife was material, competent or relevant; defendant did not show that the knife was not merely corroborative of other testimony; defendant did not show that due diligence

was used and proper means were employed to examine the contents of defendant's pocketbook prior to trial; and defendant did not show that evidence concerning the knife was of such nature that a different result would probably be reached at a new trial.

DEFENDANT appeals from judgment of *Smith (David), S.J.*, entered at the 4 December 1978 Session of FRANKLIN Superior Court.

Defendant was tried upon a bill of indictment proper in form charging her with first degree burglary.

The State's evidence tends to show that Sonny Quesinberry and wife Margaret live on Cross Street in Youngsville, North Carolina. On the evening of 1 September 1978 they retired at approximately 10 p.m. at 5:45 the next morning, 2 September 1978, they were awakened by a noise in their bedroom. A strange woman was standing at the foot of their bed with their jewelry box in her arms. She was wearing slacks, a white blouse and a bandana around her head. The Quesinberrys could not see her face. The woman fled when Mr. Quesinberry jumped out of bed and turned on the light. He then went outside and found the jewelry box lying on the porch and jewelry scattered in the yard. The intruder was nowhere in sight. He went inside and called the police.

The Quesinberrys determined that the only items missing from their house were the jewelry box, the jewelry, an envelope containing money, and a pocketknife taken from Mr. Quesinberry's pants pocket.

Police officers arrived about 5:55 a.m. Officer Gilliam testified it was completely dark when he arrived. He and Mr. Quesinberry drove around the block looking for the intruder. As they completed the drive and turned into the Quesinberry driveway, the headlights reflected on defendant standing across the street from the Quesinberry house. She was wearing slacks, a white blouse and a bandana around her head. She walked across the street and informed Officer Gilliam that her pocketbook had been stolen. Mrs. Quesinberry found a pocketbook in her living room, and defendant identified it as her own. Officer Gilliam found a woman's shoe in a ditch across the street together with a pocketknife. Defendant identified the shoe as belonging to her,

and Mr. Quesinberry identified the pocketknife as belonging to him. Officer Gilliam found a second shoe at the spot where defendant had first been standing, and she identified that shoe as hers.

At trial, Mrs. Quesinberry identified defendant as the person first seen in the Quesinberry bedroom, basing her identity on defendant's shape, the color of her clothing, what she was wearing and the fact that her hair was wrapped in a bandana. Mr. Quesinberry identified her as the burglar and based his identity upon her dress, the presence of her pocketbook in the Quesinberry living room, and the fact that his pocketknife was found in the ditch with one of defendant's shoes.

The State's evidence further tends to show that when the Quesinberrys went to bed on the night of 1 September 1978, all outside doors were shut and all of them, except the side porch door, were locked. When they awoke, the side porch door was standing open.

When taken into custody, defendant told the officers she had been thrown out of a car and the people in the car had stolen her pocketbook. She consistently denied entering the Quesinberry home but could not, or would not, give any description of the vehicle from which she was thrown or of her companions. She offered no evidence at trial.

The jury convicted defendant of first degree burglary and she was sentenced to life imprisonment. Her appeal to this Court preserves and poses for decision the questions discussed in the opinion.

Rufus L. Edmisten, Attorney General, by Jane Rankin Thompson, Assistant Attorney General, for the State.

Thomas F. East and Larry E. Norman, attorneys for defendant appellant.

HUSKINS, Justice.

Defendant's first assignment of error is based on denial of her motion for judgment of nonsuit at the close of all the evidence. She contends the State's evidence as to the identity of defendant as the burglar was insufficient to carry the case to the jury.

[1] The constituent elements of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972). There is ample evidence in this case to support an affirmative finding as to each of these elements. Thus the intruder, whoever she was, is guilty of first degree burglary. *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976); *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). Is the evidence sufficient on the question of identity to support the verdict against this defendant? We think so.

[2] Although the Quesinberrys could not see the intruder's face, the testimony, taken in the light most favorable to the State, tends to show that they were awakened by the presence of a woman in their bedroom; that she was carrying their jewelry box and fled when they awakened; that within fifteen minutes defendant was seen standing across the street from the Quesinberry house; that defendant was wearing the same clothing as the intruder; that defendant's pocketbook was found in the Quesinberry living room; that Mr. Quesinberry's knife had been taken from his pants pocket by the intruder and was found with one of defendant's shoes in a ditch near the house; that defendant's other shoe was found at the point where she was standing when discovered; and the jewelry box was found on the porch with jewelry scattered into the yard. This evidence, unexplained, points unerringly to defendant as the burglar and is sufficient to carry the case to the jury. *Compare State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). Defendant's motion for nonsuit was properly denied.

[3] After the State had rested its case and defendant's motion for judgment of nonsuit had been denied, the court permitted the State to reopen the case and offer into evidence the pocketbook found in the Quesinberry living room. After arguments of counsel and jury instructions, the jury returned its verdict of guilty of first degree burglary on 4 December 1978, and judgment was pronounced. On 7 December 1978, defendant filed a motion for appropriate relief pursuant to G.S. 15A-1414, alleging error in allowing introduction of the pocketbook, after the close of all the evidence, "without permitting the defendant the opportunity to

introduce any rebuttal evidence" in violation of G.S. 15A-1226(a). This constitutes defendant's second assignment of error and requires examination of the statutes cited.

G.S. 15A-1226 reads as follows:

> "(a) Each party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the other party must be permitted further rebuttal.
>
> (b) The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict."

G.S. 15A-1414(a) reads as follows:

> "After the verdict but not more than 10 days after entry of judgment, the defendant by motion may seek appropriate relief for any error committed during or prior to the trial."

Defendant recognizes in her brief that G.S. 15A-1226(b) authorizes a trial judge in his discretion to permit any party to offer additional evidence at any time prior to verdict. Our case law is to like effect. *See State v. Coffey*, 255 N.C. 293, 121 S.E. 2d 736 (1961); *State v. Perry*, 231 N.C. 467, 57 S.E. 2d 774 (1950). She contends, however, that under G.S. 15A-1226(a) she should have been allowed to present "rebuttal" evidence and the court erred in its failure to afford her that opportunity. Her argument is not persuasive. The record discloses that failure to introduce the pocketbook before resting was a mere inadvertence on the part of the prosecution because the State's witnesses had already identified the pocketbook as the one found in the Quesinberry home and the one defendant claimed as her own. Moreover, she was afforded an opportunity to cross-examine these witnesses concerning the pocketbook and, for that matter, could have offered evidence in her own behalf concerning the pocketbook had she chosen to do so. She waited until three days after trial, verdict and judgment to seek a new trial by way of motion for appropriate relief on the ground that she was not permitted to present rebuttal evidence. The truth is that she could have offered rebuttal evidence had she informed the court of any desire to do so. This view is

strengthened by defense counsel's admission on oral argument that defendant had no rebuttal evidence to offer. Hence, no prejudice could have resulted. Defendant's second assignment of error is overruled.

[4] On 7 December 1978, after verdict and judgment, defendant filed a motion for appropriate relief pursuant to G.S. 15A-1415(b)(6), contending that during closing arguments defense counsel discovered a large knife inside defendant's pocketbook found in the Quesinberry house. Defense counsel contends this knife represented evidence which was unknown and unavailable to defendant and her counsel until the close of all the evidence and that the knife could not with due diligence have been discovered prior to that time. Defendant argues in support of the motion that the knife could have had a material bearing upon her guilt or innocence and that she should have been granted a new trial "so that proper evaluation of this *new* evidence could be undertaken." Denial of the motion constitutes defendant's third assignment of error.

G.S. 15A-1415 provides in pertinent part that at any time after verdict the defendant by motion may seek appropriate relief upon any of the grounds enumerated in said section. Subsection (b)(6) reads as follows:

> "Evidence is available which was unknown or unavailable to the defendant at the time of the trial which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant."

A motion for a new trial for newly discovered evidence is addressed to the sound discretion of the trial judge and is not subject to review absent a showing of abuse of discretion. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). "In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit

the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial." *State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976).

In light of the foregoing legal principles, it is not perceived how the large knife discovered inside defendant's pocketbook during argument of the case affected the verdict or had any bearing on defendant's guilt or innocence. Counsel stated during oral argument in this Court that the jury never saw the knife and never knew it existed. Defendant has not shown that the knife was material, competent or relevant. Defendant has not shown that the knife was not merely corroborative of other testimony. Defendant has not shown that due diligence was used and proper means employed to examine the contents of defendant's pocketbook prior to trial. Nor has defendant shown that evidence concerning the knife found in defendant's pocketbook was of such nature that a different result would probably be reached at a new trial. It necessarily follows that denial of defendant's motion for a new trial on the grounds of newly discovered evidence did not constitute an abuse of discretion. *State v. Beaver, supra.*

Defendant has had a fair trial free from prejudicial error. The verdict and judgment must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. JOHNNY LEE LEWIS

No. 50

(Filed 4 December 1979)

1. **Constitutional Law § 46— motion to discharge appointed counsel**

The trial court did not err in the denial of defendant's motion at trial to discharge his court-appointed counsel, who had been appointed ten months earlier, so that he could employ counsel of his own choosing.

2. **Criminal Law § 73.4— admissibility of spontaneous utterance**

A witness's spontaneous utterance, "Oh my God," made when the witness discovered the victim's body while crawling across a room in the darkness immediately after defendant shot into the witness's house, was admissible in evidence.

3. Criminal Law § 88.1— cross-examination—person to whom defendant sold gun

Where defendant testified that he "got rid of" a .32 cal. automatic pistol three or four days before he bought the pistol with which he shot his wife, it was appropriate for the district attorney to test the credibility of this testimony by asking defendant to whom he had sold the pistol.

4. Criminal Law § 57— testimony that object "looked like" gun

A witness's testimony that an object she saw protruding from defendant's pocket on the day of the shooting in question "looked like a gun" did not constitute objectionable opinion testimony but merely connoted an indistinctness of perception or memory.

5. Criminal Law § 93— order of proof—discretion of court

The trial court did not err in permitting a State's witness to testify that she had called a police officer before it was established that there was a need for a police officer to come to her residence, since the trial court has the discretion to permit the introduction of evidence which depends for its admissibility on some preliminary showing upon counsel's assurance that such showing will be forthcoming.

6. Criminal Law § 75.14— admissibility of confession—defendant nervous, upset and crying

An officer's testimony on *voir dire* that defendant was nervous and upset and cried from time to time while making an in-custody statement did not render defendant's statement inadmissible in evidence.

ON writ of certiorari to review trial before *McKinnon, J.* Judgment entered 16 November 1978 in Superior Court, ROBESON County.

Defendant was charged by indictment, proper in form, with the first degree murder of his wife on 24 January 1978. At trial the district attorney announced that the State would proceed upon a charge of second degree murder. Defendant was convicted of second degree murder and sentenced to a minimum term of 20 years and a maximum term of life imprisonment.

The State's evidence tends to show the following: On 23 January 1978 defendant's wife (the victim) separated herself from defendant and went to stay with her mother at her grandmother's home. During the day and into the night of 23 January 1978 defendant numerous times undertook to contact his wife by telephone and in person but his efforts were frustrated by his wife's refusal to meet with him and by her relatives' refusal to call her to the telephone. Again during the day of 24 January defendant's efforts to talk with his wife proved fruitless. Finally

on the night of 24 January 1978 defendant went to the victim's grandmother's home where he fired his pistol several times through the window of the house. Four of these shots struck defendant's wife, and she died from the gunshot wounds early the following morning. After firing the shots defendant tried to gain entrance through the front door into the victim's grandmother's home, but was unable to do so. He then left and went to the police station where he announced that he had shot his wife and made an offer to shoot himself. The defendant was disarmed and he later gave a full inculpatory statement.

Defendant's evidence tended to show the following: His wife left their home on 23 January 1978 and did not return. During the day and night of 23 January he tried to talk with her but was not permitted to do so. Again during the day of 24 January he unsuccessfully tried to talk with his wife. After dark on 24 January 1978 he determined that he would go to his wife's grandmother's house where his wife was staying, and look through the window to see if she was in the house. If so, he would gain entrance by kicking in the front door so he could talk to her. He carried his pistol with him as protection from ambush along the way. The defendant remembers getting to the yard of his wife's grandmother's house but does not remember anything from that time until two to three weeks later. He does not remember going to the police station or making statements to the officers. Defendant testified that he had experienced "blackouts" before.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Robert D. Jacobson for the defendant.

BROCK, Justice.

[1] Defendant was arrested on 24 January 1978, the night of the shooting, upon a charge of assault with a deadly weapon. Upon the death of defendant's wife during the morning of 25 January 1978 he was charged with murder and taken before District Court Judge Ellis who determined that defendant was indigent and on 25 January 1978 appointed John W. Campbell to represent defendant. Attorney Campbell continued under his appointment to represent defendant from 25 January 1978 until the case was called for trial on 14 November 1978, a period of approximately

ten months. After the case was called for trial and in the absence of the jury the following colloquy occurred:

"COURT: Mr. Lewis, if you have something you want to say, you may stand up and state it.

DEFENDANT: Your Honor, this man don't know too much about the case. I hadn't ever talked to him but about three or four times about thirty minutes in all and I want to get rid of him so I can get me another lawyer and not State-appointed.

COURT: The case has been pending now for some ten months and you have had that opportunity to get a lawyer and apparently haven't done so before now. I am sure Mr. Campbell is prepared to go ahead with the trial as required and I see no reason why it should be delayed at this time.

DEFENDANT: Let me discuss it with him just a second, if you don't mind.

COURT: What is it you want to discuss with him?

DEFENDANT: Well, just go ahead on with it as it is.

COURT: Would you like to talk to him now before we begin any further?

DEFENDANT: No.

COURT: All right. Have the jury come back."

Thereafter attorney Campbell represented defendant and demonstrated throughout the trial that he was indeed prepared for trial. Defendant assigns as error that his motion to discharge his appointed counsel was denied. Judge McKinnon was correct in not allowing defendant to postpone the trial with the stratagem that he suddenly was no longer indigent, wanted to discharge is appointed counsel and employ counsel of his own choosing. It is interesting to note that defendant has not yet employed counsel but is being represented in this Court by appointed counsel. This assignment of error is overruled.

Defendant argues that the trial court committed error in allowing irrelevant and prejudicial evidence to be introduced by the State. For the reasons that follow, we disagree.

[2] As the victim's mother was testifying, she described the activities in the house while the lights were out immediately following the shooting. As she was crawling across the living room she came to her daughter lying on the floor and exclaimed "Oh my God." A spontaneous utterance of this nature by a participant or bystander, made without time for reflection or fabrication, is admissible. 1 Stansbury's North Carolina Evidence § 164 (Brandis rev. 1973). Also during the testimony of the victim's mother she was permitted to identify a photograph of the victim and defendant taken about a year before the date of the shooting. While it appears that the photograph was irrelevant to the trial of this cause its introduction into evidence clearly was not prejudicial to defendant. It merely portrayed defendant and his wife (the victim) at or about the time they were married.

[3] During the cross-examination of defendant by the district attorney the defendant in explaining why he purchased the pistol with which he shot his wife volunteered that he had a hobby of buying and selling guns, and that he had a .32 cal. automatic which he "got rid of" about three or four days before he bought the pistol with which he shot his wife. When the district attorney asked to whom he sold the .32 cal. automatic defendant objected. The objection was overruled. Even so defendant refused to directly answer the question. He replied that he sold all of them legally. The question was not pursued further. Having volunteered that he "got rid of" the .32 cal. automatic two or three days before he purchased the pistol in evidence it was appropriate for the district attorney to test the credibility of this testimony by asking to whom he sold the .32 cal. automatic. We perceive no error or prejudice to defendant.

[4] The remaining exception under this argument by defendant is that a State's witness (a brother of the victim) was allowed to testify that on the day of the shooting the victim was riding in a car with him when they passed defendant on a street in Lumberton; that defendant stepped out in the street as they passed; that the victim ducked down in the car; and that an object was protruding from defendant's trousers pocket. When asked what the object was the witness replied: "It looked like a gun." This was not objectionable opinion testimony. The statement merely connoted an indistinctness of perception or memory and was not ob-

jectionable, although it carried little weight. 1 Stansbury's North Carolina Evidence § 122 (Brandis rev. 1973).

[5] Defendant next argues that in many instances the State was permitted to offer evidence when "no proper foundation" for its reception had been laid. It is not argued that no foundation was in fact laid. These arguments center upon the order in which the evidence was admitted. We disagree with all of defendant's arguments along this line. Our reading of the record discloses that the State proceeded in as nearly a chronological manner as practical. We will not discuss each of the instances to which defendant calls our attention, one example will suffice: Defendant argues that it was error to permit a State's witness to testify that she "had called the police officer before establishing that there was a need for a police officer to come to her residence." It is within the discretion of the trial judge to permit the introduction of evidence which depends for its admissibility on some preliminary showing upon counsel's assurance that such showing will be forthcoming. 1 Stansbury's North Carolina Evidence § 24 (Brandis rev. 1973). We think the trial judge in this case summed up the answers to all of defendant's objections along this line when he overruled one of defendant's objections that "no proper foundation had been laid" by stating to defense counsel: "You have to start somewhere."

Under his next assignment of error defendant asserts three instances in which evidence was admitted that he argues had no logical tendency to prove any fact in issue in the case. We disagree with defendant. Without discussion of each instance we dispose of these arguments by stating that we have reviewed the evidence referred to and defendant's arguments thereon. In our opinion the evidence complained of was properly admitted for the purpose for which it was offered.

Under his next assignment of error defendant points out instances in which he contends the district attorney was allowed to ask improper, leading questions. We disagree with defendant. It is elementary learning that the trial judge, in his discretion, may permit leading questions in appropriate instances. Our reading of the record discloses that in each instance complained of by defendant the permitting of a leading question was justified and appropriate. The able trial judge in no way abused his discretion.

[6] The next assignment of error argued by defendant challenges the admission into evidence of his confession. He argues that he was upset, nervous, and crying to the extent that he did not rationally waive his rights. The defendant did not testify or otherwise offer evidence on voir dire. His testimony at trial tended to show that he did not remember going to the police station or talking to the officers. He in no way and at no time offered evidence of a lack of understanding on his part of warnings given to him by the officers or a lack of understanding of the waiver of his rights. Defendant's argument is based upon the testimony of the interrogating officer on cross-examination by defense counsel during the voir dire hearing upon the admissibility of his confession. In response to questions by defense counsel the interrogating officer testified:

> "No, sir. My opinion was he was fully capable of understanding. I don't recall saying that he was highly nervous. I said he was nervous and upset."
>
> * * *
>
> He was not acting out of the way. He was just nervous and upset. Once in a while, while I was talking to him, he would cry a little bit; then he would straighten up and start talking."
>
> QUESTION: What was it about him that led you to the conclusion that he was nervous?
>
> ANSWER: "His crying and his hands were shaking."

At the conclusion of the voir dire the trial judge found, *inter alia*, "that the statement was taken after adequate warning as to his rights at the time when the defendant appeared to be conscious and understanding what he was doing. The Court finds that mere nervousness or being distraught is not sufficient to make the statement inadmissible into evidence." We agree with the trial judge's assessment of the evidence. This assignment of error is overruled.

We have carefully considered the remaining two assignments of error brought forward by defendant and conclude that they are without merit and require no discussion.

The evidence fully justified submitting the issue of second degree murder to the jury and fully supports the verdict of guilty. The judgment entered is supported by the verdict and the law. In our opinion defendant received a full and fair trial, free from prejudicial error.

No error.

GEOFFREY BAUMANN D/B/A BAUMANN BUILDING AND COMPANY v. MR. PETER SMITH AND WIFE, MRS. MIMI SMITH

No. 61

(Filed 4 December 1979)

Contracts § 27.1 — contract alleged and denied — summary judgment inappropriate

In an action to recover for construction work on defendants' home renovation project, the trial court erred in entering summary judgment for defendants where defendants' affidavit submitted in support of their summary judgment motion did not challenge or alter the fact that the complaint alleged, and the answer denied, the existence of a contract between the parties, and defendants therefore did not meet their burden of proving that there was no genuine issue of fact.

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

ON appeal by plaintiff from the decision of the North Carolina Court of Appeals, reported in 41 N.C. App. 223, 254 S.E. 2d 627 (1979), which affirmed the judgment of *Brown, J.*, entered at 15 May 1978 Civil Session of EDGECOMBE Superior Court granting defendants' motion for summary judgment.

Plaintiff instituted this action to recover for services and materials furnished to defendants incident to renovations made on their home. Plaintiff alleged in his verified complaint that he is a cabinetmaker who also engages in residential construction; that in March 1977, plaintiff, Lee Miles, a building contractor, and defendants conferred, and plaintiff reached an agreement with defendants "that the Plaintiff would proceed with the construction of the cabinets and other renovations to the residence of the Defendants as the Defendants would direct;" that plaintiff would

be compensated at an hourly rate and defendants would pay for materials as required; that between 23 March 1977 and 15 April 1977, plaintiff furnished materials and rendered services to and under the direct supervision of defendants; that he submitted a statement for $6,520.16 to Miles "as agent for the Defendants" and to the defendants directly for the services and materials; and that when defendants refused to pay the statement, plaintiff ceased work and filed a notice of claim of lien upon defendants' residence pursuant to Article 2 of Chapter 44A of the General Statutes.

Plaintiff seeks to recover upon an express contract or, alternatively, on the basis of quantum meruit upon an implied contract between plaintiff and defendants.

Defendants denied the material allegations of the complaint and by way of further defense alleged that they entered into a contract with Lee Miles for the renovation of their home. Defendants alleged that they never had any agreement with plaintiff concerning the renovation of their home; that defendants neither controlled nor supervised plaintiff's work; and that Lee Miles was not authorized by them to contract with plaintiff in any manner. Defendants further alleged that the notice of claim of lien filed by plaintiff is a subcontractor's lien, in which plaintiff stated that the labor and materials were furnished to defendants' property pursuant to an agreement between plaintiff and Lee Miles. Defendants alleged in the alternative that plaintiff breached the contract by failing to complete the work contemplated and by refusing to work under defendants' direction and supervision.

Defendants moved for summary judgment pursuant to G.S. 1A-1, Rule 56. At a hearing on the motion, defendants submitted the following affidavit in support of their motion:

> The undersigned, being first duly sworn, do hereby state to the Court:
>
> 1. That they do reaffirm the statements in paragraphs nos. 29 through 44 of the verified Answer filed in this case and ask that said paragraphs of said Answer be incorporated herein as if fully set out.

> 2. That the undersigned did enter into an agreement dated January 5, 1976 [sic] on or about January 5, 1977, with Lee Miles, a copy of which is attached hereto.

Plaintiff submitted no affidavits or other documents in opposition to defendants' motion.

The trial court allowed defendants' motion for summary judgment. In an opinion by Judge Carlton, Judge Vaughn concurring, the Court of Appeals affirmed. Judge Clark dissented. Plaintiff appealed to this Court as a matter of right pursuant to G.S. 7A-30(2).

Frank M. Wooten, Jr., by Thomas B. Carpenter, Jr., for plaintiff appellant.

Taylor, Brimson & Aycock by James C. Marrow, Jr., for defendant appellees.

BRANCH, Chief Justice.

The sole question presented by this appeal is whether the Court of Appeals erred in affirming the trial court's granting of summary judgment for defendants. Plaintiff contends that defendants failed to meet their burden of showing that there was no genuine issue as to any material fact, and consequently summary judgment should not have been granted even though plaintiff offered no proof in opposition to the motion.

G.S. 1A-1, Rule 56 (Summary judgment), the statute pertinent to the decision of this appeal, provides in part:

> (c) . . . The [summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law . . . .
>
> * * *
>
> (e) . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in

this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The summary judgment rule is for the disposition of cases where there is no genuine issue of fact and its purpose is to eliminate formal trials where only questions of law are involved. *Caldwell v. Deese,* 288 N.C. 375, 218 S.E. 2d 379 (1975). "Two types of cases are involved: (a) Those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the undisputable facts is in controversy and it can be appropriately decided without full exposure of trial." *McNair v. Boyette,* 282 N.C. 230, 192 S.E. 2d 457 (1972); *Blades v. City of Raleigh,* 280 N.C. 531, 187 S.E. 2d 35 (1972).

"In ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any issue of genuine material fact." *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972). The movant always has the burden of showing that there is no triable issue of fact and that he is entitled to judgment as a matter of law. *Pitts v. Pizza, Inc.,* 296 N.C. 81, 249 S.E. 2d 375 (1978); *Kidd v. Early,* 289 N.C. 343, 222 S.E. 2d 392 (1976). In considering the motion, the trial judge carefully scrutinizes the papers of the moving party and resolves all inferences against him. *Kidd v. Early, supra; Caldwell v. Deese, supra.*

In interpreting G.S. 1A-1, Rule 56, we have recognized that under some circumstances the trial judge may properly deny the motion for summary judgment even when the nonmoving party fails to offer competent counter-affidavits or other evidence as provided by the statute.

In *Savings & Loan Association v. Trust Co.,* 282 N.C. 44, 191 S.E. 2d 683 (1972), the plaintiff opposed a motion for summary judgment but filed no counter-affidavit or other evidence in opposition thereto. In reversing the trial court's granting of the motion, this Court concluded that the defendant's supporting affidavit, even if treated as having complied with the requirements of Rule 56(e), failed to satisfy his burden as the moving party. Justice Lake writing for the Court noted:

> Irrespective of who has the burden of proof at trial upon issues raised by the pleadings, upon a motion for summary

> judgment the burden is upon the party moving therefor to establish that there is no genuine issue of fact remaining for determination and that he is entitled to judgment as a matter of law (Citation omitted) . . . . "If the movant's forecast [of evidence which he has available for presentation at trial] fails to do this, summary judgment is not proper, whether or not the opponent responds." Thus, . . . (Citation omitted), "The evidentiary matter supporting the moving party's motion may not be sufficient to satisfy his burden of proof, even though the opposing party fails to present any competent counter-affidavits or other materials."

Id. at 51-52, 191 S.E. 2d at 688.

In light of the principles of law discussed above, we now consider the circumstances of the instant case. Here, defendants in moving for summary judgment submitted a supporting affidavit which on its face merely reaffirmed certain paragraphs of the verified answer and stated that defendants entered into an agreement with Lee Miles, a copy of which was attached. Plaintiff did not submit an opposing affidavit but elected to stand on his verified complaint.

The submitted affidavit did not challenge or alter the fact that the complaint alleged, and the answer denied, the existence of a contract between the parties. The defendants did not meet their burden of proof, and we hold that summary judgment was not "appropriate" within the meaning of Rule 56(e). To hold otherwise would permit a movant under these circumstances to deprive the opposing party of a trial even though a genuine issue of material fact is presented.

For the reasons stated above, the decision of the Court of Appeals upholding summary judgment for the defendant is

Reversed.

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

STATE OF NORTH CAROLINA v. WILLIE SAMUELS

No. 80

(Filed 4 December 1979)

1. **Criminal Law §§ 161, 166— questions reviewable without exceptions and assignments of error—necessity for argument in brief**

A defendant may properly present on appeal the questions enumerated in Appellate Rule 10(a) without taking any exceptions or making any assignments of error in the record and may properly present for review the denial of his motion for nonsuit under G.S. 15-173 without making any exception in the record; however, the defendant must still bring such questions forward in his brief, argue them and cite authorities in support of his arguments.

2. **Rape § 5— age of defendant—opportunity of jury to view defendant**

The jury in a first degree rape case could properly find that defendant was more than 16 years of age where the jury had ample opportunity to view the defendant and estimate his age.

APPEAL by defendant from *Allen, J.*, 5 March 1979 Schedule "E" Criminal Session of MECKLENBURG County Superior Court.

Defendant was charged in an indictment, proper in form, with the first degree rape of Rosa Marie Spencer. Defendant was also charged with robbing Spencer with a dangerous weapon.

Spencer testified for the State that she lived and worked in Charlotte, North Carolina on 12 July 1978. After she got off work at 4 p.m. on that date she visited a friend at 911 Harrill Street until 6:30 p.m. and then she visited a friend at 614 East Eighth Street until 7:30 p.m. When she left her second friend's house she went to North Tryon Street to catch a bus.

As she was walking toward College Street, defendant, who was three to four feet behind her, asked her for a match. She told him she did not smoke. She crossed the street and then looked behind her. Defendant was standing less than three feet from her. She turned and started to walk away from him. He grabbed her from behind causing her to drop her purse. The two struggled for a few minutes, then defendant pulled out a knife, dragged her toward some trees and told her, with the knife at her throat and one of his legs in her stomach, to take one leg out of her pants. Defendant put a towel around her eyes and then raped her. She testified that defendant penetrated her and Dr. Gwen Boyd

testified that her examination of Spencer on 12 July 1978 revealed living sperm in her vagina.

Spencer described her assailant to police as a "black male, his hair braided off his forehead, that he was wearing green slacks, blue t-shirt, full cheeks and weighed between 175 and 190 lbs." She testified on *voir dire* that it "had already started getting dark" at the time she was raped, but she "found the conditions to be very visible" because there were street lights and lights from "a house behind the road." On 15 August 1978, she picked defendant's picture from an array of six photographs. On 22 August 1978, she picked out the defendant from a lineup of at least five persons. The trial judge made findings of fact at the *voir dire* and concluded that,

> "under the totality of the circumstances there was no pretrial procedure which was so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice, and that the in-court identification of the defendant was of independent origin based solely on the witness' observation of the defendant at the time of the assault. . . ."

Sarah Louise Toms testified for the defendant that on 12 July 1978 she lived at 513 North College Street and that "the lighting down College Street toward Tryon is very dark." An investigator for the Public Defender's office testified that he went to the scene of the crime and found that there are no street lights from Tom's house on College Street to Tryon Street, that no houses border on that stretch of the street and that "[f]or three-quarters of the street, the lighting was so bad that I could not read the face of my watch."

Mary Williams and Mattie Williams, sisters of the defendant, and Warren Williams, Mary's husband, testified that defendant spent the entire evening of 12 July 1978 with them. Mary Williams testified that she fixed a special dinner for defendant on that date because he had been to court the day before on a trespassing charge and the charge had been dismissed. Allen Rousseau, an Assistant Clerk of Superior Court in the Twenty-Sixth District, testified that a trespass charge against defendant was voluntarily dismissed in District Court on 11 July 1978.

The jury found defendant guilty of first-degree rape and not guilty of robbery with a dangerous weapon. Defendant was sentenced to life imprisonment on the rape conviction and he appealed to this Court.

Public Defenders Tom Dickinson and Fritz Y. Mercer, Jr., for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Marilyn R. Rich for the State.

COPELAND, Justice.

The record on appeal contains three exceptions, properly made, which are the basis of three assignments of error, properly set out at the end of the record. These assignments of error were not brought forward or discussed in the brief; therefore, they are deemed abandoned. Rule 28(a), (b)(3), Rules of Appellate Procedure; *State v. Davis*, 272 N.C. 469, 158 S.E. 2d 630 (1968); *State v. Battle*, 271 N.C. 594, 157 S.E. 2d 14 (1967) (*per curiam*); *State v. Strickland*, 254 N.C. 658, 119 S.E. 2d 781 (1961). These cases arose under former Rule 28, Rules of Practice in the Supreme Court; however, our present Rule 28 maintains the same rule as former Rule 28 with respect to requiring that the assignments of error be brought forward and discussed in the brief in order to properly present questions for review on appeal.

Defense counsel set forth one Question Presented in his brief. In it he stated that his examination of the record revealed no error prejudicial to the defendant. He has asked us to examine the entire record to determine whether we find prejudicial error warranting a new trial.

This question presented in the brief was not made the basis of any assignment of error. Normally, this Court will not consider questions not properly presented by objections duly made, exceptions duly entered, and assignments of error properly set out. *State v. Brooks*, 275 N.C. 175, 166 S.E. 2d 70 (1969); 1 Strong's N.C. Index 3d, *Appeal and Error* § 24. Under our former Rules of Practice in the Supreme Court, the appeal itself constituted an exception to the judgment and presented for review any error appearing on the face of the record proper. *State v. Cox*, 281 N.C. 131, 187 S.E. 2d 785 (1972); *State v. Kirby*, 276 N.C. 123, 171 S.E.

2d 416 (1970). Our present Rules of Appellate Procedure, effective 1 July 1975, obliterated the former distinction between the "record proper" and the "settled case on appeal." Instead, the single concept of "record on appeal" is used and the composition of the record on appeal is governed by Rule 9(b), Rules of Appellate Procedure. *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976); *State v. Adams*, 298 N.C. 802, 260 S.E. 2d 431 (1979) (Opinion filed this date.)

However, our present Rule 10(a), Rules of Appellate Procedure, does provide that,

> "[U]pon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, *notwithstanding the absence of exceptions or assignments of error in the record on appeal.*" (Emphasis added.)

Also, G.S. 15-173 allows a defendant to appeal the denial of his motion for nonsuit made at the close of the State's evidence (if the defendant presents no evidence) or made at the close of all the evidence (if the defendant does present evidence), "without the necessity of the defendant's having taken exception to such denial."

[1] Therefore, it is clear that a defendant may properly present on appeal the questions enumerated in Rule 10(a), without taking any exceptions or making any assignments of error in the record and may properly present for review the denial of his motion for nonsuit under G.S. 15-173 without making any exception in the record. However, in both these situations, the defendant must still bring those questions forward in his brief, argue them and cite authorities in support of his arguments. Rule 28(a), (b)(3). Failure to do so means that those questions are not properly presented for review. Rule 28(a), (b)(3); *State v. McMorris, supra*; *State v. Adams, supra.* Indeed, Rule 10(a) states that the questions enumerated there may be properly presented for review without exceptions or assignments of error being made "by properly raising them in his brief." Rule 28(a), (b)(3) then elaborates on

the requirements of the brief in this regard as discussed above. We have the power under Rule 2, Rules of Appellate Procedure, to suspend or vary the requirements of the Rules of Appellate Procedure in order "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest . . . except as otherwise expressly provided by these rules" and Rule 28(a), (b)(3) does not expressly provide otherwise.

From the foregoing, it is clear that no questions have properly been presented for review in this case. Nevertheless, due to the seriousness of the conviction and the sentence in this case, we have elected, pursuant to our inherent authority and Rule 2, to review the record on appeal with regard to the sufficiency of the evidence to take the case to the jury and the questions presented by Rule 10(a) and we find no prejudicial error. Furthermore, we have scrutinized the entire record on appeal to determine whether any error prejudicial to the defendant occurred in this trial.

[2] There was sufficient evidence of every essential element of the crime of first degree rape to take this case to the jury. One essential element of the crime of first degree rape is that defendant be more than sixteen years of age. G.S. 14-21(1)b. Here, the jury had ample opportunity to view the defendant and estimate his age. *See, State v. Evans*, 298 N.C. 263, 258 S.E. 2d 354 (1979). The trial judge properly conducted this trial, made no erroneous evidentiary rulings, properly conducted the *voir dire* on the pretrial identification procedures and the in-court identification, and correctly charged the jury. Our examination of the record reveals no prejudicial error.

We caution members of the bar to recognize that, "[i]t is not the function of the appellate courts to search out possible errors which may be prejudicial to an appellant; it is an appellant's duty, acting within the rules of practice, to point out to the appellate court the precise error of which he complains." *Nye v. University Development Co.*, 10 N.C. App. 676, 678, 179 S.E. 2d 795, 796, *cert. denied*, 278 N.C. 702, 181 S.E. 2d 603 (1971). Appeals such as this are subject to dismissal for failure to properly present any questions for review under the requirements of Rule 28(a), (b)(3), unless we elect pursuant to Rule 2, as we have done in this case,

to suspend or vary the requirements of the Rules of Appellate Procedure.

No error.

STATE OF NORTH CAROLINA v. TIMOTHY LANE McCORMICK

No. 54

(Filed 4 December 1979)

1. **Criminal Law § 89.1— character witness—general reputation of impeached witness—further testimony permitted when volunteered**

Counsel may ask only about the general reputation or character of the witness to be impeached, but the impeaching witness, of his own volition, may say in which respect the witness's reputation is good or bad.

2. **Criminal Law § 89.1— character witness—general reputation of impeached witness—amplification improperly excluded**

The trial court in a first degree burglary prosecution erred in refusing to allow a witness, who had testified for defendant that the prosecutrix had a bad reputation, to say in what respect the reputation was bad, since the witness could properly be prepared for trial by the defense attorney who could explain the applicable law in given situations and go over the attorney's questions and the witness's answers; there was no evidence that defense counsel procured the witness to give perjured testimony; and the witness's proffered testimony that the prosecutrix had a reputation in her community for being an untruthful woman pertained to the important and material issue of the credibility of the prosecutrix, and its exclusion was prejudicial to defendant.

APPEAL by defendant from his conviction of first degree burglary and sentence of life imprisonment imposed by *Smith (Donald L.), S.J.* at the 2 January 1979 Criminal Session of CUMBERLAND County Superior Court.

The State's evidence tended to show that between 3:00 a.m. and 4:00 a.m. on 28 February 1978, Beatrice Bethea was awakened in her home at 611 Monroe Drive in Cumberland County by the sound of voices outside her bedroom window. She saw one person leaning up against her back porch and hollered at him to "leave from around" her house. That person went around to the front of the house, knocked the wooden latch off the front door, cut the light on, and pushed her back into the bedroom. He told her to

take her clothes off. She hollered for help, pulled her pants off and got into bed.

A neighbor, Charles Haskins, responded to her call for help. Haskins began chopping on Bethea's bedroom door with an axe. The defendant discovered an axe in Bethea's bedroom and began chopping on the door from the inside. Defendant told Haskins to "wait, that he would come out." Haskins went outside and stood in the front yard. Defendant ran out, threw the axe at Haskins, striking him on the leg, and ran down the street.

Bethea and Haskins went to a neighbor's house. A few minutes later, defendant returned, went in the neighbor's house and asked Haskins if he could take him to a hospital. Haskins said no and defendant left. Bethea identified the defendant as Timmy McCormick and stated that, "I have been knowing Timmy since he was small."

Defendant testified that he heard Bethea hollering as he passed by her house and that he pushed his way into her house to protect her. He grabbed her and sat her down in a chair. When he heard someone come onto the porch, he took her into the bedroom and closed the door. Someone started beating on the door with an axe. Defendant told that person that he had an axe too. That person told defendant to "come outside, we'll settle this outside."

Defendant went outside and "threw the axe to keep him off of me, not to hurt nobody." Defendant ran down the street, but later returned and went to the neighbor's house where Bethea had gone. There, he saw the man he had struck with the axe and asked if he could take him to the hospital. When the man said no, defendant left.

Defendant testified that it was normal for Bethea to holler like that and he acted to protect her. He said that he did not harm her or threaten her. Testimony was offered that Bethea had attempted to drop the charges. Bethea testified that she did it because defendant's relatives threatened her.

After the testimony of the prosecutrix the trial court initiated plea negotiations between the State and the defendant and a plea bargain was offered wherein the State would allow the defendant to plead guilty to the lesser included offense of felonious breaking or entering and the court agreed that the

defendant would receive a six month jail sentence followed by special probation. The defendant declined to accept the plea bargain and the trial continued.

Defendant was convicted of first degree burglary and the mandatory life sentence in effect at the time of the conviction was imposed by the trial judge. Defendant appealed to this Court.

Assistant Public Defenders Tye Hunter and James R. Parrish, Jr., for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Thomas F. Moffitt for the State.

COPELAND, Justice.

In his fifth assignment of error, defendant contends that the trial judge committed prejudicial error in improperly restricting the testimony of a defense witness as to the reputation of the prosecutrix, Beatrice Bethea. We agree; therefore, the defendant's conviction must be reversed.

[1] The applicable law in this State provides that an impeaching character witness, who knows the general reputation and character of the witness about which he plans to testify, may state the reputation of the witness "categorically, *i.e.*, simply saying that it is good or bad, without more, or he may, *of his own volition, but without suggestion from counsel offering the witness*, amplify or qualify his testimony, by adding that it is good for certain virtues or bad for certain vices. . . ." *State v. McEachern*, 283 N.C. 57, 68, 194 S.E. 2d 787, 794 (1973), *quoting State v. Hicks*, 200 N.C. 539, 541, 157 S.E. 851, 852 (1931) (Emphasis added). (Citations omitted); *see also, State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333, *death sentence vacated*, 429 U.S. 809 (1976).

Before *State v. Hairston*, 121 N.C. 579, 28 S.E. 492 (1897), it was permissible to question a witness about the *general* reputation of the witness to be impeached, *State v. Efler*, 85 N.C. 585 (1881), *State v. Stallings*, 3 N.C. 300 (1804), and about that witness' reputation with respect to a specific character trait, *State v. Spurling*, 118 N.C. 1250, 24 S.E. 533 (1896), *Warlick v. White*, 76 N.C. 175 (1877).

However, since *Hairston* it has been the rule that counsel may only ask about the *general* reputation or character of the witness to be impeached. *State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978); *State v. Pearson*, 181 N.C. 588, 107 S.E. 305 (1921); *State v. Neville*, 175 N.C. 731, 95 S.E. 55 (1918); *State v. Burton*, 172 N.C. 939, 90 S.E. 561 (1916). However, the impeaching witness, of his own volition, may say in what respect the witness' reputation is good or bad. *State v. McEachern, supra; State v. Hicks, supra; State v. Butler*, 177 N.C. 585, 98 S.E. 821 (1919); *State v. Summers*, 173 N.C. 775, 92 S.E. 328 (1917); *State v. Melton*, 166 N.C. 442, 81 S.E. 602 (1914); *Edwards v. Price*, 162 N.C. 243, 78 S.E. 145 (1913); *State v. Hairston, supra. See also*, Sizemore, *Character Evidence in Criminal Cases in North Carolina*, 7 Wake Forest L. Rev. 17 (1970).

[2] Here, the witness, Jimmy Lee Davis, testified for the defendant that the prosecutrix had a bad reputation. The trial judge refused to allow the witness to say in what respect the reputation of the prosecutrix was bad. This testimony was not allowed because the trial judge felt that the witness had been coached and therefore could not give a voluntary or spontaneous answer.

There is absolutely no evidence in this case that defense counsel procured the witness to give perjured testimony. Defense counsel had a witness who would testify that Bethea had a reputation in her community for being an untruthful woman. It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer, *see, e.g.*, A. Morrill, *Trial Diplomacy*, Ch. 3, Part 8 (1973), and is to be commended because it promotes a more efficient administration of justice and saves court time.

Even though a witness has been prepared in this manner, his testimony at trial is still *his* voluntary testimony. Nothing improper has occurred so long as the attorney is preparing the witness to give *the witness'* testimony at trial and not the

testimony that the attorney has placed in the witness' mouth and not false or perjured testimony.

When a witness' testimony appears to have been memorized or rehearsed or it appears that the witness has testified using the attorney's words rather than his own or has been improperly coached, then these are matters to be explored on cross-examination, and the weight to be given the witness' testimony is for the jury. The sanctions of the Code of Professional Responsibility are there for the attorney who goes beyond preparing a witness to testify to that about which the witness has knowledge and instead procures false or perjured testimony. DR7-102, Code of Professional Responsibility.

From the record it appears that the witness had knowledge of Bethea's reputation for truthfulness and was prepared to give testimony to that effect. It was not error for the attorney to prepare the witness for the manner in which this testimony would be elicited on direct examination at trial. This proffered testimony was an attack on the credibility of the prosecutrix. The credibility of the prosecutrix was an important and material issue in this case. This testimony would have aided the jury in determining the believability of the testimony of the prosecutrix and thus the weight it should be given. Therefore, its exclusion was prejudicial error.

The record discloses what the excluded testimony of the witness would have been because at one point the witness answered defense counsel's question before the district attorney's objection was sustained. The better practice is for the trial judge to allow the attorney to make his offer of proof. The best manner in which to do this is to excuse the jury from the courtroom and then allow the witness to answer the question for the record. In order to determine whether the trial judge committed prejudicial error in excluding the testimony, it is necessary for the testimony to appear in the record; therefore, the trial judge should allow the attorney to make his offer of proof. *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978); *North Carolina State Highway Commission v. Pearce*, 261 N.C. 760, 136 S.E. 2d 71 (1964); *In re Gamble*, 244 N.C. 149, 93 S.E. 2d 66 (1956); 1 Strong's N.C. Index 3d, *Appeal and Error* § 49.1 and cases cited therein.

We deem it unnecessary to discuss defendant's remaining assignments of error, inasmuch as the matters which gave rise to them probably will not recur on retrial.

New trial.

STATE OF NORTH CAROLINA v. WILLIAM EARL GREEN

No. 67

(Filed 4 December 1979)

1. **Criminal Law § 76.6— confession—defendant with low I.Q.—insufficiency of findings to show voluntary waiver of counsel**

The trial court erred in the admission of defendant's confession where defendant presented evidence on motion to suppress tending to show that he had a very low I.Q., that he went to school for 10 years but he had very little education and could barely read, and that he could not understand instructions unless they were given slowly and fully explained to him, and the court failed to make sufficient findings of fact showing that defendant voluntarily, knowingly and intelligently waived his constitutional rights, particularly his right to consult with a lawyer and have the lawyer present during his interrogation.

2. **Arson § 5— first degree arson—failure to submit attempted arson**

The trial court in a first degree arson case erred in failing to submit to the jury the lesser included offense of attempted arson where defendant told the police that he poured diesel fuel around the front door of the house and placed a lighted piece of paper at the door, and the occupants of the house testified that although they observed fuel running under the front door, they discovered fire outside the back door and on the back porch and escaped from the house through the front door.

APPEAL by defendant from *Allsbrook, J.*, 29 January 1979 Session, PITT Superior Court.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with first-degree arson. Evidence presented by the state tended to show:

On 24 July 1978 Ruby Deloris Edwards, 18, and her two small children were living with her mother and five other children in a rented house in rural Pitt County. Until about two weeks before that date, Ruby had lived with defendant, he being the father of

her children. Deciding that she did not wish to continue living with defendant, she had moved in with her mother.

At around 8:30 p.m. or 9:00 p.m. on that date, defendant went to the Edwards home and tried unsuccessfully to get Ruby to come outside and talk with him. Later, after Ruby and all other occupants of the house had gone to bed, defendant went to the living room window, knocked on it, and again prevailed on Ruby to come outside. She refused to do so and urged defendant to leave the premises.

A short while later Ruby smelled what she referred to as gas in the hallway of the house. She called her mother and a few minutes later "gas" was observed running under the front door of the house and shortly thereafter fire was discovered outside of the back door and on the back porch of the house. All nine occupants of the house were able to get out after which the house was almost completely consumed by the fire.

Police arrested defendant early the next morning. After questioning, defendant gave the police a statement in which he declared that he loved Ruby and wanted her to resume living with him; that, when she refused, he obtained a drink bottle full of diesel fuel from a nearby tobacco barn; that he poured the fuel around the front door of the Edwards home; and, that after some difficulty, he ignited it.

Defendant offered evidence at the trial. He testified as a witness for himself and denied any implication in or knowledge of the fire. He further testified that the statement which he gave police was coerced and that he gave it out of fear and intimidation.

The jury returned a verdict of guilty of first-degree arson. The court entered judgment imposing a minimum and maximum sentence of life imprisonment.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General David S. Crump, for the State.

Willis A. Talton for defendant-appellant.

BRITT, Justice.

Defendant contends the trial court erred in the following respects: (1) In denying his motion to suppress evidence relating to his alleged confession; (2) in denying his motion for nonsuit; and (3) in failing to submit attempted arson as an alternative verdict. We find merit in contentions (1) and (3) and hold that defendant is entitled to a new trial.

[1] At the 2 January 1979 Session of Pitt Superior Court, Presiding Judge Cowper conducted a pretrial hearing on defendant's motion to suppress all evidence relating to any statements allegedly made by him to police on the ground that the statements were obtained in violation of his constitutional rights. At the hearing the state presented evidence tending to show that defendant was fully advised of his constitutional rights; that he signed a waiver of his right to have an attorney present during questioning; and that he freely and understandingly gave oral and written inculpatory statements. Defendant offered evidence tending to show that he had a very low I.Q.; that while he went to school for some 10 years he had very little education and could barely read; that he could not understand instructions unless they were given slowly and fully explained to him; and that he did not knowingly waive the presence of an attorney while he was questioned by police.

Following the hearing, Judge Cowper entered an order in which he briefly reviewed the proceedings before him and then found and concluded in pertinent part as follows:

> "3) Deputy Sheriff Moye interviewed the defendant on July 26, 1978 at the jail in the Interrogation Room after first fully advising him of his rights under the Miranda Warning [sic]. And the defendant, after going over each of these rights, indicated that he understood the rights and that he waived his right to an attorney and agreed to talk to the officers, after which time a full statement of confession was made and was put in writing.
>
> "From the foregoing conclusions of fact, the court makes the following finding of law. That the defendant William Earl Green was fully warned of his Constitutional Rights and knowingly signed a Waiver of Attorney and made a state-

ment while fully understanding and appreciating his rights to remain silent and to stop answering questions at any time and the right to have counsel present when any statement was made.

"The written statement made by William Earl Green to Officer Moye is admissible into evidence."

The legal principle involved here is succinctly stated by Justice Huskins in *State v. Riddick*, 291 N.C. 399, 408, 230 S.E. 2d 506 (1976), as follows:

"When the admissibility of an in-custody confession is challenged the trial judge must conduct a *voir dire* to determine whether the requirements of *Miranda* have been met and whether the confession was in fact voluntarily made. The general rule is that the trial judge, at the close of the *voir dire* hearing, *should* make findings of fact to show the bases of his ruling. *See State v. Silver*, 286 N.C. 709, 213 S.E. 2d 247 (1975); *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53 (1969). If there is a *material* conflict in the evidence on *voir dire* he *must* do so in order to resolve the conflict. *State v. Smith*, 278 N.C. 36, 178 S.E. 2d 597 (1970). . . ."

In *State v. Steptoe*, 296 N.C. 711, 716, 252 S.E. 2d 707 (1979), Justice Huskins, again speaking for the court, said:

"As a constitutional prerequisite to the admissibility of statements obtained from an accused during custodial interrogation, *Miranda* requires that the suspect be advised in unequivocal terms (1) that he has a right to remain silent; (2) that anything he says can and will be used against him in court; (3) that he has a right to consult with a lawyer and to have a lawyer present during interrogation; and (4) that if he is indigent and unable to employ a lawyer, counsel will be appointed to represent him. After having been so advised, an accused may waive the privilege against self-incrimination these warnings are designed to protect provided the waiver is made *voluntarily, knowingly,* and *intelligently*. . . ."

We hold that Judge Cowper did not make sufficient findings of fact showing that defendant voluntarily, knowingly and intelligently waived his constitutional rights as set forth in *Miran-*

da, particularly his right to consult with a lawyer and have the lawyer present during his interrogation.

With respect to his second contention, defendant virtually concedes that the evidence was sufficient to withstand his motion for nonsuit. We expressly hold that it was sufficient and further review of the evidence is not necessary.

[2] Regarding his third contention, defendant argues that the trial court erred in not granting his request that the lesser included offenses of attempted arson and damage to real property be submitted to the jury as alternate verdicts. As stated above, we think the trial court should have submitted attempted arson as an alternate verdict.

Where there is evidence of defendant's guilt of a lesser degree of the crime set forth in the bill of indictment, defendant is entitled to have the question submitted to the jury even in the absence of a specific prayer for the instruction. 4 Strong's N.C. Index 3d, Criminal Law § 115. The felony of an attempt to commit arson created by G.S. 14-67 is a lesser included offense of the crime of arson. *State v. Arnold*, 285 N.C. 751, 208 S.E. 2d 646 (1974).

Occupants of the house testified that although they observed "gas" running under the front door and into the hallway, they discovered the fire outside the back door and on the back porch; and that they escaped from the house through the front door. There was no evidence that the occupants found fire at or near the front door.

In his statement to the police, defendant said that he poured some diesel fuel around the *front* door of the house; that he ignited a piece of paper with his cigarette lighter; that he "was having trouble getting the fire to start"; that he stuck the piece of paper "between the front door" while the paper was burning; that he stood there for a minute and someone in the house said something to someone else; that when this happened he ran down the path and went to some tobacco barns; and that he did not know the house caught on fire because he ran.

Although there was sufficient evidence to submit the case to the jury on first-degree arson, there was also evidence that defendant merely *attempted* to set the house on fire. That being

true, the trial court should have submitted attempted arson as an alternate verdict.

For the reasons stated, defendant is awarded a

New trial.

BETTY ROUSE SMITH v. MYRTLE TEW BEASLEY AND DURAL LEE FISH

No. 83

(Filed 4 December 1979)

Automobiles § 91.5; Trial § 52.1— alleged inadequate damages—refusal to set aside verdict

In an action to recover for injuries suffered by plaintiff in an automobile accident where plaintiff offered evidence that her out-of-pocket expenses exceeded $3800 and where defendant offered no evidence, the trial court did not err in denying plaintiff's motion to set aside the jury verdict of $3350 as an inadequate award of damages, and there was no merit to plaintiff's contention that, because defendant offered no evidence, her evidence was uncontradicted and should be treated as a stipulation, since the testimony of plaintiff's witnesses was mere evidence to be considered, weighed, and believed or not believed by the jury.

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

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals reported in 41 N.C. App. 741 (1979), which found no error in the trial before *Preston, J.*, at the 13 March 1978 Session of WAKE Superior Court.

Plaintiff instituted this action seeking to recover damages for a back injury sustained by her as a result of a collision on 13 October 1975 between her automobile and an automobile operated by defendant Beasley and owned by defendant Fish. The circumstances surrounding the collision are fully set out in the decision of the Court of Appeals.

Plaintiff's evidence pertinent to decision of this appeal tended to show that prior to the collision which allegedly caused her personal injuries, she engaged in such activities as bowling, camping and motorcycling; that she had never had back pain prior to the accident; that shortly after the accident, she had a severe

pain in her back for which she was treated by an orthopedic surgeon; that since the accident, she has been unable to engage in many of her former activities. However, Dr. Nelson, the physician who treated plaintiff following the accident, testified that an X-ray "showed residual difficulty from a previous myelogram, which according to the report, was done for low back pain." He further noted that she had related to him "a history of prior low back pain, and this is what the myelogram was for." Dr. Nelson testified that his examination of plaintiff revealed some spasm of the muscles along her spine, but that he rated the spasm a 1+, which is the minimal degree of spasm on a scale of 1+ to 4+. In his opinion, plaintiff suffered no permanent disability. Plaintiff's evidence further tended to show that her out-of-pocket expenses, including lost salary in the amount of $3,040 and medical bills in the sum of $387, exceeded $3,800.

Although plaintiff claimed loss of salary from October until she returned to work in mid-March, her evidence tended to show that the doctor certified her as being able to return to work on 20 February 1976.

Defendant offered no evidence at trial. At the conclusion of plaintiff's evidence, the court submitted to the jury and the jury answered issues as follows:

> 1. Was the plaintiff injured as a result of the negligence of the defendant Beasley?
>
> Answer: Yes
>
> 2. What are the damages suffered by the plaintiff as a result of the negligence of the defendant Beasley?
>
> Answer: $3,350.00.

The plaintiff moved to set the verdict aside because of inadequate damages and thereafter moved pursuant to G.S. 1A-1, Rule 59(a), for a new trial on the ground that the jury manifestly disregarded the instructions of the court. Both motions were denied, and plaintiff appealed from judgment entered upon the jury verdict.

The Court of Appeals, in an opinion by Judge Vaughn, Judge Carlton concurring, found no error. Judge Clark dissented.

Young, Moore, Henderson & Alvis by George M. Teague for defendant appellees.

Brenton D. Adams for plaintiff appellant.

BRANCH, Chief Justice.

The principal question presented by this appeal is whether the trial judge erred in denying plaintiff's motion to set aside the verdict because of an inadequate award of damages. Plaintiff contends that since defendant offered no evidence, her evidence was uncontradicted and should be treated as a stipulation. She argues that since the jury awarded less than that amount, it ignored plaintiff's evidence and the court's instructions regarding pain and suffering.

In support of her position, plaintiff relies heavily upon the case of *Robertson v. Stanley*, 285 N.C. 561, 206 S.E. 2d 190 (1974). In *Robertson* the minor plaintiff and his father sued the defendant for damages resulting from defendant's alleged negligence. The minor plaintiff sought to recover for personal injuries, and the father sought recovery for medical expenditures incurred by reason of his son's personal injury. The medical expenses were *stipulated* to be in the amount of $1,970. The jury answered the issues of negligence in favor of the plaintiffs and awarded $1,970 to the father and nothing to the minor plaintiff. Plaintiff's motion for a new trial was denied by the trial court, and the Court of Appeals found no error in the trial. We reversed the Court of Appeals, holding that the jury arbitrarily ignored the minor plaintiff's proof of pain and suffering. In so holding, we stated, "If the minor plaintiff was entitled to a verdict against defendant by reason of personal injuries resulting from defendant's negligence then the minor plaintiff was entitled to all damages that the law provides in such case."

The majority in the Court of Appeals held that the case *sub judice* and *Robertson* were distinguishable. We agree.

A stipulation is an agreement between the parties establishing a particular fact in controversy. The effect of a stipulation is to eliminate the necessity of submitting that issue of fact to the jury. *Rural Plumbing & Heating, Inc. v. H. C. Jones Construction Co.*, 268 N.C. 23, 149 S.E. 2d 625 (1966). Where facts are stipulated, they are deemed established as fully as if deter-

mined by jury verdict. *Moore v. Humphrey*, 247 N.C. 423, 101 S.E. 2d 460 (1958). A stipulated fact is not for the consideration of the jury, and the jury may not decide such fact contrary to the parties' stipulation. *Inloes v. American Exchange Bank*, 11 Md. 173 (1857).

Here there was no stipulation removing any element of damages from the consideration of the jury. The testimony of plaintiff's witnesses remained mere evidence in this case to be considered by the jury. It is the function of the jury alone to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony, and determine what the evidence proves or fails to prove. *Koury v. Follo*, 272 N.C. 366, 158 S.E. 2d 548 (1968). In weighing the credibility of the testimony, the jury has the right to believe any part or none of it. *Brown v. Brown*, 264 N.C. 485, 141 S.E. 2d 875 (1965).

In instant case, the jury was free to believe or not believe plaintiff's evidence as to the amount of her damages and the nature of her injury. Plaintiff's own evidence was contradictory and in part unfavorable to her position. It is, therefore, conceivable that the jurors, under these circumstances, could have found nominal or minimal damages as to plaintiff's pain and suffering, believed the evidence unfavorable to her as to the other elements of damage and returned their verdict accordingly.

We do not deem it necessary to discuss the remaining assignments of error. Suffice it to say that we have carefully examined each of them and find no error prejudicial to plaintiff.

The decision of the Court of Appeals is

Affirmed.

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

STATE OF NORTH CAROLINA v. CHARLIE JUNIOR ADAMS

No. 14

(Filed 4 December 1979)

APPEAL by defendant from *McConnell, J.*, 27 November 1978 Session of ROCKINGHAM Superior Court.

Defendant was charged in a bill of indictment with the armed robbery of Eddie Turner and in a warrant for assault with a deadly weapon on Sam Henry Harrison. Defendant entered a plea of not guilty to each charge.

The State offered evidence tending to show that on 12 August 1978 defendant and Terry Lee Booker had been riding around drinking most of the day. Booker was operating a pickup truck which belonged to his father. At about 8:30 p.m. on that day, they stopped in front of Harriet Harrison's home. Mrs. Harrison, Eddie Turner and Geraldine Jones were sitting on the front porch. Either defendant or Booker asked for directions to Johnny Johnson's house. When the people on the porch laughed, Booker at defendant's direction backed the truck into the Harrison yard. Defendant then jumped out of the truck and shot a pistol into the air. Defendant told Turner, "I ought to shoot you and kill you now," and held the pistol against Turner's forehead. During this time, Booker was standing beside the truck holding two shotguns. Booker admitted ordering Turner to empty his pockets, but the testimony conflicted as to which of the assailants took the three dollars from Turner. Subsequently, defendant threatened to kill all the occupants of the porch and fired several shots over their heads. At this point, Mrs. Harrison's son, Sam Henry Harrison, drove up to the house. He looked at Booker's license plate, and defendant told him, "We are going to have to kill you too." Defendant then placed the pistol against Harrison's head and also pointed a shotgun at his chest. Mrs. Harrison constantly pleaded with defendant not to kill anybody. Finally, defendant and Booker left and proceeded to a Thirfty Mart store where they purchased more beer. Shortly after leaving the store, they were stopped by police officers and taken into custody. The officers charged Booker with driving under the influence of intoxicating liquor and charged defendant with public drunkenness. Mrs. Harrison did

not report the robbery and assault which occurred at her home until the next day because she was afraid of the two men.

Defendant offered evidence tending to show that, in celebration of his birthday, he began to drink wine, whiskey and beer on the morning of 12 August 1978 and continued to drink heavily all day. He remembered leaving John Boy Blackwell's house in the late afternoon of 12 August 1978 but remembered nothing else until Booker awakened him and they went into the store on Madison Street in Reidsville. Shortly after leaving this store, police officers stopped them, took Booker and defendant into custody and charged defendant with public drunkenness.

Defendant was convicted of assault with a deadly weapon and armed robbery. He was sentenced to life imprisonment on the charged of armed robbery and to a period of two years for assault with a deadly weapon.

We allowed defendant's petition for discretionary review prior to consideration by the Court of Appeals on the charge of assault with a deadly weapon.

Rufus L. Edmisten, Attorney General, by Myron C. Banks, Special Deputy Attorney General, for the State.

Alexander P. Sands III for defendant appellant.

BRANCH, Chief Justice.

Counsel for defendant excepted to the judgment entered and perfected his appeal. The record on appeal contains no assignments of error. Counsel, without presenting any arguments in his brief, submits the record on appeal with a request that we examine the record to the end that we might determine whether prejudicial error exists.

In cases where notice of appeal was given after 1 July 1975, we have adopted the single concept of "record on appeal" and abandoned the former distinction between a "record proper" and "settled case on appeal." *See* Rule 9(b) of the New Rules of Appellate Procedure, 287 N.C. 669 (1975).

Rule 28 of the New Rules specifies that our review shall be limited to questions which are supported by the arguments and authorities cited in the brief. However, we may review matters

formerly considered as appearing on the "face of the record proper" when they are properly brought forward in the brief. Rule 10(a) and Rule 28 of the New Rules of Appellate Procedure. Further, the question of the sufficiency of the evidence to carry a case to the jury may be argued on appeal even without proper exception by virtue of the statute G.S. 15-173. *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976). Enforcement of the rules under consideration is subject to the provisions of Rule 2 which in effect provides that the appellate courts may suspend or vary the Rules of Appellate Procedure in order to prevent manifest injustice or to expedite decision in the public interest.

Here defendant made no argument in his brief and cited no authority. Thus, nothing is presented to us for review. Nevertheless, because of the severity of the punishment imposed upon the verdict of guilty of armed robbery, we elected pursuant to our inherent authority and Rule 2 to examine the entire record. After such examination, we conclude that the cases were properly presented to the jury for decision since there was substantial evidence of every essential element of the offenses charged and that defendant was the perpetrator of the offenses. *See State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971). Further, we are unable to find any prejudicial error in the trial judge's evidentiary rulings. The court in its instructions to the jury adequately explained and applied the law to the evidence presented.

We, therefore, hold that there was no error warranting that the verdicts or judgments be disturbed.

We note in passing that this case might be worthy of review by the Executive Branch at the proper time in view of the imposition of a life sentence in a three dollar robbery in which no one was injured.

No error.

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

ALLISON v. INSURANCE CO.

No. 69 PC.

Case below: 43 N.C. App. 200.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 December 1979.

BANK v. MORGAN

No. 70 PC.

No. 34 (Spring Term).

Case below: 43 N.C. App. 63.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 4 December 1979.

EMPLOYMENT SECURITY COMM. v. BROADCASTING CORP.

No. 47 PC.

Case below: 42 N.C. App. 702.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 December 1979.

EQUITABLE FACTORS CO. v. CHAPMAN-HARKEY CO.

No. 100 PC.

Case below: 43 N.C. App. 189.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 December 1979.

FUNGAROLI v. FUNGAROLI

No. 86 PC.

Case below: 43 N.C. App. 227.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 December 1979.

GOODEN v. BROOKS, COMR. OF LABOR

No. 39.

(Formerly No. 70 PC Spring Term 1979.)

Case below: 39 N.C. App. 519.

Order dated 1 May 1979 (297 N.C. 299) allowing discretionary review under G.S. 7A-31 is vacated and the proceedings in the cause in the Supreme Court are dismissed 4 December 1979.

HIGH v. PARKS

No. 65 PC.

Case below: 42 N.C. App. 707.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 December 1979.

HOLLEY v. COGGIN PONTIAC

No. 82 PC.

Case below: 43 N.C. App. 229.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 December 1979.

HUDSON v. HUDSON

No. 46 PC.

No. 32 (Spring Term).

Case below: 42 N.C. App. 647.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 December 1979.

JOHNSON v. PODGER

No. 71 PC.

Case below: 43 N.C. App. 20.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 December 1979.

McLEOD v. McLEOD

No. 73 PC.

Case below: 43 N.C. App. 66.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 December 1979.

POWER & LIGHT CO. v. JACKSON

No. 59 PC.

Case below: 42 N.C. App. 731.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 December 1979.

STATE v. BAGLEY

No. 79 PC.

No. 37 (Spring Term).

Case below: 43 N.C. App. 171.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 December 1979.

STATE v. BRINCEFIELD

No. 75 PC.

Case below: 43 N.C. App. 49.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 December 1979.

STATE v. DANCY

No. 72 PC.

Case below: 43 N.C. App. 208.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 December 1979.

STATE v. HARRIS

No. 24.

Case below: 43 N.C. App. 346.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 December 1979.

STATE v. JOHNSON

No. 91 PC.

Case below: 43 N.C. App. 228.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 November 1979.

STATE v. JONES

No. 106 PC.

Case below: 43 N.C. App. 619.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 November 1979.

STATE v. LINVILLE

No. 83 PC.

No. 38 (Spring Term).

Case below: 43 N.C. App. 204.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 December 1979.

STATE v. MAYNARD

No. 94 PC.

Case below: 42 N.C. App. 257.

Application by defendant for further review denied 4 December 1979.

STATE v. PUCKETT

No. 102 PC.

No. 40 (Spring Term).

Case below: 43 N.C. App. 153.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 December 1979. Notice of appeal of defendant dismissed.

STATE v. ROGERS

No. 98 PC.

No. 39 (Spring Term).

Case below: 43 N.C. App. 177.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 December 1979 for limited purpose of reviewing lack of disposition by the Court of Appeals of defendant's exceptions re corroborative testimony and trial court's instruction on voluntary manslaughter. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 December 1979.

STATE v. SMITH

No. 51 PC.

Case below: 42 N.C. App. 731.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 December 1979.

TAYLOR v. AIR CONDITIONING CORP.

No. 81 PC.

Case below: 43 N.C. App. 194.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 December 1979.

TAYLOR v. STEVENS & CO.

No. 77 PC.

No. 35 (Spring Term).

Case below: 43 N.C. App. 216.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 4 December 1979.

APPENDIX

AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

ADMISSION TO THE PRACTICE OF LAW

PROCEDURES FOR RULING ON
QUESTIONS OF ETHICS

ELECTION OF OFFICERS

DIVISION OF WORK

AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

AMENDMENTS TO RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law in North Carolina and the Rules and Regulations of The North Carolina State Bar were duly adopted by the Council of The North Carolina State Bar at its quarterly meeting on July 13, 1979.

BE IT RESOLVED by the Council of The North Carolina State Bar that the following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina as appear in 289 N.C. 735 and as amended in 291 N.C. 724, 293 N.C. 759 and 295 N.C. 747 be and the same are hereby amended by rewriting the same to read as follows:

.0101 ADDRESS

The offices of the Board of Law Examiners of the State of North Carolina are located in the N. C. State Bar Building at 208 Fayetteville Street, Raleigh, N. C. The mailing address is P. O. Box 25427, Raleigh, N. C. 27611. The offices are open from 9:00 a.m. to 5:00 p.m. Monday through Friday, excepting holidays.

.0304 FEES; LATE REGISTRATION

Each registration must be accompanied by a fee of $35.00. An additional fee of $50.00 shall be charged all applicants who file a late registration. All said fees shall be payable to the board. No part of a registration fee shall be refunded for any reason whatsoever.

.0403 FILING DEADLINE

Applications must be filed with and received by the secretary at the offices of the board not later than 5:00 p.m., Eastern Standard Time, on the second Tuesday in January of the year in which the applicant applies to take the written bar examination; provided, however, upon payment of a late filing fee of $100 (in addition to all other fees required by these rules), an applicant may be permitted to file a late application with the board no later than 5:00 p.m. on the first Tuesday in March of the year in which the applicant applies to take the written bar examination.

.0404 FEES

Every application by a general applicant who

(1) is a resident of the State of North Carolina and who is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $150.00;

(2) is a resident of the State of North Carolina and who is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $300.00;

(3) is a nonresident of the State of North Carolina and who is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $150.00 plus such fee as the National Conference of Bar Examiners or its successor may charge from time to time for processing an application of a nonresident.

(4) is a nonresident of the State of North Carolina and who is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $300.00 plus such other fee as the National Conference of Bar Examiners or its successor may charge from time to time for processing an application of a nonresident.

.0501 REQUIREMENTS FOR GENERAL APPLICANTS

As a prerequisite to being licensed by the board to practice law in the State of North Carolina, a general applicant shall:

(1) be of good moral character and have satisfied the requirements of Section .0600 of this Chapter both at the time the license is issued and at the time of standing and passing a written bar examination as prescribed in Section .0900 of this Chapter.

(2) have registered as a general applicant in accordance with the provisions of Section .0300 of this Chapter.

(3) possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;

(4) be of the age of at least eighteen (18) years;

(5) be and continuously have been a bona fide resident of the State of North Carolina on and from the 15th day of June of the year in which the applicant applies to take the written bar examination;

(6) have filed formal application as a general applicant in accordance with Section .0400 of this Chapter;

(7) stand and pass a written bar examination as prescribed in Section .0900 of this Chapter.

.0502 REQUIREMENTS FOR COMITY APPLICANTS

(7) be of good moral character and have satisfied the requirements of Section .0600 of this Chapter.

.0702 LEGAL EDUCATION

Every general applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law shall file with the secretary a certificate from the president, dean or other proper official of a law school approved by the Council of the North Carolina State Bar, a list of which is available in the office of the secretary, or shall otherwise show to the satisfaction of the board that the applicant has or will receive a law degree within sixty (60) days after the date of the written examination.

.0805 REFUSAL TO LICENSE

Nothing herein contained shall prevent the board on its own motion from refusing to issue a license to practice law until the board has been fully satisfied as to the moral fitness of the applicant as provided by Section .0600 of this Chapter.

.0903 SUBJECT MATTER

The examination may deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

.1201 NATURE OF HEARINGS

(a) All general applicants may be required to appear before the board or a panel at a hearing to answer inquiry about any matter under these rules.

(b) Each comity applicant shall appear before the board or panel to satisfy the board that he or she has met all the requirements of Rule .0502.

.1202 NOTICE OF HEARING

The chairman will schedule the hearings before the board or panel and such hearings will be scheduled by the issuance of a notice of hearing mailed to the applicant or his attorney within a reasonable time before the date of the hearing.

.1203 WHO SHALL CONDUCT HEARINGS

(a) All hearings shall be heard by the board except that the chairman may designate two or more members to serve as a panel to conduct these hearings.

(b) A panel will report to the board its findings and recommendation.

(c) If no recommendation is made, or an unfavorable recommendation is made, the chairman will schedule a de novo hearing before the full board.

.1206 DEPOSITIONS AND DISCOVERY

(a) A deposition may be used in evidence when taken in compliance with the N.C. Rules of Civil Procedure, G.S. 1A-1. The board may also allow the use of depositions or written interrogatories for the purpose of discovery or for the use as evidence in the hearing or for both purposes pursuant to the N.C. Rules of Civil Procedure.

(b) Any party or the board may submit sworn affidavits as evidence to be considered by the board in a board hearing. The board will take under consideration sworn affidavits presented to the board by persons desiring to protest an applicant's admission to the North Carolina Bar.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendments to the Rules and Regulations of The North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of The North Carolina State Bar, this the 5th day of September, 1979.

s/B. E. James, Secretary
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 4 day of September, 1979.

s/Joseph Branch
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 4 day of September, 1979.

s/J. Phil Carlton
For the Court

The following amendments to the Rules Governing Admission to the Practice of Law in North Carolina and the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 18, 1980.

BE IT RESOLVED by the Council of the North Carolina State Bar that the following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina as appear in 289 N.C. 739-756; 293 N.C. 759, 761 and 763; 295 N.C. 747; 296 N.C. 746 and amendments approved by the Supreme Court on August 23, 1979 be and the same are hereby amended by rewriting the same to read as follows:

.0204 LIST

As soon as possible after each filing deadline for applications, the secretary shall prepare and maintain a list of general applicants for the ensuing examination.

.0303 FILING DATE

Registrations shall be filed with the secretary at the offices of the Board on or before the first Tuesday in March of the year immediately preceding the year in which the applicant applies for admission to practice law in the state.

.0402 APPLICATION FORM

(1) The application form requires an applicant to supply information relating to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, character references, along with a requirement that the applicant be familiar with the Code of Professional Responsibility as promulgated by the North Carolina State Bar. In addition, all applicants must submit four certificates of moral character from individuals who know the applicant, a recent photograph, one set of clear fingerprints and a birth certificate. The application must be filed in duplicate. The duplicate may be a photocopy of the original.

(2) An applicant who has aptly filed a complete application with the board within the past twelve (12) month period immediately preceding the filing deadlines specified in Rule .0403 of this Chapter may file a Supplemental Application on forms supplied by the board, along with the applicable fees. The Supplemental Application will update the information previously submitted to the board by the applicant. Said Supplemental Application must be filed by the deadlines set out in Rule .0403 of this Chapter.

.0403 FILING DEADLINES

(1) Applications shall be filed and received by the secretary at the offices of the Board not later than 5:00 p.m., Eastern Standard Time, on the second Tuesday in January immediately preceding the date of the July written bar examination and not later than 5:00 p.m., Eastern Daylight Savings Time, on the second Tuesday in October immediately preceding the date of the February written bar examination.

(2) Upon payment of a late filing fee of $100 (in addition to all other fees required by these rules), an applicant may file a late application with the board not later than 5:00 p.m., Eastern Standard Time, on the second Tuesday in March immediately preceding the July written bar examination and not later than

5:00 p.m., Eastern Standard Time, on the first Tuesday in November immediately preceding the February written bar examination.

(3) Any applicant who has aptly filed an application to stand the February written bar examination may make application to take the immediately following July bar examination by filing a Supplemental Application with the secretary of the board at the offices of the board not later than 5:00 p.m., Eastern Daylight Savings Time, on the first Tuesday in May immediately preceding the July written bar examination.

.0404 FEES

Every application by a general applicant who

(1) is a resident of the State of North Carolina and who is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $170.00;

(2) is a resident of the State of North Carolina and who is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $300.00;

(3) is a nonresident of the State of North Carolina and who is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $170.00 plus such fee as the National Conference of Bar Examiners or its successor may charge from time to time for processing an application of a nonresident.

(4) is a nonresident of the State of North Carolina and who is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $300.00 plus such other fee as the National Conference of Bar Examiners or its successor may charge from time to time for processing an application of a nonresident.

.0405 REFUND OF FEES

No part of the fee required by Rule .0404 of this chapter shall be refunded to the applicant unless the applicant shall file with the secretary a written request to withdraw as an applicant, not later than the 15th day of June preceding the July written bar examination and not later than the 15th day of January preceding the February written bar examination, in which event not more than one-half of the fee may be refunded to the applicant in the discretion of the board; provided, however, no part of any fee paid for nonresident investigation shall be refunded.

.0501 REQUIREMENTS FOR GENERAL APPLICANTS

(5) be and continuously have been a bona fide resident of the State of North Carolina on and from the 15th day of June of the year in which the applicant applies to take the July written bar examination, or on and from the 15th day of January of the year in which the applicant applies to take the February written bar examination;

.0502 REQUIREMENTS FOR COMITY APPLICANTS

(2) Pay to the board with each written application a fee of $575.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a nonresident, no part of which may be refunded to the applicant whose application is denied;

.0604 BAR CANDIDATE COMMITTEE

Every applicant shall appear before a bar candidate committee appointed by the chairman of the board, in the judicial district in which he resides, or in such other judicial district as the board in its sole discretion may designate to the candidate, to be examined about any matter pertaining to his moral character. An applicant who has appeared before a bar candidate committee may, in the board's discretion, be excused from making a subsequent appearance before the bar candidate committee. The applicant shall give such information as may be required on such forms provided by the board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee such information and documents as it may reasonably require pertaining to the moral fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be adivsed of the time and place of his appearance before the bar candidate committee.

.0702 LEGAL EDUCATION

Every general applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law, shall prove to the satisfaction of the board that said applicant has graduated from a law school approved by the Council of the North Carolina State Bar or that said applicant will graduate within thirty (30) days after the date of the written bar examination from a law school approved by the Council of the North Carolina State Bar. Every applicant shall file with the

secretary a certificate of the dean, or other proper official of said law school, certifying the date of graduation. A list of the approved law schools is available in the office of the executive secretary.

.0901 WRITTEN EXAMINATION

Two written bar examinations shall be held each year following 1980 for those applying to be admitted to the practice of law in North Carolina as general applicants.

.0902 DATES

The written bar examinations shall be held in the City of Raleigh beginning in the months of February and July on such dates as the board may set from year to year.

.1004 SCORES

(1) Upon written request within thirty (30) days after the results of the written bar examination have been announced, the board will release to an unsuccessful applicant the scores he received on the Multistate Bar Examination portion of the written bar examination.

(2) Upon written request of an applicant, the board will furnish the Multistate Bar Examination score of said applicant to another board of bar examiners, or like organization that administers the admission of attorneys into that jurisdiction.

.1203 WHO SHALL CONDUCT HEARINGS

(a) All hearings shall be heard by the board except that the chairman may designate two or more members to serve as a panel to conduct these hearings.

(b) The panel will make a determination as to the applicant's eligibility to stand the written bar examination or to be licensed by comity. The applicant will be notified in writing of the panel's determination. In the event of an adverse determination, the applicant may request a hearing de novo before the full board by giving written notice to the secretary at the offices of the board within ten (10) days following receipt of the panel's determination. Failure to file such notice in the manner and within the time stated shall operate as a waiver of the right of the applicant to request a hearing de novo before the board and shall result in the determination of the panel becoming final.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing Admission to the Practice of Law in North Carolina have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendments to the Rules Governing Admission to the Practice of Law in North Carolina as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 23rd day of January, 1980.

s/B. E. James, Secretary
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of February, 1980.

s/Joseph Branch
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 25th day of February, 1980.

s/Walter E. Brock
For the Court

AMENDMENT TO PROCEDURES FOR RULING ON QUESTIONS OF ETHICS

The following amendments to the Rules, Regulations and the Certificate of Organization of The North Carolina State Bar was duly adopted by the Council of The North Carolina State Bar at its quarterly meeting on September 27, 1979.

BE IT RESOLVED by the Council of The North Carolina State Bar, that Article VI, Section 5. Standing Committees of the Council, b. of the Certificate of Organization of The North Carolina State Bar, as appears in 205 N.C. 859 and as amended in 243 N.C. 795 be and the same is hereby amended by adding after the second paragraph the following Procedures:

PROCEDURES OF THE NORTH CAROLINA STATE BAR FOR RULING ON QUESTIONS OF ETHICS

(A) DEFINITIONS

(1) "Attorney" shall mean any active member of the Bar.

(2) "Bar" shall mean The North Carolina State Bar.

(3) "Chairman" shall mean the Chairman, or in his absence the Vice-Chairman, of the Ethics Committee of the Bar.

(4) "Citizen" shall mean any person, firm or corporation residing in North Carolina who is not an attorney as above defined.

(5) "Committee" shall mean the Ethics Committee of the Bar.

(6) "Council shall mean the Council of the Bar.

(7) "Ethics Advisory" shall mean an informal legal ethics ruling issued by the Executive Director under the supervision of the Ethics Committee. The advisories shall be designated by the letters "EA", numbered and kept on file at the Bar's headquarters.

(8) "Ethics Decision" shall mean a ruling by the Council in response to a request for a Legal Ethics Opinion which, because of its special facts or for other reasons, does not warrant issuance of a published opinion. The Decisions shall be designated by the letters "ED", numbered, and kept on file at the Bar's headquarters.

(9) "Executive Director" shall mean the Executive Director of the Bar or, in his absence, his designee.

(10) "Grievance Committee" shall mean the Grievance Committee of the Bar.

(11) "Legal Ethics Opinion" shall mean an opinion issued by the Council to provide ethical guidance for attorneys and to establish a principle of ethical conduct. Such opinions are published and designated by the letters 'CPR' with a number to identify them as interpretations of the *Code of Professional Responsibility.*

(12) "President" shall mean the President of the State Bar or, in his absence, the presiding officer of the Council.

(13) "Published" shall mean published in *The North Carolina State Bar Quarterly.*

(B) REQUESTS FOR LEGAL ETHICS OPINIONS AND ETHICS ADVISORIES (GENERAL PROVISIONS)

(1) Any attorney or citizen may request the Bar to rule on actual or contemplated professional conduct of an attorney in the form and manner provided hereinafter. The grant or denial of the requests rests with the discretion of the Executive Director, Committee or the Council.

(2) Attorneys may initiate a request for an Ethics Advisory either in writing, by telephone or in person regarding conduct which they contemplate and in good faith believe is either a routine matter or requires urgent action in order to protect some legal right, privilege or interest. If the request is initiated verbally, the requesting attorney must promptly confirm his request in writing.

(3) A request for an Ethics Advisory, Ethics Decision or Legal Ethics Opinion shall present in detail to the Executive Director all operative facts upon which the request is based. All requests for either a Legal Ethics Opinion or an Ethics Decision shall be made in writing.

(4) Any citizen may request either a Legal Ethics Opinion or an Ethics Decision through any Councilor of the Judicial District of his residence or principal place of business except when the request is regarding the propriety of said Councilor's conduct, in which case the citizen may make the request through another Councilor in the district or a Councilor in an adjoining Judicial District.

(5) Any attorney, including a Councilor acting pursuant to paragraph (4) hereinabove, who requests either a Legal Ethics Opinion or an Ethics Decision concerning acts or contemplated professional conduct of another attorney, shall state the name of that attorney and identify all persons who the requesting attorney has reason to believe would be substantially affected by the question or questions advanced. The Councilor, acting pursuant to subsection (4) hereinabove shall also ask the requesting citizen to inform him of any attorney who the requesting citizen has reason to believe would be substantially affected by the question or questions advanced. The Councilor shall exercise good faith in preparing the request on behalf of the citizen.

(6) If an attorney willfully fails to identify an attorney who the requesting attorney has reason to believe would be substantially affected by the requested Ethics Advisory, Legal Ethics Opinion, or Ethics Decision, his willfull failure may be treated as misconduct. The requesting attorney shall receive no right, benefit, or immunity under any opinion which has been issued under such circumstances, and the opinion shall be re-examined *de novo* under the procedures delineated in section (D) hereinbelow.

(C) ETHICS ADVISORIES

(1) An Ethics Advisory answers an inquiry by an attorney regarding his own contemplated conduct when the attorney needs an expeditious ethics ruling on either a routine matter or under exigent circumstances and has complied with section (B) hereinabove.

(2) Upon receipt of either a written or verbal request from an attorney for an Ethics Advisory, the Executive Director acting under the supervision and direction of the Ethics Committee, may either honor the request or deny it. If the Executive Director honors the request, he shall communicate his ruling to the inquirer. The action on the request shall be either written or verbal with prompt confirmation in writing. Action on the request shall be taken within a reasonable time. Neither the denial nor issuance of an advisory nor the ruling itself shall be appealable.

(3) An Ethics Advisory issued by the Executive Director shall be promulgated under the authority of the Ethics Committee and in accordance with such guidelines as the Ethics Committee may establish and prescribe from time to time.

(4) An Ethics Advisory shall sanction or disapprove only the matter in issue, not otherwise serve as precedent and not be published.

(5) Ethics Advisories shall be reviewed periodically by the Committee. If, upon review, a majority of the Committee present and voting decides that an Ethics Advisory should be withdrawn, the requesting attorney shall be notified in writing of the Committee's decision by the Executive Director. Until such notification, the attorney shall be deemed to have acted ethically and in good faith if he acts pursuant to the Ethics Advisory which is later withdrawn.

(6) An attorney requesting a Legal Ethics Opinion or Ethics Decision, subsequent to requesting an Ethics Advisory on the same question, shall state that an advisory was sought, specify the nature of the advisory provided and attach copies of all relevant correspondence between the attorney and the Bar.

(7) If either the Executive Director declines to issue an Ethics Advisory, or the requesting attorney disagrees with the issued advisory, or the advisory is withdrawn by the Committee, an attorney has the right to proceed *de novo* under the procedures delineated in section (D).

(D) LEGAL ETHICS OPINIONS AND DECISIONS

(1) Requests for Legal Ethics Opinions or Ethics Decisions shall be made in writing and submitted to the Executive Director who, after determining that the request is in compliance with section (B), shall transmit the requests to the Chairman of the Ethics Committee.

(2) If a Legal Ethics Opinion or Ethics Decision is requested concerning contemplated or actual conduct of another attorney, the Chairman shall notify that attorney and provide him or her with the opportunity to be heard, along with the person who requested the opinion, under such guidelines as may be established by the Committee. The Chairman shall notify any additional person or group he deems appropriate and provide them an opportunity to be heard.

(3) The Committee shall prepare a written proposed Legal Ethics Opinion or Ethics Decision which shall state its conclusion in respect to the question asked and the reasons therefor.

(4) The proposed Legal Ethics Opinion or Ethics Decision shall be provided to the interested persons and shall be transmitted to the President for consideration by the Council.

(5) At least thirty (30) days prior to the next regularly scheduled meeting of the Council, any interested person or group may submit a written request to be heard on the proposed opinion or decision. The Council, under such guidelines as it may adopt, may in its discretion allow or deny such request. Any attorney, whether permitted to appear before the Council or not, has the right to file a written brief with the Council under such rules as may be fixed aforesaid. The President may, in his discretion, permit any additional person or group to file a written brief.

(6) The Council's action on the proposed opinion shall be determined by vote of the majority of the Council present and voting. Notice of such action shall be provided to the interested persons.

(7) The Committee may on its own motion submit a proposed Legal Ethics Opinion to the Council for its consideration. Prior to action by the Council, the proposed opinion shall be published and an opportunity shall be provided for interested persons to request to be heard before the Council when the opinion is considered, subject to the provisions of subsection (5) above.

(8) A Legal Ethics Opinion or Ethics Decision may be reconsidered or withdrawn by the Council pursuant to rules which it may establish from time to time. Those persons who participated in the original proceedings shall be given an opportunity to request to be heard in connection with the reconsideration in accordance with subsection (5) above.

(9) When an ethics inquiry may amount to the statement of a grievance, the Executive Director, the Chairman or the President may either consider the request as seeking an ethics ruling or refer the matter to the Grievance Committee.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar has been

duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment to the Rules and Regulations of The North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of The North Carolina State Bar, this the 15th day of October, 1979.

s/B. E. James, Secretary
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8 day of November, 1979.

s/Joseph Branch
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 8 day of November, 1979.

s/Carlton, J.
For the Court

AMENDMENT TO RULES GOVERNING ELECTION OF OFFICERS

The following amendment to the Rules, Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of The North Carolina State Bar at its quarterly meeting on January 18, 1980.

BE IT RESOLVED by the Council of The North Carolina State Bar that Article III, Section 1, ELECTION OF OFFICERS, as appears in 205 N.C. 856 and as amended in 221 N.C. 583 and 274 N.C. 606, be amended to read as follows:

Section 1. Election of Officers

The officers of the North Carolina State Bar and the Council shall consist of a President, President-Elect, a Vice-President and an Immediate Past President, who shall be deemed members of the Council in all respects. These officers shall serve without compensation, except per diem allowance fixed by statute.

There shall be a Secretary-Treasurer who shall have the title of Executive Director, but who shall not be a member of the Council. The Secretary-Treasurer shall receive a salary fixed by the Council.

All officers shall be elected annually by the Council at an election to take place at the Annual Meeting of the North Carolina State Bar and shall hold office for one year and until their successors are elected and qualified. The President-Elect shall take office as President at the conclusion of the Annual Meeting following his term of office as President-Elect. The President-Elect and Vice-President need not be members of the Council at the time of their election.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar has been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of January, 1980.

s/B. E. James, Secretary
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of February, 1980.

s/Joseph Branch
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 25th day of February, 1980.

s/Walter E. Brock
For the Court

AMENDMENT TO RULES GOVERNING DIVISION OF WORK

The following amendment to the Rules, Regulations and the Certificate of Organization of The North Carolina State Bar was duly adopted by the Council of The North Carolina State Bar at its quarterly meeting on January 18, 1980.

BE IT RESOLVED by the Council of The North Carolina State Bar that Article I, Section 2, DIVISION OF WORK, as appears in 205 N.C. 854 be amended to read as follows:

Section 2. Division of Work.

To facilitate the work for the accomplishment of the above enumerated purposes, the Council may, from time to time, classify such work under appropriate sections and committees, either standing or special, of the North Carolina State Bar.

The Council shall determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to each committee.

Any committee may, at the discretion of the appointing or electing authority, be composed of Council members or members of the North Carolina State Bar who are not members of the Council or of lay persons or of any combination.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar has been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of January, 1980.

s/B. E. James, Secretary
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of February, 1980.

s/Joseph Branch
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 25th day of February, 1980.

s/Walter E. Brock
For the Court

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ANALYTICAL INDEX

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APPEAL AND ERROR

§ 6. Finality as Bearing on Appealability

An order of the hearing commission of the State Bar denying defendant's motion to dismiss on the ground of lack of jurisdiction was interlocutory and defendant could not appeal therefrom as a matter of right. *State Bar v. DuMont*, 564.

§ 17. Stay Bonds

The Court of Appeals erred in denying plaintiff's motion to dissolve a stay of the trial court's order since the appeal of the order to which the stay was directed was not perfected. *Craver v. Craver*, 231.

§ 22.1. Certiorari; Scope of Review

Trial court's order was not placed before the Court of Appeals for review by way of defendant's petition for certiorari since that petition was made solely for the purpose of preserving an exception to the trial judge's settlement of the record. *Craver v. Craver*, 231.

§ 38. Settlement of Case on Appeal

The Court of Appeals had no authority on June 5, 1978 to consider the merits of the trial court's order entered on 27 September 1977 since defendant failed within 10 days of the settlement of the case on appeal to obtain the clerk's certification of the record and failed within 150 days of giving notice of appeal to file the settled record in the Court of Appeals. *Craver v. Craver*, 231.

§ 45.1. Effect of Failure to Discuss Assignments of Error in Brief

Where the trial court refused to set aside the verdict because of a misapprehension of law, such error would entitle plaintiff to have the cause remanded to the trial judge for consideration of his motion to set the verdict aside; however, because plaintiff did not raise the question in his brief, such assignment of error is deemed abandoned. *Insurance Co. v. Chantos*, 246.

§ 64. Affirmance or Reversal

Where one member of the Supreme Court did not participate in a decision and the remaining six justices are equally divided, the decision of the Court of Appeals is affirmed without becoming a precedent. *Starr v. Clapp*, 275.

ARREST AND BAIL

§ 3.11. Duty of Officer After Arrest Without Warrant

Statutes requiring that an arrested person must be taken before a magistrate without unnecessary delay do not prescribe mandatory procedures affecting the validity of a trial. *S. v. Reynolds*, 380.

§ 5.2. Right to Enter Dwellings

An officer's warrantless entry into defendant's trailer dwelling for the purpose of arresting defendant for murder was lawful where the officer had probable cause to believe that the person who committed the murder was in defendant's trailer, and the officer's seizure of a rifle found in the trailer was lawful. *S. v. Allison*, 135.

§ 6. Resisting Arrest

The charge of resisting an officer who is discharging a duty of his office is not a lesser included offense of the charge of assaulting a law enforcement officer while he is discharging a duty of his office, and though the facts in a given case might constitute a violation of both statutes, defendant cannot be punished twice for the same conduct. *S. v. Hardy*, 191.

ARREST AND BAIL—*Continued*

§ 6.1. Resisting Arrest; Validity and Sufficiency of Warrant

Where defendants were charged with assaults upon two police officers, trial court was without jurisdiction to enter judgment upon verdicts convicting defendants of resisting arrest by those officers. *S. v. Hardy,* 191.

§ 6.2. Resisting Arrest; Sufficiency of Evidence

Although trial court erred in not requiring the State to elect at the close of the evidence between the charges of resisting and assaulting a police officer and in submitting the issue of defendants' guilt of resisting as a lesser degree of the offense of assaulting the officer, such errors were harmless since defendants were properly charged in valid warrants with resisting the officer; defendants were convicted of only one crime, resisting; and the double jeopardy rule was therefore inapplicable. *S. v. Hardy,* 191.

ARSON

§ 5. Instructions

Trial court in a first degree arson case erred in failing to submit the lesser included offense of attempted arson. *S. v. Green,* 793.

ASSAULT AND BATTERY

§ 4. Criminal Assault in General

The charge of resisting an officer who is discharging a duty of his office is not a lesser included offense of the charge of assaulting a law enforcement officer while he is discharging a duty of his office, and though the facts in a given case might constitute a violation of both statutes, defendant cannot be punished twice for the same conduct. *S. v. Hardy,* 191.

§ 14.8. Assault on a Female; Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a prosecution for assault on a female where it tended to show that defendant entered the victim's house during the night, threatened her with a knife, and felt her breasts and pubic area. *S. v. Evans,* 263.

In a prosecution for assault with intent to commit rape, the jury could find defendant guilty of the offense of assault on a female though there was no evidence that defendant was over 18 since the jury could estimate his age. *Ibid.*

§ 15.4. Assault on Law Enforcement Officer; Instructions

Although trial court erred in not requiring the State to elect at the close of the evidence between the charges of resisting and assaulting a police officer and in submitting the issue of defendants' guilt of resisting as a lesser degree of the offense of assaulting the officer, such errors were harmless since defendants were properly charged in valid warrants with resisting the officer; defendants were convicted of only one crime, resisting; and the double jeopardy rule was therefore inapplicable. *S. v. Hardy,* 191.

ATTORNEYS AT LAW

§ 6. Withdrawal of Attorney from Case

Prejudice warranting a new trial does not automatically result to a defendant whose codefendant is represented by counsel who formerly represented both defendants when testimonial conflicts between defendants develop at trial. *S. v. Nelson,* 573.

AUTOMOBILES

§ 46. Opinion Testimony as to Speed

Defendant driver of an automobile could properly give his opinion as to the speed of his automobile just prior to the accident giving rise to a cause of action. *Insurance Co. v. Chantos,* 246.

§ 53.1. Failing to Stay on Right Side of Highway; Sufficiency of Evidence of Negligence

In an action to recover from defendant an amount paid to a third person for injuries sustained in an automobile accident where defendant stipulated that the car he was operating crossed over the median into the lane of traffic going in the opposite direction and collided with a third persons' car, a jury question was nevertheless presented where defendant offered evidence tending to show that he was in the lane of oncoming traffic from a cause other than his own negligence. *Insurance Co. v. Chantos,* 246.

§ 91.5. Issues Relating to Damages

Trial court did not err in refusing to set aside a jury verdict of $3350 where the plaintiff offered evidence that her expenses exceeded $3800, and there was no merit to plaintiff's contention that because defendant offered no evidence her evidence was uncontradicted and should be treated as a stipulation. *Smith v. Beasley,* 798.

§ 94.10. Driver's Willful and Wanton Conduct as Affecting Recovery by Contributorily Negligent Guest or Passenger

Plaintiff's willful or wanton negligence is a defense in an action seeking recovery for injuries caused by defendant's willful or wanton conduct. *Harrington v. Collins,* 535.

Plaintiff's passenger's failure to remonstrate or leave a car at a rural crossroads minutes past midnight on a cold Christmas Eve when he learned of the driver's plan to engage in a prearranged speed competition did not constitute willful or wanton conduct as a matter of law which would bar his action against the driver of the second car involved in the race. *Ibid.*

Defendant driver's participation in a prearranged speed competition constituted willful or wanton conduct and was a proximate cause of injuries received by plaintiff passenger in a collision during the race. *Ibid.*

§ 126.3. Breathalyzer Test; Time of Administration

G.S. 15A-501(5), which gives a criminal defendant a right to consult with an attorney within a reasonable time after arrest, does not apply to breathalyzer tests, and the 30 minute time limit referred to in G.S. 20-16.2(a)(4) applies to the purpose of calling an attorney and the purpose of selecting a witness to view the breathalyzer test. *Seders v. Powell,* 453.

Plaintiff willfully refused to submit to a breathalyzer test where he refused to take the test until he talked with his attorney and the 30 minute time limit expired while plaintiff was waiting for an attorney to return his call. *Ibid.*

The strict 30 minute limitation of G.S. 20-16.2(a)(4) for taking a breathalyzer test is not irrational and violative of due process. *Ibid.*

The operator of a motor vehicle in N.C. has no constitutional right to confer with counsel prior to making a decision on whether to submit to a breathalyzer test. *Ibid.*

BILLS OF DISCOVERY

§ 6. Discovery in Criminal Cases

Trial court did not abuse its discretion in the denial of defendant's motion to exclude an inculpatory statement made by him to the arresting officer or to grant a continuance because the State failed to provide such statement pursuant to defendant's request for discovery where the prosecutor provided the statement to defendant when he first learned of it during the trial. *S. v. Allison,* 86.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence

Evidence of burglary and larceny of items from a motel room was sufficient to be submitted to the jury against one defendant, but evidence against a codefendant tending to show that he was seen near the scene of the crime some three hours later in the company of defendant was insufficient to be submitted to the jury. *S. v. Lyles,* 179.

Evidence was sufficient to be submitted to the jury in a burglary case where it tended to show that defendant entered the victim's house during the night, threatened her with a knife, and felt her breasts and pubic area. *S. v. Evans,* 263.

§ 5.1. Sufficiency of Evidence; Identification of Defendant as Perpetrator

In a prosecution for first degree burglary, the evidence as to the identity of defendant as the burglar was sufficient to carry the case to the jury. *S. v. Person,* 765.

§ 6. Instructions

Trial court's statement to the jury that the motel room in question was a "sleeping apartment" for the purposes of applying the law of burglary constituted an impermissible expression of opinion, but such error was harmless. *S. v. Nelson,* 573.

§ 6.4. Instructions on Breaking and Entering

Trial court properly instructed the jury on constructive breaking in a burglary which occurred at a motel. *S. v. Nelson,* 573.

§ 7. Instructions on Lesser Included Offenses

Trial court in a first degree burglary case did not err in refusing to submit the lesser included offense of felonious breaking and entering. *S. v. Nelson,* 573.

CONSTITUTIONAL LAW

§ 13.1. Police Power; Regulation of Design of Building

An ordinance of the City of Raleigh creating the Oakwood Historic District constituted a valid exercise of the police power. *A-S-P Associates v. City of Raleigh,* 207.

§ 23.4. Due Process; Actions Affecting Professions

The hearing and appeal procedures of G.S. 115-34 provided plaintiff a constitutionally effective set of administrative and judicial remedies to review her discharge as a school cafeteria manager. *Presnell v. Pell,* 715.

§ 28. Due Process in Criminal Proceedings

The State did not knowingly use false testimony in violation of defendant's right to due process by presenting a witness whose trial testimony was inconsistent

CONSTITUTIONAL LAW—Continued

in nonsubstantial respects with his testimony at the preliminary hearing. *S. v. Boykin,* 687.

Where defendant was convicted of two counts of assault with a firearm and one count of robbery with a firearm, second offense, sentence of life imprisonment without benefit of parole was not a denial of equal protection. *S. v. Dunlap,* 725.

§ 30. Discovery

Trial court did not err in denying defendant's motions for a bill of particulars or a list of the State's witnesses. *S. v. Detter,* 604.

Trial court erred in requiring the State to disclose to defendant before trial statements by witnesses containing remarks made to them by defendant. *Ibid.*

§ 31. Affording Accused Essentials for Defense

Trial court properly refused to appoint a private investigator for an indigent defendant. *S. v. Alford,* 465.

§ 33. Ex Post Facto Laws

Where defendant administered poison to her husband on three occasions at a time when the maximum punishment for first degree murder was life imprisonment, then imposition of the sentence of death violated the prohibition against imposition of an ex post facto punishment. *S. v. Detter,* 604.

§ 40. Right to Counsel

An indigent defendant was not prejudiced by failure of the court to appoint an associate counsel to assist his counsel in a first degree murder case. *S. v. Johnson,* 47.

Trial court did not err in denying indigent defendant's motion for the appointment of additional counsel to represent her in a first degree murder case. *S. v. Barfield,* 306.

Trial judge did not abuse his discretion in denying defendant's motion for the appointment of associate counsel for his appeal from a first degree murder conviction. *S. v. Johnson,* 355.

§ 43. Right to Counsel; What Is Critical Stage of Proceedings

Defendant was not denied his right to counsel at a crucial stage of the proceedings because his counsel was not permitted to be present when a prosecutor talked with the State's witnesses prior to a lineup. *S. v. Cherry,* 86.

Trial court did not err in admitting into evidence tape recorded conversations between defendant and a witness made while defendant was unrepresented by counsel where one conversation was recorded during the investigatory stage of the case and before arrest was made, and the other conversation was recorded after defendant's initial appearance before the district court judge but before a probable cause hearing, indictment and arraignment. *S. v. Detter,* 604.

§ 46. Removal of Appointed Counsel

The trial court did not err in the denial of defendant's motion at trial to discharge his court-appointed counsel, who had been appointed ten months earlier, so that he could employ counsel of his own choosing. *S. v. Lewis,* 771.

§ 51. Delays Between Arrest and Arraignment

Statutes requiring that an arrested person must be taken before a magistrate without unnecessary delay do not prescribe mandatory procedures affecting the validity of a trial. *S. v. Reynolds,* 380.

CONSTITUTIONAL LAW—Continued

§ 70. Right of Confrontation; Cross-Examination

Defendant's constitutional right of confrontation was not violated when the court limited defendant's cross-examination of the State's rebuttal witness to evidence presented in the rebuttal testimony. *S. v. Boykin,* 687.

§ 79. Sentences Within Maximum Fixed by Statutes

Where defendant was convicted of two counts of assault with a firearm and one count of robbery with a firearm, second offense, sentence of life imprisonment without parole did not constitute cruel and unusual punishment. *S. v. Dunlap,* 725.

§ 80. Death Sentence

The death penalty is not unconstitutional on the ground that the district attorney has unbridled discretion in setting cases before judges of his choice. *S. v. Cherry,* 86.

The N.C. death penalty statutes are not mandatory in nature and therefore unconstitutional. *S. v. Barfield,* 306.

There was no merit to defendant's contention that the N.C. death penalty statutes are unconstitutional because the State ought to be required to prove there are no mitigating circumstances before the death penalty may be imposed. *Ibid.*

The death penalty for first degree murder is not cruel and unusual punishment within the meaning of the Eighth Amendment. *Ibid.*

CONTRACTS

§ 27.1. Existence of Contract; Sufficiency of Evidence

In an action to recover for construction work on defendants' home, trial court erred in entering summary judgment for defendants where their affidavit submitted in support of their summary judgment motion did not challenge or alter the fact that the complaint alleged, and the answer denied, the existence of a contract between the parties. *Baumann v. Smith,* 778.

§ 29.2. Calculation of Compensatory Damages

Where defendant lender breached a commitment to provide long-term financing for plaintiffs' motel construction project, a substitute loan was unavailable and plaintiffs had to refinance their construction loan by a demand note, plaintiffs are entitled to recover as damages for breach of the loan: (1) amounts they expended in their unsuccessful attempts to secure a substitute long-term loan; (2) interest plaintiffs paid on the demand note between the date of defendant's breach and the date of trial, less the amount of interest plaintiffs contracted to pay defendant between those dates; and (3) the present value of the difference between interest payments owed under the contract between the date of the trial and the end of the credit period and interest which would have been paid during the same period at the rate found by the court to be the lowest prevailing rate of interest on the date of the breach for a long-term commercial loan. *Pipkin v. Thomas & Hill, Inc.,* 278.

CRIMINAL LAW

§ 5. Mental Capacity

The Mullaney decision does not require that the burden be placed on the State to refute the defense of insanity. *S. v. Johnson,* 355; *State v. Wetmore,* 743.

CRIMINAL LAW — Continued

§ 11. Accessories After the Fact

In a prosecution for attempted armed robbery and first degree murder, trial court did not err in failing to submit issues as to defendant's guilt of being an accessory after the fact to those crimes. *S. v. Atkinson*, 673.

§ 15.1. Venue; Pretrial Publicity

Trial court did not err in denial of defendant's motion for change of venue because of unfavorable pretrial publicity. *S. v. Hamilton*, 238.

Trial court did not err in denying defendant's motion for change of venue to the western part of the State, nor did it err in moving the case to another county because of the number of jailed persons awaiting trial. *S. v. Barfield*, 306.

§ 23. Plea of Guilty

Defendant was not denied his rights under *Dunaway v. New York*, 99 S.Ct. 2248, by denial of his motion to suppress statements which he made to police officers since Dunaway dealt with the legality of custodial interrogation of an unwilling detainee on less than probable cause, and since defendant effectively waived any rights he might have had under Dunaway by failing to notify either the state or the court during plea negotiations that he intended to appeal denial of his suppression motion. *S. v. Reynolds*, 380.

§ 26.5. Former Jeopardy; Same Acts Violating Different Statutes

Defendant convicted of first degree murder on the theory of felony murder cannot be subjected to additional punishment for the underlying felony. *S. v. Atkinson*, 673.

§ 29.1. Procedure for Determining Mental Capacity

The procedure provided by G.S. 15A-1002 to determine a defendant's capacity to proceed is constitutionally adequate to protect a defendant's right not to be tried while legally incompetent. *S. v. Taylor*, 405.

§ 29.2. Mental Capacity; Commitment of Defendant

Trial judge did not err in failing to order a psychiatric examination of defendant prior to holding the hearing mandated by G.S. 15A-1002 to determine defendant's capacity to proceed. *S. v. Taylor*, 405.

§ 33.2. Evidence as to Motive, Knowledge or Intent

Evidence of confrontation between defendant and a police officer which occurred just prior to defendant's arrest was not inadmissible as evidence of his bad character. *S. v. Sanders*, 512.

§ 34.4. Admissibility of Evidence of Other Offenses

In a prosecution of defendant for poisoning the man with whom she lived, trial court did not err in admitting evidence concerning defendant's poisoning four other individuals and defendant's forging and uttering forged checks. *S. v. Barfield*, 306.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Motive

Testimony concerning defendant's plans to commit other robberies to obtain money to buy drugs and his commission of another robbery on the same day as the robbery in question was competent to show defendant's motive in committing the robbery for which he was on trial. *S. v. Cherry*, 86.

§ 42.6. Articles Connected With Crime; Chain of Custody

In a prosecution of defendant for first degree murder of her husband by poisoning, there was no merit to defendant's contention that results from tests per-

CRIMINAL LAW—Continued

formed on specimens from deceased's body were improperly introduced in evidence because the chain of custody was not established. *S. v. Detter,* 604.

§ 45.1. Particular Experimental Evidence

Trial court in a rape prosecution did not err in permitting a demonstration by the prosecuting witness and a detective depicting the manner in which the rape took place. *S. v. Mayhand,* 418.

§ 57. Evidence in Regard to Firearms

A witness's testimony that an object she saw protruding from defendant's pocket "looked like a gun" did not constitute objectionable opinion testimony. *S. v. Lewis,* 771.

§ 61.2. Competency of Evidence of Shoe Prints

Trial court properly permitted a police officer who was a nonexpert witness to testify that bloody shoe prints found at the crime scene were similar to impressions found on the soles of shoes belonging to defendant. *S. v. Atkinson,* 673.

§ 63. Evidence of Sanity of Defendant

Trial court in a rape case did not err in allowing two lay witnesses who were police officers to testify concerning defendant's mental capacity. *S. v. Mayhand,* 418.

§ 66.1. Evidence of Identity by Sight; Competency of Witness

Trial court did not err in allowing a witness to identify defendant at trial as the perpetrator of an armed robbery without having earlier been tested by a photographic or physical lineup. *S. v. Dunlap,* 725.

§ 66.5. Right to Counsel at Lineup

Defendant was not denied his right to counsel at a crucial stage of the proceedings because his counsel was not permitted to be present when a prosecutor talked with the State's witnesses prior to a lineup. *S. v. Cherry,* 86.

§ 66.6. Suggestiveness of Lineup

A witness's courtroom identification of defendant was not rendered inadmissible on the ground of improper out of court suggestiveness because an officer had told the witness after she had picked defendant in a lineup that she had picked the "right person." *S. v. Nelson,* 573.

§ 66.8. Identification from Photographs; Admission of Photographs in Evidence

A photograph of defendant used in a photographic identification procedure was properly admitted in evidence where the photograph was taken after defendant's lawful arrest. *S. v. Hamilton,* 238.

§ 66.9. Photographic Identification; Suggestiveness of Procedure

The fact that identifying witnesses had either heard defendant's name on the radio or read it in a newspaper as being a suspect in the case and the fact that defendant was a former customer at a finance company where the witnesses worked did not render photographic identification procedures impermissibly suggestive. *S. v. Dunlap,* 725.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identification

A rape and kidnapping victim was properly permitted to identify defendant at trial as her assailant where the victim's identification was not tainted by a pretrial photographic identification. *S. v. Hamilton,* 238.

CRIMINAL LAW – Continued

§ 66.20. Voir Dire to Determine Admissibility of In-Court Identification; Findings of Court

There was no merit to defendant's contention that he was denied a fair hearing on his motion to suppress identification testimony because the trial judge in his findings of fact failed to mention the publicity surrounding defendant's arrest. *S. v. Dunlap,* 725.

§ 68. Other Evidence of Identity

An expert's testimony that hair found on a rape and murder victim's sweater had microscopic characteristics similar to head hairs taken from defendant was not rendered inadmissible as having no probative value by the witness's testimony on cross-examination that, although the hairs were similar, the number of characteristics they shared was "limited." *S. v. Perry,* 502.

§ 70. Tape Recordings

Trial court did not err in admitting into evidence tape recorded conversations between defendant and a witness made while defendant was unrepresented by counsel where one conversation was recorded during the investigatory stage of the case and before arrest was made, and the other conversation was recorded after defendant's initial appearance before the district court judge but before a probable cause hearing, indictment and arraignment. *S. v. Detter,* 604.

Tapes of conversations between defendant and witnesses were properly authenticated and admitted into evidence. *Ibid.*

§ 73.2. Statements Not Within Hearsay Rule

The contents of a telephone call to the sheriff's department were not inadmissible as hearsay where the testimony was offered only to explain the officer's subsequent conduct. *S. v. White,* 430.

§ 73.4. Spontaneous Utterance

A witness's spontaneous utterance was admissible. *S. v. Lewis,* 771.

§ 74. Confessions Generally

An officer's written summarization of defendant's statement to him was admissible where defendant adopted the statement as his own by reading it, circling a minor incorrect portion, and initialing it. *S. v. Boykin,* 687.

§ 75. Voluntariness of Confession; Effect of Confronting Defendant with Certain Evidence

Defendant's in-custody confession to a murder was not tainted by the State's prior acquisition of a pistol used by defendant in an unrelated homicide. *S. v. Johnson,* 355.

§ 75.6. Voluntariness of Confession; Requirement that Defendant be Warned of Constitutional Rights

Trial court did not err in denying defendant's motion to suppress statements by her to police officers where the evidence tended to show that she was sufficiently advised of her constitutional rights. *S. v. Barfield,* 306.

§ 75.7. Voluntariness of Confession; Warning Defendant of Constitutional Rights; Custodial Interrogation

Inculpatory statements made by defendant to a detective while defendant was in the detective's automobile did not result from custodial interrogation and were

CRIMINAL LAW—Continued

admissible in defendant's murder and rape trial though defendant had not been given the Miranda warnings. *S. v. Perry*, 502.

§ 75.14. Defendant's Mental Capacity to Confess

Defendant's in-custody statement was not rendered inadmissible by the fact that defendant was nervous and upset and cried from time to time while making the statement. *S. v. Lewis*, 771.

§ 76.2. Voir Dire Hearing to Determine Voluntariness of Confession

An officer's testimony as to incriminating statements made to him by defendant when he went to defendant's home in response to a telephone call from defendant was properly admitted by the trial court without making a finding as to the voluntariness of the statements. *S. v. Boykins*, 687.

§ 76.5. Voir Dire Hearing to Determine Voluntariness of Confession; Necessity for Findings

Defendant was not prejudiced by trial court's failure to make an express finding as to whether defendant knowingly and intelligently waived his right to counsel before answering questions by police. *S. v. Heavener*, 541.

§ 76.6. Voir Dire Hearing to Determine Voluntariness of Confession; Sufficiency of Findings

There was no merit to defendant's contention that the trial court erred in failing to make adequate findings as to whether defendant requested counsel during the time of his interrogation since the court clearly found that defendant waived his right to counsel. *S. v. Reynolds*, 380.

Trial court erred in the admission of the confession of a defendant with a low I.Q. where the court failed to make sufficient findings of fact showing that defendant voluntarily, knowingly and intelligently waived his constitutional rights. *S. v. Green*, 793.

§ 76.10. Voluntariness of Confession; Review of Trial Court's Determination

Defendant was not denied his rights under *Dunaway v. New York*, 99 S.Ct. 2248, by denial of his motion to suppress statements which he made to police officers since Dunaway dealt with the legality of custodial interrogation of an unwilling detainee on less than probable cause, and since defendant effectively waived any rights he might have had under Dunaway by failing to notify either the state or the court during plea negotiations that he intended to appeal denial of his suppression motion. *S. v. Reynolds*, 380.

§ 82.2. Physician—Patient Privilege

No privileged relationship arises where a psychiatrist examines a criminal defendant for the sole purpose of passing upon his ability to proceed to trial. *S. v. Mayhand*, 418.

§ 83. Competency of Spouse to Testify

Defendant failed to establish that the woman with whom he lived was his common law wife pursuant to the laws of Pennsylvania, and G.S. 8-57 therefore did not preclude the woman from testifying against defendant. *S. v. Alford*, 465.

§ 84. Evidence Obtained by Unlawful Means

Where there was no illegal arrest and defendant clearly consented to the taking of hair samples after officers explained he was not required to do so, defendant could not complain on appeal that testimony of the results of an analysis of the hair samples should have been excluded at his sentencing hearing. *S. v. Reynolds*, 380.

CRIMINAL LAW—Continued

Evidence obtained by military authorities in an inventory of soldiers' possessions was not required to be excluded in a civilian criminal trial of the soldiers on the ground that the surrender of the evidence by military to civilian authorities violated the Posse Comitatus Act. *S. v. Nelson*, 573.

The State's presentation to defendant of a receipt which had previously been suppressed as evidence, the court having found that it was seized in an unconstitutional search, for the purpose of refreshing his recollection of the date his car had been repaired did not constitute the use of tainted evidence to impeach defendant. *Ibid.*

§ 86.1. Impeachment of Defendant

Cross-examination of defendant concerning prior convictions and acts of misconduct was properly allowed for impeachment purposes. *S. v. Mayhand*, 418.

§ 86.2. Impeachment of Defendant; Prior Convictions

Defendant who testified in his own behalf could properly be cross-examined concerning a prior inconsistent statement, a knifing incident which resulted in conviction of assault on a female, and another incident in which defendant was charged with rape but convicted of assault on a female. *S. v. Herbin*, 441.

§ 86.5. Impeachment of Defendant; Specific Acts

A defendant could be cross-examined about specific acts of misconduct which occurred subsequent to commission of the crime charged. *S. v. Ferdinando*, 737.

§ 88.1. Scope of Cross-Examination

Defendant's constitutional right of confrontation was not violated when the court limited defendant's cross-examination of the State's rebuttal witness to evidence presented in the rebuttal testimony. *S. v. Boykin*, 687.

§ 89.1. Evidence of Character Bearing on Credibility

Trial court in a first degree burglary case erred in refusing to allow a witness who had testified for defendant that the prosecutrix had a bad reputation to say in what respect the reputation was bad. *S. v. McCormick*, 788.

§ 89.3. Prior Consistent Statements of Witness

Prior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached *S. v. Perry*, 502.

§ 91. Speedy Trial

Defendant was not denied his right to a speedy trial under the Interstate Agreement on Detainers. *S. v. Ferdinando*, 737.

§ 91.3. Continuance on Ground of Illness

Trial court did not err in denying defendant's motion for continuance based upon the absence of a witness who was ill since the testimony of the witness was obtained and presented by way of deposition. *S. v. Barfield*, 306.

§ 92.1. Consolidation; Different Defendants, Same Offense

There was no merit to one defendant's argument that he was prejudiced because, if his trial had not been consolidated with that of his codefendant, a master key to the burglarized motel found in the codefendant's car would not have been admissible against him. *S. v. Lyles*, 179.

CRIMINAL LAW—Continued

Although two defendants in a rape, burglary and armed robbery trial gave inconsistent testimony at trial, defendants were not denied a fair trial by the refusal of the trial court to sever their trials. *S. v. Nelson,* 573.

§ 93. Order of Proof

Trial court did not abuse its discretion in permitting new evidence to be introduced in the State's rebuttal testimony. *S. v. Boykin,* 687.

§ 96. Withdrawal of Evidence

Trial court did not err in denying defendant's motion for mistrial made after a police officer, in describing the procedure he followed when allowing a witness to make a photographic identification, testified that he had retrieved a photograph of defendant from police records since the court instructed the jury to disregard the testimony. *State v. Clark,* 529.

Trial court's erroneous instruction to prospective jurors that defendant could receive the death penalty if he was convicted of first degree murder was cured by the court's subsequent instructions that there was no death penalty in N.C. at the time the alleged offense occurred and that the jury should disregard the court's prior remarks. *S. v. White,* 430.

§ 97. Introduction of Additional Evidence

Defendant in a first degree burglary case was not prejudiced where the court permitted the State to reopen the case and offer into evidence defendant's pocketbook found in the victim's living room. *S. v. Person,* 765.

§ 99.9. Examination of Witnesses by Court

Trial court did not express an opinion in a prosecution for burglary, assault with intent to rape and larceny when he questioned two witnesses as to the accuracy of fingerprint impressions taken from the crime scene and from defendant's hands. *S. v. Evans,* 263.

§ 100. Permitting Counsel to Assist or Act in Lieu of Solicitor

There is no merit in defendant's contention that private prosecution should not be permitted in a capital case because the private prosecutor is hired by decedent's family to seek the death penalty rather than to see that justice is done. *S. v. Boykin,* 687.

Trial court in a murder case did not abuse its discretion in permitting private prosecution by an attorney who defendant contended was potentially a material witness for defendant. *Ibid.*

§ 102.5. Prosecutor's Conduct in Examining Witnesses

There was no merit to defendant's contention that the district attorney presented the case for the State in such a way that he was guilty of prosecutorial misconduct. *S. v. Barfield,* 306.

§ 102.6. Prosecutor's Jury Argument

Even if the district attorney improperly stated a personal opinion about the evidence and argued matters outside the record during the sentencing phase of a first degree murder case, the impropriety was not so excessive as to compel the appellate court to hold that the trial judge abused his discretion in failing to correct the arguments ex mero motu. *S. v. Johnson,* 355.

CRIMINAL LAW—Continued

§ 102.13. Prosecutor's Comment on Judicial Review

The district attorney did not impermissibly suggest to the jury the possibility of parole when he argued to the jury that the only way to protect society, themselves and their children from defendant was to impose the death penalty. *S. v. Johnson*, 355.

§ 111.1. Particular Miscellaneous Instructions

Trial court did not err in instructing the jury that "all the evidence is important." *S. v. White*, 430.

§ 112.6. Instructions on Insanity

Trial court did not err in failing to submit the defense of insanity to the jury in a homicide case where three psychiatrists testified that defendant knew the difference between right and wrong, and there was no evidence she did not know the nature of her acts. *S. v. Barfield*, 306.

§ 113.1. Instructions Summarizing Evidence

There is no merit to defendant's contention that the trial court inadequately summarized the testimony of a State's witness because the court did not include the parts showing the incredibility of the witness's testimony. *S. v. White*, 430.

Trial court erred in recapitulating fully the State's evidence but failing to summarize at all evidence favorable to defendant, and defendant did not waive his right to challenge the instructions by his failure to object at trial. *S. v. Sanders*, 512.

§ 114.2. No Expression of Opinion in Statement of Evidence

Trial court did not express an opinion in instructing the jury that the evidence tended to show that defendant "confessed" that he committed the crime charged in the case. *S. v. Hamilton*, 238.

§ 117.1. Instructions on Credibility

Trial court's instructions on prior consistent statements were proper. *S. v. Detter*, 604.

§ 122. Additional Instructions After Jury's Retirement

Trial court did not err in bringing the jury back into the courtroom 15 minutes after they retired, informing them that the State had requested an instruction on acting in concert, and then giving such instruction. *S. v. Lyles*, 179.

§ 126.2. Inquiry to Clarify Verdict

Trial court in a first degree murder case did not err in questioning the jury about their verdict for purposes of clarity rather than sending them back for further deliberations. *S. v. Goodman*, 1.

§ 126.3. Impeachment of Verdict

The possibility that jurors knew that defendant might be eligible for parole in 20 years if the jury recommended life imprisonment would not permit a juror to impeach his verdict recommending the death sentence after it was received by the court. *S. v. Cherry*, 86.

A juror's affidavit stating that photographic exhibits of the victim's body were taken into the jury room and a newspaper clipping indicating that the possibility of parole was a major consideration in the jury's deliberations on whether to recommend the death penalty would serve only to impeach the verdict and were properly excluded by the trial judge from the record on appeal. *S. v. Johnson*, 355.

CRIMINAL LAW—*Continued*

§ 131.2. New Trial for Newly Discovered Evidence; Sufficiency of Showing

In a prosecution for first degree burglary where defendant's pocketbook, which was found in the victim's living room, was introduced into evidence, defendant was not entitled to a new trial on the ground of newly discovered evidence because defense counsel, during closing arguments, discovered a large knife inside the pocketbook. *S. v. Person,* 765.

§ 134.1. Reference to Offense in Judgment; Ambiguity

Where defendant was convicted of armed robbery, second offense, but the judgment and commitment order made no mention of sentence without parole and did not specify the subsection under which defendant was sentenced, the case is remanded for clarification of the sentence. *S. v. Dunlap,* 725.

§ 134.2. Time and Procedure for Imposition of Sentence

Defendant was not prejudiced by the trial judge's failure to conduct a sentencing hearing inasmuch as defense counsel conceded in oral argument that she had no further evidence to submit at the hearing. **S. v. Sanders**, 512.

§ 135. Sentence in Capital Cases

There was no merit to defendant's contention that the trial court erred in failing to instruct the jury that they might recommend life imprisonment even though they found the aggravating circumstances outweighed those in mitigation. *S. v. Goodman,* 1.

§ 135.1. Death Sentence as Mandatory

The death penalty is not unconstitutional on the ground that the district attorney has unbridled discretion in setting cases before judges of his choice. *S. v. Cherry,* 86.

§ 135.3. Exclusion of Veniremen Opposed to Death Penalty

Trial court did not err in excluding potential jurors because of their death penalty views during the guilt determination phase of a bifurcated trial for first degree murder. *S. v. Cherry,* 86.

There was no merit to the contention of defendant in a first degree murder case that he was entitled to have separate juries empaneled to hear issues of guilt and punishment and that a prospective juror could not be excluded from the guilt determination phase because of his views on capital punishment. *S. v. Spaulding,* 149.

There is no merit to defendant's contention that jurors not opposed to the death penalty are more apt to convict and that a defendant in a bifurcated trial for first degree murder is denied due process when members of the jury are qualified pursuant to the standards of *Witherspoon v. Illinois. S. v. Taylor,* 405.

Trial court can properly excuse jurors for cause on the basis of their capital punishment beliefs in a bifurcated trial in a capital case. *S. v. Boykin,* 687.

§ 135.4. Cases Decided Under G.S. 15A-2000

Trial court in a first degree murder prosecution erred in instructing the jury during the sentencing phase on aggravating circumstances that the felony was committed for the purpose of avoiding a lawful arrest and that the felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, since the court submitted two issues on the same evidence. *S. v. Goodman,* 1.

CRIMINAL LAW—Continued

When a criminal defendant contends that his faculties were impaired by intoxication, such intoxication must be to a degree that it affects defendant's ability to understand and control his actions before the court is required to instruct on such intoxication as a mitigating factor. *Ibid.*

Trial court in a sentencing hearing in a first degree murder case erred in failing to explain (1) the difference between defendant's capacity to know right from wrong and the impairment of his capacity to appreciate the criminality of his conduct, and (2) that even if there was no impairment of defendant's capacity to appreciate the criminality of his conduct, the jury should find the existence of the impaired capacity mitigating factor if it believed that defendant's capacity to conform his conduct to the law was impaired. *S. v. Johnson,* 47.

In the absence of a timely request by defendant that the court at the sentencing hearing in a capital case instruct on specified "other circumstances" which defendant contends the jury should consider in mitigation, failure of the court to mention any particular item as a possible mitigating factor will not be held for error if the court instructs that the jury may consider any circumstance which it finds to have mitigating value. *Ibid.*

If mitigating circumstances in a capital case which are expressly mentioned in G.S. 15A-2000(f) are submitted to the jury in writing, any other relevant circumstance proffered by defendant as having mitigating value which is supported by the evidence must, upon defendant's timely request, also be submitted in writing. *Ibid.*

The burden of persuading the jury on the issue of the existence of any mitigating circumstance is upon defendant, and the standard of proof is by a preponderance of the evidence. *Ibid.*

A defendant may not plead guilty to first degree murder and by prearrangement with the State be sentenced to life imprisonment without the intervention of a jury. *Ibid.*

The State may not recommend to the jury during the sentencing hearing a sentence of life imprisonment when the State has evidence from which the jury could find at least one aggravating circumstance listed in G.S. 15A-2000(e). *Ibid.*

Upon request by defendant, the trial court should instruct the jury that not every murder is necessarily especially heinous, atrocious or cruel in the sense those words are used in G.S. 15A-2000(e)(9). *Ibid.*

Trial court in a first degree murder case properly submitted to the jury the aggravating circumstance as to whether the murder was "especially heinous, atrocious or cruel." *Ibid.*

In a sentencing hearing in a first degree murder case, trial court did not unduly limit the jury's consideration of mitigating factors by the exclusion of an affidavit concerning the rehabilitation of a convicted murderer, an affidavit that the death penalty is counterproductive as a deterrent to crime, an affidavit of a newspaper reporter that he believed innocent persons are executed from time to time, and an affidavit from ministers opposing the death penalty on religious grounds. *S. v. Cherry,* 86.

When a defendant is convicted of first degree murder under the felony-murder rule, trial judge may not submit to the jury at the sentencing phase of the trial the aggravating circumstance of the underlying felony. *Ibid.*

G.S. 15A-2000 and G.S. 15A-2001 do not permit a defendant in a capital case to enter a plea of guilty on condition that his sentence be life imprisonment. *S. v. Johnson,* 355.

CRIMINAL LAW—Continued

Trial court did not err in refusing during the sentencing phase of a first degree murder trial to instruct the jury that its failure to agree unanimously on the sentence within a reasonable time would result in the imposition of a sentence of life imprisonment. *Ibid.*

Trial judge did not abuse his discretion in denying defendant's motion for imposition of a sentence of life imprisonment when the jury failed to return a verdict after deliberating for two hours and thirty-nine minutes. *Ibid.*

Trial court properly refused to permit defendant to present during the sentencing phase of a first degree murder trial an eyewitness account of a 1957 gas chamber execution. *Ibid.*

The jury's sentence recommendation in a capital case is binding on the trial judge, and he does not have the power to disturb such recommendation. *Ibid.*

Defendant is entitled to a new sentencing hearing in a first degree murder case because of the trial court's failure to explain to the jury the difference between defendant's capacity to know right from wrong and the impairment of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law within the meaning of G.S. 15A-2000(f)(6). *Ibid.*

Admission of photographs depicting a child murder victim's body as it appeared two months subsequent to his death after it had been dismembered by animals was harmless error in the guilt phase but constituted prejudicial error in the sentencing phase. *S. v. Johnson,* 355.

§ 138. Severity of Sentence

Though G.S. 15A-2000(d)(2) gives the Supreme Court the authority to review a sentence to determine if it is disproportionate to the sentence in similar cases, such review function should be employed only in cases where both phases of the trial of a defendant have been found to be without error. *S. v. Goodman,* 1.

§ 138.1. Severity of Sentence; More Lenient Sentence to Codefendant

Defendant's sentence of life imprisonment for first degree murder did not violate his constitutional rights because his codefendant was permitted to plead guilty to second degree murder and was sentenced to a term of imprisonment of 60 to 80 years. *S. v. Atkinson,* 673.

§ 138.4. Severity of Sentence; Where There Are Several Charges

Where defendant was found guilty of first degree murder based upon premeditation and deliberation and the felony-murder rule, trial court could disregard the felony-murder basis of the homicide verdict and impose additional punishment upon defendant for the underlying crimes. *S. v. Goodman,* 1.

Where defendant was charged with first degree murder, first degree rape and first degree burglary but received two consecutive life terms upon negotiated pleas of guilty to second degree murder, first degree rape and first degree burglary, the issue of merger was not before the court on appeal. *S. v. Reynolds,* 380.

§ 146.5. Appeal from Sentence Imposed on Plea of Guilty

Defendant was not denied his rights under *Dunaway v. New York,* 99 S.Ct. 2248, by denial of his motion to suppress statements which he made to police officers since Dunaway dealt with the legality of custodial interrogation of an unwilling detainee on less than probable cause, and since defendant effectively waived any rights he might have had under Dunaway by failing to notify either the state or the court during plea negotiations that he intended to appeal denial of his suppression motion. *S. v. Reynolds,* 380.

CRIMINAL LAW—Continued

§ 154.5. Settlement of Case by Trial Judge

The action of the trial judge in settling the record on appeal is final and will not be reviewed on appeal except by certiorari. *S. v. Johnson,* 355.

§ 162. Objections to Evidence

Trial judge erred in denying defense counsel the right to state specific grounds for her objections, but such error was harmless. *S. v. Sanders,* 512.

§ 166. The Brief

Although a defendant may properly present certain questions on appeal without taking any exceptions thereto, the defendant must still bring such questions forward in his brief. *S. v. Samuels,* 783.

§ 177. Disposition of Cause on Appeal

Where one member of the Supreme Court did not participate in a decision and the remaining six justices are equally divided, the decision of the Court of Appeals is affirmed without becoming a precedent. *S. v. Greene,* 268; *State v. Insurance Co.,* 270.

§ 181. Postconviction Hearing

The trial judge, not the district attorney, has the authority and sole responsibility to schedule a hearing for an application for post-conviction relief. *S. v. Mitchell,* 549.

HOMICIDE

§ 4.1. Murder by Lying in Wait

State's evidence in a first degree murder case supported the court's instructions on lying in wait. *S. v. Allison,* 135.

§ 13. Pleas

A defendant may not plead guilty to first degree murder and by prearrangement with the State be sentenced to life imprisonment without the intervention of a jury. *S. v. Johnson,* 47.

G.S. 15A-2000 and G.S. 15A-2001 do not permit a defendant in a capital case to enter a plea of guilty on condition that his sentence be life imprisonment. *S. v. Johnson,* 355.

§ 15.5. Expert Opinion as to Cause of Death

Trial court did not err in permitting three pathologists to state their opinions as to the cause of death. *S. v. Barfield,* 306.

§ 19. Evidence Competent on Question of Self-Defense

In a prosecution of defendant, a prison inmate, for first degree murder of another prison inmate, trial court erred in excluding evidence concerning an earlier attack on defendant while in prison, evidence as to the availability of knives in prison, evidence that defendant knew that his fellow prisoners were dangerous men, and evidence of the pervasiveness of fear of physical harm in defendant's prison block. *S. v. Spaulding,* 149.

§ 19.1. Evidence of Character or Reputation to Show Self-Defense

Evidence of the victim's reputation as a dangerous man is admissible only in cases involving self-defense and is not relevant where defendant relies on the defense of accident. *S. v. Winfrey,* 260.

HOMICIDE – Continued

§ 20. Real and Demonstrative Evidence

In a prosecution for poisoning deceased where there was evidence that defendant had poisoned other people and forged checks, trial court did not err in admitting into evidence a rat poison bottle and forged checks. *S. v. Barfield,* 306.

§ 20.1. Photographs

A photograph of deceased's decomposed body as it was found lying in a stream was properly admitted for the purpose of illustrating an officer's testimony. *S. v. White,* 430.

§ 21.2. Sufficiency of Evidence That Death Resulted from Injuries Inflicted by Defendant

The State's evidence sufficiently established a causal connection between the victim's death and an assault on the victim by defendant's companion with a baseball bat during a robbery to support defendant's conviction of first degree murder where testimony by the State Medical Examiner tended to show that the victim was unable to withstand the shock of the assault because of preexisting heart disease and that the injuries and stress from the assault contributed to and accelerated the victim's death by heart attack. *S. v. Atkinson,* 672.

§ 21.5. Sufficiency of Evidence of First Degree Murder

Evidence was sufficient for the jury in a prosecution for first degree murder where it tended to show that defendant shot deceased, hid his body and told witnesses that he thought he had killed deceased. *S. v. Heavener,* 541.

There was sufficient evidence of premeditation and deliberation to support defendant's conviction of first degree murder. *S. v. Ferdinando,* 737.

§ 21.6. Sufficiency of Evidence of Homicide by Poisoning

Evidence was sufficient for the jury in a prosecution of defendant for the first degree murder of the man with whom she lived by poisoning him. *S. v. Barfield,* 306.

Evidence of murder by poisoning was sufficient to take the case to the jury where it tended to show that defendant put ant killer in her husband's food. *S. v. Detter,* 604.

§ 21.7. Sufficiency of Evidence of Second Degree Murder

Evidence was sufficient for the jury where it tended to show that defendant shot deceased at a recreation center. *S. v. Herbin,* 441.

§ 25.2. Instructions on Premeditation and Deliberation and Lying in Wait

State's evidence in a first degree murder case supported the court's instructions on lying in wait. *S. v. Allison,* 135.

§ 28.1. Duty to Instruct on Self-Defense

Trial court in a first degree murder case erred in refusing to instruct the jury on self-defense. *S. v. Spaulding,* 149.

Trial court properly refused to instruct on self-defense where the evidence tended to show that defendant willingly left his place of safety and aggressively entered a fight without lawful excuse or adequate provocation. *S. v. Montague,* 752.

§ 28.2. Instructions on Necessity to Take Life

Trial court's instructions on apparent necessity to defend oneself were proper. *S. v. Herbin,* 441.

HOMICIDE — Continued

§ 28.6. Defense of Intoxication

Trial court in a first degree murder case was not required to charge the jury upon the defense of intoxication. *S. v. Goodman,* 1.

§ 30. Submission of Guilt of Second Degree Murder on Charge of Premeditated and Deliberate Murder

Trial court in a first degree murder case should have instructed the jury on second degree murder. *S. v. Poole,* 254.

The evidence did not require the trial court to instruct the jury that defendant could be guilty of no more than second degree murder or manslaughter if he first choked the victim without malice or without premeditation or deliberation or in the heat of passion and then, believing the victim to be dead, ran over her body. *S. v. Ferdinando,* 737.

§ 30.1. Submission of Second Degree Murder in Prosecution for Murder by Lying in Wait

Trial court did not err in restricting the jury to possible verdicts of guilty of murder in the first degree or not guilty in a prosecution for murder by lying in wait. *S. v. Allison,* 135.

§ 30.3. Submission of Manslaughter

Trial court in a first degree burglary case did not err in failing to instruct on the lesser included offense of voluntary manslaughter. *S. v. Montague,* 752.

§ 31. Verdict; Specifying Degree of Crime

Where an indictment for murder and the evidence at trial would support a guilty verdict upon the theory of premeditation and deliberation or upon application of the felony-murder rule, it was appropriate for the trial court to require the jury to specify in its verdict the theory upon which they found defendant guilty of first degree murder so that defendant could be properly sentenced. *S. v. Goodman,* 1.

Where defendant was charged with first degree murder, first degree rape and first degree burglary but received two consecutive life terms upon negotiated pleas of guilty to second degree murder, first degree rape and first degree burglary, the issue of merger was not before the court on appeal. *S. v. Reynolds,* 380.

§ 31.1. Punishment for First Degree Murder

Where defendant was found guilty of first degree murder based upon premeditation and deliberation and the felony-murder rule, trial court could disregard the felony-murder basis of the homicide verdict and impose additional punishment upon defendant for the underlying crimes. *S. v. Goodman,* 1.

Where defendant administered poison to her husband on three occasions at a time when the maximum punishment for first degree murder was life imprisonment, then imposition of the sentence of death violated the prohibition against imposition of an ex post facto punishment. *S. v. Detter,* 604.

Defendant convicted of first degree murder on the theory of felony murder cannot be subjected to additional punishment for the underlying felony. *S. v. Atkinson,* 673.

§ 31.3. Constitutionality of Death Penalty

The N.C. death penalty statutes are not mandatory in nature and therefore unconstitutional. *S. v. Barfield,* 306.

HOMICIDE — Continued

There was no merit to defendant's contention that the N.C. death penalty statutes are unconstitutional because the State ought to be required to prove there are no mitigating circumstances before the death penalty may be imposed. *Ibid.*

The death penalty for first degree murder is not cruel and unusual punishment within the meaning of the Eighth Amendment. *Ibid.*

§ 32.1. Error Cured by Verdict

Defendant was not prejudiced by the court's instructions relating to first degree murder since he was convicted only of second degree murder, and any error in the court's instructions on voluntary manslaughter or self-defense could not have been prejudicial to defendant since he was not entitled to such instructions. *S. v. Wetmore,* 743.

INFANTS

§ 15. Temporary Custody and Detention of Juveniles

The intent of the legislature in enacting G.S. 15A-502 was to prohibit the fingerprinting and photographing of any delinquent child except in limited cases. *In re Vinson,* 640.

§ 18. Admissibility and Sufficiency of Evidence in Juvenile Case

Though a city police department improperly photographed a 13 year old respondent, trial court did not err in failing to suppress identification testimony based on the witness's prior knowledge of respondent and not on the illegal photographs. *In re Vinson,* 640.

A juvenile respondent is entitled to the application of the same rules in weighing the evidence against him on a motion for nonsuit or to dismiss as if he were an adult criminal defendant. *Ibid.*

The quantum of proof required in a juvenile case is proof beyond a reasonable doubt. *Ibid.*

In a juvenile delinquency proceeding where the juvenile was charged with armed robbery, the evidence raised no more than a suspicion or conjecture as to the identity of respondent as the perpetrator. *Ibid.*

§ 20. Judgments and Orders; Dispositional Hearings

In a juvenile case where respondent is accused of a serious crime, and particularly when the juvenile requests it, the better practice is for the trial court to postpone the dispositional hearing until all available information is at hand. *In re Vinson,* 640.

Trial courts giving consideration at a dispositional hearing to unadjudicated acts allegedly committed by a juvenile, unrelated to that for which he stands petitioned, must first determine that such information is reliable and that it was competently obtained. *Ibid.*

While the final commitment order in a juvenile proceeding need not formally state all the alternatives considered by a trial judge in committing a child, a finding that alternatives are inappropriate must be supported by some showing in the record that the sentencing authority at least heard or considered evidence as to what those alternative methods of rehabilitating were. *Ibid.*

JURY

§ 5. Excusing of Jurors

Remarks made by two prospective jurors on voir dire in the presence of other prospective jurors concerning defendant's guilt were harmless where both such jurors were excused either for cause or peremptorily. *S. v. Taylor,* 405.

§ 6. Voir Dire Examination Generally

Trial judge in a first degree murder case did not abuse his discretion in denying defendant's motion for an individual voir dire of each prospective juror and for sequestration of jurors during voir dire. *S. v. Johnson,* 355; *S. v. Taylor,* 405; *S. v. Barfield,* 306.

§ 7.11. Challenge for Capital Punishment Views

Trial court did not err in excluding potential jurors because of their death penalty views during the guilt determination phase of a bifurcated trial for first degree murder. *S. v. Cherry,* 86.

There was no merit to the contention of defendant in a first degree murder case that he was entitled to have separate juries empaneled to hear issues of guilt and punishment and that a prospective juror could not be excluded from the guilt determination phase because of his views on capital punishment. *S. v. Spaulding,* 149.

There is no merit to defendant's contention that jurors not opposed to the death penalty are more apt to convict and that a defendant in a bifurcated trial for first degree murder is denied due process when members of the jury are qualified pursuant to the standards of *Witherspoon v. Illinois. S. v. Taylor,* 405.

Trial court in a bifurcated trial for first degree murder did not err in excluding prospective jurors because of their capital punishment beliefs. *S. v. Johnson,* 355; *S. v. Barfield,* 306.

Defendant in a first degree murder case was not prejudiced by the court's error in excusing for cause a juror whose answers on voir dire did not show that she was unequivocally opposed to the death penalty and would not under any circumstances vote for its imposition. *S. v. Johnson,* 355.

Trial court can properly excuse jurors for cause on the basis of their capital punishment beliefs in a bifurcated trial in a capital case. *S. v. Boykin,* 687.

§ 7.13. Number of Peremptory Challenges

Trial court in a first degree murder case did not err in refusing to increase the number of defendant's peremptory challenges. *S. v. Johnson,* 355.

§ 9. Alternate Jurors

Trial court did not abuse its discretion in excusing a juror and substituting an alternate juror when the juror indicated she could not attend a session of court on Saturday. *S. v. Nelson,* 573.

LARCENY

§ 7. Sufficiency of Evidence

Evidence of burglary and larceny of items from a motel room was sufficient to be submitted to the jury against one defendant, but evidence against a codefendant tending to show that he was seen near the scene of the crime some three hours later in the company of defendant was insufficient to be submitted to the jury. *S. v. Lyles,* 179.

LARCENY — Continued

Evidence was sufficient for the jury in a larceny prosecution where it tended to show that defendant entered the victim's house and took money from a wallet. *S. v. Evans*, 263.

LIBEL AND SLANDER

§ 5.2. Imputations Affecting Business or Profession as Actionable Per Se

Plaintiff's complaint stated a claim for slander per se against defendant school principal where it alleged that defendant falsely accused plaintiff, a school cafeteria manager, of distributing alcoholic beverages on the school premises. *Presnell v. Pell*, 715.

§ 9.1. Limitations on Qualified Privilege

Plaintiff's complaint failed to show that the actions of defendant school principal were qualifiedly privileged. *Presnell v. Pell*, 715.

MARRIAGE

§ 5. Proof of Marriage

Defendant failed to establish that the woman with whom he lived was his common law wife pursuant to the laws of Pennsylvania, and G.S. 8-57 therefore did not preclude the woman from testifying against defendant. *S. v. Alford*, 465.

MASTER AND SERVANT

§ 1. Nature of Employment Relationship

A person who suffers from simple glaucoma but has 20/20 vision in both eyes with glasses does not have a "visual disability" within the meaning of G.S. 168-1 and is thus not a "handicapped person" who is granted a right of employment by G.S. 168-6. *Burgess v. Brewing Co.*, 520.

§ 10.2. Actions for Wrongful Discharge

The Secretary of Human Resources had the authority to dismiss plaintiff as superintendent of Broughton Hospital before his six year term expired, and it was not required that he be dismissed by the State Board of Mental Health. *Smith v. State*, 115.

In an action by plaintiff to recover damages for wrongful discharge from his position as superintendent of Broughton Hospital, plaintiff's refusal to comply with a lawful and reasonable order of his superior to turn over a tape of a meeting of the Credentials Committee of the Hospital constituted cause for plaintiff's dismissal, and the information on the tape did not come within the protection of the doctor-patient privilege. *Ibid.*

MUNICIPAL CORPORATIONS

§ 4.5. Housing and Urban Redevelopment

An exchange of real property between a redevelopment commission and a church constitutes a sale which must comply with the advertisement and bid requirements of G.S. 160A-514(d) or with the public hearing and valuation requirements of G.S. 160A-514(e)(4). *Campbell v. Church*, 476.

MUNICIPAL CORPORATIONS—Continued

§ 29.4. Authority Under Police Power to Enact Particular Ordinances

An ordinance of the City of Raleigh creating the Oakwood Historic District constituted a valid exercise of the police power. *A-S-P Associates v. City of Raleigh*, 207.

§ 30.9. Spot Zoning

A city ordinance creating a historic preservation district did not constitute "spot zoning." *A-S-P Associates v. City of Raleigh*, 207.

PRINCIPAL AND AGENT

§ 4. Proof of Agency

Whether defendant endorsed a check as real or implied agent of the second defendant and the endorsement was therefore valid and not a forgery was a question of fact for the jury, and the trial court erred in granting summary judgment for plaintiff. *Bank v. Hammond*, 703.

RAPE

§ 3. Indictment

An indictment was insufficient to charge first degree rape where it failed to allege that defendant was older than 16 or that defendant used a deadly weapon or inflicted serious bodily injury. *S. v. Perry*, 502.

§ 4. Relevancy and Competency of Evidence

An expert's testimony that hairs found on a rape and murder victim's sweater had microscopic characteristics similar to head hairs taken from defendant was not rendered inadmissible as having no probative value by the witness's testimony on cross-examination that, although the hairs were similar, the number of characteristics they shared was "limited." *S. v. Perry*, 502.

Trial court in a rape prosecution did not err in permitting a demonstration by the prosecuting witness and a detective depicting the manner in which the rape took place. *S. v. Mayhand*, 418.

§ 5. Sufficiency of Evidence

The jury in a first degree rape case could properly find that defendant was more than 16 years of age where the jury had ample opportunity to view the defendant and estimate his age. *S. v. Samuels*, 783.

SALES

§ 8. Parties Liable on Warranties

Privity in the sale of goods is not necessary to a purchaser's action on an express warranty relating to the goods which is directed by its terms to the purchaser, and an action by the purchaser of a farm tractor against the manufacturer to recover for breach of an express warranty contained in its owner's manual was not barred by the absence of contractual privity. *Kinlaw v. Long Mfg.*, 494.

SCHOOLS

§ 13.2. Dismissal of School Employees

The hearing and appeal procedures of G.S. 115-34 provided plaintiff a constitutionally effective set of administrative and judicial remedies to review her discharge as a school cafeteria manager. *Presnell v. Pell,* 715.

Superior court had no jurisdiction to entertain plaintiff's claim for wrongful discharge from her employment as a school cafeteria manager where no appeal from the decision of the district school committee to terminate plaintiff's employment was taken to the county board of education. *Ibid.*

SEARCHES AND SEIZURES

§ 3. Searches at Particular Places

A warrantless search by military authorities of a military billet of a soldier detained by civilian authority to make an inventory of his belongings and secure them for safeguarding pursuant to military regulations was not an unreasonable search or seizure proscribed by the Fourth Amendment, and a second look by military authorities at some of the inventoried items three days later did not constitute another search subject to Fourth Amendment proscriptions. *S. v. Nelson,* 573.

Evidence obtained by military authorities in an inventory of soldiers' possessions was not required to be excluded in a civilian criminal trial of the soldiers on the ground that the surrender of the evidence by military to civilian authorities violated the Posse Comitatus Act. *Ibid.*

§ 4. Physical Examination or Tests

Where there was no illegal arrest and defendant clearly consented to the taking of hair samples after officers explained he was not required to do so, defendant could not complain on appeal that testimony of the results of an analysis of the hair samples should have been excluded at his sentencing hearing. *S. v. Reynolds,* 380.

§ 7. Search Incident to Arrest

A pistol was lawfully seized from under a rug in defendant's motel room as an incident to his lawful arrest and under the plain view doctrine. *S. v. Cherry,* 86.

After having caused defendant to exit a shot house where illegal liquor is sold and to submit to an arrest outside the premises, the strong possibility that the officers might be fired on from the shot house constituted an "exigent circumstance" which made it reasonable for them to make a limited, protective sweep of the shot house to search for weapons. *S. v. Taylor,* 405.

§ 10. Search on Probable Cause

An officer's warrantless entry into defendant's trailer dwelling for the purpose of arresting defendant for murder was lawful where the officer had probable cause to believe that the person who committed the murder was in defendant's trailer, and the officer's seizure of a rifle found in the trailer was lawful. *S. v. Allison,* 135.

§ 15. Standing to Object to Lawfulness of Search

Defendant had no standing to object to a search of the codefendant's car and to seizure of items therefrom. *S. v. Lyles,* 179.

Defendant had no standing to object to the search of a storage building located behind a house which he rented. *S. v. Alford,* 465.

Defendant failed to establish that he had a privacy interest in the room at a "shot house" where his gun was found by officers sufficient to give him standing to object to the search of that room. *S. v. Taylor,* 405.

SEARCHES AND SEIZURES — Continued

§ 31. Description of Property to be Seized

An OSHA inspection warrant was invalid where it failed to indicate the conditions, objects, activities or circumstances which the inspection was intended to check or reveal. *Brooks, Comr. of Labor v. Enterprises, Inc.*, 759.

§ 41. Knock and Announce Requirements

An officer's failure to announce his purpose and authority before entering a mobile home did not require the exclusion of a seized rifle under G.S. 15A-401(e)(1)c since (1) the officer might reasonably have believed that giving notice of his authority and purpose to arrest defendant "would present a clear danger" to his life, and (2) his conduct, if error, was not a substantial violation of the statute. *S. v. Allison*, 135.

§ 43. Motions to Suppress Evidence

Defendant's motion at trial to suppress a watch seized pursuant to a search warrant was not timely. *S. v. Nelson*, 573.

STATE

§ 12. State Employees

The Secretary of Human Resources had the authority to dismiss plaintiff as superintendent of Broughton Hospital before his six year term expired, and it was not required that he be dismissed by the State Board of Mental Health. *Smith v. State*, 115.

In an action by plaintiff to recover damages for wrongful discharge from his position as superintendent of Broughton Hospital, plaintiff's refusal to comply with a lawful and reasonable order of his superior to turn over a tape of a meeting of the Credentials Committee of the Hospital constituted cause for plaintiff's dismissal, and the information on the tape did not come within the protection of the doctor-patient privilege. *Ibid.*

TAXATION

§ 31.3. Sales Taxes on Particular Transactions

A company engaged in the business of renting and leasing automobiles is not entitled to an exemption from sales tax on the sale of its rental and lease vehicles to private individuals not for resale because it paid sales taxes on the rental and lease of its vehicles. *Rent-A-Car Co. v. Lynch*, 559.

TELECOMMUNICATIONS

§ 1.4. Evidence of Fair Value

The Utilities Commission did not act arbitrarily or capriciously in giving only a 10% weighting to replacement cost and a 90% weighting to original cost in determining the fair value of a telephone company's property. *Utilities Comm. v. Telephone Co.*, 162.

The Utilities Commission may not base its weighting of replacement cost and original cost of a telephone company's property solely on the percentages of debt and equity in the company's capital structure. *Ibid.*

§ 1.6. Property "Used and Useful" in Providing Service

The evidence supported a finding by the Utilities Commission that 1000 lines and terminals owned by a telephone company were not used and useful in providing

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telephone service and should be excluded from the company's rate base as excessive plant investment. *Utilities Comm. v. Telephone Co.*, 162.

§ 1.8. Determination of Rate of Return

A finding by the Utilities Commission that a return of 14.76% on original cost common equity of the Mebane Home Telephone Company was fair and reasonable was supported by the evidence. *Utilities Comm. v. Telephone Co.*, 162.

TRIAL

§ 52.1. Setting Aside Verdict for Inadequate Award

Trial court did not err in refusing to set aside a jury verdict of $3350 where the plaintiff offered evidence that her expenses exceeded $3800, and there was no merit to plaintiff's contention that because defendant offered no evidence her evidence was uncontradicted and should be treated as a stipulation. *Smith v. Beasley*, 798.

UNIFORM COMMERCIAL CODE

§ 11. Express Warranties

Privity in the sale of goods is not necessary to a purchaser's action on an express warranty relating to the goods which is directed by its terms to the purchaser, and an action by the purchaser of a farm tractor against the manufacturer to recover for breach of an express warranty contained in the owner's manual was not barred by the absence of contractual privity. *Kinlaw v. Long Mfg.*, 494.

§ 36. Collection of Checks or Drafts

Unproven and contested allegations of forged endorsement on a check are insufficient as a matter of law to breach a warranty of good title under G.S. 25-4-207. *Bank v. Hammond*, 703.

UTILITIES COMMISSION

§ 28. Factors in Determining Value of Property

The Utilities Commission may not base its weighting of replacement cost and original cost of a telephone company's property solely on the percentages of debt and equity in the company's capital structure. *Utilities Comm. v. Telephone Co.*, 162.

§ 30. Replacement Cost

The Utilities Commission did not act arbitrarily or capriciously in giving only a 10% weighting to replacement cost and a 90% weighting to original cost in determining the fair value of a telephone company's property. *Utilities Comm. v. Telephone Co.*, 162.

§ 35. Over-Adequate Facilities

The evidence supported a finding by the Utilities Commission that 1000 lines and terminals owned by a telephone company were not used and useful in providing telephone service and should be excluded from the company's rate base as excessive plant investment. *Utilities Comm. v. Telephone Co.*, 162.

UTILITIES COMMISSION—Continued

§ 42. Sufficiency of Return to Induce Investment

A finding by the Utilities Commission that a return of 14.76% on original cost common equity of the Mebane Home Telephone Company was fair and reasonable was supported by the evidence. *Utilities Comm. v. Telephone Co.*, 162.

VENDOR AND PURCHASER

§ 2. Time of Performance of Option

Plaintiff's notice to defendants of intent to purchase certain property was timely given on 15 January 1976 where the parties' contract provided that notice should be given at least 60 days prior to 15 March 1975, and use of the words "at least" did not alter the general rule for computation of time. *Harris v. Latta*, 555.

WILLS

§ 38. Estates in Trust

Evidence was sufficient to support the court's conclusion that a will created seven separate trusts for the seven grandchildren of testator living at the time of his death. *Bank v. Goode*, 485.

§ 44. Representation and Per Capita and Per Stirpes Distribution

Trial court properly concluded that provisions of testator's will directed that any property remaining in the established trust of a deceased grandchild should be held in trust for the grandchild's issue until the date of final distribution, at which time the then surviving issue of the deceased grandchild should share per capita in the separate trust estate. *Bank v. Goode*, 485.

§ 65. Afterborn Children

Provisions of testator's will which provided for afterborn grandchildren is interpreted so as to exclude from trust provisions only those grandchildren born after testator's death and after the first date of entitlement to the trust corpus by any other beneficiary. *Bank v. Goode*, 485.

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