NORTH CAROLINA REPORTS

VOLUME 299

SUPREME COURT OF NORTH CAROLINA

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1980

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OF
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3. Appointed 2 July 1980 to succeed B. Gordon Gentry who retired 30 April 1980.
4. Appointed 29 August 1980 to succeed Hollis M. Owens, Jr. who was appointed to Superior Court 31 July 1980.

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CASES REPORTED

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

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

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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 April 21, 1980, the following individuals were admitted:

TERRY DANIEL BLACKWOOD ..... Hope Mills, applied from West Virginia
WALLACE MANNINGTON KAIN ..... Greensboro, applied from New York
JAMES JOSEPH TRAINOR ..... Greensboro, applied from New York
WILLIAM JAMES PATTERSON ..... Charlotte, applied from Michigan
ROBERT ALLEN JENKINS ..... Buies Creek, applied from Michigan
ROBERT JAMES BURFORD ..... Raleigh, applied from New York
THOMAS PATRICK LORDEON ..... Sylva, applied from Ohio

On May 29, 1980, the following individual was admitted:

LAMONT MONTIE WALTON ..... Graham, applied from Michigan

On June 6, 1980, the following individuals were admitted:

MARC DALE TOWLER ..... Charlotte, applied from Illinois
THOMAS M. MCCRARY ..... Raleigh, applied from Arkansas
EDWARD BOGRAD ..... Charlotte, applied from Massachusetts
ROBERT Y. PETERS ..... Greensboro, applied from Pennsylvania

Given under my hand and seal, this the 22nd day of July, 1980.

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

FALL TERM 1979

THOMAS HAWKS, ET AL., PETITIONERS v. THE TOWN OF VALDESE, RESPONDENT

No. 56

(Filed 8 January 1980)

1. **Municipal Corporations § 2.2— parcels separated by previously annexed satellite—no annexation as one area**

Two parcels of land which are completely separated from each other by a previously annexed satellite area may not be annexed as one area since the use and subdivision tests prescribed by G.S. 160A-36(c) for determining whether an "area to be annexed" is "developed for urban purposes" cannot be applied to such area but must be applied to each parcel as a separate "area to be annexed."

2. **Municipal Corporations § 2.3— annexation—area contiguous only to boundaries of satellite**

Territory which is contiguous solely to the boundaries of a satellite area does not satisfy the statutory requirement that the area to be annexed in an involuntary annexation proceeding under G.S. 160A-33 *et seq.* be adjacent or "contiguous" to the "municipal boundaries" of the city seeking annexation, since the terms "municipal boundary" and "contiguous area" in G.S. 160A-36 and G.S. 160A-41(1) remain unaltered by the enactment of statutes permitting the annexation of noncontiguous satellite areas and refer exclusively to the primary corporate limits and areas which abut the primary corporate limits.

3. **Municipal Corporations § 2.3— external boundaries of area to be annexed—inclusion of distance around satellite boundaries**

Where an area to be annexed was almost severed by a satellite which had previously been annexed, and the two portions of such area were connected only by a 30 foot wide strip of land which lies adjacent to the northern

boundary of the satellite, the satellite itself could not be included as part of the area to be annexed in calculating the external boundaries of the area, and the distance around the western, northern and eastern boundaries of the satellite must be included in the measurement to determine whether the area to be annexed satisfies the statutory requirement that at least one-eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.

PETITIONERS appealed to the Court of Appeals from judgments of *Ferrell, J.*, 4 September 1978 Non-Jury Civil Session, BURKE Superior Court.

Prior to determination by the Court of Appeals, we certified the case for initial appellate review by the Supreme Court.

Pursuant to the provisions of G.S. 160A-38, petitioners in apt time filed a petition in the Superior Court of Burke County seeking review of the action of the governing board of the Town of Valdese in adopting ordinances under which certain areas of land were annexed to the Town of Valdese, including lands and property belonging to petitioners. Petitioners allege they will suffer material injury by reason of the failure of the Town of Valdese to comply with annexation procedures or to meet the requirements contained in G.S. 160A-36 as they apply to the property of each petitioner.

At the conclusion of the hearing before Judge Ferrell, he made the following pertinent findings of fact:

1. The Town of Valdese at all times pertinent had a population of less than 5,000.

2. The Town of Valdese prepared a report as required by G.S. 160A-35 showing, among other things, that the areas to be annexed met the requirements of G.S. 160A-36.

3. The Town of Valdese had adopted a resolution of intent to consider annexation of Area 1 and Area 2, the boundaries of such areas being described in each resolution, and gave notice of the date, hour, and place of a public hearing to be held on the matter.

4. Notice of said intent and public hearing was published as required by law.

5. Thereafter, on 1 May 1978, the Town of Valdese approved the report and made it available to the public.

6. A public hearing was held on 22 May 1978 at the time and place set forth in the notice. A representative of the Town explained the report, and all persons affected by the proposed annexation, as well as all residents of the Town, were given an opportunity to be heard.

7. On 5 June 1978, the Town of Valdese passed ordinances annexing Area 1 and Area 2, both effective 30 June 1978.

8. Each annexation ordinance contained a statement of intent to provide services to Area 1 and Area 2 as required by G.S. 160A-35 and contained a specific finding that by 30 June 1978 the Town would have funds appropriated in sufficient amount to finance construction of new water and sewer lines found necessary in the report. Each ordinance adopted as aforesaid contained metes and bounds description of the particular area annexed.

9. The reports of annexation and the annexation ordinances contained statements that the Town Council specifically found and declared that the described territories met the requirements of G.S. 160A-36 in that the total areas to be annexed met the following standards:

(a) Each area is adjacent and contiguous as defined in G.S. 160A-41(1) as of 17 April 1978, the date when the annexation proceedings were begun.

(b) At least one eighth of the aggregate external boundary line of both Area 1 and Area 2 coincided with the primary corporate boundary of the Town of Valdese.

(c) No part of the areas to be annexed is included within the boundary of another incorporated municipality.

(d) Both Area 1 and Area 2 are developed for urban purposes in that more than 60 percent of the total number of lots and tracts in each area is used for residential, commercial, industrial, institutional, governmental purposes, and more than 60 percent of the total residential and undeveloped acreage consists of lots and tracts five acres or less in size.

10. Area 1 lies north of the primary corporate limits of Valdese. It consists of tracts located on either side of a 27.132

acre tract owned by the Town of Valdese and a part of the Town by reason of satellite annexation proceedings effective 20 April 1977. One of the tracts making up Area 1 abuts directly only on the northern boundary of the satellite, while the other tract making up Area 1 abuts directly on both the southern boundary of the satellite and the northern boundary of the primary corporate limits of the Town of Valdese.

11. Area 2 lies east of the primary corporate limits of Valdese. It consists of one tract which is nearly severed by a tract which is a part of the Town by reason of a prior satellite annexation proceeding. Area 2 abuts directly on the eastern boundary of the primary corporate limits of Valdese. The portions of Area 2 adjacent to the western and eastern boundaries of the satellite are connected to each other by a strip of land 30 feet in width which is adjacent to the northern boundary of the satellite. This connecting strip of land constitutes one-half of the right-of-way for Highway U.S. 64-70.

12. In determining the extent to which the aggregate external boundaries of Area 1 were contiguous with the primary municipal boundaries of Valdese, respondent measured the aggregate external boundaries of Area 1 as if the satellite were included within Area 1 for such purpose and no other.

13. In determining the extent to which the aggregate external boundaries of Area 2 were contiguous with the primary municipal boundaries of Valdese, respondent measured the aggregate external boundaries of Area 2 as if the satellite were included in Area 2 for such purpose and no other. Thus, the Town did not include the footages of the eastern, northern and western satellite boundaries in computing the aggregate external footage of "the area to be annexed" designated as Area 2.

Some additional findings not pertinent to decision have been omitted. Other findings may be discussed in more detail in the opinion.

Judge Ferrell concluded that the actions of the Town of Valdese in annexing Area 1 and Area 2 were in all respects valid. Accordingly, the annexations of those areas, effective as of 30 June 1978, were affirmed. Petitioners appealed, assigning errors discussed in the opinion.

Herbert L. Hyde and G. Edison Hill, attorneys for petitioner appellants.

Mitchell, Teele, Blackwell & Mitchell, by Hugh A. Blackwell and H. Dockery Teele, Jr., attorneys for respondent appellee.

HUSKINS, Justice.

Petitioners challenge the validity of two annexation ordinances adopted by the Town of Valdese on 5 June 1978 as the culmination of simultaneous annexation proceedings held pursuant to the terms of G.S. 160A-33, *et seq.* The two annexed areas are referred to as Area 1 and Area 2.

One feature common to both Areas 1 and 2 is that they are either nearly or completely severed by *noncontiguous* tracts of land which have been previously annexed by the Town of Valdese as "satellite" areas pursuant to authority granted in G.S. 160A-58, *et seq.* It would be helpful, therefore, to review briefly the contiguity requirement and exceptions thereto in our statutory scheme for annexation before considering separately the merits of each annexation ordinance.

In North Carolina's statutory scheme for annexation, contiguity is an essential precondition to the involuntary annexation of outlying territories by cities. Thus, in annexation by all cities, whether less than 5,000 or more than 5,000 in population, the "total area to be annexed" must meet the following requirements, among others:

> "(1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.
>
> (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.
>
> (3) No part of the area shall be included within the boundary of another incorporated municipality."

G.S. 160A-36(b); 160A-48(b). "Contiguous area" is defined as "any area which, at the time annexation procedures are initiated, either abuts directly on the municipal boundary or is separated from the municipal boundary by a street or street right-of-way, a creek or river, the right-of-way of a railroad or other public serv-

ice corporation, lands owned by the municipality or some other political subdivision, or lands owned by the State of North Carolina." G.S. 160A-41(1); 160A-53(1).

In 1973 the General Assembly enacted a limited exception to the requirement of contiguity by making it possible for a city to "annex an area not contiguous to its primary corporate limits" upon receipt of a valid petition requesting annexation "signed by all of the owners of real property in the area described therein. . . ." G.S. 160A-58.1(a). Substantial restrictions are imposed on the type of noncontiguous area which may be proposed for annexation:

"(1) The nearest point on the proposed satellite corporate limits must be not more than three miles from the primary corporate limits of the annexing city.

(2) No point of the proposed satellite corporate limits may be closer to the primary corporate limits of another city than to the primary corporate limits of the annexing city.

(3) The area must be so situated that the annexing city will be able to provide the same services within the proposed satellite corporate limits that it provides within its primary corporate limits.

(4) If the area proposed for annexation, or any portion thereof, is a subdivision as defined in G.S. 160A-376, all of the subdivision must be included.

(5) The area within the proposed satellite corporate limits, when added to the area within all other satellite corporate limits, may not exceed ten percent (10%) of the area within the primary corporate limits of the annexing city."

G.S. 160A-58.1(b). If the petition appears to be valid, the area meets all the standards of G.S. 160A-58.1(b), and the council determines that the "public health, safety and welfare of the inhabitants of the city and of the area proposed for annexation will be best served by the annexation, the council *may* adopt an ordinance annexing the area described in the petition." G.S. 160A-58.2 (emphasis added).

AREA 1

Area 1 lies north of the primary corporate limits of Valdese and is completely severed by a noncontiguous 27.132 acre tract which was annexed by the Town pursuant to a prior satellite annexation proceeding. The portion of Area 1 located southeast of the satellite area abuts directly on *both* the southern boundary of the satellite area and the northern boundary of the primary corporate limits of Valdese. On the other hand, the portion of Area 1 located northwest of the satellite abuts *solely* on the northern boundary of the satellite area.

[1] The first question presented for review is whether Area 1 may be annexed as one area notwithstanding the fact that one part of Area 1 is completely separated from the other by a previously annexed satellite area.

We hold that Area 1 may not be annexed as one area because the tests provided in G.S. 160A-36(c) for determining whether an "area to be annexed" is "developed for urban purposes" cannot be applied to Area 1 as presently constituted.

In addition to being contiguous to the municipality's primary boundaries, the total area to be annexed must "be developed for urban purposes." G.S. 160A-36(c). An area is developed for urban purposes if no less than 60 percent of the lots in the area are in actual use other than for agricultural purposes and if the area is subdivided such that no less than 60 percent of the total acreage, "not counting the acreage used at the time of annexation for commercial, industrial, governmental, or institutional purposes, consists of lots and tracts five acres or less in size." G.S. 160A-36(c).

The use and subdivision tests prescribed by G.S. 160A-36(c) yield accurate results only if applied to a land area which encompasses only unannexed territory. This is so because these tests require a determination of the *percentage* of lots being used for "urban purposes" and the *percentage* of "total acreage" subdivided into lots of five acres or less. It takes no great mathematical insight to realize that such percentage figures will be skewed and inaccurate if not based on data from *all* the acreage and lots encompassed by the land area under consideration.

Area 1, as presently constituted, necessarily encompasses three parcels of land. One of these parcels has been previously an-

nexed in a satellite proceeding and lies between two unannexed parcels. Thus, in order to obtain accurate percentage figures for the land area encompassed by Area 1, it is necessary to consider not only the uses of lots and subdivision of acreage in the two unannexed parcels but also the land uses and subdivision in the previously annexed parcel. The problem with doing this, of course, is that the satellite area can no longer be considered an "area to be annexed" by virtue of its prior annexation. As a result, land use and subdivision data from the satellite area cannot be considered in determining percentage figures for Area 1. Since the percentages calculated by the Town of Valdese for Area 1 are of necessity based only on data from two of the three parcels encompassed by Area 1, it follows that such figures are distorted and inaccurate.

In effect, the prior annexation of the intervening satellite area precludes the two unannexed, noncontiguous parcels in Area 1 from ever being considered as part of one entity or "area to be annexed" for purposes of applying the use and subdivision tests of G.S. 160A-36(c). Accordingly, it is impossible to determine whether Area 1, as presently constituted, has attained the level of urban development required by G.S. 160A-36(c). The only accurate way to determine whether the two unannexed parcels in Area 1 are developed for "urban purposes" is to apply the use and subdivision tests of G.S. 160A-36(c) to each parcel as a separate "area to be annexed."

The conclusion we reach indicates that Area 1 can never be the subject of one annexation proceeding. Rather, the previously annexed satellite area irrevocably splits Area 1 into two unannexed areas, each of which may be the subject of separate annexation proceedings, and each of which may or may not meet all requirements for annexation.

[2] Since we hold that Area 1 cannot be annexed as one area, it is not necessary to consider a number of questions which are briefed and argued: (1) whether Area 1 in its present form is contiguous to the municipal boundary of Valdese as required by G.S. 160A-36(b)(1); (2) whether its boundaries follow topographical boundaries wherever practical as required by G.S. 160A-36(d); (3) whether the Town of Valdese correctly calculated degree of land subdivision and types of land uses in Area 1. However, since the

issue may recur in future annexation proceedings involving this same territory, we consider whether the boundaries of a satellite area are the "municipal boundaries" of Valdese for purposes of determining the contiguity of the area to be annexed in an involuntary annexation proceeding. *See* G.S. 160A-36(b)(1).

When the two unannexed areas which presently constitute Area 1 are examined separately with respect to their contiguity to the municipal boundaries of Valdese, it is evident that the unannexed area adjacent to the southeast boundary of the satellite presents no contiguity problems since it also abuts directly on the northern boundary of the *primary* corporate limits of Valdese. However, the contiguity of the unannexed area adjacent to the northwest boundary of the satellite is suspect since its contiguity to the "municipal boundaries" of Valdese is premised *solely* on the fact that it abuts directly on the northern boundary of the satellite.

The question whether the boundaries of such satellite areas constitute "municipal boundaries" is a serious one indeed since a holding that they were municipal boundaries would allow cities to extend their corporate limits by annexing territory contiguous *only* to noncontiguous satellite areas. Thus, cities would be permitted to grow from these noncontiguous areas without ever having to annex the intervening territory between the primary corporate limits and the satellite corporate limits.

The Town of Valdese contends that the boundaries of a satellite area are "municipal boundaries" as that term is used in G.S. 160A-36(b) and 160A-41(1). Valdese reasons that since the area within the satellite is part of Valdese, it follows that the boundaries of the satellite area are likewise the "municipal boundaries" of Valdese. Accordingly, contiguity to the boundaries of the satellite is the same as contiguity to the primary corporate limits of Valdese. Hence, respondent concludes that unannexed areas contiguous solely to satellite boundaries are "contiguous areas" within the meaning of the statutory provisions for involuntary annexation.

Petitioners contend that the term "municipal boundaries" refers solely to the primary corporate limits of Valdese. According to petitioners, the requirement in G.S. 160A-36(b)(1) that the "total area to be annexed" in an involuntary annexation must "be

adjacent or contiguous to the municipality's boundaries" refers solely to the primary corporate limits. Thus, petitioners conclude that an area which is adjacent or contiguous *solely* to satellite boundaries is not a "contiguous area" within the meaning of the statutory provisions for involuntary annexation.

The precise question posed, therefore, is whether territory which is contiguous *solely* to the boundaries of a satellite area satisfies the statutory requirement that the area to be annexed in an involuntary annexation proceeding be contiguous or adjacent to the municipal boundaries of the city seeking annexation. *See* G.S. 160A-136(b)(1); G.S. 160A-41(1). Resolution of this question requires us to consider whether recent legislation authorizing voluntary annexation of noncontiguous areas by cities has altered the definition of contiguity in an involuntary annexation proceeding. Specifically, we must consider whether the meaning of terms such as "contiguous area" and "municipal boundary" in G.S. 160A-36 and 160A-41(1) have been altered by the subsequent enactment of G.S. 160A-58, *et seq.*, which makes possible the annexation of noncontiguous areas.

The instant proceeding is governed by the terms of G.S. 160A-33, *et seq.*, which set out the procedures to be followed and the standards to be met by a city of less than 5,000 population which seeks to annex outlying territories. It will be recalled that among the standards to be met in such proceedings is the requirement that the "total area to be annexed . . . must be adjacent or contiguous to the *municipality's boundaries* at the time the annexation proceeding is begun." G.S. 160A-136(b)(1) (emphasis added). A "contiguous area" is defined, in pertinent part, as any area which "abuts directly on the *municipal boundary*." G.S. 160A-41(1) (emphasis added). At the time G.S. 160A-33, *et seq.*, was enacted in 1959, there were no provisions in the laws of North Carolina for the annexation of noncontiguous areas. Thus, when G.S. 160A-33, *et seq.*, was enacted the term "municipal boundary" referred exclusively to the primary corporate limits of a city and "contiguous area" referred exclusively, with certain exceptions not relevant here, to areas which abut directly on the primary corporate limits.

It now remains for us to determine whether the enactment in 1973 of legislation authorizing the annexation of noncontiguous

areas has altered the definition of contiguity in an involuntary annexation proceeding governed by G.S. 160A-33, *et seq.* We hold that the definition of contiguity has not been altered. Fortunately, the conceptual difficulties created by the boundaries of satellite areas with respect to the definition of contiguity in an involuntary annexation proceeding were anticipated and resolved by the General Assembly in the very legislation which authorized the annexation of noncontiguous areas. In this legislation, it is made clear that the existence of noncontiguous satellite areas is not to alter the definitions of "municipal boundary" or "contiguous area" in an involuntary annexation proceeding governed by G.S. 160A-33, *et seq.* This is done by carefully distinguishing the "primary corporate limits" of a city from its "satellite corporate limits." The "primary corporate limits" are defined in pertinent part as "the corporate limits of a city as defined in its charter, enlarged or diminished by subsequent annexations . . . of contiguous territory pursuant to [G.S. 160A-33, *et seq.*] . . . ." G.S. 160A-58(2). The "satellite corporate limits" are defined as "the corporate limits of a noncontiguous area annexed pursuant to this Part or a local act authorizing or effecting noncontiguous annexations." G.S. 160A-58(3). Finally, it is provided that "[a]n area annexed pursuant to this Part ceases to constitute satellite corporate limits and becomes a part of the primary corporate limits of a city when, through annexation of intervening territory, the two boundaries touch." G.S. 160A-58.6.

The above definitions establish that *only* the "primary corporate limits" of a city are subject to enlargement by annexation of contiguous territory pursuant to the procedures for involuntary annexation outlined in G.S. 160A-33, *et seq.* It follows, then, that notwithstanding the existence of satellite areas, the meanings of the terms "municipal boundary" and "contiguous area" in G.S. 160A-36 and G.S. 160A-41(1) remain unaltered and refer exclusively to the primary corporate limits and areas which abut on the primary corporate limits. Conversely, satellite corporate limits are not "municipal boundaries" as that term is used in G.S. 160A-36, and territory which is contiguous *solely* to "satellite corporate limits" is not a "contiguous area" as that term is defined in G.S. 160A-41(1).

We hold, therefore, that territory which is contiguous *solely* to the "satellite corporate limits" fails to satisfy the statutory

requirement that the area to be annexed in an involuntary annexation proceeding be contiguous or adjacent to the municipal boundaries of the city which seeks annexation. G.S. 160A-36(b)(1). Territory contiguous *solely* to "satellite corporate limits" is not eligible for annexation until such "satellite corporate limits" become "a part of the primary corporate limits." This occurs when, through annexation of intervening territory, the boundaries of the satellite area and those of the primary town area touch. G.S. 160A-58.6.

Our conclusion that a city may not involuntarily annex territory which is contiguous only to noncontiguous satellite areas is premised not only on the legislative distinction between primary and satellite corporate limits, but also on the meaning and purpose of the concept of contiguity in the law of annexation.

Contiguity has always been viewed as synonymous with the "legal as well as the popular idea of a municipal corporation in this country," which is one of "oneness, community, locality, vicinity; a collective body, not several bodies; a collective body of inhabitants—that is, a body of people collected or gathered together in one mass, not separated into distinct masses, and having a community of interest because residents of the same place, not different places. So, as to territorial extent, the idea of a city is one of unity, not of plurality, of compactness or contiguity, not separation or segregation." 56 Am. Jur. 2d, Municipal Corporations, § 69, quoting *City of Denver v. Coulehan*, 20 Colo. 471, 39 P. 425 (1894). Contiguity, then, is an essential component of the traditional concept of a municipal corporation, which is envisioned as a governmental unit capable of providing essential governmental services to residents within compact borders on a scale adequate to insure "the protection of health, safety, and welfare in areas being intensively used for residential, commercial, industrial, and government purposes or in areas undergoing such development." G.S. 160A-33(2).

The element of contiguity helps to preserve the economic and political viability of municipal government. The costly package of services provided by municipal government can be economically maintained only within the compact boundaries fostered by the contiguity requirement. Conversely, the requirement of contiguity discourages prohibitively expensive extension of municipal serv-

ices to noncontiguous areas where municipal services cannot be economically supplied. Moreover, it goes without saying that, from a political standpoint, a compact, contiguous area is more easily governed than one split into diverse, noncontiguous enclaves. Vicinity engenders a unified sense of community identity which facilitates the formation of the consensus essential to effective government. *See generally, City of Denver v. Coulehan,* supra.

Thus, to permit cities to evolve into a number of diverse, noncontiguous town areas is to invite financial and political instability into the structure of municipal government. The short-term benefits to be gained by the expansion of satellite boundaries are far outweighed by the economic loss and general disorder which would attend the collapse of an overextended municipality. Accordingly, statutes governing the extension of corporate limits, such as G.S. 160A-33, *et seq.*, usually provide in express terms that only territory adjacent to the primary corporate limits may be brought within the municipal boundaries by annexation. *See generally,* 2 McQuillin, Municipal Corporations, § 7.20 (3d ed. 1979). Imposition of the contiguity requirement is one means of insuring that the annexation process remains consistent with principles of "sound urban development." G.S. 160A-33(1).

Thus, if the Town of Valdese wishes to annex involuntarily the two unannexed areas on either side of the satellite area, it must first annex the area which abuts directly on *both* the primary corporate limits and the satellite corporate limits. Only after this intervening territory has been successfully annexed is the area which presently abuts solely on satellite corporate limits eligible for annexation. Only then do the satellite corporate limits become part of the primary corporate limits. *See* G.S. 160A-58.6. Only then does the unannexed area which was previously adjacent or contiguous merely to noncontiguous satellite corporate limits become adjacent or contiguous to the municipal boundaries of Valdese as required by the terms of G.S. 160A-36(b)(1).

Finally, we note that simultaneous annexation proceedings are permitted only when a municipality "is considering the annexation of two or more areas which are *all adjacent to the municipal boundary* but are not adjacent to one another. . . ." G.S. 160A-37(g) (emphasis added). In this case only one of the unan-

nexed areas encompassed by Area 1 is adjacent to the primary corporate limits, which constitute the "municipal boundaries" of Valdese for the purpose of determining contiguity. The other unannexed area is adjacent only to the satellite limits, which we have concluded do not constitute the municipal boundaries for purposes of determining contiguity. Thus, under the terms of G.S. 160A-37(g), simultaneous proceedings to annex the two areas encompassed by Area 1 are not permitted.

AREA 2

[3] Area 2 lies east of the primary corporate limits of Valdese. Somewhat like Area 1, the territory which comprises Area 2 is almost divided by a noncontiguous tract of land which is already part of Valdese by reason of a prior satellite annexation. The satellite area which divides Area 2, however, does not completely sever the connection between those portions of Area 2 lying on either side of it. The portion of Area 2 adjacent to the eastern boundary of the primary corporate limits and the western boundary of the satellite is connected to the portion of Area 2 adjacent to the eastern boundary of the satellite by a strip of land 30 feet in width which lies directly north of and is adjacent to the northern boundary of the satellite. This connecting strip of land constitutes one-half of the right-of-way for Highway U.S. 64-70.

From the above description, it appears that Area 2 is adjacent or contiguous to the primary corporate limits or the municipal boundaries of Valdese by virtue of a 30-foot wide umbilical cord. Thus, with Area 2 the dispositive issue is not whether it is contiguous to the municipal boundaries of Valdese as required by G.S. 160A-36(b)(1), but whether it is contiguous to the extent specified by G.S. 160A-36(b)(2).

G.S. 160A-36(b)(2) provides that "[a]t least one eighth of the *aggregate external boundaries* of the [total area to be annexed] *must* coincide with the municipal boundary." (Emphasis added.) Both parties agree that the boundary of Area 2 coincides with the primary municipal boundary of Valdese for approximately 2,800 feet. Petitioners, however, contend that the Town of Valdese did not properly measure the aggregate external boundaries of Area 2. The contention is sound and must be sustained.

In calculating the aggregate external boundaries of Area 2, the Town of Valdese has assumed that the previously annexed satellite which nearly severs Area 2 is *part of* Area 2—"the area to be annexed." This assumption is expressly made for the sole purpose of determining the aggregate external boundaries of Area 2. For all other purposes, Area 2 does not include the satellite as a part of "the area to be annexed." Application of this assumption significantly shortens the aggregate external boundaries of Area 2. Thus, instead of having to measure all the way around the western, northern, and eastern boundaries of the satellite area, Valdese merely measures along the shorter southern boundary of the satellite. The obvious effect of decreasing the length of the aggregate external boundaries is to increase the *percentage* of external boundary which coincides with the municipal boundary of Valdese. Thus, the method of measurement employed by Valdese decreases the length of the external boundaries of Area 2 to 20,200 feet and increases the percentage of contiguity to 14 percent. Significantly, the method employed by Valdese yields a percentage figure which exceeds the statutory requirement of one eighth or 12.5 percent. G.S. 160A-36(b)(2).

We hold that the method used by Valdese to calculate the external boundaries of Area 2 is not legally authorized. To properly calculate the external boundaries of Area 2, the satellite itself cannot be included as part of the area to be annexed, and the distance *around* the western, northern and eastern boundaries of the previously annexed satellite must be included in the measurement. The record indicates that when the external boundaries of Area 2 are measured in this manner, the percentage of external boundary contiguous to the municipal boundary dips to 11.3 percent. Thus Area 2 does not satisfy the statutory requirement that at least one-eighth of the aggregate external boundaries of the area to be annexed coincide with the municipal boundary of Valdese. *See* G.S. 160A-36(b)(2). Accordingly, we hold that Area 2, as presently constituted, may not be validly annexed by the Town of Valdese in this proceeding.

In light of the foregoing conclusion it is unnecessary to consider other objections raised to the annexation of Area 2.

For the reasons stated the judgments appealed from are

Reversed.

STATE OF NORTH CAROLINA v. LEROY BENTON, JR.

No. 87

(Filed 8 January 1980)

1. **Homicide §§ 14.1, 21 — death by shooting — defendant as aggressor — sufficiency of evidence — presumption from use of deadly weapon**

Evidence that defendant walked over to a table in a bar where deceased was sitting and exchanged words with him concerning a woman, and both deceased and defendant then pulled out guns and started firing was sufficient evidence to permit, but not to require, the jury to infer that defendant aggressively and willingly, without legal provocation or excuse, entered into the fight; furthermore, the State was entitled to rely upon the inference of an unlawful killing when the evidence showed deceased's death was proximately caused by defendant's intentional use of a deadly weapon.

2. **Homicide § 28; Criminal Law § 163 — self-defense — jury instructions on burden of proof — necessity for exception**

Where defendant failed to take exception to the specific portion of the jury instructions complained of, his assignment of error relating to the charge was not properly before the court on appeal; even had exception been properly taken, defendant was not prejudiced by the instruction on self-defense, since the court made it abundantly clear that the State must prove the absence of self-defense beyond a reasonable doubt, and the burden of proving self-defense was therefore not improperly shifted from the State to defendant.

3. **Criminal Law § 113; Homicide § 28 — self-defense — jury instructions — application of law to evidence**

The trial court in a homicide prosecution did not violate G.S. 15A-1232 by failing to relate the evidence to the law of self-defense where the judge properly summarized the evidence presented by the State and defendant and subsequently explained the law of self-defense arising on the evidence and related the law to the facts of the case.

Justice EXUM dissenting.

Justices BROCK and CARLTON join in the dissenting opinion.

APPEAL by defendant from the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-30(2), reported in 42 N.C. App. 228, 256 S.E. 2d 279 (1979), which found no error in the trial before *Bruce, J.*, at the 3 January 1979 Session of DAVIDSON Superior Court.

Defendant was charged in a bill of indictment proper in form with the first-degree murder of Robert Henry "Buck" Eller. Defendant enter a plea of not guilty.

The State's evidence tended to show that in the late evening on 27 October 1974, the deceased went to Dan's Place, a small private club in Davidson County, with Annabelle Ruff, Melvin Page, Paul DeLapp and Mildred Littlejohn. When this group entered the room, defendant was sitting at the bar talking with the proprietor, Dan Hulin. Mrs. Littlejohn stopped at the bar to talk with defendant for a few moments and then joined the rest of the group at a table. Defendant then walked over to the table and, standing behind Mrs. Littlejohn's chair, asked to speak with her privately. She refused, saying that "if you got anything to say to me, say it now." The deceased "Buck" Eller, who was sitting across the table from Mrs. Littlejohn, then asked defendant to leave the table. Defendant responded by asking Eller what he had to do with it and by inquiring of Mrs. Littlejohn "who she was with." Paul DeLapp answered that she was with him.

After an exchange of words, defendant and Eller each pulled out a gun and started shooting at each other. None of the State's witnesses could say who fired first, although Melvin Page did testify that he first saw defendant's gun in his hand and only noticed Eller's gun in his hand after the latter had fallen to the floor. A patron, Bobby Hayes, was killed by the gunfire, and Annabelle Ruff was wounded. Eller walked out of the bar and fell on the shoulder of the road. He was gasping for breath, bleeding in the center of his chest and the fingers on his right hand had been shot off. Eller died the next morning.

According to defendant's witnesses, defendant had done nothing to provoke Eller when the latter first pulled out his gun and started shooting. Defendant then fell to the floor behind the upturned table, pulled a gun out of his coat pocket and fired back. The proprietor testified that defendant was helping him run the club that night, and that defendant, while still at the bar, had told him that he was going over to ask Mrs. Littlejohn to dance. Defendant testified that Eller shot at him first, singeing his hair, and that defendant saw Eller pointing the gun at him. Defendant believed that he had to shoot to prevent Eller from killing him.

At the close of the State's evidence, defendant moved for nonsuit (now properly denominated a motion for dismissal; G.S. 15A-1227, effective 1 July 1978). The trial court allowed the motion as to first-degree murder but denied it as to the lesser in-

cluded offenses of second-degree murder and voluntary manslaughter. Defendant renewed his motion for nonsuit at the close of all the evidence, and it was denied.

The jury returned a verdict finding defendant guilty of voluntary manslaughter. Defendant appealed from judgment imposing a sentence of imprisonment for a term of not less than five years nor more than twenty years. The Court of Appeals, in an opinion by Judge Webb, Judge Mitchell concurring, found no error. Judge Robert M. Martin dissented.

Rufus L. Edmisten, Attorney General, by Richard L. Kucharski, Associate Attorney, for the State.

Hutchins, Tyndall, Bell, Davis & Pitt, by Fred S. Hutchins, Jr., and Richard D. Ramsey, for defendant appellant.

BRANCH, Chief Justice.

Defendant first contends that the trial court erred in denying defendant's motion for judgment as of nonsuit made at the close of the State's evidence and at the close of all the evidence. Defendant contends that all of the evidence tended only to exculpate him and, therefore, establish self-defense as a matter of law.

"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 (1977). "One who is an aggressor, or one who enters a fight voluntarily without lawful excuse, may not plead self-defense when he slays his adversary. [Citations omitted.] 'The right of self-defense is available only to a person who is without fault, and if a person voluntarily, that is, aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight and withdraws from it and gives notice to his adversary that he has done so.' [Citations omitted.]" *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973). *See also State v. Randolph*, 228 N.C. 228, 45 S.E. 2d 132 (1947).

A motion for judgment as of nonsuit requires the trial judge to consider all of the evidence actually admitted in the light most favorable to the State and to give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Strickland*, 290 N.C. 169, 225 S.E. 2d 531 (1976); *State v. Scott*, 289 N.C. 712, 224 S.E. 2d 185 (1976). "Contradictions and discrepancies, even in the state's evidence, are for the jury to resolve, and do not warrant nonsuit. Only the evidence favorable to the state will be considered, and defendant's evidence relating to matters of defense, or defendant's evidence in conflict with that of the state, will not be considered." *State v. Henderson*, 276 N.C. 430, 173 S.E. 2d 291 (1970); *State v. Vincent*, 278 N.C. 63, 178 S.E. 2d 608 (1971).

A motion for nonsuit should be overruled if, when the evidence is viewed in the light most favorable to the State, there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated*, 429 U.S. 912, 97 S.Ct. 301, 50 L.Ed. 2d 278 (1976). On the other hand, "when all the evidence, that of the State and that of the defendant, is to the same effect and tends only to exculpate the defendant, his motion for judgment as of nonsuit should be allowed." *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971); *State v. Atwood*, 290 N.C. 266, 225 S.E. 2d 543 (1976).

[1] Upon applying these well-established principles of law to the evidence in the case *sub judice*, we conclude that there was sufficient evidence to permit, but not require, the jury to infer that defendant "aggressively and willingly, without legal provocation or excuse, entered into the fight." Thus, it was for the jury to determine whether defendant was the aggressor.

Under this assignment of error, defendant also contends that the Court of Appeals erred in stating that the State's evidence that defendant shot deceased was evidence "from which the jury could conclude it was an unlawful killing." In support of this conclusion, the court cited *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976). In our opinion, *Hammonds* was cited by the Court of Appeals for the proposition that when the State proves or it is admitted that defendant intentionally inflicted a wound with a deadly weapon proximately causing death, nothing else appearing, the presumptions of malice and an unlawful killing arise. Defend-

ant claims that since *Hammonds* involved a defense of insanity for which a defendant has the burden of proof, the application of the presumption of unlawfulness to the instant case involving self-defense violates the State's burden of proof under *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975). However, this Court has held that due process under *Mullaney* is not "violated by a rule which allows rational and natural presumptions or inferences to arise when certain facts are proved beyond a reasonable doubt by the State." *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975). More specifically, the presumptions of malice and unlawfulness in homicide cases have also been held to be constitutional:

> The [*Mullaney*] decision permits the state to rely on mandatory presumptions of malice and unlawfulness upon proof beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death . . . . If there is evidence in the case of all the elements of self-defense, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence. If upon considering all the evidence, including the inferences and evidence of self-defense, the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty.

State v. Hankerson, 288 N.C. 632, 651-52, 220 S.E. 2d 575, 589 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1977).

For the reasons stated, the State was entitled to rely upon the inference of an unlawful killing when the evidence showed deceased's death was proximately caused by defendant's intentional use of a deadly weapon. We hold that the trial judge correctly denied defendant's motion for judgment as of nonsuit.

[2] By his second assignment of error, defendant contends that the trial court's charge on self-defense was confusing to the jury and impermissibly shifted the burden of proving self-defense from the State to defendant.

In this regard, defendant argues that the trial court, in defining the elements of self-defense, improperly shifted the burden of

proof by stating that "[t]he third element of self-defense that must be proved" and "[t]he fourth element of self-defense that must be proved." Judge Robert M. Martin's dissent in the Court of Appeals, in part, stated that a new trial should be granted on this basis. However, defendant failed to take exception in the record to this portion of the court's instructions. Exceptions to the trial court's charge need not be entered at the trial and may be taken within the time allowed for the preparation of the case on appeal. *State v. Lambe*, 232 N.C. 570, 61 S.E. 2d 608 (1950). Nevertheless, assignments of error relating to the charge and not predicated upon exceptions in the record set out as required by Rule 10(a) of the Rules of Appellate Procedure must be disregarded on appeal. *State v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322 (1955). Here, defendant failed to take exception to the specific portion of the charge complained of, and thus this portion of his second assignment of error is not properly before us. *State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974), *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3212, 49 L.Ed. 2d 1212 (1976). Even if exception had been properly taken, however, it is our opinion that reading the charge as a whole and considering it contextually, the court made it abundantly clear that the State must prove the absence of self-defense beyond a reasonable doubt.

On the other hand, defendant properly excepted to the court's final mandate concerning the State's burden of proving lack of self-defense. He argues that this instruction was unintelligible and confusing to the jury, thus constituting prejudicial error. After discussing the elements of self-defense, second-degree murder and voluntary manslaughter, the trial court gave the following charge to the jury:

> Finally, if the State has failed to satisfy you beyond a reasonable doubt, first, that Leroy Benton, Jr. 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 injury at the hands of Robert Henry Eller; and second, that Leroy Benton, Jr. used more force than reasonably appeared to him to be necessary; and third, that Leroy Benton, Jr. was the aggressor, then the killing of Robert Henry Eller by Leroy Benton, Jr. would be justified on the grounds of self-defense, and it would be your duty to return a verdict of not guilty.

This charge properly placed the burden on the State and correctly declared the law of self-defense. *See State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979); *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978). We are of the opinion and so hold that, when read in context with the entire charge, the challenged portion of the charge was not so confusing as to mislead the jury or affect the verdict reached by them. We note parenthetically that the challenged portion of the charge was taken verbatim from the Pattern Jury Instructions and might be reviewed by the Committee on Pattern Jury Instructions for possible clarification. *See State v. Potter, supra.*

[3] In his final assignment of error, defendant contends that the trial court violated G.S. 15A-1232 by failing to relate the evidence to the law of self-defense and thus failing to explain the law arising on the evidence.

Before the jury began its deliberations and after the trial judge completed his instructions, defendant requested that the judge relate the facts and contentions of both the State and defendant as they applied to the law. An assignment of error to the charge on the ground that the court failed to explain and apply the law to the evidence is a broadside exception and ineffectual. *State v. Newton*, 251 N.C. 151, 110 S.E. 2d 810 (1959); *State v. Britt*, 225 N.C. 364, 34 S.E. 2d 408 (1945). The assignment must, to conform with the rules of practice in this Court, point out specifically the part of the charge challenged. *State v. Haddock*, 254 N.C. 162, 118 S.E. 2d 411 (1961); N.C. Rules of Appellate Procedure, Rule 10(b)(2).

Although defendant in the case *sub judice* failed to specify by brackets or otherwise the portion of the charge complained of, this Court may still consider the supposed defect as argued in defendant's brief. *State v. Webster*, 218 N.C. 692, 12 S.E. 2d 272 (1940); N. C. Rules of Appellate Procedure, Rule 2. Here, at the beginning of his instructions to the jury, the trial judge recapitulated the contentions and evidence of the State and then gave the following summary of defendant's evidence:

> The defendant on the other hand has introduced evidence, or contends that the State has failed to prove his guilt by the evidence and beyond a reasonable doubt; and in support of the defendant's contentions the defendant has in-

troduced evidence which in substance tends to show that he was working at Dan's Place; and that when the deceased, Mr. Eller, came in with his party he engaged a lady in conversation, and during the course of this conversation that suddenly and with no provocation on the part of the defendant the deceased Robert Henry Eller drew a pistol and fired past his head; that the defendant fell on the floor; and subsequently Robert Henry Eller fired his pistol again, and the defendant thereupon drew his pistol and fired four times at or toward some person he presumed to be Robert Henry Eller. That is what some of the defendant's evidence tends to show. What any of the evidence shows or tends to show is for you the Jury to determine.

I'm not attempting to recall or summarize all of the evidence in this case. . . . It is your duty to consider all the evidence, whether I have called it to your attention or not.

"The trial judge must, without special request, charge the law applicable to the substantive features of the case arising on the evidence and apply the law to the essential facts of the case." *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978); *State v. Ardrey*, 232 N.C. 721, 62 S.E. 2d 53 (1950). Specifically, G.S. 15A-1232 requires that "[i]n instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence." The requirements of G.S. 1-180, the antecedent of the present statute, were viewed broadly in *State v. Friddle*, 223 N.C. 258, 25 S.E. 2d 751 (1943), in which Justice Barnhill (later Chief Justice) wrote that "[t]he judge should segregate the material facts of the case, array the facts on both sides, and apply the pertinent principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence."

Nevertheless, this Court has since held that the statute requires nothing more "than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case." *State v. Thompson*, 226 N.C. 651, 39 S.E. 2d 823 (1946). More recently, the applicable law has been further clarified in *State v. Williams*, 290 N.C. 770, 228 S.E. 2d 241 (1976), in which this Court held:

> Ordinarily, a statement of the applicable law and the contentions of the parties, without applying the law to the substantive features of the case arising on the evidence, is insufficient under the rule of G.S. 1-180. [Citations omitted.] However, where the evidence is simple, direct, and without equivocation and complication, an explanation of the law and a statement of the evidence in the form of contentions is a sufficient compliance with the statute. [Citations omitted.]

Id. at 773, 228 S.E. 2d at 243. *See also State v. Best*, 265 N.C 477, 144 S.E. 2d 416 (1965); *State v. Thompson, supra.* In that case, this Court overruled defendant's contention that the trial judge had failed to properly state the evidence and apply the law thereto.

In the instant case, as in *Williams*, there was direct eyewitness testimony that defendant shot and killed the deceased. Yet here the testimony permitted conflicting inferences as to who was the aggressor in the affray and thus bearing directly on defendant's claim of self-defense. Nonetheless, the case before us need not fall within the rule in *Williams* because here the trial judge did more than merely state the contentions of the parties and enunciate the pertinent law. Instead, the judge properly summarized the evidence presented by both the State and by defendant. He subsequently explained the law of self-defense arising on the evidence and related the law to the facts of the instant case. Although not a model charge, we hold that under the present set of facts it complies adequately with the requirements of G.S. 15A-1232.

We have carefully considered the entire record and find no error warranting a new trial.

No error.

Justice EXUM dissenting.

I respectfully disagree with with the majority's conclusion that defendant's motion to dismiss all charges at the close of all the evidence should have been denied. In my view all the evidence in the case offered by the state and the defendant demonstrates that defendant killed Robert "Buck" Eller in the exercise of a perfect right of self-defense.

To avoid this conclusion the majority appears to rely on the propositions: (1) there is some evidence that defendant was the aggressor in bringing on the affray with the deceased; and (2) the state, upon proof of an intentional shooting with a deadly weapon resulting in death, is entitled to rely on an inference of unlawfulness which itself suffices to survive defendant's motion.

As to the first proposition, the majority does not specify what act defendant committed that would characterize him an aggressor in the affray. My study of the record fails to reveal such an act. Defendant's conversation at the table where deceased was sitting could not have labeled him an aggressor. In order for language alone to make one who uses it an aggressor in the law of self-defense it must be "such abusive language . . . as is calculated and intended to bring on a fight" considering all the circumstances surrounding the event. *State v. Robinson*, 213 N.C. 273, 280, 195 S.E. 824, 829 (1938); *see also State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447 (1970), later app., 279 N.C. 604, 184 S.E. 2d 254 (1971); and *State v. Crisp*, 170 N.C. 785, 87 S.E. 511 (1916). There is no evidence that any such language was used by defendant.

The majority seems to rely on the testimony of state's witness Melvin Page as presenting some evidence that defendant drew his weapon first and was therefore the aggressor—a fact which, if established, would, I agree, deprive defendant of a perfect right of self-defense. Page's testimony falls far short of being evidence that defendant drew his weapon first. He said:

> "It wasn't but a minute until Leroy Benton came to the table. He asked Mildred to speak to her and Mildred said he didn't have nothing to tell her. He said I want to speak to you privately and Mildred said no. She said if you got anything to say to me, say it now. Robert Eller spoke up, said, this is a private table. Leroy Benton asked Robert what he had to do with it, and then asked Mildred who she was with. Paul DeLapp said that she was with him.
>
> Then the shooting started, so when I looked up, when I saw Benton's gun, I jumped up and Paul knocked me down. I heard a gun go off, Buck fell right beside me. Buck Eller raised back up and I crawled across over to the next table. When the shooting got over this girl came where I was and

asked was I hurt. I said no and got up. When I started out, I saw Hayes laying on the floor. I didn't see Benton at all.

. . . .

On this occasion, I saw two guns. I saw Benton's gun first and it was in his hand. I saw Mr. Eller's gun in his hand when he was on the floor. I do not know how many shots were fired. I do not know who fired first. I do not know how many shots had been fired when I saw Mr. Eller fall to the floor. This is because the way everything was and everybody was running and hollering and going on, couldn't nobody tell about the shots. I did not see Mr. Benton after the shooting, but I did see Mr. Eller after the shooting. He was laying out on the shoulder of the road."

Thus Page saw neither weapon until the shooting had already begun. The clear import of his testimony is that after the shooting had begun he saw a gun in defendant's hand and then a gun in the deceased's hand. Thereafter he did not see the defendant but he did see the deceased lying on the shoulder of the road. He never testified, nor does his testimony permit a reasonable inference that defendant drew his gun first.

Thus I find no evidence of any act by defendant that would make him the aggressor in bringing on the affray with the deceased. The majority fails to point to any such act.

The state, of course, has offered evidence that defendant intentionally shot deceased with a deadly weapon. The majority concludes, therefore, that the state is entitled to rely on an inference of unlawfulness, i.e., the absence of self-defense, which is sufficient to take the case to the jury. Such an inference does not arise, or, if it arises, it is deemed rebutted as a matter of law "[w]hen the State's evidence and that of the defendant are to the same effect and tend only to exculpate the defendant" on the ground of self-defense. *State v. Johnson*, 261 N.C. 727, 730, 136 S.E. 2d 84, 86 (1964); *accord, State v. Carter*, 254 N.C. 475, 119 S.E. 2d 461 (1961). Furthermore on a motion to dismiss at the close of all the evidence defendant's evidence, to the extent that it does not conflict with or contradict but merely explains or clarifies that offered by the state, may be considered. These principles were stated in *State v. Bruton*, 264 N.C. 488, 499, 142 S.E. 2d 169, 176 (1965), as follows:

"On a motion to nonsuit, the defendant's evidence which explains or makes clear the evidence of the State may be considered. Strong's North Carolina Index, Vol. I, Criminal Law, § 99; *S. v. Nall*, 239 N.C. 60, 79 S.E. 2d 354; *S. v. Smith*, 237 N.C. 1, 74 S.E. 2d 291; *S. v. Bryant*, 235 N.C. 420, 70 S.E. 2d 186; *S. v. Sears*, 235 N.C. 623, 70 S.E. 2d 907.

On a motion for nonsuit, the foregoing rule also permits the consideration of defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence. *S. v. Oldham*, 224 N.C. 415, 30 S.E. 2d 318."

And when the state's "evidence of guilt is purely negative in character, positive and uncontradicted evidence in explanation which clearly rebuts the inference of guilt and is not inconsistent with the State's evidence should be taken into consideration on motion to nonsuit." *State v. Oldham*, 224 N.C. 415, 417, 30 S.E. 2d 318, 320 (1944).

In this case there is really no conflict in the evidence for the state and that for the defendant. All three of the state's eyewitnesses testified that suddenly both defendant and the deceased had guns and were shooting at each other. The state's evidence is largely negative in that none of its witnesses could say who drew his weapon first or who shot first.[1] Defendant and four eyewitnesses testified unequivocally that the deceased first drew

1. Paul DeLapp testified:

"After they had words for about a minute or two, what happened then was that I saw Robert Eller, he got up and stood; he stood up. The next thing I knowed took place, the shooting was going on. Both Robert Eller and Benton was doing the shooting, both had a gun. I did not see where the guns came from.

I did not see who had a gun first. I sure didn't. I do not know who fired the first shot. I had not seen either of the guns before the shooting started and I do not know how many shots were fired. I did not see either man reach for his pocket."

Annabelle Ruff testified:

"After they had words, I seen the guns and jumped up from the table. I seen two guns and Leroy and Robert Eller had them . . . .

. . . .

I did not see either of these men get the guns out. I did not see who fired first. After I saw two guns, I jumped up from the table to get out of the way

his weapon and fired it at defendant. Thereafter defendant returned the fire killing the deceased.[2]

and I got hit in the leg with a bullet. I do not know who shot me and I have no idea how many shots were fired."

Melvin Page's testimony is summarized in the text.

2. Dan Huley testified:

"I heard Buck tell him to go get back up and sit down where he was and Leroy, I guess, paid him no attention because he wasn't talking to his friend anyway. So Buck said it again and again Leroy didn't pay him no attention.

That's when Buck jumped up. Leroy said, you don't tell me what to do. Buck came out with his gun and started shooting. Leroy fell back down and pulled the table in front of him.

I did see where Buck got the gun he shot with and he got it out of his back pocket. At the time Buck shot his gun, Leroy pulled the table down in front of him. Prior to the time Buck shot his gun, Leroy was not doing nothing. He just straightened up and told Buck not to tell him what to do. The next thing that happened was that Buck pulled the gun out of his pocket and shot at Leroy."

Mildred Littlejohn testified:

"Leroy had not done anything whatsoever to provoke Buck to shoot at him before Buck shot at him. I didn't see that Leroy had any gun at the time when Buck shot at him."

Robert Carter testified:

"Buck stood up and told them to get back from the table. He said that about twice and then he reached in his back pocket and told them to get back again.

Buck then shot twice. When Buck reached in his back pocket, he pulled out a gun. I think he shot Annabelle because she started hollering. I know Buck fired two shots. I was sitting right behind him. Leroy stooped down and started shooting too. My sister's husband got hit by a bullet when he got up to help my sister. She got shot in the back of the foot first.

. . . .

I did not see Leroy do anything at all to make Buck shoot the gun before Buck shot the two shots. The only thing I saw Leroy doing was talking to Mrs. Littlejohn. He was kind of squatted down beside her and Paul DeLapp."

Nancy Lindsay testified:

"Buck fired the first shot. Leroy was not doing anything other than talking to Mrs. Littlejohn when Buck shot that shot. After Buck fired the shot, Leroy got up and started shooting too.

The evidence for the state then is this: When the deceased was felled by defendant's shot, both men were shooting at each other. The state offered no positive evidence as to who first drew a weapon or who fired first. Defendant's evidence does not conflict with that of the state. Defendant's evidence simply explains that facet of the affray upon which the state's evidence is silent. It establishes that the deceased did indeed draw his weapon and begin shooting at defendant before defendant even drew his weapon.

Thus under the state's evidence defendant was shown to have shot a man who was shooting at him. Unless defendant drew his weapon or shot first, defendant's actions are clearly justified as being in self-defense. The state's evidence is silent, or negative, on this point. Defendant's evidence, not in conflict with that of the state, explains and clarifies this aspect of the case in defendant's favor. Therefore, considering all the evidence properly cognizable on defendant's motion to dismiss at the close of the case, I conclude this motion should have been allowed.

Justices BROCK and CARLTON join in this dissent.

STATE OF NORTH CAROLINA v. CURTIS EDWARD HUNTER

No. 79

(Filed 8 January 1980)

1. **Searches and Seizures §§ 8, 34— search of car incident to arrest—seizure of pistol—seizure of items under plain view rule**

In a prosecution for kidnapping and rape, the trial court did not err in allowing into evidence a pistol and other items seized from defendant's car without a warrant where the evidence tended to show that officers heard a radio broadcast concerning the crimes charged while they were patrolling; on the basis of the broadcast, they stopped defendant's car and had him get out;

I am kin to Buck, he and my mother were first cousins. I did know Buck before that night. I did not know Leroy before, and I had saw him one or two times but never said no words to him.

I never saw Leroy do anything to Buck but talking to cause Buck to shoot at him before Buck shot at him. All Leroy said to him was 'You don't tell me what to do.' "

defendant left his motor running, got out of the car, and stood just outside the car; one officer ran his hand under the front seat of the car and retrieved defendant's pistol; seizure of the pistol was proper as a search and seizure incident to a lawful arrest; and the other items taken from the car were lawfully seized under the plain view doctrine, since the officers observed them on the backseat and in the back floorboard of the car while the officers were outside the car, and there was probable cause to believe that the items were connected in some way with the crimes which the officers were then investigating.

2. **Rape § 4.2— forensic serologist—testimony as to possibility of intercourse admissible**

The trial court in a rape and kidnapping prosecution did not err in permitting a forensic serologist to give opinion testimony concerning the possibility of intercourse having taken place between defendant and the prosecutrix on the basis of scientific examination of their body fluids.

3. **Rape § 4.2; Criminal Law § 71— penetration of victim—expert medical evidence admissible—penetration by assailant—shorthand statement of fact**

The trial court in a rape prosecution did not err in receiving into evidence expert testimony that the prosecuting witness had been sexually penetrated a short time before a medical examination was conducted, and the witness's statement that the prosecutrix had been penetrated by an "assailant" was admissible as a shorthand statement of fact.

4. **Rape § 3— first degree rape—age of victim not alleged—sufficiency of indictment**

Though it is essential that the State prove that the age of a defendant in a prosecution for first degree rape is 16 or more, G.S. 14-21, an indictment which is drawn under the provisions of G.S. 15-144.1 which omits averments that defendant's age was greater than 16 is sufficient to charge him with the crime of first degree rape and to inform him of the accusation against him.

5. **Rape § 6.1— first degree rape charged—evidence that gun used—failure to submit lesser offenses proper**

The trial court in a first degree rape case did not err in failing to submit to the jury lesser included offenses of the crime charged since second degree rape differs from first degree rape in that defendant may be under 16 years of age and that a deadly weapon need not be used or serious bodily injury need not be inflicted, but there was no dispute in this case that defendant had a gun in his possession at or near the time he allegedly raped the prosecutrix.

6. **Kidnapping § 1— age of victim—no essential element of offense**

There was no merit to defendant's contention that, in order to convict defendant of kidnapping, the jury must find that the victim was a person 16 years of age or older, since the victim's age is not an essential element of the crime of kidnapping.

7. **Kidnapping § 1— sufficiency of indictment**

An indictment which charged that defendant kidnapped a named person without her consent for the purpose of committing the felonies of rape and

crime against nature, though it did not track the language of G.S. 14-39 completely, was constitutionally sufficient in that defendant was fairly apprised of the State's accusations against him.

APPEAL by defendant from *Braswell, J.*, 12 February 1979 Regular Schedule B Session of WAKE Superior Court.

By bills of indictment proper in form defendant was charged with (1) kidnapping and (2) raping Millicent Lorella Freeman. He pled not guilty and the state presented evidence summarized in pertinent part as follows:

On 27 October 1978 Ms. Freeman, age 25, was a junior at St. Augustine's College in Raleigh. At around 4:30 p.m. on that date, she had finished classes and was walking on Poole Road on the way to the home of her aunt. Before reaching her aunt's home, defendant (whom she did not know at the time) drove up in an automobile and stopped near Ms. Freeman. He asked her a question and, thinking that he was seeking directions, she stepped over to the passenger side of his automobile.

Defendant then produced a small pistol and ordered Ms. Freeman to get into his car. Complying with his order, she entered the car and defendant proceeded to drive on numerous streets in the eastern section of Raleigh. He suggested to Ms. Freeman that he was going to have sexual intercourse with her, and she pleaded with him not to harm her. In order to convince her that the pistol was real, he held it outside of the car and fired it.

Eventually defendant drove the car into a large parking lot at the corner of Glascock Street and King Charles Road. After talking with Ms. Freeman at that location for some period of time, defendant drove his automobile onto King Charles Road and stopped at a point adjacent to a wooded area. Upon orders from defendant, Ms. Freeman removed all of her clothing below her waist. Defendant then made her go with him into the wooded area. At that point he removed most of his clothing and proceeded to have sexual intercourse with Ms. Freeman. He also forced her to perform fellatio on him.

At all times while Ms. Freeman was with defendant he was either holding his pistol in his hand or had it close by. She

entered defendant's car, remained in it, left it at the wooded area and had sexual intercourse with him because she was afraid that he would shoot her if she did not follow his directions.

After leaving the wooded area, defendant carried Ms. Freeman to an intersection near the Wake Medical Center where he released her. She then went to her apartment, police were called, and she was taken to the hospital emergency room for examination. Medical evidence showed that Ms. Freeman had engaged in sexual intercourse shortly before her examination at the emergency room.

Defendant offered evidence, including his own testimony, which is briefly summarized as follows: On the day in question he was employed by the City of Raleigh as a garbage collector. As he started to work early that morning, he had a flat tire. He left the car at a service station to have the tire repaired and decided not to go to work. He spent most of the morning and part of the afternoon drinking intoxicants with one or more friends. After getting his car back about the middle of the afternoon, he proceeded to ride around. He had a pistol with him and laid it on the car seat beside him. While driving down Poole Road, he stopped for a traffic light at which time Ms. Freeman came up to his car and asked him if he was going to Worthdale. When he told her that he was, she got into the car. After they had gone about 200 yards, engaging in small talk, she asked him to take her to Wakefield Apartments. When he refused to grant her request, she got mad, gathered her "stuff" together and got out of the car. He did not see Ms. Freeman anymore and he did not have any sexual contact with her at any time.

Other pertinent evidence will be reviewed in the opinion.

The jury found defendant guilty of kidnapping and first-degree rape.[1] From judgments imposing two life sentences, he appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney Grayson G. Kelley, for the State.

James R. Fullwood for defendant-appellant.

1. Defendant was also charged with and tried for crime against nature. The jury found him not guilty of that charge.

BRITT, Justice.

[1] Defendant assigns as error the denial of his motion to suppress certain evidence obtained pursuant to a warrantless search of his automobile. There is no merit in this assignment.

Prior to trial defendant filed a motion asking that all evidence, including a pistol, hard hat, key chain, knife, coat and some gloves, seized by police from his automobile be suppressed because his automobile was searched and the property was seized without a search warrant, in violation of his constitutional rights.

The court conducted a *voir dire* hearing on the motion at which investigating and arresting officers testified. Their evidence tended to show that Ms. Freeman reported the alleged offenses early in the evening of the day in question; that Officer C. K. Womble of the Raleigh Police Department went immediately to her apartment; that she provided him with a vivid description of defendant and his automobile; that Officer Womble related the descriptions of defendant and his automobile to the police radio dispatcher who, in turn, broadcasted the descriptions and other pertinent information over the police radio; that Officers Weingarten and Holloway of the Raleigh Police Department were on patrol that evening and were riding together; that they heard the broadcast relating to the suspect, his automobile and the crimes he allegedly had committed; that they observed an automobile being operated on a public street by a male person, both meeting the descriptions relayed on the broadcast; that they stopped the automobile and required the occupant, defendant, to get out; that defendant left the motor of his car running and stood just outside of the car; that one of the officers ran his hand under the front seat of the car and retrieved a loaded, cocked pistol therefrom; that the other items listed in the motion were lying on the seat of the automobile; and that defendant was arrested and taken to jail.

Defendant offered no evidence at the *voir dire*. Since the evidence offered by the state was uncontradicted, the court made no findings of fact but made conclusions of law that the officers had probable cause to stop defendant's car and arrest him; that the search the officers conducted was incident to a lawful arrest and the seizure effected by the officers was valid; and that the seizure of the items which had been on the car seat was lawful

under the plain view, exigent circumstances and probable cause doctrines.

The conclusions of the trial court are fully supported by the evidence and the law. Police officers may arrest without a warrant any person who they have probable cause to believe has committed a felony. G.S. § 15A-401(b)(2)a; *see also, United States v. Watson*, 423 U.S. 411, 46 L.Ed. 2d 598, 96 S.Ct. 820 (1976). The officers in this case had probable cause to believe that defendant had committed the felonies of kidnapping and rape. When an arrest is made, it is reasonable for the arresting officer to search without a warrant the suspect and the area within his immediate control for weapons and evidentiary items which may be concealed or destroyed. *Chimel v. California*, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969); *see generally* 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.1 (1978). The seizure of the gun from under the front seat was effected by a search incident to a lawful arrest. At the time Officer Weingarten ran his hand underneath the car seat, defendant was standing close to the door jamb, with his hands placed on top of the car. It follows, therefore, that the area around the front seat of the car was within his immediate control, as he could have attempted to retrieve the pistol to resist arrest or effect his escape. *Cf., Chimel v. California, supra* ("There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence.") As to the other items, they were lawfully seized under the "plain view" doctrine. Objects which are in the plain view of a law enforcement officer who has the right to be in the position to have that view are subject to seizure and may be introduced into evidence. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971); *Harris v. United States*, 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968); *State v. Leggete*, 292 N.C. 44, 231 S.E. 2d 896 (1977); *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 45 (1976). All of the other items which defendant sought to suppress were observed by the officers from outside the car on the backseat and in the back floorboard of the automobile. There was probable cause to believe that the items

were connected in some way with the crimes which the officers were then investigating.

[2] Defendant assigns as error the admission of certain opinion testimony by T. E. Yeshion. This assignment has no merit.

When Mr. Yeshion was offered as a witness, he stated that he was employed by the North Carolina State Bureau of Investigation as a forensic serologist.[2]

At that point defendant stipulated "as to the qualifications" of the witness as a forensic serologist. The court then conducted a *voir dire* in the absence of the jury to pass upon defendant's pretrial motion to suppress Mr. Yeshion's testimony. Following the *voir dire*, the court overruled the motion to suppress.

The witness testified in the presence of the jury, among other things, that in his official capacity he received male and female "rape kits" relating to defendant and Ms. Freeman; that he also received blood samples from defendant and Ms. Freeman together with certain clothing belonging to her; that he performed certain scientific tests on the materials received; that the tests revealed that Ms. Freeman was a Group B secretor in which group approximately 80 percent of the population falls; that Group B individuals secrete their blood group types in their body fluids; that the Group B blood type can be detected in the vaginal secretions in a female "or in semen in a male as well as saliva and other bodily fluids"; that the tests revealed that defendant was a Group A non-secretor individual; and that approximately 20 percent of the population falls into the same category as defendant.

After giving certain other information, the witness was asked the following hypothetical question:

> "Mr. Yeshion, if the jury could find beyond a reasonable doubt the following facts: first, that Millicent Freeman is a type B secretor; second that the defendant is a type A non-secretor; third, that the presence of spermatozoa was found by you on the vaginal slides, the vaginal swabs, the rectal swabs, and the panties; and fourth, that the B antigen was

2. The witness testified that a forensic serologist examines articles of evidence for the presence of blood or body fluids, "body fluids including the semen and spermatozoa, the male reproductive cells."

found by you on the vaginal slides, the vaginal swabs, the rectal swabs, and the panties; do you have an opinion satisfactory to yourself as to whether or not that result, or whether or not that finding as to the slides, the swabs and panties, could or might have resulted from sexual intercourse between type B secretor and a type A non-secretor?"

Over defendant's objection, the witness stated that he did have an opinion which is: "My opinion is that these reactions are consistent with group B secretors, vaginal secretions, from Millicent Freeman; and group A non-secretors semen from the defendant."

Expert opinion testimony is generally admissible when the proffered witness is better qualified than the jury to form and state an opinion on a particular set of facts in a case. *See* 1 Stansbury's North Carolina Evidence § 132 (Brandis Rev. 1973). "The test is to inquire whether the witness' knowledge of the matter in relation to which his opinion is asked is such, or so great, that it will aid the trier in his search. *Hardy v. Dahl*, 210 N.C. 530, 535, 187 S.E. 788 (1936).

We hold that the court did not err in permitting the witness to answer the hypothetical question posed. Defendant did not move to strike any part of the answer. Clearly, the witness was better qualified than the jury to state an opinion on the facts. That scientific testimony is being accepted as more reliable is indicated by the comparatively recent enactment of our statute authorizing breathalyzer tests to determine intoxication, G.S. § 20-16.3, and our recently enacted statute authorizing evidence of blood types to prove or disprove paternity. G.S. § 8-50.1.

[3] By his third assignment of error, defendant contends that the trial court erred in receiving into evidence expert testimony that the prosecuting witness had been sexually penetrated a short time before a medical examination was conducted. The assignment is without merit.

Dr. Charles Hagan, a physician in the Emergency Department at Wake Medical Center, testified on behalf of the state. Defendant stipulated as to the qualifications of Dr. Hagan. During his direct examination by the district attorney, Dr. Hagan testified that on 27 October 1978, he was on duty in the emergen-

cy room of Wake Medical Center; that he had a conversation with the prosecutrix at about 7:00 p.m. during which she told him that she had been raped at approximately 5:30 p.m.; that he conducted a pelvic examination of the prosecutrix which indicated that she had an abrasion on the posterior wall of her vagina; that it was his opinion that the abrasion had been made a short time prior to the examination; and that the prosecuting witness had been sexually penetrated by an "assailant" on the day of the examination. Defendant argues that to allow Dr. Hagan to testify in the manner summarized above was to allow him to testify regarding the very question which the jury was charged to answer, i.e. whether the prosecutrix had been raped. We disagree.

An essential element of the crime of first-degree rape is penetration. *State v. Flippin*, 280 N.C. 682, 186 S.E. 2d 917 (1972); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968). A physician who is properly qualified as an expert may offer an opinion as to whether the victim in a rape prosecution had been penetrated and whether internal injuries had been caused thereby. *State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410, *death sentence vacated*, 403 U.S. 948, 29 L.Ed. 2d 861, 91 S.Ct. 2292 (1971). Insofar as Dr. Hagan testified as to the fact of penetration and the consequential injuries suffered by the prosecutrix, the testimony was competent under the rule of *State v. Atkinson, supra*. *Compare, State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). As to the characterization of an "assailant," that was admissible as a shorthand statement of fact. *See State v. Goss*, 293 N.C. 147, 235 S.E. 2d 844 (1977); *State v. Craddock*, 272 N.C. 160, 158 S.E. 2d 25 (1967).

By his fourth assignment of error, defendant contends that the trial court erred in failing to grant defendant's motion to dismiss the charge of rape and in not allowing his motion in arrest of judgment in the rape case for that the indictment was fatally defective in its failure to allege the age of defendant. This assignment is without merit.

[4] Though it is essential that the state prove that the age of a defendant in a prosecution for first-degree rape is sixteen or more, G.S. § 14-21, an indictment which is drawn under the provisions of G.S. § 15-144.1 which omits averments that defendant's age was greater than sixteen, as was done in this case, is sufficient to charge him with the crime of first-degree rape and inform

him of the accusation against him. G.S. § 15-144.1; *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978).

[5] By his sixth assignment of error, defendant argues that the trial court committed prejudicial error in granting the motion of the state that no lesser included offenses of the crime of first-degree rape be submitted to the jury, in failing to submit an alternative verdict of second-degree rape to the jury, and by failing to grant defendant's motion for appropriate relief as a consequence of its failure to submit the alternative verdict. These arguments are without merit.

Where the victim is at least twelve years old, the elements of first-degree rape are: (1) carnal knowledge of a female, (2) by force, (3) against the will of the victim, (4) the defendant being more than sixteen years old, and (5) the victim's resistance having been overcome or her submission having been procured by the use of a deadly weapon or by the infliction of serious bodily injury. G.S. § 14-21; *State v. Goss, supra; State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977). The crime of second-degree rape differs from first-degree rape in that the defendant need not be more than sixteen years of age and the force used against the victim need not be that of a deadly weapon or the infliction of serious bodily injury. G.S. § 14-21; *see also*, Institute of Government, North Carolina Crimes: A Guidebook for Law Enforcement Officers (1978). It is clear that when a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense which is charged in the bill of indictment contains all of the essential elements of the lesser. *State v. Bell*, 284 N.C. 416, 200 S.E. 2d 601 (1973). A defendant is entitled to have all lesser degrees of offenses which are supported by the evidence submitted to the jury as possible alternative verdicts. *State v. Drumgold*, 297 N.C. 267, 254 S.E. 2d 531 (1979); *State v. Palmer*, 293 N.C. 633, 239 S.E. 2d 406 (1977); *State v. Bell, supra.* Notwithstanding this well-established principle, the trial court need not submit lesser degrees of a crime to the jury "when the state's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime." *State v. Drumgold, supra; State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972).

Defendant was not entitled to have the alternative verdict of second-degree rape submitted to the jury for the reason that the

lesser offense was not supported by the evidence. Defendant cites our recent decision in *Drumgold* as support for his position. Defendant's reliance is misplaced. In *Drumgold*, the defendant was convicted of the crime of first-degree rape. That conviction depended, *inter alia*, on proof that the victim's resistance was overcome by the use of a deadly weapon. The defendant in *Drumgold* presented evidence through several witnesses that he did not have a gun in his possession on the day the alleged rape occurred, a contention in clear contrast to the theory of the state's case and the evidence it presented. In the case at bar, however, there is no evidence which disputes the state's contention that defendant had a gun in his possession at or near the time he allegedly raped the prosecutrix. In fact, defendant admitted that at the time he picked the prosecuting witness up on Poole Road he had a gun in his possession which was lying on the front seat of his automobile. This is consistent with the testimony of the prosecutrix that when she walked over to defendant's car, "[H]e picked up the gun and said, 'Get in.' " In this case, defendant made a general denial of the crime of first-degree rape. He admitted that he gave the prosecutrix a ride in his automobile, but that she got out of his car after "a couple of hundred yards." There was, therefore, no dispute that defendant had a gun in his possession at the time he gave a ride to Ms. Freeman. Nor was there any dispute, apparently, as to whether she had seen the gun. The absence of any dispute as to these two matters serves to distinguish the present case from that confronted by us in *Drumgold*. *Cf. State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977). (The state's evidence in a case of first-degree rape was sufficient to permit the inference that the victim's submission was procured through the use of a gun where it tended to show that defendant carried a gun in full view and waved it in his hands.)

[6] By his seventh assignment of error, defendant contends that the trial court committed prejudicial error by failing to instruct the jury that in order to find defendant guilty of kidnapping they must find beyond a reasonable doubt that the victim, Ms. Freeman, was a person sixteen years of age or older. We disagree.

Kidnapping is the unlawful and nonconsensual restraint, confinement, or removal from one place to another of an individual for the purpose of committing or facilitating the commission of

certain specified acts. G.S. § 14-39(a); *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978); *see also*, Note, Kidnapping in North Carolina—A Statutory Definition for the Offense, 12 Wake Forest L. Rev. 434 (1976). On its face, this is all that the statute requires for the state to secure a conviction of kidnapping. Defendant's argument, in substance, is that the jury must find that the victim was over sixteen years of age in order to convict him of kidnapping. The implication of this allegation is that if the victim is found to be under sixteen years of age, defendant cannot be found guilty of kidnapping. But, this is clearly not what the statutory language calls for. The statute specifically says that kidnapping is the unlawful confinement, restraint, or removal of any "person sixteen years of age or over without the consent of such person, or any other person under the age of sixteen years without the consent of a parent or legal custodian of such person . . . ." G.S. § 14-39(a).

Therefore, the victim's age is not an essential element of the crime of kidnapping itself, but it is, instead, a factor which relates to the state's burden of proof in regard to consent. If the victim is shown to be under sixteen, the state has the burden of showing that he or she was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian. Otherwise, the state must prove that the action was taken without his or her own consent.

In the present case, there was no question that the victim was over sixteen years of age. Ms. Freeman testified that she was twenty-five years old and was a junior at St. Augustine's College. She was before the jury and it was competent for the jury to look upon her and draw reasonable inferences as to her age from her appearance and growth. *See State v. McNair*, 93 N.C. 628 (1885); *State v. Arnold*, 35 N.C. 184 (1851).

[7] By his ninth assignment of error, defendant contends that the trial court committed prejudicial error in denying his motion in arrest of judgment in the kidnapping case for that the bill of indictment was fatally defective in that it failed to charge that the removal of the victim was for the purpose of "facilitating the commission of any felony." The contention is without merit.

The indictment which was returned against defendant by the Wake County Grand Jury alleges in pertinent part that

> . . . Curtis Edward Hunter unlawfully and wilfully did feloniously confine, restrain and remove from one place to another Millicent Lorella Freeman, a person 16 years of age or over, without her consent, said confinement, restraint or removal being for the purpose of the commission of a felony, to wit: Rape and crime against nature.

G.S. § 14-39 provides that one who unlawfully confines, restrains, or removes from one place to another, any person 16 years of age or older without their valid consent, or any person under the age of 16 years of age without the consent of their parents or legal guardians, shall be guilty of kidnapping if the confinement, restraint or removal is for one of three specific purposes: (1) holding such other person for ransom or as a hostage or using such other person as a shield; or (2) facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or (3) doing serious bodily harm or terrorizing the person so confined, restrained or removed or any other person. In substance, defendant's argument is that the indictment is fatally defective in that it does not track the precise words of the statute in charging defendant with the crime of kidnapping.

The language of the indictment put forward the state's theory of the case, i.e. that the kidnapping of Ms. Freeman was committed for the purpose of committing the felonies of rape and crime against nature. The state was, therefore, resting its case on the second of the three enumerated purposes of the statutory crime. An indictment is constitutionally sufficient if it apprises a defendant of the charge against him with sufficient certainty to enable him to prepare his defense, protect him from subsequent prosecution for the same offense, and enable the court to proceed to judgment. *State v. Pallett*, 283 N.C. 705, 198 S.E. 2d 433 (1973); *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1971). No indictment, whether at common law or under a statute, is sufficient if it does not accurately and clearly allege all of the constituent elements of the crime sought to be charged. *State v. Palmer, supra; State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Lackey*, 271 N.C. 171, 155 S.E. 2d 465 (1967). However, there is no requirement that an indictment must follow the precise language of the statute provided that the pleading charges facts which are sufficient to enable the indictment to fulfill its essential purposes.

Though the indictment in the present case did not track the language of the statute completely, it did charge each of the constituent elements of the crime of kidnapping in such a way that defendant was fairly apprised of the state's accusations against him.

Defendant contends that the trial court erred in refusing to dismiss the charges against him, in denying his motion to set the verdicts aside as being contrary to the weight of the evidence, in denying his motion for a new trial, and in denying his motion for appropriate relief. These contentions have no merit. There was more than sufficient evidence to take the case to the jury on the issue of defendant's guilt and to support the verdicts returned by the jury.

We have carefully considered all of the assignments of error presented by defendant and conclude that he received a fair trial which was free from prejudicial error.

No error.

HERMAN CLAYTON MIDDLETON v. JAMES WOODROW MYERS AND LOU WILLIAMS, JR.

No. 110

(Filed 8 January 1980)

Malicious Prosecution § 13.3— no genuine issue as to malice—summary judgment

In an action for malicious prosecution based upon allegations that defendant planted illegal drugs in plaintiff's truck and thereafter caused the prosecution of plaintiff for unlawful possession of the drugs, summary judgment was properly entered for defendant where malice on the part of defendant was negated by defendant's affidavit that he overheard portions of a conversation in a restaurant among three young people in which they mentioned that plaintiff, a school teacher, was a distributor of drugs and would deliver drugs, and that he acted in good faith and out of a civic duty in telling a police officer that drugs would be found in plaintiff's truck, and where no specific factual controversies as to the maliciousness of defendant's actions were presented by the testimony of plaintiff's witness, the police officer, that defendant first questioned him as to plaintiff's involvement in the drug trade and that defendant refused to tell him how defendant knew that drugs would be in plaintiff's truck but stated only that the drugs would be there if defendant said they were there.

Justice HUSKINS dissenting.

Justices EXUM and COPELAND join in the dissenting opinion.

Justice EXUM dissenting.

Justice COPELAND joins in the dissenting opinion.

ON plaintiff's petition for discretionary review of an opinion of the Court of Appeals, reported at 41 N.C. App. 543, 255 S.E. 2d 255 (1979), affirming summary judgment for the defendant Williams entered by *Collier, Judge* on 16 June 1978 in the Superior Court, DAVIDSON County.

This is an action for malicious prosecution brought by plaintiff, a school teacher in Davidson County, against the defendant Myers, a Lexington police officer, and the defendant Williams, a pharmacist in Lexington. On March 3, 1975, based on information supplied by defendant Williams, plaintiff was arrested by City of Lexington police officers, one of whom was the defendant Myers. Plaintiff was charged with an offense related to the illegal possession of narcotics. From the record before us we are unable to determine the exact nature of the criminal charges, however illegal drugs were discovered by the officers in a motor vehicle belonging to the plaintiff. In the subsequent criminal proceeding against the plaintiff, the evidence of the controlled substance was suppressed and the charges were thereafter dismissed. Following the dismissal, plaintiff instituted this action alleging the defendants caused the illegal drugs to be placed in plaintiff's vehicle, and thereafter caused the unlawful, illegal and malicious prosecution of the plaintiff.

On defendant Williams' motion, and after considering the affidavit of defendant Williams and testimony from defendant Myers offered by plaintiff, Judge Collier granted summary judgment in favor of the defendant Williams, and the granting of this motion was affirmed by the Court of Appeals (41 N.C. App. 543, 255 S.E. 2d 255 (1979)). Plaintiff's petition for discretionary review of the opinion of the Court of Appeals was allowed September 10, 1979.

Wilson, Biesecker, Tripp and Wall, by Joe E. Biesecker, for plaintiff appellant.

Rosbon D. B. Whedbee for defendant appellee Williams.

Ted Royster for defendant appellee Myers.

BROCK, Justice.

An action in tort for malicious prosecution is based upon a defendant's malice in causing process to issue. In *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223 (1955), this Court set out the essential elements needed to establish a cause of action for malicious prosecution as follows: (1) malice in the defendant's prosecuting the action, (2) want of probable cause for bringing the action, and (3) termination of the criminal proceedings instigated by the defendant in favor of the plaintiff. *See also, Abernethy v. Burns*, 210 N.C. 636, 188 S.E. 97 (1936); *Carson v. Doggett*, 231 N.C. 629, 58 S.E. 2d 609 (1950); *Taylor v. Hodge*, 229 N.C. 558, 50 S.E. 2d 307 (1948). In the present case we are of the opinion that defendant's affidavit negates malice on his part and the forecast of evidence by plaintiff failed to show any evidence of the essential element of malice on the part of the defendant and thus the granting of summary judgment in favor of the defendant was proper.

In *Zimmerman v. Hogg and Allen*, 286 N.C. 24, 29, 209 S.E. 2d 795, 798 (1974), this Court held that a party moving for summary judgment may prevail on his motion by showing that there is no triable issue of fact before the court. We noted that "[t]his burden may be carried by *movant by proving that an essential element of the opposing party's claim is nonexistent* . . . . (Emphasis added.) If the moving party meets this burden, the party who opposes the motion for summary judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing." *See also, Moore v. Fieldcrest Mills*, 296 N.C. 467, 470, 251 S.E. 2d 419, 421 (1979).

In his affidavit filed with the motion for summary judgment, defendant Williams averred that he overheard a conversation between three young people in which they were discussing the fact that they could obtain drugs from a school teacher named Middleton. Williams states that he then reported the conversation to Officer Myers of the Lexington Police Department Vice Squad. Defendant Williams by his affidavit further swears that, "I feel it is my civic duty to give you (Officer Myers) this information and I hope it will help prevent or stop some of the drug problems in our community. As a druggist, I know the danger of drug misuse

and would hate to see young people (sic) and kid's lives ruined." The affidavit also states that "[a]t no time prior to the day in question did I know Mr. Middleton nor had I ever seen him before that date to my knowledge."

In his motion for summary judgment defendant Williams submitted the above noted affidavit as evidence negating the essential element of malice in plaintiff's case of malicious prosecution. Pursuant to G.S. 1A-1, Rule 56 (Summary Judgment), after defendant submitted this affidavit, plaintiff as the adverse party to the motion for summary judgment could not rest on the allegations of his pleadings. He was required to come forward with his own affidavits or evidence setting forth *specific facts* as to the maliciousness of defendant's prosecution. To withstand the defendant's summary judgment motion, these facts must show the existence of genuine issues for trial. *See Zimmerman v. Hogg and Allen, supra; Pitts v. Pizza, Inc.*, 296 N.C. 81, 85, 249 S.E. 2d 375, 378 (1978); *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E. 2d 189, 193 (1972). In response to defendant Williams' affidavit, plaintiff submitted the testimony of the defendant Myers. Plaintiff contends this testimony presents evidence of defendant Williams' malice toward the plaintiff, creating a factual issue and thereby making summary judgment inappropriate. We disagree.

Plaintiff alleges first that Myers' testimony creates an issue of fact as to the element of malice in that approximately two weeks before the arrest of Middleton at a meeting between Williams and Myers it was Williams who first asked Myers if he (defendant Myers) ever "[got] any information on Mr. Middleton." Secondly, Myers' testimony contains statements concerning the conversation he had with defendant Williams on March 3 just prior to the arrest of the plaintiff. Plaintiff contends defendant Myers' recollection of this conversation creates a question of fact as to whether or not the defendant Williams instigated this prosecution with malice. Concerning this conversation, the testimony of Myers was as follows:

> ". . . I went by to see Mr. Williams. When I went by to see Mr. Williams, he made certain statements to me concerning Mr. Middleton. *The statements are not at all that plain to me now*, but it was in reference to Mr. Middleton having drugs in his truck; *that was the context of the statements. I can't*

> *remember the exact words right now* . . . . I asked him how did he know the drugs would be there, and he responded and said 'If I say they will be there they will be there', *or something to that effect.*" (Emphasis ours.)

Viewing this testimony offered by the plaintiff, the non-moving party, indulgently, and giving him the benefit of every reasonable inference to be drawn therefrom, [*See Page v. Sloan*, 281 N.C. 697, 704, 190 S.E. 2d 189, 193 (1972)], we are of the opinion that plaintiff's evidence presents no specific facts which could be found by the trier of fact to show that the defendant instigated this prosecution with malice. Therefore by his affidavit, defendant Williams has met his burden of showing the lack of any triable issue of fact with regard to his alleged malice in prosecuting this action, and is entitled to judgment as a matter of law.

The counter-testimony offered by plaintiff does not show specific factual controversies as to the maliciousness of defendant's actions which require a trial for the resolution thereof. First, no reasonable inference of malice may be drawn simply from the fact that defendant Myers avers defendant Williams first questioned him as to the plaintiff's involvement in the drug trade. Second, we find that even when viewed in the light most favorable to the plaintiff, the fact that when defendant Williams and defendant Myers discussed plaintiff's involvement in drug trafficking, Williams apparently refused to tell Myers how he knew the drugs would be in plaintiff's truck (although from the equivocal statements in Myers' testimony we cannot be sure just what the defendant Williams told Myers) is not sufficient to establish a factual controversy as to whether or not defendant Williams maliciously caused plaintiff to be prosecuted.

Since defendant Williams' affidavit averred that the prosecution of the plaintiff was instigated in good faith as a civic duty, and the plaintiff failed to present counter-affidavits or other evidence creating factual issues as to the maliciousness of the defendant Williams' action, summary judgment was properly granted for defendant Williams. The opinion of the Court of Appeals is therefore.

Affirmed.

Justice HUSKINS dissenting.

The court is not authorized on a motion for summary judgment to decide issues of fact and credibility. *Moore v. Fieldcrest Mills*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). It is authorized to determine only whether genuine issues of fact or credibility exist. The party moving for summary judgment has the burden of "clearly establishing the lack of any triable issue of fact by the record properly before the Court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." 6 Moore's Federal Practice § 56.15[8] at 642 (2d ed. 1976). *Accord, Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978). A motion for summary judgment must be denied if the opposing party submits affidavits or other supporting materials which materially contradict the factual showing made by movant or which cast doubt on the credibility of movant's witness. *Kidd v. Early, supra.*

In the instant case the dispositive question is whether the affidavit offered by plaintiff in opposition to defendant's motion for summary judgment raises a material question of fact with respect to the element of malice. In my opinion, plaintiff's evidentiary showing raises a factual controversy as to whether or not defendant Williams maliciously caused plaintiff to be prosecuted and casts doubt on the credibility of defendant Williams.

The affidavit offered by plaintiff tends to show that two weeks before Mr. Middleton's arrest, Mr. Williams, a pharmacist, had a conversation with Officer Myers, a member of the Lexington Police Department assigned to the drug squad. In the affidavit Officer Myers asserts that "[i]n the conversation, Mr. Williams and I were discussing information or just who had given me information. I asked him did he ever have any information for me, *and he asked me* did I ever get any information on Mr. Middleton." (Emphasis added.) Sometime later Mr. Williams got word to Officer Myers that he wanted to see him at the pharmacy. At that time Mr. Williams informed Officer Myers that Middleton had drugs in his truck:

> "I asked him how did he know that the drugs would be there, and he responded and said *'If I say they will be there, they will be there,'* or something to that wording. That's all I remember Mr. Williams telling me on that occasion. *Mr.*

Williams made no statement to me that he had overheard any previous conversation from other persons concerning Mr. Middleton, and he did not relate to me how he knew the drugs would be there. He just responded, *'If I tell you they will be there, they will be there.'* He did not tell me how he learned this information." (Emphasis added.)

Thus, defendant Williams, a pharmacist with access to drugs who two weeks earlier had expressed concern to Officer Myers over Mr. Middleton's possible involvement in illegal drug trafficking, suggested to the officer that Middleton had drugs in his truck. When asked how he knew the drugs would be there, Williams simply stated: "If I say they will be there, they will be there." Viewed indulgently, and given the benefit of every reasonable inference to be drawn therefrom, the affidavit offered by plaintiff gives rise to a permissible inference that defendant Williams planted the drugs in plaintiff's vehicle.

"Aside from express malice, which plaintiff may or may not be able to show at trial, implied malice may be inferred from want of probable cause in reckless disregard of plaintiff's rights. *Taylor v. Hodge,* [229 N.C. 558, 50 S.E. 2d 307 (1948)]; *Dickerson v. Refining Co.,* 201 N.C. 90, 159 S.E. 446 (1931) . . . . In cases grounded on malicious prosecution, probable cause 'has been properly defined as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution.' *Morgan v. Stewart,* 144 N.C. 424, 430, 57 S.E. 149, 151 (1907)." *Pitts v. Pizza, Inc., supra.* On the question of implied malice, the evidence tends to show that defendant Williams overheard portions of a conversation in a restaurant among three young people in which they mentioned that Middleton, a schoolteacher, was a distributor of drugs and would deliver drugs to preselected places. No details as to specific drug deals—past or future—were discussed. On the basis of this hearsay information, defendant Williams insisted to Officer Myers that drugs were to be found in plaintiff's vehicle. Williams refused to disclose to Officer Myers the source of his information; rather, he steadfastly insisted that "[i]f I tell you the drugs will be there, they will be there." When this evidence is viewed in the light most favorable to plaintiff, the party opposing summary judgment, malice may be inferred from the manner in which defendant Williams brought about plaintiff's arrest. Acting on

hearsay information, without probable cause to believe that drugs would *presently* be found in plaintiff's vehicle, defendant Williams recklessly insisted that such was the case, thereby precipitating plaintiff's arrest.

Additionally, I note that the affidavit submitted by plaintiff brings into question the credibility of defendant Williams. In his affidavit, Mr. Williams asserts he informed Officer Myers that the basis for his belief that Mr. Middleton was in possession of drugs was based on a conversation he had overheard in a restaurant. Yet, in his affidavit, Officer Myers asserts that Mr. Williams never said anything to him about an overheard conversation. Thus, the "overheard conversation" could be an afterthought prompted by commencement of the action for malicious prosecution. In his affidavit, Mr. Williams asserts he told Officer Myers that "he had no absolute or definite proof" as to where the drugs would be found. Yet, in his affidavit, Officer Myers asserts Mr. Williams insisted that the drugs would be found in plaintiff's vehicle.

In summary, due consideration of the evidentiary showing made by both parties pursuant to the motion for summary judgment indicates that a genuine issue of fact exists on the question of whether Mr. Williams acted with malice. "If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied." 3 Barron and Holtzoff, Federal Practice and Procedure, § 1234 (Wright ed. 1958). *Accord, Moore v. Fieldcrest Mills, Inc.*, supra. Accordingly, I conclude that the trial court's grant of summary judgment for defendant was improper.

In affirming summary judgment for defendant, the majority goes beyond the scope of summary judgment practice and sits instead as a trier of fact. The majority, in effect, credits defendant Williams' assertions that he acted in good faith out of a civic duty and refuses to give any credence, as it must on a motion for summary judgment, to Officer Myers' assertions which put Mr. Williams' actions in a very different light. In my view this case, in its present posture, raises triable issues of fact and credibility which are not susceptible of summary adjudication. Plaintiff may yet suffer a directed verdict for defendant at close of the evidence at trial, but I think he is entitled to offer his evidence notwithstanding.

For the reasons stated I respectfully dissent from the majority opinion and vote to reverse the decision of the Court of Appeals.

Justice COPELAND joins in this dissent.

Justice EXUM dissenting.

Because I believe plaintiff made a sufficient showing to survive defendant Williams' motion for summary judgment, I vote to reverse the decision of the Court of Appeals.

The gravamen of plaintiff's action as alleged against these defendants is that they surreptitiously planted illegal drugs in his truck and on 3 March 1975 instituted criminal proceedings against him for unlawful possession of the drugs. The criminal proceedings against him were dismissed. If at trial plaintiff can prove these allegations, he will have made out a case of malicious prosecution.

On Williams' motion for summary judgment Williams offered his own affidavit to this effect: On 3 March 1975 he overheard three unknown persons discussing drugs. One of them remarked that drugs were obtainable from "Middleton, a school teacher." Recalling that he had earlier discussed local drug problems with Myers, a police officer, and the name "Middleton" had been mentioned, he called Myers and told him that he had "some information about the man we talked about earlier" and that "if this was the same man that I had heard the young men discuss, I felt reasonably certain one or more of the men would be contacting him that same night." Williams said he further told Myers that while he had no "proof" as to where the drugs might be, Middleton's truck would be "as good a place to start as any, since the young men I overheard talking mentioned he made deliveries."

Plaintiff then offered the testimony of James Myers, the other defendant. Myers said that at the time of the incidents in question he was a Lexington police officer. Two weeks before 3 March 1975 he had a conversation with Williams concerning "a person known as Herman Clayton Middleton." Williams first mentioned Middleton and asked Myers if Myers ever got "any information on Mr. Middleton." Myers replied that he "had had some information on him before, not a whole lot but we had some." Later, Myers said, he had a second conversation with Williams.

Apparently this was the conversation that occurred on 3 March 1975 and which ultimately led to Middleton's arrest. In this conversation, held at Williams' insistence, Williams told Myers that Middleton had drugs in his truck. Myers asked Williams how he knew the drugs were there and, according to Myers, Williams said:

> " 'If I say they will be there, they will be there', or something to that wording. That's all I remember Mr. Williams telling me on that occasion. Mr. Williams made no statement to me that he had overheard any previous conversation from other persons concerning Mr. Middleton, and he did not relate to me how he knew the drugs would be there. He just responded, 'If I tell you they will be there, they will be there.' He did not tell me how he learned that information."

Far from tending to show that Williams was without malice and acting in good faith, this evidence, taken together, casts doubt on Williams' credibility and points at least a suspicious finger at Williams in the context of plaintiff's allegations. According to Williams, (1) Middleton "was mentioned" in his first conversation with Myers; (2) he next heard Middleton's name when he overheard the conversation of three unknown persons in a restaurant; (3) while no truck was mentioned in this conversation he told Myers that Middleton's truck was "as good a place to start as any." Myers testified, however, that their first conversation centered on Middleton whose name was suggested by Williams. In their second conversation, instigated by Williams, Williams told him the drugs would be in Middleton's truck. When asked how he knew this, Williams failed to mention the overheard conversation in the restaurant but said something to the effect that, "If I say they will be there, they will be there."

I, of course, do not know where the truth lies in this dispute. Neither do I disagree with the legal principles used by the majority to resolve this case. I simply take a different view of the evidentiary showing and the inferences which might be drawn therefrom. This showing to me demonstrates the existence rather than the non-existence of a material factual issue, *i.e.*, whether Williams did, indeed, plant the drugs in plaintiff's truck as plain-

tiff alleges. This issue should be resolved by a jury—not by the court on a motion for summary judgment.

I also join in the dissent filed by Justice HUSKINS.

Justice COPELAND joins in this dissent.

IN THE MATTER OF: THE PURPORTED WILL OF KARL ARTHUR ANDREWS

No. 94

(Filed 8 January 1980)

Wills § 21.4— caveat proceeding—undue influence—sufficiency of evidence

Evidence in a caveat proceeding was sufficient to be submitted to the jury on the question of undue influence where such evidence tended to show that testator was old and physically and mentally weak during the last few years of his life; testator lived with his wife and was subject to her constant association and supervision; other people had little or no opportunity to see or communicate with testator because his wife refused to allow them to speak with testator on the telephone; the will and codicil in question were different from prior revoked wills and were made in favor of people with whom there were no ties of blood, testator's wife and her son who was testator's stepson; the will and codicil in question bettered the positions of testator's wife and her son and, to that extent, disinherited a natural object of testator's bounty (his son); and the evidence gave rise to an inference that testator's wife procured the execution of the will and codicil in question in that prior wills were prepared by one who had been testator's attorney for years and those wills were executed in the absence of testator's wife, while the instruments in question were prepared by an attorney with Belk Stores; testator's wife had apparently been employed with Belk Stores prior to her marriage to testator; testator and his wife drove from their home in Southern Pines to Charlotte to execute that will; and prior to that meeting, the attorney who prepared the will for testator's $1.5 million estate had never seen or met with testator.

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

ON appeal by caveators from the decision of the Court of Appeals, 42 N.C. App. 86, 256 S.E. 2d 251 (1979) (opinion by *Vaughn, J.* with *Clark, J.* concurring and *Carlton, J.* dissenting). *Hairston, J.* presided at the trial of this action.

The testator, Karl Arthur Andrews, died on 27 November 1976. A will executed by testator in 1974 and a codicil executed by him in 1975 were presented to the Clerk of Superior Court of Moore County for probate. Testator's son (Mrs. Andrews' stepson), Karl Arthur Andrews, Jr., filed a caveat to this will and codicil alleging that they are not the last will and testament of the testator because they were procured by the undue influence of testator's wife, Mrs. Andrews. In this caveat proceeding, the propounders are testator's wife and the guardian *ad litem* for testator's three grandchildren; the caveator is testator's son.

Propounders' motions for a directed verdict, made at the close of the caveator's evidence and at the close of all the evidence, were denied by Hairston, J. The jury verdict was for the caveator and judgment was entered accordingly. On appeal by the propounders, the Court of Appeals reversed the trial judge's denial of propounders' motions for a directed verdict. The caveator appealed to this Court as a matter of right pursuant to G.S. 7A-30(2).

Other facts relevant to the decision of this case will be related and discussed in the opinion.

Van Camp, Gill & Crumpler by James R. Van Camp and Douglas R. Gill for caveator-appellant.

Bryant, Hicks & Sentelle by David B. Sentelle and Richard A. Elkins for propounder-appellees.

COPELAND, Justice.

The sole issue presented by this appeal is whether caveator presented a *prima facie* case that testator's will was the product of undue influence in order to survive propounders' motions for a directed verdict. The Court of Appeals held that caveator's evidence of undue influence was insufficient to take the case to the jury. We reverse.

To constitute undue influence within the meaning of the law, there must be more than *mere* influence or persuasion because a person can be influenced to perform an act that is nevertheless his voluntary action. *In re Will of Frank*, 231 N.C. 252, 56 S.E. 2d 668 (1949), *rehearing denied*, 231 N.C. 736, 57 S.E. 2d 315 (1950). For the influence to be undue,

" 'there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made.' " *In re Will of Kemp*, 234 N.C. 495, 498, 67 S.E. 2d 672, 674 (1951), *quoting In re Will of Turnage*, 208 N.C. 130, 131, 179 S.E. 332, 333 (1935); *see generally*, Wiggins, *Wills and Administration of Estates in North Carolina* § 55 (1964).

In a caveat proceeding, the burden of proof is upon the propounders to prove that the instruments in question were executed with the proper formalities required by law. *In re Will of West*, 227 N.C. 204, 41 S.E. 2d 838 (1947). Once this has been established, the burden shifts to the caveator to show by the greater weight of the evidence that the execution of the will was procured by undue influence. *Id.*

The battle by one person to overpower and overcome the free will, agency, wishes and voluntary action of another is very often difficult to prove because, after testator's death, only circumstantial evidence remains from which the trier of fact must decide whether the battle in fact occurred and whether testator was on the losing side. Caveator must rely on inferences from the surrounding facts and circumstances that arise on the evidence in his effort to prove that undue influence existed at the time testator executed his last will and testament thereby causing him to execute a will that he otherwise would not have executed. The more adroit and cunning the person exercising the influence, the more difficult it is to detect the badges of undue influence and to prove that it existed. *In re Will of Beale*, 202 N.C. 618, 163 S.E. 684 (1932).

It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to

determine its existence with mathematical certainty. *In re Will of Beale, supra.*

Several of the factors that are relevant on the issue of undue influence include:

"1. Old age and physical and mental weakness.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the will is different from and revokes a prior will.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution." *In re Will of Mueller*, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915).

Of course, no matter how difficult the task may be, the burden of proving undue influence is on the caveator and he must present sufficient evidence to make out a *prima facie* case in order to take the case to the jury. The test for determining the sufficiency of the evidence of undue influence is usually stated as follows: "[i]t is 'generally proved by a number of facts, each one of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its existence.' " *Id.* at 29, 86 S.E. at 719, *quoting In re Will of Everett*, 153 N.C. 83, 87, 68 S.E. 924, 925 (1910).

For example, proof that on the evening of the day on which the will was executed the testator came home drunk, and that in the will he left his property to some of his nephews and a niece, to the exclusion of other nephews and nieces, are circumstances to be considered on the issue of undue influence, but standing alone they are not enough to take the case to the jury. *In re Will of Harris*, 218 N.C. 459, 11 S.E. 2d 310 (1940). Proof that testator was old, suffered from chronic ailments, had a poor memory and used narcotics are circumstances to be considered. However, all of these factors relate to the existence of a poor physical and mental condition which would make testator susceptible to undue in-

fluence, but standing alone these factors are insufficient to make out a case of undue influence. *In re Will of Ball*, 225 N.C. 91, 33 S.E. 2d 619 (1945). Proof that testator stated four years after the execution of the will that he had allowed others to take advantage of him and lead him to make the will that was ultimately brought into question is a circumstance to be considered, but standing alone it is insufficient to make out a case of undue influence. *In re Will of Turnage, supra.*

Therefore, the most that can be said is that a *prima facie* case of undue influence consists of evidence by caveator of that combination of facts, circumstances and inferences from which a jury could find that the purported last will and testament is not the product of testator's free and unconstrained act, but rather that it is the result of an overpowering influence exerted by someone on the testator sufficient to overcome testator's free will and agency and to substitute for it the will and wishes of that other person, so that testator executed a will that he otherwise would not have executed. When such evidence exists, then the case must be submitted to the jury for its decision as to whether or not the last will and testament of the testator was in fact the product of undue influence.

Considering the evidence in the light most favorable to the caveator, *In re Will of Ball, supra*, and giving him the benefit of all reasonable inferences arising on the evidence, we believe caveator presented sufficient evidence of undue influence to survive propounders' motion for a directed verdict made at the close of all the evidence in order to take the case to the jury.

Caveator's evidence, when presented in chronological order, indicated that the testator executed a number of wills and codicils prior to the will and codicil in question. The first will was executed in 1962. In this will, testator devised one-half of his estate to Mrs. Andrews absolutely. The remainder he devised in trust with his son as beneficiary. When his son reached age twenty-eight, the trust was to terminate and his son was to receive the principal. However, if the son died prior to the termination of the trust, the principal was to be given to his son's issue, if any; if none, then to Mrs. Andrews. If she was not living, then the principal was to go to Mrs. Andrews' son, Michael Jad Mahaley. Mrs. Andrews was named executrix.

In 1965, testator executed a codicil to the 1962 will which appointed Mrs. Andrews and R. F. Hoke Pollock (Mr. Andrews' attorney for many years) as co-executors of the will. In 1966, testator executed a second codicil to the 1962 will in which he removed Mrs. Andrews as co-executor and appointed Pollock as sole executor. The codicil further provided that if testator's death should result from any cause other than natural causes, his wife, Mrs. Andrews, should receive nothing under the will. He also directed that an autopsy be performed to determine the cause of his death.

In 1970, testator executed a will revoking all prior wills and codicils. In this will, testator devised his estate to a trustee to pay one-half of the income to Mrs. Andrews for life and one-half to his son for life. Upon the deaths of the income beneficiaries, the principal was to be distributed to testator's grandchildren in equal shares. Pollock was appointed as executor.

From the above pattern of dispositions, it can be seen that the positions of Mrs. Andrews and her son under testator's various wills and codicils worsened between 1962 and 1970. Under the 1962 will, Mrs. Andrews was to receive a one-half interest in the estate in fee simple, but under the 1970 will she was to receive only an income interest in one-half of the estate for her life. Under the 1962 will, testator's stepson was to receive the one-half of the estate which had been devised in trust to testator's son *only* if testator's son died before the trust terminated *and* he had no surviving issue *and* provided that Mrs. Andrews predeceased him. Under the 1970 will, testator's stepson was to receive nothing.

These changes in the disposition of his estate give rise to an inference that all was not well in the relationship between testator and his wife between 1962 and 1970. There is other evidence in the above summary from which this same inference can again be drawn. Mrs. Andrews was named sole executrix in the 1962 will. In the 1965 codicil, she and Pollock were named co-executors. In the 1966 codicil, Pollock was named sole executor. In the 1970 will, Pollock was again named sole executor. Also, in the 1966 codicil, testator wanted his wife to receive nothing if he died from any cause other than natural causes and he wanted an autopsy performed to determine the cause of his death.

Caveator's evidence then tended to show that many changes occurred between 1969 and 1976. From this evidence we note that caveator presented evidence on each of the seven factors listed above as relevant to the issue of undue influence.

(1) Testator was old and was physically and mentally weak during the last few years of his life. He was seventy-seven years old at the time of his death in 1976. He had had a heart attack in 1969, and after that he was afflicted with high blood pressure and diabetes. He had been obese for many years. Evidence from his barber tended to show that testator had always been quite particular about his appearance until about 1973 when he then showed less concern. Other witnesses testified that he was not his normal self in 1974 and 1975 and was not as alert as he formerly had been. On one occasion, testator apparently was not aware that he owned certain property.

(2) Testator lived with his wife and was subject to her constant association and supervision. A former employee of the testator testified that he visited the Andrews' home in 1975. The testator was relaxed at first, but when Mrs. Andrews appeared he became quite nervous, had tears in his eyes and could not speak. A real estate dealer indicated that in 1975 and early 1976 he negotiated a purchase of some property owned by the Andrews. He testified that most of his discussions were with Mrs. Andrews and on one occasion testator was not aware that he owned certain property that the dealer desired to purchase.

(3) Other people had little or no opportunity to see the testator. The manager of the Sheraton Motor Inn in Southern Pines testified that he purchased some property from the Andrews in 1975. In negotiating the purchase of the property, he met with testator on one occasion and after that he called the testator six or seven times but could not speak with him. On each of those occasions, Mrs. Andrews said that he was resting or had had a bad night. She told him to contact her attorneys in Charlotte who would handle the closing and apparently this was done. Testator later saw the manager at the Motor Inn and asked him why he had not been called about the purchase of the property.

Another witness indicated that he tried to get in touch with testator at testator's request, but, when he called, Mrs. Andrews would not allow him to speak with her husband. Other witnesses

testified that they left messages to have calls returned when they could not speak with testator, but their calls were never returned.

(4) The 1974 will and 1975 codicil were different from and revoked prior wills. (5) These two instruments were made in favor of one with whom there were no ties of blood (Mrs. Andrews and her son—testator's stepson) and (6) to the extent those instruments increased the positions of Mrs. Andrews and her son, they disinherited a natural object of testator's bounty (his son).

In the 1974 will, testator revoked all prior wills and bequeathed all of his tangible personal property to his wife if she survived him; if not, then to his son if his son survived him, and if he did not, then to his son's surviving issue and testator's stepson in equal shares. All of the furniture, household goods, silverware, china and ornaments were acknowledged to be the property of his wife. Testator devised one-half of his adjusted gross estate to his wife in such a manner as to take advantage of the maximum marital deduction allowed under the relevant provisions of the federal estate tax. The rest of his estate was devised in trust for the benefit of his son. He was to receive the income for life and, at his death, the principal was to be divided equally between testator's stepson and testator's grandchildren. A spendthrift provision was attached to this trust whereby the income was to be paid to Mrs. Andrews and the principal beneficiaries in the event an income beneficiary tried to sell or transfer his interest in the trust. The testator appointed his wife as executrix. In July, 1975, the testator executed a codicil to the 1974 will in which he altered the provisions of the trust to provide that upon the death of his son, Mrs. Andrews, if she were still living, was to receive the income from the trust for her lifetime.

Also, in 1975, deeds were executed transferring real property that testator owned in the Southern Pines area from testator individually to testator and his wife as tenants by the entirety. Apparently, this was done because testator had read a book entitled, "How to Avoid Probate."

From the above pattern of dispositions it can be seen that after the positions of Mrs. Andrews and her son suffered in the codicils to the 1962 will and the 1970 will as compared to the 1962

will (as summarized above), there was then an improvement in their positions under the 1974 will and 1975 codicil.

Under the 1974 will, testator's stepson, who was to receive nothing under the 1970 will, was to receive a one-fourth interest in the principal of the trust set up under that will (divided equally between the stepson and testator's three grandchildren) which was to contain one-half of the testator's adjusted gross estate. Also, he was to receive one-fourth of all the tangible personal property (again to be divided equally between the stepson and testator's three grandchildren) if both testator's son and his wife predeceased the testator.

Mrs. Andrews was, under the 1974 will, acknowledged to be the owner of all the furniture, household goods, silverware, etc. She was to receive *all* of the tangible personal property if she survived the testator. After these dispositions, she was to receive one-half of testator's adjusted gross estate. Also, she was named sole executrix under this will. The significance of this appointment was stated by Judge (now Justice) Carlton in his dissenting opinion in this case in the Court of Appeals:

> "The will vests the power in the executrix to determine which property shall go into which half of the estate. In other words, Mrs. Andrews could choose that portion of the property to be allocated to her." *In re Will of Andrews*, *supra* at 96, 256 S.E. 2d at 258 (Carlton, J. dissenting).

The 1974 will also provided that, "my wife's share shall not be reduced by any estate, inheritance, transfer, succession, legacy or similar taxes." Thus, under the 1974 will, Mrs. Andrews was to receive a one-half *net* interest *in fee simple* undiminished by the payment of state and federal inheritance and estate taxes. Under the 1970 will, Mrs. Andrews would have received *a one-half income interest and no fee simple interest*, and under the 1962 will Mrs. Andrews would have received one-half of testator's estate *after* the payment of estate and inheritance taxes. From the record it appears that, at his death, testator's estate was worth approximately $1.5 million. Considering this, the increase in value to Mrs. Andrews under the 1974 will as compared to the provisions for her under the earlier wills can readily be seen.

In addition, the 1975 codicil provided that if Mrs. Andrews survived testator's son, she was to receive his income interest under the trust which contained the other one-half of testator's adjusted gross estate. And finally, the real property that had been transferred from testator individually to testator and Mrs. Andrews as tenants by the entirety would be hers outright as the surviving tenant.

It may be that the real property was changed to ownership as tenants by the entirety and that the 1974 will giving Mrs. Andrews one-half of the adjusted gross estate were done to minimize estate and inheritance tax consequences. However, the issue is whether the changes in the will were made because testator wanted them made or because Mrs. Andrews wanted them made. If Mrs. Andrews had them made by overcoming the free will and agency of the testator thereby causing him to make a will which he otherwise would not have made, then such action constituted undue influence. As was stated in *In re Will of Turnage, supra* at 132, 179 S.E. at 333:

> "To constitute such undue influence, it is not necessary that there should exist moral turpitude, but whatever destroys free agency and constrains the person, whose act is brought in judgment, to do what is against his or her will, and what he or she otherwise would not have done, is . . . [undue influence] in the eye of the law."

(7) The evidence gives rise to the inference that Mrs. Andrews procured the execution of the 1974 will. The 1962 will and the codicils thereto, as well as the 1970 will, were drafted by R. F. Hoke Pollock and executed by the testator in Southern Pines. Pollock had been testator's attorney for some time prior to the execution of the 1962 will. Mrs. Andrews was not present when these instruments were executed. The 1974 will and 1975 codicil were drafted by Paul Wyche, a Charlotte attorney, who was employed by Belk Stores Services, Inc. He had apparently been recommended to draft the will by David McConnell, who was at that time Chief Counsel of Belk Stores Services, Inc. Apparently, Mrs. Andrews had been connected in some employment situation with Belk Stores before her marriage to testator and, with respect to another transaction, the evidence reveals that Mrs. Andrews' attorneys were located in Charlotte.

After talking by telephone with testator and receiving some information from McConnell on the Andrews' estate, Wyche drafted the 1974 will (Belk's permitted him to have private clients so long as there was no interference with his work for the company) and mailed it to the testator. At that time, Wyche knew of the 1962 will, but he did not know of the two codicils to that will and he did not know of the 1970 will. As noted above, these were the instruments in which the positions of Mrs. Andrews and her son suffered as compared to the 1962 will.

Testator telephoned Wyche and said that he would like to meet him in Charlotte to execute the will that Wyche had prepared. Testator and his wife then travelled to Charlotte where testator executed the will. Apparently, testator had never seen Wyche before that meeting in Charlotte. This manner of preparing and executing a will for a $1.5 million estate appears unusual and while these facts may cast no questions of improper action upon Mr. Wyche, they do give rise to an inference that Mrs. Andrews procured the execution of the 1974 will.

Wyche also prepared the 1975 codicil and the deeds creating the relationships of tenants by the entireties in real property that formerly testator had owned alone. These were all prepared by Wyche after consultations with testator. Wyche drafted the 1975 codicil after travelling to Pinehurst at testator's request where he spent the day discussing testator's estate with testator and his accountant. The Court of Appeals relied on this testimony by Wyche (a witness for the propounders) to counter the other evidence in the case that was favorable to the caveator in order to arrive at the conclusion that, "[t]he import of his [Wyche's] testimony was that testator acted freely and knowingly in executing this will and codicil." *In re Will of Andrews, supra* at 93, 256 S.E. 2d at 256.

Reliance on this testimony by the Court of Appeals is misplaced and its conclusion is erroneous. It is our function, in a case such as this, to consider *all* of the evidence but to consider it *in the light most favorable to the caveator*, deem his evidence to be true, *resolve all conflicts in his favor* and give him the benefit of every reasonable inference to be drawn in his favor. *See, Rappaport v. Days Inn of America, Inc.*, 296 N.C. 382, 250 S.E. 2d 245 (1979). Even though there may be contradictions and conflicts in

some or all of the evidence in the case, if caveator had sufficient evidence of undue influence so that a jury could (if it believed his evidence and his version of the facts) find for the caveator, then the motion for a directed verdict should be denied and the case sent to the jury so that *it* can resolve the disputed issue of fact. *See, Rappaport v. Days Inn of America, Inc., supra.*

It may be, as propounders' evidence tended to show, that testator was in control of his own affairs until his death and that the 1974 will and the 1975 codicil were the result of testator's own wishes to plan his estate wisely and to minimize the estate and inheritance tax consequences. It may be that the will and codicil in question were the result of Mrs. Andrews' overpowering and undue influence to have testator execute the will that she wanted him to execute that would benefit her and her son more than the previous wills and would also minimize the tax consequences to his estate and thus, indirectly, to her. That is the issue that the jury had to resolve because, upon correct application of the test enunciated in *Rappaport v. Days Inn of America, Inc., supra* as set forth above, we hold that, while no single piece of evidence alone would have been sufficient, caveator presented a combination of facts from which a jury could conclude that testator's 1974 will and 1975 codicil were procured by the undue influence of Mrs. Andrews.

Judge Hairston submitted this case to the jury and it has spoken. The verdict and judgment for the caveator shall be reinstated. The Court of Appeals is reversed.

Reversed and remanded.

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

PAUL H. PEARCE v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY AND JOHN C. WARD, TRADING AND DOING BUSINESS AS JOHN'S PHONE BOOTH SERVICE COMPANY

No. 49

(Filed 8 January 1980)

1. **Evidence § 36— statements by agent—admissibility against principal**

The statement of an agent to a third party will be admitted into evidence as the admission of the principal only when (1) the statement is spoken within the scope of the agent's authority to speak for his principal, or (2) the statement relates to an act presently being done by him within the scope of his agency or employment.

2. **Evidence § 36.1— statements by defendant's employee—inadmissibility against defendant**

In an action to recover for injuries sustained when plaintiff tripped and fell over anchor brackets left in a sidewalk after removal of a telephone booth, statements concerning defendant telephone company's liability made to plaintiff by defendant's service foreman for telephone booth maintenance when he came to supervise removal of the brackets an hour and a half after the accident were not admissible against defendant where there was no showing that the service foreman was defendant's agent for handling negligence claims, and the statements did not relate to an act presently being done by the foreman within the scope of his employment but constituted a hearsay narrative of a past occurrence.

Justice COPELAND dissenting.

Justices EXUM and CARLTON join in the dissenting opinion.

APPEAL by defendant Southern Bell from decision of the Court of Appeals, 41 N.C. App. 62, 254 S.E. 2d 243 (1979), which found no error in the trial before *Smith (David I.), S.J.*, at the 30 January 1978 Civil Session of NEW HANOVER Superior Court.

On 27 May 1975, plaintiff brought this action to recover damages for personal injury suffered on 4 July 1974 when he struck his right foot on a bracket left embedded in the cement adjacent to the sidewalk in Carolina Beach. The bracket had been placed there by defendant Southern Bell as an anchor for one of its telephone booths and had been left there by defendant John C. Ward when, pursuant to instructions from Southern Bell, Ward removed the telephone booth some six months before the accident.

Plaintiff alleged that his injuries were proximately caused by the negligence of either or both defendants. In its answer, Southern Bell denied negligence on its part and asserted that John C. Ward was acting as an independent contractor when he removed the telephone booth and left the brackets. In his answer, defendant Ward denied he was an employee of Southern Bell, admitted removing the telephone booth at the request of Southern Bell, and denied negligence.

Plaintiff's evidence tends to show that a telephone booth stood at the corner of the Battery Restaurant, adjacent to a sidewalk in Carolina Beach. In April 1973, the operator of the restaurant asked Southern Bell to remove the booth. "I told them that it might be for just a temporary period of time, maybe a week or so, and that it might be put back after some remodeling or reconstruction of the outside of the restaurant." The phone booth was removed but the brackets which formerly anchored the booth were left in the cement. Thereafter, "sometime in 1973," the restaurant operator "contacted the telephone company and told it to remove the brackets." The brackets were not removed until 4 July 1974 *after plaintiff's accident.*

Plaintiff's evidence further tends to show that on 4 July 1974, while walking to a restaurant with his wife for lunch, he struck his right foot on a metal bracket adjacent to the sidewalk and fell, thus lacerating his right toe and twisting his left knee. The bracket was the same color as the sidewalk, and plaintiff had trouble seeing it even after tripping over it. Plaintiff called Southern Bell, and one Robert Rochelle, service foreman for telephone booth maintenance, promptly came to the location of the accident and in a conversation with plaintiff concerning the incident confessed negligence "on their behalf" and informed plaintiff someone from Southern Bell would contact him and furnish the name of a physician. Mr. Rochelle said: "We will take care of everything for you."

Plaintiff was later treated by Drs. Weis and Hundley for his injuries, incurred medical bills in the sum of $344.19, and plaintiff offered medical evidence tending to show that he had sustained a 10 percent permanent physical impairment to his left knee, secondary to a torn cartilage.

Defendant's evidence tends to show that John C. Ward, pursuant to contract, cleaned and maintained telephone booths for Southern Bell. One morning prior to 4 July 1974, Ward "got a call from Mr. Robert W. Rochelle, service foreman for booth maintenance for Southern Bell, to go and remove a phone booth at the Battery Restaurant; I was to remove this booth on a temporary basis. He said it might be for a day or two, as whoever was working on the building wanted to do some work behind where the booth was. Mr. Rochelle was the only one who would call me usually . . . . He instructed me to remove the booth, take it to the back of the building, and turn it face in so that no one would get inside and mess with the phone. He said he would let me know something in the next day or two as to when to put it back. I went and disconnected the booth and left the brackets standing because the work was being done in the area on scaffolding and such, and the booth was to go right back in the next day or so." Mr. Ward did not hear anything further on this matter until 4 July 1974. On that day Mr. Rochelle called Mr. Ward and told him to "go down there and remove these brackets, that somebody had stumped their toe." Mr. Ward went to the restaurant and quickly removed the brackets, and Mr. Rochelle arrived at the scene of the accident a few minutes after the removal.

At the close of all the evidence, the trial court allowed John Ward's motion for a directed verdict. Plaintiff appealed, and the Court of Appeals reversed and remanded for a new trial as to defendant Ward. 41 N.C. App. at 67. Defendant Ward has not appealed from this decision. Consequently, this aspect of the case is not before us.

At the close of all the evidence, the trial court denied Southern Bell's motion for a directed verdict. The jury found negligence on the part of Southern Bell, no contributory negligence on the part of plaintiff, and awarded plaintiff $15,000. Southern Bell appealed to the Court of Appeals and that court found no error with Vaughn, J., dissenting. Defendant thereupon appealed to the Supreme Court as of right pursuant to G.S. 7A-30(2).

Brown & Culbreth by Stephen E. Culbreth, attorney for plaintiff appellee.

Poisson, Barnhill, Butler & Britt, by L. J. Poisson, Jr., and John C. Collins; R. Frost Branon, Jr., General Attorney for Southern Bell; of Counsel, Drury B. Thompson, Vice President and General Counsel for Southern Bell, attorneys for defendant appellant.

HUSKINS, Justice.

The dispositive question on this appeal is whether statements allegedly made to plaintiff by defendant's agent R. W. Rochelle, were properly admissible into evidence as the admissions of Southern Bell.

[1] In North Carolina there are two grounds upon which the statement of an agent to a third party will be admitted into evidence as the admission of the principal. *See generally,* 2 Stansbury, North Carolina Evidence, § 169 (Brandis rev. 1973). First, such statement is admissible if it is spoken within the scope of an agent's authority to speak for his principal. *Norburn v. Mackie,* 262 N.C. 16, 136 S.E. 2d 279 (1964); *Carlton v. Bernhardt-Seagle Co.,* 210 N.C. 655, 188 S.E. 77 (1936); *Russell v. Oil Co.,* 206 N.C. 341, 174 S.E. 101 (1934). If there is competent evidence that an agent is *authorized to speak* on behalf of his employer, then statements he makes to third parties within the scope of his authority and in the course of his agency are admissible in evidence as the admissions of the principal. 2 Stansbury, supra, § 169 at 12-15. Any intimations to the contrary in *Pangle v. Appalachian Hall,* 190 N.C. 833, 131 S.E. 42 (1925); *McEntyre v. Cotton Mills,* 132 N.C. 598, 44 S.E. 109 (1903); *Summerrow v. Baruch,* 128 N.C. 202, 38 S.E. 861 (1901), and *Williams v. Telephone Co.,* 116 N.C. 558, 21 S.E. 298 (1895), are expressly rejected.

Second, if there is no competent evidence that an agent has authority to speak for his principal, then his statement to third parties will be received as an admission of his principal only if the statement relates to an act "*presently being done* by him within the scope of his agency or employment." *Hubbard v. R.R.,* 203 N.C. 675, 166 S.E. 802 (1932) (emphasis added). *Accord,* 2 Stansbury, supra, § 169, and cases cited therein. If the statement made is "merely narrative of a past occurrence," it is not part of

the res gestae but only hearsay and is not competent as against the principal. *Hubbard v. R.R.*, supra. "Authority to do an act on the principal's behalf does not ordinarily carry with it an implied authority to talk about it afterwards." 2 Stansbury, supra, § 169 at 16.

[2] Application of the above principles to the facts in this case leads us to conclude that the statements allegedly made to plaintiff by defendant's agent, R. W. Rochelle, were erroneously admitted into evidence.

Plaintiff testified that he called Southern Bell immediately after his injury. He spoke to an operator and said: " 'Operator, I guess this is an emergency. I have been injured by what used to be a phone booth on your property. To whom should I speak?' And I spoke with a lady . . . . She said she would have someone down there immediately and that she was sorry about the accident." Approximately an hour and a half later a Mr. Rochelle, from Southern Bell, came into plaintiff's shop, which was near the scene of the accident. Plaintiff testified that Mr. Rochelle told him the following:

> "I am really sorry about the accident. That this is negligence on our behalf. That someone from the phone company will contact you today and let you know what doctor to go to. I am not versed in the medical aspect of this. I am not sure exactly who our physicians are, but someone will contact you today and tell you exactly what physician to go to there will be no trouble about it. That we will take care of everything for you."

In order for this statement to be admissible as an admission of Southern Bell, there must be evidence that Mr. Rochelle had the authority to make such statements on behalf of Southern Bell or that such statements related to an act presently being done by Rochelle within the scope of his employment.

There is no evidence in the record establishing Rochelle's authority to speak on behalf of Southern Bell with respect to the handling of negligence claims. The record shows only that Rochelle was Southern Bell's service foreman for telephone booth maintenance. Apparently, he supervised the installation, cleaning and removal of telephone booths. Upon being alerted that the an-

chor brackets of a previously removed telephone booth had injured a pedestrian, he came to supervise the removal of the brackets. The mere fact that Mr. Rochelle may have taken it upon himself to make certain statements concerning Southern Bell's liability is not probative of whether he had authority to make them. "The existence of the agency cannot be proved by the agent's extrajudicial statements. It must be established *aliunde*, by the agent's testimony or otherwise, before his admission will be received against the principal." 2 Stansbury, supra, § 169 at 19, and cases there cited. *See, e.g., Parrish v. Manufacturing Co.*, 211 N.C. 7, 188 S.E. 817 (1936). In summary, the record on appeal is silent as to whether Mr. Rochelle was Southern Bell's agent for the purpose of handling negligence claims. Absent such evidence, his extrajudicial statements may not be received into evidence as the admissions of his principal.

Nor does the record indicate that Mr. Rochelle's alleged statements to plaintiff related to an act "*presently being done by him* within the scope of his agency or employment." *Hubbard v. R.R.*, supra (emphasis added). Rather, his statements related to an accident that had occurred an hour and a half earlier. As such, they merely constitute a hearsay "narrative of a past occurrence," which is not competent as against Southern Bell.

The erroneous admission of Rochelle's extrajudicial statements to plaintiff constitutes prejudicial error. Other assignments are not discussed since they are not likely to recur upon retrial.

For the reasons stated the decision of the Court of Appeals as it relates to Southern Bell is reversed. The case is remanded to the Court of Appeals for further remand to New Hanover Superior Court for retrial as to both defendants.

Reversed and remanded.

Justice COPELAND dissenting.

I respectfully dissent from the holdings of the majority that there is no evidence in the record that Rochelle was authorized to speak to plaintiff and that when an agent is not authorized to speak, his statements will bind his principal only when the agent

speaks about a matter that he is authorized to perform *while he is presently performing it.*

At one point, the majority states that the statements should not have been admitted because Rochelle was not authorized to make the statements that he made to the plaintiff concerning Southern Bell's negligence in failing to remove the metal brackets. It has never been required that the agent be authorized to make the *exact* statements that he in fact made. Companies rarely, if ever, will authorize an agent to admit negligence or the facts that constitute negligence. The rule states simply that to bind the principal, the agent must be authorized to speak; then, whatever he says during that speech will bind his principal.

The majority concludes that there is no evidence in the record that Rochelle was authorized to speak to plaintiff or that he was authorized to handle negligence claims.

The evidence in the record reveals that on 4 July 1974, Robert W. Rochelle was a service foreman for telephone booth maintenance for Southern Bell. He drove a "small compact Pinto with 'Southern Bell' all over it." Plaintiff testified that after the accident he,

> "called Southern Bell Telephone instantly. I just said, 'Operator, I guess this is an emergency. I have been injured by what used to be a phone booth on your property. To whom should I speak?' And I spoke with a lady; I am not really sure exactly what her name was. She said she would have someone down there immediately and that she was sorry about the accident.
>
> I saw someone from Southern Bell that day; I believe the gentleman's name was Mr. Rochelle. It wasn't any longer than maybe an hour and a half from the time that I was injured until he was down there. He came into my shop.
>
> . . .
>
> . . . [W]hile he was in the shop talking to me, they were taking the brackets off the sidewalk. It was two gentlemen with a sledge hammer and a chisel . . . . Mr. Rochelle came into the shop and said, . . . 'I am really sorry about the accident. That this is negligence on our behalf. That someone

from the phone company will contact you today and let you know what doctor to go to. I am not versed in the medical aspect of this. I am not sure exactly who our physicians are, but someone will contact you today and tell you exactly what physician to go to there will be no trouble about it. That we will take care of everything for you.' "

After the accident, there not only were metal brackets to be removed, there was an injured pedestrian who wanted to speak with a Southern Bell representative. *Rochelle was the man sent by Southern Bell to deal with both aspects of this emergency situation.* Therefore, I believe that this evidence (apart from declarations of the agent since such statements are not proof of any authorization to speak) gives rise to the inferences that Rochelle was authorized by Southern Bell to go to the accident scene, to have the metal brackets removed and to speak with the injured person about Southern Bell's procedure when an injury has occurred.

In addition, the record cries out with evidence that while he may not have been authorized to handle negligence claims in general, Rochelle was the man designated by Southern Bell to handle *this* negligence claim. For example, on 11 March 1976, Rochelle verified on behalf of Southern Bell the Answers to Interrogatories filed in this matter by defendant Southern Bell. Also, on 21 April 1976, defendant Southern Bell filed an Amended Answer in this case that was verified on defendant's behalf by Rochelle. From all of the above evidence, I believe that Rochelle was much more than the mere repairman that the majority characterizes him to have been. The conclusion appears inevitable to me that Rochelle was authorized to speak to the plaintiff on the afternoon of the accident and was authorized to handle this negligence claim when plaintiff initiated it.

The majority reiterates and follows our present rule that even when an agent is not authorized to speak, his statements are nevertheless admissible against his principal when he speaks about the act he is performing *while he is performing it.* The majority states that such testimony is hearsay but it is admissible because it comes within the *res gestae* exception.

In general terms, hearsay testimony is unreliable and inadmissible because it is not given under oath at trial where it can

be subjected to cross-examination. However, when there are other indicia of reliability, courts allow the testimony to be admitted as exceptions to the hearsay rule. The spontaneous nature of an agent's statements, made while he is performing the act, are made without time for reflection and fabrication. That is the indication of reliability causing the statements to be admitted under the *res gestae* exception. However, if the agent has finished performing his act, *then his agency is at an end*, and any declarations made by him about the past occurrence are inadmissible as hearsay and do not fit within any exception.

In my view, this approach is erroneous for two reasons. Our rule in this area should turn upon application of the substantive law of agency rather than upon application of the principles of the rule against hearsay and its *res gestae* exception. Also, the indication of reliability supplied by the *res gestae* exception is unnecessarily restrictive. There are sufficient indicia of reliability inherent in the agency relationship itself to warrant admitting even the *post rem* statements of the agent against his principal.

First,

> "[T]o impose liability upon the master, it is only necessary to recognize that the agent's *post rem* statements were actually made within the scope of his authority. Where such authority exists, the agent's statement is no less hearsay, *but the hearsay exclusion rule is inapplicable because, under the substantive law of agency, the agent's statement is considered 'as if' made by the* principal himself . . . ." *Branch v. Dempsey*, 265 N.C. 733, 764, 145 S.E. 2d 395, 417 (Sharp, J. (Later C.J.), dissenting.) (Emphasis added.) *See also*, Note, 44 N.C. L. Rev. 1146 (1966).

After this determination is made applying the substantive law of agency, the statements can be received into evidence as vicarious admissions of the principal. "The question is one of substantive law, the law of agency. It *is not a question of res gestae* as is often supposed." *Whitaker v. Keogh*, 144 Neb. 790, 795-96, 14 N.W. 2d 596, 600 (1944). (Emphasis in original.) "To argue from one case to another [under the *res gestae* exception] on this question of 'time to devise or contrive' is to trifle with principle, and to cumber the records with unnecesary and unprofitable quib-

bles." *Lucchesi v. Reynolds*, 125 Wash. 352, 355, 216 Pac. 12, 13 (1923).

In my view, the agency relationship does not terminate as suddenly and as magically as the majority concludes that it does. The scope of the agent's authority should be viewed as covering not only the agent's acts but also his *post rem* statements about those acts. Justice (later Chief Justice) Sharp addressed this issue in her dissenting opinion in *Branch v. Dempsey*, and there observed:

> "As Wigmore points out, it is in the field tortious liability that the scope of an agent's authority is most difficult to determine.
>
> > 'For example, if A is an agent to drive a locomotive, and a collision ensues, why may not his admissions, after the collision, acknowledging his carelessness, be received against the employer? Are his statements under such circumstances not made in performance of work he was set to do?' Wigmore, *op. cit. supra* § 1078.
>
> In discussing this problem, he cites *Northern Central Coal Co. v. Hughes*, 224 Fed. 57 (8th Cir.) and *Rankin v. Brockton Public Market*, 257 Mass. 6, 153 N.E. 97, both personal injury cases in which the *post rem* statements of the employee were held incompetent as against the employer. He argues that it is absurd to hold that an employee has the power to make the employer heavily liable, yet that his extrajudicial confession of facts constituting negligence may not be heard in court. '[T]he pedantic unpracticalness of this rule as now universally administered makes a laughingstock of court methods . . . . Such quibbles bring the law justly into contempt with laymen.' *Ibid.*" *Branch v. Dempsey, supra* at 757-58, 145 S.E. 2d at 412 (Sharp, J. dissenting).

The agent is the one who was hired to do the job. He is the one who either did or did not perform his assigned task and he is the one with the most immediate knowledge of the facts and circumstances surrounding the performance or non-performance of that task. He is still acting within the scope of his authority when he makes statements about an act he was authorized to perform and has in fact performed or failed to perform. Therefore, the

statements should be received in evidence as vicarious admissions of the principal. In an analogous situation, where the agent was authorized to drive a truck, it was stated,

> "To say, in these circumstances, that the owner of a motor truck may constitute a person his agent for the purpose of the operation of such truck over public streets and highways, and to say at the same time that such operator is no longer the agent of such owner when an accident occurs, for the purpose of truthfully relating the facts concerning the occurrence to an investigating police officer on the scene shortly thereafter, seems to me to erect an untenable fiction, neither contemplated by the parties nor sanctioned by public policy. It is almost like saying that a statement against interest in the instant case could only have been made had the truck been operated by an officer or the board of directors of the Corporation owning the truck; and trucks are not operated that way. To exclude the statement of the driver of the truck as to the speed of the truck at the time of the collision, which was not only clearly excessive in the circumstances, but even greater than the speed limit permitted on the highway between intersections, would be to deny an agency which I believe inherently exists regardless of whether the statement is made at the moment of the impact, or some minutes later to an investigating officer, or other authorized person." *Martin v. Savage Truck Line,* 121 F. Supp. 417, 419 (D.C. 1954).

Second, the remaining argument for excluding the statements is that they are unreliable. The *post rem* statements of the agent admitting facts that constitute negligence subject the agent to the possibility of personal civil liability and may jeopardize his present employment as well as impair his future employment opportunities. *K.L.M. Royal Dutch Airlines Holland v. Tuller,* 292 F. 2d 775 (D.C. Cir.), *cert. denied,* 368 U.S. 921 (1961). These considerations are more than sufficient indicia of reliability to warrant admitting the statements. This aspect of the issue was also addressed by Justice Sharp in her dissenting opinion in *Dempsey* with respect to the operation of a motor vehicle by an agent.

"Perhaps it will be suggested that employees, knowing that plaintiffs prefer to seek the deeper pocket of the employer, may be inclined to confess fault where none exists, or where it is doubtful, in order to help an injured plaintiff or to have the employer share the responsibility. This argument contravenes human nature. No motorist likes to admit that his negligence caused an accident. Ordinarily a person will absolve himself from blame in any situation where it is possible for him to do so. The employee who has been involved in a collision resulting in property damage, personal injury, or death, knows that, in addition to the possible loss of his job, he may face . . . civil . . . liability . . . . That agents customarily misrepresent the facts by deliberately making false statements which place the blame for the accident upon themselves, for the purpose of imposing liability upon their principals . . . strains credulity and presupposes the untrustworthiness of agents and servants as a class." *Branch v. Dempsey, supra* at 764-65, 145 S.E. 2d at 417 (Sharp, J. dissenting).

This view that the agent is still acting within the scope of his authority when he makes the *post rem* statements has been adopted in the federal courts. Fed. Rule Evid. 801(d)(2)(D) provides that the agent's statements are admissible and are not hearsay when they are made by an agent or servant "concerning a matter within the scope of his agency or employment, made during the existence of the relationship." By deleting the requirement in our rule that the statements must be made "while the agent is presently performing the authorized act," our rule would be coextensive with the federal rule. For all the reasons discussed above, I believe that this is the course we should follow.

Thus, my vote is to hold that there was no error by the trial judge in admitting Rochelle's statements against Southern Bell because Rochelle was authorized to speak to plaintiff and the statements were made concerning a matter within the scope of Rochelle's employment.

Justices EXUM and CARLTON join in this dissent.

STATE OF NORTH CAROLINA v. HERMAN LEE DICKENS

No. 72

(Filed 8 January 1980)

Criminal Law § 23.4— guilty plea—defendant's belief that plea bargain was made —attempted withdrawal of plea—findings required by court

A question of fact existed as to whether defendant's guilty pleas were tendered under the impression that a plea bargain had been made and had to be concealed in order for defendant to benefit from it; therefore, prior to ruling on defendant's motion to withdraw his pleas of guilty, the trial court should have held a hearing, received evidence under oath from defendant and from his trial counsel, together with any other relevant evidence, and then made findings of fact as to whether or not defendant entered the guilty pleas under the misapprehension that he had a plea bargain with respect to sentence.

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

DEFENDANT appeals from decision of the Court of Appeals, 41 N.C. App. 388, 255 S.E. 2d 212 (1979), upholding judgments of *Brown, J.*, entered 27 November 1978 in NASH Superior Court.

On 9 August 1978 defendant was arraigned in Nash Superior Court on eight separate counts of issuing worthless checks in violation of G.S. 14-107 (Cum. Supp. 1977). Four of the warrants upon which defendant was arraigned alleged the issuance of worthless checks in amounts exceeding $50 and the remaining four warrants alleged issuance of worthless checks in amounts less than $50.

The cases were called for trial on 27 November 1978, and defendant, through his court-appointed attorney Robert A. Evans, withdrew his previous pleas of not guilty and entered a plea of guilty as to each of the charges.

Before accepting defendant's pleas of guilty, the trial court personally addressed defendant to ascertain if the guilty pleas were freely, voluntarily and understandingly made. From the answers provided by defendant to the questions enumerated on the "Transcript of Plea, AOC-L, Form 290," the court made findings of fact (1) that there was a factual basis for the entry of the pleas; (2) that defendant was satisfied with his counsel; and (3) that defendant's pleas were the informed choice of defendant and

made freely, voluntarily and understandingly. Upon these findings the court concluded that defendant's pleas of guilty should be accepted by the court and ordered that the record so indicate.

The court then entered judgment on the guilty pleas. Defendant was sentenced to six months on each of the four counts alleging the issuance of a worthless check in an amount in excess of $50, the sentences to run consecutively. The four counts charging issuance of a worthless check for less than $50 were consolidated for judgment and defendant was given a thirty-day active sentence to run concurrently with the four six-month sentences previously imposed.

On 28 November 1979, defendant returned into open court and "in his own person" moved the court for leave to withdraw his pleas of guilty, asserting that the pleas were entered by him on the understanding that his punishment would be the payment of a fine and restitution in the amounts of the several checks. The following exchange then took place between the presiding judge and the defendant:

"COURT: I understand you want to say something to the court?

DEFENDANT: I want to withdraw my guilty plea. I was told I was going to be allowed to make restitution.

COURT: I asked you if you had agreed to plead as part of a plea bargain and you told me you had not.

DEFENDANT: I was told by Mr. Evans and he talked with Mr. Williams, and that was the other time, that I was going to be allowed to make restitution.

COURT: I also asked you, 'Has anyone made you any promises or threatened you in any way to cause you to enter this plea?' You answered that, 'No.'

DEFENDANT: I answered all questions no, sir, but I was told to answer those questions no, and definitely I would not have entered a plea of guilty if I had been aware of what was happening.

COURT: Your motion to withdraw your pleas of guilty is denied.

DEFENDANT: I give notice of appeal to the Court of Appeals.

COURT: All right, sir, who is going to represent you?

DEFENDANT: I don't know, sir, I don't have a lawyer and I am not in position to get one.

COURT: You mean you were willing to pay these checks off but you are not able to hire a lawyer to represent you on appeal?

DEFENDANT: Yes, sir, I was willing. My company was going to pay the checks off to keep me at work.

COURT: But your company is not willing to pay for your lawyer?

DEFENDANT: Well, right now I don't have a lawyer.

COURT: I will let him fill out an affidavit. I set a $4,000.00 appearance bond. Let him fill out an affidavit and I will decide whether or not to appoint a lawyer."

Thereafter counsel was appointed to perfect the appeal.

Defendant appealed to the Court of Appeals, and that court found no error with Clark, J., dissenting. Defendant thereupon appealed to the Supreme Court as of right pursuant to provisions of G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by Mary I. Murrill, Assistant Attorney General, for the State.

Ralph G. Willey III, attorney for defendant appellant.

HUSKINS, Justice.

Did the Court of Appeals err in upholding the trial court's denial of defendant's motion for leave to withdraw his guilty pleas? Answer to that question will dispose of this appeal. We treat the motion as a motion for appropriate relief.

We note initially that G.S. 15A-1444(e) provides in pertinent part that "except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but

he may petition the appellate division for review by writ of certiorari." When the language of the quoted statute is read conversely, it provides that when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court. It follows that the defendant in this case is entitled to appeal as a matter of right since his motion to withdraw his pleas of guilty, made during the term and on the day following pronouncement of judgment, was denied.

A plea of guilty or no contest is improperly accepted unless the trial judge has first determined that there is a *factual basis* for the plea. "The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

(1) A statement of the facts by the prosecutor.

(2) A written statement of the defendant.

(3) An examination of the presentence report.

(4) Sworn testimony, which may include reliable hearsay.

(5) A statement of facts by the defense counsel."

G.S. 15A-1022(c).

The quoted statute does not require the trial judge to elicit evidence from each, any or all of the enumerated sources. Those sources are not exclusive because the statute specifically so provides. The trial judge may consider any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty or no contest. Moreover, "a written statement of the defendant" ordinarily consists of defendant's written answers to the questions contained in a document entitled "Transcript of Plea." The Transcript of Plea in this case reads as follows:

> The defendant, having tendered a plea of guilty and being first duly sworn, makes the following answers to the questions asked by the presiding judge:

1. Are you able to hear and understand me?

Answer: Yes.

2. Do you understand that you have the right to remain silent and that any statement you make may be used against you?

Answer: Yes.

3. Are you now under the influence of alcohol, drugs, medicines, pills, or any other intoxicants?

Answer: No.

4. Have you discussed your case fully with your lawyer and are you satisfied with his services?

Answer: Yes.

5. Do you understand that you are pleading (guilty) (no contest) to the felonies of _____ misdemeanors of worthless check (8 counts)?

Answer: Yes.

6. Have the charges been explained to you by your attorney and do you understand the nature of the charges?

Answer: Yes.

7. Do you understand that upon your plea you could be imprisoned for a maximum of 2 years 4 months (and that the mandatory minimum sentence is _____)?

Answer: _____

8. Do you understand that you have the right to plead not guilty and be tried by a jury and be confronted by the witnesses against you, and by this plea you give up these and your other constitutional rights relating to trial by jury?

Answer: Yes.

9. Do you now plead guilty?

Answer: Yes.

(a) (If applicable) Are you in fact guilty?

Answer: Yes.

(b) (If applicable) Do you understand that upon your plea of no contest you will be treated as guilty whether or not you admit your guilt?

Answer: N/A.

10. Have you agreed to plead as a part of a plea bargain? Before you answer, I advise you that the courts have approved plea bargaining and if there is one, you may advise me truthfully without fear of incurring my disapproval.

Answer: N/A.

11. (If applicable) The District Attorney and your counsel have informed the court that these are all the terms and conditions of your plea: _____

(a) Is this correct? Answer: _____

(b) Do you accept this arrangement?

Answer: _____

12. (Other than what I have just said) has anyone made you any promises or threatened you in any way to cause you to enter this plea?

Answer: No.

13. Do you enter this plea of your own free will, understanding what you are doing?

Answer: Yes.

14. Do you have any questions about what I have just said to you?

Answer: No.

I am 39 years of age and completed the 10th grade of school.

I have read or have heard read all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. Neither my lawyer nor anyone else has told me to give false answers in order to have the court accept my plea in this case. The con-

ditions of the plea as stated on the reverse hereof, if any, are accurate.

11-27-78 s / HERMAN DICKENS
Defendant

Sworn to and subscribed before me this
27 day of November, 1978.
s/ MARY J. MATTHEWS
Asst. Clerk of Superior Court

* * *

As Attorney for the defendant, Herman Dickens, I hereby certify that the conditions stated on the reverse hereof, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself upon which the defendant's plea was entered. I further certify that I have fully explained to the defendant the nature and elements of the charges to which he is pleading.

11-27-78 s / ROBERT A. EVANS
Date Attorney for Defendant

As prosecutor for the 7th Judicial District, I hereby certify that the conditions stated on the reverse hereof, if any, are the terms agreed to by the defendant and his counsel and myself for the entry of the plea by the defendant to the charge in this case.

11-27-78 s / J. M. HESTER, JR.
Date Prosecutor

* * *

The record in this case reveals that defendant had been convicted on all eight charges in the district court after trial upon his pleas of not guilty, and he thereupon appealed to the superior court for trial *de novo*. Additionally, the Transcript of Plea reveals that defendant, by his answer to Question 9, said he was actually guilty of the charges. Thus there was an abundance of information before the trial judge to constitute a factual basis for the pleas of guilty and to support their acceptance. Defendant's contentions to the contrary are meritless.

Even so, defendant's motion to withdraw his pleas of guilty is based on his assertion that he was told by his attorney Mr. Evans that he would be allowed to make restitution in lieu of a prison sentence. He explains his contradictory answers to various questions contained in the written Transcript of Plea by asserting that his counsel had told him to answer "no" to certain questions asked him by the trial judge. Defendant's contention is supported by his failure to give a written answer to Question 10 in the Transcript of Plea which reads: "Have you agreed to plead as part of a plea bargain? Before you answer, I advise you that the courts have approved plea bargaining and if there is one, you may advise me truthfully without fear of incurring my disapproval." There is no explanation in the record for defendant's apparent failure to give a written answer to this question. And the same is true with respect to Question 7 which was unanswered. Nor does the record indicate whether defendant, defendant's trial attorney or the prosecutor ever stated, in response to mandatory inquiries from the trial court prior to the taking of the guilty pleas, that no plea bargains had been made or discussed with defendant. *See* G.S. 15A-1022(b). Given the deficient state of the record on appeal, we must conclude that a question of fact exists as to whether defendant's guilty pleas were tendered under the impression that a plea bargain had been made and had to be concealed in order for defendant to benefit from it. Accordingly, we hold that prior to ruling on defendant's motion to withdraw his pleas of guilty, the trial court should have held a hearing, received evidence under oath from defendant personally and from his trial counsel Robert A. Evans, together with any other relevant evidence, and then made findings of fact as to whether or not defendant entered the guilty pleas under the misapprehension that he had a plea bargain with respect to sentence. *See* G.S. 15A-1420(c)(4).

We are cognizant that the recent major revisions in our plea bargaining procedures are designed to minimize the possibility that a defendant might enter a plea of guilty in the mistaken belief that a plea bargain had been made but must be concealed from the judge in order to benefit from it. *See* G.S. 15A-1021, *et seq.* and Official Commentary. *Accord, Blackledge v. Allison*, 431 U.S. 63, 79, 52 L.Ed. 2d 136, 150, 97 S.Ct. 1621, 1631 (1977). The new procedures expressly legitimize plea bargaining. G.S. 15A-1021. The trial judge is required to make specific inquiries of

defendant, his counsel and the prosecutor as to whether a plea bargain has been discussed or entered into. G.S. 15A-1022(b). In order to encourage a defendant to disclose whether he is under the impression that a plea bargain has been struck, the trial judge now advises the defendant that courts have approved plea bargaining and he may thus admit to any promises without fear of jeopardizing an advantageous agreement or prejudicing himself in the judge's eyes. See "Transcript of Plea," AOC-L Form 290. As a final precaution, a verbatim record of the entire proceeding "must be made and preserved." G.S. 15A-1026.

Adherence to such procedures will usually indicate whether any plea bargain was in existence and, if so, insure that it was not ignored. *See Blackledge v. Allison, supra*, 431 U.S. at 79-80. Additionally, such procedures are likely to disabuse a defendant's mind of any mistaken notions he may have as to the existence of a plea bargain. If the above procedures are followed, only in a rare case will there be merit in a defendant's post-conviction claim that his plea of guilty was not knowingly and voluntarily made. *See* Chapter 15A, Article 58, Official Commentary.

Thus, in most cases reference to the verbatim record of the guilty plea proceedings will conclusively resolve all questions of fact raised by a defendant's motion to withdraw a plea of guilty and will permit a trial judge to dispose of such motion without holding an evidentiary hearing. *Accord, Blackledge v. Allison, supra*, 431 U.S. at 80-81. Any intimations to the contrary in *Edmondson v. State*, 33 N.C. App. 746, 236 S.E. 2d 397 (1977), are expressly rejected. Evidentiary hearings are required in post-conviction proceedings only when necessary to resolve questions of fact. *See* G.S. 15A-1420(c)(4). Even so, regardless of whether evidentiary hearings are held, "the importance of protecting the innocent and insuring that guilty pleas are a product of free and intelligent choice requires that such claims be patiently and fairly considered by the courts." *State v. Dickens, supra*, 41 N.C. App. at 395 (Clark, J., dissenting).

We note the record on appeal in this case does not contain a verbatim record of the proceedings at which defendant entered his pleas of guilty. *See* G.S. 15A-1026. Absent such a verbatim record, we have no way of determining the import of defendant's failures to give written answers to Questions 7 and 10 in the

Transcript of Plea. Nor do we know the nature of the representations, if any, made by defendant, defendant's trial attorney, or the prosecutor in response to mandatory inquiries by the trial court as to whether any plea bargains had been made or discussed. *See* G.S. 15A-1022(b). On this record we must conclude that defendant's allegations raise a question of fact as to whether defendant entered the guilty pleas under the misapprehension that a plea bargain had been made with respect to sentence. Accordingly, an evidentiary hearing must be held in which defendant "has the burden of proving by a preponderance of the evidence every fact essential to support the motion." G.S. 15A-1420(c)(5).

For the reasons stated the decision of the Court of Appeals is vacated and the case remanded to that court for further remand to the Superior Court of Nash County with directions that the presiding judge conduct a voir dire hearing and make appropriate findings and conclusions based thereon. If he finds that defendant's pleas of guilty were made under a plea bargaining arrangement whereby defendant would be allowed to make restitution in lieu of an active prison sentence, then defendant's motion should be allowed, the judgments vacated, and the cases reset for trial. If he finds to the contrary, defendant's motion to withdraw his pleas should be denied and commitment should issue immediately to place the sentences heretofore pronounced into effect.

Reversed and remanded.

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

Odom v. Little Rock & I-85 Corp.

T. LAFONTINE ODOM, TRUSTEE, HENRY C. RHYNE, INDIVIDUALLY AND AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF DANIEL P. RHYNE, SR., DECEASED, AND AS BENEFICIARY UNDER SAID INSTRUMENT; WILLIAM M. RHYNE AND DANIEL P. RHYNE, JR., BOTH INDIVIDUALLY AND AS BENEFICIARIES UNDER THE LAST WILL AND TESTAMENT OF DANIEL P. RHYNE, SR. v. LITTLE ROCK & I-85 CORPORATION, A CORPORATION, NCNB MORTGAGE CORPORATION, A CORPORATION; EDWARD W. LARGEN, TRUSTEE; TIM, INC., A CORPORATION, TRUSTEE; S. DEAN HAMRICK, TRUSTEE; SOUTHERN NATIONAL BANK OF NORTH CAROLINA, A CORPORATION; AND DAVID M. MCCONNELL

No. 70

(Filed 8 January 1980)

Fraud § 12; Mortgages and Deeds of Trust § 2— fraud in securing subordination of purchase money deed of trust

In an action by plaintiffs to have their purchase money deed of trust declared a first lien with priority over defendant mortgage corporation's deed of trust, the trial court erred in granting summary judgment for defendant mortgage corporation on the issue of fraud in procuring the subordination of plaintiff's deed of trust to defendant's deed of trust where plaintiff's materials tended to show that plaintiffs agreed with the purchasers of their land to subordinate their purchase money deed of trust to any deed of trust placed on the land for improvements; defendant, through its attorney and by use of mislabeled documents, intentionally misrepresented that it was making a construction loan to the purchasers for improvements when the loan in fact was for acquisition of the land; and plaintiffs, in reliance on defendant's misrepresentation, subordinated their purchase money deed of trust to defendant's deed of trust, causing them to lose the priority of their purchase money deed of trust and thereby suffer monetary damages.

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

PURSUANT to G.S. 7A-31 plaintiffs petitioned this Court to review a decision of the Court of Appeals (40 N.C. App. 242, 252 S.E. 2d 217 (1979)) upholding judgment of *Martin (Harry C.), J.*, entered 31 October 1977 in Superior Court, MECKLENBURG County. Plaintiffs' petition was allowed June 28, 1979.

In brief summary the basic facts pertinent to this controversy follow. On June 15, 1973 plaintiffs Rhynes gave to one J. E. Shockley, agent, a 90-day option for his purchase of some 20 acres of real estate owned by them and located in Mecklenburg County at the intersection of Little Rock and Tuckaseegee Roads. The option price was $15,750 per acre, payable 29% down at closing with the balance to be paid over a 10 year period at 7½% interest.

The financing terms were apparently to enable the plaintiff-sellers to qualify for installment sales treatment for federal income tax purposes.

In the option agreement plaintiffs Rhynes agreed to ". . . subordinate [their] purchase money note and Deed of Trust . . . to the lien or liens of any mortgage or deed of trust to any bank, insurance company or other lending institution which is placed on said property by Buyer . . . *for improvements made to said property.*" (Emphasis ours.) On September 24, 1973 Shockley, agent, exercised the option to purchase the property agreeing to the terms and agreements contained therein. In exercising this option, Shockley was acting for his undisclosed principal the defendant David McConnell, and the defendant Little Rock & I-85 Corporation (Little Rock Corporation).

Following the exercise of the option defendant McConnell retained Robert Blythe, attorney at law, to represent him in acquisition of title to the property from the plaintiffs Rhynes. As it turned out neither defendant McConnell individually nor his corporation, Little Rock Corporation, possessed the funds necessary to successfully make the first payment as required by the option agreement. As a result of this shortage of funds, defendant McConnell as president of defendant Little Rock Corporation signed a real estate loan commitment with the defendant NCNB Mortgage Corporation dated December 27, 1973. The terms of this commitment provided that $150,000 be loaned to defendant Little Rock Corporation to apply towards the purchase price of the Tuckaseegee Road property. As security for this land acquisition loan, defendant NCNB Mortgage Corporation was to receive the first mortgage on the purchased property.

Prior to defendant NCNB Mortgage Corporation issuing the above noted commitment letter, they learned by way of letter dated December 17, 1973 from defendant McConnell to Mr. David Bagwell of defendant NCNB Mortgage Corporation that the firm of Adams, Singleton & Associates was interested in purchasing the property in question from the defendant McConnell at a per acre price substantially higher than what was to be paid to the plaintiffs.

Defendant McConnell and defendant Little Rock Corporation having now obtained financing and a prospective purchaser for

the property (although it turned out Adams, Singleton never went through with the deal) were now ready for a closing of the transaction. The closing was held in the offices of Robert Blythe, attorney at law, on the 28th of December 1973. As noted above attorney Blythe represented the interests of defendant McConnell and defendant Little Rock Corporation. He also served as closing attorney and handled all legal matters as required for the real estate closing on behalf of the defendant NCNB Mortgage Corporation.

At the Rhynes-McConnell closing plaintiff Odom, the attorney representing plaintiffs Rhynes, was shown by attorney Blythe a deed of trust in the amount of $150,000 dated December 28, 1973 from defendant Little Rock Corporation to the trustees of defendant NCNB Mortgage Corporation entitled "Deed of Trust-Construction Loan." In reality this deed of trust though labeled by NCNB Mortgage Corporation as a construction loan deed of trust represented security for the acquisition loan given to the defendant Little Rock Corporation by the defendant NCNB Mortgage Corporation to acquire the Rhynes' property.

After reading the "Deed of Trust-Construction Loan" and hearing attorney Blythe's representations that the construction loan had not been funded, as the plans for what would be put on the property were not completed, plaintiff Odom agreed to subordinate plaintiffs Rhynes' purchase money deed of trust to that of NCNB's supposed construction loan deed of trust. Odom did this without asking to see any other loan documents entered into between the defendants McConnell and NCNB Mortgage Corporation, in accordance with the option agreement. Had plaintiff Odom carefully read the construction loan deed of trust he would have discovered that the body thereof referred to a "Construction Loan Agreement" which was incorporated into the construction loan deed of trust by reference. The "Construction Loan Agreement", incorporated by reference, in turn referred to a "Real Estate Loan Commitment" entered into by defendant NCNB Mortgage Corporation and defendant Little Rock Corporation on December 27, 1973. Section 5 of paragraph A of the "Construction Loan Agreement" in referring to the loan commitment stated ". . . [this] Commitment contemplates that Corporation will provide temporary funds to finance the *construction of improvements upon the security for his loan. . . .*" (Emphasis ours.) Para-

graph 5 of Section D on page 4 of the Construction Loan Agreement provides however that in the event of conflict between the construction loan and the loan commitment, the loan commitment will control. Even had plaintiff Odom carefully read both the "Deed of Trust-Construction Loan" and the "Construction Loan Agreement," there was no indication in these documents that they referred to anything other than advances for construction purposes.

A loan commitment supplement added at page 6 of the letter of commitment entered into by the defendant NCNB Mortgage Corporation and defendant Little Rock Corporation on December 27, 1973, provided that the money being advanced was in fact not for construction of improvements but was for land acquisition. Thus from a reading of the documents the only way plaintiff could have discovered the loan was not for construction purposes was from a reading of a loan commitment letter to which he was not even a party.

At the conclusion of the Rhynes-McConnell closing, Odom delivered to Blythe the Rhynes' warranty deed conveying the property to Little Rock Corporation and Blythe delivered to Odom, Little Rock Corporation's purchase money deed of trust. Blythe also delivered to Odom a check drawn on the account of defendant Little Rock Corporation in the amount of $92,978.48. This represented a 29% down payment of $95,978.48 less the $3,000 payment advanced to exercise the option to purchase. This payment was apparently made from the funds created by the $150,000 loaned to defendant Little Rock Corporation by defendant NCNB Mortgage Corporation on December 28, 1973 the same day as the Rhynes-McConnell closing. On the record before us we do not know what defendant McConnell and defendant Little Rock Corporation did with the remaining $54,021.52 loaned by defendant NCNB Mortgage Corporation, but it is clear that it was not applied on the purchase price of plaintiffs' land. Following these transactions, and upon his request, attorney Blythe was given permission by plaintiff Odom to record defendant NCNB Mortgage Corporation's alleged construction loan deed of trust prior to the recording of plaintiffs' balance purchase money deed of trust.

After three extensions, defendant McConnell and defendant Little Rock Corporation failed to make the first annual installment payment due on the balance remaining on the purchase money promissory note and deed of trust. Plaintiff Odom, as trustee, then desired to foreclose against defendant McConnell and defendant Little Rock Corporation. Since no construction had begun on the property, plaintiff Odom attempted to have defendant NCNB Mortgage Corporation remove their construction loan deed of trust since it was his understanding that it had been unfunded. It was at this point that plaintiffs discovered that the $150,000 loan from NCNB Mortgage Corporation to which they had subordinated their interests was one for land acquisition and not for construction of improvements. Defendant NCNB Mortgage Corporation refused to remove its deed of trust and plaintiffs instituted this action against Little Rock Corporation, NCNB Mortgage Corporation and its trustees, Southern National Bank and David M. McConnell.

Plaintiffs moved for summary judgment and the motion was granted as against defendant Little Rock Corporation and defendant David McConnell. This judgment entered June 1, 1976 ordered that plaintiffs recover from David McConnell and Little Rock Corporation the amount of $234,981.79 plus interest at 7.5% per annum from the 28th of December 1973 computed at the amount of $42,199.58; together with attorneys fees at the rate of 15% of the principal amount, or $35,247.26, or a total amount of principal, interest and attorneys fees of $312,428.63 plus costs.

On January 17, 1977 defendant NCNB Mortgage Corporation and its trustees filed a motion for summary judgment and on 31 October 1977 their motion was granted.

Wade and Carmichael, by J. J. Wade, Jr., for plaintiff-appellants.

Cansler, Lockhart, Parker and Young, by Sarah Elizabeth Parker for defendant-appellees.

BROCK, Justice.

The sole question facing this Court is the propriety of the summary judgment granted in favor of the defendant NCNB Mortgage Corporation, affirmed by the Court of Appeals at 40

N.C. App. 242, 252 S.E. 2d 217 (1979). In *Page v. Sloan*, 281 N.C. 697, 704, 190 S.E. 2d 189, 193 (1972) this Court held that:

> ". . . . [T]he party moving for summary judgment has the burden of 'clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded.' (Citations omitted.) Rendition of summary judgment is, by the rule itself, conditioned upon a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law. (Citations omitted.)" *See also Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978).

Plaintiffs' complaint alleges that the defendant NCNB Mortgage Corporation fraudulently misrepresented material facts at the December 28, 1973 real estate closing involving plaintiffs and the defendant Little Rock Corporation. They allege NCNB Mortgage Corporation intentionally misrepresented that loan funds provided by NCNB Mortgage Corporation were to be used for improvements to be made on the property plaintiffs were selling to defendant Little Rock Corporation rather than for land acquisition which was the true purpose of the loan. Plaintiffs contend this fraudulent misrepresentation induced them to subordinate their purchase money deed of trust to a supposed construction loan deed of trust held by defendant NCNB Mortgage Corporation. Plaintiffs allege that the subordination agreement would not have been entered into had they realized they were subordinating their interest to a land acquisition deed of trust.

Relying on *Foster v. Snead*, 235 N.C. 338, 69 S.E. 2d 604 (1952) the Court of Appeals held that the plaintiffs in their affidavits in opposition to the defendants' motion for summary judgment made no showing of the essential elements necessary to make out a prima facie case of fraud and thus summary judgment was properly granted for the defendants. To make out an actionable case of fraud plaintiff must show: (a) that the defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that the

defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury. 235 N.C. at 339, 340, 69 S.E. 2d at 606. The Court of Appeals correctly noted that in order for the case to get to the jury plaintiffs as the parties alleging fraud bore the burden of proof to show that the essential elements as enumerated in Foster, *supra*, existed. However it appears that the Court of Appeals failed to consider that the defendants as the parties moving for summary judgment were faced with the initial burden of first showing that there were no contested factual issues surrounding the alleged fraud, and secondly, that they (defendants) were entitled to judgment as a matter of law.

For the reasons that follow we hold that the defendants as movants for summary judgment failed to show that there were no material factual issues remaining, and we therefore reverse the Court of Appeals' upholding of summary judgment for NCNB Mortgage Corporation.

In the motion for summary judgment defendants rely partly on the affidavits of T. LaFontine Odom, Robert Blythe, and E. A. Westmoreland. In reading these affidavits, and giving plaintiffs the benefit of every inference to be drawn from the facts contained therein, these affidavits clearly create questions of fact sufficient to withstand defendants' motion for summary judgment.

From the actions of counsel for defendant NCNB Mortgage Corporation in invoking the attorney-client privilege to prevent attorney Blythe from answering questions concerning the land transaction with Little Rock Corporation, and the affidavits of attorney Blythe and E. A. Westmoreland, an employee of NCNB Mortgage Corporation, there can be no question that attorney Blythe was representing the interests and acting in behalf of NCNB Mortgage Corporation at the land closing between the defendant Little Rock Corporation and plaintiffs Rhynes.

Defendant NCNB Mortgage Corporation in advancing $150,000 to David McConnell was cognizant that the money was being advanced for acquisition of the Rhynes' property and not for the purposes of construction financing. This awareness of the purpose of the loan is evident from the contents of the commitment letter of December 27, 1973 between defendant McConnell

and defendant NCNB Mortgage Corporation where the supplement to that letter specifically provided that the money was to be advanced for acquisition purposes. Robert Blythe as closing attorney representing NCNB Mortgage Corporation states in his deposition that he was also aware that the money was to be used for land acquisition and not for construction of improvements on the property.

In his deposition, which for the purpose of determining the correctness of defendants' motion for summary judgment must be taken as true, plaintiff T. LaFontine Odom stated that at the time of the closing, Robert Blythe indicated to him that NCNB Mortgage Corporation was going to make a construction loan with regard to improvements that would be made to the property purchased from the Rhynes by defendant David McConnell and defendant Little Rock Corporation. Odom states that he was shown a single NCNB Mortgage Corporation form document entitled "Deed of Trust-Construction Loan" which referred to $150,000 "made or to be made" for improvements to the property. This construction loan deed of trust referred to a "Construction Loan Agreement" and incorporated it by reference. Plaintiff Odom did not ask to see this "Construction Loan Agreement." In his deposition Odom states that attorney Blythe handed him the "Deed of Trust-Construction Loan" and at this point Odom assumed Blythe was representing both NCNB Mortgage Corporation and Little Rock Corporation. Odom stated Blythe indicated that there were no other documents in existence because the transaction between NCNB Mortgage Corporation and Little Rock Corporation had not been completed. Later in his deposition plaintiff Odom again states that Blythe indicated the loan agreements were not complete and no money had been advanced for NCNB Mortgage Corporation and Little Rock Corporation were unsure as to the exact amount of the final construction loan. Odom stated also that attorney Blythe indicated that the construction loan would be made at a later date and that nothing had been finalized as of the Rhynes-McConnell closing.

According to his deposition, at Blythe's request, plaintiff Odom allowed Blythe to record the "construction loan" deed of trust first, so as to avoid the necessity of a later subordination agreement between the Rhynes and NCNB Mortgage Corporation. Odom also alleges that he advised the Rhynes to subordinate

the lien of their purchase money deed of trust to the lien of the "construction loan" deed of trust from Little Rock Corporation to NCNB Mortgage Corporation. He alleges that he did this on the basis of Blythe's representation that NCNB Mortgage Corporation was going to make the "construction loan" to Little Rock Corporation after the construction plans were completed, and that the tendered "construction loan" deed of trust was currently unfunded.

In contrast to plaintiff Odom's deposition attorney Robert Blythe in his deposition made the following statements: "I do not recall any specific conversation with Mr. Odom at the closing at all . . . . I do not recall making any representation to Mr. Odom or to the Rhynes at the closing of the Rhyne transaction that the $150,000 NCNB Mortgage loan would be used solely for improvements." These statements are in direct conflict with those of plaintiff Odom. Such conflict creates a factual controversy over the possible misrepresentations of the loan agreement which led to plaintiffs' willingness to subordinate their purchase money deed of trust.

Here the facts advanced by plaintiff Odom could be found by a jury to show that the defendant NCNB Mortgage Corporation through their attorney, and by mislabeled loan documents, made an intentional misrepresentation of the type of loan which they were advancing to the defendants; that they made this misrepresentation with the intent that plaintiffs would rely upon it and subordinate their purchase money deed of trust to the deed of trust held by NCNB Mortgage Corporation as security for money advanced for land acquisition; that plaintiffs relied on defendant NCNB Mortgage Corporation's misrepresentation of the land acquisition loan as a construction loan, and for that reason subordinated their interest causing the plaintiffs to lose priority of their purchase money deed of trust, and thereby suffer monetary damages.

Plaintiffs by their affidavits offered in opposition to defendants' motion for summary judgment have created material issues of fact as to all the essential elements needed to establish fraud. Plaintiffs having done so, the defendants' motion for summary judgment should have been denied.

The decision of the Court of Appeals is reversed and this cause is remanded to the Court of Appeals for further remand to the Superior Court, Mecklenburg County, for appropriate proceedings.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. JAMES ALONZO POWELL

No. 114

(Filed 8 January 1980)

1. **Rape § 5; Homicide § 21.5— first degree murder—first degree rape—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for first degree murder and first degree rape where it tended to show that the victim's body was found strangled and stabbed, stretched out on a bed in her house with the feet propped on the bed's headboard and the head lolling back over the edge of the mattress; the victim's bed clothing was torn, her vagina was bruised, and semen was present; the bruises were inflicted within a half hour prior to death or within a few minutes after death; the bruises were caused by a blunt instrument such as a body part; the time of death was likely in the early morning of 15 April 1978; shortly after the probable time of death, defendant was seen with the victim's car; his fingerprints were found on the rear view mirror; a carving knife missing from the house was found in the car and it bore defendant's fingerprints; shortly after the probable time of death, defendant delivered the victim's television to his cousins; the victim's house was locked and windows were unbroken, giving rise to the supposition that the victim knew her assailant and let him in; defendant was known in the victim's neighborhood where he had been a visitor at the home of his father and stepmother; and defendant fled when he was first approached by authorities on this matter.

2. **Criminal Law § 106— motion to dismiss**

The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss.

3. **Robbery § 4.7— robbery with a dangerous weapon—insufficiency of evidence**

In a prosecution for rape, murder and robbery with a dangerous weapon where the evidence indicated that the victim was murdered during an act of

rape, evidence that defendant possessed the victim's television and automobile gave rise to the inference that defendant took them and therefore that he committed the crime of larceny, but there was no substantial evidence giving rise to the reasonable inference that defendant took the objects from the victim's presence by use of a dangerous weapon; therefore, the trial court should have granted defendant's motion to dismiss the charge of robbery with a dangerous weapon.

APPEAL from *McLelland, J.*, 7 May 1979 Criminal Session of CUMBERLAND Superior Court. Defendant was tried for first degree murder, first degree rape and robbery with a dangerous weapon. He entered pleas of not guilty to each and was found guilty by a jury of first degree murder in the perpetration of first degree rape, robbery with a dangerous weapon and first degree rape. The jury recommended a life sentence on the conviction of first degree murder in the perpetration of first degree rape and the trial court, merging the conviction of first degree rape with this conviction, entered judgment accordingly. Defendant was also sentenced to a minimum term of 20 years and a maximum term of 50 years, to run at the expiration of the life sentence, for the conviction of robbery with a dangerous weapon. Defendant appeals as a matter of right from the life sentence. We allowed the motion to bypass the Court of Appeals on appeal of the sentence for robbery with a dangerous weapon.

Evidence for the State tended to show that Martha Gilchrist Walker was a 69-year-old woman who lived alone in Fayetteville. She was last seen alive by her neighbors late in the afternoon of Friday, 14 April 1978, in the backyard of her home. Earlier that day she had parked her car in her carport after taking a neighbor to the grocery. At 6:30 a.m. on the following morning, one of her neighbors noticed that her car was missing. Another neighbor noticed the car was not at home at 9:30 a.m. and later that same afternoon, her brother-in-law observed the car was not parked in its usual place in the carport. The following Sunday morning, Mrs. Walker was not at church. That night, relatives reported Mrs. Walker missing. They went to her house and called for her, but received no response. They found the windows secured and the doors locked and so left.

The following morning, Monday, 17 April 1978, Mrs. Walker's car was found abandoned, locked and parked at a station in Fayetteville. Later that morning, officers broke into her home and

found her dead in her bedroom. She had been strangled and stabbed once in the neck. An autopsy revealed that she had bruising in her vaginal area which probably occurred between thirty minutes before to several minutes after death. Semen was present in her vagina and on a sheet taken from her bed. The autopsy revealed that Mrs. Walker died of strangulation and was stabbed after death. The pathologist's opinion was that death occurred sometime between one and three days prior to Monday, 17 April 1978.

A carving knife from a set and a small Sony television were missing from Mrs. Walker's house. A pocketknife was found in her bedroom and was later determined to be bloodstained. The house had not been ransacked, but was neat and clean.

SBI agents searched Mrs. Walker's car and found the carving knife missing from the victim's home. The knife had two fingerprints later determined to match those of defendant. The rear view mirror had four fingerprints which also matched those of defendant. Two Kool cigarettes, among others, were found in the car and gave reactions for group "O" blood type. Defendant smoked Kools and his blood type was "O" positive, as was the victim's. The victim, however, did not smoke.

Defendant was a Marine stationed at Camp LeJeune. On April 14, 15, 16 and 17, 1978, he had no duty assigned at Camp LeJeune. On Saturday, 15 April, defendant drove an automobile later identified as Mrs. Walker's between 9:00 a.m. and 9:30 a.m. to the home of his cousin Charles McNeill in Fayetteville. There, he gave his second cousin, Gary McNeill, a Sony television later identified as the television taken from the victim's house.

On Sunday, 16 April 1978, defendant was in Durham driving the automobile later identified as belonging to the victim. He took his sister and another person to a restaurant in the car. He was later seen that afternoon back in Fayetteville. On 18 April 1978, when officers at Camp LeJeune attempted to detain defendant for Fayetteville police, defendant fled from the base. He was later apprehended in Durham.

Testimony also established that defendant's father and stepmother had lived across the street from the victim from 1970 until 1976 and defendant had been seen there as late as 1976.

Defendant did not testify or present any evidence.

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

Mary Ann Tally, Public Defender, and James R. Parish, Assistant Public Defender, for defendant.

CARLTON, Justice.

The sole question on this appeal is whether the trial court erred in denying defendant's motion to dismiss at the close of the State's evidence. We think the trial court ruled properly and find no error in the trial court proceedings on the charges for first degree murder and first degree rape. However, we reverse the trial court's denial of the motion to dismiss with respect to the charge of robbery with a dangerous weapon.

In testing the sufficiency of the evidence to sustain a conviction, a motion for dismissal pursuant to G.S. 15A-1227 is identical to a motion for judgment as in the case of nonsuit under G.S. 15-173. Cases dealing with the sufficiency of evidence to withstand the latter motion are therefore applicable to motions made under G.S. 15A-1227. *See State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979).

Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971).

If the evidence 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 should be allowed. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967); *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. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971); *State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340 (1967).

The terms "more than a scintilla of evidence" and "substantial evidence" are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary. *See State v. Smith, supra. But see State v. Agnew,* 294 N.C. 382, 241 S.E. 2d 684 (Exum, J., dissenting), *cert. denied,* 439 U.S. 830, 99 S.Ct. 107, 58 L.Ed. 2d 124 (1978).

The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. *State v. Thomas,* 296 N.C. 236, 250 S.E. 2d 204, (1978); *State v. McKinney,* 288 N.C. 113, 215 S.E. 2d 578 (1975).

The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969). The trial court's function is to test whether a *reasonable inference* of the defendant's guilt of the crime charged may be drawn from the evidence. *State v. Thomas, supra; State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661 (1965).

The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both. *State v. Stephens, supra.* "When the motion . . . calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland, supra. See also State v. Irick,* 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. Cutler, supra.* In passing on the motion, evidence favorable to the State is to be considered as a whole in order to determine its sufficiency. This is especially true when the evidence is circumstantial since one bit of such evidence will rarely point to a defendant's guilt. *State v. Thomas, supra. See also State v. Rowland, supra.*

[1] We first apply the foregoing principles to the convictions for first degree murder and first degree rape. One is guilty of murder during the perpetration of rape if he kills another human being while committing or attempting to commit the crime of rape. G.S. 14-17. One is guilty of first degree rape if, being a male person over sixteen years of age, he has sexual intercourse with a female with force and against her will and her resistance was overcome by the use of a deadly weapon or by the infliction of serious bodily injury. G.S. 14-21.

The evidence for the State clearly established that Mrs. Walker's body was found strangled and stabbed, stretched out on a bed with the feet propped on the bed's headboard and the head lolling back over the edge of the mattress. Evidence also established that Mrs. Walker's bed clothing was torn and her vagina was bruised with semen present. Semen was also present on her bedclothes. The bruises to the vagina were inflicted within a half hour prior to death or within a few minutes after death. The bruises were caused by a blunt instrument such as the use of a body part. These facts are clearly sufficient as substantial evidence to support the reasonable inference that the victim was raped with force and against her will, and that her resistance was overcome by the infliction of serious bodily injury which resulted in her being murdered.

The State also introduced substantial evidence to give a reasonable inference that defendant was the perpetrator of the crime. The time of death was likely in the early morning of 15 April 1978. This is consistent with the autopsy report and the fact that a coffee pot Mrs. Walker normally used only in the morning was still on. Shortly after the probable time of death, defendant was seen with Mrs. Walker's car. His fingerprints were found on the rear view mirror. The carving knife missing from the house was found in the car, and also bore defendant's fingerprints. Also, shortly after the probable time of death, defendant delivered the victim's television to his cousins, the McNeills.

Victim's house was locked and windows were unbroken, giving rise to the supposition that Mrs. Walker knew her murderer and let him in. Defendant was known to Mrs. Walker's neighborhood where he had been a visitor to his father and stepmother.

Moreover, when first approached by authorities on this matter, defendant fled. While flight by the defendant does not create a presumption of guilt, it is some evidence which may be considered with other facts and circumstances in determining guilt. *State v. Irick, supra.*

[2] Defendant contends, however, that the guilt of an accused is not to be inferred merely from facts consistent with his guilt but that the facts must be inconsistent with his innocence. Defendant cites several cases which tend to support that position. *See e.g. State v. Langlois,* 258 N.C. 491, 128 S.E. 2d 803 (1963); *State v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886 (1947); *State v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472 (1947).

These and other cases did seem to support the proposition, for a period of time, that evidence offered by the State must be consistent with guilt and inconsistent with every reasonable hypothesis of innocence in order to withstand the motion. Such, however, is clearly not the present law in this jurisdiction. The trial court is *not* required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss. *State v. Burton,* 272 N.C. 687, 158 S.E. 2d 883 (1968). Justice Higgins stated the present view in *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1956):

> 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 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.

Id. at 383-84.

We therefore hold that the trial court properly denied defendant's motion to dismiss the charges of first degree murder and first degree rape.

[3] Our holding is otherwise, however, with respect to the motion to dismiss the charge of robbery with a dangerous weapon. To withstand that motion, the State was required to show sub-

stantial evidence of each of the essential elements of that crime. Under G.S. 14-87, an armed robbery is defined as the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm or other deadly weapon with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property. *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928, 98 S.Ct. 414, 54 L.Ed. 2d 288 (1977). The gist of the offense is not the taking but the taking by force or putting in fear. *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399, *appeal dismissed*, 402 U.S. 1006, 91 S.Ct. 2199, 29 L.Ed. 2d 428 (1971). The offense requires use of a dangerous weapon. It suffices to say that, while possession by defendant of the television and automobile belonging to Mrs. Walker gave the inference that defendant took them, and therefore committed the crime of *larceny*, there is no substantial evidence giving rise to the reasonable inference that the defendant took the objects from the victim's presence by use of a dangerous weapon, an essential element of robbery with a dangerous weapon. The arrangement of the victim's body and the physical evidence indicate she was murdered during an act of rape. We believe that even construing the evidence in a light most favorable to the State, it indicates only that defendant took the objects as an afterthought once the victim had died. While it is true that "presence" of a victim must be construed broadly, *State v. Clemmons*, 35 N.C. App. 192, 241 S.E. 2d 116 *disc. rev. denied*, 294 N.C. 737, 244 S.E. 2d 155 (1978), and while it is true that frequently armed robbery, rape and murder are committed in one continuous chain of events and constitute contiguous crimes, we do not believe the evidence here supports that view of the facts. Thus the trial court's denial of the motion to dismiss the charge for robbery with a dangerous weapon is incorrect.

We therefore hold that defendant's conviction and sentence for robbery with a dangerous weapon is

Reversed.

In the proceedings leading to defendant's conviction for first degree murder and first degree rape, we find

No error.

STATE OF NORTH CAROLINA v. LONNIE JONES

No. 76

(Filed 8 January 1980)

1. **Homicide §§ 9.4, 28.4— defense of habitation—use of deadly force**

A person has the right to use deadly force in the defense of his habitation in order to prevent a forcible entry, even if the intruder is not armed with a deadly weapon, where the attempted forcible entry is made under such circumstances that the person reasonably apprehends death or great bodily harm to himself or the occupants of the home at the hands of the assailant or believes that the assailant intends to commit a felony.

2. **Homicide § 28.4— failure to instruct on defense of home—error not cured by instruction on defense of family member**

When there is competent evidence in a case to raise the issue of defense of home, the jury must be instructed on this defense, and error in the court's failure to so charge is not cured by an instruction on defense of a family member.

3. **Homicide §§ 28.4, 28.5— instructions on defense of home and defense of family member**

The trial court in a homicide case was required to instruct the jury both on defense of home and defense of a family member where there was evidence tending to show that deceased stood in the street in front of defendant's home cursing and threatening the occupants thereof; defendant fired three warning shots in an attempt to scare deceased away; deceased ran onto the porch of the home, beat and kicked on the door, tore the lock off the screen door, and broke several panes of glass in the front door; some of the occupants of the home were hiding in closets because they were afraid of deceased; defendant's brother ran up on the porch and struck deceased three times with a shovel in an effort to stop him from trying to enter the home; and when deceased turned toward defendant's brother, defendant shot him three times.

4. **Homicide § 21.9— threatening harm to defendant's relatives—sudden passion—voluntary manslaughter**

The trial court in a homicide case should have instructed the jury on involuntary manslaughter where the jury could have found that deceased provoked defendant by suddenly arousing defendant's passion by threatening injury to defendant's close relatives.

5. **Homicide § 28.3— instructions on excessive force**

Defendant in a homicide case was not entitled to an instruction that an honest but unreasonable belief that it was necessary to kill deceased in defense of a family member should result in a verdict of guilty of voluntary manslaughter where the court correctly instructed the jury that the use of excessive force while acting without malice and in defense of a family member is voluntary manslaughter, since the court's instruction was but another way of stating that one who has an honest but unreasonable belief that it is necessary to kill is guilty of voluntary manslaughter.

ON appeal by defendant from the decision of the Court of Appeals, 41 N.C. App. 465, 255 S.E. 2d 232 (1979) (opinion by *Hedrick, J.* with *Morris, Chief Judge* concurring and *Webb, J.* dissenting), which found no error in defendant's trial before *Brewer, J.* at the 21 August 1978 Session of CUMBERLAND County Superior Court.

Defendant was charged in an indictment, proper in form, with second degree murder in the death of Lonnie Gregory, Jr.

The State's evidence tended to show that late in the evening on 22 October 1977, Van Porter, Ronnie Jones, Joe Thrash and Buddy Dunn were walking down Cude Street in Fayetteville, heading towards the Jones' house located on Center Street. As they passed Richard Hall's house on Cude Street, the deceased yelled derogatory comments at the four young men, threw a beer can at them, and chased them down Cude Street.

The four youths ran up to the Jones' house and ran inside. They informed the occupants of the house, Mrs. Alma Jones (defendant's mother), Carolyn Jones, Johnny Ray Jones, Billy Jean Locklear and the defendant, that there was someone outside trying to start trouble. At this time, the deceased was standing in the road in front of the house cursing and shouting. He had pulled off his jacket and his shirt and had thrown them on the ground, and he dared everyone in the house to come outside and fight him.

The defendant went to a room in the back of the house, got a loaded .22 automatic rifle, walked out the back door and around to the right front side of the house. Everyone else in the house went out on the front porch and Mrs. Jones told deceased to leave and go home because "we don't want no trouble." Deceased yelled a derogatory remark at Mrs. Jones and exchanged remarks with others on the porch. Defendant fired three warning shots. Deceased raised his hands and ran toward the house. All of the people on the porch ran inside and defendant ran around to the other side of the house. The deceased ran up on the porch and started beating and kicking the front door. He tore the lock off the screen door, tore the screen, and broke several panes of glass in the front door.

Ronnie Jones ran up on the porch with a shovel and struck the deceased once on the back of the head and twice on the back. As the deceased turned toward Ronnie Jones, defendant shot him twice in the back and once in the side. Deceased's brother and a friend carried him to the hospital where he died as a result of the three gunshot wounds.

The testimony from different state's witnesses conflicted on whether or not the deceased was armed with a knife. Weldon Whitehead testified for the State that the first shot was fired when everyone was in front of Richard Hall's house and then the chase to the Jones' house occurred. Whitehead also testified that he is the one that beat on the front door of the Jones' house and that he did this after deceased had been shot.

The defendant's evidence tended to show that as the deceased chased the four youths down Cude Street he was threatening to kill them. Deceased also threatened to kill some of the people on the front porch of the Jones' house as he yelled at them from the street. After defendant fired the warning shots, deceased told a friend of his who was nearby "to go get the gun." Defendant testified that before he fired the warning shots, the deceased "had taken about three or four half steps" toward the Jones' house. Defendant said that he fired those shots to "scare him off and keep him from coming up to the house."

When the deceased rushed up on the porch and started beating on the door and breaking out the glass, all of the people on the porch ran inside "like an airplane" and some hid in closets because they were frightened. At that point, defendant thought he saw a knife in deceased's possession. Ronnie Jones ran up on the porch and hit the deceased three times with a shovel. When the deceased turned toward Ronnie Jones defendant shot the deceased three times. He also thought he saw deceased with a knife as he turned toward Ronnie Jones.

Defendant testified that he shot the deceased "because he turned on my brother" and that, "I shot him because he said he was going to hurt somebody and he had turned towards my brother at that time." Defendant further testified that he "wasn't just determined to shoot somebody." He said he thought the deceased "was trying to get in on my mom and my sisters and my brothers, to hurt them or somebody" and that he "didn't know

who he [the deceased] was going to kill either, if he got ahold of them."

The trial judge charged the jury on second degree murder, defense of a family member, voluntary manslaughter by reason of the use of excessive force during the exercise of the right of defense of a family member and voluntary manslaughter by reason of the defendant being the aggressor in bringing on the affray.

After some deliberation, the jury returned to the courtroom and asked to be instructed again on the definition of second degree murder, malice and voluntary manslaughter. After further deliberations, the jury returned with a verdict of second degree murder.

Defendant was sixteen years of age at the time he shot and killed the deceased. He was sentenced to a term of imprisonment of fifty years as a regular youth offender. The trial judge recommended a minimum term of imprisonment of not less than ten years. The trial judge also found as a fact that the defendant would not benefit from treatment and supervision as a committed youthful offender.

The Court of Appeals found no error in defendant's trial with Webb, J. dissenting. Defendant appealed to this Court pursuant to G.S. 7A-30(2).

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

Assistant Public Defenders James R. Parish and Tye Hunter for the defendant.

Attorney General Rufus L. Edmisten by Associate Attorney Fred R. Gamin for the State.

COPELAND, Justice.

By his third assignment of error, defendant contends that the trial judge erred in refusing to charge the jury on his right to defend his home from an attempted forceful entry by the deceased. By his fifth assignment of error, defendant contends that the trial judge erred in refusing to instruct the jury on voluntary

manslaughter by reason of a killing committed in the heat of passion. We agree with defendant on both of these arguments; therefore, he must be awarded a new trial.

[1] A person has the right to use deadly force in the defense of his habitation in order to prevent a forcible entry, even if the intruder is not armed with a deadly weapon, where the attempted forcible entry is made under such circumstances that the person reasonably apprehends death or great bodily harm to himself or the occupants of the home at the hands of the assailant or believes that the assailant intends to commit a felony. *State v. McCombs*, 297 N.C. 151, 253 S.E. 2d 906 (1979); *State v. Baker*, 222 N.C. 428, 23 S.E. 2d 340 (1942); *State v. Gray*, 162 N.C. 608, 77 S.E. 833 (1913). The occupant may use deadly force when it is actually or apparently necessary to do so, and the jury is the judge of the reasonableness of the defendant's apprehension. *State v. Miller*, 267 N.C. 409, 148 S.E. 2d 279 (1966).

The defendant has the burden of going forward to produce evidence that he acted in defense of home, or rely on such evidence as may be present in the State's case to raise this defense. At all times, the burden of proof is on the State to prove that the defendant acted unlawfully and with malice which includes proving beyond a reasonable doubt that the defendant did not act in lawful defense of home when defendant has met his burden of going forward to produce evidence that he did. *See, State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977).

[2] Thus, when there is competent evidence in the case to raise the issue of defense of home, the jury must be instructed on this defense and the fact that the jury was instructed on defense of a family member does not cure the error. *See, State v. Miller, supra*; *see, State v. Spruill*, 225 N.C. 356, 34 S.E. 2d 142 (1945). The trial judge must declare and explain the law arising on the evidence. G.S. 15A-1232.

Here, defendant requested that the trial judge instruct on defense of home; however, since this defense is a substantial and essential feature of the case, the trial judge must instruct on this defense when it is raised by the evidence even in the absence of any request by the defendant for special instructions. *State v. Miller, supra*; *State v. Spruill, supra.*

[3] The Court of Appeals held that defendant was entitled to an instruction on defense of a family member but not defense of home because the deceased had stopped beating on the front door of the house and had turned toward defendant's brother when deceased was shot. The defendant testified, "I fired the shots because he turned on my brother . . . I shot him because he said he was going to hurt somebody and he had turned towards my brother at that time." We agree that this evidence raises the issue of defense of a family member and it was correct for the trial judge to instruct the jury on this defense. However, we disagree with the Court of Appeals' conclusion that this evidence makes the evidence of defense of home insufficient. We agree with the dissenting opinion by Webb, J. that there is competent evidence in the record raising the issue of defense of home so that it should also have been included in the jury charge.

The deceased took off his jacket and shirt and stood in the street yelling at and threatening the occupants of the house. After the defendant fired three warning shots, the deceased ran toward the house and up on the front porch. Before turning toward defendant's brother, deceased had been beating on the front door; he had torn the lock off the screen door; he had torn the screen; and he had broken several panes of glass from the front door. Many of the occupants of the house were hiding in closets because they were afraid of the deceased. He had turned momentarily toward defendant's brother because the brother had struck the deceased three times with a shovel *in an effort to stop him from trying to enter the house.* Defendant testified that he thought the deceased "was trying to get in on my mom and my sisters and my brothers, to hurt them or somebody" and that he "didn't know what he [the deceased] was going to do, didn't know who he was going to kill either, if he got ahold of them."

There is abundant evidence in the record raising the issue of defense of home. There is also evidence to raise the issue of defense of a family member. The evidence to support the latter does not render the evidence of the former insufficient. The jury must be instructed on both defenses because both are supported by competent evidence. *State v. McCombs, supra; State v. Spruill, supra.*

Second degree murder is the unlawful killing of a human being with malice and without premeditation and deliberation. *State v. Poole*, 298 N.C. 254, 258 S.E. 2d 339 (1979); *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963).

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Cousins*, 289 N.C. 540, 223 S.E. 2d 338 (1976).

When there is evidence of all the elements of heat of passion on sudden provocation (which negates malice) then in order to prove the existence of malice the State must prove the absence of heat of passion beyond a reasonable doubt. *State v. Hankerson, supra.*

Killing in the heat of passion on sudden provocation means killing,

> "without premeditation but under the influence of sudden 'passion,' this term means any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection." *State v. Jennings*, 276 N.C. 157, 161, 171 S.E. 2d 447, 449-50 (1970), *quoting* Black's Law Dictionary (4th ed. 1951), p. 1281.

If upon considering all the evidence, including the inferences and the evidence of heat of passion, the jury is left with a reasonable doubt as to the existence of malice it must find the defendant not guilty of murder in the second degree and should then consider whether he is guilty of voluntary manslaughter. *State v. Hankerson, supra.*

Voluntary manslaughter is a lesser included offense of murder. 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. Poole, supra*; *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. Poole, supra*; *State v. Duboise, supra.*

[4] Here, it is reasonable to infer from the evidence that the deceased provoked the defendant by suddenly arousing defendant's passion by threatening injury to defendant's close relatives. *State v. Edmundson*, 209 N.C. 716, 184 S.E. 504 (1936) (sudden passion aroused by assault on defendant's brother); LaFave & Scott, *Criminal Law* § 76, p. 577 (1972) and cases cited therein.

The deceased had been beating on the front door of the house and had damaged the screen door and broken the glass panes. The house was occupied by close relatives of the defendant. Defendant testified,

> "When I shot Lonnie Gregory, Jr., I was frightened, scared. I shot him because he said he was going to hurt somebody and he had turned towards my brother at that time.
>
> . . . When he was on the porch beating on the door I saw what I thought was a pocket knife in his right hand. He was beating on the door with his right hand but the blade was sticking out—the blade was not hitting the door. After Ronnie hit him with the shovel he turned and I thought I saw the knife again. I thought Lonnie Jr. Gregory was trying to get in on my mom and my sisters and my brothers, to hurt them or somebody.
>
> . . .
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> . . .
>
> . . . Approximately when he rushed up on the porch, he was going to do something. I don't know, nobody else knowed. I didn't know what he was going to do, didn't know who he was going to kill either, if he got ahold of them."

The above evidence would support a conviction of voluntary manslaughter; therefore, it was prejudicial error for the trial judge to refuse to instruct on this offense. *State v. Edmundson, supra*; *cf., State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971) (no evidence of voluntary manslaughter); 6 Strong's N.C. Index 3d, *Homicide* § 27.1 and cases cited therein. Prejudicial error in the jury charge requires a new trial. *State v. Cousins, supra.*

We agree with the Court of Appeals that there is no evidence in this case that defendant shot and killed the deceased in self-defense. A person may kill another when he is free from fault in bringing on the affray and it is necessary, or reasonably appears to be necessary, to kill in order to protect himself from death or great bodily harm. *State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979). There is no evidence in this record that defendant acted out of a reasonable belief that it was necessary for him to kill in order to save *himself* from death or great bodily harm.

We shall discuss the remaining assignment of error that defendant brought forward and argued in his brief since it is likely to recur upon the retrial of this case.

[5] By his seventh assignment of error, defendant contends that the trial judge erred in failing to instruct the jury that an honest but unreasonable belief that it was necessary to kill the deceased should result in a verdict of guilty of voluntary manslaughter. Defendant relies upon this Court's decision in *State v. Thomas*, 184 N.C. 757, 114 S.E. 834 (1922), in support of this assignment. In *Thomas* it was held that an honest but unreasonable belief in the necessity to kill in self-defense would rebut a presumption of malice and support a verdict of guilty of voluntary manslaughter.

It is the law in this State that a person may kill when it is actually or apparently necessary to do so in order to avoid death or great bodily harm. *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979); *State v. Spaulding, supra*; *State v. Clay*, 297 N.C. 555, 256 S.E. 2d 176 (1979); *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); *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. Herbin, supra*; *State v. Spaulding, supra*; *State v. Clay, supra*; *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); *State v. Ellerbe*, 223 N.C. 770, 28 S.E. 2d 519 (1944).

These principles relate equally to self-defense, *State v. Spaulding, supra*, defense of a family member, *State v. Fowler, supra*, and defense of home (with the additional right in defense of home to use deadly force to prevent a forcible entry when

defendant reasonably apprehends death, great bodily harm, *or that the intruder will commit a felony*). *State v. McCombs, supra*; *State v. Miller, supra*. Use of excessive force while acting without malice and while otherwise acting in defense of a family member or in defense of home is voluntary manslaughter. *See, State v. Fowler, supra*; 6 Strong's N.C. Index 3d, *Homicide* § 28.3 and cases cited therein.

A defendant who honestly believes that he must use deadly force to repel an attack but whose belief is found by the jury to be unreasonable under the surrounding facts and circumstances, has, by definition, used excessive force. This rule was made clear in *State v. Clay, supra*, where Justice (now Chief Justice Branch) wrote:

> "[W]here the assault being made upon defendant is insufficient to give rise to a reasonable apprehension of death or great bodily harm, then the use of deadly force by defendant to protect himself from bodily injury or offensive physical contact is excessive force as a matter of law." *State v. Clay, supra* at 563, 256 S.E. 2d at 182; *see also*, LaFave & Scott, *Criminal Law* § 53, pp. 392-94, § 77, pp. 583-84 (1972).

Thus, for all practical purposes, to state that one who, while acting in defense of a family member or in defense of home uses excessive force is guilty of voluntary manslaughter is but another way of stating that one who has an honest but unreasonable belief that it is necessary or apparently necessary to kill is guilty of voluntary manslaughter. Since *State v. Thomas, supra*, we have not spoken of this rule of law in terms of an "honest but unreasonable belief that it is necessary or apparently necessary to kill." Instead, we have stated that use of excessive force while acting without malice and in defense of a family member or in defense of home is voluntary manslaughter. Here, the trial judge instructed with respect to the use of excessive force while acting in defense of a family member that,

> "If the State proves beyond a reasonable doubt that the defendant, though otherwise acting in lawful defense of a family member, used excessive force or was the aggressor, though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary manslaughter.

. . .

Now, if you find from the evidence beyond a reasonable doubt that on or about the 23rd day of October, 1977, Lonnie Jones intentionally and without justification or excuse shot Lonnie Gregory, Jr. with a .22 caliber rifle thereby proximately causing Lonnie Gregory, Jr.'s death, but the State has failed to satisfy you beyond a reasonable doubt that the defendant acted with malice because it has failed to satisfy you beyond a reasonable doubt that Lonnie Jones did not act in defense of family member, but the State has proved beyond a reasonable doubt that Lonnie Jones used excessive force in his defense of a family member or was the aggressor, it would be your duty to return a verdict of guilty of voluntary manslaughter."

The above instructions are an accurate statement of the law. This assignment of error is overruled.

For failure by the trial judge to charge on defense of home and voluntary manslaughter by reason of a killing in the heat of passion, defendant is entitled to a new trial. Defendant is entitled to an instruction on voluntary manslaughter due to the use of excessive force while otherwise acting in defense of a family member and in defense of home or due to defendant's being the aggressor. He is not entitled to an instruction on self-defense or voluntary manslaughter due to an honest but unreasonable belief in the necessity (real or apparent) to kill.

New trial.

STATE OF NORTH CAROLINA v. HENRY JAMES BUMGARNER

No. 82

(Filed 8 January 1980)

Criminal Law §§ 87, 99— court's erroneous statement that calling witness would be unethical—witness not called—absence of prejudice

Defendant was not entitled to a new trial because his attorney refrained from calling a witness who he knew would plead the Fifth Amendment after the trial court erroneously stated that it would be unethical for defendant's at-

torney to call such a witness where the court's subsequent statements made it clear that defendant was free to call the witness to testify for him; furthermore, defendant was not prejudiced by the court's statement where the State called the witness on rebuttal, defense counsel had full opportunity to present the witness's testimony on cross-examination and the witness's testimony supported defendant's version of the incident in question.

DEFENDANT was charged in an indictment, proper in form, with the second degree murder of one Johnny Sterling ("Red Dog") Smith on 23 January 1978. At trial before *Judge Brannon* at the 10 July 1978 Criminal-Civil Term of CATAWBA County Superior Court, State's evidence tended to show that on the night in question, defendant and two friends, Michael Wayne Cornell and James Dean McGinnis, went drinking at the "Klub," a bar and poolroom in Catawba County. As they were leaving the establishment at closing time, they attempted to strike up a conversation with two women who were parked in a car in the parking lot. The women, unwilling, drove off down the parking lot and stopped decedent in his car, requesting his assistance. In the meantime, defendant and his two friends had walked up to the two cars. Decedent Red Dog stepped out of his car and defendant immediately shot him three times, killing him.

Defendant's evidence, which included his own testimony, tended to show that he and his friends had left the bar and were walking toward their car when decedent Red Dog, a motorcycle gang member with a reputation for violence, opened his car door, striking defendant and knocking him off balance. Defendant then saw decedent advancing on him with something "shining" in his hand, and fired his own gun in fear.

Before testifying himself, defendant attempted to call one of the two friends, James Dean McGinnis, as an eyewitness but withdrew this witness when the trial court questioned the propriety of calling him.

The jury returned a verdict of guilty of second degree murder. Defendant was sentenced to a term of not less than 15 nor more than 25 years in prison. Defendant appealed to the Court of Appeals which granted a new trial. 42 N.C. App. 71, 255 S.E. 2d 663 (1979). The Attorney General petitioned this Court for discretionary review pursuant to G.S. 7A-31 and we allowed the motion on 20 July 1979.

Attorney General Rufus L. Edmisten by Assistant Attorney General Amos C. Dawson III for the State.

J. Michael Gaither for defendant.

CARLTON, Justice.

The Court of Appeals ordered a new trial on the sole ground that "it appears defendant was prevented from calling as a witness an eyewitness to the alleged crime because of an erroneous interpretation of the law by the presiding judge." The Court of Appeals reached its conclusion after reviewing a colloquy which took place between the trial court, counsel for the defendant, counsel for an eyewitness to the crime, and the assistant district attorney. The record discloses that when defendant's attorney stated to the trial court that he would call the eyewitness James Dean McGinnis as a witness for the defendant, McGinnis' attorney advised the court that his client would refuse to answer certain questions on fifth amendment grounds. During the ensuing colloquy, the trial court inquired whether his understanding was correct that the rules of ethics preclude an attorney from calling a witness when he knows the witness will take the fifth. The Canon of Ethics does not forbid this practice. The Court of Appeals, held, in essence, that this comment by the trial court was intimidating to counsel for defendant, was an erroneous interpretation of the law, and therefore entitled defendant to a new trial.

We do not think the Court of Appeals has properly interpreted the colloquy. Only a portion of that colloquy is printed in its opinion, but full reading of the exchange indicates that on at least five occasions during the colloquy, the trial court stated to defense counsel that he could call the witness if he desired to do so. At one point the trial court even said, "Now if you want to call this person you may do so." Moreover, the State did not object to the calling of the witness at any time. While the trial court was obviously confused about the Canon of Ethics, we think his subsequent statements made it clear that defendant was free to call this witness to testify for him. Where the court corrects an error or inadvertence, the error is ordinarily cured. *Cf. State v. Culp*, 5 N.C. App. 625, 169 S.E. 2d 10 (1969). (Court immediately corrected inadvertent reading of part of indictment in charge to

jury.) *See also State v. Withers*, 271 N.C. 364, 156 S.E. 2d 733 (1967).

Moreover, to warrant a new trial, defendant must show the ruling complained of was material and prejudicial to his right, *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971), and that a different result would likely have ensued, *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487 (1970), *death sentence vacated*, 403 U.S. 948, 91 S.Ct. 2290, 29 L.Ed. 2d 860 (1971); *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1968). Even if there were any conceivable error in the trial court's statement to counsel, it was subsequently rendered nonprejudicial when the State called the same witness McGinnis on rebuttal. At that time, defense counsel had full opportunity to present this witness's testimony on cross-examination, and the record reveals the witness told a story that supported defendant's version of the facts.

Defendant contends that the manner, tone, inflection and attitude of the trial court during this exchange were such that no subsequent statements by him could relieve the intimidation felt by his counsel so that he would be free to call the desired witness. On oral argument, defense counsel noted that this was his first experience in the trial court. The record discloses, and defense counsel concedes, however, that at the time of this exchange defense counsel was being assisted by another member of the Catawba County Bar whom he had associated because of his relative inexperience. Defense counsel argues that even the most experienced trial lawyer would have been intimidated by this trial court's behavior. Suffice it to say that the record before us does not disclose any prejudicial behavior on the part of this trial judge nor any intimidation by him of counsel for defendant. We agree with defendant that the cold record before an appellate court does not reveal the "tone" and "inflection" of trial participants. The only answer is that we give the most careful review to the record before us to ensure that no prejudicial error has occurred. We do not believe that the trial court erred in this instance and reverse the Court of Appeals.

In light of our holding above, it is necessary that we address the defendant's remaining assignments of error presented to the Court of Appeals. Prior to trial, defendant moved that the State's witnesses be sequestered on the grounds that it was necessary so

the jury could accurately gauge the veracity of these witnesses. The trial court denied the motion on the grounds that no notice had been given, that there was no reason appearing from the statement of counsel to sequester, and that the number of witnesses involved was too great for the limited area in the courthouse. The sequestration of witnesses is a matter of discretion within the trial judge and his ruling thereon is not reviewable absent a showing of abuse of that discretion. *State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976); Stansbury, North Carolina Evidence § 20 (Brandis rev. ed. 1973). Here, defendant has failed to show any prejudice by denial of the motion and we find no abuse of the trial court's discretion.

Finally, defendant contends that the trial court erred in denying his motions for directed verdict of not guilty and his motion for a mistrial. Defendant cites no authority in support of these contentions but requests this Court to review the record to determine the propriety of the trial court's action.

A motion for a mistrial in a case such as this one is addressed to the trial court's sound discretion, and his ruling thereon is not reviewable without a showing of gross abuse. *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977); *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). A motion for a directed verdict of not guilty challenges the sufficiency of the evidence to justify submission to the jury. *State v. Wilson*, 296 N.C. 298, 250 S.E. 2d 621 (1979); *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967); *State v. Wiley*, 242 N.C. 114, 86 S.E. 2d 913 (1955); *State v. Woodlief*, 2 N.C. App. 495, 163 S.E. 2d 407 (1968). Upon such a challenge, all the evidence admitted must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. *See State v. Wilson, supra; State v. Glover, supra; State v. Woodlief, supra.*

Suffice it to say that we have reviewed the entire record before us and find no error in the trial court's rulings on these motions. The evidence of defendant's guilt was certainly sufficient to permit the case to be submitted to the jury and defendant has failed to show any abuse of the trial court's discretion in denying the motion for mistrial.

Defendant had a fair trial, free from prejudicial error. The decision of the Court of Appeals is reversed and this case is remanded to that court with the instructions that it remand to the Superior Court of Catawba County for reinstatement of the trial court's judgment.

Reversed and remanded.

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

ANDERSON v. GOODING

No. 123 PC.

Case below: 43 N.C. App. 611.

Petition by plaintiff for discretionary review under G.S. 7A-31 dismissed 18 December 1979 without prejudice to plaintiff to present any question which he properly presented for review to the Court of Appeals pursuant to Rule 16(a).

ASHE v. ASSOCIATES, INC.

No. 108 PC.

Case below: 43 N.C. App. 319.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 8 January 1980.

BANK v. BAKER

No. 104 PC.

Case below: 43 N.C. App. 388.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

BELL v. MARTIN

No. 99 PC.

No. 62 (Spring Term).

Case below: 43 N.C. App. 134.

Petitions by plaintiff and defendant for discretionary review under G.S. 7A-31 allowed 8 January 1980.

BETHEA v. BETHEA

No. 118 PC.

Case below: 43 N.C. App. 372.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

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

BOWES v. BOWES

No. 121 PC.

Case below: 43 N.C. App. 586.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

BROUGHTON v. DuMONT

No. 151 PC.

Case below: 43 N.C. App. 512.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 January 1980. Motion of defendant to dismiss appeal for failure to comply with Rules of Appellate Procedure allowed 8 January 1980.

COMPLEX, INC. v. FURST and FURST v. CAMILCO, INC. and CAMILCO, INC. v. FURST

No. 96 PC.

Case below: 43 N.C. App. 95.

Petition by Furst and the Mezzanottes for discretionary review under G.S. 7A-31 denied 8 January 1980.

HAGA v. CHILDRESS

No. 119 PC.

Case below: 43 N.C. App. 302.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 January 1980.

IN RE LASSITER

No. 144 PC.

Case below: 43 N.C. App. 525.

Petition for discretionary review under G.S. 7A-31 denied and appeal dismissed 8 January 1980.

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

IN RE NORWOOD and IN RE HAIGLER

No. 103 PC.

Case below: 43 N.C. App. 356.

Petition by Norwood for discretionary review under G.S. 7A-31 denied 8 January 1980.

IN RE SIMMONS

No. 97 PC.

Case below: 43 N.C. App. 123.

Petition by caveators for discretionary review under G.S. 7A-31 denied 8 January 1980.

JAMES v. HUNT

No. 89 PC.

Case below: 43 N.C. App. 109.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 January 1980.

KARRIKER v. SIGMON

No. 88 PC.

Case below: 43 N.C. App. 224.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

MAINES v. CITY OF GREENSBORO

No. 44.

Case below: 43 N.C. App. 553.

Motion of defendant to dismiss appeal for lack of substantial constitutional question denied 8 January 1980.

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

PAGITT v. PAGITT

No. 117 PC.

Case below: 43 N.C. App. 619.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

SMITH v. SMITH

No. 101 PC.

Case below: 43 N.C. App. 338.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 January 1980.

SNYDER v. FREEMAN

Nos. 280 PC and 123 (Fall Term).

No. 26 (Spring Term).

Case below: 40 N.C. App. 348.

Motion of defendant to dismiss appeal for failure to comply with Rules 41(d)(1) and 15(g)(2) denied 8 January 1980.

STATE v. BARBOUR

No. 76 PC.

Case below: 43 N.C. App. 38.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

STATE v. BLACKMON

No. 164 PC.

Case below: 44 N.C. App. 190.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

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

STATE v. BROWN

No. 49 PC.

No. 61 (Spring Term).

Case below: 42 N.C. App. 724.

Petition by defendants for discretionary review under G.S. 7A-31 denied 8 January 1980. Petition by defendants for writ of certiorari to the North Carolina Court of Appeals allowed 8 January 1980.

STATE v. COLLINS

No. 48.

Case below: 44 N.C. App. 141.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 8 January 1980.

STATE v. HENDRICKS

No. 107 PC.

Case below: 43 N.C. App. 245.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

STATE v. McLAWHORN

No. 138 PC.

Case below: 43 N.C. App. 695.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

STATE v. McMILLIAN

No. 120 PC.

Case below: 43 N.C. App. 520.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 8 January 1980.

STATE v. PREVETTE

No. 128 PC.

Case below: 43 N.C. App. 450.

Petition by defendants for discretionary review under G.S. 7A-31 denied 8 January 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 January 1980.

STATE v. STEPHENSON

No. 115 PC.

Case below: 43 N.C. App. 323.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

STATE v. STUMP

No. 155 PC.

Case below: 43 N.C. App. 754.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

UTILITIES COMM. v. FARMERS CHEMICAL ASSOC.

No. 53 PC.

Case below: 42 N.C. App. 606.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

WELLS v. INSURANCE CO.

No. 109 PC.

Case below: 43 N.C. App. 328.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1980.

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

WOOD v. CITY OF FAYETTEVILLE

No. 141 PC.

Case below: 43 N.C. App. 410.

Petitions by defendants for discretionary review under G.S. 7A-31 denied 8 January 1980. Plaintiffs' motion to dismiss appeal for lack of substantial constitutional question allowed 8 January 1980.

STATE OF NORTH CAROLINA v. BERNARD AVERY

No. 34

(Filed 1 February 1980)

1. **Constitutional Law § 60; Grand Jury § 3.3; Jury § 7.4— use of voter registration and tax lists—random selection by computer—no systematic exclusion of blacks—cross-section of community**

There was no systematic exclusion of blacks from the grand and petit juries in violation of the Equal Protection Clause of the Fourteenth Amendment where blacks constituted 24% of the population of the county, the use of voter registration and tax lists in selecting the jury pool resulted in a jury pool with 15% blacks, and a computer randomly selected every 2nd, 4th, 8th, 12th and 15th name from the master jury list, since there was only a 9% deviation between the percentage of blacks in the county and the percentage of blacks in the jury pool, and there was no subjective or discretionary selection of jurors by the jury commissioners. Nor did selection of the jury pool in such manner violate defendant's right to be tried by a jury drawn from a representative cross-section of the community as guaranteed by the Sixth Amendment and applied to the states through the Fourteenth Amendment.

2. **Constitutional Law § 63; Jury § 7.11— exclusion of jurors for capital punishment views—answers not equivocal**

The trial court did not err in allowing the State's challenge for cause of two prospective jurors who answered "I don't believe I would" and "I don't think so" when asked whether they could comply with the court's instructions and impose the death penalty if the evidence so required, since the phrasing of the jurors' negative responses did not equivocate their refusal to follow the law as given by the court to such an extent as to make their challenge for cause improper.

3. **Constitutional Law § 63; Jury § 7.11— exclusion of jurors for capital punishment views—cross-section of community**

Defendant was not deprived of a jury composed of a fair cross-section of the community by the exclusion of jurors who indicated that they could not impose the death penalty under any circumstances, there being no evidence that a jury qualified pursuant to the *Witherspoon* decision is prosecution prone or biased against Negroes and the lower economic classes.

4. **Criminal Law § 46.1— instruction on flight—supporting evidence**

The trial court's instruction on flight in a murder prosecution was supported by evidence that defendant admitted to two witnesses that he killed a cab driver and that defendant went to New York a few days after the crime, and the fact that defendant was originally from New York and the inference could be drawn that he was returning home did not render the instruction on flight improper.

Justice EXUM dissenting.

State v. Avery

APPEAL by defendant from *Snepp, J.* Judgment entered 7 December 1978 in Superior Court, MECKLENBURG County.

By indictments proper in form defendant was charged with first degree murder and with robbery with a dangerous weapon. On pleas of not guilty the jury found the defendant guilty of first degree murder and of robbery with a dangerous weapon.

After the verdicts were returned the trial court ruled that the armed robbery conviction merged with the first degree murder conviction.

Thereafter the question of whether defendant should be sentenced to death or to life imprisonment was submitted to the jury. Upon the jury being unable to agree upon a sentence recommendation within a reasonable time the trial judge, pursuant to G.S. 15A-2000(b), sentenced defendant to the State's prison for a minimum and maximum term of life.

The evidence for the State tended to show the following. On the evening of September 4, 1977 the defendant and Andre Sharpe went to the home of the defendant's cousin Rick Fuller. From Fuller they obtained a .22 caliber pistol and bullets. At about 11:00 p.m. that evening the defendant and Sharpe visited the home of Ella Currance. At the Currance residence the defendant engaged in an argument where he fired three to five shells from the .22 pistol into the ceiling. Following this altercation Sharpe and defendant Avery left the Currance's home and drove in Sharpe's car towards the Charlotte airport. Near the airport the defendant got out of Sharpe's car for the purpose of stealing an automobile but for an unknown reason he did not do so.

Sometime between 4:30 and 5:00 a.m. on the morning of September 5, 1977, Sharpe and Avery returned to the home of Ella Currance. There the defendant placed a call to Checker Cab Company and the dispatcher of the cab company dispatched Robert L. Moses in answer to the call. After phoning for the cab the defendant and Sharpe left the Currance's home. Having driven approximately two blocks, Sharpe pulled off the road, parked in a man's front yard and went to sleep. Sharpe was awakened by the sound of a pistol shot and when he woke up he found the defendant was not in the car. Sharpe drove towards the sound of the shot and arrived as the defendant was pulling

Robert Moses onto the ground from the driver's seat of a Checker Cab. Sharpe pulled up next to the cab and told the defendant "let's go." The defendant got into the car holding the .22 caliber pistol, a light blue jacket he had not had before and other articles of clothing.

The State's evidence further tended to show that Robert Moses was shot to death in the back of the neck and head by bullets from a .22 caliber pistol which could have been fired from the .22 caliber pistol which was in the possession of the defendant.

After leaving the cab the defendant and Sharpe went to a house on Marene Avenue in Charlotte where the defendant told Sharpe that he twice shot the driver Robert L. Moses. The defendant had a wallet containing Moses' driver's license and approximately $200 in cash.

On September 7, 1977 the defendant told John Lee Stewart, a friend of Sharpe's, that he had shot the cab driver in the head and neck. On September 7, 1977 the defendant and Sharpe left Charlotte for New York City.

Attorney General Edmisten by Assistant Attorney General Charles M. Hensey for the State.

Chambers, Stein, Ferguson & Becton by James C. Fuller, Jr., for the defendant-appellant.

BROCK, Justice.

In his first argument to this Court defendant-appellant contends that the trial court denied him his Fourteenth and Sixth Amendment rights in failing to quash an allegedly discriminatory jury venire. Defendant contends that he made a prima facie showing of constitutional violations and thus the burden shifted to the State to rebut his prima facie case. For the reasons which follow we hold the defendant did not make such a showing.

[1] The defendant brings forward an equal protection argument as well as an argument that he was denied a jury from a fair cross-section of the community. Defendant interchangeably cites numerous United States Supreme Court opinions as supporting both these contentions. In *Whitus v. Georgia*, 385 U.S. 545, 550,

17 L.Ed. 2d 599, 603, 87 S.Ct. 643, 646 (1967) in describing the defendant's claim of racial discrimination in violation of the Fourteenth Amendment the United States Supreme Court stated "[t]here is no question as to the constitutional principle. '[. . . [A] conviction cannot stand if it is based on a grand jury or a verdict of a petit jury from which Negroes were excluded by reason of their race.' 385 U.S. at 549, 17 L.Ed. 2d at 603, 87 S.Ct. at 646.] [T]he question involved is its application to the facts disclosed in this record."

The pertinent facts relating to the racial makeup of Mecklenburg County and the county's jury selection process follow. As prescribed by G.S. 9-2 the jury commissioners of Mecklenburg County used the tax list and voter registration list in compiling a master jury list. This raw list of 160,716 of which over 150,000 came from the voter registration list was fed into the computer of the Mecklenburg County data processing department which randomly selected every 2nd, 4th, 8th, 12th and 15th name. This selection produced a final list containing 53,572 names. A card was then punched by the computer for each name and these cards were alphabetized and locked in a file kept in the custody of the Mecklenburg County Register of Deeds. In his argument to this Court defendant-appellant is not questioning the validity of the selection system per se. This argument was raised earlier in *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972) and this Court found that a jury list was not discriminatory nor unlawful simply because it was drawn from the tax list of the county. It is the racial composition of the list employed of which the defendant is complaining. In 1978 the total population of Mecklenburg County was 400,000 and of this total figure 24% were blacks. Defendant contends use of the tax lists and voter registration lists in selecting the jury pool fails to adequately represent Mecklenburg County's black population. In 1978 there were 240,000 persons possibly eligible to vote in Mecklenburg County, of these 184,293 persons were actually registered to vote. This figure of 184,293 may be broken down into 156,036 white voters and 28,257 black voters. In other words, 15% of the registered voters in Mecklenburg County were blacks. The evidence presented at the voir dire on defendant's motion to quash the jury pool showed that there was no attempt to discourage blacks from voting, and that voter registration was easily available. However when presented with

the opportunity 84% of the white population registered to vote while only 51% of the black population registered. The defendant offered evidence which tended to show the jury commissioners knew the percentage of black voters was lower than white voters. The defendant complains that the percentage of blacks on the tax list is even lower than the voter registration list but agrees that 15% black in the jury pool is a workable figure. Thus the statistics presented by the defendant show Mecklenburg County with a population of 24% black and a jury pool with a composition of 15% black. This creates a 9% deviation between the percentage of blacks in Mecklenburg County and the percentage of blacks in the jury pool. It is on these facts that we must determine the validity of defendant's claims of constitutional violation.

We turn first to defendant's Fourteenth Amendment right to be free from racial discrimination. *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879) held that Negroes were an identifiable class, and as noted earlier if the defendant was convicted by a jury from which Negroes were systematically excluded on account of their race then his conviction cannot stand. *Whitus v. Georgia, supra*; *State v. Ray*, 274 N.C. 556, 164 S.E. 2d 457 (1968); *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970). The defendant however is not entitled to a jury of any particular composition, nor is there any requirement that the jury actually chosen must mirror the community and reflect various and distinctive population groups. *Fay v. New York*, 332 U.S. 261, 91 L.Ed. 2043, 67 S.Ct. 1613 (1947); *Apodaca v. Oregon*, 406 U.S. 404, 32 L.Ed. 2d 184, 92 S.Ct. 1628 (1972). At the outset it must be noted that:

> ". . . [T]he fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the [equal protection] Clause. 'A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race, or by unequal application of the law to such an extent as to show intentional discrimination.' (Citations omitted.) *Washington v. Davis*, 426 U.S. 229, 239, 48 L.Ed. 2d 597, 607, 96 S.Ct. 2040, 2047 (1976). *See also Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824 (1965); *Duren v. Missouri*, 439 U.S. 357, 364, 58 L.Ed. 2d 579, 589, 99 S.Ct. 664, 668, n. 26 (1979); *Castaneda v. Partida*, 430 U.S. 482, 509-10,

51 L.Ed. 2d 498, 520, 97 S.Ct. 1272, 1288 (1977) (Powell, J.; dissenting)."

The evidence offered by the defendant in this case fails to show a discriminatory purpose on the part of the Mecklenburg County jury commission. In fact, the voir dire testimony tended to show exactly the opposite. Charles Williams, a jury commissioner, stated that the commission gave more weight to the voter list for it presented a fairer cross-section of the community. Presentation of this evidence which showed an attempt by the jury commission not to discriminate along with a showing that the jury commissioners followed the guidelines of G.S. 9-2 does not make a prima facie showing of purposeful systematic exclusion in violation of the Fourteenth Amendment.

Defendant relies on cases where the United States Supreme Court found an identifiable group was the subject of systematic exclusion. All of these cases are distinguishable from the case at bar; first, due to a much greater statistical deviation between the total population of the identifiable group and its membership in the jury venire, and secondly, because in cases relied on by the defendant, the jury selection system was one of personal preference or subjective selection on the part of the commissioners, and therefore subject to much greater abuse.

The case of *Castaneda v. Partida, supra,* concerns systematic exclusion of Mexican Americans in Hidalgo County, Texas. Hidalgo County contained a Mexican American population totaling 79.1%, yet the percentage of Mexican American grand jurors was only 39%, creating a 40% disparity between actual population and jury service. In selecting its juries the Hidalgo County jury commission utilized what was known as "the key man" system. This selection process allowed the jury commissioners to select individuals whom they personally felt were moral and forthright, and would make good jurors. As Mr. Justice Marshall pointed out in his concurring opinion, the selection system was entirely discretionary with Spanish surnamed persons being easily identifiable and thus excludable. By showing such a large numerical disparity of 40% and a totally subjective selection procedure, the defendant made out a prima facie case for selective exclusion requiring the State to rebut the showing.

The two other cases principally relied on by the defendant in advancing his Fourteenth Amendment claim are *Whitus v. Georgia, supra,* and *Turner v. Fouche,* 396 U.S. 346, 24 L.Ed. 2d 567, 90 S.Ct. 532 (1970). *Turner* was a class action brought by a Negro school child and her father. The case arose in Taliaferro County, Georgia which has a population composed 60% of Negroes. The statistics from Taliaferro County showed that while Negroes composed 60% of the general population, they composed only 37% of the list from which the grand jury was drawn. This created a disparity in the jury pool of 23%. Coupled with this high percentage of disparity was the totally subjective method in which jurors were selected. Potential jurors were placed into the jury pool "whenever a jury commissioner thought a voter . . . qualified as a potentially good juror." 396 U.S. at 350, 24 L.Ed. 2d at 573, 90 S.Ct. at 535. No name was selected for the jury pool unless personally known to one of the jury commissioners as "upright or intelligent." In *Turner* the United States Supreme Court noted a background of racial discrimination, and based upon this background, statistical evidence of a 23% disparity between total population and percentage in the jury pool, and a selection system grossly susceptible to abuse, the court found that the defendant had made a prima facie showing of systematic exclusion. In the case at bar the defendant presents no evidence comparable to that presented to the United States Supreme Court in *Turner.*

In *Whitus v. Georgia, supra,* the same jury selection procedure was employed with selection being based on the jury commissioner's subjective determination that the potential juror was "upright and intelligent." Georgia law prescribed that the names of prospective jurors were to be chosen from the books of the county's tax receiver. Prior to 1965 the tax returns for whites were kept on white paper while the tax returns for Negroes were recorded on yellow paper. The statistics presented by the defendant showed that 27.1% of the taxpayers were Negroes while only 9.1% of the grand jury members were Negroes and 7.8% of the petit jury venire were Negroes. This created an 18% and 19.3% disparity in the jury pool. Again, as in *Turner,* there is a jury selection process which is grossly subjective and statistics which support a conclusion that the system was being abused by systematic exclusion of an identifiable group.

In the cases relied on by defendant disparity between the identifiable group's total population and the percentage of that group in the jury pool varied from a low of 18% to a high of 40%. In Mecklenburg County defendant's figures showed the disparity at 9%. The systems used for jury selection in Texas (*Castaneda*) and in Georgia (*Whitus* and *Turner*) are also much more susceptible to abuse than the statutory scheme complied with by the Mecklenburg County jury commission. The legislative intent of G.S. 9-2 is to provide a system for objective selection of veniremen, and the defendant presented no evidence that this objective statutory scheme was subjectively applied in violation of the Fourteenth Amendment. The key to establishing a prima facie case of systematic exclusion is a statistical showing of underrepresentation plus a system of selection which allows the jury commission to exclude prospective jurors on account of race. The defendant's evidence in this case has shown neither.

Swain v. Alabama, supra, is very pertinent to the case at bar. In 1964 Alabama law required that all male citizens over the age of 21 be placed on the jury roll. In Talladega County, Alabama, 26% of the male population over 21 years of age was Negro, and yet Negroes made up only 10-15% of the grand and petit juries. As in the earlier discussed cases the jury commission utilized a very subjective test for determining a prospective juror. The commission was to select only intelligent men esteemed for good character and sound judgment. Here however the United States Supreme Court found that purposeful discrimination based on race alone was not satisfactorily proved by showing an identifiable group in the community was underrepresented by *10%*. The Court in discussing the jury selection procedure noted that ". . . an imperfect system [of selection] is not equivalent to purposeful discrimination based on race." 380 U.S. at 209, 13 L.Ed. 2d at 766, 85 S.Ct. at 830. Such is the case in Mecklenburg County. While the selection process may not provide a full pro rata representation of whites and blacks, the defendant's evidence does not show that the jury commission purposefully and systematically excluded blacks from the jury pool.

We now turn to defendant's contention that the selection of the Mecklenburg County jury venire violated his right to be tried by a jury drawn from a representative cross-section of the community as guaranteed by the Sixth Amendment and applied to

the States through the Fourteenth. In *Taylor v. Louisiana*, 419 U.S. 522, 528, 42 L.Ed. 2d 690, 697, 95 S.Ct. 692, 697 (1975) the United States Supreme Court held that the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial. *Taylor* was concerned with the systematic exclusion of women from the jury pool where 53% of the persons eligible for jury service were female, but the actual jury pool was only 10% female. The court found this 43% disparity denied the defendant a jury drawn from a representative cross-section of the community. *Duren v. Missouri, supra*, was also concerned with systematic exclusion of women from the jury pool denying the defendant his Sixth Amendment right to a fair cross-section of the community. Here the population was composed 54% of women and yet the jury venire was only 15% female. In *Duren* the court held that to establish a prima facie violation of the fair cross-section requirement the defendant must show: (1) that the group alleged to be excluded is a distinctive group; (2) that the representation of the group within the venire is not fair and reasonable with respect to the number of such persons in the community; (3) that the underrepresentation is due to systematic exclusion in the jury selection process.

In applying the *Duren* test to the case *sub judice*, the defendant satisfies the first requirement for Negroes are an identifiable class. *See Strauder v. West Virginia, supra*. We do not think the defendant has established a prima facie case with respect to requirements two and three of the *Duren* test. In both *Taylor* and *Duren* the disparity between the female population in the community and the women in the jury pool exceeded 35%. Here the disparity totaled only 9%. In *Taylor* the court noted that the fair cross-section requirement must have much leeway in its application, and in *Duren* the court noted a *gross* discrepancy between the percentage of women in the jury venire and the percentage of women in the community. It does not appear that the defendant here has presented evidence showing any type of discrepancy comparable to the cases on which he relies. Even if we were to accept his statistical figures as showing an unfair cross-section, we fail to see evidence of systematic exclusion on the part of the Mecklenburg County jury commission.

We therefore hold that the defendant did not present sufficient evidence to establish a prima facie case of systematic exclusion based on race in violation of the Equal Protection Clause of the Fourteenth Amendment. We also hold that the defendant was tried by a jury composed of a fair cross-section of the community in compliance with the Sixth Amendment as applied to the States through the Fourteenth.

[2] Defendant next contends that the trial court erred in excusing jurors Curbeam and Averette for cause based on their responses to the court's questions concerning the death penalty. In its initial comments to these prospective jurors the court provided each with a cursory explanation of the trial procedures. After preliminary voir dire the court asked Mrs. Curbeam the following:

> "COURT: . . . Now, do you have any religious or personal convictions about the death penalty?
>
> Mrs. CURBEAM: I'm really not sure about my feelings about the death penalty.
>
> COURT: Let me ask you this. Do you have such convictions about the death penalty that even though the State satisfied you beyond a reasonable doubt that the defendant was guilty of first degree murder, you would not follow the law as explained to you by the court and consider imposing the death penalty, no matter what circumstances might appear from the evidence, that you would just not even consider it?
>
> Mrs. CURBEAM: I really, really don't know. Must I say yes or no right now?
>
> COURT: Yes ma'am, I'm afraid I have to have an answer as to your feelings on this. I'm not asking you would you do it, but would you listen to the law and consider the evidence and consider whether the death penalty should or should not be imposed? You wouldn't automatically say, 'Under no circumstances would I consider the death penalty'? That's what I'm asking you.

Mrs. CURBEAM: I don't believe I would. I don't believe I would consider the death penalty.

COURT: You do not?

Mrs. CURBEAM: I do not think I would."

Questioning of juror Averette proceeded as follows:

"COURT: What I'm asking you is, despite your feeling about the death penalty as a practice could you follow the law, and if you did make all the findings and were convinced of it, impose the death penalty?

Mr. AVERETTE: I'm not sure that I could. No, sir.

COURT: Well, would you say that your feeling about the death penalty is that in no event, no matter what the circumstances of the offense were, and no matter how strongly you felt the aggravating circumstances might overcome the mitigating circumstances, you still wouldn't impose the death penalty?

Mr. AVERETTE: I don't think so."

Following these questions the State moved to have these jurors removed for cause and the motion was allowed. Jurors Curbeam and Averette under questioning by the court responded that under no circumstances and regardless of the evidence they still would not impose the death penalty. Exclusion of prospective jurors when they express unequivocal opposition to imposition of the death penalty is proper. *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Washington*, 283 N.C. 175, 195 S.E. 2d 534 (1973); *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971); *State v. Honeycutt*, 285 N.C. 174, 203 S.E. 2d 844 (1974).

Defendant contends that the responses of jurors Curbeam and Averette to questions concerning imposition of the death penalty were equivocal and thus under the standards laid down in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770, *rehearing denied*, 393 U.S. 898 (1968) their exclusion was improper. We do not agree.

In *Witherspoon* the United States Supreme Court held that veniremen may not be excluded from a jury based on general objections to the death penalty or based on expressed conscientious or religious scruples against infliction of the death penalty. *See also State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975), *second appeal*, 291 N.C. 37, 229 S.E. 2d 163 (1976).

It is clear that jurors Averette and Curbeam expressed more than general objections to the imposition of the death penalty. Each affirmatively stated that he could not impose the death penalty regardless of the evidence presented. On this record the fact that their negative responses were phrased "I don't believe I would" and "I don't think so" does not equivocate their refusal to follow the law as given by the judge to such an extent as to make their challenge for cause improper. *See State v. Noell*, 284 N.C. 670, 685-86, 202 S.E. 2d 750, 760-61 (1974).

[3] In his third argument to this Court defendant contends that the trial court denied him his rights guaranteed under the Sixth and Fourteenth Amendments by granting the prosecution's challenges for cause of jurors who indicated an inability to comply with the judge's instructions as to the law and impose the death penalty if the evidence so required. Since we have previously determined that the jurors were properly excluded based on the criteria established by the United States Supreme Court in *Witherspoon, supra*, we must now determine if the jury as selected improperly excluded an identifiable group within the community. Such an exclusion would deprive the defendant of a jury composed of a fair cross-section of the community in violation of the Sixth Amendment as applied to the States through the Fourteenth Amendment.

The defendant contends that those with scruples against the death penalty are "a distinct, opinion shaped group" and their exclusion produces a prosecution prone jury skewed against Negroes and the lower economic classes. This argument was rejected by the United States Supreme Court in *Witherspoon* where that court held "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." 391 U.S. at 517, 518, 20 L.Ed. 2d

at 782, 88 S.Ct. at 1774, 1775. *See also Bumper v. North Carolina*, 391 U.S. 543, 20 L.Ed. 2d 797, 88 S.Ct. 1788 (1968).

In a number of recent decisions this Court has also expressly rejected the defendant's contention that a jury qualified pursuant to *Witherspoon* is non-representative and prosecution prone. *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Montgomery*, 291 N.C. 235, 229 S.E. 2d 904 (1976); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979); *State v. Honeycutt, supra*; *State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979); *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979).

In *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973, 98 S.Ct. 2954 (1978) four jurors were excluded from the jury panel based on their opposition to capital punishment. The defendant claimed this exclusion violated his Sixth Amendment right as guaranteed by *Taylor v. Louisiana, supra*. Eight Justices concurred in holding: "Nothing in *Taylor*, however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." 438 U.S. at 596, 597, 57 L.Ed. 2d at 984, 98 S.Ct. at 2961.

No evidence has been presented in this case which convinces us that the prior decisions of this Court are incorrect. We therefore adhere to these decisions.

[4] The defendant's final contention is that there was insufficient evidence for the trial court to charge the jury on flight as a reason for the defendant's return to New York three days after the slaying of Robert Langston Moses. In *State v. Irick*, 291 N.C. 480, 494, 231 S.E. 2d 833, 842 (1977), this Court held that ". . . [s]o long as there is *some evidence* in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for the defendant's conduct does not render the instruction improper." (Emphasis ours.) *See also State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973).

The testimony of Andre Sharpe and John Lee Stewart provide sufficient evidence to support a charge on flight. Stewart testified that the defendant told him he had killed the cab driver and shortly after that Stewart discovered that the defendant had

left with Andre Sharpe for New York. Sharpe testified he was with the defendant on the night of September 4 when the deceased was murdered and that the defendant admitted to him that he had killed the deceased. Sharpe also heard the defendant tell John Lee Stewart that he had committed the murder. Sharpe then testified that later in the week around September 7 he went to New York with the defendant.

It is true that the defendant was originally from New York and the inference could be drawn that he was returning home. Simply because such an inference can be drawn does not make the instruction as to flight erroneous. *State v. Irick, supra.* There was competent evidence to support the charge of flight, and based on such evidence the trial court correctly instructed the jury.

From the evidence before the court this defendant committed a planned, deliberate and vicious killing of an innocent human being merely for the purpose of robbery to satisfy his personal desire for a little money. He is fortunate that the jury was unable to agree on the death penalty.

After careful examination of the entire record, and each of the defendant's assignments of error, we hold the defendant received a fair trial free from prejudicial error. Therefore the trial, verdict and judgment will be upheld.

No error.

Justice EXUM dissenting.

General Statute 15A-2000 contemplates a bifurcated trial procedure wherein the jury's determination of a defendant's guilt or innocence in a capital case is separate and independent from its later imposition of punishment should guilt be found. Under these circumstances, to permit the state to challenge an unlimited number of veniremen at the guilt phase of the trial for no "cause" other than that they would refuse to consider capital punishment at the sentencing phase works a systematic exclusion from jury service of that class of persons whose opposition to the death penalty precludes their vote for its imposition. Such an exclusion attains constitutional significance when it is shown that the members of the class excluded tend to share a commonality of in-

terests and attitudes not represented on the remaining jury panel. I believe that defendant's evidence in this case has sufficiently demonstrated that persons who strongly oppose the death penalty constitute a group "cognizable" for purposes of jury selection analysis. The state has failed to provide adequate justification for the purposeful exclusion of this group on the guilt phase of the trial. The result is that defendant has been deprived, on the guilt phase of the case, of a venire composed of a fair and representative cross section of the community in violation of his constitutional jury trial rights guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 24, of the North Carolina Constitution. Consequently, I respectfully dissent from that portion of the majority opinion which holds to the contrary and vote for a new trial.

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940). Community representation is required because the very purpose of the jury system is to temper the application of the law with the "commonsense judgment of the community." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). Thus, in a criminal case, "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams v. Florida*, 399 U.S. 78, 100 (1970). It is for this reason that the Sixth Amendment right to a jury trial[1] guarantees the selection of a petit jury from "a representative cross section of the community." *Taylor v. Louisiana, supra* at 528. No less, I believe, can be said of the jury trial guarantee in Article I, Section 24, of the North Carolina Constitution.

There is, of course, no constitutional requirement that a petit jury actually chosen from a representative venire provide a perfect mirror of the community's diversity. The right to a jury trial is not a right to have every jury contain representatives of all the economic, social, religious, racial, political, and geographic

1. The Sixth Amendment is applicable to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

groups of the community. But it *is* a right to have prospective jurors selected "without systematic and intentional exclusion of any of these groups." *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946). The Sixth Amendment comprehends at the least a set of jury selection procedures which will ensure "*a fair possibility* for obtaining a representative cross section of the community." *Williams v. Florida, supra* at 100. (Emphasis supplied.) This possibility is destroyed by any process which leads to the systematic exclusion of "identifiable segments playing major roles in the community." *Taylor v. Louisiana, supra* at 530; *see also Peters v. Kiff*, 407 U.S. 493, 500 (1972); *State v. Robertson*, 284 N.C. 549, 552, 202 S.E. 2d 157, 160 (1974).

Duren v. Missouri, --- U.S. ---, 58 L.Ed. 2d 579 (1979), held, as the majority notes, that in order for a defendant to make out a fair cross section violation under the Sixth Amendment he must show, *id.* at ---, 58 L.Ed. 2d at 587:

> "(1) That the group allowed to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process."

Systematic exclusion means "inherent in the particular jury-selection process utilized." *Id.* at ---, 58 L.Ed. 2d at 588. Unlike equal protection challenges to jury selection based on discrimination, which require a showing of a discriminatory purpose, a Sixth Amendment fair cross section challenge requires only the showing of a systematic disproportion of the distinctive group alleged to have been excluded. No discriminatory purpose is required. "[I]n Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross-section. The only remaining question is whether there is adequate justification for this infringement." Id. at ---, n. 26, 58 L.Ed. 2d at 589, n. 26.

The challenges for cause allowed in this case effected a systematic exclusion from the venire[2] of all persons whose strength of opposition to the death penalty was such that under no circumstances could they vote to impose capital punishment. The relevant inquiry is whether such persons comprise as a class an "identifiable segment" of the community, the exclusion of which denies defendant a jury selected from a representative venire.

For the purpose of jury selection analysis, the cognizability of any group depends largely upon (1) whether the group members share a common perspective or outlook on human events, and (2) if so, whether the exclusion of the group from jury service will tend to result in jury deliberations significantly deprived of the group's perspective.[3] Since "the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case,"

2. *Duren v. Missouri, supra,* and the earlier fair cross section case of *Taylor v. Louisiana, supra,* 419 U.S. 522, were concerned only with the selection of the venire itself. The Court had only to point to the large discrepancies in those cases between the number of women which appeared in the venires and the number in the community at large to find the element of unreasonable under-representation. There was no need for further analysis in either case. Where, however, as here, the venire contains at the outset a presumably representative number of persons who could not vote to impose the death sentence and the state is allowed to exercise unlimited challenges for cause to reduce that number to zero, the effect is the same as if those persons had been denied access to the venire in the first place. It is the effective mode of exclusion, not the time of its application, which is constitutionally significant. "All that the Constitution forbids . . . is systematic exclusion of identifiable segments of the community from jury panels *and from the juries ultimately drawn from those panels.* . . ." *Apodaca v. Oregon,* 406 U.S. 404, 413 (1972). (Emphasis supplied.)

3. For instance, in *United States v. Guzman,* 337 F. Supp. 140 (S.D.N.Y. 1972), *aff'd* 468 F. 2d 1245 (2d Cir. 1972), *cert. denied,* 410 U.S. 937 (1973), the trial court defined a "cognizable" group as one which (1) has a definite composition according to some definitive quality or attribute, (2) maintains a cohesive set of "attitudes or ideas or experience," and (3) represents a "community of interest" which may not be represented by other segments of society. 337 F. Supp. at 143-44. Cases from other jurisdictions have similarly examined group cognizability in terms of attitudinal significance. *See, e.g., United States v. Butera,* 420 F. 2d 564 (1st Cir. 1970) (The "less educated" comprise "a sufficiently large group with sufficiently distinct views and attitudes that its diluted presence on the jury pool requires some explanation by the government."); *Rubio v. Superior Court of San Joaquin County,* 154 Cal. Rptr. 734, 593 P. 2d 595 (1979) (Members of a cognizable group share "a common social or psychological outlook on human events" not otherwise represented on a jury from which they are excluded.); *Mooney v. State,* 243 Ga. 373, 254 S.E. 2d 337 (1979) (Persons 18-21 years of age do not constitute a

Ballew v. Georgia, 435 U.S. 223, 234 (1978), it is the *effect* of group exclusion which may work an injury of constitutional dimension:

> "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters v. Kiff, supra*, 407 U.S. at 503-04.

By similar reasoning, this Court has recognized that even the complete exclusion of a group or class from the jury venire may be permissible under the Sixth Amendment and Article I, Section 24, of the North Carolina Constitution "*so long as* there is no reasonable basis for the conclusion that the ineligible group or class would bring to the deliberations of the jury a point of view not otherwise represented upon it." *State v. Knight*, 269 N.C. 100, 104, 152 S.E. 2d 179, 182 (1967). (Emphasis supplied.)

The uncontradicted evidence presented by the defendant in this case demonstrates that persons opposed to capital punishment have for many years constituted a substantial percentage of our population.[4] Moreover, the narrower class of those whose opposition to the death penalty would prevent their consideration as

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cognizable group absent a showing that their "attitudinal segment" is unique or significant.). *Compare State v. Jenison*, 405 A. 2d 3 (R.I. 1979) (College presidents, professors, students, and tutors are recognized as a cognizable group without more; the Court need not "speculate on the particular qualities shared by this group that are missing from the spectrum of views on a jury that excludes its members.").

4. Dr. Hans Zeisel, Professor Emeritus of Law and Sociology at the University of Chicago School of Law, testified to various Gallup polls and other surveys which show that public support in the United States for the death penalty has fluctuated markedly. In 1960 it was 52%; 1965, 45%; 1966, 42%; the average percentage of people now favoring the death penalty is 70%. Professor Zeisel, a lawyer and sociologist, is a renowned and respected scholar in the area of the interaction of the discipline of law and sociology. His and Kalven's definitive work, *The American Jury* (1966), has been regularly cited by the United States Supreme Court and was heavily relied on in *Ballew v. Georgia*, 435 U.S. 223 (1978).

jurors of its imposition has also comprised a substantial minority of the population.[5] The evidence further shows that these persons generally exhibit attitudinal characteristics markedly different from those shared by people who favor the death penalty as an instrument of the criminal law. All of the available data suggest that persons who are strongly opposed to capital punishment tend also to be less authoritarian,[6] more liberal in their political attitudes,[7] less punitive in their legal attitudes,[8] and less likely to endorse "discrimination against minority groups, restrictions on civil liberties, and violence for achieving social goals"[9] than persons who favor the death penalty. The attitudinal differences become even more distinct with regard to those whose scruples would prevent their vote for capital punishment regardless of the evidence in the case.[10] The data are remarkably consistent, furthermore, in showing that attitudes about capital punishment cut unequally across various demographic lines. Opposition to the death penalty, for example, is more pronounced among women than men, non-whites than whites, high school and college graduates than non-graduates, and lower income groups than higher.[11]

5. A 1971 Harris Poll indicated that of the 36% of the population then opposed to the death penalty, slightly less than two-thirds (or 23% of the population) would be willing to state that as a member of the jury they would refuse to vote for the death penalty under any circumstances. The poll is reported and analyzed in White, "The Constitutional Invalidity of Convictions Imposed by Death-Qualified Jurors," 58 Cornell L. Rev. 1176 (1973).

6. Boehm, "Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias," 1968 Wisc. L. Rev. 734.

7. R. Crosson, "An Investigation into Certain Personality Variables Among Capital Trial Jurors," unpublished doctoral dissertation, Case Western Reserve University, 1966.

8. Jurow, "New Data on the Effect of a 'Death Qualified' Jury on the Guilt Determination Process." 84 Harv. L. Rev. 567 (1971). *See also* White, *supra* note 5; Zeisel, "Some Data on Juror Attitudes Toward Capital Punishment," University of Chicago Center for Studies in Criminal Justice, 1968.

9. Bedau and Pierce, Capital Punishment in the United States 134-35 (1976).

10. *See* White, *supra* note 5, at 1186 n. 54.

11. *See generally* Vidmar and Ellsworth, "Public Opinion and the Death Penalty," 26 Stan. L. Rev. 1245 (1974); Bronson, "On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen," 42 U. Colo. L. Rev. 1 (1970); White, *supra* note 5. The relevant studies are summarized in Girsh, "The Witherspoon Question: The Social Science and the Evidence," 35 NLADA Briefcase 99 (September 1978).

Viewed in connection with the facts of this case, the evidence is compelling, moreover, that the exclusion of veniremen unalterably opposed to the imposition of capital punishment results in the systematic under-representation of black jurors. The results of a 1971 Harris Poll indicate that such an exclusion would deny jury service to thirty-five percent of blacks but only twenty-one percent of whites.[12] Uncontradicted evidence in the record before us shows that a far greater percentage of blacks harbor intense opposition to the death penalty than do whites.[13] This evidence is borne out by the results of the *voir dire* challenges in the instant case. Of the 57 persons in the jury venire who were examined for possible service on the petit jury which tried defendant, 15 (26%) were black. Of these 15, 9 were permitted to be challenged for cause on the ground that they would under no circumstances vote to impose the death penalty. Two white veniremen were challenged for cause on the same ground. The state's challenges for cause thus resulted in the exclusion of 60% of the black citizens examined on the venire and approximately 5% of the white citizens so examined.

I believe that the cumulative weight of the evidence just discussed supports the conclusion that the group of citizens automatically excluded from the venire in this case by the state's challenges for cause constitutes (1) an identifiable segment of the community with (2) distinctive characteristics of attitude and outlook which in any fair system of criminal justice ought to be allowed a chance for representation in the jury's deliberations. At the very least, the evidence proferred by defendant conclusively demonstrates that the challenges for cause here allowed systematically exclude a disproportionate number of blacks. There can be no doubt that black citizens define a cognizable group for jury selection purposes. *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124 (1971), wherein the Supreme Court found no occasion to emphasize the question of cognizability, despite belabored findings by the district court on the issue.

12. *See* White, *supra* note 5, at 1194.

13. Professor Zeisel testified that opposition among black citizens to the death penalty has remained consistent at around 70%. *See also* Bronson, *supra* note 11, at 20; Vidmar and Ellsworth, *supra* note 11, at 1254 n. 38.

A cursory reading of *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and its companion decision, *Bumper v. North Carolina*, 391 U.S. 543 (1968), might suggest that these cases foreclose the conclusions I reach here. I do not so read these cases. In both *Witherspoon* and *Bumper* the state procedure under consideration involved capital cases in which the same jury decided the issues of guilt and punishment in a single proceeding.[14] In each case the Supreme Court denied a contention that a guilty verdict could not be constitutionally returned by a petit jury selected from a venire from which all persons who had "scruples" against the death penalty were challenged for cause. In *Witherspoon* the Court did overturn on due process grounds a sentence of death rendered by such a jury. In *Bumper* the Court overturned the verdict of guilty because unconstitutionally seized evidence had been introduced. While the argument that the jury chosen from the venire was rendered unrepresentative by improperly allowed challenges for cause might have been suggested in these cases, the principal contention in *Bumper* and *Witherspoon* was to the effect that the challenges for cause resulted in petit juries which were "conviction prone" or "biased in favor of conviction" and that defendants were thereby denied due process of law. The Supreme Court concluded that the data presented were simply too "tentative and fragmentary" to conclude *either* "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." *Witherspoon v. Illinois, supra*, 391 U.S. at 517, 518. The clear implication of this language is that a stronger evidentiary showing in the future might establish that a jury from which those unalterably opposed to the imposition of capital punishment are excluded is a jury less than representative on the issue of guilt or biased in favor of the prosecution.

In sustaining Witherspoon's due process argument on the question of punishment, the Court noted, 391 U.S. at 520:

14. The Illinois procedure applicable in *Witherspoon* permitted the jury to return in its discretion a verdict of death along with the determination of guilt. Ill. Rev. Stat., c. 38, § 1-7(c)(1) (1967). The crime of rape charged in *Bumper* was punishable by death unless the jury returned a specific recommendation of life imprisonment "at the time of rendering its verdict in open court." N.C.G.S. § 14-21 (1953).

> "If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty."

It then added, at n. 18:

> "Even so, a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution."

Defendant argues strenuously that he has met the challenge laid down in *Witherspoon* to demonstrate that a petit jury selected as this one was in accordance with the *Witherspoon* standard is, indeed, biased in favor of guilt. The studies and data presented in this case do consistently and forcefully suggest that a jury culled of those who would not vote for the death penalty is in fact a jury prone to convict on the guilt phase.[15] Moreover, despite intimations in the majority opinion to the contrary, the evidence adduced in this case on the "guilt prone" tendencies of a *Witherspoon*-qualified jury is substantially greater than that which was available to the Supreme Court in *Witherspoon* or *Bumper*, or to this Court in our own prior decisions.[16] Defendant's argument and the new data upon which it rests warrants careful review and I commend it for consideration by our General Assembly. I do not choose to reach its merits, however, because I believe that defendant has made a sufficient showing, not made in

15. *See generally* the sources cited in notes 5-9, and note 11 *supra*.

16. In addition to pre-*Witherspoon* studies, defendant in this case submitted for the trial court's consideration studies by Zeisel, *supra* note 8; Boehm, *supra* note 6; Bronson, *supra* note 11; Jurow, *supra* note 8; and White, *supra* note 5. There is no indication in any of our previous cases that any of these sources were presented or considered.

Witherspoon or *Bumper*, that the jury in this case was, on the guilt phase of the trial, substantially unrepresentative of the community's conscience.

This, however, is not the end of the inquiry. Even systematic exclusion of identifiable groups may be constitutionally permissible if "a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." *Duren v. Missouri*, *supra*, --- U.S. at ---, 58 L.Ed. 2d at 589. The right to a representative jury cannot be overcome merely because the state can show some reason for the exclusions which render the jury venire non-representative. *Taylor v. Louisiana*, *supra*, 419 U.S. at 534; *Duren v. Missouri*, *supra*, --- U.S. at ---, 58 L.Ed. 2d at 589. The burden is upon the state to show that the "attainment of a fair cross-section [is] incompatible with a significant state interest." *Duren v. Missouri*, *supra*, --- U.S. at ---, 58 L.Ed. 2d at 589-90.

The state no less than the defendant has a significant interest in obtaining a jury composed of persons who can sufficiently put aside personal biases to follow and apply the applicable law. Such an interest is normally advanced by excluding "for cause" those jurors who cannot. Indeed, the very purpose of allowing unlimited challenges for cause is to enable the parties to obtain a fair and impartial jury. *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969); *State v. English*, 164 N.C. 498, 80 S.E. 72 (1913). General Statute 15A-1212(8) permits the excusal for cause of any potential juror who, "[a]s a matter of conscience, regardless of the facts and circumstances, *would be unable to render a verdict* with respect to the charge in accordance with the law. . . ." (Emphasis supplied.) General Statute 15A-1212(9) further provides for a challenge to any potential juror who "[f]or any other cause *is unable to render a fair and impartial verdict*." (Emphasis supplied.) It is thus the venireman's demonstrated inability to maintain impartiality and to follow the law which properly triggers a party's right to challenge for cause. "[I]t is the fixedness of the [biased] opinion . . . which constitutes the exception"; the mere expression of an opinion which might favor one side or the other does not constitute grounds for a challenge for cause absent further inquiry into the "*fact* of favour or indifferency." *State v. Benton*, 19 N.C. (2 Dev. & Bat.) 196, 213 (1836). (Emphasis original.)

Where the *voir dire* inquiry elicits from a potential juror the fact that his biases are such as to preclude his rendering an impartial verdict, he is properly excused from the venire. A venire from which such jurors have been removed by challenges for cause is constitutionally permissible even if it is no longer representative of the community.

In *Lockett v. Ohio*, 438 U.S. 586 (1978), the state was rightly permitted to challenge all jurors who stated that they were so opposed to capital punishment that "they could not sit, listen to the evidence, listen to the law, [and] make their determination solely upon the evidence and the law without considering the fact that capital punishment might be imposed." *Id.* at 595. The Supreme Court held that the right to a representative jury did not include the right "to be tried by jurors *who have explicitly indicated an inability to follow the law* and instructions of the trial judge." *Id.* at 596-97. (Emphasis supplied.)

Lockett did not involve the kind of challenge for cause permitted here. No challenged juror in the present case stated that because of opposition to the death penalty he or she could not under any circumstances return a guilty verdict. All simply stated that they could not vote for the imposition of the death penalty. These jurors, therefore, did not demonstrate any bias on any of the critical issues in the guilt phase of the trial. Their bias related only to the sentencing phase. The state has not demonstrated that the jurors challenged for cause because of opposition to the death penalty could not have followed the law and been impartial on the guilt phase of the case. Unless, therefore, the state has a significant interest in having precisely the same jurors who determine guilt also determine punishment, a fair cross section violation has been shown because of the systematic exclusion of those unalterably opposed to imposition of the death penalty.

Given the alternatives already provided by G.S. 15A-2000, I do not believe such a significant interest exists. This statute provides for a bifurcated trial in capital cases.[17] The first phase is for the purpose of determining guilt; the second, punishment. While

17. This procedure was not, as I have already shown, in use in either Illinois or North Carolina when *Witherspoon* and *Bumper* were considered by the United States Supreme Court. *See* text at note 14 *supra.*

the statute seems to contemplate that the same jury which determines guilt should ordinarily also determine punishment, it does provide that if before the punishment phase "any juror dies, becomes incapacitated *or disqualified, or is discharged for any reason*, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel." G.S. 15A-2000(a)(2). (Emphasis supplied.) Furthermore the statute provides that if the jury which determines guilt is unable "to reconvene" for the punishment phase, "the trial judge shall impanel a new jury to determine the issue of punishment." *Id.*

Thus the bifurcated trial procedure provides two reasonable alternatives to having precisely the same jurors pass on both guilt and punishment. If the petit jury contains some members who, qualified on the guilt phase, were because of the strength of their opposition to capital punishment disqualified on the sentencing phase, alternate jurors qualified on the sentencing phase could be empaneled at the outset to hear both phases. These alternate jurors would not, however, participate in deliberations on guilt. If a guilty verdict were returned, these alternates would replace, on the sentencing phase of the case, their counterparts disqualified on this phase. Another alternative provided by the statute is to empanel a different jury for the punishment phase if the jury on the guilt phase was "unable to reconvene" because all of its members were disqualified on the question of punishment. In this latter circumstance nothing would prevent the second, punishment jury from hearing the guilt phase of the trial simultaneously with the guilt phase jury. This would avoid the necessity of reintroducing evidence on the punishment phase.

If North Carolina is to maintain the death penalty as an instrument of the criminal law, this Court should insist that in cases in which this penalty may be exacted a defendant's constitutional rights be scrupulously protected. None of these rights should be withered to insure a more expeditious proceeding. The fundamental right to a fairly representative jury is essential to the integrity of the fact finding process. The procedures I have suggested would better serve to guarantee that right. The extra burdens on the state attendant to these procedures seem a small price to pay in the context of proceedings aimed at determining whether the law's ultimate penalty, death, shall be imposed.

STATE OF NORTH CAROLINA v. JIMMY DARRELL RAY

No. 19

(Filed 1 February 1980)

1. **Homicide §§ 26, 27— murder—voluntary and involuntary manslaughter—instructions on intent incorrect**

The trial court's distinction between the intentional homicides of murder and voluntary manslaughter and the unintentional homicide of involuntary manslaughter was not altogether correct where the court instructed that the former crimes required an intent to kill while the latter did not, and the court thus focused on the presence or absence of an intent to kill rather than on the presence or absence of an intentional act.

2. **Criminal Law § 115— improper instruction on lesser offense—when error is prejudicial**

Where there is no reasonable possibility that a verdict more favorable to defendant would have occurred absent an erroneous instruction on a lesser offense not supported by the evidence, the error occasioned by such instruction is harmless; however, where there does exist a reasonable possibility that defendant would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial and defendant is entitled to appellate relief.

3. **Homicide § 30.3— lesser offense of involuntary manslaughter improperly submitted—prejudicial error**

Defendant in a murder prosecution was prejudiced by the trial court's erroneous submission of the lesser offense of involuntary manslaughter and by the court's misleading definition of that offense, since, had the charge of involuntary manslaughter not been submitted, the jury would have been forced to determine whether defendant's intentional shooting of the victim was in the exercise, perfectly or imperfectly, of his right to defend himself and his brother, and, given the strong tendency of the evidence to demonstrate justification for defendant's plea, there was a reasonable possibility that a verdict of acquittal might have resulted. G.S. 15A-1442.

4. **Criminal Law § 168— lesser included offense improperly submitted—error not favorable as matter of law**

A verdict based upon the erroneous submission of a lesser included offense not supported by the evidence does not invariably constitute error favorable to a defendant as a matter of law.

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

Justice COPELAND dissenting.

Chief Justice BRANCH joins in the dissenting opinion.

BEFORE *Judge Canaday* at the 12 December 1977 Session of WAKE Superior Court defendant on a proper indictment for murder was convicted by a jury of involuntary manslaughter in the death of Larry Caudle. He was sentenced to a term of imprisonment of not less than 8 nor more than 10 years. The Court of Appeals (*Judges Webb* and *Hedrick* and *Chief Judge Morris*), in an unpublished opinion reported pursuant to App. R. 30(e), found no error. We allowed defendant's petition for further review pursuant to G.S. 7A-31 on 4 April 1979.

Rufus L. Edmisten, Attorney General, by Jo Anne Sanford, Assistant Attorney General, for the State.

George R. Barrett, Attorney for defendant appellant.

EXUM, Justice.

Defendant was tried on an indictment charging him with the first degree murder of Larry Caudle. At trial Judge Canaday at the close of all the evidence dismissed the charge of first degree murder and submitted to the jury alternative verdicts of second degree murder, manslaughter, involuntary manslaughter, not guilty, and not guilty by reason of self-defense and defense of another. All the evidence, including defendant's own testimony, demonstrated that defendant intentionally shot Caudle and the wound so inflicted caused Caudle's death. The defense rested entirely on the theory that defendant's shooting of Caudle was justified on the grounds of self-defense and defense of defendant's brother, Donald Ray.

The only question properly presented to us[1] is whether it was error prejudicial to defendant to submit an alternative verdict of involuntary manslaughter. We conclude that under the circumstances of this case it was. The Court of Appeals relied on the general rule that submission of a lesser included offense not supported by the evidence is error nonprejudicial to a defendant. It therefore upheld defendant's conviction. We recognize the general

1. Defendant argued the insufficiency of the evidence to convict in the Court of Appeals but he does not bring this argument forward in his brief submitted to this Court. This argument is therefore deemed abandoned. App. R. 28. Defendant also attempts to argue before this Court an alleged error in the jury instructions which he did not argue in the Court of Appeals. This point is not properly cognizable in this Court. App. R. 16(a).

rule but conclude that it has no application to the situation here presented. The decision of the Court of Appeals is reversed; the judgment of the trial court is vacated; and the defendant is ordered discharged.

The only witnesses to this homicide were defendant and his brother. The state called defendant's brother. It also offered defendant's out-of-court statements to investigating law officers. Defendant testified in his own behalf.

Defendant's brother, Donald Ray, testified essentially as follows: On 31 March 1975 at approximately 2:00 a.m. defendant arrived at Donald's trailer on the "outskirts of Wake Forest." Defendant asked Donald to accompany him to 713 North Main Street in Wake Forest where defendant lived with his and Donald's father. Donald agreed. When they arrived, defendant asked Donald to go in the house and get his pistol. Donald did and returned the pistol to defendant who was still sitting in the car.[2] Defendant then told Donald that "someone was coming to kill him [defendant]" and that Donald should go in the house. Donald returned to the house. Three or four minutes later Caudle drove up, got out of his car with a shotgun in his hand, went to defendant's car and told defendant he was going to "blow his brains out." Donald, still in the house, hollered at Caudle, "Leave my brother alone." Caudle replied, "If I don't kill him, I'll kill you." Caudle put down the shotgun and approached the house with a pistol in his hand. Donald closed the door. Caudle shot twice through the door. One shot wounded Donald in the left hand. Then a third shot came through the window. Donald ran back to his father's bedroom. He heard one or two more shots and then heard the defendant holler. Donald and his father, Jessie Ray, went outside to defendant and all three traveled in defendant's car to the police station where an ambulance was summoned for Donald.

Willis Rogers, a Wake Forest policeman at the time of the incident, testified for the state that when defendant came to the police station defendant stated that Caudle had shot his brother in the hand. Rogers stated, "I asked Jimmy Ray where Larry

2. The record indicates that defendant was, apparently due to an accident, paralyzed from the waist down. He could drive a car and he used a wheelchair which he transported in his car.

Caudle was and he said he didn't know. He said he emptied his gun when he was crossing the highway. Didn't know whether he hit him or not, but hoped goddamit he killed him." Rogers went to defendant's residence to investigate the incident. He found Caudle's body lying between two vehicles across the highway from defendant's residence and also found blood on the porch and in the yard. He was able "to track" the blood from across the highway back to the house. Defendant returned to the scene and offered no resistance when he was taken into custody.

The pathologist who performed the autopsy on Caudle testified for the state that he found several bullet wounds but that the cause of death was "internal bleeding into the chest as a result of a through and through bullet wound in the left chest. Entrance was from the back." He said the deceased could have run the 256 feet from the house to where his body was found, even after the fatal wound was inflicted, "as the heart was not damaged and the deceased could walk, run, or do some activity in a period of a number of seconds." The deceased's blood alcohol content was 240 milligrams, or .24 grams, percent, *i.e.*, per 100 cubic centimeters of blood.

The state also offered in evidence the written, signed out-of-court statement made by defendant to investigating officers. According to this statement defendant and Caudle had been close friends for many years and had never had any trouble with each other. Defendant and Caudle had been together earlier in the evening on the day in question. An incident occurred which made defendant angry with Caudle and they separated. Later they got in touch with each other on their automobile citizens' band radios. Caudle began to curse and defendant told him "to come up to my house and let's talk." The statement then continued:

> "Larry said he would be there in a few minutes. Got there. Came out of car with shotgun and pointed it at my head. My brother called to him and then he started shooting at my brother. Shot into my house and hit my brother. Then called him and shot him and did not think I hit him then.
>
> I thought he was going to shoot me so I shot him two more times. Then he ran across road. When he ran off I shot his car in the front. Shot car so he could not leave on his car. Larry was wild. Had never seen him act that way. Been close friends many years. Never no trouble before. Wish he had

shot me for I have nothing to lose and he has wife and three kids. Knew he carried the .25 caliber always."

Albert Caudle, the deceased's father, testified for the state that on the evening in question his son woke him up getting a shotgun from the house. He said that his son "went out and didn't speak a word . . . . I guess he was mad. I didn't try to stop him. I just asked him what the trouble was and followed him to the car. . . . I figured it was trouble when he got his gun. . . . His wife was trying to stop him but he never spoke to her. He did knock her down. She tried to stop him but she got hold of the gun and he whirled around and she fell backwards. She was trying to stop him. . . . I figured my son and Jimmy Ray to be good friends. I never know them to have any harsh words. My son had a CB radio and Jimmy Ray had a CB radio and they talked back and forth on the radio before. Larry started to tell me something but a voice came over the CB radio, and said, you son-of-a-bitch, ain't you coming over here. Then Larry said, I'll be there in a minute or two."

At the close of the state's evidence defendant moved for dismissal on the ground that all the evidence showed that he shot Caudle in defense of himself and his brother. The motion was denied.

Defendant testified that on the evening in question at approximately 11:00 p.m. he was driving on Main Street in Wake Forest when he met Caudle who got into defendant's car. Caudle had been drinking. They went to Rudy Horton's, "a beer joint," where Caudle went in. After 15 to 20 minutes Caudle returned with two men who were not known to defendant. The three of them got into defendant's car and they all rode to the Community Grocery in Wake Forest. There Caudle got out and did not return. After 10 minutes defendant told the two men that he was going to leave. One tried to stop him but defendant left anyway. At their request defendant returned the men to Horton's. On his way home defendant heard Caudle speaking on the CB radio. Defendant broke in and asked Caudle where he had gone at the Community Store. Caudle didn't answer. Defendant asked why Caudle got out of the car and "left me like that." He told Caudle he wanted to see him. Caudle became angry, started cursing, and threatened defendant. Caudle was "cussing on the radio,

something I never heard him do and I knew he was mad and that he carried a gun." Defendant then drove to his brother's house.

Defendant and his brother then returned to defendant's residence. Defendant said, "I was getting my wheelchair out to get out of the car when Bubba [defendant's brother] brought me the gun. My wheelchair was setting on the ground. I had not put my pulley in yet. I was getting ready to get in the wheelchair when Larry Caudle came up. He slid into the yard sideways. He got out of his car with a shotgun and squatted down behind his door and was aiming the shotgun toward me and then he got up and came over to my car and stuck the gun in the window right in my face and told me he was gonna blow my damn head off.

"Bubba was standing in the door with the door partially opened. He told Larry to leave me alone. Larry set the shotgun down and leaned up against my car and ran over there with his pistol. He took his pistol out of his pocket and told Bubba he would take care of him first. He ran up on the porch. Bubba slammed the door and Larry ran against the door and tried to go in the house, I reckon.

"Larry shot through the door and I heard my brother holler. I called Larry's name with my gun in my hand. He didn't pay me no mind. He shot again. Then I shot at him. I aimed down low the first time because I knowed it would kill him if I shot him higher. After I shot him he turned toward me. He still had his gun in his hand. As soon as he turned in my direction I fired twice. After I fired he ran in front of my car, crossed the street and the last time I ever saw him was over at the corner of the building at the poolroom.

. . . .

"My brother and Daddy got in the car and I drove. When I backed up I struck Caudle's car, left and went to the police station. I told them that my brother had been shot and Larry had done it. I didn't know whether I had shot Larry or not. I thought I had missed him. I was upset over my brother being shot. He was bleeding a lot.

"Larry Caudle was a friend of mine, my best friend. He appeared angry that evening. I had never seen him like that before. I thought he was gonna kill my brother. He used to spend nights

with me. I thought Larry was facing me when the last two shots were fired. He was still up on the porch."

At the close of all the evidence defendant's motion to dismiss on the ground that all the evidence demonstrated that he shot Caudle in defense of himself and his brother was again denied. Judge Canaday then proceeded to instruct the jury that it could return a verdict of guilty of second degree murder, manslaughter, or not guilty by reason of self-defense and defense of another. He then instructed that the jury could find defendant guilty of involuntary manslaughter or not guilty. He defined involuntary manslaughter as the "unintentional *killing* of a human being by . . . an act done in a criminally negligent way . . . ." (Emphasis supplied.) During their deliberations the jury returned to the court and asked to hear again the court's definitions of the various degrees of homicide. Again Judge Canaday instructed them that:

> "COURT: Second degree murder is defined as the unlawful killing of a human being, that is an *intentional killing* of a human being and with malice. You must have unlawful killing. *It must be intentional* as I have defined intent to you, and it must be accomplished with malice. The State must show those elements.
>
> Now voluntary manslaughter is the unlawful killing of a human being without malice. There need be no showing of malice. Voluntary manslaughter, *the State must show intent, must be an intentional killing*, but without malice.
>
> Now involuntary manslaughter is the *unintentional killing* of a human being, by an act done in a criminally negligent way.
>
> Now I will repeat those definitions again for you. Going upward. Involuntary manslaughter is the unintentional killing of a human being by an act done in a criminally negligent way.
>
> Involuntary manslaughter, *no intent is required in that offense.*
>
> Voluntary manslaughter is the unlawful killing of a human being without malice, there being no malice, but it is intentional, it is unlawful.

> Second degree murder is the unlawful killing of a human being, that is an intentional killing, with malice." (Emphasis supplied.)

Thus Judge Canaday told the jury that one difference between second degree murder and manslaughter on the one hand and involuntary manslaughter on the other was that the former crimes required an intent to kill while the latter did not. He did not instruct the jury again on the principles of self-defense or defense of another.

[1] Judge Canaday's distinction between the intentional homicides of murder and voluntary manslaughter and the unintentional homicide of involuntary manslaughter is not altogether correct. Neither second degree murder nor voluntary manslaughter has as an essential element an intent to kill. In connection with these two offenses, the phrase "intentional killing" refers not to the presence of a specific intent to kill, but rather to the fact that the *act* which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. Such an act of assault committed under circumstances sufficient to show malice is second degree murder. Such an act of assault committed in the heat of passion suddenly aroused by adequate provocation, or in the imperfect exercise of the right of self-defense, is voluntary manslaughter. But such an act can never be involuntary manslaughter. This is so because the crime of involuntary manslaughter involves the commission of an act, whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm. *See generally State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978); *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971).

All the evidence in this case is that defendant intentionally assaulted Caudle with a deadly weapon, causing Caudle's death. The assault was one likely to kill or inflict serious bodily injury. Therefore the homicide which resulted, if any, was at least voluntary manslaughter. Furthermore defendant's evidence, and practically all of the state's evidence, tend to establish that defendant shot Caudle in defense of himself and his brother. The only evidence offered by the state which could support a verdict of voluntary manslaughter lies in the out-of-court statement alleged-

ly made by defendant to policeman Rogers. Rogers testified, "I asked Jimmy Ray where Larry Caudle was and he said he didn't know. He said he emptied his gun when he was crossing the highway. Didn't know whether he hit him or not but hoped goddamit he killed him." The most favorable inference to the state which could arise from this testimony is that defendant shot Caudle when Caudle was retreating from the affray and no longer presented a threat either to defendant or his brother. If found as fact by the jury, such a use of excessive and unnecessary force could support a verdict of voluntary manslaughter, or even of murder in the second degree. *See, e.g., State v. Quick*, 150 N.C. 820, 64 S.E. 168 (1909). In any event, there was no evidence presented in the case upon which a jury could base a verdict of involuntary manslaughter.

The question for decision, then, is whether under the circumstances of this case it was error prejudicial to defendant for the trial judge to submit to the jury the alternative verdict of involuntary manslaughter. This Court has generally held that the submission of a lesser included offense not supported by the evidence is error, but error nevertheless favorable to the defendant and one for which he cannot complain on appeal. The point seems first to have been made in homicide cases in *State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906). Defendant there was indicted for the first degree murder of his wife. The evidence tended to show that he poisoned her, but there was also some evidence that he was under the influence of morphine when he administered the poison. The trial court instructed the jury that if defendant had been so narcotized by morphine that "he was unconscious of the character of the crime he was committing, he would not be guilty of murder in the first degree for want of power to deliberate and act with premeditation . . . and he would be guilty of murder in the second degree." On appeal from a verdict of second degree murder, defendant contended that there was in fact no evidence to support the lesser verdict. This Court found no error, saying, *id.* at 625-26, 55 S.E. at 343-44:

> "Nor is intentional homicide by poisoning necessarily always murder in the first degree. . . . There is no exception to this charge and we do not pass upon it, but the jury may have taken that view of the evidence. *But whatever the reasoning of the jury, the prisoner has no cause to complain that he*

was not convicted of the higher offense." (Emphasis supplied.)

State v. Quick, supra, 150 N.C. 820, 64 S.E. 168, involved a homicide by shooting in the course of a barroom brawl. Defendant was tried for second degree murder and convicted of voluntary manslaughter. Defendant, who had relied on self-defense at trial, contended on appeal that there was no evidence to support the manslaughter conviction and the trial court improperly submitted this view of the case to the jury. This Court concluded that there was evidence of voluntary manslaughter to support the charge. In *dictum*, however, the Court said, 150 N.C. at 823-24, 64 S.E. at 170:

> "Suppose the court erroneously submitted to the jury a view of the case not supported by evidence, whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the State, and not to him. His plea of self-defense had been fully and fairly presented to the jury and rejected by them as untrue. What, then, was the duty of the jury, if there was no evidence of manslaughter? Clearly, under the law, they should have convicted the defendant of murder in the second degree. How, then, can the defendant, his plea of self-defense having been wholly discarded by the jury and the burden being upon him to reduce the offense to something less than murder in the second degree, reasonably complain of a charge, however erroneous in that respect, which permitted the jury to convict of a lesser degree of homicide?
>
> The appellant, in all cases, civil as well as criminal, is not only required to show error, but that he was injured by it.
>
> The deduction seems to us to be founded in the very logic of the law that evidence which is amply sufficient to support a conviction of murder must of necessity be sufficient to sustain a conviction of manslaughter. But, independent of that, there are phases of the evidence which warranted a verdict for manslaughter and not for murder, and therefore his Honor's charge is unobjectionable."

Although Justice Walker concurred in the result, he disagreed with the majority's view that no error prejudicial to the defendant would have occurred had there been no evidence of manslaughter in the case. Justice Walker said, "I think that a conviction must be founded not alone upon the charge preferred in the indictment, but upon some evidence sufficient in law to establish it." *Id.* at 826, 64 S.E. at 171.

The same holding and *dictum* occur in *State v. Fowler*, 151 N.C. 731, 66 S.E. 567 (1909).

In *State v. Bentley*, 223 N.C. 563, 27 S.E. 2d 738 (1943), defendant was indicted for assault with intent to kill with a deadly weapon, to wit, a shotgun, inflicting serious injury. The evidence tended to show that defendant shot the victim wounding him in the chest and putting out one eye. The jury returned a verdict of guilty of assault with a deadly weapon, an alternative which was not submitted to them by the trial court. On appeal defendant sought to be discharged on the ground that there was no evidence of the offense of which the jury convicted him. The Court rejected this argument saying, 223 N.C. at 566, 27 S.E. 2d at 740:

> "If we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

Similar reasoning was employed in *State v. Roy*, 233 N.C. 558, 64 S.E. 2d 840 (1951) (indictment for rape; rape proved; verdict: assault with intent to commit rape); *State v. Chase*, 231 N.C. 589, 58 S.E. 2d 364 (1950) (indictment for armed robbery; armed robbery proved; verdict: common law robbery); and *State v. Robertson*, 210 N.C. 266, 186 S.E. 247 (1936) (indictment for burglary; burglary proved; verdict: attempt to commit burglary).

In *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956), defendant was tried for the murder of his wife. The evidence tended to show that defendant purchased dynamite the day before a severe explosion occurred in his home in which his wife was killed. There was other circumstantial evidence tending to show that the explosion was caused by dynamite and that defendant was present in the kitchen immediately before and was absent at the exact time of the explosion. The verdict was guilty of manslaughter. This Court said, 244 N.C. at 384, 93 S.E. 2d at 434:

> "Evidence of manslaughter is lacking. The defendant, however, cannot complain that 'the jury, by an act of grace,' has found him guilty of a lesser offense. 'Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed.' *S. v. Bentley*, 223 N.C. 563, 27 S.E. 2d 738; *S. v. Roy*, 233 N.C. 558, 64 S.E. 2d 840; *S. v. Matthews*, 231 N.C. 617, 58 S.E. 2d 625; *S. v. Harvey, supra*, [228 N.C. 62, 44 S.E. 2d 472]; *S. v. Robertson*, 210 N.C. 266, 186 S.E. 247."

More recently the Court carefully considered the principle in question and relied on it wholly in the disposition of *State v. Vestal*, 283 N.C. 249, 195 S.E. 2d 297, *cert. denied*, 414 U.S. 874 (1973). In *Vestal*, defendant was charged with the first degree murder of Angelo Pennisi. Pennisi's body had been found floating in a lake wrapped with a length of window drape and approximately seventy pounds of heavy chains. He had been severely beaten about the head and his skull was fractured in several places. Although evidence linking defendant to Pennisi's death was entirely circumstantial, defendant was convicted of murder in the second degree. On his first appeal, defendant complained *inter alia* of the trial court's failure to submit manslaughter as an alternative verdict. This Court held that this was not error, there being no evidence in the record to sustain a verdict of manslaughter. The Court did however find various other errors and remanded for a new trial. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

At Vestal's second trial he was convicted of manslaughter, the then trial judge, now Justice, Copeland having submitted this

as an alternative verdict. On Vestal's second appeal he contended that the verdict should be set aside since there was no evidence of manslaughter. Surmising that Judge, now Justice, Copeland had been induced to submit manslaughter as an alternative verdict because of defendant's objection to its not having been charged at this first trial "even though evidence of manslaughter is lacking," this Court rejected defendant's contention of prejudice:

> "On the question thus presented, our decided cases follow the majority rule and hold that if the court charges on a lesser included offense when all the evidence tends to support a greater offense, the error is favorable to the defendant and he is without standing to challenge the verdict." 283 N.C. at 252, 195 S.E. 2d at 299.

The Court relied essentially on *State v. Stephens, supra,* 244 N.C. 380, 93 S.E. 2d 431; *State v. Chase, supra,* 231 N.C. 589, 58 S.E. 2d 364; *State v. Fowler, supra,* 151 N.C. 731, 66 S.E. 567; and *State v. Quick, supra,* 150 N.C. 820, 64 S.E. 168.

[2] It is clear then that it is error for the trial court to submit as an alternative verdict a lesser included offense which is not actually supported by any evidence in the case. It is also clear that in the cases in which this situation has arisen, this Court has concluded that the error was harmless and indeed actually favorable to the defendant. In all of these cases, however, the evidence was such as to compel this Court to conclude that had the jury not been given the unsupported lesser offense as an alternative, it most certainly would have returned a verdict of guilty of a higher offense. Certainly where it cannot be doubted that the effect of an erroneous charge "was to cause a verdict for the lesser offense to be found . . . than *should* have been rendered," *see, e.g., State v. Alston,* 113 N.C. 666, 668, 18 S.E. 692 (1893) (emphasis supplied), a defendant has no cause for complaint. The principle applied in our cases so far, then, is nothing more than an application of the well recognized doctrine of harmless error, now codified in G.S. 15A-1442 and G.S. 15A-1443. Stated simply, that doctrine provides that only those errors which prejudice a defendant will entitle him to relief on appeal. G.S. 15A-1442. And a defendant is "prejudiced" by errors other than constitutional ones only when "there is a reasonable possibility that, had the error in question

not been committed, a different result [favorable to defendant] would have been reached at the trial . . . ." G.S. 15A-1443. Thus, where there is no reasonable possibility that a verdict more favorable to defendant would have occurred absent an erroneous instruction on a lesser offense not supported by the evidence, the error occasioned by such instruction is harmless. Conversely, where there does exist a reasonable possibility that defendant would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial and defendant is entitled to appellate relief.

In the case before us, there is a reasonable possibility that defendant's plea of self-defense would have sustained a verdict of acquittal had the trial court not erroneously instructed on involuntary manslaughter. We recognize that in *State v. Quick*, *supra*, 150 N.C. 820, 64 S.E. 168, the Court concluded that the return of a verdict of voluntary manslaughter was, in effect, a rejection by the jury of defendant's claim of self-defense. A similar conclusion does not arise, however, upon the return of a verdict of involuntary manslaughter under the particular circumstances of the case before us.

As noted before, a killing in self-defense is necessarily an "intentional killing" insofar as it is accomplished by an intentional act. When asserted in response to a charge of intentional homicide such as second degree murder or voluntary manslaughter, a plea of self-defense is a plea of confession and avoidance. By it a defendant admits, for example, that he intentionally shot his assailant but that he did so justifiably to protect himself from death or great bodily harm. In this case the trial judge correctly submitted self-defense and defense of another as defenses only to the intentional homicides of second degree murder and voluntary manslaughter, not to the unintentional homicide of involuntary manslaughter. Defendant in the instant case testified that he intentionally shot at Caudle but that his initial shot was aimed toward Caudle's feet so as to avoid killing him. He ultimately testified that he did not at the time know whether he had killed Caudle. By this testimony he asked the jury to conclude either that he was guilty of an intentional homicide or that he was not guilty by reason of self-defense or defense of his brother.

[3] It is not at all clear, however, that the jury ever considered these alternatives. In his instructions, the trial judge incorrectly distinguished involuntary manslaughter from voluntary manslaughter and second degree murder by focusing on the presence or absence of an *intent to kill* rather than the presence or absence of an *intentional act.* The jury could well have concluded from defendant's testimony that defendant had no actual intent to kill Caudle and that he was therefore guilty of the offense of involuntary manslaughter as that crime was defined by the court. In effect, the erroneous submission of the offense of involuntary manslaughter, coupled with the misleading definition of that offense by the trial court, may have short-circuited the jury's consideration of defendant's claim of self-defense. Had the charge of involuntary manslaughter not been submitted, the jury would have been forced to face squarely the real issue presented by the evidence in this case, *i.e.*, whether defendant's intentional shooting of Caudle was in the exercise, perfectly or imperfectly, of his right to defend himself and his brother. Given the strong tendency of the evidence to demonstrate justification for defendant's plea, there is a reasonable possibility that a verdict of acquittal might have resulted. Certainly, the circumstances of this case make us mindful of Justice Seawell's statement in *State v. McDay*, 232 N.C. 388, 61 S.E. 2d 86 (1950):

> "Where the court below is in error as to the definition of an essential element of a crime, and one which completely diverts the attention of the jury into a different field of inquiry, there is little propriety in speculating whether the instruction given is more harmful, or on the other hand, more favorable to the defendant than the one which ought to have been given, since justice is not a gamble. The defendant is at least entitled to be tried for the identical crime with which he is charged, and convicted or acquitted of it as the case may be."

As noted above, the instant case is one in which all of the evidence, including that posed by defendant's sole reliance on self-defense, demonstrates conclusively that the fatal assault was nothing less than intentional. The evidence is compelling, moreover, that defendant's assault upon the deceased was legally justifiable. Thus the general rule that an erroneous charge on a lesser included offense is error favorable to the defendant "*when*

all of the evidence tends to support a greater offense," *see State v. Vestal, supra,* 283 N.C. at 252, 195 S.E. 2d at 299 (emphasis supplied), is inapplicable to the facts of this case. Indeed, we have found no decision in the appellate courts of this state which hold as a matter of law that the submission and resulting verdict of *involuntary* manslaughter in a case such as this one will always be harmless error. The holdings relied upon by the state do no more than show that the finding of prejudice or the lack of it must always turn upon the facts and circumstances of the individual case. Thus, in *State v. Bass,* 36 N.C. App. 500, 244 S.E. 2d 458, *cert. denied,* 295 N.C. 467, 246 S.E. 2d 216 (1978), the Court of Appeals found some evidence in a voluntary manslaughter prosecution to support the verdict of involuntary manslaughter. The court's *dictum* in *Bass* that even if the submission of involuntary manslaughter were in error, it was error favorable to the defendant, seems correct in light of the fact that defendant offered no legal justification for the fatal shooting. Similarly, both the record and the language of the decision in *State v. Walker,* 34 N.C. App. 485, 238 S.E. 2d 666, *cert. denied,* 294 N.C. 445, 241 S.E. 2d 847 (1977), support a conclusion that there was sufficient evidence of involuntary manslaughter in that case. And although the *Walker* court held that the instruction on involuntary manslaughter was unwarranted, its finding that the jury passed upon involuntary manslaughter only after specifically considering and rejecting defendant's theory of self-defense is supported by the trial court's explicit instructions evidenced in the record. In the case *sub judice,* however, it is not at all clear that the jury's verdict of involuntary manslaughter is necessarily equivalent to a considered rejection of defendant's self-defense plea. While Judge Canaday gave the same instructions relied on in *Walker* in the main body of his charge, thereafter the jury requested clarification of his definitions of the degrees of homicide. At this point Judge Canaday gave the jury, as we have already shown, *see* text *supra* pp. 7-8, an incorrect and likely misleading definition of involuntary manslaughter. He did not, furthermore, repeat his earlier instructions on self-defense. *Compare State v Spinks,* 39 N.C. App. 340, 250 S.E. 2d 90 (1979), a case involving instructions similar to those in *Walker,* wherein another panel of the Court of Appeals said it could not conclude that the jury had already rejected self-defense at the time it considered involuntary manslaughter.

Case law from other jurisdictions supports the proposition that the unwarranted submission of involuntary manslaughter in a homicide case involving a self-defense claim may often result in error prejudicial to a defendant. For example, the rule in Illinois is that where the evidence admits of only one of the two possible conclusions, *i.e.*, that defendant is either guilty of murder or not guilty by reason of self-defense, a verdict of manslaughter based on a charge not supported by the evidence is prejudicial error. *See, e.g., People v. Gajda*, 87 Ill. App. 316, 232 N.E. 2d 49 (1967). Similarly, in Kentucky it has been held that an instruction on involuntary manslaughter and a resulting conviction thereof is prejudicially erroneous where the evidence supports only a conviction of intentional homicide or an acquittal based upon the justification of self-defense. *Martin v. Commonwealth*, 406 S.W. 2d 843 (Ky. Ct. App. 1966). And in *Parham v. State*, 135 Ga. App. 315, 217 S.E. 2d 493 (1975), the Georgia Court of Appeals used the following language in reversing a verdict of manslaughter unsupported by the evidence: "The evidence here does not *demand* a verdict of murder, and there is evidence of self-defense which would authorize an acquittal. The error is therefore reversible." *Id.* at 318, 217 S.E. 2d at 497. (Emphasis original.)

[4] We emphasize that the result reached here should not be read as casting any doubt on the validity of earlier decisions of this Court or of the Court of Appeals. Our decision today does no more than recognize that a verdict based upon the erroneous submission of a lesser included offense not supported by the evidence does not invariably constitute error favorable to a defendant as a matter of law. Whether such an error is harmless depends instead upon the facts and circumstances peculiar to each case. We hold simply that the facts and circumstances peculiar to the instant case warrant a conclusion that, absent the erroneous submission of involuntary manslaughter, there is a reasonable possibility that the jury would have returned a verdict of acquittal. The error complained of was therefore prejudicial to the defendant. G.S. 15A-1442. As was well stated by the Georgia Supreme Court in *Robinson v. State*, 109 Ga. 506, 34 S.E. 1017 (1900):

> "If, in a trial for murder, the law of . . . manslaughter is not involved, the court should not charge thereon; but so doing will not, in such a case, be cause for a new trial, if the accused be rightly convicted of murder, or if, though he be con-

victed of . . . manslaughter only, a verdict of murder was really demanded. If, however . . . there was evidence which would have warranted an acquittal . . . there should be a new trial."

Defendant has, in effect, been acquitted of all degrees of homicide other than involuntary manslaughter. That degree of homicide was not supported by the evidence. We cannot conclude in this case that its erroneous submission was harmless error; therefore the judgment of the trial court must be vacated and the defendant discharged. The decision of the Court of Appeals to the contrary is, consequently,

Reversed.

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

Justice COPELAND dissenting.

I respectfully dissent because I firmly believe that the decision in this case is controlled by the rule as set forth in *State v. Vestal*, 283 N.C. 249, 195 S.E. 2d 297, *cert. denied*, 414 U.S. 874 (1973), and not as it is set forth and interpreted in the majority opinion.

The majority states that second degree murder and voluntary manslaughter are intentional homicides and that involuntary manslaughter is an unintentional homicide committed in a criminally negligent way. The majority then holds that the trial judge incorrectly defined an intentional killing for second degree murder and voluntary manslaughter as requiring an actual or specific intent to kill so that if the jury did not believe that the defendant had a specific intent to kill, they could have erroneously returned a verdict of the unintentional homicide, involuntary manslaughter. I do not read the instruction given the jury in this case as having required a specific intent to kill.

The jury was instructed that,

"Second degree murder is defined as the unlawful killing of a human being, that is an *intentional killing* of a human being and with malice. you must have unlawful killing. *It*

must be intentional as I have defined intent to you, and it must be accomplished with malice. The State must show those elements.

Now voluntary manslaughter is the unlawful killing of a human being without malice. There need be no showing of malice. Voluntary manslaughter, the State must show intent, *must be an intentional killing, but without malice.*

Now involuntary manslaughter is the *unintentional killing* of a human being, by an act *done in a criminally negligent way.*" [Emphasis added.]

The trial judge had already correctly defined intentional killing earlier in his instructions.

Even in the portion of the instructions singled out and quoted in the majority opinion, I do not find that the trial judge required a specific intent to kill. The jury was instructed that,

"Voluntary manslaughter, the State must show intent, *must be an intentional killing*, but without malice.

Now involuntary manslaughter is the *unintentional killing* of a human being, by an act done in a criminally negligent way.

Second degree murder is the unlawful killing of a human being, *that is an intentional killing*, with malice." [Emphasis added.]

From the context of all of the instructions read as a whole, I believe that the jury was fully and adequately instructed on the law regarding second degree murder, voluntary manslaughter and involuntary manslaughter. The trial judge was referring to "intentional killing" in the same manner that the majority did in its opinion and was not erroneously requiring a specific intent to kill.

Furthermore, the majority holds that under the trial judge's instructions the jury could have convicted the defendant of involuntary manslaughter even if it believed that defendant killed in self-defense or defense of a family member since those defenses were submitted only as defenses to an intentional killing (second degree murder and voluntary manslaughter) and not as defenses to an unintentional killing (involuntary manslaughter). To so hold

the majority must have simply ignored the instructions on self-defense and defense of a family member that were given to the jury in this case.

The jury was instructed that,

> "And a killing, ladies and gentlemen, *would be excused entirely on the ground of self-defense, or upon the ground of defense of a member of a family,* if . . .
>
> * * *
>
> . . . [I]f after a fair and impartial consideration of all the evidence in the case, *including the evidence of self-defense,* you have a reasonable doubt as to the defendant's guilt of this offense [second degree murder], it would be your duty to give him the benefit of such doubt *and return a verdict of not guilty and acquit him.*
>
> * * *
>
> . . . [I]f after a fair and impartial consideration of all of the evidence in the case, *including the evidence with respect to self-defense or defense of a member of the family,* you have a reasonable doubt as to the defendant's guilt of this offense [voluntary manslaughter]; it would be your duty to give him the benefit of such a reasonable doubt *and return a verdict of not guilty and acquit him.*
>
> Now, if you do not find the defendant guilty, ladies and gentlemen, of the offense of voluntary manslaughter, then you would consider the question of his guilt or innocence of the offense of involuntary manslaughter.
>
> * * *
>
> Now if you do not find the defendant guilty of the offense of murder in the second degree; or of voluntary manslaughter; *but the State has satisfied you from the evidence beyond a reasonable doubt that the defendant did not act in self-defense; then* you must determine whether or not the defendant is guilty of the offense of involuntary manslaughter.
>
> * * *

> . . . [I]f after a fair and impartial consideration of *all the evidence* in the case you have a reasonable doubt as to the defendant's guilt of this offense [involuntary manslaughter], it would be your duty to give him the benefit of such doubt *and return a verdict of not guilty and acquit him.*" [Emphasis added.]

Therefore, on at least five occasions, the jury was instructed that if it believed that the defendant killed the deceased in self-defense or in defense of a family member, it was to find the defendant *not guilty and acquit him.* I believe that the jury was fully and completely instructed on self-defense and defense of a family member and that the burden of proof on these defenses was correctly placed on the State.

If the jury in this case had believed that defendant killed in self-defense or defense of a family member then it would have been their duty to return a verdict of not guilty. Since the jury found the defendant guilty, it obviously rejected the theories of self-defense and defense of a family member. As stated in a case regarding second degree murder, voluntary manslaughter and self-defense which I believe to be fully applicable here, it was held that,

> "His plea of self-defense had been fully and fairly presented to the jury and rejected by them as untrue. What, then, was the duty of the jury, if there was no evidence of manslaughter? Clearly, under the law, they should have convicted the defendant of murder in the second degree. How, then, can the defendant, his plea of self-defense having been wholly discarded by the jury . . . reasonably complain of a charge, however erroneous in that respect, which permitted the jury to convict of a lesser degree of homicide?" *State v. Quick*, 150 N.C. 820, 823-24, 64 S.E. 168, 170 (1909).

It is true that there is no evidence to support a conviction of involuntary manslaughter. However, Willis Rogers, a Wake Forest policeman testified that, "I asked Jimmy Ray where Larry Caudle was and he said he didn't know. He said he emptied his gun when he was crossing the highway. Didn't know whether he hit him or not, but hoped . . . he killed him." This is sufficient evidence to support a conviction of second degree murder. Defendant cannot complain that he has been convicted of a lesser

included offense unsupported by any evidence since there is sufficient evidence to support a conviction of the higher offense. *State v. Vestal, supra.*

Today, for the first time and without being told to what constitutional provision the error relates, we are told that *Vestal* is in effect but an application of the harmless error rule. The majority states that it was harmless error in *Vestal* for the defendant to be convicted of a lesser included offense for which there was no evidence since, in the absence of the unsupported lesser offense as an alternative, it *most certainly would have* returned a verdict of guilty of a higher offense. Then, in the case *sub judice*, the majority does not apply the harmless error test of G.S. 15A-1443(b); instead, it applies the reasonable possibility test of G.S. 15A-1443(a).

There is a difference between the two tests. Error of constitutional proportions is prejudicial unless the State can prove beyond a reasonable doubt that the error was harmless. G.S. 15A-1443(b). Errors arising other than under the Constitution are prejudicial when there is a reasonable possibility that, absent the error, a different result would have been reached at the trial. G.S. 15A-1443(a). Under this subsection the defendant has the burden of showing prejudicial error. The majority does not cite any constitutional provision to which the error of convicting defendant of an offense unsupported by any evidence relates.

In my view, *Vestal* states that the defendant has the burden of showing that the error is prejudicial and this he cannot do even though the offense for which he has been convicted is unsupported by any evidence, when there is sufficient evidence from which a jury could reasonably find the defendant guilty of a higher offense. In *Vestal* it was stated that,

> "[O]ur decided cases follow the majority rule and hold that if the court charges on a lesser included offense when all the evidence *tends to support* a greater offense, the error is favorable to the defendant and he is without standing to challenge the verdict.
>
> * * *
>
> The evidence, though circumstantial, *was amply sufficient* to sustain the jury's finding that the defendant was

> responsible for the killing of Angelo S. Pennisi." *State v. Vestal, supra* at 252-53, 195 S.E. 2d at 299-300. [Emphasis added.]

Likewise, in *State v. Quick, supra* at 824, 64 S.E. at 170 (1909) it was stated that,

> "The deduction seems to us to be founded in the very logic of the law that evidence which is *amply sufficient to support a conviction* of murder must of necessity *be sufficient* to *sustain a conviction* of manslaughter." [Emphasis added.]

Thus, in *Vestal* and *Quick* the holdings were that there was *sufficient evidence* of the higher offense so that a jury *could* have found defendant guilty of that offense thereby making it *nonprejudicial error* for it to convict him of the unsupported lesser included offense. From the above, it is clear that the real issue is simply the sufficiency of the evidence to go to the jury on the higher offense. If there is sufficient evidence from which a jury *could* find defendant guilty of the greater offense then it is error favorable to him where he has been convicted of a lesser included offense unsupported by any evidence. It is not a question of harmless error and I disagree that there is a reasonable possibility in this case that had the error not been committed a different result would have been reached at the trial. The majority relies on two alleged erroneous areas in the jury instructions to find this reasonable possibility: (1) erroneously instructing the jury that second degree murder and voluntary manslaughter required a specific intent to kill and (2) self-defense and defense of a family member were submitted as defenses to intentional but not an unintentional homicide. For the reasons discussed above and on the record as extensively quoted above, I find no erroneous instructions.

I do not believe that the jury instructions somehow short-circuited the jury's consideration of self-defense and defense of a family member as the majority holds. It appears that the only thing that has been short-circuited is the rule as set forth in *Vestal*. To this unjustifiable erosion of the rule as set forth in *Vestal*, I register my dissent.

Chief Justice BRANCH joins in this dissent.

LUCY BLOUNT WILLIAMS v. ALFRED WILLIAMS III

No. 88

(Filed 1 February 1980)

1. **Divorce and Alimony § 16— dependent spouse—meaning of "actually substantially dependent"**

To qualify as a dependent spouse under G.S. 50-16.1(3) as one "actually substantially dependent" upon the other spouse, the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which such spouse became accustomed during the several years prior to separation, *i.e.*, the party seeking alimony must actually be unable to maintain the accustomed standard of living from his or her own means.

2. **Divorce and Alimony § 16— meaning of "maintenance and support"—construction of statutes in pari materia**

In determining the meaning of "maintenance and support" in G.S. 50-16.1(3), that statute must be construed *in pari materia* with the provisions of G.S. 50-16.5 pertaining to the amount of alimony.

3. **Divorce and Alimony § 16— dependent spouse—substantially in need of maintenance and support**

To qualify as a dependent spouse under G.S. 50-16.1(3) as one who is "substantially in need of maintenance and support from the other spouse," the spouse seeking alimony must establish that he or she would be unable to maintain his or her accustomed standard of living (established prior to separation) without financial contribution from the other.

4. **Divorce and Alimony § 16— dependent spouse—consideration of "estates"—estate depletion not required**

In listing "estates" of the parties as one of the factors in G.S. 50-16.5 for determining the amount of alimony, the legislature did not intend that one seeking alimony be disqualified as a dependent spouse because, through estate depletion, such spouse would be able to maintain his or her accustomed standard of living.

5. **Divorce and Alimony § 16— dependent spouse—"other facts of particular case"—length of marriage—contribution to financial status**

When determining dependency pursuant to G.S. 50-16.1(3) and G.S. 50-16.5, the court's consideration of "other facts of the particular case" should include a consideration of the length of the marriage and the contribution each party has made to the financial status of the family over the years.

6. **Divorce and Alimony § 16— dependent spouse—large estates by both parties**

The trial court properly concluded that plaintiff wife was the dependent spouse and defendant husband was the supporting spouse where the court found upon competent evidence that the accustomed standard of living of the parties would require expenditures by plaintiff of $3,500 per month; plaintiff

had a net worth of $761,975 and defendant had a net worth of $870,165; plaintiff had a gross income from her estate of $1,833 per month; and defendant had a gross income of $116,660 and a net income of $61,702 for the past year, since plaintiff had a shortfall of $1,667 per month which she could meet only by depleting her estate.

7. **Divorce and Alimony § 16— award of alimony—consideration of fault**

Considering G.S. 50-16.2 and G.S. 50-16.5(b) *in pari materia*, it was the intent of the legislature that fault be a consideration in awarding alimony.

8. **Divorce and Alimony § 16— alimony award—improper award of counsel fees**

The trial court improperly awarded counsel fees to plaintiff wife in an action for alimony where an award of counsel fees was not necessary to enable plaintiff, as litigant, to meet defendant, as litigant, on substantially even terms by making it possible for her to employ counsel. Furthermore, the trial court erred in awarding plaintiff $2,500 as "reasonable expenses" of prosecuting the suit.

9. **Appeal and Error § 2— appeal of right from Court of Appeals after dissent—matters which may be considered**

In an appeal as a matter of right from a decision of the Court of Appeals to which there was a dissent, the Supreme Court is not limited to consideration only of matters mentioned by the dissenting judge's opinion.

10. **Appeal and Error § 2— appeal from Court of Appeals—questions not brought forward**

In an appeal from a decision of the Court of Appeals, questions not brought forward from those properly presented in the Court of Appeals are deemed abandoned. Rule 28(a), N. C. Rules of Appellate Procedure.

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 42 N.C. App. 163, 256 S.E. 2d 401 (1979), one judge dissenting, reversing judgment entered for plaintiff at the 8 May 1978 Session of WAKE County District Court, *Parker, J.* presiding.

The primary issue on this appeal is a determination of the meaning of "dependent spouse" in our alimony statutes, G.S. 50-16.1 *et seq.* We also address the issue of entitlement to counsel fees and other suit expenses in an action for permanent alimony.

Gulley, Barrow & Boxley by Jack P. Gulley for plaintiff appellant.

Hunter & Wharton by John V. Hunter III for defendant appellee.

CARLTON, Justice.

I.

On 23 August 1977 plaintiff filed a complaint seeking, *inter alia*, a divorce from bed and board, temporary alimony, permanent alimony, counsel fees and suit money, custody of the one minor child of the parties, and child support.

Prior to trial, the parties stipulated that defendant had abandoned plaintiff, one of the statutory grounds for allowing alimony under G.S. 50-16.2. The parties also agreed that plaintiff should have the care, custody and control of the minor son and that defendant should have reasonable and liberal visitation rights.

At hearing, testimony of the plaintiff tended to show that she and defendant were married in 1947; that she and defendant have three adult children and one minor child; that her husband's initial support to the family was not adequate and her father sent her $100.00 each month and later raised this to $200.00 which was paid from stock owned by her; that her husband's contributions to household and family expenses did increase gradually over the years, and 7 or 8 years prior to suit reached $800.00 a month plus payment of the mortgage, gasoline and utility bills; and that she had repeatedly asked defendant for more money to run the household throughout the marriage but he had refused.

She further testified that the family home was built in 1963 with $60,000.00 of her money and that she had spent in addition some $15,000.00 of her own money for improvements.

Plaintiff also testified that she is a junior college graduate with no experience in business; that her own average income over the past three years has been around $21,000.00, mostly from stocks; that she had a savings account balance of $123,000.00 in May of 1977 and transferred $50,000.00 of this to bonds approximately ten days prior to trial; that though she does not recall doing so, she has apparently co-signed several financial documents with defendant; that she knows little about her financial transactions as defendant has always handled them for her and at one time was paid by her family to do so; that for several years now she has contributed approximately $3,000.00 out of her savings each month for family expenses; and that the monthly expenses for herself and her minor child total $6,754.00.

Testimony of the defendant tended to show that he is president of Alfred Williams and Company of Raleigh and owns 270 of the 600 shares of stock outstanding; that in 1976 he paid $48,000.00 for a furnished condominium in Pinehurst but had the deed recorded in the name of T. F. Ellis and did not include that property on his financial statement; that he paid $4,500.00 for the lot for the marital home some three years before construction and title to the lot was conveyed in the entireties; that in addition to the $60,000.00 paid by his wife, he borrowed an additional $30,000.00 to complete the house; that his financial statement for 1976 shows a net worth of $870,000.00; that his wife did co-sign a personal guarantee for a substantial loan to Williams Investment Corporation, a business owned by him, plaintiff and their children; that he receives income from various rental properties in Raleigh and makes monthly payments on various financial transactions.

The parties introduced into evidence various exhibits regarding their financial status.

On 8 May 1978, the trial court entered three separate orders finding and concluding, *inter alia*, that plaintiff had a net worth in May, 1977, of $754,000.00 which had increased to $761,975.00 by the time of trial, and defendant had a net worth at time of trial of $870,165.00; that plaintiff had an annual gross income of approximately $22,000.00 in interest and dividends and defendant had a gross income of $116,660.00 in 1977 with an after-tax income of $61,702.00; that plaintiff's reasonable monthly expenses for maintaining the household in which she is presently living "in a manner commensurate with the standard of living usually enjoyed by the parties" was $3,500.00 per month; that for the past 16 years, the plaintiff had contributed over $2,500.00 per month toward the maintenance of the household and at the time of trial and for several years prior thereto, the defendant's contributions to the maintenance of the household had been $800.00 per month plus mortgage, utility and other payments of $634.00 per month.

The trial court concluded that plaintiff was the dependent spouse and defendant was the supporting spouse. It went on to award plaintiff alimony of $1,000.00 per month, possession of the home, mortgage, tax and utility payments, payment of insurance coverage on the home, and payment of certain medical expenses. The court also found that the husband had the means to pay such

alimony. The trial court based its conclusions expressly on the evidence in the case without regard to any presumption that the husband was the supporting spouse.

Plaintiff was also awarded $4,500.00 per year for private school expenses of the minor child, an additional $450.00 per month child support, $3,000.00 for each of her two attorneys and $2,500.00 for suit expenses.

We note that the award here was for permanent alimony. No *pendente lite* hearing was held as defendant had contributed $800.00 per month plus house payments and other expenses during pendency of the action. Plaintiff was granted a divorce from defendant *a mensa et thoro.*

From the judgments, defendant appealed to the Court of Appeals. That court held, *inter alia*:

(1) The trial court erred in awarding alimony to plaintiff because "[t]he evidence completely fails to support the trial court's finding that plaintiff is substantially dependent upon the defendant or in need of maintenance and support from him."

(2) The trial court further erred in awarding counsel fees because "there is no evidence that plaintiff is a dependent spouse."

(3) The trial court erred in awarding plaintiff $2,500.00 for suit expenses because plaintiff is not a dependent spouse and because G.S. 50-16.4 makes no mention of such "expenses."

So saying, the Court of Appeals reversed the orders for alimony, counsel fees and suit expenses and further vacated and remanded the child support award because no findings were present in the record as to actual past expenditures for the child.

Judge Erwin dissented, agreeing with all portions of the majority opinion except that reversing the award of alimony. He would hold that plaintiff was the dependent spouse because the findings of the trial judge were supported by competent evidence.

II.

A.

On appeal to this Court, plaintiff first contends that the Court of Appeals erroneously reversed the trial court's findings

that she is a dependent spouse within the meaning of our alimony statutes. We agree with Judge Erwin's dissent that the trial court's findings were supported by competent evidence, and we also think the trial court properly interpreted our statutory and case law in this portion of its order. We therefore reverse the Court of Appeals.

Alimony is defined by G.S. 50-16.1(1) as "payment for the *support and maintenance* of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce." (Emphasis added.) While the word "permanent" is not included, the stated definition obviously contemplates what is commonly referred to as "permanent alimony." *See* R. Lee, *North Carolina Family Law* § 135 (Manuscript ed. 1980).

G.S. 50-16.2 provides that only a "dependent spouse" is entitled to alimony when one of the ten enumerated grounds in that statute is present. Here, defendant stipulated that he had abandoned the plaintiff as contemplated by G.S. 50-16.2(4). The crucial question to determine entitlement to alimony, therefore, revolves around the meaning intended by the statutory term "dependent spouse."

G.S. 50-16.1(3) defines "dependent spouse" to mean a spouse, "whether husband or wife, (1) who is *actually substantially dependent* upon the other spouse for his or her maintenance and support *or* (2) is *substantially in need* of maintenance and support from the other spouse." (Numbered parentheses and emphasis added.)

Conversely, G.S. 50-16.1(4) defines "supporting spouse" to mean a spouse, "whether husband or wife, (1) upon whom the other spouse is actually substantially dependent or (2) from whom such other spouse is substantially in need of maintenance and support. A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife." (Numbered parentheses added.)

The legislature has not spelled out what is precisely meant by the terms "actually substantially dependent," "substantially in need of," and "maintenance and support." However, when construing the words of a statute, the intent of the legislature con-

trols. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it plain and definite meaning, *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977); *Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973), keeping in mind that nontechnical statutory words are to be construed in accordance with their common and ordinary meaning. *Lafayette Transportation Service, Inc. v. County of Robeson*, 283 N.C. 494, 196 S.E. 2d 770 (1973); *In re McLean Trucking Company*, 281 N.C. 242, 188 S.E. 2d 452 (1972).

[1] Accordingly, we think the legislative intent in use of the phrase "actually substantially dependent" is clear. This term obviously implies that the spouse seeking alimony must have actual dependence on the other *in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation.* We elaborate below on the underlined portion of the preceding sentence. Thus, to qualify as a "dependent spouse" under that portion of G.S. 50-16.1(3), one must be actually without means of providing for his or her accustomed standard of living. In the case at bar, plaintiff would obviously not qualify under that portion of the definition.

The second and third cited expressions from the statute, however, are not so easily construed. "Substantially in need" obviously refers to something less than being "actually substantially dependent," but the degree of difference is unclear. The economic level contemplated by the phrase "maintenance and support" is also not explicitly defined in the statute.

A fundamental rule of statutory construction is that when the legislature has erected within the statute itself a guide to its interpretation, that guide must be considered by the courts in the construction of other provisions of the act which, in themselves, are not clear and explicit. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). The act must be considered as a whole and none of its provisions shall be deemed useless or redundant if they can be reasonably considered as adding something to the act which is in harmony with its purpose. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). Statutes dealing with the same subject matter must be construed *in pari materia*, *Becker County Sand & Gravel Com-*

pany v. Taylor, 269 N.C. 617, 153 S.E. 2d 19 (1967); *Shaw v. Baxley*, 270 N.C. 740, 155 S.E. 2d 256 (1967), as together constituting one law, *Jackson v. Guilford County Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969) and harmonized to give effect to each, 82 C.J.S. *Statutes* § 366 at 810 (1953 & Cum. Supp. 1979).

[2] Applying the stated rules, G.S. 50-16.1 through G.S. 50-16.8 must be construed *in pari materia*. Each of these sections deals with the same subject matter and constitutes one law—that of alimony—with the common purpose of delineating the statutory rules for the same. Thus, in construing the meaning of "substantially in need" and "maintenance and support" in G.S. 50-16.1(3), we must turn for guidance to G.S. 50-16.5, the statute for determining *amount* of alimony. That statute provides that "[a]limony shall be in such amount as the circumstances render necessary, having due regard to the (1) estates, (2) earnings, (3) earning capacity, (4) condition, (5) *accustomed standard of living of the parties*, and (6) other facts of the particular case." (Numbered parentheses and emphasis added.)

We think usage of the term "accustomed standard of living of the parties" completes the contemplated legislative meaning of "maintenance and support." The latter phrase clearly means more than a level of mere economic survival. Plainly, in our view, it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed. For us to hold otherwise would be to completely ignore the plain language of G.S. 50-16.5 and the need to construe our alimony statutes *in pari materia*. This we are unwilling to do.

[3] Having so construed that portion of G.S. 50-16.1(3), we are then able to discern legislative intent in usage of the phrase "substantially in need of." Having previously determined that the first portion of G.S. 50-16.1(3) requires an actual dependence of one spouse on the other for maintenance of the accustomed standard of living (*i.e.*, the party seeking alimony would be actually unable to maintain the accustomed standard of living from his or her own means), the determination of a dependent spouse under the second portion of G.S. 50-16.1(3) requires only that the spouse

seeking alimony establish that he or she would be unable to maintain his or her accustomed standard of living (established prior to separation) without financial contribution from the other.

Our holding on this point today is not inconsistent with lower court holdings on the same issue. Previous decisions by the Court of Appeals have implicitly recognized that the meaning of "substantially in need of maintenance and support" found in G.S. 50-16.1(3) must be construed *in pari materia* with the terms of G.S. 50-16.5. In *Peeler v. Peeler*, 7 N.C. App. 456, 172 S.E. 2d 915 (1970), the defendant husband argued that in order for his spouse to be found dependent, she had to be unable to exist without his aid. The Court of Appeals refused to agree with the husband's position saying:

> The statute [G.S. 50-16.1(3)] provides, among other things, that a dependent spouse [is] a spouse who is "substantially in *need* of maintenance and support from the other spouse." In determining the *needs* of a dependent spouse, all of the circumstances of the parties should be taken into consideration, including the property, earnings, earning capacity, condition and *accustomed standard of living of the parties.* (Emphasis added.)

Id. at 461, 172 S.E. 2d at 918. *Accord, Sprinkle v. Sprinkle*, 17 N.C. App. 175, 193 S.E. 2d 468 (1972). Even under our prior statutes which awarded alimony for a "reasonable subsistence," this Court considered accustomed standard of living in setting "subsistence" amount. *Cf., Schloss v. Schloss*, 273 N.C. 266, 160 S.E. 2d 5 (1968) (Wealthy husband abandoned wife; $1,500.00 a month alimony to her held a "reasonable subsistence"). Moreover, attention to expenses incurred in maintaining an accustomed standard of living when awarding alimony, rather than attention to subsistence level expenses, is the general view in other jurisdictions. *See, Annot.*, 1 A.L.R. 3d 6, 41-43 (1965 & Supp. 1979) and cases cited therein.

Applying the factors of G.S. 50-16.5, we think the legislature intended trial courts to determine dependency under G.S. 50-16.1(3) bearing in mind these propositions:

(1) The parties must have been legally married to each other and one spouse must have been adjudged to have committed one

of the grounds for alimony under G.S. 50-16.2 or have stipulated that one of the grounds is present. These are findings of fact which must be entered into the record by the trial court.

(2) The incomes and expenses measured by the standard of living of the family as a unit must be evaluated from the evidence presented. If this comparison reveals that one spouse is without means to maintain his or her accustomed standard of living, then the former would qualify as the dependent spouse under the phrase "actually substantially dependent." G.S. 50-16.1(3).

(3) If the comparison does not reveal an *actual* dependence by one party on the other, the trial court must then determine if one spouse is "substantially in need of maintenance and support" from the other. In doing so, these additional guidelines should be followed:

A. The trial court must determine the standard of living, socially and economically, to which the parties *as a family unit* had become accustomed during the several years prior to their separation.

B. It must also determine the present earnings and prospective earning capacity and any other "condition" (such as health and child custody) of each spouse at the time of hearing.

C. After making these determinations, the trial court must then determine whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the standard of living of the spouse seeking alimony in the manner to which that spouse became accustomed during the last several years prior to separation. This would entail considering what reasonable expenses the party seeking alimony has, bearing in mind the family unit's accustomed standard of living.

[4] D. The financial worth or "estate" of both spouses must also be considered by the trial court in determining which spouse is the dependent spouse. We do not think, however, that usage of the word "estate" implies a legislative intent that a spouse seeking alimony who has an estate sufficient to maintain that spouse in the manner to which he or she is accustomed, *through estate depletion*, is disqualified as a dependent spouse. Such an interpretation would be incongruous with a statutory emphasis on

"earnings," "earning capacity," and "accustomed standard of living." It would also be inconsistent with plain common sense. If the spouse seeking alimony is denied alimony because he or she has an estate which can be spent away to maintain his or her standard of living, that spouse may soon have no earnings or earning capacity and therefore no way to maintain *any* standard of living.

We think, therefore, that the trial court consideration of the "estates" of the parties is intended primarily for the purpose of providing it with another guide in evaluating the earnings and earning capacity of the parties, and not for the purpose of determining capability of self-support through estate depletion. We think this is equally true in giving consideration to the estate of the alleged supporting spouse. Obviously, a determination that one is the supporting spouse because he or she can maintain the dependent spouse at the standard of living to which they were accustomed through estate depletion could soon lead to inability to provide for either party. *See, e.g., Beall v. Beall*, 290 N.C. 699, 228 S.E. 2d 407 (1976); *Berry v. Berry*, 56 App. Div. 2d 522, 391 N.Y.S. 2d 120 (1977).

Defendant argues that awarding alimony to this plaintiff would result in maintaining "not the wife, but her wealth." He argues that compelling the husband to build up by alimony a "treasure hoard for the wife" has been consistently rejected. *Sayland v. Sayland*, 267 N.C. 378, 148 S.E. 2d 218 (1966) (decided under prior law); *Taylor v. Taylor*, 26 N.C. App. 592, 216 S.E. 2d 737 (1975). Nothing in this decision is designed to allow plaintiff to increase her wealth at the expense of defendant. Under the guidelines established, plaintiff would be required to continue in expending *all* of her annual income if she desires to maintain her present standard of living. Should the wife's capital assets increase in value, through inflation, prudent investment or otherwise, and results in an increase of her income, defendant would, of course, be entitled to petition the court for modification of the alimony order under G.S. 50-16.9.

We note that, while the Court of Appeals has seldom discussed whether to consider a dependent spouse's estate when determining eligibility for permanent alimony, it has tended to disallow depletion of estates when alimony *pendente lite* has been granted. "The mere fact that the wife has property or means of

her own does not prohibit an award of alimony pendente lite." *Cannon v. Cannon*, 14 N.C. App. 716, 721, 189 S.E. 2d 538, 541 (1972). *Accord, Sprinkle v. Sprinkle, supra; Newsome v. Newsome*, 22 N.C. App. 651, 207 S.E. 2d 355 (1974).

In *Davis v. Davis*, 35 N.C. App. 111, 240 S.E. 2d 488 (1978), where the plaintiff wife had a savings account of $21,000.00 which was larger than her spouse's savings account, the Court of Appeals upheld an award of alimony *pendente lite* citing the husband's larger income. There the court stated, "Surely we cannot say that under these circumstances the dependent spouse must use her meager savings during the pendency of this action. . . ." *Id.* at 114, 240 S.E. 2d at 489. Likewise in *Gardner v. Garnder*, 40 N.C. App. 334, 252 S.E. 2d 867 (1979), the Court of Appeals upheld an award of alimony *pendente lite* despite the dependent wife's estate of $220,000.00.

We do not believe the fact that these cases involve alimony *pendente lite* rather than permanent alimony makes them inappositive to the case *sub judice*. The statutory provisions for alimony *pendente lite* found in G.S. 50-16.3 include a requirement that the spouse seeking alimony *pendente lite* be a dependent spouse presumably within the purview of G.S. 50-16.1(3). *See also* G.S. 50-16.4.

Plainly, it costs more to support two homes than one and unless one or both of the parties has income which had previously been unnecessary for their combined support, estate depletion may occur. We simply hold that our legislature, in listing "estates" as one of the factors in G.S. 50-16.5, did not intend that one seeking alimony be disqualified as a dependent spouse because, through estate depletion, that spouse would be able to maintain his or her accustomed standard of living.

[5] E. We further note that G.S. 50-16.1(3), read *in pari materia* with G.S. 50-16.5, in defining dependency, provides for a trial court's consideration of "other facts of the particular case" when awarding alimony. Under this statutory rubric, we feel that consideration should be given to the length of a marriage and the contribution each party has made to the financial status of the family over the years. The law is replete with cases in other jurisdictions where a dependent spouse contributed substantial labor or assets which improved the supporting spouse's economic

position and estate. In such cases, courts have often awarded alimony on a theory or reimbursement. In *Fields v. Fields*, 303 Ky. 624, 198 S.W. 2d 298 (1946), much of the husband's property was acquired after marriage. The wife's income relieved him of the necessity of spending his earnings or savings for current household obligations. There, the court awarded the wife alimony as reimbursement for her contribution to her husband's wealth. *See also Sims v. Sims*, 128 Ind. App. 408, 146 N.E. 2d 111 (1957); *DeRoin v. DeRoin*, 198 Okla. 430, 179 P. 2d 685 (1947); *Fields v. Fields*, 343 S.W. 2d 168 (Mo. App. 1960); 1 A.L.R. 3d, *supra* at 29-33.

The formula for determining whether alimony is appropriate, however, is only half present once the issue of dependency has been resolved. G.S. 50-16.1(4), as noted above, defines supporting spouse as one upon whom the dependent spouse must rely. Courts of this State have recognized that evidence one spouse is dependent does not necessarily infer the other spouse is supporting. *Cf.*, *Manning v. Manning*, 20 N.C. App. 149, 201 S.E. 2d 46 (1973) (Alimony order vacated and remanded where the court stated, *inter alia*, that unemployed wife could have been supported by someone not her spouse).

Furthermore, it must be remembered that we are not concerned here with establishing guidelines for determining the amount of alimony. Defendant's appeal to the Court of Appeals did not attack the *amount* of alimony awarded by the trial court but questioned his spouse's qualification for alimony based on her dependency. After making an initial determination of dependency, the trial court would proceed to follow the rules established by our statutes and case law in setting the amount of alimony. It is entirely possible, for example, that the trial court might determine a spouse dependent under the guidelines noted above and then find that it cannot order the amount of alimony needed from the other spouse because the latter is incapable of providing that total amount of support for any number of reasons.

Finally, we note that no precise mathematical equation can be established for determining which spouse is dependent and which is supporting. We have attempted here to establish general guidelines on the basis of our interpretation of the statutes. Within these guidelines, our trial courts must continue to make determinations on a case-by-case basis.

B.

[6] Applying these principles to the facts of the case *sub judice*, we hold that the trial court properly concluded that plaintiff was the dependent spouse and defendant the supporting spouse for the following reasons:

(1) The trial court found that the standard of living to which the parties had become accustomed would require monthly expenses of more than $3,500.00 by the plaintiff.

(2) It also found that the wife's *gross* income averaged $1,833.00 per month from her estate which had a net worth of $761,975.00. It found that defendant had a gross income of $116,660.00 and a net income of $61,702.00 in 1977 from his estate which had a net worth of $870,165.00 and from his salary as president of Alfred Williams and Company.

All of the trial court's findings noted above are supported by competent evidence in the record and are therefore binding on us on appeal. *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976); *Rock v. Ballou*, 286 N.C. 99, 209 S.E. 2d 476 (1974).

The dependent spouse here was thus "substantially in need of maintenance and support" from the supporting spouse. Subtracting plaintiff's monthly income of $1,833.00 from her expenses of $3,500.00 leaves a $1,667.00 shortfall per month which plaintiff could meet only by depleting her estate, a necessity we have rejected in determining entitlement to alimony. Plaintiff is therefore dependent on defendant for an amount needed to maintain her in the manner to which she was accustomed—the standard established by the parties during the last several years prior to separation.

[7] We would be remiss, in attempting to provide guidance for the determination of "dependency," not to mention the question of fault in the marital separation. Fault is nowhere specifically listed in our alimony statutes as one of the factors to be considered in determining which spouse is the dependent spouse nor in determining the amount of alimony. Indeed, alimony is not to be awarded as punishment for a broken marriage. *See Schloss v. Schloss, supra* (decided under prior law); *Lemons v. Lemons*, 22 N.C. App. 303, 206 S.E. 2d 327 (1974). However, G.S. 50-16.2 provides for the allowance of alimony to the dependent spouse *only*

when the supporting spouse has committed one of the ten enumerated acts, all of which involve marital misdeeds. Moreover, G.S. 50-16.5(b) provides that one who might otherwise qualify as the dependent spouse may be denied alimony if he or she has committed one of the enumerated misdeeds. Considering the statutes *in pari materia*, we believe that our legislature clearly intended that fault be a consideration in awarding alimony.

In so providing, the legislature implicitly recognized that the dissolution of the family as an economic unit works hardship on both parties. Assets used to maintain one household do not stretch so far when maintaining two. In such cases, the burden of contending with diminished assets should, in all fairness, fall on the party primarily responsible for the break-up of the economic unit.

Nor do we find the notion of fault repugnant to sound public policy. One of the clear purposes of alimony is to accomplish a separation with the least possible social and financial disruption. The parties to marriage entered into a binding contract—one historically considered the strongest and most permanent known to the law. Sound public policy would dictate that the party who violated that binding contract should continue to bear its financial burden where he or she can reasonably do so *and* where that is necessary to prevent a relatively greater economic hardship on the party without fault. "Divorce inevitably produces painful alterations in the lives of the parties. A major function of alimony is to minimize its financial impact." H. Clark, *The Law of Domestic Relations* § 14.5 at 442 (1968).

We are not unmindful that attitudes towards alimony are changing. Several courts in other jurisdictions are basing their awards of alimony on such doctrines as equitable distribution or rehabilitative alimony. *See* R. Lee, *supra* at § 135.1. We are also not unmindful that our own alimony statute, premised as it is upon fault, has been questioned by some commentators. *See, e.g.*, Marschall, Proposed Reforms in North Carolina Divorce Law, 8 *N.C. Cent. L. R.* 35 (1976). These trends and criticisms, however, do not take into account the legislative mandate under which this Court, or any court in this State, labors. Changing trends in other jurisdictions are based on different statutory mandates. We do not believe our legislature intended to propel our State into a

world where " 'women's lib' [exists] as a *fait accompli*, " *see* Lee, *supra* at § 135.1 quoting Krause, *Family Law in a Nutshell* § 28.2 at 332 (1977), and where the presumption of equality in earning power is allowed to outweigh the reality of unequal financial bargaining position. *See, e.g., Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed. 2d 189 (1974). The statutory mandate is not a question of adherence to outdated traditions in the marital relationship, but a question of "fairness and justice to all parties." *Beall v. Beall, supra; Sayland v. Sayland, supra.*

Defendant urges that we declare that portion of G.S. 50-16.1 unconstitutional which deems the husband to be the supporting spouse unless he is incapable of supporting his wife. Defendant concedes that the trial court expressly stated in its order that no reliance was placed on this presumption in reaching its decision. He argues, however, that trial courts cannot continue to do this and "make it forever impossible for any man to raise the point." It is well-established that we do not pass upon a constitutional question if another issue is determinative of the matter before us. *Iredell County v. Crawford*, 262 N.C. 720, 138 S.E. 2d 539 (1964); *State v. Blackwell*, 246 N.C. 642, 99 S.E. 2d 867 (1957).

We do, however, agree with defendant that the trial court improperly designated the award to plaintiff as "permanent lump-sum alimony." G.S. 50-16.7 provides in part that alimony shall be paid by lump sum payment or periodic payments. Clearly, the trial court here has ordered periodic payments and that portion of the trial court order referring to a "lump sum" payment is vacated.

Finally, it is obvious that this decision concerns parties of unusual wealth, yet the issues addressed go to hundreds of cases tried in North Carolina each year. Suffice it to say that the principles established by this decision apply to parties of all economic status.

III.

[8] Plaintiff's second major contention in her appeal here is that the Court of Appeals improperly reversed the trial court order providing for an award of attorney fees. Since the Court of Appeals determined that plaintiff was not a dependent spouse, it held that attorney fees were not allowable. We agree with the

result reached by the Court of Appeals on this question albeit for a different reason than that court considered.

It is well-established in this jurisdiction that the purpose of the allowance of counsel fees is to enable the dependent spouse, *as litigant*, to meet the supporting spouse, *as litigant*, on substantially even terms by making it possible for the dependent spouse to employ adequate counsel. *Schloss v. Schloss*, *supra* (interpreting the pre-1967 statutes); *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972) (extending the holding in *Schloss* to the present statutes, G.S. 50-16.1 *et seq.*); 2 Lee, *North Carolina Family Law* § 148 at 70 (3d ed. 1965 & Cum. Supp. 1974).

It is clear from the record before us that an award of counsel fees was not necessary to enable plaintiff, as litigant, to meet defendant, as litigant, on substantially even terms by making it possible for her to employ counsel. That portion of the Court of Appeals' decision reversing the trial court allowance of attorney fees for plaintiff is therefore affirmed. Likewise, that portion of the Court of Appeals' decision reversing the trial court allowance of $2,500.00 to plaintiff as "reasonable expenses" of prosecuting this suit is also affirmed.

IV.

[9, 10] In her brief to this Court, plaintiff states that the child support provisions of the trial court order are not involved in this appeal "since the dissent in the Court of Appeals was only with regards to the decision on alimony." This Court is not limited, in reviewing a decision of the Court of Appeals, to consideration of only such matters as may be mentioned by the dissenting judge in the Court of Appeals' opinion. However, since the parties in their briefs do not argue the portions of the trial court order involving child support and ownership of household furniture and possessions, we do not address those arguments presented to the Court of Appeals and decided by them. Questions not brought forward from those properly presented in the Court of Appeals are deemed abandoned. Rule 28(a), N.C. Rules of Appellate Procedure.

We therefore hold that the portion of the Court of Appeals' decision reversing the trial court allowance of permanent alimony is reversed. That part of the trial court order for alimony referring to a "lump sum" payment is vacated. That portion of the

Court of Appeals' decision reversing the trial court allowance of attorney fees and "necessary expenses" is, for the reasons stated, modified and affirmed. The remaining portions of the Court of Appeals' decision are left undisturbed and the case must be remanded to the Court of Appeals for further remand to the District Court, Wake County for further proceedings consistent with that portion of the Court of Appeals' decision relating to child support.

Reversed in part.

Modified and affirmed in part.

Vacated and remanded in part.

STATE OF NORTH CAROLINA v. TOMMY MORGAN

No. 71

(Filed 1 February 1980)

1. **Criminal Law § 75.2— confession—no mental or psychological pressure exerted**

Officers did not exert such mental or psychological pressure against defendant so as to overcome his will and thereby induce a confession which defendant was not otherwise disposed to make where the evidence tended to show that defendant was questioned for approximately six hours before he first made his incriminating statements and was told on at least two occasions during that time that he was free to leave, but defendant instead chose to remain in the sheriff's office and continued to answer questions; four different officers questioned defendant at different times, but there was no suggestion that defendant was at any time bullied by the presence and questioning of a group of interrogators; and an officer's insistence to defendant that he tell the truth was not accompanied by any sort of threat or deprivation.

2. **Criminal Law § 75.1— confession made in sheriff's office—defendant not under arrest**

There was no merit to defendant's contention that his incriminating statement resulted from an illegal arrest, since, at the time officers talked with defendant, they did not consider him to be a suspect in the case but simply wanted to talk to him about a radio in his possession which was like one owned by the murder victim; defendant was allowed to go back into his home unaccompanied to get dressed after first talking with the deputies; on two occasions during the deputies' interview with defendant, he was told that he was

free to go; defendant was not frisked, handcuffed, or in any other way treated as if he were incarcerated; and defendant therefore was not under arrest at the time he made the statement.

3. **Criminal Law § 53— testimony by forensic pathologist—form of questions—nonresponsive answer—opinion as to cause of death**

An expert in the field of forensic pathology who had examined skeletal remains was qualified to state an opinion as to what was the probable cause of death without the intervention of a hypothetical question and without couching his testimony in terms of what might have or could have caused death; furthermore, the fact that the witness testified concerning identification of the remains as well as the cause of death when questions propounded by the district attorney did not call for such opinion testimony did not require exclusion of the answers since they stated relevant facts, and the expert witness could properly state his opinion as to cause of death without invading the province of the jury.

4. **Criminal Law § 102.3— improper jury argument—time for taking exception**

When counsel makes an improper remark in his jury argument, an exception must be taken before verdict or the alleged impropriety is waived.

5. **Homicide § 21.7— defendant's exculpatory statement—evidence casting doubt on statement—sufficiency of evidence**

There was no merit to defendant's contention that the State, by introducing defendant's confession in which he claimed the killing of the victim was an accident, was bound entirely by the purported truth of that statement and that the charge against him therefore should have been dismissed, since the State offered evidence which cast doubt on defendant's statement that the killing was accidental, including evidence that defendant had made up his mind to rob the victim and went to his place of work for that purpose, although he kept changing his mind from time to time throughout the course of his activities on whether to go through with his intention; defendant lied to the victim about the condition of the victim's father and thereby induced the victim to close the produce stand which he was operating; defendant did not take the victim to his home but instead took him to a remote area of the county where he induced the victim to get out of the car by lying to him about the presence nearby of some marijuana plants; defendant walked into the woods carrying a shotgun, falsely saying that it was for the purpose of killing rabbits; and defendant did not assist the victim in any manner after he was shot but instead ran away frightened from the area.

6. **Homicide § 24.3— death by accident—burden of proving crime properly placed on State**

The trial court's instruction with respect to death by accident properly placed the burden on the State to prove each and every element of the crime charged beyond a reasonable doubt, thereby disproving defendant's assertion of an accidental death.

APPEAL by defendant from *Barbee, S.J.*, 29 January 1979 Regular Criminal Session, SCOTLAND Superior Court.

Upon a plea of not guilty, defendant was tried on a bill of indictment proper in form which charged him with the murder of Bobby Smith. The state presented evidence summarized in pertinent part as follows:

On 28 August 1976, Bobby Smith, 25, left his home in Laurinburg, North Carolina, with his father en route to a small produce stand belonging to Mr. Smith located on Highway 74 between Laurinburg and Maxton. Before they went to the produce stand, Bobby and his father visited the store of Howard Fields, a dealer in electronic equipment, in Maxton. While they were at the store, Mr. Smith purchased several items of electrical equipment for Bobby to use with his citizen band radio. These items included an antenna and an adapter box which provided a power source for the radio.

Bobby was then taken by his father to the produce stand. Though he was somewhat mentally retarded, Bobby was able to operate the produce stand by himself. Unable to read and write, he nevertheless was able to handle arithmetic proficiently enough to enable him to sell produce to the customers who came to the stand. At the time his father left him at the stand, approximately 10:00 a.m., Bobby had in his possession a paper bag containing $180, $100 in currency and $80 in change.

On that evening, at approximately eight o'clock, Bobby's mother, Mrs. Grace Smith, arrived at the produce stand to take her son home for the night. Bobby did not have a driver's license, and it was customary for his parents to take him to work in the morning and return for him in the evening. When Mrs. Smith drove up to the stand, it was closed and locked. She did not notice anything unusual about the area except that her son was nowhere to be found. After searching the immediate area around the stand for her son, Mrs. Smith returned to their home, called her husband at another produce stand which he owned, and asked whether Bobby was with him. After learning that Bobby was not there, she returned to the stand near Maxton where she was later joined by her husband. A search of the premises showed that the "CB" radio antenna which had been purchased earlier in the day was still in the stand but that all of the money which had been in Bobby's possession was gone. Thereafter, a search was conducted by members of the Scotland County Sheriff's Department, the

State Bureau of Investigation, the Federal Bureau of Investigation, and members of the community. The search failed to reveal the whereabouts of Bobby.

On 27 November 1976 members of a hunting party, while hunting in the northern portion of Scotland County, discovered what appeared to be a human skull and other bones of various sizes. Law enforcement officers who were summoned to the scene gathered the remains which were taken to the office of the Chief Medical Examiner in Chapel Hill. Tests and examinations conducted by Dr. Page Hudson, Chief Medical Examiner of the State of North Carolina, and members of his staff, indicated that the bones were those of a white male between twenty and thirty, approximately six feet tall and who had been dead more than two months but less than one year. A comparison of dental records led Dr. William P. Webster, a forensic odontologist on the medical examiner's staff, to conclude that the remains were those of Bobby Smith.

On 6 March 1978 the Scotland County Sheriff's Department had received information that defendant had attempted to sell a radio similar to the one which Bobby Smith had at the time of his death. Between 8:00 a.m. and 8:30 a.m. on that date, two deputies went to defendant's home and, at their invitation, defendant went with them to the sheriff's office. After arriving at the sheriff's office, defendant was advised of his constitutional rights and executed a written waiver of rights. At the same time he was informed of his rights, defendant was informed that the officers had information that he had a "CB" radio similar to that which had been owned by Bobby Smith and that he had been trying to sell it.

After being questioned by police officers for several hours, defendant made an incriminating statement. In his statement, he admitted that on the day Bobby Smith was killed, he had made up his mind to rob Bobby; that he kept changing his mind; that he went to the produce stand where he knew Bobby worked; that he told Bobby that his father's feet were "acting up again" and that he had been asked to pick Bobby up; that he helped Bobby close the produce stand; that instead of taking Bobby home, he took him to a rural section of Scotland County, telling Bobby that he had marijuana planted nearby; that he took his shotgun with him

when they left the car and proceeded into the woods; that while they were walking through the woods, he tripped over some vines; that the gun discharged as he fell, wounding Bobby in the chest and stomach; that upon seeing Bobby fall, he became frightened and ran away from the scene; that he threw the shotgun out on a highway between Laurel Hill and Old Hundred; and that he threw Bobby's "CB" radio in a pond near Old Hundred.

At the conclusion of the state's evidence, defendant chose not to offer any evidence, and the jury returned a verdict finding him guilty of second-degree murder. The court entered judgment sentencing defendant to life imprisonment.

Other facts which are pertinent to this appeal will be discussed in the opinion.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Donald W. Stephens and Assistant Attorney General J. Michael Carpenter, for the State.

Kenneth S. Etheridge for defendant-appellant.

BRITT, Justice.

In his brief defendant brings forward and argues 29 assignments of error. We find no merit in any of the assignments and will discuss only those which we consider important.

Defendant makes a two-pronged attack on the admissibility of evidence relating to statements he allegedly made to police officers at the sheriff's offices on 6 March 1978. He argues that the statements were unconstitutionally obtained in that they were given (1) involuntarily as the products of psychological coercion, and (2) pursuant to an illegal arrest. We are not impressed with either argument.

Prior to admitting the challenged evidence, the court conducted an extensive voir dire hearing in the absence of the jury. Following the hearing the court made findings of fact which are fully supported by the evidence, consequently we are bound by the findings. 4 Strong's N.C. Index 3d, Criminal Law § 76.10. The court also made conclusions of law which are fully supported by the findings of fact.

Portions of the court's findings of fact pertinent to the questions being discussed are summarized as follows:

1. On or about 6 March 1978 Detective A. W. Oxendine and Sgt. Walter Sims of the Scotland County Sheriff's Department were investigating the disappearance of Bobby Smith who allegedly disappeared on 28 August 1976. Det. Oxendine, after receiving information that defendant had made an offer to sell a CB radio to one James Larkin, asked Sgt. Sims to go with him to defendant's home. They arrived at defendant's residence around 8:30 a.m. Det. Oxendine blew the car horn and defendant, without a shirt on, came out of his residence. Det. Oxendine identified himself and told defendant that they would like to talk to him at the sheriff's department. Defendant returned to the inside of his home and later came back to the police vehicle and entered the backseat. Neither officer at this time told defendant what they wanted to discuss with him. On the way to the sheriff's department, there was no conversation between defendant and the officers. The officers did not have an arrest warrant.

2. The officers and defendant arrived at the sheriff's department around 8:50 a.m. They went into a deputies' office which is about 22 feet by 22 feet; the office has a window and there were several desks with chairs in the office; and there was also a telephone which was operational.

3. After the three of them entered the deputies' office, the officers left temporarily and called S.B.I. Agent Van Parker who was also investigating the case. Upon returning to the office, Det. Oxendine and Sgt. Sims advised defendant that they had received information that defendant had tried to sell a CB radio to James Larkin; that the radio was similar to one that Bobby Smith had at the time he disappeared; and that they wanted to ask defendant some questions "about that matter".

4. Det. Oxendine then advised defendant of his constitutional rights. Defendant appeared to understand his rights and said that he did not want a lawyer present. Defendant was advised of his rights around 9:00 a.m. and he signed a waiver of rights form in the presence of Oxendine and Sims.

5. Thereafter Officers Oxendine and Sims began to question defendant about the CB radio. Defendant gave several conflicting

statements about the radio including an assertion that he had stolen it from a car at the Cinema Theater parking lot.

6. At around 11:00 a.m., after Oxendine and Sims had alternated in asking defendant questions about the radio, Oxendine asked defendant if he wanted to leave or go to work and defendant replied that he was not going to work. Oxendine asked him if he wanted to call anybody and defendant replied that his wife knew where he was. The officers also told defendant that he was free to leave at any time he chose to do so.

7. Defendant declined to leave and Sims asked him again about the CB radio. He told defendant that he was not a "rogue" or "thief" and to tell him where the radio was. Sims also asked defendant if he wanted anything, and defendant replied that he wanted a Mountain Dew, some crackers and some cigarettes. Defendant gave Sims a dollar after which Sims went and purchased and brought to defendant the cigarettes, crackers and Mountain Dew which he requested.

8. Thereafter Sims left the room and Agent Parker and Det. Siler went in and questioned defendant. This questioning continued until about 2:00 p.m. A little later Sims returned to the room where defendant was alone and asked defendant again about the CB radio. Shortly thereafter, defendant gave the officers the incriminating statements hereinbefore summarized.

9. Defendant first made the incriminating statements shortly after 2:00 p.m. Thereafter, and until around 5:45 p.m., the officers engaged in the process of reducing their questions and defendant's answers and statements to writing.

10. Defendant was 20 years of age and had a ninth grade education at the time the statements were allegedly made. He was in good physical and mental condition and while in the deputies' office he was offered food and was also given permission to use the telephone to call anyone he desired.

11. Defendant was not under arrest at the time he was questioned by the officers and at the time he made his incriminating statements. He was free to leave at any time and was so advised by the officers. Defendant voluntarily, understandingly, knowingly and intelligently made the statements to Officers Oxendine, Sims and Parker.

The court concluded as a matter of law that defendant was properly advised of his constitutional rights as set forth under the *Miranda* decision; that he was in full understanding of his constitutional rights to remain silent, his right to counsel and all other rights; and that defendant purposely, freely, knowingly, understandingly, intelligently and voluntarily waived each of those rights and made statements to the officers above named.

[1] Defendant points to the facts and circumstances surrounding his presence at the sheriff's offices and urges this court to conclude that the totality of the attendant circumstances amounted to psychological coercion of a confession.

It is a basic principle of criminal law that an involuntary confession is inadmissible. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973); *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978). A confession is involuntary when it is coerced, either by physical force, *see e.g., Beecher v. Alabama*, 408 U.S. 234, 33 L.Ed. 2d 317, 92 S.Ct. 2282 (1972) (per curiam); *Clewis v. Texas*, 386 U.S. 707, 18 L.Ed. 2d 423, 87 S.Ct. 1338 (1967), or by mental pressure, *Lynumn v. Illinois*, 372 U.S. 528, 9 L.Ed. 2d 922, 83 S.Ct. 917 (1963); *State v. Chamberlain*, 263 N.C. 406, 139 S.E. 2d 620 (1965). There is no suggestion or evidence in the present case that there was any physical force exerted against defendant. Our inquiry, therefore, is confined to the consideration of whether, from the totality of circumstances, *see generally* Cook, Constitutional Rights of the Accused: Trial Rights § 74 (1974), such mental or psychological pressure was brought to bear against defendant so as to overcome his will and thereby induce a confession that he was otherwise not disposed to make. We agree with the trial court that the officers in this case did not exert such pressure.

While it is true that defendant was questioned for a substantial period of time, before he first made his incriminating statement, approximately six hours, in a foreign environment, there is nothing in the record which indicates that he was subjected to deprivation or abuse in the course of the questioning.

Psychological coercion sufficient to render a confession involuntary manifests itself in a number of ways. *See generally* 3 Wharton's Criminal Evidence §§ 674-685 (13th ed. 1973). Interrogation by law enforcement officers may be so prolonged as to

render a confession involuntary. *Clewis v. Texas, supra*; *Davis v. North Carolina*, 384 U.S. 737, 16 L.Ed. 2d 895, 86 S.Ct. 1761 (1966). While defendant was questioned for approximately six hours before he first made his incriminating statements, on at least two occasions he was told that he was free to leave. He did not leave but remained seated in the office and continued to answer questions.

The use of multiple interrogators is a factor which may cause a confession to be deemed involuntary. *See generally*, Cook, Constitutional Rights of the Accused: Trial Rights § 74 (1974). In *Ashcraft v. Tennessee*, 322 U.S. 143, 88 L.Ed. 1192, 64 S.Ct. 921 (1944), the defendant was questioned continuously for thirty-six hours by relays of officers. The procedure was found to be so inherently coercive that it rendered the confession obtained from the accused to be involuntary. However, a careful consideration of the cases which have addressed this issue shows that the multiplicity of interrogators becomes an important factor in determining the voluntariness of a confession when the interrogation complained of extends over a prolonged period. *See, e.g., Watts v. Indiana*, 338 U.S. 49, 93 L.Ed. 1801, 69 S.Ct. 1347 (1949); *Haley v. Ohio*, 332 U.S. 596, 92 L.Ed. 224, 68 S.Ct. 302 (1948).

The period of time in which defendant was questioned in the case at hand was less than one-fourth the time the defendant was questioned in *Ashcraft*. We observed earlier that the interrogation was not so protracted that it resulted in an involuntary confession in light of the fact that defendant was informed that he was free to leave and go to work but instead elected to remain in the office and talk with the officers. While four different officers participated in questioning defendant, there is nothing in the record which indicates that their questioning was so relentless or overbearing that a valid objection to their conduct could be raised. There is evidence which indicates that the various officers went into the room in intervals, and different officers questioned defendant at different times. Nothing suggests, however, that at any time in the course of the questioning was defendant bullied by the presence and questioning of a group of interrogators.

A mere adjuration to a criminal suspect to speak the truth does not in and of itself render a subsequent confession involuntary. *Sparf v. United States*, 156 U.S. 51, 39 L.Ed. 343, 15 S.Ct.

273 (1895); *State v. Thompson*, 227 N.C. 19, 40 S.E. 2d 620 (1946). On *voir dire*, Officer Sims testified that he told defendant that he "knew he was no rogue nor a thief and to go ahead and tell me what he had done with the 'CB'." There is no evidence in the record which indicates that this insistence to defendant that he tell the truth was accompanied by any sort of threat or deprivation. It, therefore, follows that Officer Sims' statement to defendant did not render his subsequent confession involuntary.

In light of the foregoing discussion, we find no basis upon which to conclude that defendant's statement was involuntarily given.

[2] There is no validity in defendant's claim that his incriminating statement resulted from an illegal arrest for the simple reason that he was not under arrest at the time he made the statement. An arrest occurs when law enforcement officers interrupt the activities of an individual and significantly restrict his freedom of action. *Cf. Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968). *Henry v. United States*, 361 U.S. 98, 4 L.Ed. 2d 134, 80 S.Ct. 168 (1959). The dispositive issue is not the label which is appended to the encounter between law enforcement officers and an individual but whether the individual has been deprived of his freedom of action by way of a seizure. *See generally* 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 5.1(a) (1978). A person is not arrested if he is free to choose whether to enter or continue an encounter with law enforcement officers and elects to do so. *United States v. Brunson*, 549 F. 2d 348 (5th Cir.), *cert. denied*, 54 L.Ed. 107 (1977); *see also United States v. Bailey*, 447 F. 2d 735 (5th Cir. 1971) (A postman's voluntary act in accompanying postal inspectors to post office when he had completed his day's work did not constitute an arrest.); *Doran v. United States*, 421 F. 2d 865 (9th Cir. 1970). (There was no arrest where defendant voluntarily accompanied agents to the place where he was questioned in light of the fact that on two occasions he was informed that he was not under arrest and was free to leave.)

The case of *United States v. Brunson, supra*, is particularly instructive. In *Brunson*, the authorities were investigating the armed robbery of a post office and the murder of its postmistress. A witness heard several shots fired and saw two black men come

out of the building and drive off in a light colored Cadillac. Fingerprints lifted from the counter in the building were found to match those of one Glen Herman who had recently purchased such an automobile. The authorities launched an intensive effort to locate Herman or anyone who knew him. In the course of the investigation, the investigators came to believe that one of Herman's associates was Aaron Brunson. A number of postal inspectors and a sheriff's deputy went to his home and asked him to accompany them to headquarters. The officers told Brunson that he was not under arrest and that they would later take him back to his home when the questioning was completed. The questioning was for the purpose of helping the officers locate Herman. When the officers and Brunson arrived at the Orange County (Florida) Sheriff's Department, Brunson was advised of his *Miranda* rights. After executing a written waiver, he began talking with the officers and later made an incriminating statement, implicating himself in the robbery and murder at the post office. It was only after he made the confession that Brunson was formally arrested. On appeal, Brunson contended that the trial court erred in refusing to suppress his confession as the product of an illegal arrest. The United States Court of Appeals for the Fifth Circuit affirmed Brunson's conviction, holding that at the time he made the confession, Brunson was not under arrest. In so holding, the Court of Appeals made several pertinent observations which may be profitably applied to the present case.

(1) In *Brunson*, there was evidence which showed that the investigators had not focused on Brunson as a suspect, let alone obtained sufficient information to constitute probable cause as to him individually. In the present case, the deputies only had information from a confidential informant that defendant had in his possession an unusual "CB" radio which he had been trying to sell. The radio was similar to the one which Bobby Smith kept at the produce stand. There was no evidence in their possession at that time which linked defendant to Bobby's disappearance and death.

(2) In *Brunson*, there was evidence that the investigators wanted to talk with Brunson so that they might come to know the whereabouts of Glen Herman, *upon whom the investigation had focused*. Here, however, it will be remembered that the deputies had only minimal evidence which led them to desire to talk with

defendant. On *voir dire*, Deputy Sims testified that when he and Deputy Oxendine went to defendant's home, *he did not consider him to be a suspect in the case.*

(3) In *Brunson*, the investigators told him that he was not under arrest; that they intended to drive him home after the interview; and that they wanted him to go with them voluntarily. In the present case, defendant was allowed to go back into his home *unaccompanied* to get dressed after first talking with the deputies. On one occasion during the interview, defendant was offered the opportunity to go to work, but he declined. Shortly thereafter, he was told that he was free to go, but he, instead, elected to remain at the sheriff's office and continue talking with the officers.

(4) Neither Brunson nor the present defendant were treated as though they were incarcerated. In neither case were the individuals frisked or handcuffed when they accompanied the officers. Not until after each had made an incriminating statement were they subjected to any sort of physical contact with law enforcement officers.

In summary, from all that appears in the record, defendant was not restrained in his freedom to walk away. It cannot be argued, therefore, that he was seized in the Fourth Amendment sense of that term.

Defendant refers this court to the recent decision of the United States Supreme Court in *Dunaway v. New York*, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979), in support of his argument that his confession ought to have been suppressed as the fruit of an illegal arrest. Defendant's reliance upon *Dunaway* is misplaced because it cannot be properly applied to the facts in this case. *See State v. Reynolds*, 298 N.C. 380, 259 S.E. 2d 843 (1979) ("While this decision . . . clearly has major ramifications with respect to the question of custodial interrogation on less than probable cause, we do not believe that it controls the case at bar.")

Dunaway stands for the proposition that when a criminal defendant has been *seized* on less than probable cause and subsequently makes an incriminating statement, that statement must be suppressed as "the fruit of the poisonous tree" unless the effect of the illegal arrest has become sufficiently attenuated.

Dunaway v. New York, 60 L. Ed. 2d at 839. We observed above that defendant was not *seized* in the Fourth Amendment sense of that term in that he was not restrained of his liberty by the officers to the extent that he could not break off the questioning and leave them if he had so desired. He voluntarily entered into and continued the encounter with the officers. The voluntariness of the encounter was brought home to defendant by the officers in the manner in which they conducted the proceeding and by advising on two different occasions that he was free to go to work or otherwise leave the sheriff's office. This atmosphere is to be contrasted with that found in *Dunaway*. In *Dunaway*, the defendant was involuntarily accosted and taken to a police station for questioning. There was evidence which indicated that defendant was not free to leave if he had wanted to do so. Furthermore, there was evidence in *Dunaway* that the defendant was physically coerced at the time he was picked up for questioning. While it is true that in the present case, defendant did not initiate the encounter with the investigating officers as was done by the defendant in *State v. Reynolds, supra*, he did elect to accompany the officers to the sheriff's department and chose to remain there, answering questions, without having been restrained in any way.

* * * *

Defendant contends that the trial court committed prejudicial error in admitting into evidence over his objection the opinion testimony of Dr. Page Hudson, Chief Medical Examiner of the State of North Carolina. The objection to Dr. Hudson's testimony rests upon four separate grounds: (1) The questions of the district attorney were not framed in such a way that they might form a proper basis for the expression of an opinion; (2) the testimony of Dr. Hudson was not responsive to the questions propounded to him; (3) the testimony of Dr. Hudson was based upon inadequate data; and (4) the testimony of Dr. Hudson invaded the province of the jury. The contention is without merit.

Dr. Hudson testified on behalf of the state as an expert witness qualified in the field of forensic pathology. He stated that unattached bones constituting a partial human skeleton had been brought to him; that the bones could have been those of more than one person; that there was no soft tissue on the bones when they were brought to his office; that the bones had been damaged

by physical contact with an object or animal of some kind; and that an examination of the bones revealed the presence of bird shot.

On direct examination, the following exchange transpired.

Q. What did your examination of the skeletal remains themselves reveal, sir?

A. My examination revealed that there were—there was a major part of the tibia, which is the lower leg bone; a fibula, or two thigh bones; approximately half a dozen hand or foot bones; there were fourteen vertebrae; backbone; there was part of the sacrum, which is the bone at the end of the spine; a portion of the hip bone; collar bone; several small fragments of bone, including some from the scapula, or shoulder bones; sixteen ribs; and a skull, including the lower jaw. After examination of these, with several specific things in mind, I was able to recognize that they were all compatible with being from a single human being, and in my opinion—were from one indiviudal, and in my opinion they were from a white male individual, whose age I evaluated as being somewhere between twenty and thirty, and whose height was approximately six feet tall, give or take approximately two inches.

Q. Dr. Hudson, did you come to any conclusion, based on your examination of these remains, as to what caused the death of that individual?

A. Yes, sir. On the basis of my examination of the material . . ., I did form an opinion as to the cause of death.

Q. And on what did you base—specifically, on what did you base this opinion?

A. On the presence of pellets imbedded in the shoulder bone and the scapula, and the presence of other pellets in this material, it was my opinion that the person probably died of a shotgun wound, shotgun blast.

[3] (1) The questions of the district attorney were not framed in such a way that they might form a proper basis for the expression of an opinion.

Defendant argues that the questions of the district attorney were inadequately phrased in that they were not in the form of a hypothetical and that they called for the witness to testify as to whether a particular event or condition did produce the result in question, i.e. the death of Bobby Smith. We disagree.

It is settled law in North Carolina that an expert witness need not be interrogated by means of a hypotheical question which incorporates the relevant facts in evidence which counsel hopes the jury will accept as true when the facts upon which he bases his opinion are within his personal knowledge. *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978); *State v. Griffin*, 288 N.C. 437, 219 S.E. 2d 48 (1975), *death sentence vacated*, 49 L.Ed. 2d 1210 (1976); *Huff v. Thornton*, 287 N.C. 1, 213 S.E. 2d 198 (1975); *see also* 1 Stansbury's North Carolina Evidence § 136 (Brandis rev. 1973). The evidence showed that Dr. Hudson had examined the remains himself. It naturally follows that he was competent to state an opinion concerning those remains without the intervention of a hypothetical question.

When the subject of a jury's inquiry relates to cause and effect in a field where special knowledge is required to answer a question put to an expert witness, the purpose behind allowing expert testimony is likely to be thwarted or perverted unless the expert witness is allowed to express a positive opinion (if he has one) on the subject. *Taylor v. Boger*, 289 N.C. 560, 223 S.E. 2d 350 (1976); *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974), *death sentence vacated*, 49 L.Ed. 2d 1212 (1976). As an expert in the field of forensic pathology, Dr. Hudson was qualified to state an opinion as to what probably caused the death of Bobby Smith without couching his testimony in terms of what might have or could have caused his death.

(2) The testimony of Dr. Hudson was not responsive to the questions propounded to him.

Defendant contends that even though the district attorney did not ask Dr. Hudson a question which called for the expression of an opinion in its answer, on two occasions he nevertheless offered his opinion. When asked by the district attorney what his examination of the skeletal remains revealed, Dr. Hudson answered that it was his opinion that the remains were those of a white male who was between twenty and thirty years old and

who was approximately six feet tall. Shortly thereafter, Dr. Hudson testified that it was his opinion that the individual whose remains he had examined had probably died from a shotgun blast. This statement was in addition to his answer to a question as to what was the basis for his opinion as to the cause of death, *i.e.*, "the presence of pellets imbedded in the shoulder bone and the scapula, and the presence of other pellets in this material." Defendant's objections were overruled, and his motions to strike were denied. The court did not commit error in this regard.

"Whether an answer is responsive to a question is not the ultimate test on a motion to strike. If an unresponsive question produces irrelevant facts, they may and should be stricken and withdrawn from the jury. However, if the answers bring forth relevant facts, they are nonetheless admissible [although] they are not specifically asked for or go beyond the scope of the question." *State v. Ferguson*, 280 N.C. 95, 98, 185 S.E. 2d 119 (1971). In other words, if an answer states relevant and otherwise admissible evidence, it need not be stricken merely because it was not responsive to the question. *In re Will of Taylor*, 260 N.C. 232, 132 S.E. 2d 488 (1963); *In re Will of Tatum*, 233 N.C. 723, 65 S.E. 2d 351 (1951). The identification of the remains as well as the cause of death were relevant subjects of inquiry in the trial. That evidence pertaining to these two matters was not sought in the questions which nonetheless elicited these responses is immaterial.

(3) The testimony of Dr. Hudson was based upon inadequate data.

Defendant argues that the opinion testimony of Dr. Hudson was based upon inadequate data in that the only facts which were then in evidence were that human bones had been examined by him and that bird shot had been found among them. There was a sufficient foundation laid for Dr. Hudson's testimony. Prior to stating any opinion, Dr. Hudson testified that he had examined the remains collectively and indiviudally, measuring, sorting and photographing them.

(4) The testimony of Dr. Hudson invaded the province of the jury.

Defendant argues that the testimony of Dr. Hudson invaded the province of the jury by containing an opinion as to what was

the cause of death of the individual who was later identified as Bobby Smith. This argument has no merit.

It has long been the rule in North Carolina that the cause of an individual's death is the proper subject of expert testimony. *State v. Hairston*, 280 N.C. 220, 185 S.E. 2d 633 (1972); *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970); *State v. Cole*, 270 N.C. 382, 154 S.E. 2d 506 (1967); *see generally* 1 Stansbury's North Carolina Evidence § 135 (Brandis Rev. 1973). There was no dispute as to the qualifications of Dr. Hudson. He had sufficient information upon which to base an opinion as to the cause of Bobby Smith's death. *See generally* Comment, Expert Medical Testimony: Differences Between the North Carolina Rules and the Federal Rules of Evidence, 12 Wake Forest L. Rev. 833 (1976).

* * * *

[4] Defendant contends that the district attorney exceeded the bounds of propriety in his argument to the jury and thereby deprived him of his right to a fair and impartial trial. Our examination of the record indicates that at the time of the district attorney's argument, no objection of any kind was made to any portion of the jury argument. While it is true that counsel have wide lattitude in making their arguments to the jury, *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975), counsel may not travel outside of the record and inject into his argument facts within his own knowledge, *Jenkins v. Harvey C. Hines Co.*, 264 N.C. 83, 141 S.E. 2d 1 (1965), or facts outside of the evidence. *Cuthrell v. Greene*, 229 N.C. 475, 50 S.E. 2d 525 (1948). When counsel makes an improper remark in his argument to the jury, an exception must be taken before verdict or the alleged impropriety is waived. *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970), *death sentence vacated*, 29 L.Ed. 2d 860 (1971). However, a trial judge has the duty to act *ex mero motu* in those instances where such action is necessary to preserve in an unencumbered state the right of a defendant to a fair and impartial trial. *See Lamborn & Co. v. Hollingsworth*, 195 N.C. 350, 142 S.E. 19 (1928); *McLaurin v. Williams*, 175 N.C. 291, 95 S.E. 559 (1918); *Massey v. Alston*, 173 N.C. 215, 91 S.E. 964 (1917). In light of the serious penalty which has been imposed upon defendant, *see State v. Williams, supra*, we have carefully reviewed the argument of the district attorney even

though no objection was made at the time of the argument. We find no support in the record for any of defendant's exceptions to the argument and particularly for his contentions that the district attorney characterized him as a liar, commented on his failure to testify on his own behalf, or expressed an opinion as to his guilt.

* * * *

[5] Defendant contends that the trial court erred in denying his motion to dismiss at the close of the state's evidence and his motion to dismiss at the close of all the evidence. Defendant argues that the state, by introducing his confession in which he claimed the killing of Bobby Smith was an accident, is bound entirely by the purported truth of that statement. We disagree.

When the state introduces into evidence exculpatory statments of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the state is bound by those statements. *State v. Bruton*, 264 N.C. 488, 142 S.E. 2d 169 (1965); *State v. Gaines*, 260 N.C. 228, 132 S.E. 2d 485 (1963). However, the introduction by the state of a defendant's exculpatory statement does not preclude the state from showing the facts concerning the crime to be different, and does not require the granting of a motion to dismiss if the state contradicts or rebuts the defendant's exculpatory statement. *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 54 L.Ed. 2d 288 (1977); *State v. Carter*, 289 N.C. 35, 220 S.E. 2d 313 (1975), *death sentence vacated*, 49 L.Ed. 2d 1211 (1976); *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds sub nom.*, 53 L.Ed. 306 (1977). On a motion to dismiss, all of the admitted evidence must be viewed in the light most favorable to the state, and the state must be given the benefit of every reasonable inference to be drawn therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977); *State v. May, supra; State v. Poole*, 285 N.C. 108, 203 S.E. 2d 786 (1974).

We hold that dismissal was properly denied in view of evidence which casts doubt on defendant's statement that the killing was accidental. This evidence is to the effect that: (1) defendant had made up his mind to rob Bobby Smith and went to the produce stand for that purpose, although he kept changing his mind from time to time throughout the course of his activities on whether to go through with his intention; (2) defendant lied to

Bobby about the condition of his father and thereby induced him to close the produce stand; (3) defendant did not take Bobby home, but instead took him to a remote area of Scotland County where he induced Bobby to get out of the car by lying to him about the presence nearby of some marijuana plants; (4) defendant walked into the woods carrying a shotgun, falsely saying that it was for the purpose of killing rabbits; (5) defendant did not assist or aid Bobby in any manner after he was shot but, instead, ran away frightened from the area.

Taken together, the foregoing inconsistences in defendant's statement are sufficient to present a jury question as to whether the killing was accidental or intentional. Therefore, the state is not bound by the exculpatory portions of defendant's statement and is entitled to go to the jury on the issue of defendant's guilt of the crime charged. *See State v. Hankerson, supra.*

* * * *

[6] Defendant argues that the trial court committed prejudicial error in its charge with respect to death by accident. The charge excepted to by defendant contained the following language.

> "The defendant contends that Bobby Smith's death was accidental. If the killing was in fact accidental, the defendant would not be guilty of any crime, even though his acts were responsible for the victim's death. A killing is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve criminal negligence. A killing cannot be intentional or criminally negligent if it was the result of an accident. When the defendant asserts that the victim's death was the result of an accident, he is in effect denying the existence of those facts which the State must prove beyond a reasonable doubt in order to convict him. Therefore, the burden is on the State to prove those essential facts, and in so doing, disprove the defendant's assertion of accidental death. The State must satisfy you beyond a reasonable doubt that the victim's death was not accidental before you may return a verdict of guilty.
>
> "Now, Members of the Jury, bearing in mind that the burden of proof rests upon the State to establish the guilt of the defendant beyond reasonable doubt, I charge that if you find

from this evidence that the killing of the deceased was accidental—that is, that Bobby Smith's death was brought about by an unknown cause or that it was from an unusual or unexpected event, from a known cause, and you also find that the killing of the deceased was unintentional, that at the time of the homicide the defendant was engaged in the performance of a lawful act, without any intention to do harm, and that at the time he was using proper precaution to avoid danger; if you find these to be the facts, remembering that the burden is upon the State, then I charge you that the killing of the deceased was a homicide by misadventure and if you so find, it would be your duty to render a verdict of not guilty as to this defendant."

Defendant contends that the instruction set out above is confusing in that it would permit the jury to conclude that it must find beyond a reasonable doubt from the evidence that the killing of Bobby Smith was accidental in order to acquit defendant. We disagree.

The first portion of the charge clearly and properly placed the burden on the state to prove each and every element of the crime charged beyond a reasonable doubt, thereby disproving defendant's assertion of an accidental death. *State v. Patterson*, 297 N.C. 247, 254 S.E. 2d 604 (1979); *State v. Jones*, 287 N.C. 84, 214 S.E. 2d 24 (1975). The second portion of the charge which is set out above is identical to that which we approved in *State v. Harris*, 289 N.C. 275, 221 S.E. 2d 343 (1975). We are not disposed to reexamine our holding in *Harris*.

* * * *

We have carefully considered the other assignments of error brought forward in defendant's brief and find no merit in any of them. Our deliberations impel the conclusion that defendant received a fair and impartial trial which was free from prejudicial error.

No error.

O. LARRY WOODHOUSE AND GERALD F. FRIEDMAN v. BOARD OF COMMISSIONERS OF THE TOWN OF NAGS HEAD

No. 112

(Filed 1 February 1980)

1. **Municipal Corporations § 30.6— conditional use permit—prima facie showing**

An applicant for a conditional use permit is *prima facie* entitled to the permit where he produces competent, material and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of such a permit.

2. **Municipal Corporations § 30.6— conditional use permit—planned unit development—denial on ground of "unsuitability"**

A town's board of commissioners improperly denied an application for a conditional use permit for a planned unit development on the ground that the planned unit development did not meet the test of suitability as outlined in the intent section of the zoning ordinance since a planned unit development, as a specified "conditional use," was by definition in accord with the purpose and intent of the ordinance, and since the commissioners could not deny such a permit in their unguided discretion on the ground of "unsuitability."

3. **Municipal Corporations § 30.6— conditional use permit—planned unit development—compliance with specific ordinance requirements—no burden to show adequacy of public fire-fighting facilities**

Where the applicants for a conditional use permit met their burden of showing compliance with the specific standards and requirements of the ordinance for such a permit, the applicants had no burden to establish the adequacy of public facilities, including fire-fighting facilities, for the planned development, and the denial of the permit on the basis of a finding that the planned unit development potentially outstrips community fire-fighting equipment was erroneous in the absence of evidence to support such a finding.

4. **Municipal Corporations § 30.6— conditional use permit—planned unit development—denial on ground sewage plant would be nuisance**

A town's board of commissioners erred in denying a conditional use permit for a planned unit development on the ground that "the installation of a wastewater treatment facility in the midst of a residential complex would be the equivalent of taking a nuisance to the property owners in the area" since the board relied on incompetent testimony by neighboring landowners concerning odors emanating from sewage facilities at nearby motels and their fears of experiencing similar problems with the proposed plant, the board of commissioners was empowered under the ordinance to impose conditions and restrictions on the proposed sewage facilities, and the applicants were at all times willing to comply with those conditions.

5. **Municipal Corporations § 30.6— conditional use permit—planned unit development—no restriction on types of dwellings**

A town's board of commissioners erred in denying a conditional use permit for a planned unit development in an R-2 zone on the ground that the

planned development included multi-family dwellings which were not permitted in an R-2 zone since (1) a provision of the zoning ordinance stating that "additional uses permitted to be established in a special Planned Unit Development shall only be those uses permitted in the Low Density Residential (R-1) zoning district" referred to uses in addition to residential uses, and a planned unit development could thus include residential uses and any nonresidential uses permitted in an R-1 zone, including churches, cemeteries, schools and parks, and (2) there was no restriction on the types of residential dwellings permitted in a planned unit development regardless of the particular zoning restrictions in the district in which the development was located.

ON discretionary review to review the decision of the North Carolina Court of Appeals, reported in 41 N.C. App. 473, 255 S.E. 2d 249 (1979), which reversed the judgment of *Fountain, J.*, entered 17 April 1978 Session of DARE Superior Court, reversing the Nags Head Board of Commissioners' denial of petitioners' application for a conditional use permit.

During the fall of 1977, petitioners O. Larry Woodhouse and Gerald F. Friedman applied to the Board of Commissioners of the Town of Nags Head for a conditional use permit in order to use certain property as a planned unit development (hereinafter referred to as "PUD"). The proposed 5.548 acre site was located in an area zoned R-2, or medium density residential. The proposed PUD would consist of thirty-two dwelling units, a sewage treatment plant, two tennis courts, a handball court and parking facilities.

Petitioners' application was initially considered and substantially approved by the Planning Board of the Town of Nags Head. The application, along with certain recommendations submitted by the Planning Board, was then considered during an open meeting of respondent Board of Commissioners (hereinafter referred to as "Board") on 6 January 1978. The Board heard from petitioners and other interested parties and discussed petitioners' application. The Board then tabled the matter pending its referral of the application to the Board's engineering firm and other appropriate parties to permit further review of the impact of the proposed use on the Town of Nags Head.

The Board again considered petitioners' application during an open meeting on 6 March 1978. After hearing from petitioners and interested persons, the members of the Board discussed the matter in the meeting and denied the application by a vote of three to two.

The Board of Commissioners gave the following reasons in support of its denial of the application:

(1) The planned development does not meet the test of suitability as specified in Section 9.01(b) of the ordinance;

(2) The planned development potentially outstrips community fire-fighting facilities or services;

(3) The installation of a waste water treatment facility in the midst of a residential complex would be the equivalent of taking a nuisance to the property owners in the area.

(4) The Board of Commissioners cannot find that it is empowered to grant the conditional use permit because multi-family dwellings are not permitted as a matter of right in an R-2 zone and to permit them as part of a planned unit development would alter the basic character of the R-2 zone.

(5) The Board of Commissioners cannot find that the granting of the conditional use permit will not adversely affect the public interest.

Petitioners in apt time petitioned the trial court for a writ of certiorari pursuant to G.S. 160A-388 seeking judicial review of the decision of respondent Board. The trial court, Fountain, J., issued the writ on 29 March 1978. After a hearing on the matter, Judge Fountain concluded that the Board's denial of the application was not supported by competent, material and substantial evidence in the record. The trial court accordingly reversed and remanded the proceeding to the Board of Commissioners directing that approval be granted for the conditional use and that processing of the application be continued in accord with the applicable provisions of the zoning ordinance.

Respondent Board appealed to the Court of Appeals. In an opinion by Judge Mitchell, Judges Parker and Martin (Harry C.) concurring, the Court of Appeals held that, while no competent evidence supported the Board's finding number two regarding fire-fighting facilities, the burden of proving the existence of such facilities was on petitioners. As a result of this conclusion, the Court of Appeals reversed the trial court.

We allowed petitioners' petition for discretionary review pursuant to G.S. 7A-31 on 11 September 1979.

Other facts which are pertinent to our review of this case will be discussed in the opinion.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, P.A., by Norman W. Shearin, Jr., and Dewey W. Wells, for petitioners.

Kellogg, White & Evans, by Thomas L. White, Jr., and Thomas N. Barefoot, for respondent.

BRANCH, Chief Justice.

The central issue before us is whether the Board of Commissioners of the Town of Nags Head correctly denied petitioners' application for a special use permit to construct a planned unit development.

On 20 July 1977, the Town of Nags Head adopted its current zoning ordinance. Article VII, "Schedule of District Regulations," provides for several basic zoning areas ranging from R-1 (low density residential) to C-2 (general commercial). The parties in this action have stipulated that the proposed development site is located in a district zoned R-2, or medium density residential district. Section 7.02 of Article VII lists the applicable provisions for this particular zone and reads in pertinent part as follows:

A. *Intent*

The R-2 District is intended to encourage the development of moderate density residential neighborhoods with a mix of permanent and short-term seasonal residents, and to serve as a transition zone between the low-density area and more intensely developed areas. The maximum density shall not exceed six (6) dwelling units per acre for Planned Unit Development.

B. *Permitted Uses*

The following uses shall be permitted by right:

(1) Detached single-family dwellings (not to include trailers or mobile homes).

(2) Duplexes with each unit subject to the dimensional requirements for single-family dwellings in the district except for the side yards required at any common walls.

(3) Customary accessory buildings including private swimming pools, private docks and bulkheads.

C. *Conditional Uses Permitted*

The following uses are permitted subject to the requirements of this district and additional regulations and requirements imposed by the Board of Commissioners as provided in Article X:

(1) Churches and cemeteries

(2) Cottage courts

(3) Fire stations, schools and other public buildings

(4) Fishing piers

(5) Home occupations as defined in Section 4.02 of this ordinance

(6) Private parks and playgrounds

(7) Public utility facilities

(8) Planned Unit Development under the provision of Article IX

D. *Dimensional Requirements*

All permitted and conditional uses within the R-2 Residential District, unless otherwise specified, shall comply with the dimensional requirements shown in tabular form in Section 7.07.

Specifically included as a conditional use in this zone is a "Planned Unit Development under the provisions of Article IX." Petitioners proceeded to follow the procedures outlined in Article IX in order to qualify for a conditional use permit.

[1] A conditional use permit "is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist."

Refining Co. v. Board of Aldermen, 284 N.C. 458, 467, 202 S.E. 2d 129, 135 (1974); *In re Application of Ellis*, 277 N.C. 419, 178 S.E. 2d 77 (1970). Where an applicant for a conditional use permit produces "competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it." *Refining Co. v. Board of Aldermen*, *supra* at 468, 202 S.E. 2d at 136.

[2] The Board gave as its first reason for denial of the application that the PUD did not "meet the test of suitability as specified in Section 9.01 B of the ordinance." That section sets forth the intent of Article IX to permit PUDs "in areas which are suitable with respect to location, size, and physical character for development as units." The section then lists several factors for consideration of "suitability," including the goals and objectives of the Land Development Plan, physical characteristics of the site and the nature of the surrounding development.

In support of the Board's first reason, Commissioner Bryan noted that "the proposed development contravenes several of the goals and objectives of the land use plan . . . ." A PUD, however, is listed in the ordinance as a "conditional use" and a "conditional use," as defined in the Nags Head Ordinance, is "a use that would not be appropriate generally or without restriction throughout a particular Zoning District but which, if controlled . . . *would preserve the intent of this ordinance* . . . ." (Emphasis added.) A PUD, as a specified "conditional use," then, is by definition in accord with the purpose and intent of the ordinance. *Keiger v. Winston-Salem Board of Adjustment*, 278 N.C. 17, 178 S.E. 2d 616 (1971).

> The inclusion of the particular use in the ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district.

A. Rathkopf, 3 *Law of Zoning and Planning*, 54-5 (1979).

Furthermore, the denial of an application on grounds that the proposed plan "does not meet the tests of suitability" as outlined in the intent section of a particular ordinance is no different from refusing a permit because the proposed use would "adversely af-

fect the public interest." A board of commissioners "cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, [it] would 'adversely affect the public interest.' "[1] *In re Application of Ellis, supra* at 425, 178 S.E. 2d at 81; *Keiger v. Winston-Salem Board of Adjustment, supra.*

[3] The denial of the permit on the ground that the planned development potentially outstrips community fire-fighting facilities is equally untenable. Petitioners maintain that the reason stated by the Board as ground for denial of the application was not supported by competent, material and substantial evidence in the record. They further contend that they showed the "existence of facts and conditions" required by Article IX for the issuance of a special use permit, and therefore the permit should have been issued.

Respondent contends that petitioners failed to prove the adequacy of the public fire-fighting facilities to protect the development and the surrounding areas in general. Respondent bases this contention on the following langauge of the Article dealing exclusively with PUDs and found in section 9.01 D:

> PUDs shall be appropriately located with respect to intended functions, to the pattern and timing of development existing . . . and to public and private facilities, existing or clearly to be available by the time development reaches the stage where they will be needed.

It is well settled that an applicant has the initial burden of showing compliance with the standards and conditions required by the ordinance for the issuance of a conditional use permit. *See Refining Co. v. Board of Aldermen, supra.* The parties here have stipulated that Section 9.03, "Planned Unit Development Standards and Requirements," has been complied with insofar as it is applicable. Nevertheless, respondents further contend that petitioners failed to meet their burden of showing the adequacy of public and private facilities. On the other hand, petitioners take the position that no such additional burden was placed upon them in order to obtain the permit.

1. Respondent has conceded in its brief that Finding Number 5 is invalid under the rule of *In re Application of Ellis, supra.*

The Court of Appeals agreed with petitioners that no competent evidence appeared in the record to support the Board's finding that the PUD "potentially outstrips community fire-fighting facilities." However, the Court of Appeals held that petitioners had the burden of establishing the adequacy of fire-fighting facilities as a standard or condition required by the ordinance. In so holding, the court found that the lack of evidence in the record was a direct result of petitioners' failure to meet their burden to put on evidence of compliance with this condition.

The resolution of this question turns on a construction of Article IX of the Nags Head Zoning Ordinance. That Article is entitled "Planned Unit Development as a Conditional Use" and deals exclusively with practices and procedures for the establishment of PUDs. The first section of the Article, 9.01, is entitled "Planned Unit Development Concept" and contains the definition of a PUD, the intent of the Article, certain specific procedural requirements and the section upon which respondents rely here. Section 9.02 lists additional procedural steps for review of development plans. Section 9.03 is entitled "*Planned United Development Standards and Requirements*" (emphasis supplied) and outlines certain specific conditions including minimum size, maximum density and minimum lot area permitted in a PUD. This particular section is the only section found in Article IX which states the specific standards for PUDs. Petitioners and respondent stipulated that *all* provisions of this section have been met with the exception of 9.03C which is inapplicable to this case.

"The granting of a special exception is apparently not too generally understood. It does not entail making an exception to the ordinance but rather permitting certain uses which the ordinance authorizes under stated conditions. In short, a special exception is one allowable when the facts and conditions specified in the ordinance as those upon which the exception is permitted are found to exist." *Syosset Holding Corp. v. Schlimm*, 159 N.Y.S. 2d 88, 89, *modified on other grounds*, 4 A.D. 2d 766, 164 N.Y.S. 2d 890 (1956). (Emphasis deleted.) A board of commissioners "may grant or deny a special permit solely on the basis of the specific authority delegated by the regulations, and subject to the limitations imposed thereby." R. Anderson, 3 *American Law of Zoning 2d* § 19.19 (1977). The board is "without power to deny a permit on grounds not expressly stated in the ordinance" and it must

employ specific statutory criteria which are relevant. *Id.* "[W]here a zoning ordinance specifies standards to apply in determining whether to grant a special use permit and the applicant fully complies with the specified standards, a denial of the permit is arbitrary as a matter of law." *Hay v. Township of Grow*, 296 Minn. 1, 5, 206 N.W. 2d 19, 22 (1973).

In the instant case, petitioners have fully complied with the applicable specific conditions set forth in Article IX's section on "Standards and Requirements" and the parties have so stipulated. There are numerous sections in Article IX which list general considerations for determining the appropriateness of a particular PUD, including the section upon which respondent relies here. To hold that an applicant must first anticipate and then prove or disprove each and every general consideration would impose an intolerable, if not impossible, burden on an applicant for a conditional use permit. An applicant "need not negate every possible objection to the proposed use." Anderson, *supra* § 19.19. Furthermore, "once an applicant . . . shows that the proposed use is permitted under the ordinance and presents testimony and evidence which shows that the application meets the requirements for a special exception, the burden of establishing that such use would violate the health, safety and welfare of the community falls upon those who oppose the issuance of a special exception." *West Whiteland Township v. Exton Materials Inc.*, 11 Pa. Cmwlth. 474, 479, 314 A. 2d 43, 46 (1974); *Appeal of College of Delaware County*, 435 Pa. 264, 254 A. 2d 641 (1969).

In this case, there is no competent evidence appearing in the record to support the finding by the Board that "the planned development potentially outstrips community fire-fighting facilities." Crucial findings of fact which are unsupported by competent, material and substantial evidence in view of the entire record as submitted cannot stand. *Refining Co. v. Board of Aldermen, supra.* Since no competent evidence supports the Board's finding, and since petitioners met their burden of showing compliance with the specific requirements of the ordinance, we hold that the finding cannot stand.

Moreover, we note that Commissioner Bryan conceded that the concern over fire-fighting facilities would exist regardless of the type of use or development of the property involved here. In *Nalitt v. Millburn*, 66 N.J. Super. 292, 168 A. 2d 864 (1961), a con-

ditional use permit for a bowling alley was denied because of the "difficulty in furnishing relatively prompt police and fire protection" to the particular location. In holding this finding invalid, the court there stated:

> . . . if this thesis be true as it applies here, it would be equally true in its application to any structure which might be erected on the site, the logical result then being that the lands would remain in an unimproved condition and the owners thereof would be deprived of the right to put the premises to the uses authorized by the ordinance itself.

Id. at 299, 168 A. 2d at 868.

[4] The third finding by the Board in this case was that "the installation of a wastewater treatment facility in the midst of a residential complex would be the equivalent of taking a nuisance to the property owners in the area." This finding was apparently based on abundant testimony from neighboring landowners concerning odors emanating from sewage facilities located at nearby motel establishments. Since the sewage plant proposed here is similar to those at the motels, the landowners expressed fears of experiencing similar problems with the proposed plant.

Petitioners, however, tendered experts who testified regarding the differences between existing facilities and the proposed facility. Furthermore, Mr. Ed Fleace, a registered engineer with an engineering firm representing the Town of Nags Head, testified: "[A]s I commented in my letter back on January the 26th, we concur that the type of treatment facilities proposed here should be—is the type of treatment facility that would provide excelent [sic] treatment for these type [sic] of waste in this situation."

The evidence relied upon by the respondent Board to support its finding is incompetent as opinion testimony and is highly speculative in nature. "The denial of a special exception permit may not be founded upon conclusions which are speculative, sentimental, personal, vague or merely an excuse to prohibit the use requested." *Baxter v. Gillispie*, 60 Misc. 2d 349, ---, 303 N.Y.S. 2d 290, 296 (1969). *See Refining Co. v. Board of Aldermen, supra.* Such a permit may not be denied on the ground that the use may be so conducted as to become a nuisance. *Baxter v. Gillispie,*

supra. Evidence that similar sewage plants gave off offensive odors is insufficient standing alone to show that petitioners' plant will do likewise. *Zautner v. Magony,* 28 App. Div. 2d 791, 281 N.Y.S. 2d 260 (1967). Such evidence is hypothetical as to the operation of the proposed plant. *Id.*

Furthermore, we note that the submission to the Board of Commissioners of the plans for a proposed PUD is a preliminary stage in the process of establishing such a development. During the course of the hearings involved here, all parties constantly noted that it was too soon to determine some issues with finality and that certain potential problems could be worked out as the project progressed. The ordinance itself provides that upon approval by the Board of Commissioners, "the developer is required to submit *final detailed* plans of the proposed PUD to the Planning Board." (Emphasis added.) Applicants are then subjected to further compliance with provisions regarding subdivision regulations and building permits. The ordinance also provides:

> In granting any Conditional Use Permit, the Board of Commissioners may prescribe appropriate conditions and safeguards in conformity with this ordinance. Violation of those conditions and safeguards, when made a part of the terms under which the conditional use permit is granted, shall be considered a violation of this ordinance and will be punishable under Article XVIII of this ordinance.

Petitioners here acknowledged their willingness to cooperate and to comply with recommendations for changes in the sewage plant. *In Appeal of College of Delaware County, supra,* the municipal governing board denied a conditional use permit on the basis of a "potential sewerage problem." In holding that this was not a valid reason for denial of the permit, the court noted that once the permit is granted, the applicant would be required to make arrangements to comply with the state and local regulations. *See also Crowther, Inc. v. Johnson,* 225 Md. 379, 170 A. 2d 768 (1961); *Holmes & Murphy, Inc. v. Bush,* 6 App. Div. 2d 200, 176 N.Y.S. 2d 183 (1958).

The hypothetical nature of the concerns over the sewage plant, together with the fact that the Board of Commissioners was empowered under the ordinance to impose conditions and restrictions upon the proposed sewage facilities in this case, and

the fact that petitioners were at all times willing to comply with those conditions, dictate the conclusion that this third reason for denial of the permit cannot stand. We so hold.

[5] The Board of Commissioners gave as its fourth ground for denial that it could not find that it was empowered to grant the conditional use permit requested because multi-family dwellings are not permitted as a matter of right in an R-2 zone and to permit them as part of a PUD would alter the basic character of the R-2 zone. Respondent relies primarily on this reason to support its denial of petitioners' request.

Respondent contends that, while PUDs are permitted as conditional uses in an R-2 zone, only those PUDs are permitted which conform to the uses as of right in an R-2 zone. An R-2 zone only provides for single-family residences or duplexes as a matter of right. Since petitioners' proposed PUD includes mutli-family dwellings, respondent argues that the proposed development cannot be approved in this particular zone.

Respondent relies on the following underlined language in Article IX to buttress its contention:

SECTION 9.04—USES PERMITTED

A. *Additional uses permitted to be established in a special Planned Unit Development shall only be those uses permitted in the Low Density Residential (R-1) zoning district,* except that:

(1) In developments comprising one hundred (100) or more dwelling units, "convenience" commercial establishments may be permitted to be established to provide the following services and facilities for residents of the development and their guests.

a. food stores

b. drug stores

c. barber or beauty shops

d. restaurants

e. professional offices

(2) Total maximum floor area of all convenience commercial uses established as part of any project shall not exceed five (5) percent of the total floor area of the project, or twenty-five thousand (25,000) square feet, whichever is less.

(3) Off-street parking areas shall be provided for each use as required by Section 6.01 of this Ordinance.

(4) Uses established shall be designed and scaled to meet only the needs of residents of the development and their guests.

(5) One non-illuminated sign shall be permitted per use established. Maximum sign area shall be ten (10) square feet.

(6) No commercial use, or sign established therewith, shall be visible from any adjacent street.

B. Building permits shall be issued for "convenience" shopping facilities only after permits have been obtained by the developer for the minimum number of dwelling units required as a prerequisite for those facilities.

C. Business licenses shall be issued for "convenience" shopping operations only after at least fifty percent (50%) construction has been completed on all the minimum required dwelling units.

We note, initially, that the ordinance before us is hardly a model of clarity. While expressly setting out density and lot size requirements, the Article governing PUDs nowhere mentions the uses contemplated; yet, Section 9.04, entitled "Uses Permitted," authorizes certain "*additional uses.*"

Respondent maintains that the word "additional" means "in addition to uses already permitted in a particular zone." In short, the uses permitted in a PUD would be confined to those already permitted under the traditional zoning regulations of a district, plus those permitted in an R-1 zone.

The section of the ordinance governing the R-1 district reads in pertinent part as follows:

SECTION 7.01—R-1 LOW DENSITY RESIDENTIAL DISTRICT

A. *Intent*

The R-1 district is intended to encourage the development of permanent low-density residential neighborhoods. The maximum density shall not exceed 3.5 dwelling units per acre for Planned Unit Development.

B. *Permitted Uses*

The following uses shall be permitted by right:

(1) Detached single-family dwellings (not to include trailers or mobile homes).

(2) Customary accessory buildings including private swimming pools, private docks and bulkheads.

C. *Conditional Uses Permitted*

The following uses are permitted subject to the requirements of this district and additional regulations and requirements imposed by the Board of Commissioners as provided in Article X:

(1) Churches and cemeteries

(2) Fire stations, schools and other public buildings

(3) Home occupations as defined in Section 4.02 of this ordinance

(4) Private parks and playgrounds

(5) Public utility facilities

(6) Planned Unit Development under the provisions of Article IX

Petitioners contend that an R-2 district permits as a conditional use a "Planned Unit Development under the provisions of Article IX." Article IX specifically enumerates the density requirements for each zoning district, as well as lot size and number of buildings permitted. The Article, however, nowhere mentions the *type* of dwellings permitted in particular districts. Petitioners argue that the purpose of a planned unit development, as set out

in the ordinance, is to "achieve flexibility of design, the integration of mutually compatible uses and optimum land planning . . . ." They maintain that the very essence of the PUD concept presupposes a variety of dwelling types.

Finally, petitioners note that if there is a conflict between Article IX provisions and the provisions of the section on R-2 zoning, the ordinance by its own terms provides that the PUD provisions control.

The rules applicable to statutes apply equally to the construction and interpretation of municipal ordinances. *Perrell v. Beaty Service Co.*, 248 N.C. 153, 102 S.E. 2d 785 (1958). Ordinances, like statutes, must be construed as a whole. *State v. Fox*, 262 N.C. 193, 136 S.E. 2d 761 (1964). An ordinance will be given a reasonable interpretation and, if possible, its provisions will be reconciled and harmonized. *Cogdell v. Taylor*, 264 N.C. 424, 142 S.E. 2d 36 (1965).

In terms of the accepted rules of statutory construction alone, respondent's interpretation of the ordinance here is untenable. Section 9.04 states that *additional* uses "shall only be those uses permitted in" the R-1 district. The R-1 district, however, permits the absolute minimum in terms of allowable uses, and by its own terms is to encourage "low-density residential neighborhoods." Moving up the scale of residential districts, we note that the R-2 zone permits a slightly greater variety of permitted and conditional uses, and the R-3 zone still more. The R-2 zone, for example, permits single-family dwellings and duplexes as of right, and permits as conditional uses all of the conditional uses permitted in the R-1 zone, plus fishing piers and cottage courts. According to respondent's interpretation of Section 9.04, a proposed PUD in an R-2 zone could include the uses permitted there, and *in addition*, those uses permitted in an R-1 zone. This position is unsound, since, as we have shown, the R-2 zone already permits more than is permitted in an R-1 zone. There is nothing *additional* in permitting *fewer* uses than already exist in a district.

Statutes should be construed so as to avoid absurd results. *Person v. Garrett*, 280 N.C. 163, 184 S.E. 2d 873 (1971). The intent and spirit of an act are controlling in its construction. *Queen City Coach Co. v. Currie*, 252 N.C. 181, 113 S.E. 2d 260 (1960). In ascer-

taining this intent, the courts should consider the terms of the enactment, the spirit of the act and what it sought to accomplish, and the changes to be made and how these should be effected. *Stevenson v. Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972).

The obvious intent of Article IX of the ordinance before us is to provide a means for implementing a planned unit development. A planned unit development, or PUD, is the development of a tract of land as a single entity which may include dwellings of various types, commercial uses, and sometimes industrial uses. 2 Anderson, *supra*, § 11.13. Such a planned unit "enables the builder to create, within the confines of a single development, a variety of housing types which . . . will [enhance] the possibilities of attractive environmental design and [provide] the public with open spaces and other common facilities." G. Lloyd, *A Developer Looks at Planned Unit Development*, 114 U. Pa. L. Rev. 3, 4 (1965). The concept of a PUD is frequently limited in practice to residential developments of various sizes having a variety of housing in addition to recreation areas and perhaps some retail establishments. 82 Am. Jur. 2d, *Zoning and Planning*, § 106 (1976).

The PUD "is a legislative response to changing patterns of land development and the demonstrated shortcomings of orthodox zoning regulations . . . . Currently, the improvement of land is in the control of developers who assemble large tracts and improve the land for resale or rental. Given this modern pattern of land development, planners and legislators conceived a technique of land-use control which was better adapted to the realities of the marketplace." 2 Anderson, *supra*, § 11.12. Planned unit developments make it possible "to insure against conflicts in the use of land while permitting a mix of uses in a single district." *Id.* The PUD concept "has freed the developer from the inherent limitations of the lot-by-lot approach and thereby promoted the creation of well-planned communities." 82 Am. Jur. 2d, *supra*.

The most prominent feature of a PUD, and perhaps its most frequently-cited virtue, is flexibility. *Lake Barrington Citizens Committee, Inc. v. Village of Lake Barrington*, 19 Ill. App. 3d 648, 312 N.E. 2d 337 (1974); 2 Anderson, *supra*, § 11.14; B. Hanke, *Planned Unit Development and Land Use Intensity*, 114 U. Pa. L. Rev. 15 (1965); 82 Am. Jur. 2d, *supra*. The very heart of a planned unit development is the notion that it may diverge from zoning

regulations established in any one or more districts. *Doran Investments v. Muhlenberg Township*, 10 Pa. Cmwlth. 143, 309 A. 2d 450 (1973). Furthermore, where a PUD is established by means of a conditional use permit, the specifications for the PUD are those found in the exception clauses of the ordinance. *Doran Investments v. Muhlenberg Township, supra;* Freilich & Quinn, *Effectiveness of Flexible and Conditional Zoning Techniques—What They Can and What They Can Not Do for Our Cities*, Inst. on Planning, Zoning, and Eminent Domain, 167 (Southwestern Legal Foundation, Dallas, Texas, 1979).

With this background in mind, we turn now to the Zoning Ordinance before us. The regulations governing the R-2 district involved here expressly permit the establishment of a PUD "under the provisions of Article IX." Article IX expressly provides that where conflicts occur between the PUD provisions and other provisions, the PUD provisions control. Therefore, we hold that the provisions of Article IX control the establishment of this planned unit development. *Doran Investments v. Muhlenberg Township, supra.*

Article IX defines a planned unit development "as the complete development of land which is under central control, or for which central control mechanisms have been established." The Article is intended to "provide a means of regulating development which can achieve flexibility of design, the integration of mutually compatible uses, and optimum land planning with greater efficiency, convenience, and amenity than the procedures and regulations under which it is permitted as of right under conventional zoning requirements."

Article IX nowhere mentions the *types* of residential dwellings permitted in a PUD. The Article does set forth the maximum density allowable in each residential district. The Article then provides for certain "additional uses," limited to the uses permitted in an R-1 zone.

Numerous authorities note that a PUD consists mainly of residential uses. 2 Anderson, *supra* § 11.22; Lloyd, *supra*; 82 Am. Jur. 2d, *supra.* The ordinance here permits PUDs in each of the residential districts, but does not permit a PUD in any strictly commercial district. Moreover, the section of Article IX just

preceding the "additional uses" section deals specifically with the requirements for "dwelling units."

In our view then, it is obvious that the drafters of Article IX contemplated that a PUD would consist primarily of residential buildings. We therefore conclude that the term "additional uses" as used in Section 9.04 refers to "uses in addition to residential uses." In other words, as we construe Section 9.04, a PUD may include residential uses and in addition, any non-residential uses permitted in an R-1 zone, including churches, cemeteries, fire stations, schools and parks. Section 9.04 then goes on to permit a PUD, in certain cases not applicable here, to expand further by establishing a limited variety of retail facilities.

We turn now to the question of whether the *types* of residential dwellings permitted in a PUD may diverge from those permitted in the particular district under traditional zoning regulations. Since we have concluded that the provisions of Article IX control the establishment of a PUD, the intent and spirit of those provisions must control. As we have noted, based on abundant authority, the primary virtue inherent in PUD legislation is flexibility. 2 Anderson, *supra*, § 11.14; Hanke, *supra;* 82 Am. Jur. 2d, *supra*. Moreover, authorities concur that the planned unit development concept contemplates "dwellings of various *types*." 2 Anderson, *supra*, § 11.13 (emphasis added); Lloyd, *supra;* 82 Am. Jur. 2d, *supra*.

In light of what we perceive to be the intent and purpose of planned unit developments in general, and this planned unit development in particular, we hold that under this ordinance, there is no restriction on the *types* of residential dwellings permitted in a PUD, regardless of the particular zoning restrictions in the district in which the PUD is located.

Our holding is entirely consistent with decisions of other courts which have considered this issue. *See, e.g., Lake Barrington Citizens Committee, Inc. v. Village of Lake Barrington, supra; Chandler v. Kroiss*, 291 Minn. 196, 190 N.W. 2d 472 (1971); *Doran Investments v. Muhlenberg Township, supra*. In all of the cited cases, PUDs consisting of multi-family dwellings were proposed for areas zoned as single-family districts. In each case, opponents of the PUD contended that the PUD would alter the basic character of the single-family district. The court in each

case, noting the nature and purpose of a PUD, upheld the establishment of the multi-family dwellings, despite the single family limitation found in the regular zoning ordinance. As the court in *Doran Investments v. Muhlenberg Township* stated, "It is the very essence of a planned residential development that it may diverge from zoning requirements."

Id. at 155, 309 A. 2d at 457.

The decision of the Court of Appeals is reversed, and this cause is returned to the Court of Appeals with direction that it be remanded to the Superior Court of Dare County for reinstatement of that court's judgment.

Reversed.

STATE OF NORTH CAROLINA v. JOHN JASON CRONIN

No. 96

(Filed 1 February 1980)

1. **False Pretense § 2.1— representations did deceive—bill of indictment sufficient**

In a prosecution for obtaining property by false pretenses in violation of G.S. 14-100, there was no merit to defendant's contention that the bill of indictment was fatally defective because there was no specific allegation that defendant's false representations did in fact deceive a named bank, since the indictment alleged that defendant knowingly and falsely made false representations to the bank that he was offering as security for a loan a new mobile home having a value of $10,850, when the offered security was actually a fire damaged mobile home having a value of $2500, and that defendant by means of such false pretense and with intent then and there to defraud the bank received from the bank $5704.54, and the allegations contained in the bill of indictment were sufficient to raise a reasonable inference that the bank made the loan because it was deceived by defendant's false representations.

2. **False Pretense § 2.1— property obtained without compensation—allegation not required in bill of indictment**

Failure of a victim to obtain compensation is not an essential element of the offense of obtaining property by false pretenses, and it is therefore not necessary to allege in a bill of indictment charging false pretenses that the accused obtained property from the victim "without compensation."

3. False Pretense § 1— intent to deceive as element of crime—instructions proper

When a person obtains something of value by means of misrepresentations with intent to deceive the victim, the intent to cheat or defraud required by G.S. 14-100 exists; therefore, the trial court's instruction that, in order to return a verdict of guilty, the jury must find that defendant "intended to deceive" the bank and did in fact deceive the bank was sufficient.

4. False Pretense § 1— elements of crime

The crime of obtaining property by false pretenses pursuant to G.S. 14-100 requires a false representation of a subsisting fact or a future fulfillment or event which is calculated and intended to deceive, which does in fact deceive, and by which one person obtains or attempts to obtain value from another.

5. False Pretense § 3.1— deceiving bank—sufficiency of evidence

In a prosecution for obtaining property by false pretenses, evidence was sufficient to be submitted to the jury where it tended to show that defendant made false representations to a bank that he was offering as security for a loan a new mobile home having a value of $10,850; the offered security was actually a fire damaged mobile home having a value of $2500; defendant intended to deceive the bank; and defendant received from the bank $5704.54.

6. Criminal Law § 131—newly discovered evidence—defendant not entitled to new trial

The trial court did not err in denying defendant's motion for appropriate relief made on the ground of newly discovered evidence, since such "evidence" was a document which defendant had in his possession three or four days prior to trial and in the exercise of reasonable diligence he could have produced and presented the evidence at trial.

APPEAL by the State from the decision of the North Carolina Court of Appeals, reported in 41 N.C. App. 415, 255 S.E. 2d 240 (1979), which found error in the trial before *Small, J.*, at the 2 October 1978 Session of CURRITUCK Superior Court and ordered a new trial.

Defendant was charged in a bill of indictment proper in form with obtaining property by false pretenses in violation of G.S. 14-100. Defendant entered a plea of not guilty.

The State's evidence tended to show that defendant had had several credit transactions with the Bank of Currituck prior to the events relevant to the crime charged in this case. In the latter part of March, 1978, defendant visited the Bank of Currituck to talk with Sam T. Moore, Jr., the chief executive officer of the bank, about financing a new mobile home. Defendant was asked to

fill out a credit application form which he subsequently executed and returned on 31 March 1978. Defendant represented to Moore that the mobile home had a suggested retail price of $10,850.00, but that defendant had about $5,000.00 to use as a down payment and wanted the bank to finance the balance. He showed Moore a purchase agreement for the mobile home from Deltona Mobile Home Sales, but Moore failed to retain the agreement and could not recall its precise terms.

In the loan application, defendant described the mobile home as a "1977 Doral, three bedroom, two bath, beautiful house, mobile home." Wilton E. Bray, the assistant vice-president and loan officer of the bank, filled out the necessary loan documents. Defendant executed an instrument granting the bank a secured interest in collateral described as a "1978 Mansefield mobile home—Doral model, I.D. #H-3513." The bank agreed to loan defendant a total of $5,704.54, which included $4,900.00 in net loan proceeds for the purchase of the mobile home, $500.00 for a previous ninety-day note from defendant held by the bank and $304.54 for credit life insurance requested by defendant. Bray then prepared a cashier's check in the amount of $4,900.00 payable to both Deltona Mobile Home Sales and defendant for loan proceeds for the purchase of the mobile home.

In the middle of March, 1978, defendant went to the sales office of Deltona Mobile Home Sales in Chesapeake, Virginia, and spoke with Daniel W. Chandler, III, general manager of the company. Defendant was interested in buying a mobile home in Deltona's inventory which, prior to being sold, had been damaged by fire. Chandler described this as a Marshfield mobile home, three bedroom, two bath with serial number H-3513. Defendant represented that he was in the profession of repairing and reselling mobile homes and automobiles and wanted to purchase the mobile home for that purpose. Although valued at close to $11,000.00 before being damaged, the mobile home was not in a liveable condition in its current state. Chandler and defendant agreed upon a price of $2,620.00, and Chandler gave a copy of the purchase agreement to defendant.

On 1 April 1978, defendant returned to Deltona with a Cashier's check for the amount of $4,900.00. Defendant explained to Chandler that this amount of money was to pay for both the

mobile home and the remodeling. Chandler made arrangements with the People's Bank of Chesapeake by which the check issued by the Bank of Currituck in the amount of $4,900.00 was deposited, the purchase price of the mobile home of $2,620.00 was credited to the account of Deltona Mobile Home Sales and defendant received a cashier's check back in the amount of $2,280.00.

Defendant was at this time in the process of opening a new place of business, a pizza parlor. He subsequently returned several times to the Bank of Currituck seeking an additional loan, which the bank was unwilling to make. Around 15 July 1978 the bank had still not received the documents of title or the insurance required by the bank on a mobile home loan. The loan was three months past due, and defendant had not yet made the first payment. Moore and Bray asked defendant to tell them where the mobile home was located so that they could see it. Defendant first directed them to an older mobile home in which his family resided and then to a mobile home belonging to someone else. He denied that a burned out mobile home parked next to his pizza parlor was related in any way to his transaction with the Bank of Currituck. Nevertheless, upon investigation the bank officers realized that the mobile home next to the Pizza Shack met the description and had the same serial number as the mobile home listed as collateral. Moore then told defendant that 20 July 1978 was the final deadline by which time defendant must have the loan brought up to date and properly documented and insured. When such results were not forthcoming, Moore contacted the sheriff, and a warrant was issued for defendant's arrest.

Defendant, being found indigent by the court, elected to waive the assistance of court-appointed counsel and represent himself at trial.

At the close of the State's evidence, defendant moved for judgment as of nonsuit, now denominated a motion for dismissal under G.S. 15A-1227, elected not to offer any evidence, and renewed his motion for judgment as of nonsuit. Defendant's motions were denied.

The jury returned a verdict finding defendant guilty of obtaining property by false pretenses. Defendant was sentenced to imprisonment for a term of four years, the court recommending

that work release or parole be conditioned on defendant making restitution to the Bank of Currituck in the amount of $5,450.76.

On 16 October 1978 defendant, represented by counsel, filed a motion for appropriate relief pursuant to G.S. 15A-1411 based upon a claim of newly discovered evidence. At a hearing on the motion at the 23 October 1978 term of the Superior Court of Dare County, Judge Small denied defendant's motion.

Defendant appealed to the Court of Appeals, which in an opinion by Judge Mitchell ordered a new trial on the grounds that the trial court erred in failing to properly instruct the jury as to all the elements of the crime charged. The State petitioned this Court for discretionary review pursuant to G.S. 7A-31, and its petition was allowed on 24 August 1979.

Rufus L. Edmisten, Attorney General, by William F. O'Connell, Special Deputy Attorney General, and Robert R. Reilly, Assistant Attorney General, for the State.

Aldridge, Seawell & Khoury, by G. Ivrin Aldridge and Daniel D. Khoury for defendant appellee.

BRANCH, Chief Justice.

Defendant first assigns as error the trial court's failure to dismiss the charges against him. Defendant contends that the court should have allowed his motion made at the close of the State's evidence to dismiss the bill of indictment for failure to charge every essential element of the offense of obtaining property by false pretenses.

Initially, we note that since defendant contended that the bill of indictment failed to charge an offense, he should have moved to dismiss pursuant to G.S. 15A-954(a)(10) which by virtue of the provisions of G.S. 15A-952(d) may be made at any time during the trial. Nevertheless, we have elected to consider this assignment of error.

The indictment in the present case reads as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 31 day of March, 1978, in Currituck County John Jason Cronin wickedly and feloniously

devising and intending to cheat and defraud The Bank of Currituck, a banking corporation, with force and arms at and in the county aforesaid, unlawfully, knowingly, designedly and feloniously did unto The Bank of Currituck, a banking corporation, falsely pretend that he, the said, JOHN JASON CRONIN, was purchasing a new 1977 Marshfield, Doral Model mobile home having a value of Ten Thousand Eight Hundred Fifty and No/100 Dollars ($10,850.00) by making a Five Thousand Dollar ($5,000.00) cash downpayment on said mobile home and financing the remaining balance through a bank loan with The Bank of Currituck, a banking corporation, whereas in truth and in fact, he, the said JOHN JASON CRONIN, was purchasing a fire damaged mobile home having a value of Two Thousand Five Hundred and No/100 Dollars ($2,500.00). By means of which said false pretense, he, the said, JOHN JASON CRONIN, knowingly, designedly and feloniously, did then and there unlawfully obtain from the said The Bank of Currituck, a banking corporation, the following goods and things of value, the property of The Bank of Currituck, a banking corporation, to wit: currency of the United States in the value of Five Thousand Seven Hundred Four and 54/100 Dollars ($5,704.54), with intent then and there to defraud, against the statute in such case made and provided, and against the peace and dignity of the State.

G.S. 15A-924(a)(5) requires that every bill of indictment must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

In *State v. Greer*, 238 N.C. 325, 77 S.E. 2d 917 (1953), Parker, J. (later Chief Justice), in considering the validity of a bill of indictment wrote:

> The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such con-

> stitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. [Citations omitted.]

Id. at 327, 77 S.E. 2d at 919.

The crime of obtaining property by false pretenses is defined by G.S. 14-100, which as amended states in part:

> (a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money . . . or other thing of value with intent to cheat or defraud any person of such money . . . or other thing of value, such person shall be guilty of a felony . . . .

In 1975 G.S. 14-100 was amended, effective 1 October 1975, to alter the law in two significant respects. First, the amendment makes a false representation "of a past or subsisting fact or of a future fulfillment or event" punishable under the statute. The statute formerly required that the false representation be of a subsisting fact. *See State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684, *cert. denied*, 439 U.S. 830 (1978); *State v. Knott*, 124 N.C. 814, 32 S.E. 798 (1899); *State v. Phifer*, 65 N.C. 321 (1871). Second, the statute now includes in the definition of the crime an *attempt* to obtain something of value with an intent to defraud. Formerly, to commit the crime defendant must have actually obtained something of value as a result of his false pretense. *See State v. Davenport*, 227 N.C. 475, 42 S.E. 2d 686 (1947). As observed by Judge Mitchell writing for the Court of Appeals, this interpretation of the statute as amended is technically in conflict with its title, "Obtaining property by false pretenses." Nevertheless, captions of a statute cannot control when the meaning of the text is clear. *Dunn v. Dunn*, 199 N.C. 535, 155 S.E. 165 (1930). Here the Legislature, by the unambiguous language of the 1975 amendment, clearly intended to broaden the scope of the proscribed ac-

tivity in the manner set forth above. However, we find nothing in the 1975 amendment which indicates that the Legislature intended to alter the definition of false pretense in any other respect.

Defendant in the instant case challenges the indictment for its failure to allege: (1) that defendant did in fact deceive the Bank of Currituck; and (2) that defendant obtained property from the Bank of Currituck without compensation. We will consider these contentions seriatim.

[1] Defendant relies heavily upon the case of *State v. Whedbee*, 152 N.C. 770, 67 S.E. 60 (1910), in support of his contention that the bill of indictment in instant case was fatally defective because there was no specific allegation that defendant's false representations did in fact deceive the bank. In *Whedbee* the bill of indictment alleged that the defendant had knowingly made a series of misrepresentations about a certain corporation, by means of which he obtained a promissory note from W. C. Heath with intent to cheat and defraud W. C. Heath. This Court held that the bill of indictment was fatally defective in failing to state the causal connection between the false representation and the execution of the note by W. C. Heath. In so holding, the Court stated:

> . . . it does not appear by direct or express allegation, or even by implication, what causal connection the false statements had with the note, or how W. C. Heath was induced thereby to make and endorse the note. We must see by the very indictment itself, not only that false representations were made, but, as we have already said, that they were calculated to deceive W. C. Heath, and that by the deception he was actually induced to give the note. The indictment, therefore, fails at its vital point.

Id. at 775, 67 S.E. at 63. The Court also quoted with approval from *State v. Fitzgerald*, 18 N.C. 408 (1835), the following:

> . . . it seems to us essential, in a case where there is no obvious connection between the result produced and the falsehood practiced, that the facts should be set forth which do connect the consequence with the deceitful practice. [Italics removed.]

152 N.C. at 777, 67 S.E. at 64.

Defendant does not point to later decisions by this Court which tend to support his position; however, we find that the Court of Appeals has recently addressed the specific question under consideration. In *State v. Hinson*, 17 N.C. App. 25, 193 S.E. 2d 415 (1972), *cert. denied*, 282 N.C. 583, 194 S.E. 2d 151 (1973), *cert. denied*, 412 U.S. 931 (1973), the Court of Appeals squarely addressed the question presented here and held that it was not necessary to allege specifically that the victim was in fact deceived by the false pretense when the facts alleged in the bill of indictment are sufficient to suggest that the surrender of something of value was the natural and probable result of the false pretense. *Accord, State v. Hines*, 36 N.C. App. 33, 243 S.E. 2d 782, *cert. denied*, 295 N.C. 262, 245 S.E. 2d 779 (1978). This holding in *Hinson* was based upon the holding of this Court in *State v. Dale*, 218 N.C. 625, 12 S.E. 2d 556 (1940).

In *Dale* the defendant moved to quash the indictment charging false pretense because it failed to show any causation between the alleged false representation and the obtaining of something of value. In denying the motion to quash, the Court speaking through Seawell, J., stated:

> The principle applied by the Court in *S. v. Whedbee*, 152 N.C., 770, 67 S.E., 60, we do not understand to be applicable where the surrendering of the money or other thing of value is the natural and probable result of the false pretense. Certainly, a mere "lie," which of itself and upon the face of the pleading offers no inducement to a man to give up his money, would not undergird the crime, but it may be seen as an important element in obtaining money under false pretense, when the latent connection is brought out . . . . The facts alleged in the indictment here, relating to the misrepresentation, *ex proprio vigore*, are such as to imply causation, since they are obviously calculated to produce the result.

Id. at 641, 12 S.E. 2d at 565. *See State v. Claudius*, 164 N.C. 521, 80 S.E. 261 (1913). Defendant argues that *Dale* and *Claudius* are distinguishable from *Hinson* and the case *sub judice* because *Dale* and *Claudius* deal with the causal connection between defendant's false representation and the obtainment of something of value from the victim. On the other hand, *Hinson* and the instant case are concerned with the question of whether the false pretense in

fact deceived the victim. This is a distinction without a difference. If the false pretense caused the victim to give up his property, it logically follows that the property was given up because the victim was in fact deceived by the false pretense.

Here the indictment, in essence, alleged that defendant knowingly and falsely made false representations to the bank that he was offering as security for a loan a new mobile home having value of $10,850, when actually the offered security was a fire-damaged mobile home of the value of $2,500, and that defendant by means of such false pretense and with intent then and there to defraud the bank received from the bank the sum of $5,704.54.

In our opinion, the allegations contained in this bill of indictment were sufficient to raise a reasonable inference that the bank made the loan because it was deceived by defendant's false representations.

[2] By this assignment of error, defendant also challenges the bill of indictment on the ground that it failed to charge that defendant obtained property from the Bank of Currituck "without compensation."

There has been some confusion in our cases concerning the necessity of alleging in a bill of indictment charging false pretense that the accused obtained property "without compensation." In *State v. Phifer, supra,* this Court in defining the offense of false pretense included the language "without compensation." Thereafter, in many cases this Court has quoted *Phifer* and used the words "without compensation." *State v. Davenport, supra; State v. Mikle,* 94 N.C. 843 (1886); *State v. Young,* 76 N.C. 258 (1877). On the other hand, we find cases which cite *Phifer* as authority in defining the crime of false pretense without including this language. *State v. Matthews,* 121 N.C. 604, 28 S.E. 469 (1897); *State v. Dickson,* 88 N.C. 643 (1883); *State v. Eason,* 86 N.C. 674 (1882). We take particular note of a number of cases in which *Phifer* is cited and the phrase "without compensation" is used, and yet *some* compensation was in fact given by the defendant. *See State v. Howley,* 220 N.C. 113, 16 S.E. 2d 705 (1941); *State v. Roberts,* 189 N.C. 93, 126 S.E. 161 (1925); *State v. Claudius, supra; State v. Mangum,* 116 N.C. 998, 21 S.E. 189 (1895); *State v. Hefner,* 84 N.C. 751 (1881).

The confusion which has existed concerning the necessity of using this language in a bill of indictment charging false pretense is most evident in *State v. Carlson*, 171 N.C. 818, 89 S.E. 30 (1916). In that case, Justice Walker writing for the Court seemingly embraced two definitions of the crime of false pretense, one of which contained that langauge "without compensation" and another which omitted that language. We quote from *Carlson*:

> A criminal false pretense may be defined to be the false representation of a subsisting fact, whether by oral or written words or conduct, which is calculated to deceive, intended to deceive, and which does in fact deceive, and by means of which one person obtains value from another without compensation. *S. v. Phifer*, 65 N.C., 321; *S. v. Whedbee*, 152 N.C., 770. In order to convict one of this crime the State must satisfy the jury beyond a reasonable doubt (1) that the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made. *S. v. Whedbee, supra.*

Id. at 824, 89 S.E. at 33.

In the recent case of *State v. Hines, supra*, Judge Morris (now Chief Judge) writing for the Court of Appeals in a well-reasoned and carefully researched opinion stated:

> Certainly, beginning with the statute codified as Potter's Revisal of 1819, laws of 1811, Ch. 814 § 2, through the present G.S. 14-100, there is and has been no statutory requirement that the State must prove that the defendant obtained the goods, property, things of value, services, etc., without compensation to the victim. Nor has our research disclosed a case in which the question of the victim's compensation was before the Court, although in some cases the victim received nothing at all, and in some the victim did receive some compensation of a sort. We conclude that the phrase "without compensation" has constituted *obiter dictum* in the cases where it has been used, and it is not an element of the offense of false pretense.

Id. at 40, 243, S.E. at 786.

Finally, we note that G.S. 14-100, which defines the crime of false pretenses, does not make the failure of the victim to obtain compensation an essential element of the crime of false pretenses.

We hold that the phrase "without compensation" is not an essential element of the offense of false pretenses, and, therefore, it is not necessary to allege in a bill of indictment charging false pretenses that the accused obtained property from the victim "without compensation." Any language in our cases to the contrary is no longer authoritative.

Defendant finally challenges the bill of indictment on the grounds that it violated his rights under Article I, Section 23 of the North Carolina Constitution which states in part that "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation . . . ." Defendant contends that the indictment here violated the requirement imposed by our decisions that an indictment "to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Barnes*, 253 N.C. 711, 714, 117 S.E. 2d 849, 851 (1961); *State v. Greer, supra.* Since we have concluded that the indictment here accurately alleged all the essential elements of the offense, we hold that defendant's motion was properly denied by the trial court.

Thus, the challenged indictment charged the crime of false pretenses with sufficient certainty to apprise defendant of the charge against him, so as to protect him from a subsequent prosecution for the same offense and to enable the court properly to pronounce sentence upon conviction, a plea of guilty or a plea of *nolo contendere.*This assignment of error is overruled.

Defendant assigns as error the trial court's failure to instruct the jury properly on all elements of the crime charged.

The court, in substance, instructed the jury that in order to return a verdict of guilty it must find that defendant knowingly made false representations; that defendant "intended to deceive" the bank thereby and did in fact deceive the bank; and that as a result of such deceit defendant received property from the bank having a value of $5,704.54.

[3] Defendant maintains that the language "intended to deceive" does not meet the statutory requirements of G.S. 14-100 which re-

quire that there be an "intent to cheat or defraud." The Court of Appeals agreed with defendant and ordered a new trial on the basis of this assignment of error. The court reasoned that an intent to deceive means "to cause someone to believe something that is false" and that an intent to "cheat or defraud" includes the intent to actually deprive someone of something of value.

The crime of false pretense is statutory. G.S. 14-100. The statute has remained substantially in its present form since its enactment. The statute defining the crime of false pretense was first codified in this jurisdiction in 1811 in North Carolina Session Laws, Chapter 11, Section 2, and contained the following pertinent language:

> . . . if any person or persons shall knowingly . . . by any false token or other false pretense . . . obtain from any person . . . any money, goods, property or other thing of value . . . with intent to *cheat or defraud* any person or persons, or corporation of the same, shall be held and deemed guilty of fraud and deceit . . . . [Emphasis added.]

In interpreting the statute, the Court in *State v. Phifer, supra,* stated:

> We state the rule to be that a false representation of a subsisting fact calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, or in acts, by which one man obtains value from another without compensation, is a false pretense, indictable under our statute.

Id. at 325-26.

The statute as recodified, including our present G.S. 14-100, has included the words "intent to cheat or defraud." Yet the majority of our cases have followed the definition of the crime of false pretenses as set forth in *Phifer. State v. Louchheim,* 296 N.C. 314, 250 S.E. 2d 630, *cert. denied,* 100 S.Ct. 71 (1979); *State v. Agnew, supra; State v. Davenport, supra; State v. Howley, supra; State v. Roberts, supra; State v. Carlson, supra; State v. Claudius, supra; State v. Whedbee, supra; State v. Matthews, supra; State v. Phifer, supra.*

The Court of Appeals in the case before us attempted to distinguish the long-recognized authority represented by these cases on the ground that they were decided prior to the 1975 amendment of the statute. We do not find this to be a valid distinction. Although the 1975 amendment made several discrete changes, including those heretofore noted, the amendment did not alter the language of the statute requiring that the property be obtained "with intent to cheat or defraud."

We have held that the crime of obtaining property by false pretense is committed when one obtains a loan of money by falsely representing the nature of the security given. *State v. Howley, supra; State v. Roberts, supra. See also People v. Oscar,* 105 Mich. 704, 63 N.W. 971 (1895).

In instant case, defendant obtained a loan of $5,704.54 by representing to the bank that the security given was a new mobile home with a value of $10,850.00, when in fact it was a fire-damaged mobile home having a value of $2,620.00. The bank was deceived and consequently acted upon these false representations.

In the context of the provisions of G.S. 14-100, we are of the opinion that when a person obtains something of value by means of misrepresentations with intent to deceive the victim, the requisite intent to cheat or defraud exists.

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

[4] In light of the 1975 amendment to the statute and our prior discussion of the relevant law, we hold that the crime of obtaining property by false pretenses pursuant to G.S. 14-100 should be defined as follows: (1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another. *See State v. Davenport, supra;* G.S. 14-100. This holding in no way affects the general rule that an indictment for a statutory offense is sufficient when the offense is charged in the words of the statute. *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970), *cert. denied,* 403 U.S. 940 (1971); *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913 (1969).

[5] Defendant next assigns as error the failure of the trial judge to allow his motion for judgment as of nonsuit. He argues that the

State has failed to present sufficient evidence to show: (1) that defendant intended to deceive the bank; (2) that the bank was in fact deceived by his misrepresentations; and (3) that he received something of value without compensation. The latter contention is obviously without merit. We have hereinabove held that obtaining property by false pretense *without compensation* is not an element of the crime of false pretense. Even in this day of double digit inflation, the sum of $5,704.54 is still "something of value." Furthermore, when considered in the light most favorable to the State and giving the State the benefit of every reasonable inference to be drawn from the evidence, as we must, we hold that there was ample evidence from which the jury could reasonably infer that defendant intended to deceive by false pretenses, the bank was in fact deceived by defendant's false pretenses, and defendant thereby received something of value. *State v. Agnew, supra; State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971).

[6] Defendant finally contends that the trial court erred in denying his motion for appropriate relief made pursuant to G.S. 15A-1411. His motion is based upon newly discovered evidence.

This Court has held that the prerequisites for a new trial on the grounds of newly discovered evidence are as follows:

> 1. That the witness or witnesses will give the newly discovered evidence. [Citations omitted.]
>
> 2. That such newly discovered evidence is probably true. [Citations omitted.]
>
> 3. That it is competent, material and relevant. [Citations omitted.]
>
> 4. That due diligence was used and proper means were employed to procure the testimony at the trial. [Citations omitted.]
>
> 5. That the newly discovered evidence is not merely cumulative. [Citations omitted.]
>
> 6. That it does not tend only to contradict a former witness or to impeach or discredit him. [Citations omitted.]
>
> 7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. [Citations omitted.]

State v. Casey, 201 N.C. 620, 624-25, 161 S.E. 81, 83-84 (1931). *See generally* 12 Strong's N.C. Index 3d, *Trial*, § 49, and cases cited therein. Such a motion is addressed to the sound discretion of the trial judge and is not subject to review absent a showing of an abuse of discretion. *Webb v. Gaskins*, 255 N.C. 281, 121 S.E. 2d 564 (1961).

At the hearing on defendant's application for appropriate relief, his evidence tended to show that he delivered to the bank the purchase agreement for the mobile home offered for security and that the agreement disclosed upon its face that the mobile home had been damaged by fire. Defendant testified that he obtained this document through discovery on the Friday before he was tried on the following Tuesday, but that he did not realize what it was and thus did not attempt to introduce it into evidence at trial. Defendant at trial cross-examined Mr. Moore about this document, and the latter stated that contrary to normal bank policy he had not retained a copy of the agreement. Since defendant admittedly had a copy of the document in his possession three or four days before the trial, we find that he was in a position, in the exercise of reasonable diligence, to have produced and presented this evidence at trial.

Although defendant, a layman, represented himself at trial, he understandingly chose to do so after the court had found him to be an indigent and appointed a lawyer satisfactory to defendant to represent him. He elected nevertheless to request that the trial proceed and that he be allowed to represent himself when it was disclosed that Mr. Aldridge, the attorney appointed by the court, had a conflict which would necessitate a continuance of defendant's case. In addition to his oral request that the trial proceed and that he be allowed to represent himself, defendant executed a written waiver of counsel.

It is well settled that a defendant has the right to defend himself in a criminal action, and that the constitutional guarantee of counsel does not justify forcing counsel upon an accused who rejects the offer of counsel and elects to represent himself in the trial and disposition of his case. *State v. Morgan*, 272 N.C. 97, 157 S.E. 2d 606 (1967) (per curiam); *State v. Bines*, 263 N.C. 48, 138 S.E. 2d 797 (1964); *State v. McNeil*, 263 N.C. 260, 139 S.E. 2d 667 (1965). When a defendant understandingly chooses to appear *pro*

se, he does so at his peril and acquires no greater right or latitude than would be allowed an attorney acting for him. *State v. Pritchard*, 227 N.C. 168, 41 S.E. 2d 287 (1947); *State v. Lashley*, 21 N.C. App. 83, 203 S.E. 2d 71 (1974). Note, *Right to Defend Pro Se*, 48 N.C. L. Rev. 678 (1970). Under these circumstances, we find no abuse of discretion on the part of the trial judge in denying defendant's motion for appropriate relief.

For the reasons stated, this case is remanded to the Court of Appeals, with instruction that it be remanded to the Superior Court of Currituck County for entry of judgment in accordance with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. CURTIS HOUGH

No. 44

(Filed 1 February 1980)

1. Constitutional Law § 60; Grand Jury § 3.3; Jury § 7.4— racial discrimination in selection of grand and petit juries—no prima facie showing

Defendant's evidence failed to present a *prima facie* case of racial discrimination in the selection of the grand and petit juries in violation of the equal protection clause of the Fourteenth Amendment where it tended to show that for the 1976-77 biennium, the jury commission prepared a list of 6000 names by hand by starting at the end of the alphabet and taking every fifth name from the voter registration list and every third name from the tax list and by selecting 74 names randomly from the telephone book; the commission purged 545 names from the list by deleting the names of those on the previous jury list and those they knew to be disqualified due to old age or physical disability; for the 1978-79 biennium, the jury list was compiled by computer by starting at the beginning of the alphabet and systematically taking names from the voter registration and tax lists; the jury commissioners did not know the percentage of blacks on the tax list, voter registration list, or jury list, but could possibly tell from an address whether the person lived in a predominantly white or black neighborhood; for the 1978-79 biennium 17.6 percent of the population of the county eligible for jury service was black and 11.2 to 12.5 percent of the jury pool was black, resulting in an absolute disparity of only 5.1 to 6.4 percent; and for the 1976-77 biennium the absolute disparity ranged from 3.2 to 4.7 percent, since an absolute disparity in the representation of blacks on the jury list of no more than 6.4 percent was insufficient to make out a *prima facie* case, and the disparity was not due to a subjective selection pro-

cedure which is subject to abuse. Nor did such evidence make out a *prima facie* case of a violation of defendant's Sixth Amendment right (as applied to the states by the Fourteenth Amendment) to a jury representing a fair cross-section of the community.

2. **Criminal Law § 105.1— defendant's introduction of evidence—effect on motion for directed verdict**

Defendant, by introducing evidence in his behalf, waived his right to argue on appeal the denial of his motion for directed verdict made at the close of the State's evidence. G.S. 15-173.

3. **Burglary and Unlawful Breakings § 5.1; Rape § 5— first degree burglary—rape—defendant as perpetrator—sufficiency of evidence**

The State's evidence was sufficient for the jury to find that defendant was the perpetrator of a first degree burglary and rape where the victim positively identified defendant as the man who raped her in her home at night after the court conducted a *voir dire* and found that the victim had sufficient time and light to observe and identify the perpetrator of the crimes at the crime scene.

4. **Criminal Law §§ 112, 119— charge on presumption of innocence and reasonable doubt—failure to give exact charge requested**

The trial court did not err in failing to use the exact language of defendant's requested instructions on the presumption of innocence and on reasonable doubt where the court's charge, which followed the pattern criminal instructions on the presumption of innocence and on reasonable doubt, was a correct and adequate statement of the law and was in substantial conformity with the requested instructions.

5. **Criminal Law § 114.3— instructions—no expression of opinion**

The trial court did not express an opinion on the evidence by stating to the jury, "before you return a verdict of guilty of either charge," where the statements were at the end of sentences which, when read as a whole, were correct statements of the law.

6. **Criminal Law § 114.2— statement of contentions—no expression of opinion**

The trial judge did not express an opinion on the evidence by failing, during his statement of the State's contentions, to qualify his statements with remarks such as "the evidence tends to show" or "she testified that" where the judge began such portion of the charge with the statement that "the State has offered evidence which the State contends tends to show" and ended that portion of the charge with the statement that "the State contends from this evidence that you should be satisfied as to . . . ."

7. **Criminal Law § 114.2— instructions—reference to "rape"—no expression of opinion**

The trial court did not express an opinion on the evidence in stating that a doctor's examination was made "some hour or so after she testified that the Defendant had raped her" where the victim testified that she had been "raped" and the court was simply recapitulating her testimony.

8. Criminal Law § 114.3— statement of contentions—no expression of opinion

The trial judge did not express an opinion that defendant was the perpetrator of a first degree burglary and a rape when, during a statement of the State's contentions, he stated that "she says she did not consent to have defendant come in at all" and "of course, Mrs. Tucker has testified that he was there when she awoke and that defendant was on top of her."

9. Criminal Law § 118.2— statement of contentions of both parties—restatement of State's contentions—no failure to give equal stress

The trial court did not fail to give equal stress to the contentions of both parties where the court stated the contentions of both parties, defined the elements of the offenses, and then restated the contentions of the State, since the contentions of defendant were stated, defendant failed to object when the State's contentions were restated, and it was not error to consume more time in stating the State's contentions.

10. Criminal Law § 118— charge on contentions—omission of elements of crime charged

The court's charge, when considered as a whole, correctly defined the offenses of first degree burglary and second degree rape, although the court did omit certain elements of those offenses in stating the State's contentions.

11. Criminal Law § 112.1— refusal to review evidence during jury deliberations—no abuse of discretion

The trial judge did not abuse his discretion in refusing to review certain testimony when the jury returned to the courtroom with questions during its deliberations.

12. Constitutional Law § 60; Jury § 7.4— gratuitous findings after trial concerning racial discrimination in jury selection—absence of prejudice

Defendant was not prejudiced by the court's gratuitous finding after verdict and judgment that a black prospective juror was challenged for cause in this case because she had been restrained by the trial judge from issuing further bail bonds for failure to pay certain judgments or by the court's gratuitous conclusion after trial that, based on his observations over the last seventeen years, blacks are not systematically excluded from jury pools in the county, since defendant's motion to quash the indictment and the petit jury venire was properly denied at the conclusion of a *voir dire* held before the trial commenced, and no findings of fact were necessary in ruling on that motion because there were no conflicts in the evidence to be resolved.

Justice BROCK concurs in the result.

ON appeal by defendant from *McConnell, J.*, 4 December 1978 Session of UNION County Superior Court.

Defendant was tried upon indictments, proper in form, with first degree burglary and second degree rape. The State's evidence tended to show that Mrs. Mary Tucker, who lives at 400

East Houston Street in Monroe, was awakened shortly after 2:30 a.m. on 28 September 1977 by a man who was on top of her in bed. He apparently gained entry into the house by tearing a hole in the screen at the back door and then opening the door from the inside.

Defendant had a stick with him and he threatened to strike Mrs. Tucker. The two struggled and Mrs. Tucker received bruises on her right arm and on her right leg. Defendant had sexual intercourse with her by force and against her will.

There were no lights on in her bedroom at the time of the incident but there was light coming into the room from nearby streetlights. She described her assailant to the police as a black male who was a little taller than herself, with a small beard or goatee, plaited hair, a gold earring in his left ear, and she thought he was wearing bluejeans. When the police officer went outside to radio in this description, he saw the defendant, who matched the description, walking down the street about a hundred feet from the Tucker house. Defendant was taken into custody.

Mrs. Tucker made no pretrial identifications of the defendant. She identified him in court as the man who raped her. A brown bag was found on the night of this incident on Mrs. Tucker's back porch. Fingerprints identified as those of Barbara Vinson, a friend of the defendant, were found on the bag.

Defendant's evidence tended to show that he partied with friends that evening until around midnight and that he had been drinking at the party. When he left his friend's home, he went to a telephone booth and called Barbara Vinson. He testified that they "weren't getting along too good" and he wanted to see if he could "better [their] relationship." Vinson testified that she told him not to come over when he called and she was "sort of angry" when he got to her house. He had a brown bag with him when he arrived and she picked it up but does not remember looking inside. They talked for about two and one-half hours. She looked at her digital clock when he left and it was 2:32 a.m.

Defendant testified that he then walked to the Bickett School and slept there until 4:00 a.m. He then went home, dressed, and left for work. He was walking down Maurice Street toward his brother's house when the police came up and arrested him.

The jury found defendant guilty as charged in both indictments. He was sentenced to life imprisonment upon the conviction for first degree burglary and he has appealed this conviction to this Court. He was sentenced to sixty years in prison (minimum and maximum) upon the conviction for second degree rape. His motion to bypass the Court of Appeals on his appeal from this conviction was allowed by this Court on 9 May 1979.

Karen Bethea Galloway and Susan E. Barco for the defendant.

Attorney General Rufus L. Edmisten by Associate Attorney General Francis W. Crawley for the State.

COPELAND, Justice.

[1] By his second assignment of error, defendant contends that the trial judge erred in denying his motion to quash the indictment returned by the grand jury and to quash the petit jury venire on the grounds that the method of juror selection in Union County results in a significant under-representation of blacks[1] in violation of the Sixth and Fourteenth Amendments. These contentions are without merit. We shall discuss defendant's Fourteenth Amendment equal protection claim first.

A defendant is not entitled to demand a proportionate number of his race on the jury which tries him nor on the venire from which petit jurors are drawn. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972); *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970). He is constitutionally entitled not to have members of his race systematically excluded from grand juries and from petit jury venires. *State v. Cornell, supra; State v. Spencer, supra.* When the defendant alleges such racial discrimination, the burden is upon him to establish it. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977).

In order to establish a violation of equal protection, a defendant must show that he is a member of a recognizable, distinct class or group which has been purposely discriminated against

1. Throughout this opinion we use the term "blacks" absolutely synonymously with the term "Negroes" and we are referring to no group or race any larger or smaller than that encompassed by the term "Negroes."

and singled out for different treatment under the laws as written or applied. *Washington v. Davis*, 426 U.S. 229, 48 L.Ed. 2d 597, 96 S.Ct. 2040 (1976); *Castaneda v. Partida*, 430 U.S. 482, 51 L.Ed. 2d 498, 97 S.Ct. 1272 (1977). The intentional discrimination may be proven by showing that the procedure employed for the selection of jurors has resulted in substantial under-representation of his race or identifiable group for a significant period of time. *State v. Hardy, supra; Castaneda v. Partida, supra.* In turn, this substantial under-representation must be proven by comparing the proportion of the group in the total population to the proportion called for service on the grand jury or placed on the petit jury venire. *State v. Hardy, supra; Castaneda v. Partida, supra.* This under-representation must be to such an extent as to show intentional discrimination. *Washington v. Davis, supra.*

Also, a showing that the selection procedure is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. *See, Castaneda v. Partida, supra* (selection procedure subject to abuse because jury commissioners subjectively chose those whom they felt were moral, upright and would make good jurors); *Turner v. Fouche*, 396 U.S. 346, 24 L.Ed. 2d 567, 90 S.Ct. 532 (1970) (significant statistical disparity and subjective selection method both shown); *Whitus v. Georgia*, 385 U.S. 545, 17 L.Ed. 2d 599, 87 S.Ct. 643 (1967) (highly subjective selection method). Once the defendant has made out a *prima facie* case of discriminatory purpose, the burden then shifts to the State to rebut that case. *State v. Hardy, supra; Castaneda v. Partida, supra.*

Here, defendant produced the following relevant evidence at the hearing on the motion to quash the indictment and the petit jury venire. For the 1976-77 biennium, the jury commission for Union County prepared a list of 6,000 names. They started at the last of the alphabet and worked back taking every fifth name from the voter registration list for Union County. They did the same with the tax list taking every third name. Seventy-four names were taken randomly from the telephone book.

They purged approximately 545 names from the list. This was accomplished by comparing the compiled list with the jury list from the previous biennium and deleting the names of those who were on the previous list. The commissioners also testified

that, pursuant to additional instructions set forth in a manual published by the Institute of Government, *Manual for Jury Commissioners*, pp. 6-8 (1973), they deleted the names of those whom they knew were disqualified due to old age or physical disability.

The jury commissioners compiled this list by hand and secretaries in the office of the Clerk of Court typed up the approximately 6,000 names individually on index cards. These cards were then turned over to the Register of Deeds' office. For the 1978-79 biennium, the list was compiled by computer according to procedures determined by the jury commission for that biennium. The tax list and voter registration list were again used, but this time they began at the beginning of the alphabet in systematically taking names by computer for the jury list.

The jury commissioners who testified stated that they did not know the percentage of blacks on the tax list, the voter registration list, on their compiled jury list, or in Union County. Addresses accompanied the names on one of the lists they used to compile the jury list. Some commissioners testified that they might be able to tell from an address whether a person lived in a predominantly white or black neighborhood but there was no indication that they followed any procedure other than the prescribed systematic procedure. Another commissioner testified that they did not have time to look at the addresses since they had to compile the list by hand for the 1976-77 biennium and, as noted above, the list was compiled systematically by computer for the 1978-79 biennium.

James Michael O'Reilly testified for the defendant that he took samples from the compiled jury list and compared them with the total black population in Union County eligible for jury service. He determined that 82.4 percent of the population of Union County eligible for jury service in 1977 was white and 17.6 percent was black. He found that 11.2 percent to 12.5 percent of the jury pool for the 1978-79 biennium was black. The percentage of eligible blacks in the county minus the percentage of blacks in the jury pool equals the absolute disparity in the representation of blacks on the jury list. Here, there is an absolute disparity of 5.1 percent to 6.4 percent.

He also computed comparative disparity figures. Absolute disparity divided by the percentage of eligible blacks in the coun-

ty equals comparative disparity. He found that for the 1978-79 biennium blacks were from 28.6 percent to 36.5 percent less likely to be placed on the jury list than whites. For the 1976-77 biennium, he found an absolute disparity ranging from 3.2 percent to 4.7 percent and comparative disparities ranging from 18.4 percent to 27.6 percent.

We hold that this evidence fails to present a *prima facie* case of racial discrimination in violation of the equal protection clause of the Fourteenth Amendment. Defendant is black and blacks constitute a cognizable group. *State v. Lowry*, 263 N.C. 536, 139 S.E. 2d 870, *cert. denied sub nom.*, 382 U.S. 22 (1965); *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879). However, defendant has failed to show a substantial under-representation of blacks as required by *Hardy* and *Castaneda*.

Defendant maintains that in measuring this under-representation we should use comparative rather than absolute disparity figures. His argument is that absolute disparity figures fail to take into account the total eligible black population in the county. Thus, blacks in counties with a low black population will suffer more harm if we allow the same level of absolute disparity in those counties that we allow in counties with a larger black population.

We consider absolute disparity figures and we do so on a case by case basis. *State v. Brower*, *supra*. This means that we consider the percentage of blacks in the jury pool in light of the percentage of eligible blacks in the county's population. In *Cornell*, it was stated that 20 percent of the population of Forsyth County was black while the jury pool was 10 percent black. This 10 percent disparity was held insufficient to make out a *prima facie* case of racial discrimination. We hold that, given a black population in Union County of 17.6 percent, an absolute disparity, which by defendant's calculation ranges no higher than 6.4 percent, is insufficient to make out a *prima facie* case.

Furthermore, the disparities are not due to a subjective selection procedure that is subject to abuse as was the case in *Castaneda*, *Turner* and *Whitus*. The selection procedure for Union County for the past two bienniums was conducted in compliance with the objective, systematic procedure set forth in G.S. 9-2 *et seq.* which was held to be constitutional in *State v. Cornell*, *supra*.

The fact that some jury commissioners may have been able to identify the race of some of the potential jurors from their addresses was held insufficient in *Cornell* to show an opportunity for discrimination. We cannot say that purposeful discrimination has been proven by showing a disparity of 6.4 percent. *State v. Cornell, supra; Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824 (1965) (absolute disparity of 10 percent held insufficient to show purposeful racial discrimination).

Defendant also maintains that he has been denied his Sixth Amendment right (as applied to the States by the Fourteenth Amendment, *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed. 2d 491, 88 S.Ct. 1444, *rehearing denied*, 392 U.S. 947 (1968)) to a jury representing a fair cross-section of his community.

The Sixth Amendment does require that jury pools represent a fair cross-section of the community and that no identifiable group be systematically excluded. *Taylor v. Louisiana*, 419 U.S. 522, 42 L.Ed. 2d 690, 95 S.Ct. 692 (1975). In order to establish a *prima facie* case of a violation of this requirement, a defendant does not have to show purposeful discrimination. Instead, he must show that he is a member of a distinctive group and that the representation of this group in venires from which juries are chosen is not fair and reasonable in relation to the population of that group in the community. He must then show that this underrepresentation is due to the systematic exclusion of that group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 58 L.Ed. 2d 579, 99 S.Ct. 664 (1979). Defendant has failed to meet these latter two requirements.

In *Taylor*, a 43 percent disparity in the representation of women in the jury pool was shown. Thus, defendant was denied a jury drawn from a representative cross-section of the community. In *Duren*, the disparity of women in the jury pool was 39 percent. The highest disparity figure we have here is 6.4 percent. Defendant has not presented evidence showing a level of disparity anywhere near the figures presented in *Taylor* and *Duren*. Also, the objective, systematic procedures set forth in G.S. 9-2 *et seq.* were scrupulously followed in this case and therefore, we see no evidence of any systematic exclusion of blacks. We hold that defendant has failed to present a *prima facie* case of a violation of the Sixth Amendment. This assignment of error is overruled.

[2] By his third assignment of error, defendant argues that the trial judge erred in denying his motions for a directed verdict. Defendant, by introducing evidence in his behalf, waived his right to argue on appeal the denial of his motion for directed verdict made at the close of the State's evidence. G.S. 15-173. His motion for directed verdict made at the close of all the evidence is here for review and his contention that his motion should have been granted is meritless.

[3] We held in *State v. Conrad*, 293 N.C. 735, 239 S.E. 2d 260 (1977) that to withstand defendant's motion to dismiss there must be a sufficient basis for the jury to find that the crime charged (1) was committed (2) by the person charged. Defendant argues that there is insufficient evidence to show that he is the one who burglarized the Tucker residence and raped Mrs. Tucker. Mrs. Tucker positively identified him in court as the man in her home in her bed who raped her. A *voir dire* was conducted on this identification and the trial judge found that there was sufficient time and light to observe and identify the perpetrator of the crime at the time of its commission. He properly concluded that the in-court identification was not tainted in any manner. This assignment of error is overruled.

[4] By his fourth assignment of error, defendant argues that the trial judge erred in failing to use the exact language of defendant's requested instructions on the presumption of innocence and regarding the State's burden that it must prove the offenses charged beyond a reasonable doubt.

We held in *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976), that when a defendant makes a request for special instructions on the presumption of innocence and reasonable doubt that are correct in themselves and are supported by evidence, then the trial judge must charge the jury in substantial conformity with the requests. However, the trial judge does not have to "parrot the instructions" or "become a mere judicial phonograph for recording the exact and identical words of counsel." *Id.* at 14, 229 S.E. 2d at 294, *quoting State v. Bailey*, 254 N.C. 380, 386, 119 S.E. 2d 165, 170 (1961); *State v. Henderson*, 206 N.C. 830, 175 S.E. 201 (1934).

Here, the trial judge followed the pattern criminal jury instructions on the presumption of innocence and reasonable doubt. Since his charge was a correct and adequate statement of the law,

we hold that it was in substantial conformity with the requested instructions which were also substantially correct statements of the law. *State v. Davis, supra; State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); *State v. Flippin*, 280 N.C. 682, 186 S.E. 2d 917 (1972).

Defendant also asserts that he was denied due process of law in the judge's charge to the jury as defined by the United States Supreme Court in *Taylor v. Kentucky*, 436 U.S. 478, 56 L.Ed. 2d 468, 98 S.Ct. 1930 (1978). The rationale of *Taylor v. Kentucky* is inapposite to the case *sub judice*. There, it was held to be a denial of due process on the facts of that case for the trial judge to refuse to instruct on the presumption of innocence. Here, there was a correct and adequate instruction on the presumption of innocence. This assignment of error is overruled.

By his fifth, sixth and eighth assignments of error, defendant asserts that the trial judge expressed opinions during his charge to the jury that certain facts had been proved and that the defendant was guilty as charged.

It is elementary that the trial judge may not express any opinions on the evidence or of defendant's guilt during his instructions to the jury. G.S. 15A-1232; *State v. Barber*, 268 N.C. 509, 151 S.E. 2d 51 (1966); *State v. Belk*, 268 N.C. 320, 150 S.E. 2d 481 (1966); *State v. Newton*, 249 N.C. 145, 105 S.E. 2d 437 (1958).

[5] He groups his alleged statements of opinions into four categories. First, defendant cites three instances where the trial judge stated to the jury, "before you return a verdict of guilty of either charge." Defendant has simply taken the ending to these three sentences which when read as a whole are correct statements of the law. One example will suffice. The trial judge instructed the jury that,

> "They are two separate cases, and you must vote on them separately when you come to consider them and before you return a verdict of guilty as to either charge. It must be the verdict of all twelve Jurors; and you must be satisfied, the burden being on the State to satisfy you from the evidence and beyond a reasonable doubt of his guilt before you return a verdict of guilty of either of the charges."

We find no expression of opinion here or in the other statements of which defendant complains.

[6] Second, defendant complains that during the statement of the State's contentions, the trial judge failed to qualify his statements with remarks such as, "the evidence tends to show" or "she testified that." The trial judge began the complained of portion of the charge with the statement that, "[t]he State has offered evidence which the State contends tends to show that" and ended with the statement that, "the State contends from this evidence that you should be satisfied as to. . . ." The use of these statements does not constitute an expression of an opinion. *State v. Huggins*, 269 N.C. 752, 153 S.E. 2d 475 (1967); *State v. Roberts*, 293 N.C. 1, 235 S.E. 2d 203 (1977). Also, it is not necessary for the trial judge to repeat such phrases throughout the charge in restating the evidence and in stating the contentions of the parties. *State v. Humbles*, 241 N.C. 47, 84 S.E. 2d 264 (1954).

[7] Third, defendant asserts that the trial judge expressed an opinion in saying to the jury that the doctor's examination was made "some hour or so after she testified that the Defendant had raped her." She did so testify. Use of the word "rape" by a witness is not an expression of an opinion. *State v. Pearce*, 296 N.C. 281, 250 S.E. 2d 640 (1979). We hold that it was not prejudicial error for the trial judge to use this word when recapitulating some of her testimony. *See, State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973).

In *State v. McEachern*, 283 N.C. 57, 194 S.E. 2d 787 (1973), we held that the trial judge expressed an opinion in asking the prosecutrix whether she was "in the car when [she was] raped," because prosecutrix had not testified that she had been raped though there was evidence from which it could have been so inferred. *McEachern* is distinguishable from the case at bar because Mrs. Tucker testified that she had been raped and the trial judge was simply recounting that testimony. The jury was further instructed to base its verdicts solely upon the evidence that was presented from the witness stand. We find no prejudicial error.

[8] Fourth, defendant maintains that at several points in his charge, the trial judge expressed the opinion that the defendant was the perpetrator of the crime. The trial judge expressed no opinions at these points in the charge. He was merely stating the

State's contentions. For example, the trial judge stated that, "[s]*he says* she did not consent to have the defendant come in at all" and "[o]*f course, Mrs. Tucker has testified* that he was there when she awoke and that the defendant was on top of her." (Emphasis added.) We find no error here. These assignments of error are devoid of merit and are overruled.

[9] By his eighth assignment of error, defendant also contends that the trial judge erred in failing to give equal stress to the contentions of both parties. A trial judge does not have to state the contentions of the parties. However, when he undertakes to do so he must give equal stress to the contentions of both sides. *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978). This requirement was explicitly stated in former G.S. 1-180. It is now implicit in G.S. 15A-1232. *Id.*

Generally, any objections to the statement of contentions must be made before the jury retires to give the trial judge an opportunity to correct the statements he made; otherwise, they are deemed to have been waived and will not be considered on appeal. *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968); *State v. Butler*, 269 N.C. 733, 153 S.E. 2d 477 (1967). The rule is otherwise, however, where the trial judge states fully the contentions of the State but fails to give *any* of the defendant's contentions. No objection is required in that event. *State v. Hewett, supra.* The fact that the trial judge necessarily consumes more time in stating the contentions of the State does not violate the requirement of equal stress. *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979).

Here, the trial judge stated the contentions of both parties. He then defined the elements of each crime for which the defendant had been charged. He restated the contentions of the State after defining the elements of the offenses and then properly related the law to the evidence. While we do not necessarily condone the practice of restating the State's contentions when defining the offenses charged, we find no prejudicial error on the record before us. Defendant's contentions were stated. He failed to object when the State's contentions were restated, and it is not error to consume more time in stating the State's contentions. This assignment of error is overruled.

[10] By his seventh and ninth assignments of error, defendant contends that the trial judge failed to fully define the offenses of second degree rape and first degree burglary. In stating some of the State's contentions, the trial judge omitted the requirement that the crime must have been committed against Mrs. Tucker's consent in order to constitute rape. In stating the contentions of the State regarding the burglary charge, there were no references to the requirement that there be a breaking and that there be an intent to commit a felony.

These assignments are without merit. At the points in the charge that the trial judge was *defining* the offense of rape and *defining* the offense of burglary, he performed those tasks correctly. The charge, read as a whole, *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971), correctly defined the offenses charged. These assignments of error are overruled.

[11] By his tenth assignment of error, defendant maintains that the trial judge erred in refusing to exercise his discretion concerning whether to review certain testimony when the jury returned to the courtroom during its deliberations with questions. We held in *State v. Ford*, 297 N.C. 28, 252 S.E. 2d 717 (1979), that error was committed when the trial judge stated that he was not allowed to go back and have the testimony read to the jury. Such a matter is within the trial judge's sound discretion. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193, *cert. denied*, 434 U.S. 924 (1977); *State v. Covington* 290 N.C. 313, 226 S.E. 2d 629 (1976).

Here, the trial judge exercised his discretion and decided against reviewing the testimony. He did not abuse his discretion or state an opinion in so doing. This assignment of error is overruled.

[12] By his eleventh assignment of error, defendant contends that, after the verdict and judgment had been rendered, the trial judge erred in making a certain finding of fact and entering a certain conclusion of law. Defendant contends that there was no evidence to support the finding made after trial that a black prospective juror was challenged for cause in this case due to her having been restrained from issuing any further bonds because of her failure to pay certain judgment absolutes. There was nothing in the record to disclose that any objection was made by the

defendant to this challenge for cause while the jury was being selected. The trial judge also gratuitously concluded after trial that, based on his observations over the last seventeen years, blacks are not systematically excluded from jury pools in Union County.

This alleged "finding" and "conclusion" by the trial judge are no more than remarks inserted in the record which are absolutely meaningless as far as his ruling *before* trial on defendant's motion to quash based on his allegations under the Sixth and Fourteenth Amendments concerning the jury lists in Union County for the 1976-77 and 1978-79 bienniums. Defendant's motion to quash the indictment and the petit jury venire was properly denied at the conclusion of the *voir dire* held before the trial commenced. No findings of fact were necessary in ruling on that motion before trial because there were no conflicts in the evidence to resolve. *See, State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977). This assignment of error is overruled.

Defendant failed to bring assignments of error one and twelve forward and argue them in his brief; therefore, they are deemed abandoned. Rule 28(a), (b)(3), Rules of Appellate Procedure; *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979); *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336 (1972).

Defendant was "entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619, 97 L.Ed. 593, 605, 73 S.Ct. 481, 490 (1953); *accord, State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093 (1977). A fair trial the defendant has had and we find

No error.

Justice BROCK concurs in the result.

TANGLEWOOD LAND COMPANY, INC. v. C. L. BYRD AND WIFE, KATHLEEN N. BYRD

No. 89

(Filed 1 February 1980)

1. **Courts § 21.7— contract made in Virginia—Virginia law controlling**

The laws of Virginia governed the validity of an executory contract for the sale of land since the contract was executed in Virginia and since the contract itself provided that the laws of that state should be controlling.

2. **Vendor and Purchaser § 1— right to mortgage premises retained by seller—contract not unconscionable—contract supported by consideration**

In an action to recover the balance due on a note and contract for the purchase of land, the contract was not unconscionable and unsupported by valid consideration because, pursuant to the terms of the contract, plaintiff seller reserved the right to convey its interest in the land in question and to mortgage the premises, since plaintiff's contractual obligation to execute a special warranty deed upon defendant purchasers' final installment payment provided sufficient mutuality of obligation to prevent the contract from being unconscionable and provided sufficient consideration to constitute a valid contract.

3. **Vendor and Purchaser § 1— contract to convey voided by prior sale—contract not illusory**

A land sales contract was not illusory because it provided that "Buyer agrees that in the event of prior sale of said lot(s), this agreement and note shall be cancelled and voided without further liability to either party, except for refund of all payments made hereunder," since such "prior sale" referred to a contract to sell consummated, or a sale consummated, between the seller and another purchaser with reference to the same tract of land prior to the signing of the subject contract, and both seller and purchaser were protected by this provision in the event one of plaintiff's salesmen sold the lot in question to another purchaser unbeknownst to the salesman selling it to defendant.

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

Justice COPELAND dissenting.

Justice HUSKINS joins in the dissenting opinion.

APPEAL by defendants to review an opinion of the Court of Appeals by *Judge Hedrick* with *Judge Vaughn* concurring and *Judge Arnold* dissenting. 42 N.C. App. 251, 256 S.E. 2d 270 (1979). Defendants appealed as a matter of right under G.S. 7A-30(2).

Plaintiff is a Virginia corporation with its principal place of business located at Bracey, Virginia. Defendants are residents of Wake County, North Carolina. The land involved in this lawsuit is

located in Mecklenburg County, Virginia, and known as Lot No. 42E, in the Eagle Village of River Ridge Golf and Camping Club.

On 5 May 1974 plaintiff and defendants entered into an executory contract for the sale of said Lot No. 42E by plaintiff to defendants, and defendants executed their promissory note to plaintiff for the purchase price of said lot payable in equal monthly installments. The total deferred balance on the note, including finance charges, was $8,100.00 payable at the rate of $135.25 per month for 60 consecutive months commencing on 19 June 1974 [the final monthly payment being in the amount of $120.25]. The contract and the note show on their face that they were executed at Bracey, Virginia. The contract provided that upon payment in full of the note by defendants the plaintiff would convey the lot to defendants by a Special Warranty Deed.

Defendants made regular monthly payments on the note and contract until 6 November 1974 after which defendants have paid nothing. On 19 November 1976 plaintiff instituted this action to recover the balance due on the note and contract. A copy of the note and contract was attached to and incorporated in the amended complaint which was filed 31 May 1977.

Defendants answered the amended complaint admitting the execution of the note and contract, and admitting that they had made no payments since 6 November 1974. Defendants denied that they had defaulted in the payment of the note and denied that plaintiff had demanded payment. By their first defense defendants seek dismissal under Rule 12(b) on the grounds that the amended complaint fails to state a claim upon which relief can be granted.

By order filed 3 August 1978 in Superior Court, Wake County, plaintiff's action was dismissed ". . . for reason that it appears upon the face of the contract upon which this suit is based, a copy of which contract is incorporated in the complaint, is unconscionable, and there is a failure of consideration to support the plaintiff's claims . . . ." Plaintiff appealed to the Court of Appeals.

By opinion filed 3 July 1979 (42 N.C. App. 251, 256 S.E. 2d 270 (1979)) the Court of Appeals reversed the dismissal and remanded the case to the Superior Court for further proceedings.

Mast, Tew, Nall & Moore, by Allen R. Tew for plaintiff-appellee.

Gulley, Barrow & Boxley, by Jack P. Gulley for defendant-appellants.

BROCK, Justice.

[1] We note first that this contract was executed in Virginia, and that the interpretation of a contract is governed by the law of the place where the contract was made. *Bundy v. Commercial Credit Corporation*, 200 N.C. 511, 516, 157 S.E. 860, 863 (1931); *Fast v. Gulley*, 271 N.C. 208, 155 S.E. 2d 507 (1967). Secondly, the contract on its face provides that in construing the contract the laws of the Commonwealth of Virginia shall be controlling. This Court has held that where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect. Thus by the provisions of this contact, the law of the Commonwealth of Virginia governs our determiantion of its validity. *Tennessee Carolina Transpotation, Inc. v. Strick Corporation*, 283 N.C. 423, 431, 196 S.E. 2d 711, 716 (1973), *later app.*, 286 N.C. 235, 210 S.E. 2d 181 (1974).

[2] Defendants argue to this Court that the land sales contract is on its face unconscionable, illusory and not supported by valid consideration as it is in effect totally one sided in favor of the plaintiff Tanglewood Land Company. Defendants rely first on paragraph 12 of the land sales contract which provides as follows:

> ¶12 "Seller reserves the right to convey its interest in the above described premises and its conveyances thereof shall not be a cause for recision. Buyer expressly consents that Seller and its grantees and/or assigns may mortgage said premises and the rights of Seller and Buyer shall be subordinate to the lien of all such mortgages, whether the same shall be given hereinbefore or hereinafter."

It is defendant-appellants' contention that in light of this paragraph they as purchasers could make all payments under the terms of the contract, and receive no interest in the property in return for such payments. Defendant-appellants argue that plaintiff-appellee could have placed a mortgage in any amount on the property and its rights in the property would be subordinate

to such a mortgage by the terms of the contract. For the reasons that follow we disagree and hold that the contract is supported by valid consideration and is not unconscionable on its face.

We turn first to the question of the contract's unconscionability. Paragraph 4 of the land sales contract provides that seller retains title to the property as a security interest until receipt of all payments from the buyer. Upon such receipt seller shall "deliver a conveyance of said lot(s) to Buyer consisting of a SPECIAL WARRANTY DEED . . . ." The code of Virginia, Section 55-69, defines a covenant of special warranty as one where: "the grantor has covenanted that he, his heirs and personal representatives will forever warrant and defend such property unto the grantee . . . against the claims and demands of the grantor, and all persons claiming or to claim by, through or under him." *See also Pic Construction Company, Inc. v. First Union National Bank, et al.*, 218 Va. 915, 919, 241 S.E. 2d 804, 806 (1978).

Reading paragraph 12 of the contract in light of paragraph 4 it is apparent that plaintiff has retained the right to encumber title to the property so long as it holds said title as security, however upon defendants' final payment plaintiff is contractually obligated to provide defendants with unencumbered title to the property and defend such title against all of those claiming through them as grantors.

If plaintiff acts in good faith and should be unable for good cause to provide clear title as warranted, the defendants as purchasers may bring suit for specific performance or for nominal damages with return of all monies paid with interest. However, if plaintiff as vendor has acted in bad faith in originally undertaking to convey title, or has voluntarily disabled itself from making such a conveyance (*i.e.*, by mortgaging the property subsequent to the original sale to these defendants) it will be liable to the purchasers-defendants for their loss of bargain. This is computed as the market value of the land at the time of the breach with interest from the date of purchase less the original purchase price left unpaid. (NOTE: Subject to the terms of this contract, defendants must pay the full purchase price before they acquire title, thus the purchase price left unpaid would necessarily be zero, and defendants could recover full market value as of date of breach.) *Davis v. Beury*, 134 Va. 322, 340, 114 S.E. 773, 777-78 (1922); *Williams v. Snider*, 190 Va. 226, 230, 56 S.E. 2d 63, 65 (1949).

We hold that plaintiff's contractual obligation to execute a Special Warranty Deed upon purchasers' final installment payment provides sufficient mutuality of obligation to prevent the contract from being unconscionable.

We now turn to the question of whether or not the contract is supported by valid consideration. The contractual duty on the part of the plaintiff as seller to execute to the defendants as purchasers a Special Warranty Deed upon defendants' payment of the final installment provides sufficient consideration to constitute a valid contract under Virignia law. *Midkiff v. Glass*, 139 Va. 218, 223-24, 123 S.E. 329, 330 (1924) held that a promise of a seller to convey property in return for a promise by the buyer to pay the unpaid remainder of the purchase price furnishes a valid and sufficient consideration to hold buyer or his estate liable to pay the remainder of the purchase price.

[3] Finally we turn to the question of whether or not this land sales contract is illusory in that there is no enforceable duty on the part of the plaintiff-vendor to actually convey the property to the defendants as purchasers. Defendants argue to this Court that paragarph 6 of the contract when combined with paragraph 12 noted *supra* renders the contract illusory. We do not agree. In its pertinent part paragraph 6 reads as follows:

> "Buyer agrees that in the event of prior sale of said lot(s), this agreement and note shall be cancelled and voided without further liability to either party, except for refund of all payments made hereunder . . . ."

We interpret the words "prior sale" in paragraph 6 of the contract to mean a contract to sell consummated, or a sale consummated, between the seller and another purchaser with reference to the same tract of land prior to the signing of the subject contract. These words, "prior sale", do not refer to a sale or contract to sell to another purchaser entered into after the time of signing the subject contract or at any time during which the subject contract is being complied with by the subject purchaser.

The reason for paragraph 6 being in the contract is readily apparent. The seller had eight or ten authorized salesmen on the premises of the development for the purpose of driving prospective purchasers through the development to select a lot or tract

suitable to the prospective purchaser. Obviously two or more prospective purchasers, accompanied by different salesmen, may select the same lot or tract. The salesman with any one prospective purchaser, easily might not be aware of the prior sale of a particular lot or tract within a short span of time by another salesman. Under these circumstances it is conceivable that the same lot or tract could have been the subject of a prior sale without a second salesman's knowledge, and the second salesman in good faith might offer the lot for sale and execute a contract with a second purchaser. Under such circumstances the "prior sale" provided for in paragraph 6 of the contract would permit the seller to refund whatever the second purchaser had paid upon such second sale, or such second contract to sell, and to void the contract and note. This is a reasonable arrangement for the protection of both the seller and the second would be purchaser. At oral argument in this Court counsel for defendant conceded that allowing a period to set a second sale aside in the event of the above noted contingency was the practical application of paragraph 6.

As so interpreted the provisions of paragraph 6 of the contract do not render the agreement illusory.

All of the foregoing arguments were previously rejected by the Court of Appeals in *Land Co. v. Wood*, 40 N.C. App. 133, 252 S.E. 2d 546 (1979). We find also that the land sale contract in this case is valid under Virginia law and therefore we affirm the opinion of the Court of Appeals.

Affirmed.

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

Justice COPELAND dissenting.

I agree with the majority that the decision in this case turns on application of the law of the Commonwealth of Virginia. Under Virginia law,

> " '[W]here the consideration for the promise of one party is the promise of the other party, there must be absolute mutuality of engagement, so that each party has the right to

hold the other to a positive agreement. Both parties must be bound, or neither is bound.' " *Capps v. Capps*, 216 Va. 378, 381, 219 S.E. 2d 901, 903 (1975), *quoting Town of Vinton v. City of Roanoke*, 195 Va. 881, 896, 80 S.E. 2d 608, 617 (1954); *American Agricultural Chemical Co. v. Kennedy*, 103 Va. 171, 176, 48 S.E. 868, 870 (1904).

Where a party suing to enforce a contract promise has given no consideration in exchange for that promise, there is no legally binding contract and the contract cannot be enforced. An illusory promise, being not a legally binding promise at all, is not sufficient consideration to make a contract mutually binding and enforceable. *Town of Vinton v. City of Roanoke, supra.* The point is well stated in Corbin on Contracts § 145 (1963):

"If what appears to be a promise is an illusion, there is no promise; like the mirage of the desert with its vision of flowing water which yet lets the traveller die of thirst, there is nothing there. By the phrase 'illusory promise' is meant words in promisory form that promise nothing; they do not purport to put any limitation on the freedom of the alleged promisor, but leave his future action subject to his own future will, just as it would have been had he said no words at all."

The majority holds that plaintiff-seller's promise to execute to the defendants as purchasers a Special Warranty Deed upon defendants' payment of the final installment of the purchase price provides sufficient consideration to constitute a valid contract under Virginia law citing *Midkiff v. Glass*, 139 Va. 218, 223-24, 123 S.E. 329, 330 (1924).

The case *sub judice* is distinguishable from *Midkiff* because of the additional paragraph present in the contract under consideration here which provides as follows:

"6. Buyer agrees that in the event of prior sale of said lot(s), this agreement and note shall be cancelled and voided without further liability to either party, except for refund of all payments made hereunder to Buyer, and to accept the decision of seller without recourse, that said prior sale of lot(s) has been made."

The question is whether the above paragraph makes the plaintiff-seller's promise to sell and to give a Special Warranty Deed after all installments have been paid, an illusory promise so that there is no consideration to support the defendant-buyers' promise to buy. If the seller's promise to sell is in reality an illusory promise, then the plaintiff cannot enforce this contract against the defendants because there are no *mutually binding promises* and as noted above, under Virginia law, *both parties must be bound or neither is bound. Capps v. Capps, supra.*

The issue is what is meant by "prior sale of said lot" in paragraph 6 of the contract. Seller-plaintiff urges and the majority decides that it means a sale of the lot prior to the sale of the same lot on the same date to the second buyers. This alleged interpretation is adopted because it is said that the company has many agents in different places selling these lots and a certain lot may be sold twice in the same day. In that event, the second buyer would get a refund of his down payment because of the prior sale.

The majority so construes this paragraph in order to avoid declaring the contract invalid. Even though maintaining the validity of the contract is a laudable goal, our function is to *interpret* the contract that the parties have written and not to rewrite the contract for them. A new contract cannot be written for the parties under the guise of construction nor can the contract be altered so as to conform it to the court's notion of the contract the parties should have made in view of the surrounding facts and circumstances. *Ames v. American National Bank of Portsmouth*, 163 Va. 1, 176 S.E. 204 (1934). There is no basis in the contract for the majority's construction. In fact, I believe that the majority's construction ignores the plain English that seller chose in composing paragraph 6. Words are to be given their ordinary meaning unless it is clearly shown a different meaning was intended, *id.*, and no such showing has been made in this case.

The buyer-defendants argued at the trial level, in the Court of Appeals and in this Court (through incorporation in its brief before this Court of its brief in the Court of Appeals) that prior sale means any sale prior to the payment of the last installment. In that event, seller, at the time this contract was entered into, made no binding promise to sell the lot to the defendants. In-

stead, the seller made only an illusory promise to sell the lot to the defendants *if* it did not sell to someone else before all installments were paid by the buyers. From the very words of the contract itself, I believe that this is the only correct interpretation of paragraph 6.

I am not unmindful of the rule of contract construction that states that words in promissory form should not be interpreted so as to make them illusory unless the context shows an intent to leave performance subject to the party's future will and desire. Corbin on Contracts § 546 (1963). From the context of paragraphs 4 and 6 of the contract, which the seller prepared, I believe that there is an objective manifestation by the seller of an intent to leave its performance subject to its future will and desire.

This contract was entered into on 5 May 1974 and on that date a $500.00 down payment was made. The first of the sixty installment payments of $135.25 was due over a month later on 19 June 1974. If the term "prior sale" in paragraph 6 was intended to mean a prior sale on the same day as the sale to the buyer-defendants, as the majority holds, then seller, who prepared this contract, should have provided that in the event of a prior sale the *down payment* would be refunded since that is the *sole* payment made on the day of the sale. Instead, seller provided for refund of all payments. The question then becomes, what did seller mean by "all payments"?

The contract must be construed as a whole. *State Farm Mutual Automobile Insurance Co. v. Justis*, 168 Va. 158, 190 S.E. 163 (1937). The intent of the parties must be gathered from the words they have used in the contract. *Ames v. American National Bank of Portsmouth, supra.* Paragraph 4 of this contract provides that,

> "Seller . . . agrees upon receipt of *all payments* provided herein . . . to record . . . and deliver a conveyance of said Lot(s) to Buyer consisting of a SPECIAL WARRANTY DEED. . . ." (Emphasis added.)

Certainly "all payments" in paragraph 4 means payment of the down payment *and all installment payments by the buyers.* In my view, the term "all payments" has exactly the same meaning in paragraph 6 that it has in paragraph 4 for the simple reason

that the term is used and defined in paragraph 4 and is then used again two paragraphs later in paragraph 6. The term "all payments" determines the true intended length of the time period for a possible "prior sale" as objectively manifested in the contract language construed as a whole. A "prior sale" could be made by the seller at any time prior to payment of the last installment by the buyers in which event seller would refund *all of the payments*. Therefore, seller made only an illusory promise and the contract is unenforceable. As stated in Corbin on Contracts § 145 (1963):

> "Such an illusory promise is neither enforceable against the one making it, nor is it operative as a consideration for a return promise. This is true even though the other promisor in fact bargains for a mere illusory promise in return and gets it."

This same issue was addressed by the Court of Appeals in *Tanglewood Land Co. v. Wood*, 40 N.C. App. 133, 252 S.E. 2d 546 (1979). There Judge (now Justice) Carlton concluded that buyer's argument (that paragraph 6 of the contract made seller's promise to sell merely an illusory promise) was without merit because the buyer could sue for breach of contract and obtain either specific performance or damages.

Before a party can successfully sue for breach of contract and obtain damages or specific performance, there must first be a valid and enforceable contract which has then been breached. When the only consideration to support a promise to buy is an illusory promise to sell, then no valid and enforceable contract has ever been entered into because an illusory promise is not sufficient consideration and sufficient consideration is a prerequisite to the *formation* of a contract. When a party argues that all it received as consideration for its promise was an illusory promise, then that party is asserting a defense to the *formation* of a contract and thus, the question of *breach* of that contract is never reached. In the case cited by the Court of Appeals in *Tanglewood Land Co. v. Wood, supra* in support of its holding on this point, *Davis v. Beury*, 134 Va. 322, 114 S.E. 773 (1922), there was a valid and enforceable contract between the parties which seller had breached and buyer brought suit for an appropriate remedy.

"If the promisor bargains for some sort of real promise, and receives only an illusion, *there is no contract* for the reason that the offer has not been accepted [by a binding promise to convey] as well as for the reason that there is no sufficient consideration." Corbin on Contracts § 145 (1963). (Emphasis added.)

Accordingly, I would hold that seller-plaintiff cannot enforce this contract against buyer-defendants because seller gave no binding promise to sell and convey a special warranty deed as consideration for buyers' promise to buy. Since seller made only an illusory promise, no valid contract was ever entered into and the agreement is unenforceable.

Justice HUSKINS joins in this dissenting opinion.

WHALEHEAD PROPERTIES, A PARTNERSHIP v. COASTLAND CORPORATION, OCEAN SANDS PROPERTY OWNERS ASSOCIATION, INC. AND OCEAN SANDS, INC.

No. 124

(Filed 1 February 1980)

1. **Appeal and Error § 6.2— right of appeal—final judgment—interlocutory order affecting substantial right**

A right of appeal lies from the final judgment of superior court or from an interlocutory order of the superior court which affects some substantial right. G.S. 1-277; G.S. 7A-27(b).

2. **Appeal and Error § 6.2— finality of judgment—appeal from summary judgment order**

Where plaintiff's first cause of action was settled by consent, summary judgment granting plaintiff a permanent injunction was entered on plaintiff's second cause of action, plaintiff's third cause of action sought a declaratory judgment that its redesigned plans for development of its property complied with an agreement of the parties, and the court found that the development plans did not comply with the agreement and entered summary judgment for defendants, plaintiff received a final judgment as to all its causes of action and could appeal from the court's order entering summary judgment for defendants on its third cause of action.

3. Appeal and Error § 6.2— breach of contract—summary judgment establishing liability—rejection of specific performance—appealability of order

Where the trial court granted summary judgment establishing plaintiff's liability for breach of an agreement to redesign its plan for development of its property to comply with the "Currituck Plan" for development of outer banks property, but the court rejected defendants' claim for specific performance of the contract and ordered the issue of damages to be determined at a subsequent trial, the denial of defendants' claim for specific performance prior to hearing evidence on the question of damages affected a substantial right of defendants and was appealable, since the court's preemptory denial of specific performance will preclude defendants from seeking such relief at the trial on the issue of damages, and by the time final judgment is rendered on defendants' claim plaintiff may have been able to develop its property in a manner not in compliance with its agreement.

4. Contracts § 20.1— breach of contract—no impossibility of performance

Plaintiff was not excused on the ground of impossibility of performance from compliance with its contract with defendant to redesign its plans for development of its property to comply with the "Currituck Plan" for development of outer banks property, which required a central water and sewer system, and the trial court properly entered summary judgment for defendants establishing plaintiff's liability for breach of the agreement, where (1) the evidence on motion for summary judgment tended to show that, although Currituck County had adopted a new "Land Use Plan" for development of the outer banks which replaced the "Currituck Plan," developments in compliance with the "Currituck Plan" were still permitted in the county, and (2) plaintiff's evidence tended to show that county approval of participation in a central water and sewer system would not be automatic but failed to show that plaintiff ever presented a definite proposal to the county commissioners or that approval of such a plan would never be forthcoming.

5. Specific Performance § 1— breach of contract—summary judgment—denial of specific performance before evidence of damages

The trial court erred in preemptorily denying the equitable relief of specific performance when it granted summary judgment establishing plaintiff's liability for breach of contract and ordered that the issue of damages be decided at a subsequent trial, since the court was without the necessary facts to determine whether damages would provide defendants an adequate remedy at law.

ON plaintiff's and defendants' petition for discretionary review of an opinion of the Court of Appeals reported at 42 N.C. App. 198, 256 S.E. 2d 284 (1979) dismissing plaintiff's and defendants' appeals from judgments of *Snepp, J.*, entered at the May 29, 1978 Session of Superior Court, CURRITUCK County.

Petition for discretionary review allowed 25 September 1979.

Plaintiff and defendants are landowners and competing developers of adjoining tracts of land on the outer banks of Currituck County, N.C. The plaintiff's Whalehead property lies immediately to the north of the defendants' Ocean Sands subdivision. Plaintiff's property is bordered on the north by federal lands, on the east by the Atlantic Ocean and on the west by Currituck Sound. Access to plaintiff's property from the north has been blocked by the federal government. To obtain a southern entrance to their development, plaintiff obtained use of a right-of-way known as the "Slick Easement" which extends southwardly along the Currituck outer banks from the southern boundary of defendants' Ocean Sands subdivision to the northern end of State Road 1200. The "Slick Easement" is an unpaved roadway which has not been dedicated to the public.

This suit arises out of contractual agreements between plaintiff and defendants in which plaintiff acquired use of the "Slick Easement." Prior to the execution of the agreements in question, the defendants had obtained access over the "Slick Easement" by entering its various agreements with Earl F. Slick and others. These agreements granted defendant Coastland a non-exclusive right to use the "Slick Easement" with the proviso that others would be granted the right to use the roadway only with the joint consent of Coastland and Slick. Subsequently, defendant Coastland granted use of the easement to the Ocean Sands Property Owners Association, and plaintiff also sought access across the "Slick Easement" in order that its employees, agents and eventually property owners could reach its Whalehead property.

To obtain this needed access plaintiff entered into various contractual agreements with defendants securing to the plaintiff the right to use the "Slick Easement" to reach its development. On 10 April 1974, in partial consideration for such access, plaintiff agreed to the following:

> "3(a) Redesign the remaining unsold portions which are reasonably feasible for redesign of the Whalehead property to comply with the Currituck Plan . . . .[1]

1. The Currituck Plan adopted December 3, 1973 was a written and graphic policy statement about the future development of the outer banks. The plan required present and future developments to provide central water and sewer service. It further recommended cluster type or planned unit developments (PUDs) for new subdivisions.

3(b) Work out a participation agreement with Currituck County so that the Whalehead development will participate in the central water and sewer project being sponsored by Currituck County.

3(c) . . . Coastland agrees not to oppose any design of K & R [plaintiff] on any of the Whalehead property provided the standards set out in paragraph 3(a) above are met."

Plaintiff also agreed to other conditions, including payment of a percentage of the cost to construct and maintain the roadway on the "Slick Easement."

In 1974 and 1975 when plaintiff and defendants entered into agreements concerning the "Slick Easement," the "Currituck Plan" was the only development scheme approved for construction on the Currituck Banks. However, in 1977 Currituck County adopted a plan known as the "Land Use Plan" which superseded the "Currituck Plan" as the county's development *policy* for its outer banks. This "Land Use Plan" contrary to the "Currituck Plan" permitted construction of low density housing without requiring that water and sewer service and other public utilities be provided. After adoption of the "Land Use Plan," the "Currituck Plan" was no longer required as a development scheme; however, use of development schemes approved by the "Currituck Plan" was still allowed.

In compliance with the new "Land Use Plan," plaintiff submitted plats of the undeveloped real estate which remained on the Whalehead property. The plats did not comply with the "Currituck Plan." Subsequent to the recording of these new plats, defendants terminated or threatened to terminate plaintiff's right to use the "Slick Easement" for its alleged failure to comply with the contractual agreements which mandated compliance with the "Currituck Plan."

Thereupon plaintiff instituted this action against defendants alleging three causes of action. The first cause of action was settled between the parties by consent. In its second cause of action, plaintiff alleged compliance with the contractual agreements and sought a temporary restraining order, a preliminary injunction, and a permanent injunction restraining the defendants from terminating or threatening to terminate access by way of the "Slick

Easement." Plaintiff moved for summary judgment on this cause of action, and Judge Snepp, in a judgment dated 15 June 1978, granted the plaintiff's motion for summary judgment. The judgment entitled plaintiff to a permanent injunction so long as a pro rata share of the road's upkeep was paid by them. Neither party excepted to this order. In its third cause of action, plaintiff prayed for declaratory judgment which would hold that its design of the Whalehead property complied with plaintiff's and defendants' contractual agreements. However, defendants' motion for summary judgment on plaintiff's third cause of action was granted by Judge Snepp, who held as a matter of law that the new design failed to comply with the "Currituck Plan" and therefore, the parties' agreement had been breached.

Defendants filed a counterclaim alleging that the proposed redesign was in violation of the "Currituck Plan" and their agreement. Defendants prayed for specific performance of their contract insofar as it related to the "Currituck Plan" or, in the alternative $3,000,000 "or some other large sum as actual damages." Judge Snepp granted the defendants' motion for summary judgment as to its counterclaim but denied specific performance. In accord with the pre-trial order by Judge Fountain, the issue of damages, if any, was not before the court and was to be decided at a separate and subsequent trial.

From the order granting summary judgment in favor of the defendants on plaintiff's third cause of action, plaintiff appealed. Defendants appealed from Judge Snepp's denial of their requested relief of specific performance. The Court of Appeals dismissed both appeals as interlocutory in character and therefore non-appealable. Both parties petitioned to this Court for further review.

J. Kenyon Wilson, Jr. and M. H. Hood Ellis, and White, Hall, Mullen, Brumsey and Small, by Gerald F. White, for Whalehead Properties, plaintiff.

LeRoy, Wells, Shaw, Hornthal, Riley & Shearin, by Dewey W. Wells and Mark M. Maland, and Twiford, Trimpi & Thompson, by Russell E. Twiford and Jack E. Derrick, for Coastland Corporation, et al., defendants.

BROCK, Justice.

[1] The Court of Appeals in its dismissal of the parties' appeals relied on our opinion in *Tridyn Industries, Inc. v. American Mutual Insurance Company*, 296 N.C. 486, 251 S.E. 2d 443 (1979). For the reasons which follow we hold *Tridyn* does not require dismissal of either plaintiff's or defendants' appeal.

We turn first to plaintiff's right of appeal. It is settled law in this State that the right of appeal lies from the final judgment of superior court or from an interlocutory order of the superior court which affects some substantial right. *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E. 2d 377, 381 (1950); *Tridyn Industries, Inc. v. American Mutual Insurance Company, supra*. Right of appeal is now statutorily provided by G.S. 1-277 and G.S. 7A-27(b). G.S. 1-277(a) provides:

> "An appeal may be taken from every judicial order or determination of a judge of a superior or district court, . . . which affects a substantial right claimed in any action or proceeding. . . ."

G.S. 7A-27(b) provides:

> "From any final judgment of a superior court, other than one [involving a sentence of death or life imprisonment where appeal is direct to the North Carolina Supreme Court], or one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, appeal lies of right to the Court of Appeals."

[2] In this case plaintiff alleged three causes of action against the defendants. The first cause of action was settled by the consent of the parties. In its second cause of action, plaintiff was granted summary judgment and received a permanent injunction preventing the defendants from closing or threatening to deny plaintiff access to the "Slick Easement." No exception was taken to this judgment by either party. In its third cause of action, plaintiff prayed for a declaratory judgment establishing, when reasonably construed under the agreements entered into between plaintiff and defendants, that plaintiff's redesign of the development plats in the Whalehead property complied with the agreements entered into between plaintiff and defendants. Judge

Snepp held that plaintiff's redesign failed to comply with the "Currituck Plan" and that plaintiff was in breach of its agreement. Therefore, on plaintiff's third cause of action summary judgment was entered in favor of the defendants.

In its third cause of action plaintiff prayed for no further relief beyond the declaratory judgment. Thus by the parties settling the first cause of action by consent and by Judge Snepp granting summary judgment in plaintiff's favor on its second cause of action, and against plaintiff on its third cause of action, plaintiff received a final judgment as to all causes of action which it had brought.

The summary judgment for defendants on plaintiff's third cause of action denies plaintiff a trial on the issue of whether plaintiff's redesign of the development of its Whalehead property complied with the agreements between plaintiff and defendants, and disposes of all of plaintiff's causes of action. Thus the order is a final judgment as to all of plaintiff's causes of action and affects a substantial right of plaintiff. The order is therefore appealable under G.S. 1-277(a) and G.S. 7A-27(b). *See Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976).

[3] We now turn to defendants' right of appeal from Judge Snepp's denial of the specific performance prayed for in its counterclaim. Judge Snepp granted summary judgment in favor of the defendants on their counterclaim, establishing as a matter of law plaintiff's breach of the contractual agreements. However, Judge Snepp rejected defendants' claim for specific performance. Judge Snepp made no ruling on defendants' claim for monetary damages, as Judge Fountain's pre-trial order had delayed this decision until a subsequent trial. From Judge Snepp's denial of the specific performance remedy, defendants claim a right to appeal.

In our recent decision of *Tridyn Industries, Inc. v. American Mutual Insurance Company, supra*, we held that in a suit by plaintiff for money damages, defendant was not entitled to appeal from an order granting partial summary judgment in favor of the plaintiff on the issue of defendant's liability prior to the trial court's determination of the damages to be awarded. *Id.* at 494, 251 S.E. 2d at 449. In *Tridyn*, defendant appealed from an order granting plaintiff's motion for summary judgment as to the liability of the defendant for breach of an insurance contract. Plaintiff had at

first sought summary judgment on all issues before the court, including damages, but moved for summary judgment solely on the issue of liability. The trial court entered judgment for the plaintiff on the issue of liability but concluded that there was a genuine issue as to the amount of money damages which plaintiff was entitled to recover. From the adverse summary judgment order defendant appealed. In holding defendant's appeal improper as interlocutory this Court noted:

> "If this partial summary judgment is in error defendant can preserve its right to complain of the error on appeal from the final judgment by a duly entered exception. Even if defendant is correct on its legal position, *the most it will suffer from being denied an immediate appeal is a trial on the issue of damages. Id.* at 491, 251 S.E. 2d at 447. (Emphasis ours.)

Here, unlike *Tridyn* where denial of defendant's interlocutory appeal subjected him only to a trial on damages, which was appealable at the entry of final judgment, denial of these defendants' appeal will eliminate the opportunity to obtain specific performance. As we noted above, our decision in *Tridyn* held that an interlocutory order is appealable if it affects a substantial right, and will work injury to the appealing party if not corrected before an appeal from final judgment.

In determining whether an interlocutory judgment affects a substantial right, "[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case . . . ." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 343 (1978). In the case at bar, the preemptory denial by the trial court of specific performance will preclude the defendants from even seeking such relief at the subsequent trial on the issue of damages. By the time final judgment is rendered on defendants' counterclaim, plaintiff may have been able to develop the redesigned Whalehead property in a manner not in compliance with the "Currituck Plan." After development is complete an order to specifically perform the contract according to its terms would be foreclosed, and defendants would be forced to accept the remedy of money damages, which it argues is not an effective remedy nor the one it seeks.

We are of the opinion that denial of defendants' claim to the equitable relief of specific performance prior to hearing evidence on the question of damages, affected a substantial right of the defendants and therefore was appealable. We now turn to the substantive issues raised by these appeals.

[4] Plaintiff contends that the trial court erred in denying its motion for summary judgment, and granting summary judgment in favor of the defendants on plaintiff's third cause of action. By granting summary judgment in favor of the defendants, Judge Snepp ruled as a matter of law that plaintiff's redesign of the unsold portion of its Whalehead subdivision was in breach of the parties' contractual agreement whereby plaintiff was guaranteed access to the "Slick Easement." The portion of the contract pertinent to plaintiff's alleged breach is as follows:

> "3(a) Redesign the remaining unsold portions which are reasonably feasible for *redesign of the Whalehead property to comply with the Currituck Plan.* . . . (Emphasis ours.)
>
> 3(b) Work out a participation agreement with Currituck County so that the Whalehead development will participate in the central water and sewer project being sponsored by Currituck County.
>
> 3(c) . . . Coastland agrees not to oppose any design of K & R [plaintiff] on any of the Whalehead property provided the standards set out in paragraph 3(a) above are met."

Accompanying its motion for summary judgment of 19 May 1978, plaintiff presented the affidavits of County Commissioners Bowden, Dozier and Ferrell which averred that the "County Commissioners of Currituck County *would not* approve a development plat or plan which would place upon the County of Currituck the burden of operation and maintenance of a central water and sewer system constructed and paid for by the developer; nor would the County of Currituck supervise the construction thereof or set forth the specifications therefore (sic)." Plaintiff also tendered the affidavit of S. G. Folkes, a licensed engineer, who averred that no portion of the Whalehead property was reasonably feasible for redesign into high density clusters without central water and sewer, and that the redesign under existing regulations was as close as reasonably possible to the "Currituck Plan."

On 19 May 1978 defendants also filed their motion for summary judgment which was granted by Judge Snepp. Accompanying their motion, defendants filed the affidavits of James E. Johnson, President of Coastland Corporation, Robert E. Upton, Jr., a real estate broker, John T. Sherrill, Secretary of Coastland Corporation, and Benjamin B. Taylor, President of Envirotek, Inc. (the company which designed the "Currituck Plan"). All of the above noted affidavits averred the plaintiff's redesign of the undeveloped Whalehead property did not provide underground utilities, nor provide open space as required by the "Currituck Plan." The affidavits concluded that the redesign was in violation of the "Currituck Plan," and of the parties' agreements. Defendants also presented the affidavits of three Currituck County Commissioners, the Currituck County Manager, and the Currituck County Community Development Officer, which averred that the "Currituck Plan" was no longer *required* as the development scheme on the outer banks, but that developments in compliance with the specifications of the "Currituck Plan" were still allowed in the County.

As a result of the new "Land Use Plan" adopted by the Currituck County Commissioners, and the County's alleged unwillingness to participate in centralized public utilities, plaintiff argues that its literal compliance with the "Currituck Plan" is impossible. Plaintiff contends that it has done everything reasonably feasible to redesign its Whalehead property to comply with the "Currituck Plan," and is thereby in compliance with paragraph 3(a) of the parties' agreement. As noted above, Judge Snepp disagreed, and concluded that plaintiff was in breach of its agreement, and therefore granted summary judgment on plaintiff's third cause of action in favor of the defendants.

G.S. 1A-1 Rule 56(c) provides that summary judgment is appropriate if ". . . there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Accord Kessing v. Mortgage Co.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971). In the case at bar, both plaintiff and defendants moved the court for summary judgment. By their motions both parties are contending that there are no material issues of fact left for the trier of fact's determination. Therefore the question raised by plaintiff on this appeal is not the propriety of summary judgment, but the correctness of the trial court's granting sum-

mary judgment in favor of the defendants. For the reasons that follow, we hold that Judge Snepp's order granting the defendants' motion for summary judgment was proper.

Plaintiff by both its pleadings and affidavits concedes that the redesign of the Whalehead property is not in absolute compliance with the "Currituck Plan." It contends however that its redesign constitutes the most reasonable compliance with the "Currituck Plan" when measured by plaintiff's ability to perform under the current "Land Use Plan." We disagree. The defendants presented affidavits of county officials which averred that developments in compliance with the "Currituck Plan" were still *allowed* under the County's current "Land Use Plan"; however, pursuant to its new policy the County no longer *required* developments to comply with said "Currituck Plan." Plaintiff submitted no affidavits or testimony containing evidence that the new "Land Use Plan" prohibited construction in compliance with the "Currituck Plan." Further plaintiff's affidavits aver that its proposed new development of the Whalehead property does not contain the high density features found in developments constructed pursuant to the "Currituck Plan." Since plaintiff's evidence does not dispute that the adoption by Currituck County of a new land use policy, while encouraging low density housing, does not prohibit high density construction as called for under the "Currituck Plan," and the parties' agreement calls for development pursuant to the "Currituck Plan," we affirm Judge Snepp's judgment that the County's adoption of the new non-exclusive "Land Use Plan" does not excuse plaintiff from compliance with its contractual commitments.

Plaintiff also contends that pursuant to the County's new "Land Use Plan," no County participation would be available for construction of central water and sewer as contemplated by paragraph 3(b) of the parties' agreement. Without such participation, plaintiff argues compliance with paragraph 3(b) of the contract becomes impossible, and plaintiff is therefore excused from literal compliance with the agreement. Again we disagree. Plaintiff in its affidavits presents *no evidence* that Currituck County actually refused to agree to participate in constructing a central water and sewer system for plaintiff's Whalehead property. In support of its argument that compliance with paragraph 3(b) of the contract is impossible, plaintiff presents affidavits of three in-

dividual County Commissioners which aver that the County "*would not* approve a development plat or plan which would place upon the County of Currituck the burden of operation and maintenance of a central water and sewer system . . . [built either by the developer or the County]." (Emphasis ours.) Such affidavits do not represent the consensus of the present County Commissioners nor do they represent the opinions of any future County Commissioners. Also such affidavits refer to hypothetically proposed participation plans, *not* a definite participation proposal advanced by the plaintiff. Plaintiff also relies on two resolutions of the Currituck County Board of Commissioners which state *inter alia*:

> "It is no longer the county's policy to *require* 'cluster' or planned unit development (PUD) design schemes . . . nor are water and sewer utilities *required* for new developments. . . .
>
> Currituck County [will] not involve itself in affording water and sewage utilities on the Outer Banks which *will result in extensive costs to the taxpayers of the County with very limited benefits thereof*. . . ." (Emphasis ours.)

We are of the opinion that these resolutions in themselves do not present the County's policy as a blanket denial of all participation plans for central water and sewer systems. They simply resolve that such plans are no longer required on outer banks developments, and that the County will not participate in such plans where extensive taxpayer cost will result with very limited taxpayer benefits.

The resolutions and affidavits offered by the plaintiff tend to show that County approval of the central sewer and water participation plans will not be automatic, but they do not show that plaintiff ever presented a definite proposal to the Commissioners, or that approval of such a plan would never be forthcoming. Therefore, we hold that plaintiff's affidavits and exhibits do not establish impossibility of performance of paragraph 3(b) of the contract. Simply because the County's actions subsequent to the parties' agreements may make plaintiff's ability to obtain County paticipation more difficult, does not excuse plaintiff's performance. *Goldston Brothers v. Newkirk*, 233 N.C. 428, 431, 64 S.E. 2d 424, 427 (1951). *See also* 17 Am. Jur. 2d Contracts § 402 (1964).

The evidence before the trial court established that plaintiff, without adequate excuse, failed to comply with the terms of the parties' contractual agreement, therefore summary judgment was properly entered for defendants.

[5] We now turn to defendants' appeal from the judgment denying its prayer for specific performance. Defendants' motion for summary judgment on its counterclaim was granted, however Judge Snepp ruled that:

> "The motion by the Defendants that the plaintiff be ordered to specifically perform the agreements concerning the redesign of its Whalehead Development . . . is denied. It is ORDERED that the issue of damages be tried at a later session of the court, pursuant to order of The Honorable George M. Fountain entered May 2, 1978."

We note that pursuant to Judge Fountain's pre-trial order, the issue of damages was separated from the remaining issues of liability, to be adjudicated at a subsequent trial. G.S. 1A-1 Rule 42(b) provides for such separation by the trial court in "furtherance of convenience or to avoid prejudice. . . ." Judge Fountain's pre-trial separation of the damages issue was within his discretion, and entirely proper. *Aetna Insurance Co. v. Carroll's Transfer, Inc.*, 14 N.C. App. 481, 484, 188 S.E. 2d 612, 614 (1972). However since the trial court was unable to consider the adequacy of the damages remedy following this order, we hold that its preemptory denial of the equitable relief of specific performance was error.

In *Trust Co. v. Webb*, 206 N.C. 247, 250, 173 S.E. 598, 600 (1934), this Court stated that "[j]urisdiction to enforce specific performance rests . . . on the ground that damages at law will not afford a complete remedy. (Citations omitted.)" *See* 71 Am. Jur. 2d Specific Performance § 8 (1973). Corbin in his treatise on contracts also notes that it is "the stated rule of law that specific performance of a contract will not be decreed unless the remedy in money damages is an inadequate one." *Corbin on Contracts*, Vol. 5A § 1139 (1964). In the case *sub judice* the trial court heard no evidence as to the adequacy of the defendant's remedy through damages. In *Hutchins v. Honeycutt*, 286 N.C. 314, 319, 210 S.E. 2d 254, 257 (1974), Justice Huskins speaking for the Court noted, "specific performance does not depend upon an un-

bridled discretion that varies with the length of the chancellor's foot, but *is granted or withheld according to the equities that flow from a just consideration of all the facts and circumstances of the particular case.* (Emphasis ours.) *Byrd v. Freeman*, 252 N.C. 724, 114 S.E. 2d 715 (1960), 71 Am. Jur. 2d Specific Performance § 6 (1973)." Here with the issue of damages not even before the court, Judge Snepp could not consider all the facts and circumstances of the case and determine if equitable relief was proper.

The denial of defendants' prayer for specific performance was improper because the trial court was without the necessary facts to determine whether damages would have provided defendants an adequate remedy at law.

At a subsequent hearing, for defendants to be entitled to specific performance, they must show their right in equity and good conscience to the relief demanded. The burden rests with the defendants as the parties seeking specific performance to first allege and prove that they have performed their obligations under the contract. *Darden v. Houtz*, 353 F. 2d 369, 372 (4th Cir. 1965). *Wilson v. Lineberger*, 92 N.C. 547 (1885). Also defendants will be entitled to demand that plaintiff specifically perform its portion of the contract only if they can show the inadequacy of their remedy at law. *Trust Co. v. Webb, supra. Corbin on Contracts*, Vol. 5A § 1142 (1965), notes factors to be considered in determining the adequacy of the legal remedy of money damages. Some of them are: (1) the difficulty and uncertainty in determining the amount of damages to be awarded for the breach, (2) difficulty and uncertainty of collecting such damages after they are awarded, and (3) the insufficiency of money damages to obtain duplicate or substantial equivalence of the promised performance. Because there has been no hearing on the damage issue, we are unable to determine from the present state of the record what relief, if any, the defendants are entitled to receive. Therefore in accordance with the order following herewith, this case must be remanded for determination of the propriety of defendants' claim for specific performance.

The order of the Court of Appeals dismissing the appeal is reversed; the order of Judge Snepp granting summary judgment for the defendants on plaintiff's third cause of action is affirmed; the order of Judge Snepp denying defendants' prayer for specific

performance is vacated; and this cause is remanded to the Court of Appeals for further remand to the Superior Court, Currituck County, for trial upon the question of whether defendants are entitled to a decree of specific performance and the extent thereof, or are entitled to monetary damages and the amount thereof.

The order of the Court of Appeals is reversed and this cause is remanded.

Reversed and remanded.

STATE OF NORTH CAROLINA v. BUDDY RAY MATTHEWS

STATE OF NORTH CAROLINA v. ROBERT EUGENE SNOW

No. 108

(Filed 1 February 1980)

1. **Jury §§ 7.6, 7.14— jury accepted by State—challenge of two jurors properly permitted**

The trial court did not err in allowing the State to challenge two jurors after the State had accepted them where one juror told defense counsel that she did not want to sit on the case and that she did not "want this matter on her conscience," and the second juror worked at the same place as one defendant's mother, and the mother spoke to the juror concerning her son during a recess before the jury was impaneled.

2. **Homicide § 20.1— photographs of victim**

The trial court in a second degree murder case did not err in permitting the State to introduce photographs of the victim, and the number of photographs and evidence pertaining thereto were not excessive.

3. **Robbery § 3— amount of money taken—evidence not prejudicial**

In a prosecution for second degree murder and armed robbery of a store employee, the defendant was not prejudiced by testimony that $99.17 was missing from the store, since defendant did not object to or move to strike the testimony, and since other evidence tended to show that money was taken from the store and the exact amount taken was relatively unimportant.

4. **Criminal Law § 66.1— identification of defendant—testimony not inherently incredible**

There was no merit to defendant's contention that the in-court identification testimony of a witness was inherently incredible since the witness, an

employee of a detective agency, passed by the crime scene which was well lighted, saw three men struggling, slowed momentarily, observed the faces of the three men and could positively identify defendant as one of those men.

5. **Criminal Law § 113.7— aiding and abetting—jury instruction proper**

In a prosecution for second degree murder and armed robbery, the trial court did not err in instructing on aiding and abetting where evidence was presented tending to show that defendant was actually present at the time the crimes were committed, and defendant's own evidence showed that he was constructively present.

6. **Criminal Law § 113.6— two defendants—failure to repeat certain instructions—no error**

In a trial of two defendants for second degree murder and armed robbery, the trial court did not err in its jury charge relating to the second defendant in telling the jury that the court would not repeat the elements of the crime of robbery with a dangerous weapon or the definition and elements of second degree murder but the jury would recall the instructions given in the first defendant's case.

7. **Criminal Law § 119— requests for instructions—similar instructions given—timeliness of request**

There was no merit to defendant's contention that the trial court erred in failing to give jury instructions requested by him with respect to the law on aiding and abetting and statements against penal interest, since the court did give instructions on aiding and abetting substantially in accord with defendant's request, and since defendant's request for an instruction on statements against penal interest was not timely.

8. **Constitutional Law § 30— access to evidence prior to trial—defendant not prejudiced**

The trial court did not err in admitting testimony by an expert in the field of analytical chemistry, though defendant was not provided prior to trial with any information regarding the witness's testimony, since the assistant district attorney stated that the witness had filed no reports with him and had not talked with him until about an hour before the witness was called to testify, and since the witness's testimony was in no way prejudicial to defendant.

9. **Criminal Law § 169— evidence stricken—similar evidence subsequently admitted—defendant not prejudiced**

Defendant failed to show that he was prejudiced by the trial court's striking of certain testimony where defense counsel on recross-examination was able to elicit and get before the jury substantially the same testimony that the court had ordered stricken.

APPEAL by defendants from *Mills, J.*, 9 April 1979 Criminal Session GUILFORD Superior Court, Greensboro Division.

Upon pleas of not guilty and on bills of indictment proper in form, defendants were tried for the second-degree murder and the armed robbery of Eugene Green Suddreth. Evidence presented by the state is summarized in pertinent part as follows:

At around 1:00 a.m. on 1 December 1978, Teresa Jones, a detective agency employee, while driving by the Little General Store at 2303 North Church Street in the City of Greensboro, observed three men struggling near the entrance to the store. She identified defendant Snow as one of those men.

A short while later, the body of Eugene Suddreth, the operator of the store, was found in the store's parking lot. He had been dead only a few minutes. Three stab wounds were on his body: two on his chest and one on his back. Immediately after the body was found, police found the store's cash register open; no currency—only a small amount of change—was in the register. Approximately $99.00 was missing.

Shortly after 1:15 a.m. on 1 December 1978, defendants went to the home of Sammie Collie, Sr., defendant Snow's brother-in-law. At that time, defendant Snow had a butcher knife in his hand and gave it to Collie. The blade of the knife was approximately two inches wide and eight inches long. Snow told Collie that he and defendant Matthews had robbed the Little General Store. Matthews proceeded to pull money out of his pockets and place it on a table. Defendants then began arguing with each other. They divided $55.00 between them. Snow told Matthews that "he didn't have to kill the guy". In reply, Matthews stated that "the guy" should not have run out of the store. Matthews further stated that he stabbed the victim once while he was in the store and twice while he was outside; and that he then reentered the store and got the money. Snow told Collie that he was sitting in the car behind the store at the time of the robbery and killing.

Defendant Matthews changed clothes while at the Collie home and left them there. Defendants left the home together. Collie hid the clothes in some woods near his home. The next day, Collie took the clothes and the butcher knife to a park on Charles Street. Later, Collie took defendant Snow to the clothes. Snow removed some money from the pockets and threw the clothes back into the woods.

On 21 December 1978 defendant Matthews told Nathan Alberty that he robbed the Little General Store; that he walked into the place and asked "the man" for money; that the man would not give him the money; and that he then cut the man, took the money and left.

An autopsy was performed on Suddreth's body on the morning of 1 December 1978. Medical evidence tended to show that three stab wounds were found, two in the victim's chest and one in his back; that each of the three wounds had a depth of two to four inches; that one of the wounds penetrated the victim's heart and the others penetrated his lung; that the immediate cause of death was the heart wound; and that death occurred within five minutes after the heart wound was inflicted.

Defendant Matthews offered evidence including his own testimony. He testified that he and defendant Snow were good friends and were together on the night in question; that he (Matthews) had possession of his mother's automobile; that because of an injured foot, he asked Snow to drive; that earlier that night they went to various night spots, drank intoxicants and smoked pot; that eventually they parked near the Little General Store and he went in; that he watched someone else play the pinball machine and then went out of the store; that Snow entered the store and a few minutes later he heard someone yelling; that he then went back to the entrance of the store and saw that man (Suddreth) holding his side; that he grabbed Snow and asked him "what the hell he was doing"; that Snow pointed a knife at him and he returned to the car; that Snow came to the car and they went to the Collie home; that he had nothing to do with the robbery or the killing; that he did not accept any part of the money that Snow took; and that he never told Collie or anyone else that he robbed or hurt Suddreth. He further stated that Snow told him he stabbed Suddreth while inside the store and again on the outside.

Defendant Snow offered evidence including his own testimony. He testified that on the night in question he obtained a butcher knife at Matthews' request; that they then went to the Little General Store and he parked near the store; that he remained in the car and went to sleep; that sometime later Matthews returned and waked him up; that Matthews said he had

robbed the store and he believed he had killed the operator; that Matthews showed him quantities of money; that he drove by the front of the store and saw a man lying in the parking lot; and that they then went to Collie's home.

Other evidence pertinent to the questions presented on appeal will be alluded to in the opinion.

Each defendant was found guilty of second-degree murder and armed robbery. The court entered judgments imposing life sentences on the murder charges and sentences of 40-60 years on the armed robbery charge, the latter sentences to begin at expiration of the life sentences. Defendants appealed and we allowed their motions to bypass the Court of Appeals in the armed robbery cases.

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

Public Defender Wallace C. Harrelson and Assistant Public Defender A. Wayland Cooke for defendant-appellant Buddy Ray Matthews.

Walter E. Clark for defendant-appellant Robert Eugene Snow.

BRITT, Justice.

We find no merit in any assignment of error brought forward by either defendant.

DEFENDANT SNOW'S APPEAL

[1] By his first assignment of error defendant Snow contends the trial court erred in allowing the state to challenge two jurors after the state had accepted them. There is no merit in the assignment.

After the state had passed on a panel of jurors, the court allowed the state to use one of its peremptory challenges and excuse Mrs. Loman after she told defense counsel that she did not want to sit on the case, "that she did not want this matter on her conscience". The court also allowed the state to challenge for cause Mrs. Galloway who had been passed by the state before a

noon recess. It was brought to the court's attention after lunch that defendant Snow's mother, who worked at the same place where Mrs. Galloway worked, spoke to Mrs. Galloway about her son during the recess. The jury had not been impaneled at the time Mrs. Loman and Mrs. Galloway were excused.

In *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated*, 50 L.Ed. 2d 278 (1976), this court held that neither the case law nor G.S. 9-21(b) "prohibits the trial court, in the exercise of its discretion before the jury is impaneled, from allowing the State to challenge *peremptorily or for cause* a prospective juror previously accepted by the State and tendered to the defendant." *Id.* at 680. Although G.S. 9-21(b) has been substantially altered by Article 72 of Chapter 15A, the new statutes do not change the principle laid down in *McKenna*. *See State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978).

[2] By his second assignment of error, defendant Snow contends the court erred in permitting the state to introduce numerous photographs and excessive testimony relating to the victim and his injuries.

"It is settled law in this State that a witness may use a photograph to illustrate his testimony and make it more intelligible to the court and jury; and if a photograph accurately depicts that which it purports to show and is relevant and material, the fact that it is gory or gruesome, or otherwise may tend to arouse prejudice, does not render it inadmissible." *State v. Young*, 291 N.C. 562, 570, 231 S.E. 2d 577 (1977), citing 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 34; *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971); *State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410 (1971); *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970).

While defendant recognizes the quoted principle of law, he argues that the number of photographs and other evidence relating to the victim's injuries admitted in this case was excessive; therefore, the rule stated in *State v. Foust*, 258 N.C. 453, 460, 128 S.E. 2d 889, 894 (1963), and restated in *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969), is applicable.

Considering all of the evidence in this case, we hold that the trial court did not err in admitting the photographs and other evidence complained of.

[3] By his third assignment of error, defendant Snow contends the court erred in denying his motion to strike the testimony of the witness Driver relating to the amount of money that was missing from the store. The record discloses that defendant Snow did not object to, or move to strike, Driver's testimony that $99.17 was missing. That being true, the question which defendant Snow attempts to raise is not presented for review. Rule 10, Rules of Appellate Procedure.

Furthermore, defendant was not prejudiced by the testimony complained of in view of the other evidence, including that of defendants themselves, that money was taken from the store. The exact amount taken was relatively unimportant. "The burden is on defendant not only to show error but also to show that the error complained of affected the result adversely to him . . . ." 4 Strong's N.C. Index 3d, Criminal Law § 167.

[4] There is no merit in defendant Snow's fourth assignment of error wherein he contends the trial court erred in failing to strike the in-court identification testimony of Teresa Jones. Defendant argues that her testimony was inherently incredible, hence the principle followed in *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967), should have been applied to Jones' testimony. We disagree.

In *Miller* the sole identification evidence against the defendant who was charged with breaking and entering was the testimony of one Melton, 16 years old. His testimony showed that he was never closer than 286 feet from the man whom he saw running in the nighttime along the side of the burglarized building; that he saw the man run once in each direction, stop at the front of the building, "peep" around it and look in the witness' direction; and that he did not know the man. This court observed that the witness saw Miller some six hours later in a police lineup "so arranged that the identification of Miller with the man seen earlier would naturally be suggested to the witness". This court held that the evidence did not have sufficient probative force to establish the identity of the defendant.

While the record before us does not disclose the distance from Church Street on which witness Jones was travelling and the entrance to the Little General Store, there is every indication that it was considerably less than 286 feet. Police Officer Rudd testified that he was driving on Church Street at approximately

12:55 a.m., that he observed the Little General Store, and that he recognized Mr. Suddreth who was standing behind the counter inside the store. All the evidence indicated that the store and the area in front of it were well lighted. Mrs. Jones testified that she was employed by a detective agency, that as she passed the store she saw three men struggling, that she slowed momentarily, that she was able to observe the faces of the three men, and that she could positively identify defendant Snow as one of those men.

We hold that the witness' testimony was not inherently incredible and that its weight was a question for the jury. We also point out that there was considerable other testimony, including that of defendant himself, placing defendant at the scene of the crimes.

We find no merit in defendant Snow's sixth assignment of error in which he contends the trial court expressed an opinion on the evidence in violation of G.S. 15A-1222.

Defendant submits that the court, in charging the jury with respect to the evidence of robbery with a dangerous weapon, a butcher knife, said:

> ". . . the manner in which Robert Eugene Snow used it or threatened to use it, and the size and strength of Robert Eugene Snow as compared to Eugene Suddreth;"

Also, that the court in giving the final mandate to the jury concerning the guilt or innocence of defendant Matthews on the charge of robbery with a dangerous weapon, said, "by aiding and abetting Robert Eugene Snow, as he committed robbery with a dangerous weapon".

Defendant argues that in view of his plea of not guilty, and his testimony that he had nothing to do with the robbery and killing of Suddreth, the court suggested that it was an established fact that he had the butcher knife in his possession at the time of the robbery and that he actually committed the robbery. We disagree.

It is settled that the jury charge of the court must be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from objection. *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 34

L.Ed. 2d 218 (1972). A reading of the portions of the charge in question preceding and following the portions complained of disclose that the court had carefully instructed the jury on the state's burden of proof; that the state had to prove beyond a reasonable doubt that defendant Snow had a dangerous weapon in his possession. The jury had been made fully aware that if the state had proven beyond a reasonable doubt that defendant in fact did possess the weapon, then the jury would determine by the nature of the weapon and the way it was used whether it was a dangerous weapon. By the time the second statement found objectionable by defendant Snow was made, the court had reiterated several times the state's burden of proving beyond a reasonable doubt each and every element of the crimes charged.

We hold that the court did not express an opinion on the evidence.

There is no merit in defendant Snow's seventh assignment of error in which he contends the trial court erred in instructing the jury on conspiracy. While defendants were not charged with conspiracy, some of the elements of that crime are found in "aiding and abetting" and "acting in concert". The state contended, and its evidence tended to show, that defendants aided and abetted each other and acted in concert in the robbery of Suddreth, hence we perceive no error in the instruction complained of. As the state's brief suggests, the challenged instruction is very similar to one approved by this court in *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *vacated on other grounds*, 33 L.Ed. 2d 761 (1972).

[5] In his eighth assignment of error defendant Snow contends the trial court erred in its instructions on aiding and abetting. He argues that his evidence as well as evidence presented by the state showed that he was not present at the crime scene, therefore, the court should have submitted his guilt or innocence solely on the basis of his being constructively, rather than actually, present. This argument is not persuasive.

In the first place, evidence was presented—that of Teresa Jones and defendant Matthews—tending to show that defendant was actually present at the time the crimes were committed. His own evidence showed that he was constructively present. More importantly, however, is the fact that one who is actually *or* con-

structively present when the crime is committed and aids or abets another in its commission is a principal in the second degree and is equally guilty with one who is a principal in the first degree. *State v. Keller*, 268 N.C. 522, 151 S.E. 2d 56 (1966); *State v. Minton*, 234 N.C. 716, 68 S.E. 2d 844 (1952). *See also State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975).

Finally, by his ninth assignment of error defendant contends the court erred in giving the following jury instruction:

> "If the State proved beyond a reasonable doubt or it is admitted that the defendant intentionally killed Eugene Suddreth with a deadly weapon or intentionally inflicted a wound upon Eugene Suddreth with a deadly weapon that proximately caused his death, the law implies first, that the stabbing was unlawful, and, second, that it was done with malice; and if nothing else appears the defendant would be guilty of second degree murder."

We disagree with defendant that the quoted instruction is contrary to the principles set forth in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), and *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds sub nom.*, 53 L.Ed. 2d 306 (1977). The instruction is very similar to the one this court approved in *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976). *See also State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975).

Clearly, the court did not err in failing to charge on voluntary manslaughter as there was no evidence to support such charge. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971).

* * * *

DEFENDANT MATTHEWS' APPEAL

[6] First, defendant Matthews contends the trial court erred in its jury charge relating to him in telling the jury that the court would not repeat the elements of the crime of robbery with a dangerous weapon or the definitions and elements of second-degree murder but the jury would recall the instructions given in defendant Snow's case.

Defendant's reliance on *State v. Forrest*, 262 N.C. 625, 138 S.E. 2d 284 (1964), is misplaced as that case is easily

distinguishable from the case at hand. In *Forrest*, the defendant was tried for driving an automobile while under the influence of intoxicants. No other case was tried with his. In charging the jury on the elements of the offense, the court merely referred to instructions given in other cases and charged the jury to take those instructions into consideration in arriving at their verdict in the case against Forrest. In awarding a new trial, this court held that the charge must be complete within itself and that the defendant and his counsel are entitled to hear the instructions and to have them for review upon appeal.

In the case at hand defendants Matthews and Snow were tried together. After reviewing the evidence, the court gave the jury instructions relating to the charges against defendant Snow, definitions and elements of the offenses and the application of the law to the evidence. The court then told the jury it would not repeat the definitions and elements of the offenses, referred the jury to the definitions and elements given as to defendant Snow, and applied the law to the evidence in defendant Matthews' case.

Clearly, the reason for granting a new trial in *Forrest* does not exist in this case. The jury, defendant and his counsel heard the instructions given and they are before this court for review. The assignment is overruled.

Defendant Matthews contends next that the court erred in instructing the jury on "acting in concert" and "aiding and abetting". He argues that there was no evidence of aiding and abetting. We reject this contention.

In 4 Strong's N.C. Index 3d, Criminal Law § 113.7, we find:

> If the defendant is present with another and with a common purpose does some act which forms a part of the offense charged, the trial judge must explain and apply the law of "acting in concert"; if the defendant was actively or constructively present and did no act necessary to constitute the crime but aided and abetted another in the commission thereof, the trial judge must explain and apply the law of "aiding and abetting. . . ."

Under the state's version of the evidence in this case, defendant Matthews was either a principal in the first degree or was acting in concert with defendant Snow in committing the crimes.

Under defendant Matthews' testimony, he was at most an aider and abettor. Therefore, the trial court properly instructed the jury on the principles of acting in concert and aiding and abetting.

[7] Defendant Matthews contends that the trial court erred by not giving jury instructions requested by him with respect to the law on (1) aiding and abetting and (2) statements against penal interests.

Regarding (1), following the close of the evidence, defendant Matthews requested special instructions to the effect that the mere presence of a person at the scene of a crime at the time of its commission does not make him a principal, and that to render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime, or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary, citing *State v. Aycoth*, 272 N.C. 48, 157 S.E. 2d 655 (1967); and that even though the jury might find that defendants were friends, the presence of defendant Matthews standing alone would not be sufficient to make him an aider or abettor in the commission of the crimes, citing *State v. Banks*, 242 N.C. 304, 87 S.E. 2d 558 (1955). A review of the charge discloses that the court gave instructions substantially in accord with defendant's request. (R. pp. 264, 266). The law does not require that the charge be given exactly in the words of the tendered request or instructions. *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973); *State v. Howard*, 274 N.C. 186, 162 S.E. 2d 495 (1968).

Regarding (2), after the close of the evidence, arguments of counsel and the court's charge to the jury, defendant Matthews requested special instructions on statements against penal interests. The request was refused. He argues that defendant Snow told at least one other person that he (Snow) was the sole perpetrator of the crimes; that this constituted a statement against penal interests and is entitled to be given greater weight by the trier of fact; and that the court should have given his requested instructions on that principle of law.

Assuming, *arguendo*, that defendant's requested instructions were supported by the evidence, they should have been requested immediately after the close of the evidence. G.S. 15A-1231; *State v. Boyd*, 278 N.C. 682, 180 S.E. 2d 794 (1971); *State v. Broome*, 268 N.C. 298, 150 S.E. 2d 416 (1966). Since the instructions were not timely requested, whether they should have been given was in the discretion of the trial judge. *State v. Broome, supra.* We perceive no abuse of discretion.

[8] Defendant Matthews contends the trial court erred in denying his motion to suppress the testimony of state's witness James A. Rayburn. He argues that he filed a motion for disclosure of evidence pursuant to G.S. 15A-903(a)(1), that the state failed to provide him with any information regarding testimony of witness Rayburn, and that his constitutional rights of due process were violated by the admission of the evidence. He further argues that the court should have imposed sanctions as provided by G.S. 15A-910.

Mr. Rayburn was submitted by the state as, and found by the court to be, an expert in the field of analytical chemistry. When defendant Matthews moved to suppress his testimony, the assistant district attorney stated that the witness had filed no reports with the district attorney and that he (the assistant district attorney) had not even talked with the witness until about an hour before the witness was called to testify.

The witness stated that he made an analysis of spots found on a pair of pants previously introduced into evidence and allegedly worn by defendant Matthews at the time of the crimes; and that in his opinion the spots or stains were "dye stuff".

In the first place, we do not think there was a violation of G.S. 15A-903 or G.S. 15A-910. More importantly, we cannot perceive how defendant Matthews was prejudiced by Rayburn's testimony. As we view the record, the state was attempting to show that the pants worn by defendant Matthews on the occasion in question had blood on them following the robbery and killing; and the testimony of Rayburn tended to *disprove* that contention.[1] We hold that the court did not err in admitting Rayburn's

1. It is also noted that defendant Matthews admitted that he had blood on his pants following the killing. (R. p. 158)

testimony. It is incumbent on defendant not only to show error but that the error complained of was prejudicial to him. *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1967).

Defendant Matthews assigns as error the admission into evidence of numerous photographs of the victim and his injuries and testimony relating thereto, contending that the evidence was inflammatory. Defendant Snow raised the same question in his second assignment of error. For the same reasons set forth above in the discussion of defendant Snow's second assignment, we find no merit in defendant Matthews' assignment relating to the same question.

[9] Finally, defendant Matthews contends the trial court erred in striking certain questions propounded by his counsel and answers thereto. This contention relates to the cross-examination of state's witness G. F. Minor, a Greensboro police officer, who testified that he went with Sammie Collie, Sr., to a wooded area and recovered the clothing allegedly worn by defendant Matthews at the time the crimes were committed.

On cross-examination, counsel for defendant Matthews elicited from Minor testimony to the effect that before going to look for the clothing, Minor obtained a search warrant based upon information given to him by Collie; and that he set out in the application for the search warrant that on 2 December 1978 Collie and defendant Snow drove to a deserted area on Henry Street in Greensboro and deposited the blood stained brown trousers, blue shirt and a butcher knife in the wooded area. On redirect examination of Minor, the court allowed the witness to read from the search warrant. Thereupon, counsel for defendant Snow objected and moved to strike all of Minor's testimony relating to the search warrant and the court allowed the motion. The state then moved that the evidence elicited by counsel for defendant Matthews relating to the search warrant be stricken and the court allowed that motion.

On recross-examination by counsel for defendant Matthews, Minor testified:

> I talked with Sammie Earle Collie, Sr. on or about December 28, 1978, and, in addition to other things, he said that he took them out there and then he later saw Robert

Snow, and he and Robert Snow went to that wooded area and located the pants and the shirt, and Mr. Snow took some money out of the pants, and they left them out there in the woods; but Mr. Collie stated originally that he took the pants, knife, and shirt and put them in the woods. Originally he did not say Robert Snow went along.

Defendant Matthews argues that striking the testimony of Minor deprived him of his right of cross-examination to discredit the testimony of the witness Collie by showing inconsistencies therein. This argument is not persuasive in view of the fact that counsel on recross-examination was able to elicit and get before the jury substantially the same testimony that the court had ordered stricken. Again defendant Matthews has failed to show that the alleged error was prejudicial to him. *State v. Paige, supra.*

* * * *

In the trial of defendants and the judgments appealed from, we find

No error.

STATE OF NORTH CAROLINA v. JAMES THOMAS JONES

No. 90

(Filed 1 February 1980)

1. Searches and Seizures § 20— search warrant—sufficiency of affidavit

The affidavit upon which a search warrant is issued is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender.

2. Searches and Seizures § 21— affidavit for warrant—hearsay

The affidavit for a search warrant may be based on hearsay information if the magistrate is informed of underlying circumstances upon which the informant based his conclusion as to the whereabouts of the articles and the underlying circumstances upon which the officer concluded that the informant was credible.

3. Searches and Seizures § 23— sufficiency of affidavit for search warrant

An SBI agent's affidavit was sufficient to establish probable cause for the issuance of a warrant to search the house, barn and garage of defendant's parents for a hatchet and welder's gloves where it alleged that a murder victim's body was found in a certain location in South Carolina; defendant and a companion were arrested for the murder; the companion gave oral and written statements detailing his and defendant's participation in the murder; the companion accompanied officers to the crime scene on the banks of a river in North Carolina where a pipe used in the murder and other items were recovered; the companion told officers that defendant wore welder's gloves at the time of the murder and also used a hatchet in the killing; the companion showed officers an area behind the victim's residence where the body was kept for a week before it was taken to South Carolina; and the companion stated that the defendant owned the hatchet and welder's gloves and kept them either in the garage workshop or in the house of his parents.

4. Searches and Seizures § 23— probable cause for search warrant—staleness of information

Probable cause for the issuance of a warrant to search the home and garage of defendant's parents for a hatchet and welder's gloves used in a murder was not dissipated by the passage of some five months between the time an informant last saw defendant's hatchet and welder's gloves and the date the informant told officers of the whereabouts of those items since the hatchet and welder's gloves were not particularly incriminating in themselves and were of enduring utility to defendant, and the affidavit indicated that defendant normally kept such items either in his parents' home or in a garage workshop behind his parents' home.

5. Searches and Seizures § 15— standing to object to search and seizure

Defendant failed to establish standing to object to the seizure of a hatchet and welder's gloves from his parents' garage where he asserted neither a property nor a possessory interest in the garage and made no showing of any other circumstances giving rise to a reasonable expectation of privacy in the premises searched.

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

In a prosecution for first degree murder, evidence that defendant and the victim had been jointly involved in certain thefts of tobacco and cars was properly admitted to show that defendant's motive for killing the victim was that he thought the victim was "talking too much" and he was afraid the victim would "tell them everything" when he went to court on two drunk driving charges.

7. Criminal Law § 135.4— first degree murder—aggravating circumstances—no authority to impose life imprisonment without sentencing hearing

In a prosecution for first degree murder in which the jury could have found at least one aggravating circumstance beyond a reasonable doubt, the presiding judge, district attorney and defense counsel had no legal authority whatsoever (1) to announce that the State would not seek the death penalty, (2) to agree to make no motions concerning the death penalty, (3) to eliminate

voir dire examinations of jurors with respect to the death penalty, (4) to eliminate the separate sentencing proceeding to determine whether the punishment should be death or life imprisonment, or (5) by consent to fix the punishment at life imprisonment should the jury convict defendant of murder in the first degree.

DEFENDANT appeals from judgment of *Brewer, J.*, 9 April 1979 Criminal Session, CUMBERLAND Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging defendant with the first degree murder of Glenn Currie Gibson on 30 March 1978 in Cumberland County. When arraigned defendant pled not guilty and a jury was duly selected and empaneled.

The State's evidence tends to show that prior to the events surrounding the murder of Glenn Gibson, defendant and Gibson had been jointly involved in certain thefts of tobacco and automobiles. Approximately two weeks prior to Glenn Gibson's death, defendant told David Odom, a witness for the State, that Gibson "was getting drunk and was running off at the mouth bragging about things and that he was supposed to go into court for two (2) charges of DUI [driving under the influence]; and Jones was scared that if Gibson went to court, he would talk and tell them everything. Jones stated he wasn't going to pull time for anybody getting drunk and running off at the mouth." At that time defendant told Odom of a plan to kill Gibson by rendering him unconscious and placing him on a railroad track but that plan was never carried out.

On 30 March 1978, defendant, David Odom and Glenn Gibson went fishing in a remote area of the Cape Fear River. Defendant drove to the fishing site in his own vehicle and David Odom drove Gibson's car accompanied by Gibson. They fished along the river until 8-8:30 p.m. and then returned to their cars and prepared to leave for home. Gibson, however, was unable to start his car. As Gibson and Odom searched the trunk of Gibson's car for a piece of wire so he could "straight wire" the car, defendant struck Gibson in the back of his head with a length of pipe which was two and one-half inches in diameter. Gibson's knees buckled and defendant struck him twice more with the same piece of pipe. Defendant then laid the pipe down, went to this truck and obtained a hatchet, placed a piece of tablecloth over Gibson's head and then struck

Gibson in the left temple three to five times with the back side of the hatchet. During this entire episode defendant wore high-top welder's gloves. After he had killed Gibson, defendant threw the pipe into the river, raked the bloody dirt into a plastic bag, wrapped the body in a piece of cloth, tied the cloth with rope and placed it in the trunk of Gibson's car. Defendant then placed the hatchet in the trunk of his own vehicle, went to the front of Gibson's car, twisted two wires together and told Odom to crank the car. "This took him less than half a minute, and the car started right up." Defendant and Odom then drove back to Gibson's house where they planned to "drop a car" on the body so as to make it appear that Gibson had been killed in an accident while working on the car. This plan was interrupted, however, when Gibson's family returned home unexpectedly. So, rather than risk discovery, defendant and Odom simply left the body under a wrecked car there on the premises. They left the Gibson property and Odom scattered the blood-soaked rope, dirt, blanket and cloth in a wooded area.

About one week later defendant told Odom that defendant's father and mother had signed a $25,000 appearance bond for Gibson conditioned on his presence at trial for driving under the influence of intoxicants. To prevent a forfeiture of this bond defendnt said it was necessary that the authorities discover Gibson's body. Defendant and Odom therefore removed the body from beneath the wrecked car and hid it along I-95 in South Carolina where it remained for approximately one month. Defendant decided the authorities were not likely to find the body and told Odom to call the South Carolina Highway Patrol and tell them where a body might be found along I-95. Guided by the information thus furnished, the highway patrol soon discovered the body and it was later identified as the body of Glenn Gibson.

David Carl Odom was later arrested and made a statement to the police as a result of which defendant was arrested. Based on the information furnished by Odom, the officers also obtained a search warrant to search defendant's truck and to search his father's house including the barn and garage. A search was carried out and Officer Connerly found an army hatchet and welder's gloves in the garage on defendant's father's property. The State's evidence tends to show that defendant used that garage as an automobile workshop and stored all his tools there. Odom iden-

tified the hatchet as the one used by defendant to bludgeon Gibson. Laboratory analysis, however, revealed no evidence of blood on either the hatchet or the gloves.

David Carl Odom informed the jury that his attorney had made a plea bargain with the district attorney by the terms of which Odom agreed to testify truthfully and the State agreed to drop all charges against Odom.

Defendant did not testify as a witness in his own behalf but offered the testimony of others tending to show that several people had seen Glenn Gibson alive after 30 March 1978; that the State had agreed to dismiss the charge of accessory after the fact against David Odom in exchange for his testimony against defendant; that the army hatchet identified as the murder weapon is a standard item often carried by boy scouts and that such hatchet was especially common in the Cumberland County area.

The jury convicted defendant of murder in the first degree and the presiding judge, pursuant to a consent order entered by him at the commencement of the trial, sentenced defendant to life imprisonment without conducting a sentencing proceeding to determine whether the punishment should be death or life imprisonment as required by G. S. 15A-2000. Defendant appealed and assigns errors discussed in the opinion.

Rufus L. Edmisten, Attorney General, by Joan H. Byers, Assistant Attorney General, and Thomas J. Ziko, Associate Attorney, for the State.

H. Gerald Beaver, attorney for defendant appellant.

HUSKINS, Justice.

Denial of defendant's motion to suppress all evidence obtained in a search conducted pursuant to a search warrant issued on 23 August 1978 constitutes defendant's first assignment of error.

The record reveals that Ken Snead, an SBI investigator, interrogated David Odom for fifteen hours during which Odom told the investigator that he and defendant James Thomas Jones were involved in the murder of Glenn Gibson. Odom furnished the details concerning the crime, including information that a two-

inch piece of water pipe was the murder weapon and that an army hatchet with a cover over its metal part and welder's gloves had been used by defendant during the murder. Relying on information obtained from Odom, Mr. Snead searched a section of the river bank along the Cape Fear River, an area behind the victim's home, and a site in Scotland County. These searches produced various items of evidence consistent with Odom's statements to Mr. Snead. With the reliability of Odom's information thus established, Mr. Snead procured a warrant to search defendant's truck and to search his father's house, barn and garage for various items, including "an army-type hatchet with a green cloth cover" and " 'Case XX' welder's gloves soaked in oil." Armed with the search warrant, Mr. Snead and Officer Connerly proceeded to the home of Mr. and Mrs. M. L. Jones, parents of defendant, located at Route 1, Box 301, Shannon, N. C., to begin the search. During the search of the M. L. Jones garage, they discovered and seized an army O.D.-type hatchet (State's Exhibit 17), with the word "U.S." stamped on it, one pair of men's leather-type welder's gloves (State's Exhibit 39), and a single leather-type welder's glove (State's Exhibit 40). These items were later offered in evidence over objection. Defendant contends his motion to suppress them should have been allowed because (1) the affidavit on which the search warrant was issued failed to allege facts sufficient to establish probable cause; and (2) an unreasonable length of time expired between the alleged homicide on 30 March 1978 and the date of the search and seizure on 23 August 1978. We hold defendant's contentions are unsound and that his first assignment of error has no merit.

[1,2] Within the meaning of the Fourth Amendment and G.S. 15A-243 to 245, "probable cause means a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. Thus, the affidavit upon which a search warrant is issued is sufficient if it 'supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender.' " *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976) (citations omitted). *Accord, State v. Campbell*,

282 N.C. 125, 191 S.E. 2d 752 (1972). "The affidavit may be based on hearsay information if the magistrate is informed of underlying circumstances upon which the informant bases his conclusion as to the whereabouts of the articles and the underlying circumstances upon which the officer concluded that the informant was credible." *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972). Whether probable cause exists for the issuance of a search warrant depends upon a practical assessment of the relevant circumstances. *State v. Phifer*, 297 N.C. 216, 254 S.E. 2d 586 (1979); *State v. Louchheim*, 296 N.C. 314, 250 S.E. 2d 630, cert. denied, 40 CCH S.Ct. Bull. p. 15 (1979). Each case must be decided on its own facts and "reviewing courts are to pay deference to judicial determinations of probable cause, and 'the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.'" *State v. Louchheim*, *supra*, (citations omitted). With these principles in mind, we look at the search warrant and the affidavit upon which it was obtained.

[3] In applying for the search warrant SBI Agent Snead swore, in his affidavit to establish probable cause for issuance, that the body of Glenn Gibson had been found in a ditch near milepost 187 beside I-95 in Dillon County, South Carolina; that defendant James Thomas Jones and David Carl Odom had been arrested for the murder of Mr. Gibson; that David Carl Odom had given oral and written statements detailing participation in the murder by him and defendant; that Odom had accompanied officers to the crime scene on the banks of the Cape Fear River where the murder weapon had been recovered with other items; that Odom had shown officers the area behind the victim's residence where the body was kept for a week before it was taken to South Carolina; that Odom had stated that the hatchet used in the killing along with the pipe, already recovered, was the property of defendant and that defendant kept the hatchet and welder's gloves either in the garage workshop or in the house of his parents located at Route 1, Box 301, Shannon, North Carolina, telephone 875-2510. It further appears that Odom and defendant had jointly participated in the murder of Glenn Gibson and had moved the body twice. Odom knew where defendant's parents lived and knew there was a workshop behind their house which was used by defendant.

All this information was before the magistrate. A practical assessment of it would lead a reasonably prudent magistrate to conclude that the information was credible and that the proposed search would reveal, upon the premises to be searched, the presence of the objects sought and that those objects would aid in the apprehension or conviction of the offender. This constitutes probable cause sufficient to justify the issuance of a warrant.

[4] Defendant contends that the information contained in the affidavit furnished the magistrate suffers from staleness. He argues that five months elapsed between the time Odom last saw defendant's hatchet and welder's gloves and the date Odom told officers of the whereabouts of the hatchet. The passage of such time, it is urged, dissipates probable cause to believe that the materials sought were still located at the place to be searched.

Common sense is the ultimate criterion in determining the degree of evaporation of probable cause. *United States v. Brinklow,* 560 F. 2d 1003 (10th Cir. 1977), *cert. denied,* 434 U.S. 1047 (197); *State v. Louchheim, supra.* "The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock . . . ." *Andresen v. State,* 24 Md. App. 128, 331 A. 2d 78, *cert. denied,* 274 Md. 725 (1975), *aff'd,* 427 U.S. 463 (1976). "The significance of the length of time between the point probable cause arose and when the warrant issued depends largely upon the property's nature, and should be contemplated in view of the practical consideration of everyday life." *United States v. Brinklow,* supra (citations omitted).

The items sought by the search warrant—a hatchet and welder's gloves—were not particularly incriminating in themselves and were of enduring utility to defendant. Moreover, the affidavit indicates that defendant normally kept such items either in his parents' home, or in a garage workshop behind his parents' home. A practical assessment of this information would lead a reasonably prudent magistrate to conclude that the hatchet and welder's gloves were "probably" located in the home or on the premises of defendant's parents. *See generally, United States v. Brinklow, supra; State v. Louchheim, supra; State v. Carbone,* 172 Conn. 242, 374 A. 2d 215 (1977); *People v. Wing,* 92 Misc. 2d 846, 400 N.Y.S. 2d 437 (Cty. Ct. 1977). We hold that the search warrant

was properly issued and the hatchet and gloves properly admitted into evidence.

[5] We note that the items in question were seized from the premises owned by defendant's parents. A party seeking shelter under the Fourth Amendment has the burden of establishing that his *personal rights* were violated by the search and seizure. *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979); *State v. Craddock*, 272 N.C. 160, 158 S.E. 2d 25 (1967). The burden is on defendant to establish standing. *State v. Taylor, supra.* The United States Supreme Court, in a recent review of the protection offered by the Fourth Amendment, determined that such protection encompasses only those persons who have a reasonable expectation of privacy in the premises searched. *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978). *Accord, State v. Alford*, 298 N.C. 465, 259 S.E. 2d 242 (1979). In the instant case, defendant has asserted neither a property nor a possessory interest in his parents' garage. Nor has he made a showing of any other circumstances giving rise to a reasonable expectation of privacy in the premises searched. Therefore, irrespective of the existence of probable cause to issue the warrant and the reasonableness of the search and seizure, defendant has failed to establish his standing to object.

[6] The State offered evidence over objection tending to show (1) that defendant and the victim Gibson had been jointly involved in certain thefts of tobacco in Robeson County, and (2) that defendant, the victim Gibson and David Odom had been collectively involved in several car thefts. Defendant contends that admission of evidence of other crimes is prejudicial error. This constitutes his second assignment of error.

It is undoubtedly the general rule that evidence of the commission of other crimes is not admissible to prove defendant's guilt of the crime for which he is on trial. *State v. Hight*, 150 N.C. 817, 63 S.E. 1043 (1909). Even so, there are various exceptions to the general rule, as well established as the rule itself. *See State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), containing eight numbered exceptions and citing many authorities. Pertinent to the case before us is the fifth exception listed in *McClain*, to wit: "Where evidence tends to prove a motive on the part of the accused to commit the crime charged, it is admissible, even though

it discloses the commission of another offense by the accused." (Citations omitted.) Motive is always a relevant fact, and evidence tending to prove it will not be excluded merely because it also shows the accused to have been guilty of an independent crime. *See State v. Williams*, 292 N.C. 391, 233 S.E. 2d 507 (1977) (evidence of defendant's participation in a prior armed robbery and murder competent to show motive for committing the crime charged); *State v. Christopher*, 258 N.C. 249, 128 S.E. 2d 667 (1962) (theft of automobile a month before a murder committed in perpetration of a robbery admissible to show that purpose of the robbery was to obtain money to pay repair bills and regain possession of car); *State v. Adams*, 245 N.C. 344, 95 S.E. 2d 902 (1957) (evidence of illicit liquor activities by defendant competent to show motive for killing supposed informer); 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) §§ 91, 92.

It is apparent from the record in this case that evidence with respect to theft of tobacco and cars was offered and admitted for the purpose of showing defendant's motive for killing Gibson. David Odom testified that defendant "thought Gibson was talking too much" and "was scared that if Gibson went to court he would talk and tell them everything." The trial court properly permitted the State to offer the challenged evidence to show defendant's motive for killing Gibson. There is no merit in this assignment.

The remaining assignments are not discussed in defendant's brief and have been expressly abandoned under Rule 28, Rules of Appellate Procedure.

We note, *ex mero motu*, that the presiding judge in this case, for reasons not readily apparent, and in violation of the provisions of G.S. 15A-2000, *et seq.*, sentenced defendant to life imprisonment without conducting a separate sentencing proceeding on the issue of punishment.

Defendant was convicted of a capital felony. G.S. 15A-2000(a)(1) provides that 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." Succeeding subsections of G.S. 15A-2000 delineate in detail the separate sentencing proceeding to be conducted and the circumstances, aggravating and mitigating, to be considered by

the jury in determining whether the sentence shall be death or life imprisonment. Even upon pleas of guilty to a capital offense, the presiding judge is required to empanel a jury for the limited purpose of hearing evidence and determining a sentence recommendation. G.S. 15A-2001. The presiding judge is required by G.S. 15A-2002 to follow the recommendation of the jury and impose the sentence recommended. In *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979), Justice Exum, writing for the Court, said: "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." Following a discussion of the provisions of G.S. 15A-2000, *et seq.*, Justice Exum continued: "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." *Accord*, *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

[7] In the instant case there was evidence from which the jury could have found at least one or more aggravating circumstances beyond a reasonable doubt. There was evidence, for example, which tended to show the especially heinous, atrocious, and cruel manner in which the victim Gibson was clubbed to death—an aggravating circumstance listed in G.S. 15A-2000(e)(9). Given the existence of such evidence, the presiding judge, district attorney, and defense counsel had no legal authority whatsoever (1) to announce that the State would not seek the death penalty, (2) to agree to make no motions concerning the death penalty, (3) to eliminate voir dire examinations of jurors with respect to the death penalty, (4) to eliminate the separate sentencing proceeding to determine whether the punishment should be death or life imprisonment, or (5) by consent to fix the punishment at life imprisonment should the jury convict defendant of murder in the first degree. These unauthorized "homemade" procedures must not recur. Double jeopardy considerations preclude a retrial of this case. Since the impermissible procedure adopted by the trial

court resulted in error obviously favorable to the defendant, he is in no position to complain.

Prejudicial error not having been shown, the verdict and judgment will be upheld.

No error.

STATE OF NORTH CAROLINA v. CHRISTOPHER SPICER

No. 120

(Filed 1 February 1980)

1. **Constitutional Law § 28— district attorney's refusal to dismiss charges—no denial of equal protection**

In a prosecution for armed robbery and assault with a deadly weapon, defendant, who contended that the prosecuting witnesses did not wish to press charges, was not denied equal protection of the laws by the district attorney's refusal to drop the charges, since the district attorney could properly exercise his discretion in determining whom to prosecute; defendant could not show that all cases in which the prosecuting witness refused to press charges had been dismissed while his had not; and even if all other cases had been dismissed, defendant failed to show that, in the exercise of his discretion, the district attorney intentionally or deliberately discriminated against defendant by design.

2. **Criminal Law § 88.1— cross-examination limited—evidence already before jury**

Defendant's cross-examination of the State's witnesses was not improperly restricted where the excluded testimony would not have shown bias against defendant and where the excluded information was already before the jury anyway.

3. **Criminal Law § 118— contentions of parties—no expression of opinion**

The trial judge is not required to state the contentions of the parties, but when he undertakes to do so he must give equal stress to the contentions of both parties, even when defendant does not testify. The trial court in this case fully developed defendant's contentions and did not express an opinion in so doing.

4. **Criminal Law § 138.6— sentencing hearing—defendant's criminal record**

It is not error for the trial judge during the sentencing phase of trial to see the entire record including charges of which defendant was acquitted or in which he succeeded in having the conviction overturned on appeal so long as he does not sentence the defendant while operating upon any erroneous assumptions concerning defendant's criminal record.

State v. Spicer

ON appeal by defendant from *Small, J.*, 30 April 1979 Criminal Session of NEW HANOVER County Superior Court.

The State's evidence tended to show that on the evening of 18 October 1975, defendant entered the B & J Poolroom located at Tenth and Dawson Street in Wilmington. Defendant was armed with an M-1 carbine rifle. He ordered everyone in the poolroom to "put their money on the table" and "get up against the wall." Defendant went through the pockets of some of the patrons while they were facing the wall. During the course of the robberies, some shots were fired and two patrons were injured.

The defendant did not testify and he called no witnesses in his behalf.

The jury found defendant guilty of the armed robbery of Alvin Nixon (No. 79CRS1870), Irving Green (No. 79CRS1871), Wilbert Rowell (No. 79CRS1876), Mike McRae (No. 79CRS1877), and Elton Williams (No. 79CRS1880) and guilty of assault with a deadly weapon inflicting serious injury upon Alvin Nixon (No. 79CRS1875). Judge Small consolidated cases number 79CRS1870, 1871 and 1876 for judgment and imposed a life sentence. Defendant has appealed to this Court from these convictions and imposition of a life sentence.

Cases number 79CRS1875, 1877 and 1880 were consolidated for judgment. In those three cases, one sentence of 10 years (minimum and maximum) was imposed and it was ordered that this sentence begin to run at the expiration of the life sentence. Defendant's motion to bypass the Court of Appeals on his appeal from these convictions and ten-year consecutive sentence was allowed by this Court.

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

Ernest B. Fullwood for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Richard L. Griffin for the State.

COPELAND, Justice.

[1] Defendant's first argument is that he was denied due process of law when the trial judge refused to grant him an evidentiary

hearing upon his motion to dismiss all of the charges. He also maintains that the right to such an evidentiary hearing is inherent in G.S. 15A-954. Defendant's contentions are without merit. In order to discuss defendant's due process and statutory claims, it is necessary to examine the underlying claim upon which defendant sought an evidentiary hearing.

Defendant stated that the district attorney's office in the Fifth District has established a policy of not prosecuting any defendant when the prosecuting witness has indicated that he or she does not desire to have the case prosecuted. Defendant obtained affidavits from Nixon, Rowell and Williams that they had received restitution and did not desire to prosecute any of the charges against the defendant. Defendant obtained an affidavit from McRae that he did not wish to testify or be involved in the case in any manner whatsoever and he desired that all charges be dropped. The district attorney refused to drop the charges.

Defendant filed a motion seeking to have the trial judge dismiss all of the charges. He contends that singling him out for prosecution when other members of the same class of people similarly situated (the class consisting of all defendants with felony charges brought against them in which the prosecuting witness no longer desired to prosecute) is a denial of his Fourteenth Amendment right to the equal protection of the laws. Defendant's attorney was heard on this motion. At this hearing, he requested a full evidentiary hearing at which he could present his proof that he had been denied equal protection of the laws. The trial judge denied his motion to dismiss and denied his request for an evidentiary hearing.

District attorneys have wide discretion in performing the duties of their office. This encompasses the discretion to decide who will or will not be prosecuted. In making such decisions, district attorneys must weigh many factors such as "the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the State, and his own sense of justice in the particular case." Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Columbia L. Rev. 1103, 1119 (1961). The proper exercise of his broad discretion in his consideration of factors which relate to the administration of criminal justice aids tremendously in achieving the

goal of fair and effective administration of the criminal justice system.

Of course, the district attorney may not, during the exercise of his discretion, transcend the boundaries of the Fourteenth Amendment's guarantee of equal protection. The equal protection clause is not limited to the enactment of fair and impartial legislation, *State v. Greenwood*, 280 N.C. 651, 187 S.E. 2d 8 (1972), but also extends to the *application* of those laws by administrative officials, *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886), and district attorneys, *Oyler v. Boles*, 368 U.S. 448, 7 L.Ed. 2d 446, 82 S.Ct. 501 (1962).

In the case *sub judice*, defense counsel produced statistics tending to show that other defendants had charges dismissed when the prosecuting witness so desired. Standing alone, these statistics simply show that the district attorney has in fact exercised his discretion. If these statistics alone were enough to establish a denial of equal protection, then a mandatory rule would be created requiring the district attorney to dismiss charges in all cases where the prosecuting witness so desired and there would be no discretion in this area. Defense counsel could not even state that *all* other such cases had been dismissed while this one had not. He stated at the hearing on the motion that he had been informed by the district attorney's office that there were "some cases . . . which prosecuting witnesses had asked that they be dismissed which were not dismissed." However, he added that all such cases that he had seen had been dismissed.

Even if all other cases had been dismissed, defendant has still not sufficiently alleged a denial of equal protection. A defendant must show more than simply that discretion has been exercised in the application of a law resulting in unequal treatment among individuals. He must show that in the exercise of that discretion there has been intentional or deliberate discrimination by design. *Oyler v. Boles, supra; Edelman v. California*, 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953); *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 62 L.Ed. 1154, 38 S.Ct. 495 (1918).

The facts of *Oyler v. Boles, supra*, are strikingly similar to the facts here. In *Oyler*, the defendant produced statistical evidence showing that from January, 1940 to June, 1955, he was

the only person prosecuted as a habitual offender in Taylor County, West Virginia. Five other defendants who could have been prosecuted as habitual offenders were not so prosecuted. The United States Supreme Court held:

> "Thus petitioners' contention is that the habitual criminal statute imposes a mandatory duty on the prosecuting authorities to seek the severer penalty against all persons coming within the statutory standards but that it is done only in a minority of cases. This, petitioners argue, denies equal protection to those persons against whom the heavier penalty is enforced . . . . This does not deny equal protection due petitioners under the Fourteenth Amendment. See *Sanders v. Waters*, 199 F. 2d 317 (CA10th Cir. 1952); *State v. Hicks*, 213 Or. 619, 325 P. 2d 794 (1958).
>
> Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged." *Oyler v. Boles, supra* at 455-56, 7 L.Ed. 2d at 452-53, 82 S.Ct. at 505-06.

Here, defendant's statistical evidence was insufficient to allege a denial of equal protection. He presented no evidence that he was subjected to any intentional or deliberate discrimination upon any unjustifiable standard. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979); *State v. Rudolph*, 39 N.C. App. 293, 250 S.E. 2d 318, *cert. denied*, 297 N.C. 179, 254 S.E. 2d 40 (1979); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 59 L.Ed. 2d 587, 99 S.Ct. 1355 (1979).

The hearing afforded the defendant in this case met the requirements of due process and the right to a full evidentiary hearing is not inherent in G.S. 15A-954.

G.S. 15A-954 provides that the charges shall be dismissed on a motion by the defendant when it is determined that the statute alleged to have been violated is unconstitutional as applied to him. Defendant is certainly entitled to be heard on this motion and he received a hearing in this case.

At this hearing, defense counsel argued his legal points and read into the record the names of seven cases that arose during 1977, 1978 and 1979 in which the district attorney's office had dismissed the charges when the prosecuting witness stated that they no longer desired to have the case prosecuted. His request for a full evidentiary hearing was properly denied.

Such hearings would inevitably lead to having the district attorney take the stand to be cross-examined concerning his motive and purpose in prosecuting the case. When a defendant has alleged intentional discrimination he must have substantial evidence that it existed or no evidentiary hearing will be allowed. *United States v. Baechler*, 509 F. 2d 13 (4th Cir. 1974), *cert. denied*, 421 U.S. 993 (1975); *see, State v. Cherry, supra. A fortiorari*, no evidentiary hearing will be allowed when defendant has not even sufficiently alleged a denial of equal protection or produced any evidence of intentional discrimination. This assignment of error is overruled.

[2] Defendant's second argument is that his cross-examination of the state's witnesses was improperly restricted. He maintains that questions that would have impeached the credibility of the witnesses and would have shown bias against the defendant were improperly excluded by the trial judge.

Defense counsel failed to have the answers of the witnesses placed in the record so that we would know what the answers to those questions would have been. This failure is sufficient grounds upon which to overrule this assignment of error. *State v. Curry*, 288 N.C. 660, 220 S.E. 2d 545 (1975); *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239 (1973). In any event, it is clear from the arguments made in defendant's brief that the excluded testimony would not have shown bias against the defendant or that the witnesses may have been testifying untruthfully for the State. Indeed, the evidence shows the opposite. The witnesses desired to have all of the charges dropped and were very reluctant to testify for the State. We fail to see how this evidence would have impeached the credibility of these witnesses to the benefit of the defendant or would have shown that they were biased against the defendant.

Also, it is apparent from the record that the substance of this information was in fact placed into evidence. Witness Green testi-

fied that an order for his arrest was issued and he was told that if he did not attend the trial and testify he would be arrested. His affidavit that he wanted the charges dropped and did not wish to testify was introduced into evidence. Similar testimony was elicited on the cross-examination of Nixon, McRae and Williams. Thus, the jury was fully aware of the reluctance these witnesses had in testifying and was aware of the circumstances under which they testified. Since of all this information was before the jury, there was no error in sustaining the State's objections to these additional questions. This assignment of error is overruled.

[3] Defendant's third argument is that the trial judge impermissibly expressed an opinion while stating the defendant's contentions in violation of G.S. 15A-1222.

While the trial judge is not required to state the contentions of the parties, when he undertakes to do so he must give equal stress to the contentions of both parties. *State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962). This is true even when the defendant does not testify. He still has contentions regarding the case that arise from his plea of not guilty, from the State's evidence and from his cross-examination of the State's witnesses. *See, State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979) (the trial judge is not required to fully recapitulate all the evidence, but when he does so he must summarize the evidence in the case that is favorable to the defendant even though defendant presented no evidence).

The defendant pleaded not guilty. This placed in issue every essential element of every crime for which he had been charged. An element of these offenses was that the defendant possessed and used a firearm to perpetrate the robberies and the assault with a deadly weapon.

In this case, we believe that the trial judge simply stated all of the various contentions of the defendant. For example, at one point the trial judge stated to the jury:

> ". . . therefore, you should find him not guilty, the defendant contending that he is not the person that went into the B & J Poolroom on the day in question and the defendant contends that you should return a verdict of not guilty."

At another point, the jury was instructed as follows:

"The defendant, on the other hand, contends that you should return a verdict of not guilty as to this charge, the defendant contending that there is no evidence that he intentionally assaulted anyone, the defendant contending that no one actually saw him fire a firearm that emitted a projectile that struck Alvin Nixon and, therefore, there being no eyewitnesses to the fact that he actually fired the round that struck Nixon, that you should not find him guilty of that offense."

The portion of the statement of contentions that the defendant argues constitutes prejudicial error is as follows:

"The defendant, on the other hand, contends that you should find him not guilty to this charge, the defendant contending that there were a number of people in there and that *although Alvin Nixon saw him with the rifle* the defendant contends that Alvin Nixon did not see the defendant shoot him and contends that on [sic] no one else saw him shoot Alvin Nixon and the defendant contends that someone else picked up the money off the pool table and gave it to him and that thereafter he left and the defendant contends that you should return a verdict of not guilty as to this charge." (Emphasis added.)

At yet another point, the jury was instructed that:

"The defendant, on the other hand, contends that you should not return a verdict of guilty as to this charge, the defendant contending that he did not intend to assault anyone, the defendant contending that he was not even present at the poolroom on the date in question."

It is prejudicial error for the trial judge to state an opinion on the evidence by assuming that a fact that is in issue has been established. *State v. Swaringen*, 249 N.C. 38, 105 S.E. 2d 99 (1958). We hold that no prejudicial error was committed in this case. During the statement of the defendant's contentions, the trial judge was merely stating to the jury all of the various contentions that could be raised on the State's evidence and the defendant's cross-examination of the State's witnesses; to wit, that he did not go to the B & J Poolroom on 18 October 1975; that if he

went he did not possess a firearm; and that if he did possess a firearm no one saw him fire it or take the money from the scene.

We are aware that in these situations the trial judge has a most laborious task. If he fails to give all of the contentions of the defendant (and this is difficult when the defendant offers no evidence though he certainly has contentions arising on the State's evidence or lack of it and his cross-examination of witnesses), then the defendant may complain on appeal that the trial judge failed to give equal stress to each side. When the judge attempts, as best he can, to state the contentions of the defendant, defendant may complain on appeal that the trial judge misstated the contentions or impermissibly expressed an opinion on the evidence. Of course, we shall scrupulously hold the trial judges to the requirements we have laid down in this area and that are set forth in G.S. 15A-1222 and G.S. 15A-1232 in order to insure that defendants will receive a fair trial. A statement of an opinion by the trial judge during the statement of the contentions of the parties is prejudicial error. *State v. Newton*, 249 N.C. 145, 105 S.E. 2d 437 (1958).

Here, the trial judge was merely seeking to fully develop defendant's contentions so as to comply with the requirement that he give equal stress. He prefaced the complained of portion of the statement of contentions with the remark that, "the defendant contends." He did not erroneously assume that a fact that was in issue had been established. No prejudicial error was committed. *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978); *State v. Saults*, 294 N.C. 722, 242 S.E. 2d 801 (1978) (*Swaringen* distinguished); *State v. Carelock*, 293 N.C. 577, 238 S.E. 2d 297 (1977); *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *State v. Huggins*, 269 N.C. 752, 153 S.E. 2d 475 (1967); *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. denied*, 365 U.S. 830 (1961). This assignment of error is overruled.

[4] Defendant's fourth argument is that the trial judge considered irrelevant evidence at the sentencing stage in violation of G.S. 15A-1334. He argues that in considering previous charges for which defendant was found not guilty and convictions which were overturned on appeal, he was denied due process as defined by the United States Supreme Court in *Townsend v. Burke*, 334 U.S. 736, 92 L.Ed. 1690, 68 S.Ct. 1252 (1948).

We hold that the trial judge did not consider any possibly irrelevant evidence in violation of G.S. 15A-1334. The trial judge stated to defense counsel that:

> "Well, I can assure you, Mr. Fullwood, that I do not consider that I hold it against someone for the fact that they exercise their constitutional right to enter a plea of not guilty and to demand a jury trial. I think it would be unlawful for me to do so and it is my duty to attempt to uphold the law. He is entitled to that right and I certainly would not want that to prejudice his welfare."

In *Townsend v. Burke, supra*, it was held that a sentence imposed after consideration of a previous incident for which the trial court erroneously assumed that the defendant had been convicted was a violation of due process. The Court stated that due process required that the defendant was entitled to have counsel present during the sentencing phase to correct such erroneous assumptions regarding defendant's criminal record. That is precisely what occurred in this case. There were no erroneous assumptions by the trial judge that defendant had been convicted of an offense when such was not the case or that a conviction stood when it had been overturned on appeal. It is not error for the trial judge to see the entire record including charges for which defendant was acquitted or in which he succeeded in having the conviction overturned on appeal so long as he does not sentence the defendant while operating upon any erroneous assumptions concerning defendant's criminal record. *See, Townsend v. Burke, supra*; *United States v. Tucker*, 404 U.S. 443, 30 L.Ed. 2d 592, 92 S.Ct. 589 (1972). Defendant's sentencing hearing was properly conducted. This assignment of error is overruled.

Defendant had a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. FRANKLIN JUNIOR SAULTS

No. 78

(Filed 1 February 1980)

1. **Criminal Law § 131.2— motion for new trial for newly discovered evidence— remand for determination of pertinent facts**

In a hearing on a motion for a new trial for newly discovered evidence by a defendant who was convicted at his second trial of accessory before the fact of arson, the court's findings did not support its conclusion that defendant was not entitled to a new trial because he had knowledge or by the use of reasonable diligence should have had knowledge of all the facts and circumstances alleged in his motion for a new trial, and the matter is remanded for a determination as to whether (1) defendant, either before or during his second trial, in fact talked to two officers whose testimony would tend to discredit the story related by the State's witnesses, and (2) he had sufficient information so that he should have talked to them at some time before the end of his second trial.

2. **Judgments § 2.1— judgment out of term and out of county—absence of consent**

Trial court's order denying defendant's motion for a new trial for newly discovered evidence was null and void where it was entered out of term, out of session, out of county and out of the district in which the hearing was held, and it does not appear that the parties consented thereto.

Justice BROCK dissenting.

Chief Justice BRANCH and Justice HUSKINS join in the dissenting opinion.

ON appeal of this MITCHELL County case which was heard, by consent of the parties, before *Kirby, J.* at the 5 June 1978 Session of WATAUGA County Superior Court.

Defendant was tried before Ferrell, J. at the 30 August 1976 Criminal Session of Mitchell County Superior Court for the crime of being an accessory before the fact to arson. This bill of indictment does not appear in the record.

The principal State's witness was Jackie Lee Parker. He testified that he met with the defendant around noon on 29 November 1975. At that meeting, defendant hired him to burn the home of Ola Mae Yelton. Parker testified that no one else was with him when he met with the defendant. Defendant gave him two one gallon jugs, a siphon hose and a pair of gloves. Parker siphoned the gas to start the fire from a car belonging to Doris

Hoilman. Two girls drove him close to the Yelton house and put him out around 11 p.m. He then walked up to the Yelton house and started the fire.

Ola Mae Yelton testified that she was awakened between 11 and 11:30 p.m. by a loud burst of noise. She saw flames at the front door of her home. The home was occupied by Mrs. Yelton; her two sons, J. L. and Ballard Yelton; and J. L. Yelton's wife, Pamela. Her two sons extinguished the fire with a garden hose. Chief Deputy of Mitchell County, Larry Cox, testified that he investigated the fire on 30 Novmeber 1975 and found "some charring of a porch" and he found that a wooden door had been burned. The jury was unable to reach a verdict and a mistrial was declared.

An indictment, proper in form, was returned for the same offense on 18 July 1977 and the case came on for trial before Howell, J. at the 22 July 1977 Criminal Session of Mitchell County Superior Court.

Parker testified at this trial that when he met with the defendant around noon on 29 November 1975, defendant picked him up at the White Oak Trailer Park. Parker rode with the defendant and Parker's girlfriend, Judy Hoilman, and her sister, Doris Hoilman, followed them in Doris Hoilman's car. He further testified that Judy and Doris Hoilman drove him to the Yelton home on that evening when he set the fire and that he rode back from the Yelton house with the Hoilman sisters.

Judy Hoilman's testimony substantially corroborated Parker's testimony. On rebuttal for the State, Doris Hoilman testified concerning the meeting at noon between Parker and the defendant and on cross-examination she testified that the noon meeting was all that she knew "about this whole thing."

The jury found the defendant guilty and he was given a life sentence. Upon his appeal from his conviction and sentence, this Court found no error in the trial and the verdict and judgment were affirmed. *State v. Saults*, 294 N.C. 722, 242 S.E. 2d 801 (1978).

On 1 June 1978, defendant moved for a new trial on the basis of newly discovered evidence pursuant to G.S. 15-174 (which was repealed and replaced by G.S. 15A-1415(b)(6) effective 1 July 1978)

and G.S. 1A-1, Rule 60(b)(2). He filed several affidavits in support of his motion.

Bill Pennix and Stokes Bailey each stated in their affidavit that they were policemen with the Town of Bakersville and that they were on patrol together on the evening of 29 November 1975. They stopped a 1964 Chevrolet automobile on N.C. Highway 226 near its intersection with White Oak Road between 10 p.m. and midnight. The operator and sole occupant of the car, whom they both believe was Jackie Lee Parker, jumped out and ran. While they were searching the car, Dora Hoilman and her two daughters, Judy and Doris Hoilman, who lived nearby, walked up and demanded possession of the car. A license tag check by Officer Pennix revealed that the car was registered to Doris Hoilman.

Freddie Ollis and Ruth Ollis filed affidavits in which they stated that they are next door neighbors to the Hoilman family. On 29 November 1975, they overheard Dora, Judy and Doris Hoilman arguing and then the three Hoilman women walked down White Oak Road toward N.C. Highway 226. The Ollises stated that Jackie Lee Parker was not in the presence of Judy and Doris Hoilman around 11 p.m. that evening and they did not see Parker at the Hoilman residence or in the presence of the Hoilman women at any time on 29 November 1975.

At the hearing on the motion for a new trial, Judge Kirby received the affidavits into evidence and heard testimony from Officer Bailey and defendant's wife. On 16 October 1978, he entered an order in which he made findings of fact and concluded that the defendant was not entitled to a new trial.

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

Goldsmith and Goldsmith by Frank Goldsmith, Jr. for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Douglas A. Johnston for the State.

COPELAND, Justice.

[1] Defendant contends that the findings of fact made by the trial judge do not support his conclusion of law. We agree.

Findings of fact are binding and are conclusive on appeal when they are supported by competent evidence. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Hedgebeth*, 228 N.C. 259, 45 S.E. 2d 563 (1947), *cert. dismissed*, 334 U.S. 806 (1948). The findings of fact must support and justify the conclusion of law. *State, ex rel. Glamorgan Pipe and Foundry Co. v. Benfield*, 266 N.C. 342, 145 S.E. 2d 912 (1966).

Here, Judge Kirby's findings of fact number 3, 4 and 5 are: (3) Parker testified during the first trial that he siphoned gas from a 1964 Chevrolet owned by Doris Hoilman; (4) Parker testified during the first trial that he rode near the residence of J. L. Yelton with "these two girls"; and (5) "the defendant could easily have known the identification of the said two witnesses having been present during both trials." These findings do not support the conclusion that defendant is not entitled to a new trial because he "either had knowledge of or by use of reasonable diligence, should have had knowledge of all the facts and circumstances alleged in his Motion for New Trial, as being newly discovered evidence" and "[t]hat defendant calculated not to make use of the said evidence at his second trial on July 18, 1977 . . . ."

The identities of those two women are not of critical importance to the defendant. It is reasonable to assume that if defendant had interviewed them before the second trial, their statements to him would have been substantially the same as their testimony at the second trial.

The critcial evidence that defendant contends is newly discovered is the statement from Officer Pennix and from Officer Bailey that they stopped a car registered to Doris Hoilman at approximately 11 p.m. on 29 November 1975; that there was only one person in the car; that they believe that person to have been Parker; and that the Hoilman sisters and their mother then came down the road and demanded possession of Doris Hoilman's car. If defendant had talked to either of those officers before the conclusion of the second trial, then he would have developed evidence tending to establish a very different story from that revealed by Parker and the Hoilman sisters at the second trial. This evidence from Bailey, Pennix and the Ollises tends to establish that the Hoilman sisters were not with Parker on the evening of 29 November 1975 and may not have been with him earlier on that

day. The importance of discovering any evidence tending to destroy the testimony of the Hoilman sisters takes on much greater importance after considering the prior history of this case. Without the testimony of the Hoilman sisters, the first trial ended with a hung jury. With their testimony, the second trial ended with a conviction and a life sentence for the defendant.

Reduced to its simplest terms, the issue is whether (1) defendant in fact talked to Officers Bailey or Pennix before or during the second trial and (2) whether he had sufficient information so that he *should have talked* to them some time before the end of the second trial. If the answer to either part of the above issue is "yes," then defendant has no newly discovered evidence.

First, the trial judge found that the defendant talked to Officer Bailey during the first trial and told him that he overheard a radio broadcast on his police scanner on the evening of 29 November 1975 that the officers had stopped a car and "the rabbit had run again."

From the record, it is clear that all of the questioning of Officer Bailey on this issue concerned whether the conversation between defendant and Officer Bailey first occurred during or only after the *second* trial. At first, Bailey equivocated in his answers to this question, but he then stated that he was out of town during the second trial. In response to direct questioning from defense counsel and later from the trial judge, Bailey said that his first conversation with defendant was the week after his second trial while defendant was in jail waiting to be transported to Central Prison. There is no evidence to support the finding that defendant talked to Bailey about overhearing the radio message during the first trial, or for that matter, during the second trial. All of the evidence reveals that the first conversation about this matter occurred the week after the second trial.

Second, both Bailey and Pennix were employed at that time as police officers by the Town of Bakersville. The entire arson investigation was handled by the Mitchell County Sheriff's Department so there was no reason the defendant should have talked to Bailey or Pennix about the crime for which he had been charged unless the defendant had some additional reason to believe that those officers had relevant information that could aid him in his defense.

There is evidence in the record that defendant overheard a radio message on 29 November 1975 that the two officers had stopped a car and the "rabbit had run again." There is no evidence in the record that defendant overheard the license tag check revealing that the car was registered to Doris Hoilman. Therefore, the issue is when did defendant first realize who the officers were referring to when it was stated that the "rabbit had run again." If he knew who they were referring to at the time he overheard the radio message on 29 November 1975, then he should have talked to the two officers before his conviction at the second trial. If he was first able to understand the reference to "the rabbit" only after the second trial as a result of chance conversations with police officers, then he has come into possession of newly discovered evidence.

Officer Bailey testified that:

> "Yes, he knew who the rabbit was, who I was referring to. He knew I was talking about Parker, the person (sic) had given testimony against him at his trial. He told me he knew that because he heard the conversation himself, with his own ears. *On May 9, [1978]* he told me, 'you remember stopping Jackie Parker driving Doris' car that night and you referred to him as the rabbit's run again?' " (Emphasis added.)

This evidence does not shed any light on the question of when the defendant first became aware of who the officers were referring to as "the rabbit." The above evidence simply shows that he had discovered who they were talking about as of 9 May 1978. Therefore, this evidence is insufficient to support finding of fact number 6 that the defendant knew on 29 November 1975 that *Jackie Lee Parker* had been stopped by police officers. When the evidence is insufficient to support a finding of fact, the case must be remanded for a new hearing. *State v. Robinson*, 248 N.C. 282, 103 S.E. 2d 376 (1958); *State v. Davis*, 243 N.C. 754, 92 S.E. 2d 177 (1956).

Finally, we note *ex mero motu* that we may take judicial notice of the assignments of trial judges to hold court, of the counties that make up a certain district and of the resident district of a superior court judge. *Baker v. Varser*, 239 N.C. 180, 79 S.E. 2d 757 (1954). Therefore, we take judicial notice of the following: During the Spring Term, 1978, Judge Kirby was assigned to the

Twenty-First District and was assigned to hold the 5 June 1978 Criminal Session of Watauga County Superior Court. During the Fall Term, 1978, he was assigned to the Schedule B session in District 27 and was assigned to hold the 16 October 1978 Criminal Session of Gaston County Superior Court. Judge Kirby is the senior resident superior court judge in district 27-A.

[2] Judge Kirby held this hearing in Watauga County during the 5 June 1978 Criminal Session of court rather than in Mitchell County where the crime occurred and where both trials were held because the parties consented to have the hearing held in Watauga County. There is nothing in the record to indicate that the parties consented to have the order entered out of term, out of session, out of county and out of district from where the hearing was held when, on 16 October 1978, he entered his order in this case while he was holding court in Gaston County. We hold that the order entered in this case is null and void since it was entered out of term and out of session. *See, Baker v. Varser, supra,* where it was held that a trial judge cannot hear a matter *and* enter an order out of term and out of session, and *Clark v. Cagle,* 226 N.C. 230, 37 S.E. 2d 672 (1946), where it was held that after final judgment has been entered and an appeal noted (but the time allowed for service of case on appeal has not run), the trial judge cannot enter a substitute judgment *at a subsequent term except by consent.*

For all of the above reasons defendant is entitled to a new hearing. Since we are awarding a new hearing, it is premature for us to resolve defendant's second contention that the trial judge abused his discretion in refusing to order a new trial. At the new hearing, it must be determined whether defendant in fact has newly discovered evidence and if so, whether that evidence, in the trial judge's sound discretion, warrants a new trial. *State v. Beaver,* 291 N.C. 137, 229 S.E. 2d 179 (1976).

New hearing.

Justice BROCK dissenting.

I respectfully dissent from the analysis and holding of the majority opinion and I vote to uphold the order of Judge Kirby

denying defendant's motion for a new trial on grounds of newly discovered evidence.

The majority opinion places considerable stress on the fact that Judge Kirby found that defendant talked to Officer Bailey during the first trial concerning the defendant's having overheard the police radio broadcast on the evening of 29 November 1975 that the officers had stopped a car and the "rabbit had run again." The majority stresses that this finding of fact by Judge Kirby is not supported by the evidence because from the evidence it appears that the defendant first talked to Officer Bailey about the radio broadcast after the second trial. To me, this finding of fact by Judge Kirby is immaterial to the real question involved. The real question is whether the defendant had sufficient information prior to the second trial to impose upon him a reasonable duty to talk to Officer Bailey prior to the second trial.

At the hearing of the motion for the new trial, Officer Bailey testified as follows:

> "Yes, he knew who the rabbit was, who I was referring to. He knew I was talking about Parker, the person (sic) had given testimony against him at his trial. He told me he knew that because he heard the conversation himself, with his own ears. On May 9, [1978] he told me, 'you remember stopping Jackie Parker driving Doris' car that night and you referred to him as the rabbit's run again?' "

It is clear from the above testimony that defendant heard the police radio broadcast on 29 November 1975, which was prior to his indictment in this case. When the defendant did talk to Officer Bailey, at whatever time his conversation with Officer Bailey may have been, he asked the Officer, "you remember stopping Jackie Parker driving Doris' car that night and you referred to him as the rabbit's run again?" It seems quite clear that the defendant knew at all times from having heard the police radio broadcast on 29 November 1975 that Officer Bailey had stopped Jackie Parker and that Jackie Parker was driving Doris Hoilman's automobile. In my view this should have caused the defendant to talk with Officer Bailey prior to the second trial.

The majority also declare Judge Kirby's order null and void because there was no showing in the record that the parties con-

sented to have the order entered out of term, out of session, out of county and out of district from where the hearing was held. The defendant does not raise any question about this and it seems obvious to me that the entry by Judge Kirby of the order at a later time and out of the district was verbally or tactitly agreed to by the parties and does not render it null and void.

It is not unusual that a judge would want the court reporter to transcribe the testimony at the hearing in order that he would have an opportunity to review it before entering his order. To me this is obviously what Judge Kirby wanted in this situation. His discussion with the attorneys involved is not a matter of record but it seems clear to me, since the defendant does not now raise the question, that the parties agreed that Judge Kirby should have time to study the transcript and that he might enter such order at such time and place after he had time to study the transcript. In my view *Baker v. Varser*, 239 N.C. 180, 79 S.E. 2d 757 (1954) and *Clark v. Cagle*, 226 N.C. 230, 37 S.E. 2d 672 (1946) have no application to the facts or the law of this case.

I vote to uphold the order of Judge Kirby.

Chief Justice BRANCH and Justice HUSKINS join in this dissent.

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

ABSHER v. FURNITURE CO., INC.

No. 122 PC.

Case below: 43 N.C. App. 753.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 February 1980.

ADVERTISING, INC. v. PEACE

No. 186 PC.

Case below: 43 N.C. App. 534.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 February 1980.

APARTMENTS, INC. v. WILLIAMS

No. 129 PC.

Case below: 43 N.C. App. 648.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 February 1980.

ATTAWAY v. SNIPES

No. 142 PC.

Case below: 43 N.C. App. 619.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 February 1980.

BANK v. CHURCH

No. 127 PC.

Case below: 43 N.C. App. 538.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 February 1980.

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

BRILES v. BRILES

No. 139 PC.

Case below: 43 N.C. App. 575.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 February 1980.

CLODFELTER v. BATES

No. 181 PC.

Case below: 44 N.C. App. 107.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 February 1980.

COMMUNITY CLUB v. HOPPERS

No. 161 PC.

Case below: 43 N.C. App. 671.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 February 1980.

COX v. COX

No. 147 PC.

Case below: 43 N.C. App. 518.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 February 1980.

CRAWFORD v. SURETY CO.

No. 184 PC.

Case below: 44 N.C. App. 368.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 February 1980.

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

HALL v. LASSITER

No. 126 PC.

Case below: 44 N.C. App. 23.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 February 1980.

HAWTHORNE v. REALTY SYNDICATE, INC.

No. 140 PC.

No. 103 (Spring Term).

Case below: 43 N.C. App. 436.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 6 February 1980. Motion of plaintiffs to dismiss appeal for lack of substantial constitutional question denied 6 February 1980.

HENRY v. DEPT. OF TRANSPORTATION

No. 166 PC.

Case below: 44 N.C. App. 170.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 February 1980.

IN RE DAIRY FARMS

No. 43.

Case below: 43 N.C. App. 459.

Appeal of Milk Commission dismissed on motion of Dairy Farms for lack of substantial constitutional question 6 February 1980.

IN RE HAYES

No. 132 PC.

Case below: 43 N.C. App. 515.

Petition by LeRoy Glenn Hayes for discretionary review under G.S. 7A-31 denied 6 February 1980.

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

JONES v. DEPT. OF HUMAN RESOURCES

No. 150 PC.

No. 105 (Spring Term).

Case below: 44 N.C. App. 116.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 February 1980.

LETCHWORTH v. TOWN OF AYDEN

No. 157 PC.

Case below: 44 N.C. App. 1.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 February 1980.

MENACHE v. MANAGEMENT CORP.

No. 152 PC.

Case below: 43 N.C. App. 733.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 February 1980.

NICHOLSON v. HOSPITAL

No. 148 PC.

No. 104 (Spring Term).

Case below: 43 N.C. App. 615.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 6 February 1980.

OSMAR v. CROSLAND-OSMAR, INC.

No. 165 PC.

Case below: 43 N.C. App. 721.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 February 1980.

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

PETROU v. HALE

No. 149 PC.

Case below: 43 N.C. App. 655.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 February 1980.

STANLEY v. BROWN

No. 146 PC.

Case below: 43 N.C. App. 503.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 February 1980.

STATE v. ALEXANDER

No. 180 PC.

Case below: 42 N.C. App. 257.

Application by defendant for further review denied 6 February 1980.

STATE v. BOOKER

No. 75.

Case below: 44 N.C. App. 492.

Motion of Attorney General to dismiss defendant's notice of appeal for lack of substantial constitutional question allowed 6 February 1980.

STATE v. COLLINS

No. 163 PC.

Case below: 44 N.C. App. 27.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 February 1980.

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

STATE v. GAULDIN

No. 158 PC.

Case below: 44 N.C. App. 19.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 6 February 1980.

STATE v. LANDRUM

No. 116 PC.

Case below: 43 N.C. App. 619.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 February 1980.

STATE v. ODEN

No. 153 PC.

Case below: 44 N.C. App. 61.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 February 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 February 1980.

STATE v. RUSS

No. 191 PC.

Case below: 44 N.C. App. 190.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 February 1980.

STATE v. SEAY

No. 185 PC.

Case below: 44 N.C. App. 301.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 February 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 February 1980.

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

STATE v. ZIADY

No. 156 PC.

Case below: 44 N.C. App. 190.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 February 1980.

SUGGS v. HOAGLIN

No. 143 PC.

Case below: 43 N.C. App. 620.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 February 1980.

STATE OF NORTH CAROLINA v. HERMAN K. SIMPSON

No. 60

(Filed 1 February 1980)

1. **Criminal Law § 75.1— defendant not taken before issuing magistrate—Pennsylvania requirement—suppression of confession in N.C. not required**

The fact that Philadelphia officers failed to take defendant before a proper issuing official in Philadelphia for issuance of a warrant and for preliminary arraignment in accordance with the Pennsylvania Rules of Criminal Procedure was not grounds for suppression of defendant's inculpatory statement in a trial in N.C.

2. **Criminal Law § 75.9— questioning by officers—defendant's statement voluntary**

Defendant's inculpatory statement was voluntarily and understandingly made where defendant voluntarily went to the police station to discuss the investigation with police officers; he was advised of his constitutional rights and indicated that he did not desire the presence of a lawyer; defendant was accorded every courtesy and every request; there were no threats and no inducement generating hope of relief of any kind; and the fact that an officer told defendant, before he made the inculpatory statements, that the officer thought defendant was a liar and thought that he was guilty, standing alone, did not render the confession inadmissible.

3. **Criminal Law § 34— admission of another crime in confession—incompetency on question of guilt**

In a prosecution for first degree murder, first degree burglary and assault with a firearm with intent to kill, the trial court erred in admitting evidence that defendant had committed sodomy with a dog, since evidence of the independent, unrelated crime was inadmissible to prove defendant's guilt of the crimes charged, even though that evidence was contained in defendant's confession to the crimes charged.

4. **Burglary and Unlawful Breakings § 4; Criminal Law § 38— custom or habit—evidence admissible to establish essential element of crime**

In a prosecution for first degree murder of a rest home resident, first degree burglary and assault with a firearm with intent to kill, the trial court did not err in admitting testimony of the rest home assistant supervisor that it was her custom to keep the windows and screens of the rest home closed, since such evidence was relevant upon the question of how entry to the rest home was gained, and there was no merit to defendant's contention that evidence of habit or custom should not be allowed for the purpose of establishing an essential element of a crime.

5. **Burglary and Unlawful Breakings § 5— first degree burglary—breaking through window—sufficiency of evidence**

Evidence of first degree burglary was sufficient to be submitted to the jury, though defendant contended that he entered a rest home, the crime

scene, through an open window, where the evidence tended to show that the investigating officer found the window in question open, the screen on the ground outside, and a sawhorse under the window; it would be unreasonable to believe that, even if someone inside the rest home had opened the window, he would have also removed the screen and thrown it out on the ground; removal of the screen would constitute a breaking; and it was the custom of the assistant supervisor to keep the windows and screens closed.

APPEAL by defendant from *Brewer, Judge*. Judgments entered 25 January 1979 in Superior Court, CUMBERLAND County.

Defendant was charged in indictments, proper in form, with (1) the first degree murder of Nellie Hair on 29 March 1976, (2) (a) first degree burglary, and (2) (b) assault with a firearm with intent to kill. The jury found defendant guilty of the felony of first degree murder, the felony of first degree burglary, and the misdemeanor of assault with a deadly weapon. The trial judge properly ruled that the burglary conviction merged with the murder conviction, and sentenced defendant to life imprisonment (this offense was committed prior to the reenactment of the death penalty in North Carolina). Defendant was sentenced to a prison term of two years on the misdemeanor conviction, to commence at the expiration of the life sentence. On 13 August 1979 this Court allowed defendant's motion to bypass the Court of Appeals on the misdemeanor conviction.

The State's evidence tended to show the following.

During the early morning hours of March 29, 1976, an attendant at the Person Street Rest Home in Fayetteville, Cumberland County, North Carolina, noticed that the light was on in the room of Ms. Nellie Hair. She opened the door to the room and saw that Ms. Hair was on her bed with her gown pulled up to her waist. A man was in the room next to the bed, zipping up his trousers. After the attendant screamed the man ran out the back door of the rest home. The man who was in the room was a black male about five feet seven or eight inches tall and heavy built. He had a mustache and was wearing a brown cap and brown coat. [According to the record of defendant's interview with the Philadelphia police officers defendant is a Negro male, five feet eight and one-half inches tall, weighing 192 pounds, and wearing a mustache.] The police arrived and discovered Ms. Hair's bathroom window open and screenless, with a sawhorse under the bathroom

window and the window screen nearby. Ms. Hair died as a result of injuries to her head which she received that night. She had been hit hard in the head with a blunt instrument. No one could identify the man who had been in the room.

On 12 April 1976 officers of the Philadelphia, Pa. Police Department, at the request of the Fayetteville, N.C. Police Department, interviewed defendant concerning the homicide in the death of William A. Kinlaw in Fayetteville, N.C. on 21 March 1976 (*see State v. Simpson*, 297 N.C. 399, 255 S.E. 2d 147 (1979)). During this interview defendant not only confessed to the murder of William A. Kinlaw on 21 March 1976, he also confessed to the murder of Nellie Hair on 29 March 1976. Defendant stated to the officers:

> "I left Linda's [Linda Ann Bethea, defendant's girlfriend who lives in Fayetteville, N.C.] house sometime after midnight and I walked to the rest home on Person Street [the Person Street Rest Home] which is acrossed from the A & P. I got in the rest home through an opened bathroom window on the side near the back of the home. There is a two-story house on that side of the rest home. Once I got inside I walked down the hallway to a room where an old white lady was asleep in bed. I got up close to her and she woke up and yelled and I hit her with a rock or a brick I had taken in with me from outside the rest home. The room wasn't well lighted but I think I hit her in the head. I pulled the bed covers back and I was opening my pants when a middled aged lady came in and cut the lights on. She saw me and ran from the room and I fired a shot at her with the .32 I had from the old man [Mr. Kinlaw].
>
> The gun had went off without me even knowing it. I ran from the rest home and went through the back door and threw the brick or rock hard away from me. I ran beside the side of the rest home near the creek. I went back to Linda's house. I brought the gun back with me to Philadelphia when I came back. I kept it for a while and then I threw it away in a garbage can in Philadelphia."

When the police were called to the Person Street Rest Home during the morning of the Nellie Hair homicide the attendant who had found a man in the Nellie Hair room told the officers that the

man had fired a shot at her and had run out the back door. A .32 cal. bullet was recovered from a wall in the rest home.

The defendant offered no evidence before the jury.

Other evidence necessary to an understanding of the errors assigned will be discussed in the opinion which follows.

Attorney General Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr., for the State.

Malcolm R. Hunter and Fred J. Williams, Assistant Public Defenders, Cumberland County, for the defendant.

BROCK, Justice.

Defendant brings forward seven assignments of error which he presents in eight arguments, the first assignment of error being asserted on two legal theories. They are: (1) that the trial court erred in failing to suppress the evidence of defendant's inculpatory statement given to the Philadelphia law enforcement officers because (a) the officers failed to take defendant before a proper issuing authority in Pennsylvania for issuance of a warrant and for preliminary arraignment as is required by the Pennsylvania Rules of Criminal Procedure, and (b) because defendant's inculpatory statement was involuntary; (2) that the trial court erred in the admission of evidence of defendant's having committed sodomy with a dog; (3) that the trial court erred in the admission of testimony of the rest home attendant that it was her custom to keep the windows and screens closed; (4) that the trial court erred in refusing to dismiss the first degree murder charge; (5) that the trial court erred in refusing to dismiss the first degree burglary charge; (6) that the trial court erred in refusing to dismiss the assault with a deadly weapon with intent to kill charge; and (7) that the trial court erred in instructing the jury that the evidence tended to show that the defendant entered the building by a breaking. We will discuss the assignments of error in the order presented.

1(a).

[1] Should defendant's inculpatory statement have been suppressed because the Philadelphia officers failed to take defendant before a proper issuing official in Philadelphia for issuance of a

warrant, and for preliminary arraignment in accordance with the Pennsylvania Rules of Criminal Procedure? We hold that this is not grounds for suppression of the inculpatory statement in a trial in North Carolina.

This same argument was advanced in the first *Simpson* case (*State v. Simpson*, 297 N.C. 399, 255 S.E. 2d 147 (1979)) and we felt it did not merit discussion. However, with the hope that this argument will not again be asserted we give it a brief treatment. The Pennsylvania Rules of Criminal Procedure are not applicable to trials in North Carolina. Motions to suppress evidence in trials in North Carolina are governed by North Carolina law.

1(b).

[2] Should defendant's inculpatory statement have been suppressed because it was not voluntary? We hold that defendant's inculpatory statement was voluntarily given and, excepting the parts hereinafter held to be inadmissible, was properly admitted into evidence at trial.

Prior to trial defendant moved to suppress the evidence of defendant's inculpatory statements given to the Philadelphia police officers. Defendant argues that the statements were coerced and therefore not voluntary. On 10 and 11 January 1979 Judge Canaday, in accordance with proper procedure, conducted a full evidentiary hearing on defendant's motion to suppress. Judge Canaday made detailed findings of fact, to which no exceptions are taken, finding that all of defendant's statements were freely, voluntarily, understandingly and intentionally made, and that no threat of physical or mental violence of any nature or promise or assurance of help or reward of any nature was made to defendant by said law enforcement officers as an inducement to the defendant to make statements and furnish information to them. Judge Canaday thereafter ordered that defendant's motion to suppress be denied.

With defendant having excepted only to the order denying his motion to suppress we are presented only with the question of whether the findings of fact by Judge Canaday support his order denying defendant's motion to suppress. Judge Canaday's findings of fact are as follows:

"That on April 9, 1976, the Fayetteville Police Department was investigating the death of Willie Alexander Kinlaw, the death having occurred on March 21, 1976 and the death of Nellie Hair having occurred on March 29, 1976. That a crucial part of that investigation pertained to a telephone call made from the residence of Willie Alexander Kinlaw on the morning of March 21, 1976 to Philadelphia, Pennsylvania. That on April 9, 1976, Detectives Donald Lyons and George Smith of the Philadelphia Police Department, at the request of the Fayetteville Police Department, went to the residence of Millie Smith at 210 West Abbottsford in Philadelphia, Pennsylvania. That while there the detectives met Millie Smith, her daughter, Mary Melton and Herman Simpson with whom they had a conversation concerning the phone call. During that conversation, Simpson advised the officers that while he had made telephone calls from Fayetteville to Philadelphia, he had not made such a call on March 21, 1976.

That on April 12, 1976, Detective Daniel Rosenstein and Detective Konieczny located Herman Simpson and Mary Melton in the Wyneva Hotel in Philadelphia, Pennsylvania. The Detectives advised Simpson that they would like to talk with him concerning the aforesaid matters; that Simpson agreed to come down with the officers to the Police Administration Building, but needed a short time to get dressed. At approximately ten (10) minutes later, Simpson and Ms. Melton left the hotel room and came downtown to the Police Administration Building along with Ms. Melton's mother, Millie Smith. That Herman Simpson arrived at the Police Administration Building at approximately 9:15 o'clock a.m.

That Herman Simpson, Mary Melton and Millie Smith were all escorted into room number 104 of the Police Administration Building which was the homicide section of that department. That once inside, Herman Simpson went into an interview room located within room number 104 in the Police Administration Building and was left alone in that room from 9:17 o'clock a.m. until 9:30 o'clock a.m. That at 9:30 o'clock a.m., Simpson was advised of his constitutional rights by Detectives Rosenstein and Konieczny and at that time, Simpson acknowledged to the officers that he understood his rights; that he had a right to keep quiet; that anything he

said would be used against him; that he did not desire to remain silent; that he had a right to talk to a lawyer and that if he could not afford a lawyer, one would be appointed for him free of charge, and at that time, Simpson stated he did not want to talk to a lawyer and was willing to answer questions. That at approximately 9:40 o'clock a.m., Simpson was taken to the bathroom and given water and that he returned to the interview room at approximately 9:46 o'clock a.m. where he remained alone until 9:50 o'clock a.m. That at 9:50 o'clock a.m., Simpson was again advised of his constitutional rights by Detective Cook of the Fayetteville Police Department, Agent Van Parker of the North Carolina State Bureau of Investigation and Detective Rosenstein of the Philadelphia Police Department and again Simpson acknowledged that he understood his rights and that he did not desire the presence of an attorney and that he was willing to talk to the officers.

That after this second advisement of rights and waiver of rights by Simpson, he again was offered a drink and a meal by Detective Rosenstein at approximately 10:10 o'clock a.m. which Simpson refused.

That Detectives Cook and Rosenstein and Agent Parker interviewed Simpson from approximately 10:11 o'clock a.m. until 11:25 o'clock a.m. at which time Simpson was given a break, water and taken to the bathroom. That the interview was interrupted for this break from 11:25 o'clock a.m. until 11:55 o'clock a.m. That at 11:55 o'clock a.m., the interview resumed and continued until 1:25 o'clock p.m. at which time Simpson again was offered a meal and he refused. The interview resumed at approximately 1:26 o'clock p.m. and continued until 2:45 o'clock p.m. at which time the interview was stopped for the purpose of having the information which Simpson had related to the officers reduced to a typewritten form. That at approximately 2:46 o'clock p.m., Simpson was taken to a cafeteria by Detective Cook and returned to room number 104 at approximately 3:10 o'clock p.m. That Simpson was left alone in the interview room from 3:10 o'clock p.m. for a short time after which Detective (sic) Lyons, Rosenstein and Cook entered the interview room and obtained Simpson's permission to search his apartment in the hotel. That Simpson consented to the search of this premises at approximate-

ly 3:15 o'clock p.m. at which he was given a meal of a ham and cheese sandwich, a coke and a cake. Simpson spent from 3:15 o'clock p.m. until 3:35 o'clock p.m. consuming said meal. That between 3:35 o'clock p.m. and 5:00 o'clock p.m. the Detectives received portions of the typed statement as it was being prepared by secretaries outside the interview room and would go over each page as it was received with Simpson during this time. That at 5:00 o'clock p.m., Detectives Cook, Rosenstein and Agent Parker went over the typed statement with Simpson and he signed it at approximately 5:15 o'clock p.m.

That the oral interview resumed with Cook, Parker and Rosenstein from 5:15 o'clock p.m. until 6:15 o'clock p.m. At 6:15 o'clock p.m., Simpson was given water and taken to the bathroom and the interview resumed at 6:25 o'clock p.m. with Agent Parker and Simpson. Parker's interview with Simpson lasted until 7:25 o'clock p.m. at which time Simpson was again given water. At 7:30 o'clock p.m. the interview resumed with Detective Rosenstein and continued until 8:30 o'clock p.m. At approximately 8:30 o'clock p.m., Detective Dupe entered the interview room and advised Simpson that he had a warrant issued from the State of North Carolina for the arrest of Simpson in connection with the death of Willie Alexander Kinlaw on March 21, 1976. That the said North Carolina warrant was not served or read to Simpson, but he was advised at that time by Detective Dupe of the existence of the warrant and what it charged. At approximately 8:37 o'clock p.m., Detective Dupe left the interview room and Simpson made a statement to Detective Rosenstein that he had committed the crimes in question and that if he could see Millie Smith, he would tell the Detectives about it. That at approximately 8:40 o'clock p.m., Millie Smith entered the interview room and remained alone with Simpson until 8:50 o'clock p.m. at which time she asked to leave and was allowed to leave the interview room. That at 8:50 o'clock p.m. Detective Rosenstein re-entered the room and continued the interview with Simpson until 9:20 o'clock p.m. at which time Simpson requested to be able to visit with Mary Melton.

At approximately 9:20 o'clock p.m. upon Simpson's request Mary Melton was allowed to enter the interview room

and remained alone with Simpson until 9:25 o'clock p.m. at which time she left upon her own request. At 9:25 o'clock p.m. the oral interview resumed with Detective Rosenstein and continued until 9:30 o'clock p.m. At 9:30 o'clock p.m. Agent Parker entered the room and joined Rosenstein and Simpson during which time Simpson related in detail the circumstances involving the death of William Alexander Kinlaw on March 21, 1976 and Nellie Hair on March 29, 1976. At 10:45 o'clock p.m., Simpson was taken to the bathroom and given water and returned to the interview room at 10:55 o'clock p.m.

Simpson remained alone in the interview room from 10:55 o'clock p.m. until approximately 11:10 o'clock p.m. at which time Agent Parker and Detective Rosenstein reentered the room with a typewriter for the purpose of reducing the admission by Simpson to a typewritten fashion. That from approximately 11:10 o'clock p.m. until 11:55 o'clock p.m. Agent Parker and Detective Rosenstein reduced the admissions by Simpson which had been made from approximately 8:30 o'clock p.m. that evening to typewritten fashion in Simpson's presence. The typewritten statement was read to Simpson from 11:55 o'clock p.m. and concluded at 12:05 o'clock a.m. April 13, 1976. At 12:05 o'clock a.m., Simpson was asked by Agent Parker to sign the typewritten statement of admissions which he refused to do at 12:06 o'clock a.m. At 12:06 o'clock a.m., Parker asked Simpson if the statement in its typewritten fashion was correct to which Simpson replied yes. At 12:07 o'clock p.m. Simpson was offered a meal again and was given a cheeseburger and milk which he consumed and was left alone from 12:30 o'clock a.m. until 1:25 o'clock a.m. At 1:25 o'clock a.m., Simpson was slated by telephone in the Fourteenth District of the Philadelphia Judicial System.

At 1:30 o'clock a.m. a request was made to the Philadelphia Public Defender's Office for an attorney to advise Simpson on the question of extradition and Simpson remained in the interview room alone until 2:40 o'clock a.m. at which time a Public Defender arrived and conferred with Simpson until 3:46 o'clock a.m. at which time the attorney advised the Detectives that Simpson did not wish to waive extradition.

The Courts (sic) specifically finds as a fact that at the time Herman K. Simpson voluntarily agreed to accompany Detectives Rosenstein and Konieczny from the Wyneva Hotel to the Police Administration Building in Philadelphia, Pennsylvania on April 12, 1976, he did so freely and voluntarily and was not under arrest at that time; further that the Defendant was advised by Agent Parker, Detectives Cook and Rosenstein at approximately 9:50 o'clock a.m. on April 12, 1976 that he was being questioned concerning the homicide deaths of Willie Alexander Kinlaw on March 21, 1976 and Nellie Hair on March 29, 1976 in Fayetteville, North Carolina; that at no time during the interview process was Herman Simpson placed under arrest and at no time was Simpson handcuffed to any chair or in any fashion. The Court finds that Simpson was subjected to the same security procedures within the Police Administration Building as any other individual and was not placed under arrest or confinement during said interview process; further that Herman Simpson intelligently, intentionally and voluntarily waived his right to counsel and agreed to talk to Detectives on April 12, 1976 concerning the deaths of the aforementioned individuals; further that Simpson never requested to be allowed to leave the Police Administration Building nor to have the presence of counsel at any part of the interview process nor to stop answering questions nor to have the presence of an attorney at any time.

Further that any and all statements made by Herman Simpson to Detectives Rosenstein and Cook and Agent Parker were freely, voluntarily, understandingly and intentionally made and that no threat of physical or mental violence of any nature or promise or assurance of help or reward of any nature was made to the Defendant by said law enforcement officers as an inducement to the Defendant to make statements and furnish information to them.

That further the Court finds that the Defendant was not restrained of his liberties by law enforcement officers until a warrant was served upon him, but that he probably would not have been permitted to leave the Police Administration Building after Fayetteville Police Officer Dupe entered the

room with the warrant for Defendant's arrest which had been issued previously by the North Carolina Courts."

Defendant argues that the foregoing facts found by Judge Canaday require suppression of defendant's inculpatory statements under the principles laid down in *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975). We disagree.

In holding the inculpatory statement inadmissible in *Pruitt*, Justice Branch (now Chief Justice) stated:

> "The rule set forth in *Roberts* has been consistently followed by this Court. The Court has, however, made it clear that custodial admonitions to an accused by police officers to tell the truth, standing alone, do not render a confession inadmissible. (Citations omitted.) Furthermore, this Court has made it equally clear that any improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage. (Citations omitted.)
>
> In instant case the interrogation of defendant by three police officers took place in a police-dominated atmosphere. Against this background the officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around.' Under these circumstances one can infer that the language used by the officers tended to provoke fright. This language was then tempered by statements that the officers considered defendant the type of person 'that such a thing would prey heavily upon' and that he would be 'relieved to get it off his chest.' This somewhat flattering language was capped by the statement that 'it would simply be harder on him if he didn't go ahead and cooperate.' Certainly the latter statement would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.*, confess." 286 N.C. at 458, 212 S.E. 2d at 102.

In the case *sub judice* there is no threat of any kind and there is no inducement generating hope of relief of any kind. It is true that the officer told defendant, before defendant made the inculpatory statements, that the officer thought defendant was a

liar and thought that he was guilty, but this standing alone does not render the confession inadmissible. *See State v. Thomas*, 241 N.C. 337, 85 S.E. 2d 300 (1954); *State v. Thompson*, 227 N.C. 19, 40 S.E. 2d 620 (1946); *State v. Thompson*, 224 N.C. 661, 32 S.E. 2d 24 (1944). Defendant's reliance on *Pruitt* is misplaced.

Nor does the principle of *Dunaway v. New York*, --- U.S. ---, 99 S.Ct. ---, 60 L.Ed. 2d 824 (1979) require that defendant's inculpatory statements be suppressed. In the case *sub judice* there was no "seizure" of defendant until after he confessed. Defendant voluntarily went to the police station to discuss the investigation with the Philadelphia officers. The defendant was accorded every courtesy and every request.

Defendant's first assignment of error is overruled.

2.

[3] Defendant argues that the trial court committed error in the admission of evidence that defendant committed sodomy with a dog. This evidence was contained in defendant's inculpatory statement and in quite substantial additional testimony offered by the State. For the reasons stated in *State v. Simpson*, 297 N.C. 399, 405-08, 255 S.E. 2d 147, 152-53 (1979) we agree with defendant and order a new trial on these charges. It is appropriate to point out that the present trial was held in January 1979 and the opinion in the other *Simpson* case was filed 12 June 1979, therefore the trial judge, the district attorney, and defense counsel could not have been aware of our holding in that case at the time this case was tried.

3.

[4] Defendant argues that the trial court committed error in admitting testimony of the rest home assistant supervisor that it was her custom to keep the windows and screens of the rest home closed. Defendant concedes that "[evidence of] a person's habit or custom or practice of doing a certain thing in a certain way is admissible as evidence that he did the same thing in the same way on a particular occasion which is in issue in the case." 1 Stansbury's North Carolina Evidence Brandis Rev. § 95 (1973). However, defendant argues that evidence of habit or custom should not be allowed for the purpose of establishing an essential element of a crime. We see no merit in such a distinction.

In this prosecution one of the offenses charged against defendant was the felony of common law burglary. A breaking is an essential element of the common law crime of burglary. *State v. Madden*, 212 N.C. 56, 58, 192 S.E. 859, 860 (1937). In this case the window screen was found lying nearby the window and the window was found raised with a sawhorse standing beneath the window. A removal of the screen or a raising of the window would constitute a breaking within the meaning of the law. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976). The testimony of the assistant supervisor of the rest home that it was her custom to keep the screens and windows of the rest home closed was clearly relevant upon the question of how entry to the rest home was gained. Also the testimony of the assistant supervisor's custom of keeping the screens and windows closed was competent as evidence that on the occasion in question the assistant supervisor followed her custom on the night in question and that the window and screen were closed. It was for the jury to determine from the evidence whether it was satisfied beyond a reasonable doubt that the window and screen, or either one, were closed on the night in question. Upon this question of allowing evidence of habit or custom or practice as evidence to establish an essential element of a crime our Court of Appeals affirmed the allowance of such evidence in *State v. Lash*, 21 N.C. App. 365, 204 S.E. 2d 563, *cert. denied*, 285 N.C. 593 (1974). In *Lash* the defendant was indicted on charges of felonious larceny and felonious receiving of stolen goods. The jury found her not guilty of felonious larceny and guilty of felonious receiving. An essential element of the State's case against the defendant for felonious receiving was that the defendant was in possession of stolen goods. In holding evidence of the customary inventory procedures of Belk's and Laurie's stores admissible to show that the goods in the defendant's possession were stolen the Court of Appeals stated:

> "There was no error in permitting employees of the Belk's and Laurie's stores to testify that when a garment is sold in their stores a part of the tag is removed for the purpose of inventory control to record the sale of the particular garment by color, size, style and manufacturer, and to testify that the tags on the garments found in defendant's car were intact, which indicated the garments had not been sold. These were facts within the knowledge of the witnesses, and

their testimony did not invade the province of the jury, which still had the task of determining whether the garments had been stolen." 21 N.C. App. at 368, 204 S.E. 2d at 566.

This assignment of error is overruled.

4.

Defendant argues that the trial court erred in refusing to dismiss the charge of first degree murder at the close of the State's evidence. The first degree murder conviction was based upon the "felony murder" rule of the homicide having been committed in the perpetration of a felony (in this case burglary). Defendant concedes that it would be proper to submit the issue of first degree murder to the jury if it was proper to submit the issue of first degree burglary. The propriety of submitting the issue of first degree burglary to the jury is the subject of defendant's next assignment of error. We will therefore discuss the assignments jointly under defendant's assignment of error No. 5.

5.

[5] Defendant argues that the trial court erred in refusing to dismiss the charge of first degree burglary at the close of the State's evidence. By his appraisal of the evidence defendant argues that the State's evidence failed to show a breaking into the rest home. He argues that the State's evidence is susceptible *only* to a conclusion that entry was gained through a window which was already open. We disagree with such an appraisal.

Defendant points to the State's evidence by way of defendant's inculpatory statement which was offered by the State (*see* summary of facts preceding this opinion). Therein the defendant told the Philadelphia officers: "I got in the rest home through an opened bathroom window on the side near the back of the home." This statement, defendant argues, is evidence that defendant entered through a window which was already open. We disagree with the defendant's contention that this statement clearly indicates that he entered through a previously opened window. Obviously defendant could not have gained entry through a window (unless it was glassless) unless it was open. However his statement is silent as to whether he did or did not open the window.

Even if the window were already open, a removal of the screen would constitute a breaking under the law. *State v. Wells, supra.* It is unreasonable to believe that even if someone inside the rest home had opened the window that they would also have removed the screen and thrown it out on the ground.

Added to defendant's inculpatory statement is the State's evidence in explanation and clarification. The State's evidence showed that the investigating officer found the window open, the screen on the ground outside, and a sawhorse under the window. The State's evidence further showed that it was the custom of the assistant supervisor to keep the windows and screens closed as evidence that the window and screen were closed at the time in question. Defendant argues that this evidence of custom of the assistant supervisor has no probative value because the assistant supervisor was not on duty during the early morning hours of March 29, 1976, the time of the alleged offense, and could not have known whether her custom was followed at that time. Apparently defendant misreads the evidence. Mrs. Lillian Campbell, the assistant supervisor, testified, *inter alia*, as follows: "I worked there [the rest home] for ten years and was working on the early morning hours of March 29, 1976, which was a Sunday."

Although we disagree with defendant's argument it is interesting to note that defendant argues he is entitled to dismissal of the burglary charge (for failure to show a breaking) and entitled to a new trial upon a charge of felonious breaking or entering. A conviction of felonious breaking or entering (which does not require a breaking but only an entering) would nevertheless constitute the felony required to bring the homicide within the felony murder rule. Therefore such a conviction would avail defendant nothing since a felonious entry conviction would support (as did the burglary conviction) a conviction of first degree murder under the felony murder rule. A felonious entry conviction would merge (as did the burglary conviction) with the first degree murder conviction and the life imprisonment sentence would be the same.

We hold that the evidence, considered in the light most favorable to the State, justified submission of the first degree burglary charge to the jury, and in turn justified submission of the first degree murder charge to the jury.

Assignments of error Nos. 4 and 5 are overruled.

6.

Defendant abandons assignment of error No. 6.

7.

Defendant argues that the trial court erred in instructing the jury that the evidence tended to show that defendant gained entry to the rest home by climbing on a sawhorse, opening a window, and removing a screen. From a reading of the evidence and from the discussion of the evidence in this opinion it is clear that the evidence tended to show exactly what the trial judge instructed the jury that it tended to show. This assignment of error is overruled.

The defendant argues no assignment of error specifically addressing any alleged error in his conviction of assault with a deadly weapon, but the evidence of defendant having committed sodomy with a dog so prejudicially permeated the entire proceeding that justice requires a new trial on the misdemeanor charge also. Obviously defendant cannot again be placed on trial for assault with a deadly weapon with intent to kill (a felony) in the light of his acquittal of that charge by the verdict of the jury finding him guilty of an assault with a deadly weapon (a misdemeanor).

For the error in the admission of evidence of defendant having committed sodomy with a dog there must be, for each of the three charges, a

New trial.

State v. School

THE STATE OF NORTH CAROLINA, THE CHILD DAY-CARE LICENSING COMMISSION OF THE DEPARTMENT OF ADMINISTRATION AND JOSEPH W. GRIMSLEY, SECRETARY OF THE DEPARTMENT OF ADMINISTRATION, EX REL., RUFUS L. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA v. FAYETTEVILLE STREET CHRISTIAN SCHOOL AND ITS OPERATOR MR. BRUCE D. PHIPPS; GOSPEL LIGHT CHRISTIAN SCHOOL AND ITS OPERATOR MRS. DELORES B. YOKELY; GRACE CHRISTIAN SCHOOL AND ITS OPERATOR MR. EARL R. EATON; IMMANUEL DAY CARE CENTER AND ITS OPERATOR MRS. ELIZABETH HARRELL; BAPTIST TEMPLE SCHOOL AND ITS OPERATOR MR. DONALD R. CARTER; GRACE CHRISTIAN SCHOOL AND ITS OPERATOR MR. ROBERT DURHAM; BETHANY CHURCH SCHOOL AND ITS OPERATOR REVEREND GENE WOODALL; TABERNACLE CHRISTIAN SCHOOL DAY CARE AND ITS OPERATOR MR. RANDALL SHOOK; SOUTH PARK BAPTIST SCHOOL AND ITS OPERATOR MR. DANIEL D. CARR; GOSPEL LIGHT BAPTIST CHURCH AND ITS OPERATOR REVEREND GARY BLACKBURN; FRIENDSHIP CHRISTIAN SCHOOLS AND ITS OPERATOR MR. CHARLES STANLEY; AND ALL OTHERS SIMILARLY SITUATED

No. 125

(Filed 1 February 1980)

1. **Appeal and Error § 6.6— denial of motion to dismiss—nonappealable interlocutory order**

An adverse ruling on a Rule 12(b)(6) *motion to dismiss* is in most cases an interlocutory order from which no direct appeal may be taken.

2. **Appeal and Error § 6.6— denial of motion to dismiss—unconstitutional application of statute—defendants not covered by statute—premature appeal**

In an action by the State seeking a declaration that church-operated day-care facilities and their administrators are subject to the provisions of the Day-Care Facilities Act of 1977, G.S. 110-85 *et seq.*, and an injunction restraining defendants from operating day-care facilities without being licensed pursuant to the Act, the trial court's denial of defendants' motion to dismiss the complaint on grounds that (1) the Act cannot be constitutionally applied to church-operated day-care centers, and (2) defendant institutions are not "day-care facilities" as defined in the Act constituted a nonappealable interlocutory order, since the order did not finally determine any issue in the case or threaten to impair any right of defendants that could not be later protected.

3. **Appeal and Error § 6.3— denial of motion to dismiss—venue—lack of class action certification—nonappealable interlocutory order**

In an action by the State seeking a declaration that church-operated day-care facilities and their administrators are subject to the Day-Care Facilities Act of 1977 and an injunction restraining defendants from operating day-care facilities without being licensed pursuant to the Act, the trial court's denial of defendants' motion to dismiss on grounds of (1) improper venue and (2) lack of class action certification constituted a nonappealable interlocutory order where

the court's order was entered specifically without prejudice to defendants' right to file additional motions should class action certification ultimately be denied, since the court in effect postponed its ultimate response to the merits of both venue and class action arguments raised by defendants.

4. **Appeal and Error § 6.2— preliminary injunction—nonappealable interlocutory order**

The trial court's order granting the State's motion for a preliminary injunction restraining defendants from operating day-care centers without complying with the licensing requirements of the Day-Care Facilities Act of 1977 constitutes a nonappealable interlocutory order, since defendants offered no evidence of any substantial right which will be irrevocably lost if the State's entitlement to the preliminary injunction is not now reviewed, and since their contention that compliance with the Act's requirements violates their constitutionally guaranteed religious freedom goes to the heart of their legal challenge to the application of the Act itself and must await resolution at the final hearing when all facts upon which such resolution must rest can be fully developed.

5. **Appeal and Error § 3— constitutionality of statute as applied—challenge by pleadings and affidavits—appeal from interlocutory order**

Where a party seeks on no more than pleadings and affidavits to challenge the constitutionality of a statute, not on its face but as applied to that party, and pursues that challenge by attempting to appeal from an interlocutory order, an appellate court should be especially mindful of dangers inherent in the premature exercise of its jurisdiction.

6. **Appeal and Error § 3— determination of constitutional questions**

The Supreme Court will pass upon the constitutionality of a statute only when the issue is squarely presented upon an adequate factual record and only when resolution of the issue is necessary to determine the rights of the parties before it.

7. **Appeal and Error § 5.1— no right of appeal—dismissal of appeal on court's own motion**

Where an appealing party has no right to appeal, an appellate court should on its own motion dismiss the appeal even though the question of appealability has not been raised by the parties themselves.

DEFENDANTS appeal from the orders of *Judge Donald L. Smith* entered 11 December 1978 in WAKE Superior Court, overruling defendants' motion to dismiss and granting plaintiffs' motion for a preliminary injunction. The Court of Appeals affirmed on 4 September 1979. 42 N.C. App. 665, 258 S.E. 2d 459 (1979). Defendants appeal to this Court pursuant to G.S. 7A-30(1) (appeal as of right from a decision directly involving a substantial constitutional question). On 20 September 1979 we also allowed defendants' petition for discretionary review under G.S. 7A-31 and

granted defendants' petition for writ of supersedeas pending determination of the matter.

Rufus L. Edmisten, Attorney General, by Andrew A. Vanore, Jr., Senior Deputy Attorney General, and Ann Reed, Special Deputy Attorney General, for the state.

Strickland & Fuller, by Thomas E. Strickland, and Lake & Nelson, P.A., by I. Beverly Lake, Jr., and I. Beverly Lake, for defendant appellants.

EXUM, Justice.

This is a suit brought by the state for declaratory and injunctive relief against the class represented by the individually named defendants and "all others similarly situated." The state seeks a declaration that the defendants, church-operated day-care centers and their administrators, are subject to the provisions of the Day-Care Facilities Act of 1977 (Act), G.S. 110-85 *et seq.*, and prays for an injunction restraining defendants from operating any day-care facilities until such time as they shall, pursuant to the Act, obtain day-care licenses from the North Carolina Child Day-Care Licensing Commission. Defendants appeal from (1) the superior court's denial of their motion to dismiss, and (2) the superior court's granting of the state's motion for a preliminary injunction.

Upon a careful review of the record and oral arguments, we conclude that both the denial of defendants' motion to dismiss and the granting of the preliminary injunction constitute nonappealable interlocutory orders. Defendants' purported appeal therefrom should be dismissed and the Court of Appeals' opinion vacated. Accordingly, we dissolve our writ of supersedeas and remand the case to the superior court for further proceedings.

At the center of this controversy is the scope of the state's constitutional power to regulate certain aspects of the operation of child day-care centers by churches and religious organizations. The Act in question establishes under the Department of Administration the Child Day-Care Licensing Commission and provides for mandatory annual licensing by the Commission of any day-care center which provides care on a regular basis for more than four hours per day for more than five children, "wherever

operated and whether or not operated for profit." G.S. 110-86(3). Licenses are to be issued by the Secretary of Administration to operators of day-care facilities covered by the Act upon a showing of the facility's compliance with minimal standards relating to such matters as health and sanitation, capacity for emergency medical care, physical safety, staff-child ratio, and qualifications of facility staff. G.S. 110-91, 93. The purpose of these requirements is to ensure a "comprehensive approach" to the state's protection of "the growing number of children who are placed in day-care facilities" under the supervision and care of persons other than their parents or legal guardians. G.S. 110-85.

The record discloses that all of the individually named defendants were licensed in compliance with the Act sometime prior to the initiation of this suit. By verified complaint filed 20 October 1978, the state alleges that these defendants have now "asserted their refusal to be licensed or to apply for renewal of their licenses to operate day-care facilities" in accordance with the Act. The complaint prays both for a declaration that the Act may be applied to defendants without unconstitutionally interfering with their religious freedoms and for a preliminary and a permanent injunction restraining defendants from further noncompliance with the Act's provisions. Without filing answer, defendants moved on 7 December 1978 to dismiss the complaint on several grounds. On 11 December 1978 Judge Smith denied the motion to dismiss and allowed the state's motion for a preliminary injunction. Defendants appeal from these two orders.

I. The Motion To Dismiss

Defendants assert on appeal that Judge Smith should have granted their motion to dismiss on the following grounds: (1) the Act cannot be constitutionally applied to church-operated day-care centers; (2) defendant institutions are not "day-care facilities" as defined in the Act and hence are not subject to its provisions; (3) the state has failed to obtain proper venue and the superior court lacks subject matter jurisdiction; and (4) the case has not been and cannot be properly certified as a class action. Although Judge Smith's order of 11 December 1978 rejected each of these arguments, his denial of defendants' motion with regard to ground (3), improper venue and lack of jurisdiction, and ground (4), failure to certify class action status, was specifically "without

prejudice to defendants to file such additional motions as they think necessary should this action not be certified as a class action." The Court of Appeals affirmed Judge Smith's denial of the motion to dismiss and went on to hold, *inter alia*, that the challenged Act is constitutional on its face and as applied to defendants.

[1, 2] We note that the first two grounds asserted by defendants in support of their motion to dismiss clearly serve to attack the legal sufficiency of the state's complaint to set forth a claim upon which relief may be granted. As to these grounds, defendants' motion is properly characterized as one under G.S. 1A-1, Rule 12(b)(6). *See Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690 (1970). Ordinarily, a denial of a motion to dismiss under Rule 12(b)(6) merely serves to continue the action then pending. No final judgment is involved, and the disappointed movant is generally not deprived of any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on its merits. Thus, an adverse ruling on a Rule 12(b)(6) motion is in most cases an interlocutory order from which no direct appeal may be taken. *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974); *Godley Auction Co. v. Myers*, 40 N.C. App. 570, 253 S.E. 2d 362 (1979). In the case before us, we find that Judge Smith's refusal to allow defendants' motion to dismiss based upon grounds (1) and (2) above did not finally determine any issue in the case or threaten to impair any right of defendants that could not be later protected. As to those grounds, then, the denial of the motion to dismiss was clearly an interlocutory order from which any purported appeal is premature. G.S. 1-277; G.S. 7A-27.[1]

1. These statutes provide in pertinent part:

"§ 1-277. *Appeal from superior or district court judge.*—(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial."

"§ 7A-27. *Appeals of right from the courts of the trial division*:

. . . .

[3] Nor did Judge Smith's denial of that part of defendants' motion "to dismiss" based upon ground (3), improper venue and lack of jurisdiction, and ground (4), lack of class action certification, constitute final judgments for purposes of appellate review. With regard to ground (3), defendants argue that the state must proceed under G.S. 110-104, which provides that injunctive relief against the continuing operation of a day-care center not in compliance with the Act may be sought in the superior court of the county in which the day-care center is located.[2] Defendants point out that while the present action was instituted in the Superior Court of Wake County, ten of the eleven day-care centers named in the complaint are situated in counties other than Wake. Thus, defendants contend, the state has not obtained proper venue under section 104 of the Act; the state has no "standing" to maintain an action for injunctive relief apart from the express provisions of the statutory plan; and the Wake County Superior Court therefore lacks jurisdiction over the subject matter of the suit. We cannot agree that defendants' quarrel with venue raises an issue of jurisdiction. Matters of venue do not *per se* trigger questions of jurisdictional power. And neither the spirit and intent of

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(b) From any final judgment of a superior court . . . appeal lies of right to the Court of Appeals.

. . . .

(d) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which

(1) Affects a substantial right, or

(2) In effect determines the action and prevents a judgment from which appeal might be taken, or

(3) Discontinues the action, or

(4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals."

2. G.S. 110-104 reads in its entirety:

"*Injunctive relief.*—The Secretary or his designee is empowered to seek injunctive relief in the superior court of the county in which a day-care center is located against the continuing operation of that day-care facility at any time, whether or not any administrative proceedings are pending. The superior court may grant injunctive relief, temporary, preliminary or permanent when there is any violation of this Article, or of the rules and regulations promulgated by the Commission, which threatens serious harm to children in the day-care facility or when a final order to deny or revoke a license has been violated or when a day-care facility is operating without a license."

the Act nor section 104 permit, much less compel, a conclusion that the Act is intended to restrict the general statewide jurisdiction of the superior court or to limit the scope of relief normally available in declaratory judgment actions.[3] Defendants' motion "to dismiss" for lack of proper venue thus presents no challenge to the trial court's power to entertain the subject matter of the suit. At best, the motion serves only to question the propriety of the state's choice of Wake County as venue for the action. The motion should accordingly be treated as one to remove the action, not dismiss it. *Coats v. Hospital*, 264 N.C. 332, 141 S.E. 2d 490 (1965); *State ex rel. Cloman v. Staton*, 78 N.C. 235 (1878).

It is true that an appeal from a final denial of a motion for change of venue is not premature. *Coats v. Hospital, supra; Klass v. Hayes*, 29 N.C. App. 658, 225 S.E. 2d 612 (1976). In the instant case, however, the trial court's rejection of defendants' contentions both as to improper venue and failure to certify class action status was specifically without prejudice to defendants' right to file additional motions should class action certification ultimately be denied. Judge Smith's order in this regard was clearly tentative. He, in effect, postponed his ultimate response to the merits of both the venue and class action arguments raised by defendants. There is not the slightest suggestion in the record that defendants suffered any impairment of a substantial right by Judge Smith's interlocutory deferral of action. The order denying defendants' motion to dismiss on grounds (3) and (4) was thus not immediately appealable.

II. THE PRELIMINARY INJUNCTION

[4] A similar analysis applies to defendants' appeal from Judge Smith's order granting the state's motion for a preliminary injunction. The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. Its impact is temporary

3. The mere existence of an alternate adequate remedy will not be held to bar an appropriate action for declaratory judgment. *See* G.S. 1A-1, Rule 57. And in many cases a preliminary injunction to maintain the *status quo* of the parties may be an appropriate form of interim relief ancillary to a pending suit for declaratory judgment. *See* 26 C.J.S. *Declaratory Judgments* § 111b and cases cited therein; *see, e.g., Campbell v. Church*, 19 N.C. App. 343, 199 S.E. 2d 34, *cert. denied*, 284 N.C. 252, 200 S.E. 2d 652 (1973).

and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. If no such right is endangered, the appeal cannot be maintained. G.S. 1-277; *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975).

In the instant case, the order appealed from restrains defendants from operating day-care centers without complying with the licensing requirements of the Act. Since defendants have all held valid licenses in the past, the order serves only to ensure that they continue their previous compliance pending disposition of the case on its merits. Defendants offer no evidence of any substantial right which will be irrevocably lost if the state's entitlement to the preliminary injunction is not now reviewed. Their contention that further compliance with the Act's requirements violates their constitutionally guaranteed religious freedoms goes to the heart of their legal challenge to the application of the Act itself and must await resolution at the final hearing when all the facts upon which such resolution must rest can be fully developed. *Milk Commission v. Dagenhardt*, 261 N.C. 281, 134 S.E. 2d 361 (1964); *Carbide Corp. v. Davis*, 253 N.C. 324, 116 S.E. 2d 792 (1960). Under the facts of this case, defendants have no right to appeal from the order granting the preliminary injunction.

[5] Our refusal to allow defendants' appeal is not a surrender to technical requirements of finality. The statutes and rules governing appellate review are more than procedural niceties. They are designed to streamline the judicial process, to forestall delay rather than engender it. "There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veasey v. Durham*, 231 N.C. 357, 363, 57 S.E. 2d 377, 382 (1950). Where, as here, a party seeks on no more than pleadings and affidavits to challenge the constitutionality of a statute, not on its face but as applied to that party, and pursues that challenge by attempting to appeal from an interlocutory order, an appellate court should be especial-

ly mindful of the dangers inherent in the premature exercise of its jurisdiction.

[6] These considerations are particularly relevant in the context of the case before us. Defendants do not challenge the Act on its face. They strenuously argue, however, that the Act *cannot apply to them* without exceeding the bounds of certain constitutional limitations. More specifically, they contend that the operation of each day-care center is an integral part of the ministry of its supporting church and that the mandatory state licensing of the facilities violates the free exercise of their religion. With the exception of defendants' own affidavits, however, there is nothing in the record to guide the inquiry of this Court or of any other judicial tribunal into the degree to which defendants' day-care services are in fact religious activities warranting special constitutional protection. Nor does the record reveal any factual basis, save that suggested by general statements in the pleadings, upon which to determine the extent to which the Act's regulations do in fact interfere with defendants' allegedly religious conduct. In short, defendants' assertions in their affidavits have not been tested by cross-examination; their allegations have not been buttressed by the introduction of evidence; and there has been no resolution of the factual issues upon which defendants' constitutional claims are grounded.[4] Yet the validity of their constitutional argument can be measured on appeal only against a fully developed factual record which clearly delineates the nature and scope of the unconstitutional intrusion which defendants assert arises from the burden imposed by the Act. Such a record is essential to the proper determination of the constitutional infirmities, if any, of a statute's application to a particular situation. Absent such a record, our intervention is necessarily premature. This Court will pass upon the constitutionality of a statute *only when* the issue is squarely presented upon an adequate factual record and *only when* resolution of the issue is necessary to determine the rights of the parties before it. *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 447, 168 S.E. 2d 401, 406

4. The trial court made no findings, nor would it have been appropriate for it to have done so, on those points which are central to defendants' claims on the merits. Such findings must await the final hearing and be based on evidence appropriately adduced at that time.

(1969); *Carbide Corp. v. Davis, supra*, 253 N.C. at 327, 116 S.E. 2d at 794.

[7] Where an appealing party has no right to appeal, an appellate court should on its own motion dismiss the appeal even though the question of appealability has not been raised by the parties themselves. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). We decline in this case to exercise our general supervisory power to consider the matters raised by the attempted appeals, *see, e.g., Consumers Power v. Power Co., supra*, 285 N.C. 434, 206 S.E. 2d 178, and accordingly dismiss the appeals *ex mero motu*. The decision of the Court of Appeals is vacated and the writ of supersedeas issued by this Court is hereby dissolved. Nothing expressed herein should be construed as an expression of our own opinion on the constitutional issues attempted to be raised by defendants. The case is remanded to the Court of Appeals to be further remanded to the superior court for further proceedings.

Vacated and remanded.

AURELIA JANE RAGLAND v. MICHAEL GEORGE MOORE AND CLEVE GEORGE MOORE

No. 122

(Filed 1 February 1980)

1. Automobiles §§ 62.2, 83.4— pedestrian crossing at place other than crosswalk —motorist speeding—summary judgment improper

In an action to recover for injuries sustained by plaintiff pedestrian when she was struck by defendants' vehicle, the trial court erred in entering summary judgment for defendants where there was evidence that defendant driver was speeding and such evidence presented a jury question as to whether defendant's negligence was a proximate cause of the accident; furthermore, where there was no evidence concerning the distance of defendant's car from plaintiff on any of the three occasions she observed it before and during the time she crossed the road, there was no showing that plaintiff was contributorily negligent as a matter of law in either starting to walk across the highway or later increasing her pace.

2. Automobiles § 83.4— pedestrian crossing at place other than crosswalk—contributory negligence as matter of law

Summary judgment may be properly entered against a plaintiff pedestrian only when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible; statements in this case by the Court of Appeals suggesting that a pedestrian is contributorily negligent as a matter of law in crossing at a place other than a crosswalk *only* when the accident is unavoidable regardless of the vehicle driver's negligence are incorrect.

APPEAL by defendant from the decision of the North Carolina Court of Appeals, reported in 41 N.C. App. 588, 255 S.E. 2d 222 (1979), which reversed the judgment of *Lee, J.*, entered 6 March 1978 in PERSON Superior Court granting defendants' motion for summary judgment.

Plaintiff instituted this action to recover damages for personal injuries, medical expenses and lost wages resulting from the alleged negligent operation of an automobile by defendant Michael George Moore. The automobile was owned by defendant Cleve George Moore as a family purpose vehicle and at the time of the accident was being operated with his knowledge and consent by his son, Michael George Moore.

Defendant filed an answer pleading plaintiff's contributory negligence as a bar to recovery and also moved for summary judgment. Plaintiff replied, alleging that defendant had the last clear chance to avoid the collision. In support of his motion for summary judgment, defendant relied upon the affidavit of Michael George Moore and on plaintiff's deposition.

The accident occurred at about 12:15 a.m. on 5 June 1976 in front of plaintiff's home on Highway 49 near Roxboro. Highway 49 is a two-lane road at the point where the accident occurred. Plaintiff and defendant were the only witnesses to the accident.

Plaintiff stated in her deposition that on the night of the accident she rode home from work with Daisy Ann Jeffers. Ms. Jeffers pulled her car onto the shoulder of the road across from plaintiff's driveway. Plaintiff first saw defendant's automobile on the hill as she was getting out of the car. She stepped onto the shoulder and went around the back of Ms. Jeffers' car, which then started to pull away. She did not watch Ms. Jeffers' car as it left, nor did that car interfere with plaintiff's ability to see defendant's

automobile. Plaintiff looked again before attempting to cross the road, and defendant's car was "midway the hill." After walking over halfway across the road, she saw defendant's car at the bottom of the hill. Plaintiff then realized that the car was going faster than she had thought and started to run across the road. Plaintiff had one foot on the gravel driveway and the other on the pavement when she was struck by defendant's car.

Plaintiff's deposition further stated that in her opinion defendant was speeding. Otherwise, she could have walked across the road from where she first saw defendant's car without being struck by defendant's automobile. The motor of defendant's car was not straining or revving, but she heard defendant's tires squeal when he applied the brakes. Plaintiff was wearing blue jeans and a sleeveless white sweater at the time.

Defendant Michael George Moore stated by affidavit that he was driving within the speed limit at a speed of between forty and forty-five miles per hour. As he approached an area where there were some houses, he saw a car parked on the shoulder, facing toward him with its headlights on bright. There was also another car coming toward him behind the car on the shoulder. As defendant reached the parked car, he saw something dart across the road in his lane. He applied his brakes, swerved to the left across the center line to avoid the object and heard something hit his car. He then swerved back into his lane to avoid colliding with the approaching car, pulled onto the shoulder and stopped the car. The car that had been parked on the shoulder of the road had already left the scene. By swerving to the left, defendant avoided hitting plaintiff head-on with his car. Plaintiff was struck by the right front corner of his car. Defendant was not charged with any violation of the laws of this State as a result of the accident.

The trial court allowed defendants' motion for summary judgment, and plaintiff appealed. In an opinion by Judge Webb, the Court of Appeals reversed and remanded the case to the trial court, holding that summary judgment was improvidently granted. Defendants petitioned this Court for discretionary review pursuant to G.S. 7A-31, and their petition was allowed on 25 September 1979.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon by O. William Faison and William P. Daniell for defendant appellants.

Fellers & Link by Carlton E. Fellers, and Ricks & Ricks by Walter E. Ricks III, for plaintiff appellee.

BRANCH, Chief Justice.

The sole question presented by this appeal is whether the Court of Appeals erred in reversing the trial court's determination that defendants were entitled to summary judgment on the basis of plaintiff's contributory negligence. Defendants contend that plaintiff failed to maintain a constant lookout for oncoming traffic and that this failure constituted contributory negligence as a matter of law.

In ruling on a motion for summary judgment, the court does not resolve issues of fact and must deny the motion if there is a genuine issue as to any 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). In considering the motion, the trial judge holds the movant to a strict standard, and "all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E. 2d 379, 381 (1975). Moreover, it is only in exceptional negligence cases that summary judgment is appropriate, since the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

In the instant case, plaintiff when struck by defendant's car was crossing the highway at a point where there was neither a crosswalk nor an intersection. In passing upon defendants' motion for summary judgment, the evidence must be tested by the rule of the reasonably prudent man, in the light of the duties imposed upon both plaintiff and defendant by the following provisions of G.S. 20-174:

> (a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked

> crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway. . . .
>
> (e) Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary. . . .

This Court has dealt with a defense of contributory negligence based upon a plaintiff's violation of G.S. 20-174(a) in many cases. In *Blake v. Mallard*, 262 N.C. 62, 136 S.E. 2d 214 (1964), Justice Sharp (later Chief Justice), writing for the Court, stated the applicable law:

> The failure of a pedestrian crossing a roadway at a point other than a crosswalk to yield the right of way to a motor vehicle is not contributory negligence *per se*; it is only evidence of negligence. [Citation omitted.] However, the court will nonsuit a plaintiff-pedestrian on the ground of contributory negligence when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible. [Citations omitted.]

Id. at 65, 136 S.E. 2d at 216. Although that case involved a motion for nonsuit rather than one for summary judgment as in the instant case, this Court has repeatedly held that "[t]he motion for summary judgment and the motion for a directed verdict, formerly nonsuit, are functionally very similar." *Williams v. Power & Light Co.*, 296 N.C. 400, 404, 250 S.E. 2d 255, 258 (1979); *Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975).

In *Blake v. Mallard, supra*, relied upon by defendant, a woman pedestrian was struck by the defendant's automobile while crossing a straight, six-lane highway at night. One of the plaintiff's witnesses testified that when the plaintiff started "walking normally" across the road, the defendant was about two hundred yards to the plaintiff's right and was approaching at a speed of sixty miles per hour. The plaintiff continued into the car's path and first observed it when she entered its lane of travel, at which time it was only forty-five feet away. At this point, the defendant could not have avoided hitting the plaintiff even if he had not been speeding. In affirming the judgment as of

nonsuit against the plaintiff, this Court cited its language in *Garmon v. Thomas*, 241 N.C. 412, 85 S.E. 2d 589 (1955):

> Conceding, however, that the defendant should have seen the plaintiff and given him warning of his approach, the plaintiff was at all times under the duty to see the defendant and to yield the right of way to him. In our opinion, both parties were negligent. The defendant was negligent in failing to exercise due care to avoid colliding with the plaintiff on the highway . . . and the plaintiff was negligent in failing to exercise reasonable care for his own safety in that he failed to keep a timely lookout to see what he should have seen and could have seen if he had looked.

262 N.C. at 66, 136 S.E. 2d at 217.

Similarly, this Court held that judgment as of nonsuit should have been granted in *Anderson v. Carter*, 272 N.C. 426, 158 S.E. 2d 607 (1968). In that case the plaintiff attempted to cross a street at a point not within a crosswalk at night. Before starting to cross the street, the plaintiff saw the lights of the defendant's car at the crest of the hill 275 to 300 feet away, headed south, but underestimated its speed. The Court held that under these circumstances, it was not contributory negligence as a matter of law for him to start walking across the northbound lane. The plaintiff continued to watch the approaching car and determined that the car was traveling at least fifteen miles per hour over the speed limit. Nonetheless, he continued to walk at the same pace until he was struck within three feet of the opposite side of the street. This Court held that the evidence clearly showed that the plaintiff, a young man with no mental or physical disability, "could have avoided the collision, either by coming to a stop and yielding the right of way before entering the southbound lane of Statesville Avenue, or by accelerating his pace across it." *Id.* at 432, 158 S.E. 2d at 611. Since the plaintiff in *Anderson* did neither of these, his failure to do so was negligence and a proximate cause of his injuries.

On the other hand, a number of decisions by this Court have held that nonsuit was improperly entered on the basis of the plaintiff-pedestrian's failure to yield the right of way to passing vehicles. In *Landini v. Steelman*, 243 N.C. 146, 90 S.E. 2d 377 (1955), the plaintiff and her friend alighted from a bus on a dark

night, walked around in front of the parked bus, looked in either direction and, seeing no oncoming cars, started walking across the street. When about two-thirds of the way across, the two ladies observed the approaching lights of the defendant's car. Both attempted to get out of its way by increasing their pace but were struck almost immediately by the defendant's car. Because of a hill, the defendant would have been visible to them from about 250 or 300 yards away. There was also evidence that the defendant was speeding. This Court held that the evidence was susceptible to diverse inferences on the issues of the defendant's negligence and the plaintiff's contributory negligence, and thus the case should have been submitted to the jury. *See also Bank v. Phillips*, 236 N.C. 470, 73 S.E. 2d 323 (1952).

A similar result was reached in *Goodson v. Williams*, 237 N.C. 291, 74 S.E. 2d 762 (1953), which involved a defendant who dimmed his lights in meeting an oncoming car on the highway at night. The moment he started to brighten his lights, plaintiff's intestate "darted in front of him, he applied the brakes and swerved the car to the center lane but was too near to avoid striking the [deceased]." Other testimony, however, indicated that the defendant swerved to the right and consequently hit the deceased, who was almost off the pavement. In holding that the defendant's motion for judgment as of nonsuit should have been overruled, this Court stated that one is not "presumed to be guilty of contributory negligence as a matter of law because he failed to yield the right of way to a vehicle on a highway when crossing such highway at an unmarked crossing other than at an intersection, as provided by G.S. 20-174(a)."

Finally, in *Williams v. Henderson*, 230 N.C. 707, 55 S.E. 2d 462 (1949), the deceased, who lived on the north side of the road, crossed the highway to go to her mailbox. As she crossed the highway, two heavily loaded oil trucks were approaching from the west, traveling at about forty-five or fifty miles per hour. The first truck passed the deceased. As the second truck approached, deceased was standing at her mailbox on the shoulder of the road, apparently oblivious of the approach of the second truck. When this truck, operated by defendant, was within fifteen or twenty feet of the deceased, she turned suddenly and "started back across the highway in a fast walk." Defendant swerved his truck to the left in an attempt to avoid striking her, but the rear-view

mirror on the right side struck her head, and her body struck the corner of the truck to the rear of the cab. In reversing the trial court's entering judgment as of nonsuit, Justice Barnhill (later Chief Justice), writing for the Court, stated:

> Of course it was the duty of the deceased to look before she started back across the highway. Even so, under the circumstances here disclosed, her failure so to do may not be said to constitute contributory negligence as a matter of law. It is for the jury to say whether her neglect in this respect was one of the proximate causes of her injury and death. [Citation omitted.]

Id. at 709, 55 S.E. 2d at 464.

[1] Applying these decisions and the applicable rules of law to the case *sub judice*, we first conclude that there is evidence in the record of defendant's negligence from which a jury could conclude that it was a proximate cause of the accident. Plaintiff stated in her deposition that in her opinion defendant was speeding. This evidence must be taken as true at this juncture and suffices to make the question as to whether defendant's negligence was a proximate cause of the accident one for the jury. *Stephens v. Oil Co.*, 259 N.C. 456, 131 S.E. 2d 39 (1963).

The motion for summary judgment also presents the question of whether plaintiff on this evidence was contributorily negligent as a matter of law. Here, no evidence was presented concerning the distance of defendant's car from plaintiff, when seen at either the top or bottom of the hill. Thus, we cannot say that plaintiff was contributorily negligent as a matter of law in either starting to walk across the highway or later increasing her pace. Clearly plaintiff in the exercise of reasonable care had a duty under *Garmon v. Thomas, supra*, and other cases to keep a "timely lookout" for her own safety. In the instant case, plaintiff looked as she got out of the car, again when she started to cross, and for a third time when she was over halfway across the road. These facts can be distinguished from those in *Blake v. Mallard, supra*, and similar cases where the plaintiff clearly failed to keep a proper lookout. Moreover, once plaintiff had realized that defendant was approaching at a high speed, she attempted to and almost succeeded in getting out of his path, unlike the plaintiff in *Anderson v. Carter, supra.*

On this evidence we are unable to say that plaintiff was contributorily negligent as a matter of law, and therefore summary judgment was improvidently granted by the trial court.

[2] Although we are of the opinion that the result reached by the Court of Appeals is correct, we note that there are some statements in the opinion which require clarification.

The Court of Appeals correctly stated:

> It is the duty of a pedestrian crossing a roadway at a point other than a crosswalk to yield the right of way to a motor vehicle. A failure to do so is contributory negligence. *If the only inference that can be drawn from the evidence is that this contributory negligence is a proximate cause* of the accident, a pedestrian cannot recover. [Emphasis added.]

This statement is in substantial accord with the correct statement of the law hereinabove quoted from *Blake v. Mallard, supra.* However, we believe that the Court of Appeals incorrectly stated that:

> As to whether the plaintiff's failure to yield the right of way must be held contributory negligence as a matter of law, we believe the cases hold that if a pedestrian steps into a roadway in such a manner that the *only* reasonable inference the jury can make is that *the accident is unavoidable regardless of the vehicle driver's negligence the pedestrian cannot recover.* [Emphasis added.]

In applying the law to the facts, the Court of Appeals again stated, "According to the evidence as forecast, the plaintiff did not enter the roadway at a point at which an accident *was unavoidable regardless of the negligence* of Michael George Moore." [Emphasis added.)

Both of these observations by the Court of Appeals suggest that the inference of contributory negligence arising from the evidence must lead *only* to the conclusion that the accident was unavoidable and that the negligence of a pedestrian who crosses a roadway at a point other than a crosswalk must be the *sole* proximate cause of his injury. This is an incorrect statement of the law in North Carolina. Whether plaintiff's actions were such as to make the accident unavoidable is not the test for granting or de-

nying summary judgment. The correct rule of law is that summary judgment may be properly entered against a plaintiff pedestrian only when "all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible." *Blake v. Mallard, supra. See also Price v. Miller*, 271 N.C. 690, 157 S.E. 2d 347 (1967); *Holland v. Malpass*, 255 N.C. 395, 121 S.E. 2d 576 (1961).

The decision of the Court of Appeals, as modified, is affirmed.

Modified and affirmed.

NATIONAL MORTGAGE CORPORATION v. AMERICAN TITLE INSURANCE COMPANY

No. 81

(Filed 1 February 1980)

1. **Judgments § 36— collateral estoppel by judgment—identity of parties**

In order for collateral estoppel by judgment to apply, the parties in the instant case must be identical to or in privity with the parties in the prior action.

2. **Insurance § 148— title insurance—defects in title when issued**

Nothing else appearing, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title which are in existence at the time the insured takes his title.

3. **Insurance § 148— title insurance—coverage provided**

Where a policy of title insurance issued by defendant insured the lien of plaintiff lender's deed of trust on property leased by the owners to the borrower "all as of the 18th day of July, 1969, at 12:26 p.m. the effective date of this policy" and excluded from coverage defects, liens, encumbrances, adverse claims against the title as insured or other matters "attaching or created subsequent to the date hereof," the policy only insured (1) that on 18 July 1969 fee simple title was vested in the lessors, and (2) that an agreement subordinating the lessors' fee simple title and the deed of trust to plaintiff were sufficient on that date to give plaintiff a first lien on the property.

4. **Insurance § 148— title insurance—loss of lien of deed of trust—matters not in existence when policy issued**

Plaintiff lender was not entitled to recover under its policy of title insurance protecting plaintiff from defects in title on 18 July 1969 for losses it

allegedly suffered by reason of the invalidity of the lien of its deed of trust where one of the conditions imposed by the lessors of the land in question for their subordination agreement to permit plaintiff's deed of trust to become a first lien on their property was that proceeds of loans secured by said deed of trust would be used by the lessee for the construction of improvements on the land; plaintiff's disbursement of the loan proceeds on 24 July 1969 before any construction began and the subsequent misappropriation of these funds caused the nullification of the subordination agreement and loss of plaintiff's lien on the property; and the failure of the subordination agreement and the consequent loss of plaintiff's lien thus cannot be attributed to matters in existence on the date the policy was issued.

DEFENDANT appeals from decision of Court of Appeals, 41 N.C. App. 613, 255 S.E. 2d 622 (1979), reversing judgment of *McKinnon, J.*, entered 28 January 1978 in ORANGE Superior Court.

Plaintiff sues under its policy of title insurance with defendant for losses it allegedly suffered by reason of the invalidity of the lien of a deed of trust held by plaintiff on two tracts of land in Orange County, hereafter referred to as the Abernethy property.

No request for a jury trial having been made by either party, the case was duly calendared and called for trial before the Honorable Henry A. McKinnon, Jr., presiding judge, who, after hearing testimony offered by plaintiff and considering documentary evidence offered by both parties, made findings of fact, conclusions of law, and entered judgment in favor of defendant.

Neither party has excepted to the findings of fact made by the trial court. These findings tend to show, in pertinent part, that Jonas Kessing, lessee, held a 60-year lease from M. A. Abernethy and wife Minna K. Abernethy, lessors, to two undeveloped tracts of land on Franklin Street in Chapel Hill owned by the Abernethys. The lease was executed on 15 May 1967 and recorded on 12 July 1968 in the Orange County Registry. Lessee's interest was subsequently assigned to Gordon L. Blackwell and was then assigned by Mr. Blackwell to Jonas W. Kessing Company. Paragraphs 10a and 10b of the lease provide for the subordination of the fee simple title of lessor, and read as follows:

> "10a. The Lessor agrees to subordinate and subject its fee simple title in and to the premises to the lien of any mortgages or deeds of trust placed on the premises by the

Lessee to secure construction and permanent financing, including primary financing, for the erection, furnishing and equipping of improvements on the premises provided that under no circumstances shall the maturity date of any such mortgage or deed of trust extend beyond the fifty-ninth year of the term hereof; and at the request of the Lessee will execute any mortgage deed of trust or subordination agreement to effectuate the provisions of this paragraph.

10b. The Lessor shall not be personally responsible for the payment of any such indebtedness secured by the Lessee for the erection of improvements on the premises, and that such financing shall not exceed the actual cost of the aforementioned improvements and equipment."

Prior to 30 June 1969 Jonas W. Kessing Company and National Mortgage Corporation, plaintiff, entered into an agreement and loan commitment whereby plaintiff agreed to make a loan in the amount of $250,000 to be secured in part by a first deed of trust on the Abernethy property on which Jonas W. Kessing Company held the lease. According to Kessing, the purpose of the loan was to build a theater and shops on the Abernethy property.

By an instrument executed on 8 July 1969 at the request of Kessing, Mr. and Mrs. Abernethy agreed to subordinate their fee simple title in the Abernethy property to a deed of trust from the lessee, Jonas W. Kessing Company, to plaintiff, which was to secure the loan being made by plaintiff to Kessing. The subordination agreement stated that the loan being made to Kessing was "for the purpose of erecting certain improvements upon [the Abernethy property]." Additionally, the subordination agreement stated that except for the subordination of the Abernethys' fee simple title, the lease agreement between the Abernethys and Kessing was "to remain in full force and effect." It was known to all parties that at least $125,000 of the loan proceeds was for the construction of improvements on the Abernethy property and it was contemplated that disbursements of the loan proceeds would be made as construction progressed.

The subordination agreement was recorded on 18 July 1969, at 12:23 p.m. The deed of trust giving plaintiff a first lien on the Abernethy property was recorded on 18 July 1969 at 12:26 p.m. By an instrument recorded on 18 July 1969 at 12:31 p.m., Jonas

W. Kessing Company assigned its interest as lessee in the Abernethy property to Village Associates of Chapel Hill.

On 24 July 1969 plaintiff authorized its local attorney, Ted R. Reynolds, to disburse $125,000 to Village Associates of Chapel Hill, an entity controlled by Jonas Kessing in which plaintiff held a 25% interest as limited partner. Mr. Reynolds, in a telephone conversation with Mr. Greene, plaintiff's president, explained to him that the direct disbursement of funds to Mr. Kessing prior to commencement of construction seemed unusual. "I was not in my practice used to disbursing all the money before construction began . . . . [Mr. Greene] thanked me for my concern [and] told me to go right ahead . . . ." Accordingly, on 24 July 1969 Mr. Reynolds disbursed the $125,000 to Village Associates of Chapel Hill. No construction of improvements was begun or funds expended for improvements on the Abernethy property and apparently Jonas W. Kessing misappropriated the $125,000 disbursed to Village Associates of Chapel Hill.

On 1 November 1973, Jonas W. Kessing Company defaulted on the $250,000 promissory note to plaintiff. On 10 December 1973, the trustees for National Mortgage under the subject deed of trust commenced foreclosure proceedings of the Abernethy property. The Abernethys filed suit in January, 1974 to enjoin the foreclosure and declare the deed of trust invalid. Summary judgment was entered in favor of the Abernethys by the Honorable E. Maurice Braswell, presiding judge, on 24 February 1975 in Orange County Superior Court. The Braswell judgment declared in pertinent part that the subordination agreement executed by the Abernethys was null and void and that, as a result, the deed of trust given to plaintiff by Kessing conveyed no valid lien on the Abernethy property. No appeal was taken from this judgment for a consideration of $10,000 paid by the Abernethys to plaintiff.

National Mortgage Corporation thereafter commenced the instant action against American Title Insurance Company. National Mortgage contends that the losses it suffered by reason of the invalidity of its lien on the Abernethy property were within the coverage of the policy of title insurance issued by defendant. The trial court in this case determined that the irregular disbursement schedule authorized by National Mortgage caused the loss suffered by plaintiff thus excluding coverage under the policy.

The Court of Appeals reversed, Clark, J., dissenting, holding that the policy of title insurance did not exclude coverage under the facts of this case. Defendant appealed to this Court as of right pursuant to the provisions of G.S. 7A-30(2).

Midgette, Page & Higgins, by Keith D. Lembo, attorneys for defendant appellant.

Allen, Hudson & Wright, by James Allen, Jr., Marcus Hudson and Katherine S. Wright, attorneys for plaintiff appellee.

Sanford, Adams, McCullough & Beard, by E. D. Gaskins, Jr., Charles Montgomery, Peter J. Sarda, Catharine B. Arrowood, for amicus curiae, North Carolina Land Title Association.

HUSKINS, Justice.

This action is based upon a policy of title insurance issued by defendant. Plaintiff seeks to recover losses allegedly suffered by it by reason of the invalidity of the lien of its deed of trust on the Abernethy property. National Mortgage's lien has been previously declared invalid in a separate action brought by Mr. and Mrs. Abernethy against National Mortgage to enjoin foreclosure proceedings and declare National Mortgage's deed of trust invalid. In that case, Judge Braswell entered summary judgment for the Abernethys. The Braswell judgment declares, in pertinent part, that the subordination agreement executed by the Abernethys is null and void and that, as a result, the deed of trust to National Mortgage by Jonas Kessing Company conveys no valid lien on the Abernethy property.

[1] At the outset we note that the Braswell judgment does not collaterally estop the parties in this case from litigating any issues of law or fact relating to the validity of National Mortgage's lien on the Abernethy property. In order for collateral estoppel to apply, the parties in the instant case must be identical to or in privity with the parties to the Braswell judgment. *See, King v. Grindstaff,* 284 N.C. 348, 200 S.E. 2d 799 (1973); *Masters v. Dunstan,* 256 N.C. 520, 124 S.E. 2d 574 (1962). Defendant in the present case, American Title Insurance Company, was not a party to the Braswell judgment. Nor did American Title stand in privity with the Abernethys or National Mortgage with respect to the property rights being adjudicated in the Braswell judgment, *i.e.*,

title to the Abernethy property. Accordingly, the parties in this case are free to litigate any issues of law or fact relating to the validity of National Mortgage's lien on the Abernethy property.

In the instant case both National Mortgage and American Title agree that the subordination agreement executed by the Abernethys is null and void as a result of which National Mortgage's lien on the Abernethy property is no longer valid. However, the parties disagree as to whether the events which caused the nullification of the subordination agreement and thus the loss of the lien are within the coverage of the title insurance policy. Consequently, the dispositive question on this appeal is whether the events which caused nullification of the subordination agreement were covered by the policy.

Review of the pertinent facts indicates that Mr. and Mrs. Abernethy held fee simple title to two undeveloped lots in Chapel Hill which they leased for a 60-year term to Jonas W. Kessing and by subsequent assignments of lessee's interest to the Jonas W. Kessing Company. The Abernethy-Kessing lease provides in pertinent part that lessors will subordinate their fee simple title to the lien of any deed of trust placed on the property by lessee to secure construction financing for the erection, furnishing and equipping of improvements on the premises. Financing was not to exceed the actual costs of the aforementioned improvements. Pursuant to these provisions of the lease, Jonas W. Kessing Company and the Abernethys executed a subordination agreement in which the Abernethys subordinated their fee simple title to a deed of trust in favor of National Mortgage. The subordination agreement incorporated the provisions of the Abernethy-Kessing lease. Subsequently, Jonas W. Kessing Company executed a deed of trust in favor of National Mortgage, giving it a first lien on the Abernethy property. The subordination agreement and deed of trust were recorded respectively at 12:23 p.m. and 12:26 p.m. on 18 July 1969.

[2] Nothing else appearing, title insurance operates to protect a purchaser or mortgagee against defects in or encumbrances on title *which are in existence at the time the insured takes his title. Mayers v. Van Schaick*, 268 N.Y. 320, 197 N.E. 296 (1935); *Trenton Potteries Co. v. Title Guarantee & Trust Co.*, 176 N.Y. 65, 68 N.E. 132 (1903); *Strass v. District-Realty Title Insurance Corp.*, 31 Md.

App. 690, 358 A. 2d 251, *cert. denied*, 278 Md. 736 (1976); *Butcher v. Burton Abstract Title Co.*, 52 Mich. App. 98, 216 N.W. 2d 434, *cert. denied*, 419 U.S. 998 (1974); 9 Appleman, Insurance Law and Practice, § 5208 at 9 (1943). "It is not prospective in its operation and has no relation to liens or requirements arising thereafter." *Mayers v. Van Schaick*, supra. "The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy is designed to save him harmless from any loss through defects, liens, or encumbrances that may affect or burden his title when he takes it." *Trenton Potteries v. Title Guarantee & Trust Co.*, supra.

[3] Here, the policy of title insurance issued by defendant insured the lien of plaintiff's deed of trust on the Abernethy property "all as of the 18th day of July, 1969, at 12:26 p.m. the effective date of this policy." This affirmative statement of coverage is also restated in the negative as an exclusion from coverage in subparagraph 3(d)(4) of the policy, which specifically excludes from coverage defects, liens other than certain statutory liens for labors and materials, encumbrances, adverse claims against the title as insured or other matters "attaching or created subsequent to the date hereof." The objective of this coverage is to protect against defects or other matters in existence at the time the policy is issued, unless otherwise excluded, which may, upon discovery at a later time, invalidate plaintiff's lien on the Abernethy property. Thus, the policy only insures: (1) that on 18 July 1969 fee simple title is vested in the Abernethys, and (2) that the subordination agreement and deed of trust are sufficient *on that date* to give plaintiff a first lien on the property. The policy does not insure against a breach of the subordination agreement by the Jonas W. Kessing Company or Village Associates of Chapel Hill *after* 18 July 1969 which invalidates the lien of plaintiff's deed of trust.

In the instant case the events which breached the conditions of the subordination agreement and rendered it ineffective occurred outside the stated coverage of the policy. On 24 July 1969 plaintiff authorized the direct disbursement to Village Associates of Chapel Hill, a limited partnership controlled by Jonas Kessing, of $125,000 in loan proceeds which plaintiff knew were required to be used to construct improvements on the Abernethy property.

This disbursement was knowingly made by plaintiff prior to the commencement of *any* construction on the property. No construction was ever begun nor were any funds ever expended for improvements on the Abernethy lots. Apparently, the moneys disbursed to Village Associates of Chapel Hill were misappropriated.

[4] One of the conditions imposed by the Abernethys in return for their agreement to permit plaintiff's deed of trust to become a first lien on their property was that the proceeds of loans secured by said deed of trust would be utilized *for the construction of improvements on their property.* The 24 July 1969 disbursement of loan proceeds in the sum of $125,000 and the subsequent misappropriation of these funds made compliance with this condition impossible and resulted in the nullification of the Abernethy subordination agreement and the loss of plaintiff's first lien on the Abernethy property.

Due consideration of the record impels the conclusion that the 24 July 1969 disbursement and the subsequent misappropriation of the loan proceeds caused the nullification of the subordination agreement and the loss of plaintiff's lien on the Abernethy property. There were no breaches of the subordination agreement as of 18 July 1969. Nor were there any fatal defects in the drafting or execution of the agreement on or prior to that date. Thus, the failure of the subordination agreement and the consequent loss of the lien cannot be attributed to matters in existence on the date the policy was issued. We hold, therefore, that the loss incurred by insured is not covered by the policy of title insurance sued upon in this case.

We note in passing that the loss suffered by plaintiff may be excluded from coverage under certain exclusionary provisions of the policy which are quoted below.

> "3. *Exclusions from the Coverage of this Policy.* This policy does not insure against loss or damage by reason of the following:
>
> * * * *
>
> (d) *Defects* . . . or other matters (1) created . . . by the Insured claiming loss or damage . . . ."

* * * *

"5. Pending disbursement of the full proceeds of the loan secured by the Deed of Trust described in Schedule 'A' hereof, this policy insures only to the extent of the amount actually disbursed, but increases as each disbursement is made in good faith, and without knowledge of any defects in, or objections to, the title, up to the face amount of the policy." Schedule B.

Since we decide the case on other grounds we need not determine whether these provisions exclude from coverage the loss in question.

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

The case is remanded to the Court of Appeals for further remand to the Superior Court of Orange County for entry of judgment in accord with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. SAMUEL LEE SIMPSON

No. 117

(Filed 1 February 1980)

1. Burglary and Unlawful Breakings § 7— first degree burglary—failure to submit lesser included offense—no error

The trial court in a first degree burglary prosecution did not err in failing to submit misdemeanor or nonfelonious breaking and entering as a permissible verdict where the State's evidence positively identified defendant as the man seen by the burglary victim in her home; defendant gained entrance to the occupied dwelling by opening a window which theretofore had been closed; a television was missing from the home; when apprehended by one of the burglary victims, defendant's first remark was that he did not take the television; after further denials defendant led the victim to an alleyway and removed the television from its hiding place; when apprehended, defendant had a "white cloth" covering his head which was identified by the victims as a shirt belonging to their daughter; defendant's evidence tended to show that he was merely walking by the crime scene when one of the victims came out of the dwelling and grabbed him, that he had never been in the dwelling in question,

and that he did not burglarize it; and there was no evidence of nonfelonious intent at the time of the breaking and entry.

2. **Burglary and Unlawful Breakings § 6.2— first degree burglary—felonious intent—instructions proper**

The trial court in a first degree burglary case properly defined intent as a mental attitude which could be inferred from the act of larceny itself, the nature and conduct of defendant, and other relevant circumstances.

3. **Burglary and Unlawful Breakings § 6.3— first degree burglary—underlying felony of larceny—failure to define not erroneous**

The use of the word "larceny" as it is commonly used and understood by the general public was sufficient in this case to define for the jury the requisite felonious intent needed to support a conviction of burglary, and there was no reasonable possibility that failure to define "larceny" contributed to defendant's conviction or that a different result would have likely ensued had the word been defined.

4. **Burglary and Unlawful Breakings § 6.3— first degree burglary—underlying felony of larceny—necessity for definition**

The decision of the Court of Appeals in *State v. Foust*, 40 N.C. App. 71, holding that the court's failure in a burglary case to define the term larceny in its instructions is "an omission which [is] prejudicial to defendant and erroneous under our case law" is too broad, since the failure to define larceny in burglary cases in which larceny is specified as the felony the accused intended to commit is not always prejudicial and does not invariably require a new trial; rather, the extent of the definition required depends upon the evidence in the particular case.

DEFENDANT appeals from judgment of *Allen, J.*, 9 April 1979 Criminal Session, MECKLENBURG Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with first degree burglary on 3 February 1979 by entering the occupied dwelling of Cynthia and Robert Johnson located at 2944 Reid Avenue in Charlotte in the nighttime with the intent to commit a felony therein, to wit, larceny.

The State's evidence tends to show that around 5:30 a.m., on 3 February 1979, Cynthia Johnson was awakened by a man kneeling beside her bed with his hand under the cover on her person. She opened her eyes and saw a bald-headed man with a beard and with a white cloth on his head. The man arose, looked at her, and walked out of the room. Mrs. Johnson awakened her husband, Roger Johnson, who immediately went into the living room and noted that the doors were still locked but that one window, theretofore closed, was open and the television was missing. Mr.

Johnson went to the door and saw a man running down the street. The man then turned around and started coming back toward the Johnson house. The man had his head covered with a white cloth in a manner identical to the man who had been in the Johnson house. Mr. Johnson went outside and grabbed the man who spontaneously said that he did not take the television. That man was the defendant. A neighbor called police officers and defendant begged Mr. Johnson to let him go, saying he would take Mr. Johnson to the television. They walked down the street to an alleyway where the television was sitting behind an old car. Defendant carried it part of the way back to the Johnson house, put it down and tried to run away. Officers who had arrived on the scene placed him under arrest. The "white cloth" covering defendant's head was identified by Mr. and Mrs. Johnson as a shirt belonging to their two-year-old daughter. At trial, Mrs. Johnson identified defendant as the man she saw in her bedroom when she was awakened.

Defendant testified that he had been walking up the street and "saw three dudes running down the street"; that he just kept on walking; that he saw a television sitting by a car but continued walking because he did not want to be involved. Defendant said he knew nothing about a burglary until Mr. Johnson grabbed him. He insisted that he did not burglarize the Johnson home and swore that he had never been in it. He admitted on cross-examination that he had been convicted of larceny from an automobile in 1954 and served four months; house breaking and larceny in 1954 and served one to two years; convicted of house breaking and larceny and served one to three years in 1956; of safecracking and robbery in South Carolina in 1958 for which he served time; of store breaking and larceny in 1965 for which he served three to five years; had been convicted of breaking and entering in 1971; that he served time for an escape from prison in 1971; and had been convicted of misdemeanor breaking and entering in 1977.

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

Rufus L. Edmisten, Attorney General, by Grayson G. Kelley, Associate Attorney, for the State.

Kermit D. McGinnis, Attorney for defendant appellant.

HUSKINS, Justice.

[1] The trial judge instructed the jury to return a verdict of guilty of first degree burglary or not guilty. Defendant contends the court erred in failing to submit misdemeanor or nonfelonious breaking and entering as a permissible verdict and this constitutes his first assignment of error.

Defendant argues that misdemeanor or nonfelonious breaking and entering is a lesser included offense of first degree burglary; that the distinguishing factor between first degree burglary and nonfelonious breaking and entering is the intent of the defendant at the time he broke and entered; that if the intent is nonfelonious, the breaking and entering could not constitute first degree burglary even though the building unlawfully entered during the nighttime was an occupied dwelling. According to defendant, there was evidence in the record of nonfelonious intent at the time of the breaking and entry. Defendant therefore contends that misdemeanor or nonfelonious breaking and entering is a lesser included offense of the crime charged which should have been submitted to the jury.

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). The bill of indictment in this case alleges that larceny was the felony defendant intended to commit.

Felonious intent is an essential element of burglary which the State must allege and prove, and the felonious intent proven must be the felonious intent alleged. *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965).

> ". . . The particular felony which it is alleged the accused intended to commit must be specified. . . . The felony intended, however, need not be set out as fully and specifically as would be required in an indictment for the actual commission

of said felony, where the State is relying only upon the charge of burglary. It is ordinarily sufficient to state the intended offense generally, as by alleging an intent . . . to commit therein the crime of larceny, rape, or arson. [Citations omitted.]" *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923). *Accord, State v. Wells*, supra.

The trial court is required to submit lesser included degrees of the crime charged in the indictment when and only when there is evidence of guilt of the lesser degrees. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235 (1971). The presence of such evidence is the determinative factor. *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954). Where all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show the commission of a crime of lesser degree, the principle does not apply and it would be erroneous for the court to charge on the unsupported lesser degree. *State v. Griffin*, supra; *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Manning*, 221 N.C. 70, 18 S.E. 2d 821 (1942).

The record in this case contains no evidence tending to show that defendant may be guilty of a lesser included offense. The State's evidence positively identifies defendant as the man seen by Mrs. Johnson in her bedroom around 5:30 a.m. on the night of 3 February 1979. It further tends to show that he gained entrance to the occupied dwelling by opening a window which theretofore had been closed and that the television set was missing. When apprehended by Mr. Johnson, defendant's first remark was that he did not take the television set. However, after further denials he led Mr. Johnson to an alleyway and removed the television from its hiding place behind an old car. When apprehended, defendant had a "white cloth" covering his head which was identified by Mr. and Mrs. Johnson as a shirt belonging to their two-year-old daughter. Thus, the State's evidence strongly supports the charge that defendant broke and entered in the nighttime the occupied dwelling of the Johnsons with intent to commit the felony of larceny therein and, in fact, stole the television and carried it away. On the other hand, defendant's evidence tends to show that he was merely walking by the Johnson dwelling when Mr. Johnson came out and grabbed him; that he had never been in the Johnson home and did not burglarize it. There is not a scintilla of

evidence from which the jury could find defendant guilty of nonfelonious breaking and entering, and the court properly refused to instruct the jury with reference thereto. An unexplained breaking and entering into a dwelling house in the nighttime is in itself sufficient to sustain a verdict that the breaking and entering was done with the intent to commit larceny rather than some other felony. *State v. Hedrick*, 289 N.C. 232, 221 S.E. 2d 350 (1976); *State v. Accor and Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970). Thus, defendant was either guilty of burglary in the first degree or not guilty of any offense triable under the bill of indictment. If he committed an assault upon Mrs. Johnson as the State's evidence tends to show, that constitutes a *separate offense*, not a lesser included degree of burglary, the crime charged in the bill of indictment. This assignment of error is overruled.

Defendant next contends the court erred in its jury instructions by failing to define burglary correctly in that: (1) it failed to define "intent" and (2) it failed to define "larceny." This constitutes defendant's second assignment of error. For reasons which follow, we hold the assignment has no merit.

[2] The court instructed the jury that burglary in the first degree "is the breaking and entering of the occupied dwelling house of another without his or her consent in the nighttime with the intent to commit larceny." This definition of burglary is correct. "The crime of burglary is complete when one person breaks and enters the occupied dwelling of another, in the nighttime, with the requisite ulterior intent to commit the felony designated in the bill of indictment . . . ." *State v. Allen*, 297 N.C. 429, 255 S.E. 2d 362 (1979). *Accord, State v. Wells, supra*; *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974).

With respect to defendant's intent the court charged as follows:

> "Now I charge for you to find the defendant guilty of burglary in the first degree, the State must prove . . . that at the time of the breaking and entering, the defendant intended to commit larceny. Now a person acts intentionally for the purpose of this crime when it is his intent to commit larceny. An intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances [from] which [intent] may be inferred. An intent

to commit larceny may be inferred from the act itself, the nature and conduct of the defendant, and other relevant circumstances which you find from the evidence that has been tendered here in the last few days."

We think the charge on felonious intent was sufficient to enable the jury, in its deliberations, to arrive at a verdict with a correct understanding of the law relative to felonious intent. The primary purpose of a charge is to aid the jury in arriving at a correct verdict according to law. *Lewis v. Watson*, 229 N.C. 20, 47 S.E. 2d 484 (1948). "The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved." *State v. Friddle*, 223 N.C. 258, 25 S.E. 2d 751 (1943). *Accord, State v. Frank*, 284 N.C. 137, 200 S.E. 2d 169 (1973). We hold that the charge on intent complies with that objective.

[3] Assuming *arguendo* that the court's failure to define larceny was erroneous, which is not conceded, we hold that such failure was not prejudicial on the facts of this case.

The whole thrust of the State's evidence revolves around the theft of the television set. When Mr. Johnson grabbed defendant in the street in front of the Johnson residence, "the first thing that he said was that he didn't have my t.v." After further denials defendant led Mr. Johnson to the television in an alleyway beside an old car. In his own testimony, defendant denied taking the television. He testified that on the night in question he saw "three dudes" run down the street and turn into the alley where the television was found, thus leaving the inference that the "three dudes" had stolen the television. In our view, no juror could have listened to the testimony regarding the removal and return of the Johnson television set without understanding that the word "larceny" referred to the theft of that television.

Defendant was on trial for burglary—not larceny. Intent to commit larceny is the *felonious intent* supporting the charge of burglary. In this context, the court in defining felonious intent used the word "larceny" as a shorthand statement of its definition, *i.e.*, to steal, take and carry away the goods of another with the intent to deprive the owner of his goods permanently and to

convert same to the use of the taker. In the instant case, the jury did not need a formal definition of the term "larceny" to understand its meaning and to apply that meaning to the evidence. The use of the word "larceny" as it is commonly used and understood by the general public was sufficient in this case to define for the jury the requisite felonious intent needed to support a conviction of burglary. *See generally, State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447 (1970). There is no reasonable possibility that failure to define "larceny" contributed to defendant's conviction or that a different result would have likely ensued had the word been defined.

[4] In our opinion, the decision of the Court of Appeals in *State v. Foust*, 40 N.C. App. 71, 251 S.E. 2d 893 (1979), a burglary case, holding that the court's failure to define the term larceny in its instructions is "an omission which [is] prejudicial to defendant and erroneous under our case law," is too broad. The failure to define larceny in burglary cases in which larceny is specified as the felony the accused intended to commit is not *always* prejudicial and does not *invariably* require a new trial. The extent of the definition required depends upon the evidence in the particular case. *State v. Spratt*, 265 N.C. 524, 144 S.E. 2d 569 (1965). "In some cases, as where the defense is an alibi or the evidence develops no direct issue or contention that the taking was under a bona fide claim of right or was without any intent to steal, 'felonious intent' may be simply defined as an 'intent to rob' or 'intent to steal.' On the other hand, where the evidence raises a direct issue as to the intent or purpose of the taking, a more comprehensive definition is required." *State v. Mundy*, 265 N.C. 528, 144 S.E. 2d 572 (1965) (citations omitted). So it is also with respect to when, and to what extent, the word larceny must be defined and explained in burglary cases. In the case before us, there was no necessity for any definition or explanation of the word "larceny" because there was no evidence suggesting the television was borrowed, or taken for some temporary purpose, or otherwise negating a taking with felonious intent to steal. Defendant's second assignment of error is overruled.

Finally, defendant contends the court committed reversible error by erroneously recapitulating portions of the evidence in its jury instructions. We have reviewed the entire charge and, in our view, the slight variations or inadvertences in the recapitulation

are immaterial. In any event, defendant did not object at trial to the recapitulation. "[I]t is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal." *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970) and cases cited therein.

Evidence of defendant's guilt is plenary and persuasive. He has failed to show prejudicial error on this appeal. The verdict and judgment must therefore be upheld.

No error.

STATE OF NORTH CAROLINA v. KNO MICHELLE RIVENS

No. 100

(Filed 1 February 1980)

1. **Robbery § 5.4— armed robbery—inability to state firearm was real—instruction on common law robbery not required—retroactivity of decision**

The decision of *State v. Thompson*, 297 N.C. 285, which overruled the decision of *State v. Bailey*, 278 N.C. 80, and held that when the State offers evidence in an armed robbery case that the robbery was attempted or accomplished by the use or threatened use of what appeared to the victim to be a firearm or other dangerous weapon, evidence elicited on cross-examination that the witness or witnesses could not positively testify that the instrument was in fact a firearm or dangerous weapon is not of sufficient probative value to warrant submission of the lesser included offense of common law robbery, *is held* to apply retroactively to a case which was in the appellate division when *State v. Thompson* was decided.

2. **Constitutional Law § 33— retroactive decision—no violation of ex post facto clause**

There is no violation of the *ex post facto* clause in either the U.S. Constitution or the N.C. Constitution when a court decision is applied retroactively because the clause applies to legislative and not judicial action. Nor is there a violation of due process or equal protection when a decision is applied retroactively.

ON petition for a writ of certiorari by the State from the decision of the Court of Appeals, 41 N.C. App. 404, 255 S.E. 2d

335 (1979) (unpublished opinion by *Mitchell, J.* with *Parker* and *Martin [Harry C.], JJ.* concurring), which granted the defendant a new trial. *Walker (Hal H.), J.* presided at the trial of this action at the 29 August 1978 Session of ROWAN County Superior Court.

Defendant was charged in an indictment, proper in form, with robbery with a firearm in violation of G.S. 14-87. The State's evidence tended to show that the robbery victim, Clarence Christy, left a Quik Stop store in Kannapolis at 11:30 p.m. on 21 July 1978. He got in his car and pulled across the street to his home at 1306 Sides Avenue. When he got out of his car, a black man approached and pointed a pistol at him. Some streetlights located approximately seventy-five yards from the scene provided lighting, but this lighting was partially blocked by some shade trees.

The man told Christy to turn around. He then removed Christy's wallet which contained more than $100. Another black man approached and stated that they wre going to put Christy in the trunk of his own car. The first man then demanded that Christy give them the keys to his car. The man realized that he had already taken Christy's keys so he instructed him to walk towards the rear of his car. As he did so, Christy screamed, shoved one of the men and ran away. The two men got into Christy's car.

Deputy Sheriff Ronnie Terry heard Christy's scream and went to the scene. As the two men drove away, Terry pursued on foot. He fired two shots at the driver's side of the car. The two men got out and ran. Terry caught the defendant, but the other man escaped. Defendant was unarmed and no weapon was found in the car or at the scene. Terry was unable to state whether the other man was armed.

The trial judge instructed on robbery with a firearm and the jury found defendant guilty of this offense. The Court of Appeals reversed the conviction and ordered a new trial for failure by the trial judge to instruct on the lesser included offense of common law robbery.

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

Attorney General Rufus L. Edmisten by Assistant Attorney General Jo Anne Sanford for the State.

William V. Bost for the defendant.

COPELAND, Justice.

[1] In awarding the defendant a new trial in an unpublished opinion filed on 15 May 1979, the Court of Appeals relied on a decision by this Court announced in 1971, *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971). Three days after the Court of Appeals filed its opinion in this case, this Court overruled *Bailey* in the decision of *State v. Thompson*, 297 N.C. 285, 254 S.E. 2d 526 (1979).

The State argues that the case *sub judice* is factually indistinguishable from *Thompson* and thus, we should apply *Thompson* as precedent for this case and conclude that no new trial is required. Defendant argues that we are prohibited from doing so by the *ex post facto* clauses in the North Carolina and United States Constitutions.

We agree with the State that this case is indistinguishable from *Thompson*. Robbery is the taking with intent to steal, of personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation. *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966). When firearms or other dangerous weapons are used to perpetrate the robbery more severe punishment may be imposed. G.S. 14-87(a) (Cum. Supp. 1979); *see, State v. Smith, supra; State v. Stewart*, 255 N.C. 571, 122 S.E. 2d 355 (1961). Common law robbery is a lesser included offense of armed robbery. When evidence of common law robbery is present in the case, it is error for the court to fail to submit this lesser included offense to the jury. *State v. Wenrich*, 251 N.C. 460, 111 S.E. 2d 582 (1959).

In *Bailey*, this Court essentially held that the victim's inability to state whether the pistol used by the robber was a real gun or a toy gun raised an issue for the jury as to whether defendant had in his possession and used or threatened to use a firearm or other dangerous weapon to perpetrate the robbery. In *Thompson*, we were satisfied that a robbery victim should not have to force that issue during the course of the robbery in order to determine

the true character of the weapon. *See, State v. Thompson*, 39 N.C. App. 375, 250 S.E. 2d 710 (1977) (Erwin, J. dissenting). Thus, the following rule, which we today emphatically reaffirm, was stated as follows:

> "[W]hen the State offers evidence in an armed robbery case that the robbery was attempted or accomplished by the use or threatened use of what *appeared* to the victim to be a firearm or other dangerous weapon, evidence elicited on cross-examination that the witness or witnesses could not positively testify that the instrument used was in fact a firearm or dangerous weapon is not of sufficient probative value to warrant submission of the lesser included offense of common law robbery. When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be—a firearm or other dangerous weapon." *State v. Thompson, supra* at 289, 254 S.E. 2d at 528. (Emphasis in original.)

The following relevant testimony appears in the record in this case:

> "Q. Mr. Christy, could you see anything in that man's hand?
>
> A. There was enough light, looked like something shiny to me. I took it for a gun.
>
> Q. Where was that gun pointed?
>
> A. Towards me.
>
> Q. Was that gun a rifle or a pistol?
>
> A. Pistol.
>
> Q. Once you saw that pistol in that man's hand, did he say anything else to you?
>
> A. Told me to turn around. I didn't hesitate. I turned around.

* * *

Q. What happened then?

A. Well, this one had the gun in my back, or whatever it was.

* * *

Q. What, then, happened?

A. He made me get in the car and I set [sic] down on the seat and he put an object to my head and said, 'You better find them keys quick.'

* * *

Q. Where, at your head, was that object put?

A. Right along here.

Q. You're showing the back left side of your head above your left ear, is that correct?

A. Yes.

Q. What did that object feel like?

A. The barrel of a gun."

On cross-examination, Christy simply stated, "I felt like it was a gun." The case *sub judice* presents the same fact situation as in *Thompson*. The question remains whether we may apply the rule set forth in *Thompson* to this case.

A decision is wholly prospective in effect when it applies solely to fact situations arising after the filing date of the opinion. *Linkletter v. Walker*, 381 U.S. 618, 14 L.Ed. 2d 601, 85 S.Ct. 1731 (1965). Retroactive or retrospective application of a decision covers application of that decision to the following situations: (1) the parties and facts of the case in which the new rule is announced; (2) cases in which the factual event, trial and appeal are all at an end but in which a collateral attack is brought; (3) cases pending on appeal when the decision is announced; (4) cases awaiting trial; and (5) cases initiated in the future but arising from earlier occurrences. *See*, Annot., *Prospective or Retroactive Operation of Overruling Decision*, 10 A.L.R. 3d 1371 (1966).

This case was in the Court of Appeals awaiting certification to the trial court when our decision in *Thompson* was announced. On 4 June 1979, this case was certified by the Court of Appeals to the trial court for a new trial. The State's time period for seeking discretionary review expired on 19 June 1979. The State sought issuance of a writ of certiorari on 27 July 1979 and it was allowed by this Court on 23 August 1979.

In *Goodson v. Lehmon*, 225 N.C. 514, 35 S.E. 2d 623 (1945), it was held that a cause is not finally terminated by a decision by the appellate division when the case is certified back to the trial court for further action. There has not been final judgment until the authority of the trial court has been exercised by entering judgment in accordance with such opinion. Thus, this case may be considered as pending on appeal at the time the decision in *Thompson* was filed.

Decisions are generally presumed to operate retroactively. *Mason v. Nelson Cotton Co.*, 148 N.C. 492, 62 S.E. 625 (1908). Such overruling decisions are given solely prospective application only when there is compelling reason to do so. *Fitzgerald v. Meissner & Hicks, Inc.*, 38 Wis. 2d 571, 157 N.W. 2d 595 (1968); *In Re Kloppenberg's Estate*, 82 N.J. Super. 117, 196 A. 2d 800 (1964); *see generally*, Annot., *Retroactive or Merely Prospective Operation of New Rule Adopted by Court in Overruling Precedent—Federal Cases*, 14 L.Ed. 2d 992 (1966); Chief Justice Traynor (California Supreme Court), *Conflict of Laws in Time: The Sweep of New Rules in Criminal Law*, 1967 Duke L.J. 713. *See, e.g., State v. Harris*, 281 N.C. 542, 189 S.E. 2d 249 (1972) (retroactive application would disrupt the orderly administration of criminal justice); *Hill v. Brown*, 144 N.C. 117, 56 S.E. 693 (1907) (no retroactive effect because of reliance in entering contracts upon the law as interpreted in the overruled decision); *Hill v. Atlantic & N.C. Railroad Co.*, 143 N.C. 539, 55 S.E. 854 (1906) (no retroactive effect because property and contract rights were acquired on the basis of the former interpretation of a statute).

In *Linkletter v. Walker, supra*, it was stated after careful analysis of numerous state and federal decisions that decisions are applied retroactively without discussion while a case is on direct review and the various factors for determining whether a decision should be given only prospective effect are generally

discussed only when a collateral attack is brought. *Cf., State v. Bell*, 136 N.C. 674, 49 S.E. 163 (1904) (no retroactive application even to the parties in *Bell* because of reliance on the advice of counsel which was based on the overruled decision); *cf. also, Michigan v. Payne*, 412 U.S. 47, 36 L.Ed. 2d 736, 93 S.Ct. 1966 (1973) (rule of *North Carolina v. Pearce* not applied retroactively although *Payne* was pending on appeal when *Pearce* was decided).

In *Huddleston v. Dwyer*, 322 U.S. 232, 236, 88 L.Ed. 1246, 1249, 64 S.Ct. 1015, 1018 (1944) it was held that,

> "It is the duty of the federal appellate courts, as well as the trial court [in a diversity of citizenship case], to ascertain and apply the state law where, as in this case, it controls decision. *Meredith v. Winter Haven*, 320 U.S. 228. And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. 'Until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.' *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538, 543." *See also, Wichita Royalty Co. v. City National Bank of Wichita Falls*, 306 U.S. 103, 83 L.Ed. 515, 59 S.Ct. 420 (1939); *Madden v. Metropolitan Life Insurance Co.*, 138 F. 2d 708 (5th Cir. 1943), *cert. denied*, 322 U.S. 730 (1944); Annot., 151 A.L.R. 987 (1944).

Also, a court will apply a decision retroactively to other cases pending before that court at the time the overruling decision is announced. *See, e.g., McNerlin v. Denno*, 378 U.S. 575, 12 L.Ed. 2d 1041, 84 S.Ct. 1933 (1964) (rule in *Jackson v. Denno* applied retroactively to a pending case and the case was remanded for reconsideration in light of *Jackson*); *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963) (*Mapp* exclusionary rule applied retroactively to a pending case.) The rationale for applying a decision to other cases pending on appeal appears to be the realization that the pending case could just as easily have been the case in which the new rule was announced.

In making the determination as to retroactive application, no distinction is drawn between civil and criminal cases. *Linkletter v. Walker, supra.* Retroactive application is neither required nor prohibited by the United States Constitution. *Id.; Johnson v. New Jersey,* 384 U.S. 719, 16 L.Ed. 2d 882, 86 S.Ct. 1772, *rehearing denied,* 385 U.S. 890 (1966).

[2] There is no violation of the *ex post facto* clause in the United States Constitution when a decision is applied retroactively because the clause applies to legislative and not judicial action. *Frank v. Mangum,* 237 U.S. 309, 59 L.Ed. 969, 35 S.Ct. 582 (1915). We hold that the same is true with respect to the *ex post facto* clause in the North Carolina Constitution. A party has no vested right in a decision of this Court, *Mason v. Cotton Co., supra,* and there is no violation of due process, *Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 68 L.Ed. 382, 44 S.Ct. 197 (1924), *Patterson v. Colorado,* 205 U.S. 454, 51 L.Ed. 879, 27 S.Ct. 556 (1907), or equal protection, *Sunray Oil Co. v. Commissioner of Internal Revenue,* 147 F. 2d 962 (10th Cir.), *cert. denied,* 325 U.S. 861 (1945), in applying a decision retroactively. *See also, In re Will of Allis,* 6 Wis. 2d 1, 94 N.W. 2d 226 (1959). Thus, the determination as to the retroactive or prospective application of a decision is a matter of judicial policy for the states. *Haney v. City of Lexington,* 386 S.W. 2d 738 (Ky. 1964); *Benyard v. Wainwright,* 322 So. 2d 473 (Fla. 1975).

[1] We hold that the decision in *Thompson* applies retroactively to this case (which was in the appellate division when *Thompson* was decided) because there is no compelling reason why it should not apply. Defendant was either guilty or not guilty of robbery with a firearm. The jury found him guilty. From all of the above, it is evident that no injustice results from denying him the new trial the Court of Appeals had ordered for failure to submit the lesser included offense of common law robbery to the jury. The Court of Appeals is reversed.

Reversed and remanded.

STATE OF NORTH CAROLINA v. AUBREY LEE WHITT

No. 126

(Filed 1 February 1980)

1. **Criminal Law § 75.1; Arrest and Bail § 3.1— warrantless arrest—probable cause—admissibility of confession**

There was no merit to defendant's contention in a murder prosecution that his confession was secured as the result of an illegal, warrantless arrest, since officers had probable cause to believe that defendant had committed the felony of larceny of an automobile belonging to one of the murder victims and the officers therefore could properly arrest defendant.

2. **Criminal Law § 75.11— waiver of constitutional rights—confession voluntary**

Evidence was sufficient to support the trial court's conclusion that defendant voluntarily, knowingly and understandingly waived his rights to remain silent and to counsel where the evidence tended to show that defendant was not under the influence of intoxicants; though he had no formal education, he could write his name; officers made no promises or offers to induce defendant to make a statement; defendant's *Miranda* rights were explained to him; and defendant thereafter made incriminating statements.

APPEAL by defendant from order of *Barbee, J.*, entered 18 April 1979, and from judgment of *Davis, J.*, entered at the 30 April 1979 Criminal Session of GUILFORD Superior Court, High Point Division.

By bills of indictment proper in form, defendant was charged with the murders of Joyce Tuggle Voss and Mary Jane Bassett. The offenses allegedly occurred on 15 December 1978.

Prior to trial defendant filed a motion asking that evidence relating to certain statements allegedly made by him on 16 December 1978, and a gun seized as a result of those statements, be suppressed. Following a hearing, Judge Barbee made findings of fact and conclusions of law as hereinafter stated and denied the motion to suppress. Defendant duly excepted to the denial of his motion.

When the cases came on for trial before Judge Davis, defendant tendered pleas of guilty to second-degree murder in both cases, expressly admitting that he was guilty of the two murders with which he was charged. After determining that the pleas were freely, voluntarily and understandingly made, the court, with the consent of the state, accepted the pleas.

Judge Davis consolidated the cases for purpose of judgment and entered judgment that defendant be imprisoned for a minimum and maximum term of 100 years. Defendant appealed pursuant to G.S. 15A-979(b).

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

Assistant Public Defender Frederick G. Lind for defendant-appellant.

BRITT, Justice.

Defendant's sole contention is that the trial court erred in denying his motion to suppress all evidence relating to statements made by him to police officers and the gun seized by the officers. The contention has no merit; consequently, we affirm the order and judgment from which defendant appeals.

[1] Defendant argues first that the challenged evidence was secured as the result of "an illegal, warrantless seizure of the defendant made without probable cause". Admittedly, defendant was arrested or taken into custody without a warrant, therefore, the legality of his arrest is governed by G.S. 15A-401(b) which, at times pertinent to this appeal, provided:

(b) Arrest by Officer Without a Warrant.—

(1) Offense in Presence of Officer.—An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.

(2) Offense Out of Presence of Officer.—*An officer may arrest without a warrant any person who the officer has probable cause to believe*:

a. *Has committed a felony*; or

b. Has committed a misdemeanor, and:

1. Will not be apprehended unless immediately arrested, or

2. May cause physical injury to himself or others, or damage to property unless immediately arrested. (Emphasis added.)

Our inquiry under the evidence in this case is whether the officers, at the time they arrested defendant, had probable cause to believe that he had committed a felony. On this question, Judge Barbee made findings of fact summarized in pertinent part as follows:

(1) On 15 December 1978, Joyce Tuggle Voss and Mary Jane Bassett were allegedly killed at a residence in High Point, N.C. Voss suffered a gunshot wound and Bassett was severely beaten about her head. On 16 December 1978 Detectives D. O. DeBerry and Frank Wilkins of the Guilford County Sheriff's Department were assigned to investigate the alleged killings. They arrived at the residence where the victims were and observed their bodies. Their investigation disclosed that defendant was residing at the residence but was not there at the time of the investigation. The officers also learned that a vehicle owned and operated by Mrs. Voss was missing. They caused an all-points bulletin for the defendant and for the vehicle to be broadcast.

(2) Later in the day on 16 December 1978 Detective DeBerry received a report that the vehicle and defendant had been seen in nearby Chatham County in the Town of Siler City, N.C.; immediately thereafter Detectives DeBerry and Wilkins drove to Siler City, arriving there between 8:15 and 8:30 p.m. Detectives DeBerry and Wilkins, accompanied by Chatham County and Siler City law enforcement officers, went to a house on East Fourth Street in Siler City where defendant was thought to be present. The car in question was parked outside the house.

(3) Detectives DeBerry and Wilkins and a lieutenant of the Siler City Police Department entered the house to talk with defendant who was sitting in a back room. The house was owned by Mr. Durham who was also present.

(4) After entering the house, the Siler City lieutenant asked defendant, "Jack, how are you doing?" Jack is the nickname of defendant. Defendant stood up and the lieutenant then frisked him for a weapon. In addition to other statements, defendant said, "Don't worry, I'm not going to give you any problems". The officers did not have an arrest warrant at the time. Detective DeBerry then told defendant that "we need to go out to the car" after which he and defendant walked outside to the car. He did

not place defendant under arrest and did not handcuff him. The officers did not have any guns drawn at any time.

(5) Defendant got into the rear seat of one of the police cars. Detective DeBerry then read him his *Miranda* rights, and defendant, at about 8:55 p.m., signed a printed form indicating that he understood his rights. After advising defendant of his rights, Detective DeBerry told defendant that they needed to know what happened. Defendant responded, "Well, you know what happened". The officer answered, "Well, yes, but I need for you to just kind of fill me in a little bit and let me know about the way things took place."

(6) Defendant then made incriminating statements summarized as follows: "It happened yesterday between one and two o'clock." Defendant was then living in the house. He had been dating Joyce for six or seven months. They had begun to have problems in their relationship, and "he had had it. . . ." He hit Mary with a mattock handle and shot Joyce once with a shotgun.

(7) When asked about the shotgun, defendant told the officers that he had sold it to some friends. Shortly thereafter, defendant was taken to the Chatham County Sheriff's Department where Sheriff Elkins got into the backseat with defendant. Sheriff Elkins knew defendant and spoke a few words to him. Thereafter, defendant directed the officers to a residence outside of Siler City where he said he had sold the gun. Upon arriving at that residence, Sheriff Elkins and Detective Wilkins entered the house. Shortly thereafter, they came out with the shotgun.

(8) Detectives DeBerry and Wilkins then transported defendant to the Guilford County Sheriff's Department in Greensboro, arriving there at around 11:25 p.m. When they arrived, the officers again advised defendant of his constitutional rights, and defendant informed the officers that he understood each of the rights they had read to him. At 11:40 p.m., defendant signed a waiver of his rights and made other incriminating statements to the officers.

Judge Barbee concluded that at the time the police officers saw defendant at the house in Siler City, they had probable cause to believe that he had stolen the vehicle belonging to Mrs. Voss;

therefore, they had probable cause to arrest him, and any detainment of defendant by the officers was lawful.

In *State v. Streeter*, 283 N.C. 203, 207, 195 S.E. 2d 502 (1973), Justice Huskins, speaking for this court, said:

> An arrest is constitutionally valid when the officers have probable cause to make it. Whether probable cause exists depends upon "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 13 L.Ed. 2d 142, 85 S.Ct. 223 (1964).

We hold that the facts found by Judge Barbee are sufficient to support his conclusion of law that the officers had probable cause to believe that defendant had committed the felony of larceny of an automobile. The evidence presented at the hearing was sufficient to support the findings of fact.

Defendant's insistence that this case is controlled by *Dunaway v. New York*, --- U.S. ---, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979), is not persuasive. The key holding in *Dunaway* is that custodial questioning on less than probable cause for arrest is violative of the Fourth Amendment. In the case at hand, there *was* probable cause for defendant's arrest.

[2] Defendant also argues that the challenged statements were illegally obtained in that he did not voluntarily, knowingly and understandingly waive his rights to remain silent and to counsel, rights guaranteed to him by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, and that the seizure of the gun resulted from the illegally obtained statements.

Following the hearing on defendant's motion to suppress, the court, in addition to finding facts and making conclusions of law as summarized above, found and concluded that immediately after defendant was taken into custody at Durham's home, Detective DeBerry advised him of each of his *Miranda* rights; that defendant then made incriminating statements; that several hours later defendant was transported to the Sheriff's Department in Greensboro where he again was advised of each of his *Miranda* rights; that he again made incriminating statements; that on said

date defendant was 50 years of age and while he had no formal education, he could write his name; that he was not under the influence of intoxicants; that at no time did any law enforcement officer make any promises or offers of hope or reward to induce defendant to make a statement; that at no time was defendant threatened or was there any violence or suggestion of violence to induce defendant to make a statement; and that any statements made by defendant were made voluntarily and not pursuant to any threats or promises of hope or reward. The court concluded that "under the totality and circumstances in this case" any statement made by defendant to the officers on 16 December 1978 was made voluntarily, knowingly, intelligently, understandingly and independently; that defendant fully understood his constitutional rights to remain silent and his right to counsel; and that defendant freely, knowingly and voluntarily waived each of his constitutional rights and made incriminating statements to the police officers.

The findings and conclusions of the trial judge are fully supported by the evidence in the record. That being true, they are conclusive on appeal. *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977); *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).

Since the arrest of defendant was lawful, and he made his statements to police voluntarily after being fully advised of and waiving his constitutional rights, evidence relating to the shotgun was also admissible.

The order and judgment appealed from are

Affirmed.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1980

HERITAGE VILLAGE CHURCH AND MISSIONARY FELLOWSHIP, INC., PLAINTIFF; THE HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, INTERVENING PLAINTIFF v. THE STATE OF NORTH CAROLINA, RUFUS L. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA; SARAH T. MORROW, SECRETARY OF HUMAN RESOURCES OF THE STATE OF NORTH CAROLINA; AND PETER S. GILCHRIST III, DISTRICT ATTORNEY FOR THE 26TH PROSECUTORIAL DISTRICT OF NORTH CAROLINA, DEFENDANT APPELLANTS

No. 87

(Filed 5 March 1980)

1. **Constitutional Law § 22; Charities and Foundations § 2— Solicitation of Charitable Funds Act—exemption of religions relying on financial support of its members—impermissible establishment of religion**

The provision of G.S. 108-75.7(a)(1) which exempts from compliance with the licensing and reporting requirements of the Solicitation of Charitable Funds Act all religious organizations except those whose "financial support is derived primarily from contributions solicited from persons other than its own members" constitutes an impermissible establishment of religion in violation of the First Amendment of the Constitution of the United States and Art. I, §§ 13 and 19 of the Constitution of North Carolina, since the result of the statute is to exempt from regulation the more orthodox, denominational and congregational religions while subjecting to regulation those religions which spread their beliefs in more evangelical, less traditional ways.

2. **Constitutional Law § 22; Charities and Foundations § 2— Solicitation of Charitable Funds Act—excessive State entanglement with religion—impermissible establishment of religion**

As applied to religious organizations, certain provisions of the Solicitation of Charitable Funds Act, including the requirement of audited financial

statements, G.S. 108-75.6(6), the requirement that extensive fiscal records be maintained and available for inspection, G.S. 108-75.12, and the grant of power to the Secretary of Human Resources to suspend or deny a license to solicit charitable funds upon finding that the applicant has or will apply "an unreasonable percentage" of the funds solicited to other than a "charitable purpose," or that the contributions solicited are not applied to the "purposes represented in the license application," or that expenses "fairly allocable" to the costs of fund-raising have exceeded or will exceed 35 percent of the total funds solicited, G.S. 108-75.18(4)-(6), *are held* to cause the State to become excessively entangled with religion so as to violate the Establishment Clause of the First Amendment of the Constitution of the United States and Art. I, §§ 13 and 19 of the Constitution of North Carolina.

Justice HUSKINS dissenting.

Justices COPELAND and BROCK join in the dissenting opinion.

APPEAL by the state from a decision of the Court of Appeals (opinion by *Judge Erwin*, in which *Judges Robert Martin* and *Mitchell* concurred), 40 N.C. App. 429, 253 S.E. 2d 475 (1979), affirming *Judge Sam Ervin III* who, finding certain aspects of G.S. 108-75.1 *et seq.* violative of the state and federal constitutions, granted in part plaintiffs' motions for summary judgment at the 15 May 1978 Session of MECKLENBURG Superior Court. We allowed petition for discretionary review under G.S. 7A-31 on 12 July 1979. This case was argued as No. 77 at the Fall Term 1979.

Wardlow, Knox, Knox, Robinson & Freeman by H. Edward Knox and John S. Freeman, Attorneys for Original Plaintiff Appellee.

Melrod, Redman & Gartlan by Dorothy Sellers, and Chambers, Stein, Ferguson & Becton P.A., by Jonathan Wallas for Intervenor Plaintiff.

Rufus L. Edmisten, Attorney General, by William F. O'Connell, Special Deputy Attorney General, and Robert R. Reilly, Assistant Attorney General, for the State.

EXUM, Justice.

This case involves a variety of challenges based on state and federal constitutional grounds to G.S. 108-75.1 *et seq.*, the "Solicitation of Charitable Funds Act" (Act). We hold that Section 75.7(a)(1) of the Act, which exempts from compliance all religious organizations except those whose "financial support is derived

primarily from contributions solicited from persons other than its own members" deprives the Act of that neutrality toward religion required by the Establishment Clause of the First Amendment and Article I, §§ 13 and 19, of the North Carolina Constitution. We also hold that other provisions of the Act generally cause the state to become excessively entangled with religion so as to violate these same constitutional provisions. We find it unnecessary to address other challenges to the Act.

The Act seeks to "protect the general public and public charity in the State of North Carolina" and to "prevent deceptive and dishonest statements and conduct" in the solicitation of funds for charitable purposes. G.S. 108-75.2. Its provisions are designed "to require full public disclosure of facts relating to persons and organizations who solicit funds from the public for charitable purposes, the purposes for which such funds are solicited, and their actual uses." *Ibid.* To this end the Act empowers the Department of Human Resources (Department) to issue licenses to charitable organizations and professional solicitors who wish to solicit funds for charity, in accordance with rules and regulations promulgated by the Social Services Commission (Commission) and with the provisions of the Act. G.S. 108-75.4. The Commission is to be aided by the Committee on Charitable Organizations (Committee), an appointed body which is to recommend appropriate rules and regulations to the Commission. G.S. 108-75.5. Some of the factors the Committee is to take into account in formulating its recommended rules are specified in section 75.5(c):

> "The rules and regulations shall take into consideration the existence of an adequate, responsible and functioning governing board of the charitable organization, professional fund-raising counsel or professional solicitor; its chartered responsibility; its need to conduct public solicitation; the proposed uses of solicited funds; the percentage of solicited funds used for management and fund-raising expenses, fund-raising activities, including but not limited to sale and benefit affairs and program services; the accountability of the charitable organization, professional fund-raising counsel or professional solicitor and disclosure of information and financial reports to the general public; and other matters proper for the protection of the public interest with respect to public solicitation."

The Act requires that a charitable organization which intends to solicit funds within the state first apply to the Department for a license. The application must divulge such information as the names and addresses of the organization and its chapters and affiliates; its place, form, and mode of organization; the names, addresses, and occupations of its "key personnel"; the location of its financial records; the method, purposes, and extent of its fundraising activities; and such other information "as may be reasonably required by the Commission." G.S. 108-75.6. In addition, pursuant to section 75.6(6), an applicant must furnish:

> "A copy of the balance sheet and income and expense statement audited by an independent public accountant for the organization's immediately preceding fiscal year, or a copy of a financial statement audited by an independent public accountant covering, in a consolidated report, complete information as to all of the preceding year's fundraising activities of the charitable organization, showing the balance sheet, kind and amounts of funds raised, costs and expenses incidental thereto, allocation or disbursement of funds raised, changes in fund balances, notes to the audit and the opinion as to the fairness of the presentation by the accountant. This report shall conform to the accounting and reporting procedures set forth in the 'Audit Guides' published by the American Institute of Certified Public Accountants, and as may be modified from time to time by said Institute or its successor. . . ."

All information filed with the Department is treated as a public record and is open to the public for inspection. G.S. 108-75.9. Furthermore, applicant organizations are required by section 75.12 to maintain fiscal records "in accordance with the rules and regulations promulgated by the Commission" and to make such records available for inspection, upon demand, to the Department, the Commission, or the Attorney General.

Section 75.18 specifies that the Secretary of the Department (Secretary) shall revoke, suspend, or deny issuance of a license to solicit charitable funds upon a finding of one or more of the following:

> "(1) One or more of the statements in the application are not true.

(2) The applicant is or has engaged in a fraudulent transaction or enterprise.

(3) A solicitation would be a fraud upon the public.

(4) An *unreasonable percentage of the contributions solicited, or to be solicited, is not applied, or will not be applied to a charitable purpose.*

(5) The *contributions solicited, or to be solicited, are not applied, or will not be applied to the purpose or purposes as represented in the license application.*

(6) Solicitation and fund-raising expenses . . . will exceed . . . thirty-five percent (35%) of the total . . . received by reason of any solicitation and/or fund-raising activities or campaigns. . . .

(7) The applicant or lessee [sic] has failed to comply with any of the provisions of this Part, or with any rules and regulations adopted by the Commission pursuant to this Part." (Emphasis supplied.)

Charitable organizations subject to the provisions of the Act include those organizations operated for "religious" purposes. G.S. 108-75.3(1), (2). Section 75.7(a)(1), however, specifically exempts from the licensing requirements:

> "A religious corporation, trust, or organization incorporated or established for religious purposes, or other religious organizations which serve religion by the preservation of religious rights and freedom from persecution or prejudice or by the fostering of religion, including the moral and ethical aspects of a particular religious faith: *Provided, however, that such religious corporation, trust or organization established for religious purposes shall not be exempt from filing a license application . . . if its financial support is derived primarily from contributions solicited from persons other than its own members, excluding sales of printed or recorded religious materials.* . . . (Emphasis supplied.)

The enforcement provision of the Act, section 75.22, provides in pertinent part that failure to file a license application, a report, document, statement, "or any other information required to be filed with the Department" may lead to the denial of issuance of a

license or to the revocation or suspension of the license then in effect. If any charitable organization "in any other way violates the provisions" of the Act, the Secretary may also deny or revoke the license. The Secretary is given authority, "upon his own motion *or upon the complaint of any person,*" to investigate any charitable organization for possible violations of the Act. (Emphasis supplied.) Finally, the Secretary may exercise the authority granted by this section "against any charitable organization which operates under the guise or pretense" of being an organization exempted from the Act but which "is not in fact an organization entitled to such an exemption."

Plaintiff Heritage Village Church and Missionary Fellowship, Inc., filed this action in Mecklenburg Superior Court seeking declaratory and injunctive relief to bar application of the Act to its charitable solicitation activities. Plaintiff Holy Spirit Association for the Unification of World Christianity was subsequently allowed to intervene with a complaint seeking substantially the same relief.

Both plaintiffs are non-profit entities which engage in substantial religious activities throughout the state. Both derive their financial support "primarily" from contributions solicited from the general public. Both contend that, as applied to them, the Act violates the First and Fourteenth Amendments to the United States Constitution and Sections 1, 13, 14 and 19 of Article I of the Constitution of North Carolina. The state does not contest that the solicitation of funds from the general public by plaintiffs is a religious activity conducted pursuant to the religious beliefs of each plaintiff respectively.

By order of 27 June 1978 Judge Ervin found in favor of plaintiffs and permanently enjoined defendants from taking any action against plaintiffs under the Act in consequence of plaintiffs' solicitation activities. In the subsequent appeal, the Court of Appeals generally affirmed Judge Ervin's conclusions that the Act, as applied to religious activities, was constitutionally infirm in numerous respects. More particularly, the Court of Appeals held *inter alia* that:

(1) The licensing provisions of sections 75.6 and 75.18(4) act as an impermissible "prior restraint" on the exercise of religion;

(2) Paragraphs (2), (3), and (4) of section 75.18 constitute an impermissible delegation of legislative powers;

(3) The qualified exemption provision in section 75.7(a)(1) constitutes an impermissible establishment of religion;

(4) The thirty-five percent limitation on solicitation and fund-raising expenditures contained in section 75.18(6) violates plaintiff's rights of association.

[1] We affirm the Court of Appeals' holding that the partiality of the qualified exemption provided by section 75.7(a)(1) works an unconstitutional "establishment" of religion. That section's proviso, which excepts from the general exemption those religious organizations which derive financial support primarily from nonmembers, constitutes on its face a violation of Sections 13 and 19 of Article I of the North Carolina Constitution and the First Amendment to the Constitution of the United States. Since the proviso cannot be constitutionally applied to deny plaintiffs an exemption from the requirements of the Act, we find no occasion to address or pass upon the merits of the other holdings of the Court of Appeals.

We start from the premise, undisputed in the case before us, that both plaintiffs essentially are religious entities which engage in the solicitation of funds in connection with the dissemination of religious literature and the espousal of religious beliefs. Accordingly, both their organizational structures and the fund-raising activities which support them come under the constitutional protections of religious freedom. *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 304-05 (1940); *International Society for Krishna Consciousness v. Rochford*, 585 F. 2d 263 (7th Cir. 1978). It matters not that plaintiffs' evangelism may fall outside the pale of more established orthodoxies; religious freedom is constitutionally extended to the unorthodox as well. *Follett v. McCormick*, 321 U.S. 573, 576-77 (1944); *In re Williams*, 269 N.C. 68, 78, 152 S.E. 2d 317, 325 (1967). We focus, then, on whether the challenged provisions of the Act exceed state and federal constitutional limitations.

Article I, Section 13 of the North Carolina Constitution guarantees to all persons the right to worship according to the dictates of their own conscience and provides that "no human

authority shall, in any case whatever, control or interfere with the rights of conscience." Article I, section 19 of the North Carolina Constitution proscribes "discrimination by the State because of . . . religion . . . ." The First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Both these clauses apply to state as well as federal action. *Everson v. Board of Education*, 330 U.S. 1 (1947) (Establishment Clause); *Cantwell v. Connecticut, supra*, (Free Exercise Clause).

Taken together, these provisions may be said to coalesce into a singular guarantee of freedom of religious profession and worship, "as well as an equally firmly established separation of church and state." *Braswell v. Purser*, 282 N.C. 388, 393, 193 S.E. 2d 90, 93 (1972). The Legislature oversteps the bounds of this separation when it enacts a regulatory scheme which, whether in purpose, substantive effect, or administrative procedure, tends to "control or interfere" with religious affairs, or to "discriminate" along religious lines, or to constitute a law "respecting" the establishment of religion. Stated simply, the constitutional mandate is one of secular neutrality toward religion.

We proceed to examine the Act for aspects of religious partiality. Since the contours of the neutrality requirement have been most thoroughly defined in the jurisprudence of the First Amendment's Establishment Clause, we may usefully turn to that body of law for analytical guidelines.[1]

It "is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an

1. Although the remainder of our discussion borrows heavily from the Establishment Clause analysis developed by the United States Supreme Court, our decision today is grounded no less on the requirements of Sections 13 and 19 of Article I of the North Carolina Constitution. It has long been recognized that the organic law of our state "expressly denies religion any place in the supervision or control of secular affairs." *Rodman v. Robinson*, 134 N.C. 503, 509, 47 S.E. 19, 21 (1904). And although the differences in terminology in the relevant North Carolina and federal constitutional provisions may support in some cases differences in scope of their application, we recognize today that the neutrality demanded by the First Amendment is also compelled by the conjunction of Sections 13 and 19 of Article I. It will be a rare case in which an instance of religious discrimination on the part of the state, prohibited by Section 19, will not also occasion a species of religious favoritism which tends to "control or interfere with the rights of conscience" protected by Section 13.

imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Gillette v. United States*, 401 U.S. 437, 450 (1971). However, the state is not required to pretend a sterile disinterest in all affairs of religion; "[n]o perfect or absolute separation is really possible." *Walz v. Tax Commission*, 397 U.S. 664, 670 (1970). Rather, "[t]he problem, like many problems in constitutional law, is one of degree." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Certainly Government may "effect no favoritism among sects," *Abington School District v. Schempp*, 374 U.S. 203, 305 (1963) (opinion of Goldberg, J.), and the circumstances of legislative categories that may net religious activities or organizations must be strictly reviewed by this Court "to eliminate, as it were, religious gerrymanders." *Walz v. Tax Commission, supra* at 696 (opinion of Harlan, J.). Moreover, adherence to the policy of neutrality will prevent the kind of governmental *involvement* in religious affairs "that would tip the balance toward government control of churches or governmental restraint on religious practice." *Id.* at 670. As the Supreme Court noted in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971):

> "[The authors of the First Amendment] did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be 'no law *respecting* an establishment of religion.' A law may be one 'respecting' the forbidden objective while falling short of its total realization. A law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." (Emphasis original.)

Thus, for a statute to pass muster under the strict test of Establishment Clause neutrality, it must pass the three-prong review distilled by the Supreme Court from "the cumulative criteria developed . . . over many years":

> "First, the statute must have a secular legislative purpose; second, its principal or *primary effect* must be one that neither advances nor inhibits religion . . . finally, the statute

must not foster 'an excessive government entanglement with religion'." *Id.* at 612-613 (Citations omitted.) (Emphasis supplied.) *See also, Roemer v. Maryland Public Works Board,* 426 U.S. 736, 748 (1976).

Applying these criteria[2] to the statutory provisions before us, we note first that there can be little argument that the whole tenor of the Act reveals a valid secular purpose. The clear intent underlying the enactment is to protect the public from fraudulent and deceptive conduct in the solicitation of funds in the name of charity. *See* G.S. 108-75.2. It is well within the police power of the state to enact appropriate laws to protect the public from incapacity, fraud, or oppression in the conduct of a business or a general activity. *State v. Harris,* 216 N.C. 746, 755-56, 6 S.E. 2d 854, 861 (1940); *see* 16 Am. Jur. 2d, Constitutional Law § 423 and cases cited therein. Our inquiry thus turns to whether the Act is "appropriate" in the context of its *regulatory effect on religious organizations.*[3]

To the degree that the Act imposes restraints or requirements upon activities and institutions within the religious sphere, its "principal or primary effect" must neither "advance" nor "inhibit" religion. This prohibition represents the essence of the Establishment Clause in its most basic sense: the state may not enact laws which "aid one religion, aid all religions, or *prefer* one religion over another." *Everson v. Board of Education,* 330

2. "It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pittenger,* 421 U.S. 349, 358-59 (1975).

3. Since our decision today applies Establishment Clause analysis to find that the Act engenders constitutionally *inappropriate* burdens on and governmental surveillance of some religious organizations but not others, we express no opinion as to whether the prevention of fraud in charitable solicitations may be characterized as one of sufficient overriding public concern or represents a "compelling state interest" such as to justify under the *Free Exercise Clause* a less intrusive manner of state regulation of religious solicitation. It should be noted, however, that to pass muster under the Free Exercise Clause, any statutory restrictions on religious freedom must represent the least restrictive means of achieving a compelling state end, and it would be incumbent upon the state to demonstrate that no alternative modes of regulation would combat abuses in religious solicitation without equally infringing First Amendment rights. *See, e.g., Sherbert v. Verner,* 374 U.S. 398, 406-07 (1963). These aspects of Free Exercise analysis are extensively discussed in Tribe, *American Constitutional Law* § 14-10 (1978).

U.S. 1, 15 (1947). (Emphasis supplied.) However, an across the board exemption from state regulation of a broadly defined class of religious entities may avoid First Amendment problems by the very breadth of the class immunized from governmental interference. Although such an exemption represents *some* contact between church and state, in the sense that the Legislature has spoken to the position of religion in the context of the regulatory scheme, its effect is one of benevolent neutrality, partaking of neither sponsorship nor hostility toward religious affairs. *See, e.g., Walz v. Tax Commission, supra,* 397 U.S. at 672-73.[4] On the other hand, a more narrowly drawn exemption might benefit some religious organizations—those which meet the criteria of its classifications—while leaving others falling outside its ambit open to the burden of state regulation. In such a case, the exemption's particularity may effect a preference for some identifiable types of religion over others, and the classification must be strictly scrutinized for potential, impermissible divisiveness. *See, e.g., Committee for Public Education v. Nyquist,* 413 U.S. 756, 794 (1973) (narrowness of the benefitted class is "an important factor" in measuring the potential religious divisiveness of a legislative measure affecting religion); *Public Funds for Public Schools of N. J. v. Byrne,* 590 F. 2d 514, 518 (3d Cir. 1979), *aff'd mem.,* 99 S.Ct. 2818 (1979) ("breadth in the benefitted class helps to guarantee that the advantages to religious institutions will be incidental to secular ends and effects"); *Kosydar v. Wolman,* 353 F. Supp. 744, 753-54 (S.D. Ohio 1972), *aff'd mem. sub nom. Grit v. Wolman,* 413 U.S. 901 (1973) (classifications which disproportionately benefit some religions are "highly suspect"). "Obviously the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement in evaluating the character of the organiza-

4. In *Walz,* the Supreme Court held that the First Amendment was not violated by the granting of property tax exemptions to a broad class of non-profit organizations, including religious organizations. As was noted by Chief Justice Burger:

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." 397 U.S. at 669.

tions." *Walz v. Tax Commission*, supra, 397 U.S. at 698-99 (opinion of Harlan, J.).

I. THE ACT'S UNEQUAL TREATMENT OF RELIGIOUS ORGANIZATIONS

[1] With these principles in mind, we note that section 75.7(a)(1) of the Act grants an exemption from the licensing and reporting requirements to a broadly defined class of religious organizations. The very indefiniteness of the exemption guarantees that its scope is wide; indeed, it is difficult to imagine how any organization with a colorable claim to bona fide religious purposes or activities would not fall within one or another of the exemption's classifications.[5] The proviso, however, which immediately follows in the same section denies the benefits of the exemption to those religious organizations which derive their financial support "primarily" from contributions solicited from "persons other than [their] own members." The Court of Appeals held that this qualification to the general exemption works an impermissible establishment of religion. We agree.

Although "member" is nowhere defined in the Act, section 75.3(12) does define "membership" as a "status . . . which provides services and confers a bona fide right, privilege, professional standing, honor or other direct benefit, in addition to the right to vote, elect officers, or hold office." Assuming arguendo that the term "member" as used in section 75.7(a)(1)'s proviso connotes someone with "membership" status, and considering the spirit of the Act and the purposes which it seeks to accomplish, *see, e.g., Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972), we presume the intent of the proviso is (1) to distinguish between religious organizations presumably somehow accountable to persons providing financial support, *i.e.*, their "members," and those religious organizations which are not

5. The part of section 75.7(a)(1) under discussion exempts any religious organization "established for religious purposes" and any other religious organizations which "serve religion" by the fostering of religion or the preservation of religious rights. The Act defines "religious purposes" as "maintaining or propagating religion or supporting public religious services, according to the rites of a particular denomination." G.S. 108-75.3(17). "Religion" however, is nowhere defined. The result is an exemption sufficiently broad to satisfy the requirement of religious neutrality. *All* groups that can fairly be considered "religious" in nature fall within the exemption's perimeters.

presumably so accountable because their financial support is largely provided by non-members, and (2) to insure that only the latter are subject to the Act's accountability requirements. The intended purpose of the proviso may thus be secular in nature, in that it seeks to promote the Act's policy "to require full public disclosure of facts relating to . . . organizations [which] solicit funds *from the public* for charitable purposes. . . ." G.S. 108-75.2. (Emphasis supplied.) Nevertheless, the *effect* of the proviso is to alter the original exemption's religious neutrality. The result is a qualified exemption which favors only those religious organizations which solicit primarily from their own members. The inescapable impact is to accord benign neglect to the more orthodox, denominational, and congregational religions while subjecting to regulation those religions which spread their beliefs in more evangelical, less traditional ways. This the state may not do.

The burden imposed by the Act's reporting requirements are in no wise *de minimis*. To note but one, section 75.6(6) requires as a condition of licensing that an applicant organization furnish the state with a detailed financial statement, independently audited according to nationally accepted accounting and reporting procedures. However commendable as a sound business practice, such an audit does not spring full blown without considerable expense and administrative coordination. The primary effect of the proviso is to place the full range of burdens attendant to the licensing procedure, including the audit requirement, solely upon those religious organizations which primarily go to the public with their religious messages and requests for the financial support needed to propagate them. The result is an inhibition by the state of a specific mode of religious practice—that of spreading one's religious beliefs via personal visitations, use of the news media, and distribution of literature among the public at large. Yet such "an age-old type of evangelism," whether carried out in the public streets or over the public media, has "as high a claim to constitutional protection as the more orthodox types" of congregational practices. *Murdock v. Pennsylvania, supra*, 319 U.S. at 110.

The state argues that when a religious organization solicits primarily from non-members, the state's interest in regulating the accountability of public solicitation thereby increases. There is no showing in the record, however, that "member" or "membership"

status in a religious organization *ipso facto* carries with it a legally enforceable right to demand and receive an accounting of the organization's fund-raising and solicitation activities. Nor is there the slightest suggestion that member funded religious organizations do in fact regularly account to their members with the same degree of specificity and audit safeguards as that which the Act requires of non-member funded organizations. Thus the conclusion is unavoidable that the proviso works to place member funded and public funded religious organizations on an unequal footing in the marketplace of religious ideas. Moreover, even if it could be shown that member funded religious groups were accountable to their members with the same kind of specificity required in the Act, this would not provide support for making only non-member funded religious groups so accountable *to the state.*

The state concedes that the acts of soliciting monies for the support of religious organizations, including those in this case, and the giving of those monies, are expressions of religious faith. These acts are seen by those who engage in them as the soliciting for, and the giving to, God that which is God's. Some religious organizations, such as plaintiffs' here, as we have noted, see their mission as being to evangelize and solicit from the public at large. They eschew the "membership" form of organization. Others receive support from both members and non-members in varying degrees. Still others rely solely on members. *All do so on the basis of their religious tenets.* A statute which *on its face* seeks to regulate all of the first kind of religious organization, only some of the second, and none of the third must, finally, make its classification on the basis of a religious test. The clear import of the Establishment Clause is, therefore, that a statute cannot *on its face* subject some religious organizations to state regulation and at the same time exempt others on the basis of the percentage of "members" which contribute, respectively, to their support.

We note that two recent federal district court decisions have reached similar conclusions in dealing with the partiality of exemptions granted religious organizations. In *Valente v. Larson,* Civil No. 4-78-453 (D. Minn., *prelim. inj. granted* July 5, 1979), U.S. District Court Judge Miles Lord granted a preliminary injunction barring state officials from requiring plaintiff Holy Spirit Association for the Unification of World Christianity to comply with the

provisions of the Minnesota Charitable Solicitations Act, Minn. Stat. §§ 309.50 *et seq.* Substantially equivalent to the Act challenged in the instant case, the Minnesota statute exempts from its reporting requirements those religious organizations which receive more than one-half of their contributions from "members." Minn. Stat. § 309.515. Judge Lord's order upheld the Report and Recommendation made by United States Magistrate Robert Renner, which pointed out, *id.* at 19, that:

> "Members of the public who contribute to a church which solicits 49% of its contributions from the public have no more contact with it, nor is that church any more answerable to them, than if the church solicited 51% of its contributions from the public. Yet, in both instances, good faith solicitors, as well as the public, have the same interest to be protected by the State. *Clearly, whatever its legislative purpose, the* [Minnesota] *Act has the immediate effect of subjecting some churches to far more rigorous requirements than others.*" (Emphasis supplied.)

In *Bob Jones University v. United States,* 468 F. Supp. 890 (D.S.C. 1978), the court rejected the government's contention that the exemption from federal taxes generally granted to charitable organizations by I.R.C. § 501(c)(3) should be applied only to those organizations which operate in harmony with federal desegregation policies. Noting that "[c]onflict with the Establishment Clause lurks within the [government's] construction of the exemption provision," the court concluded that:

> "The construction of § 501(c)(3) argued by the government would do away with the general grant of tax exemptions to all religious organizations, which was found in *Walz* to constitute an act of benevolent neutrality, and, in effect, transforms the statute into a law that provides a special tax benefit, *because favorable tax status will be accorded only to some, not all, religious organizations.* Since only selected religious institutions would receive exemption under defendant's interpretation of the law, tax exemption provided by the section no longer manifests neutrality towards all religions but, rather, favors some over others. The effect is to strengthen those religious organizations whose religious practices do not conflict with federal public policy and to

> discriminate against those religious groups whose convictions violate these secular principles. *The unavoidable effect is the law's tending toward the establishment of the approved religions*." 468 F. Supp. at 900-901. (Emphasis supplied.)

Our decision today accords with the Establishment Clause principles affirmed in these cases. Neither the First Amendment nor Article I, Sections 13 and 19, of the State Constitution permit the state to aid some religions by burdening others.

II. THE ACT'S EXCESSIVE ENTANGLEMENT WITH RELIGION

[2] Considerations of the excessive entanglement between church and state threatened by the Act's substantive requirements additionally compel us to conclude that plaintiffs may not constitutionally be denied an exemption under section 75.7(a)(1). Should plaintiffs or any other religious organization be subjected to the full panoply of strictures contemplated by the Act, we would be faced with precisely the sort of "sustained and detailed administrative relationships for enforcement of statutory or administrative standards," *Walz v. Tax Commission, supra*, 397 U.S. at 675, that have been repeatedly condemned by the Supreme Court. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 59 L.Ed. 2d 533, 542 (1979); *Committee for Public Education v. Nyquist, supra*, 413 U.S. at 794-95; *Lemon v. Kurtzman, supra*, 403 U.S. at 619-622. A continuous state surveillance of the financial records of applicant organizations inheres in the Act's auditing requirements, discussed above, as well as in the requirement that applicants maintain fiscal records in accordance with Commission regulations and make such records available for inspection upon demand. G.S. 108-75.12. The potential result of such a course of state inspection and evaluation can be seen in section 75.18(4)-(6), wherein the Secretary is empowered to suspend or deny a license upon a finding that the applicant has or will apply "an unreasonable percentage" of the funds solicited to other than "a charitable purpose," or that the contributions solicited are not applied to the "purposes represented in the license application," or that expenses of an organization "fairly allocable" to the costs of fund-raising have exceeded or will exceed 35 percent of the total funds solicited. As applied to religious organizations, the enforcement of these provisions inevitably entangles the state and its agencies in a persistent inquiry into whether particular expen-

ditures of a religious organization are secular or religious in nature, or whether the religious expenditures support the same religious purposes represented in the organization's license application. In *Lemon v. Kurtzman, supra*, 403 U.S. 602, the Supreme Court struck down certain government subsidies to church-related schools on the grounds that an excessive monitoring of the schools' affairs would be required to guarantee that the grants would be used solely for secular purposes. Certainly no less of an "entanglement" defect is latent in a statutory scheme requiring the state to ensure, through a "comprehensive, discriminating, and continuing state surveillance," *id.* at 619, that a "reasonable" quantum of a religious organization's expenditures are devoted to religious purposes. *See, e.g., Fernandes v. Limmer*, 465 F. Supp. 493, 504-05 (N.D. Tex. 1979); *see also Surinach v. Pesquera de Busquets*, 604 F. 2d 73, 76-78 (1st Cir. 1979).

Moreover, the scope of entanglement posed here goes far beyond the state's policing a religious organization's administrative records. The potential exists for the state not only to substitute its own judgment as to the substantive "purpose" of a particular expenditure, but also to inject itself into the very center of religious disputes.[6] Absent narrow circumstances of outright fraud or collusion or other specific illegality, the propriety of a religious organization's expenditures can be evaluated only by reference to the organization's own doctrinal goals and procedures. The question of proper purpose is an ecclesiastical one, and its resolution necessarily entails an interpretative inquiry into possible deviations from religious policy. "But this is exactly the inquiry that the First Amendment prohibits . . . ." *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976). *See also Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Presbyterian Church*, 393 U.S. 440 (1969); *Atkins v. Walker*, 284 N.C. 306, 200 S.E. 2d 641 (1973); *Trustees v. Seaford*,

6. Section 75.22(b) of the Act enables the Secretary, "upon the complaint of any person," to investigate any organization for possible violations of the Act. Section 75.22(e) empowers the Attorney General to bring an action for injunctive or other relief against an organization "whenever the funds raised by solicitation activities are not devoted or will not be devoted to the charitable purposes of the charitable organization." It is not unthinkable that an interested party, whether a dissenting member, a disgruntled contributor, or an advocate of opposing doctrine, would seek to use these provisions to involve the state in a dispute over the fiscal decisions of a religious organization.

16 N.C. (1 Dev. Eq.) 453 (1830). Constant state evaluation of the religious "purpose" of an organization's expenditures is no less than constant state evaluation of the religious content of the organization's activities. The result is "a relationship pregnant with dangers of excessive government direction." *Lemon v. Kurtzman, supra*, 403 U.S. at 620.

We do not intend to intimate that the state will inevitably seek to apply the Act's provisions to religious organizations in such a way as to dictate the bounds of religious purpose. But the potential for such abuse is clear when the factors discussed above are considered cumulatively. We find that the Act, as applied to plaintiff religious organizations, is characterized by excessive entanglements between the state and religion and poses significant risks of secular interference with the rights of conscience.

For all the foregoing reasons, we hold that plaintiffs may not constitutionally be denied an exemption from the Act. The Court of Appeals' decision that the qualification to the exemption in section 75.7(a)(1) of the Act effects an unconstitutional establishment of religion is

Affirmed.

Justice HUSKINS dissenting.

The purpose of the "Solicitation of Charitable Funds Act," G.S. 108-75.1, *et seq.*, is to "protect the general public and public charity in the State of North Carolina" and "to prevent deceptive and dishonest statements and conduct" in the solicitation of funds for charitable purposes. G.S. 108-75.2. In pursuance of this concededly valid legislative goal the General Assembly has determined that only those religious organizations whose "financial support is derived primarily from contributions solicited from persons other than its own members, excluding sales of printed or recorded materials", G.S. 108-75.7(a)(1), need be subject to the regulatory provisions of the Act. The majority holds that such a qualified exemption, which excludes some but not all religious organizations from the licensing provisions of the Act, per se works an unconstitutional establishment of religion. The majority reasons that the Establishment Clause does not permit the state, in enacting valid secular legislation which affects religious

organizations, to make *any* classification "which on its face, *for whatever reason*" (emphasis supplied) excludes some but not all religious groups from a regulatory scheme. In my view, the conclusion reached by the majority finds no support in the jurisprudence of the First Amendment's Establishment Clause.

Carefully read, the Establishment Clause cases do not at their farthest reach support the proposition that the state, when enacting valid secular legislation, may not make distinctions which prevent some but not all religiously motivated conduct from falling within the ambit of state regulation. See generally, *Meek v. Pittenger*, 421 U.S. 349, 359, 44 L.Ed. 2d 217, 228, 95 S.Ct. 1753, 1760 (1975); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 771, 37 L.Ed. 2d 948, 962, 93 S.Ct. 2955, 2965 (1973); 16A Am. Jur. 2d, Constitutional Law, § 467; Annot., 37 L.Ed. 2d 1147, § 3(b) (1974). Indeed, the only two Establishment Clause cases dealing with attacks on regulatory legislation founded on disparate legislative treatment of "religious claims" uniformly hold that such distinctions do not invariably work an establishment if there is a rational, neutral, secular basis for the lines the government has drawn and if claimant is unable to demonstrate that the facially valid classifications in effect constitute religious gerrymanders. *Gillette v. United States*, 401 U.S. 437, 28 L.Ed. 2d 168, 91 S.Ct. 828 (1971) (8-1 decision) (In granting an exemption for conscientious objectors, the government may distinguish between religious beliefs which oppose participation in all wars and religious beliefs which oppose participation in only unjust wars.); *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101 (1961) (8-1 decision) (Government may establish Sunday as a secular day of rest.).

The holdings in *Gillette* and *McGowan* are premised on the sound notion that the freedom of religion guaranteed by state and federal constitutions does not withdraw the government's authority to act in areas where secular interests happen to coincide with religious interests. The freedom of religion guaranteed by the First Amendment embraces both the freedom to believe and the freedom to act on the basis of one's religious belief. However, while the freedom to believe is virtually immune from intrusion by the state, the right of action may be subject to reasonable and nondiscriminatory regulation designed to safeguard valid secular interests. Such regulation of conduct cannot infringe unduly upon

the exercise of protected activities. Accordingly, a statute which regulates religiously motivated conduct will be upheld (1) if it furthers an important governmental interest; (2) if the governmental interest is unrelated to the suppression of religion; (3) if the incidental restrictions on protected activities are no greater than is essential to the furtherance of that interest. *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1940). *See generally, Poulos v. New Hampshire*, 345 U.S. 395, 97 L.Ed. 1105, 73 S.Ct. 760 (1953); 16A Am. Jur. 2d, Constitutional Law, § 473.

Significantly, the United States Supreme Court in *Cantwell v. Connecticut, supra*, has indicated that the solicitation of funds by religious organizations is an area of valid secular concern and has established standards by which to judge the validity of legislation in this area. With respect to the government's interest in regulation the Court states:

> "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury. Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The state is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience."

310 U.S. at 306-07. With respect to the standards to be applied to determine the validity of regulation in the area the Court states:

> "The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise."

310 U.S. at 305.[1]

In the Establishment Clause cases, the principles enunciated above find expression in the uniformly followed rule "that a law protecting a valid secular interest is not invalid as one 'respecting an establishment of religion' merely because it also incidentally benefits one or more or all, religions, or because it incidentally enhances the capability of religion, or religious institutions to survive in society." 16A Am. Jur. 2d, Constitutional Law, § 467. *Accord, Meek v. Pittenger, supra,* 421 U.S. at 359; *Committee for Public Education v. Nyquist,* supra, 413 U.S. at 762; *Gillette v. United States, supra; McGowan v. Maryland, supra;* Annot., 37 L.Ed. 2d 1143, § 3(b) (1974). It is clear then, that the requirement of neutrality imposed on government by the Establishment Clause does not absolutely preclude it from distinguishing between religious claims when enacting secular regulations in areas of valid governmental concern. Neutrality requires only that the classifications made by the government bear a substantial relation to the secular purposes advanced by the legislation. *Gillette v. United States,* supra. Otherwise put, the decision to exempt some but not all religious activities from a regulatory scheme must be "secular in purpose, evenhanded in operation, and neutral in primary impact." *Id.,* 401 U.S. at 450. The mere fact that an otherwise valid regulatory scheme exempts some but not all religious activities from the burden of regulation does not "in mechanical fashion" compel the conclusion that the scheme "works an establishment of religion." *Id.,* 401 U.S. at 449.

Finally, it should be noted that when enacting regulatory legislation in areas where secular interests happen to coincide with religious interests, it is not impermissible under establishment doctrine for the legislature to attempt to accommodate free exercise values by exempting from regulation those religious activities the regulation of which isn't absolutely necessary to accomplish the legislative scheme. *Gillette v. United States,* supra, 401 U.S. at 453. Such accommodation is in line with " 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.' " *Id.* (citations omitted). " 'Neutrality' in matters of

1. The licensing scheme under attack in *Cantwell* was invalidated because it vested in a government official the power to determine what a religious cause was. However, in the language quoted in text, the Court stressed that a properly drafted licensing scheme could be applied to religious organizations.

religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties, *Walz v. Tax Commission*, 397 U.S. at 669, 25 L.Ed. 2d at 701, so long as an exemption is tailored broadly enough that it reflects valid secular purposes." *Id.*, 401 U.S. at 454.

Application of these principles to the instant case compels the conclusion that the legislative exemption under attack is secular in purpose, evenhanded in operation, and neutral in primary impact. At the outset, it should be reemphasized that unquestionably, the state has a valid secular interest in regulating the public solicitation of funds by religious organizations, even though the collection be for religious purposes. *Cantwell v. Connecticut*, supra, 310 U.S. at 305-07. In terms of the Establishment Clause this means that when regulating religiously motivated conduct in this area, the state may make distinctions among religious organizations if those classifications are substantially related to the secular interests advanced by the legislation. *Gillette v. United States*, supra.

The purpose of the legislation in question is to "protect the general public and public charity in the State of North Carolina; to require full public disclosure of facts relating to persons and organizations who solicit funds from the public for charitable purposes, the purposes for which such funds are solicited, and their actual uses; and to prevent deceptive and dishonest statements and conduct in the solicitation of funds for or in the name of charity." G.S. 108-75.2. In essence, the regulatory goal is to remedy the special problems created by public charities, religious or otherwise, "who solicit funds from the public for charitable purposes." *Id.* The exemption from regulation granted by G.S. 108-75.7(a)(1) to certain religious organizations comports precisely with this valid secular interest by subjecting to regulation only those religious organizations "whose financial support is derived primarily from contributions solicited from persons other than its own members . . . ." Moreover, in section 75.7(a)(1), distinctions among religious organizations are made solely in terms of the precise conduct which the state is seeking to regulate, viz., whether financial support is derived primarily from public solicitations. On its face, section 75.7(a)(1) simply does not distinguish on the basis of religious affiliation or religious belief. It is clear, then, that the preference accorded in section 75.7(a)(1)

to religious organizations which are primarily member-funded is not made for the purpose of putting "an imprimatur on one religion, . . . or to favor the adherents of any sect or religious organization." *Gillette v. United States*, supra, 401 U.S. at 450. Rather, the purpose of the exemption is to subject to regulation only those religious organizations which clearly present the problems which the Act seeks to remedy. Such a classification is rational and clearly related to the purposes of the Act.

The majority suggests that no rational distinctions can be drawn between member-funded and nonmember-funded religious organizations for the purposes of regulating the public solicitation of funds by charitable organizations. Such a conclusion overlooks the fact that the purpose of the Act is rather specialized. The Act is concerned with the integrity and operating efficiency of public charity. The primary goal of the Act is to preserve public confidence in public charity by means of a permit system which stresses full disclosure of facts relating to the collection and application of funds and which establishes certain minimum standards of operating efficiency. In sum, the concern of the legislature is not with organizations who raise their funds internally, but rather with the specialized problems presented by organizations who solicit charitable contributions from the public. Given the legislative intent, it is eminently reasonable for the legislature to subject to regulation only those religious organizations "whose financial support is derived primarily from persons other than its own members . . . ." G.S. 108-75.7(a)(1). These are the organizations which clearly present the regulatory problems which the legislature is trying to address.

I note, moreover, that the legislative decision to exempt from coverage those religious organizations whose financial support is derived primarily from their members constitutes a creditable attempt by the legislature to accommodate free exercise values. For while the legislature has the authority to regulate public solicitation by religious organizations, it must take care not to unnecessarily hamper such activities, which are protected by the First Amendment. *Cantwell v. Connecticut, supra.* The legislative exemption in the instant case skillfully balances free exercise values with the valid need for state regulation by subjecting to regulation only those religious organizations which clearly present the problems sought to be remedied by the legislative

scheme, viz., those organizations whose financial support is derived primarily from the public. Such benevolent exemption from onerous duties does not violate the constitutional command of state neutrality in matters of religion when, as here, the exemption is tailored broadly enough to reflect valid secular purposes. *Gillette v. United States*, supra; *Walz v. Tax Commission*, 397 U.S. 664, 25 L.Ed. 2d 697, 90 S.Ct. 1409 (1970).

The majority cites a number of cases for the *general proposition* that any legislative benefit or exemption to religion which is not all-inclusive is highly suspect and likely to constitute an establishment. *Committee for Public Education v. Nyquist*, supra; *Public Funds for Public Schools of N. J. v. Byrne*, 590 F. 2d 514 (3d Cir.), *aff'd mem.*, 99 S.Ct. 2818 (1979); *Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd mem. sub. nom. Grit v. Wolman*, 413 U.S. 901 (1973). The cases cited by the majority, however, deal exclusively with the application of the Establishment Clause in the wholly different context of financial aid by the state to private education. In such cases the legislative purpose is to provide aid to a particular sector of private education.[2] Consequently, the state's capacity to make classifications among the private schools or pupils attending such schools within the particular sector being aided is necessarily circumscribed. In order to pass muster under the Establishment Clause the state aid must go to virtually *all* private schools or pupils in the sector being aided. Thus, in this factual context, the state is for the most part limited to an "all or none" choice in terms of the classifications it may make. I note moreover that in the context of government aids to private education it is easier to establish that an appropriation constitutes a religious gerrymander or has an invalid primary effect of establishing religion. Thus, a facially neutral bill to aid *all* private schools in a state where virtually all recipients of aid would be "church-related or religiously affiliated" would violate the Establishment Clause. See *Meek v. Pittenger, supra; Committee of Public Education v. Nyquist, supra.* The elevation

2. For purposes of this analysis I assume arguendo that the aid which the state seeks to give is of a type which may constitutionally be given to sectarian schools or their pupils. Compare *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Education*, 330 U.S. 1 (1947) with *Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973).

by the majority of the *results* in these cases into fixed principles of general application fails to heed Chief Justice Burger's admonition in *Walz v. Tax Commission, supra*:

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."

397 U.S. at 668.

The majority suggests that the primary impact of the classification made by the state "is to accord benign neglect to the more orthodox, denominational, and congregational religions while subjecting to regulation those religions which spread their beliefs in more evangelical, less traditional ways."[3] It is true that the Establishment Clause "forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses." *Gillette v. United States*, supra, 401 U.S. at 452 (citations omitted). Still, a claimant alleging that a facially neutral regulatory scheme constitutes a gerrymander "must be able to show *the absence of a neutral, secular basis* for the lines government has drawn." *Id.* (Emphasis supplied.) My analysis of the exemption provided by G.S. 108-75.7(a)(1) has demonstrated that its purpose is to relieve from regulation those religious organizations whose methods of financing do not clearly present the regulatory problems in the area of public solicitation which the legislature is seeking to address. Additionally, the classification attempts to ac-

3. In fact, G.S. 108-75.7(a)(1) exempts from regulation those religious organizations whose nonmember funding is derived exclusively from the "sales of printed or recorded religious materials." Thus, protection is accorded in the Act to the "age-old type of evangelism" which was held in *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943), to have "as high a claim to constitutional protection as the more orthodox types" of congregational practices.

commodate free exercise values by exempting from regulation as much religious solicitation as is consistent with the state's concededly valid interest in preserving the integrity and operating efficiency of public charity. Thus, G.S. 108-75.7(a)(1) "serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions." *Id.* Since the classifications are clearly related to the advancement of a valid state interest, any benefits accorded to one or more religious institutions are incidental and do not constitute an establishment.

In the second part of its opinion the majority additionally concludes that the *exemption* granted under G.S. 108-75.7(a)(1) constitutes an establishment because it fosters an excessive government entanglement in religion. This conclusion is clearly incorrect. The pertinent inquiry in an establishment case is whether the *aid* or *benefit* granted by the state to religion in general or particular religions is of a type which violates the constitutional command of state neutrality with respect to religion. See, *e.g.*, *Walz v. Tax Commission*, supra. In terms of the entanglement test the pertinent inquiry is whether the *aid* or *benefit* being granted by the state to religion is of a type which cannot be administered without excessive government involvement in the affairs of religion or religious organization. Thus, even though a program of state *aid* to private schools is secular in purpose and primary effect, it may nonetheless foster government entanglement in the affairs of sectarian schools because of the complex state surveillance necessary to ensure proper application of the funds being given by the state. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed. 2d 745, 91 S.Ct. 2105 (1971). Analysis of the *benefit* granted by the state in the instant case compels the conclusion that the benefit granted by the exemption in section 75.7(a)(1) does not carry with it the seeds of an extensive and continuing government entanglement. Quite to the contrary, the *benefit* accorded by the exemption is one of freedom from further state regulation. The only state involvement connected with the benefit granted is that of determining whether an organization qualifies for an exemption. Thus, once a religious organization qualifies, it is not subject to any further regulation by the state. Clearly then, the exemption or benefit granted does not foster excessive government "entanglement" with religion as that term is used in the jurisprudence of the Establishment Clause.

The majority's conclusion in Part II that the Act fosters an excessive entanglement with religion is based on the regulatory *burdens* that would be imposed on plaintiffs were they to be denied an exemption under section 75.7(a)(1). The majority reasons that exposure to the regulatory mechanisms of the Act would unduly burden plaintiffs' religious activities. In effect, the majority's analysis focuses on the extent of the *burden* imposed by *other sections* of the Act on plaintiffs' *free exercise* of religion. Thus, the issue raised by the majority in Part II of its opinion is not whether the exemption in section 75.7(a)(1) constitutes an establishment; rather, the true issue raised is whether the provisions of the act impermissibly infringe upon the free exercise of religion.

"Untangling" the lines of analyses in this manner permits examination of the free exercise problems raised by the Act in their proper context. Thus, my analysis of the free exercise problems raised by the Act proceeds on the assumption that in section 75.7(a)(1) the General Assembly may, consistent with establishment principles, subject to regulation some but not all religious organizations when legislating in the field of public solicitation. Such a conclusion, however, is not determinative of the extent to which the state may regulate these organizations. "For despite a general harmony of purpose between the two religious clauses of the First Amendment, the Free Exercise Clause no doubt has a reach of its own." *Gillette v. United States, supra*, 401 U.S. at 461. Thus, while the exemption granted in section 75.7(a)(1) withstands constitutional challenge on establishment grounds, it may well be that sections of the Act, as applied to plaintiffs, are invalid on free exercise grounds. The key point to be kept in mind is that the constitutional problems posed by the exemption in section 75.7(a)(1) are separate and distinct from the problems which may be posed by other sections of the Act. The invalidation of other sections of the Act on free exercise grounds does not, *ipso facto*, compel invalidation of the exemption granted in section 75.7(a)(1).

That the state has a compelling interest in regulating the public solicitation of funds by religious and secular organizations is conclusively established in *Cantwell v. Connecticut, supra*. Moreover, *Cantwell* suggests that the inclusion of religious organizations in a general scheme for the licensing of such

organizations is a permissible means of advancing the state's interest in protecting its citizens from fraudulent solicitations and in preserving the integrity and fiscal responsibility of public charity. "The general regulation in the public interest, of solicitation which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, *even though the collection be for a religious purpose.* Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise." *Cantwell v. Connecticut, supra,* 310 U.S. at 305. (Emphasis supplied.) *See also, id.* at 306-07. Thus, according to *Cantwell,* a properly drafted licensing scheme is a less restrictive means of achieving the state's compelling interest in regulating the public solicitation of funds by religious and secular organizations.

With a few exceptions, the provisions of the Act comport with the standards articulated in *Cantwell* and hence, are not open to constitutional objection on free exercise grounds. The primary burden imposed on religious organizations by the Act is the completion of an application for a license to solicit. See G.S. 108-75.6. The information which religious organizations must supply on their application relates clearly to the state interest in preserving the integrity and fiscal responsibility of public charity and in protecting its citizens from fraudulent solicitations. Thus, a religious organization, like any other organization which intends to solicit funds, must give its name, address, names and addresses of key personnel, a copy of an audited balance sheet which conforms to the "Audit Guides" published by the American Institute of Public Accountants, location of financial records, method of solicitation, use of professional fund-raising counsel and solicitors, length and areas of solicitation, purpose of solicitation, names of individuals responsible for the final distribution of funds. *Id.* Moreover, the only inspection authority retained by the state is over the *financial records* maintained by the soliciting organization: "Upon demand, such records shall be made available to the Department, the Commission or the Attorney General for inspection." G.S. 108-75.12.

Such requirements are general in nature, do not involve a religious test, and do not unreasonably obstruct or delay the collection of funds. The most intrusive requirement imposed on

religious organizations is the submission of an audited financial statement. G.S. 108-75.6(6). The impact of this requirement is considerably softened by a proviso which permits simplified reporting by organizations that raise less than $25,000 in the preceding fiscal year. *Id.* The compilation of a financial statement, audited or simplified, has at best a tenuous impact on matters of religious practice or belief. The primary effect of such disclosure is to reveal the flow of money into and out of the organizational structure. To the extent that management of solicited funds constitutes a religious practice or belief it must yield to the state's interest in seeing that reasonable amounts of solicited funds are used for the purposes for which they are solicited. Moreover, it would seem that sound accounting practices would in the long run tend to advance rather than retard an organization's ability to solicit funds.

Equally important in the statutory scheme are the standards by which the Secretary of Human Resources is to revoke, suspend or deny issuance of a license to a charitable organization. G.S. 108-75.18. These standards must be carefully scrutinized for imposition of an invalid religious test. Free exercise of religion precludes the denial, revocation or suspension of a license from being based on a determination that the purpose of the solicitation is not "religious" in nature or that funds are not being used for "religious" purposes. *Cantwell v. Connecticut*, supra. Such a grant of power improperly sets up the state as an arbiter of religious practice in violation of the Free Exercise Clause. *Id.* Thus, absent circumstances of outright fraud, collusion or other specific illegality, the state must accept at face value the assertion that the purposes for which funds are solicited are "religious" in nature. However, the state may, consistent with free exercise values, revoke, suspend or deny issuance of a license on the grounds that funds solicited are not being applied or will not be applied for the purposes, "religious" or otherwise, listed in the application. Such a standard limits the state to the neutral inquiry whether funds solicited will be applied to the purpose or purposes represented in the application.

Section 75.18 sets out the seven grounds upon which the Secretary shall revoke, suspend, or deny issuance of a license. The fourth ground of disqualification is that "[a]n unreasonable percentage of the contributions solicited, or to be solicited, is not

applied, or will not be applied to a charitable purpose." G.S. 108-75.18(4). The term "charitable purpose" as defined in the Act encompasses any "religious purpose." See G.S. 108-75.3(2). Thus, as applied to religious organizations, subsection four improperly sets up the Secretary as an arbiter over religious practice. Accordingly, I would hold that subsection four as applied to plaintiffs constitutes an impermissible prior restraint over religion in violation of the Free Exercise Clause. The regulatory goal improperly advanced by subsection four is accomplished in a constitutionally permissible manner by subsection five which permits disqualification upon a neutral determination that "the contributions solicited or to be solicited, are not applied, or will not be applied to the purpose or purposes as represented in the license application." G.S. 108-75.18(5). The remaining grounds of disqualification limit the state to neutral, nonreligious inquiries such as the truth of statements made in the license application, whether an applicant has engaged in a fraudulent transaction, whether an undue percentage of solicitations are being absorbed by fund-raising expenses. See generally, G.S. 108-75.18.[4]

The only other free exercise problem posed by the Act is the definition of the term "member" in the proviso which denies the exemption from regulation to those religious organizations whose "financial support is derived primarily from contributions solicited from persons other than its own members, excluding sales of printed or religious materials . . . ." G.S. 108-75.7(a)(1). The Act does not specifically define what constitutes membership in a religious organization. Without a narrow, technical definition

4. G.S. 108-75.18(4) permits the Secretary to revoke, suspend or deny issuance of a license to a charitable organization upon a finding that solicitation and fund-raising expenses have exceeded or will exceed 35% of the total funds solicited. This subsection, however, grants discretion to the Secretary to allow for higher expenses "[i]n the event special facts or circumstances are presented showing that expenses higher than thirty-five percent (35%) were not or will not be unreasonable." This hardship clause protects the First Amendment free speech interests of organizations "whose primary purpose is not to provide money or services for the poor, the needy or other worthy objects of charity, but to gather and disseminate information about and advocate positions on matters of public concern." *Schaumburg v. Citizens For A Better Environment*, 40 CCH S.Ct. Bull. p. 815, 830 (Filed February 20, 1980). Accordingly, the percentage limitation in subsection (4) is not subject to challenge on free speech grounds. *See Id.* at p. 831, n. 9. *Accord, National Foundation v. Fort Worth*, 415 F. 2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970) (cited approvingly by the Court in footnote nine of its opinion in *Schaumburg*).

of this term, the state is left free to determine what constitutes membership in a religious organization. Such power vested in the state would constitute a form of religious censorship prohibited by the Free Exercise Clause. *Cantwell v. Connecticut, supra.* Accordingly, to avoid this constitutional infirmity I would hold that the term "member" is to be defined in accordance with the rules, regulations, or rituals of the particular religious organization under scrutiny; provided, however, that the term "member" shall not include those persons who are granted a membership upon making a contribution as the result of solicitation; provided further, that the term "member" shall include only those persons who are in a position to reasonably ascertain whether contributions solicited by the organization will be applied to the purpose or purposes as represented in the license application. See generally, G.S. 108-75.3(12); 108-75.18(5). Such a definition permits the state to advance its secular interest in the charitable solicitations of religious organizations without unnecessarily infringing on the free exercise of religion.

In its discussion of the Act the majority suggests that there might be less restrictive means of achieving the state's compelling interest in preserving the integrity and efficiency of public charity. I note first that *Cantwell v. Connecticut*, supra, conclusively establishes that a *permit system* is a constitutionally permissible means of achieving this end. I note further that the purpose of the Act, in addition to protecting the general public from fraud, is to preserve public confidence in public charity. See G.S. 108-75.2. Fraud statutes alone are not sufficient to advance this interest. A permit system which stresses public disclosure of facts relating to the collection and application of funds and which establishes certain minimum standards of operating efficiency is better suited to the advancement of the dual state goals of preventing fraud and preserving the valuable services rendered to society by the institution of public charity. I note finally by way of comparison that fraud legislation may in fact be a more restrictive means of advancing the state's interest in preventing fraudulent solicitations by religious organizations. This is so because as applied to a "religious" defendant, the element of "fraudulent intent" necessarily involves deeper scrutiny of a defendant's religious beliefs. *See generally, United States v. Ballard*, 322 U.S. 78, 88 L.Ed. 1148, 64 S.Ct. 882 (1944). In com-

parison, the legislative scheme in the instant case limits its scrutiny to the essentially neutral inquiry of whether solicited funds are being applied in reasonable amounts to the purposes represented in the license application.

The majority suggests that state surveillance of the audited financial statements to be submitted by religious organizations which solicit in the state impermissibly infringes upon the free exercise of religion. Compare G.S. 108-75.4 with 108-75.6(6). In my view, such impositions are no more onerous for a religious organization than filing a state or federal income tax return or filing for tax-exempt status under the Internal Revenue Code. Additionally, the majority raises the possibility that a disgruntled contributor or advocate of an opposing doctrine might cause the Secretary to unnecessarily investigate a religious organization for violations of the Act. However, the same potential for abuse exists in any valid state regulation or criminal statute. If such potential for abuse is invariably a matter of constitutional import, then no valid state regulation which affects religion can withstand constitutional scrutiny.

G.S. 108-75.20(h)(2) prohibits solicitation of charitable funds in North Carolina by a person who has been enjoined from such solicitation in any other state. This section is violative of due process and for purposes of this dissent requires no further discussion. G.S. 108-75.7(a)(7) exempts from regulation veteran's organizations, organizations of volunteer firemen, and certain others if all of their fund-raising activities are carried on by members and such members receive no direct or indirect compensation therefor. This section is violative of equal protection and for purposes of this dissent requires no further discussion.

In Section 3 of Chapter 747 of the 1975 Session Laws the General Assembly enacted a severability clause for the "Solicitation of Charitable Funds Act" which provides as follows:

> "If any provision of this act, or the application of such provision to any person or under any circumstances shall be held invalid, the remainder of this act, or the application of such provisions to persons or under any circumstances, other than those as to which it shall have been held invalid, shall not be affected thereby."

I have concluded that G.S. 108-75.18(4), as applied to religious organizations, violates the Free Exercise Clause; that G.S. 108-75.20(h)(2), on its face, is violative of due process; and that G.S. 108-75.7(a)(7), on its face, is violative of equal protection. Accordingly, I would discard these sections under the severability clause while preserving the sound sections of the Act as discussed above.

In effect, the majority's interpretation of the Religion Clauses seems to accord with the interpretation of the United States District Court in *Christian Echoes National Ministry Inc. v. United States*, 470 F. 2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973). In that case the District Court held that the federal government could not decide whether plaintiff's activities were political or religious in nature for purposes of determining plaintiff's exempt status under the Internal Revenue Code. " 'To do so' ", concluded the court, " 'would require an interpretation of the meaning of the church doctrine espoused by plaintiff and a determination of the relative significance of the religion of plaintiff to its activities.' " 470 F. 2d at 856 (quoting conclusions of law made by the District Court). My response to this interpretation accords with that of the Tenth Circuit Court of Appeals, which reversed:

> "We know of no legal authority supporting the conclusion set forth above. Such conclusion is tantamount to the proposition that the First Amendment right of free exercise of religion, ipso facto, assures no restraints, no limitations and, in effect, protects those exercising the right to do so unfettered."

470 F. 2d at 856.

For the reasons stated, I respectfully dissent from the majority's holding that the exemption in G.S. 108-75(a)(1) establishes religion in violation of the First Amendment and Article I, Section 13 of the North Carolina Constitution. I also dissent from the majority's holding that the exemption in section 75.7(a)(1) fosters an unconstitutional entanglement with religion.

Since I conclude that establishment principles do not preclude application of the Act in its entirety to these plaintiffs, I reach the questions discussed by the Court of Appeals relative to the constitutionality of various sections of the Act. For the reasons stated in this dissent, I concur in the conclusion of the

Court of Appeals that G.S. 108-75.18(4) is an impermissible prior restraint on plaintiffs' free exercise of religion. Additionally, I would uphold the conclusions of the Court of Appeals that G.S. 108-75.20(h)(2) violates the Due Process Clause of the Fourteenth Amendment, and that G.S. 108-75.7(a)(7) violates the Equal Protection Clause of the Fourteenth Amendment.

I would reverse the Court of Appeals as to all other sections of the Act which it held to be void. With the exceptions noted above, I find no merit in the constitutional objections raised by plaintiffs.

For the reasons stated, I respectfully dissent from the majority opinion.

Justices COPELAND and BROCK join in this dissent.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; NANTAHALA POWER & LIGHT COMPANY, APPLICANT-APPELLANT v. RUFUS L. EDMISTEN, ATTORNEY GENERAL, ET AL.; INTERVENORS-APPELLEES

No. 80

(Filed 5 March 1980)

Electricity § 3; Utilities Commission § 36— electric rates—affiliated utility companies—propriety of roll-in method of rate making

The Utilities Commission erred in failing to consider a rate structure based on the rolling in of Tapoco, Inc.'s properties, revenues and expenses with those of Nantahala Power Co., as though the two were operating as one utility, since both companies were owned and controlled by the Aluminum Co. of America; the two companies presided over one physically integrated system, interconnected in such a way that all power available to the system could be used to enhance its overall reliability and supply its requirements as a whole; the companies sold all electricity which they produced to TVA and received in return entitlements to electricity from TVA; Nantahala was apportioned a small amount of this electricity to meet its public service load; when its public service demands exceeded the apportionment, it had to purchase additional energy from TVA, the cost of which was passed on to its retail customers; and the remainder of the entitlements from TVA went to Tapoco which sold the bulk of them directly to Aluminum Co. of America for substantially less than the value of the energy transferred.

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

Utilities Comm. v. Edmisten, Attorney General

APPEAL by plaintiff Nantahala Power and Light Company pursuant to G.S. 7A-30(3) from the decision of the Court of Appeals (opinion by *Judge Harry C. Martin, Chief Judge Morris* and *Judge Hedrick* concurring) at 40 N.C. App. 109, 252 S.E. 2d 516 (1979), vacating an order of the North Carolina Utilities Commission entered 14 June 1977, Docket No. E-13, Sub. 29, which authorized plaintiff to adjust and increase its retail electric rates. This case was docketed and argued as No. 11, Fall Term 1979.

Rufus L. Edmisten, Attorney General, by Richard L. Griffin, Assistant Attorney General, for the State.

Joyner & Howison, by Robert C. Howison, Jr., James E. Tucker and G. Clark Crampton for Nantahala Power and Light Company.

Crisp, Smith & Davis, by William T. Crisp, and Spiegel & McDiarmid, by Robert H. Bear for Henry J. Truett.

McKeever, Edwards, Davis & Hays, by Fred H. Moody, Jr., for County of Swain.

Joseph Pachnowski for Town of Bryson City.

EXUM, Justice.

On 1 November 1976, Nantahala Power and Light Company (Nantahala) applied to the North Carolina Utilities Commission for permission to raise its retail electric utility rates and to revise a purchased power cost adjustment clause applicable to such rates. Treating the matter as an application for a general rate increase under G.S. 62-133, the Commission ordered investigation, posting of notices, and held public hearings. The Attorney General on behalf of the consuming public of North Carolina, the Town of Bryson City, the County of Swain, and Henry J. Truett were allowed to intervene in the proceedings.

During the hearings, intervenors moved (a) for an order by the Commission joining as parties respondent Aluminum Company of America (Alcoa) and Tapoco, Inc. (Tapoco), and (b) for an order by the Commission compelling Nantahala to produce information sufficient to allow the Commission to consider a rate design based on the "rolling in" of Tapoco's properties, revenues, and expenses with those of Nantahala, as though the two were

operating as one utility. Both motions were denied, and the Commission subsequently authorized certain increases in Nantahala's rates and purchased power adjustment clause. The Court of Appeals reversed, vacating the order authorizing the rate increase and remanding the case to the Commission for the purposes of making Tapoco a party and considering "whether the people of North Carolina would benefit by use of the roll-in method of rate making involving Nantahala and Tapoco." 40 N.C. App. at 120, 252 S.E. 2d 522. On 12 April 1979, the Court granted Nantahala's petition for a writ of supersedeas to stay the mandate of the Court of Appeals and permit the continuation of the new rates authorized by the Commission.

For the reasons set out below, we affirm the decision of the Court of Appeals only insofar as it directs the Commission to consider whether a rate schedule computed as if Nantahala and Tapoco were one utility would be in the best interests of the customers of Nantahala. We leave to the discretion of the Commission the choice of the procedure whereby it will obtain the information necessary for the roll-in computation. We reverse that part of the Court of Appeals' decision which vacates the Commission's order authorizing the increased rate schedule, and we dissolve our writ of supersedeas. Although the 1977 rates will be allowed to continue in effect, we direct the Commission to require Nantahala to insure its ability to refund any excess premiums that may be found to have been charged upon final determination of the rate schedule proper to this case.

The somewhat intricate factual background of this case is not generally in dispute. Incorporated in North Carolina in 1929, Nantahala is a wholly owned subsidiary of Alcoa. It owns and operates hydroelectric generation and transmission facilities in the western part of this state and serves the public in six western counties with retail electrical service. For many years, a large percentage of Nantahala's total kilowatt hour production was transferred to Alcoa's facilities in Tennessee. With the population growth of western North Carolina after 1960, however, an increasing proportion of Nantahala's production has been required to satisfy its public service utility load. Indeed, since 1971 Nantahala has not directly transferred any of its electrical output to Alcoa.

Tapoco was incorporated in 1900 in Tennessee as Knoxville Power Company. It was domesticated in North Carolina in 1954. In 1955 Tapoco, along with Nantahala and Carolina Aluminum Co., jointly filed with the North Carolina Utilities Commission for a certificate of public convenience and necessity to permit Tapoco to acquire and operate two electrical generation facilities at Santeetlah and Cheoah then owned by Carolina Aluminum. In the order granting the certificate, the Commission directed that Tapoco supply to Nantahala the power necessary to satisfy Nantahala's public service loads in the two villages of Santeetlah and Tapoco in Graham County. This certificate is still in effect. Tapoco is a wholly owned subsidiary of Alcoa.

The transmission facilities of Nantahala and Tapoco are integrated and interconnected into a single system. Alcoa controls the ultimate operation and accounting policies of both utilities. The chief executive officers of both Nantahala and Tapoco report directly to an Alcoa vice president. Members of the board of directors of both utilities are employees of Alcoa.

In 1941 Alcoa entered into a twenty-year agreement with the Tennessee Valley Authority (TVA), pursuant to which Alcoa caused Nantahala (not a party to the agreement) to transfer to TVA a large part of Nantahala's real property holdings. The property so transferred was valued at approximately 3.5 million dollars and was eventually used in the construction of TVA's Fontana Dam. In return for the transfer, TVA agreed to supply Alcoa a continuous stream of 11,000 kw for the term of the contract. During the period of this contract, Nantahala produced electricity in excess of its public service load. This excess was sold to Alcoa at "dump" prices.

Effective 1 January 1963, the 1941 agreement was modified and largely replaced by the "New Fontana Agreement," to which Nantahala, Alcoa, Tapoco, and TVA are parties. This agreement allows TVA to coordinate Tapoco's operations and most of Nantahala's in such a way as to integrate into a single system the two utilities' electrical production and distribution. Instead of supplying Alcoa with electricity, TVA receives all of the electrical output of the Tapoco and Nantahala plants (except that of three small facilities belonging to Nantahala) and grants to Nantahala and Tapoco in return average annual entitlements to some

1,798,000,000 kwh (average power of 205.1 mw). The agreement specifies that Alcoa, Nantahala, and Tapoco are to decide among themselves how these entitlements will be allocated and distributed.

A subsequent apportionment agreement in 1963 provided that Nantahala was to receive as its monthly share of the New Fontana Agreement entitlements the *larger* of either its total actual generation output *or* one-twelfth of its annual primary energy capability of 360 million kwh.[1] This apportionment agreement further provided that Alcoa was to pay Nantahala an annual sum of $89,200 in compensation for allowing TVA to control Nantahala's facilities.

In 1971, however, the 1963 apportionment formula was superseded by new agreements between Tapoco, TVA, and Nantahala. Under these 1971 agreements, which are now in effect, Nantahala's share of the TVA entitlements is limited to 360 million kwh annually, an amount of energy equal to Nantahala's primary capability. Any additional energy needed by Nantahala to satisfy its public service load is to be purchased from TVA. Additionally, Nantahala is to pay TVA a charge if the demand of its system exceeds 54,300 kw at any instant. These agreements eliminate the annual $89,200 payment by Alcoa to Nantahala. The remainder of the energy returned by TVA under the New Fontana Agreement entitlements goes to Tapoco, which then transfers it to Alcoa.

The intervenors in this case contend that the facts and circumstances attendant to Nantahala's relationship with Tapoco

1. "Primary energy" is a planning term which refers to that quantum of energy generation which is virtually assured under even the most adverse generation conditions. In the case of a hydroelectric facility, the "primary energy capability" is the amount of energy which the facility is theoretically assured to produce during the "critical hydro period"—the period of the lowest stream flow of record. The period of record used to determine Nantahala's primary capability was the 36-year span from 1924 through 1959. The lowest stream flow which occurred during that period took place from June 1930 through November 1931. This 18-month "critical hydro period" was then used as an indicator of the lowest flow which might reasonably be expected to occur during the life of the Nantahala development. It was estimated that the Nantahala system (excluding the plants not covered by the New Fontana Agreement) would produce an adjusted minimum of 41.1 mw, or 360 million kwh annually, under stream flow conditions similar to the critical period. Nantahala's "primary energy capability" of 360 million kwh is thus the theoretical minimum annual potential generation of the Nantahala network.

and Alcoa are such as to compel the Commission at least to *consider* the propriety of a rate schedule computed upon a rate base which takes into account the property values and operating expenses of both Tapoco and Nantahala. They assert that such a roll-in method of rate making will serve to cancel, or at least to "true up," concealed benefits which allegedly flow to Alcoa from Nantahala and Tapoco by virtue of the 1971 agreements. The Commission on the other hand concluded in its order that the evidence is not sufficient to warrant the treatment of Nantahala and Tapoco as a single entity, or to disregard the separate corporate identities of Nantahala, Tapoco, and Alcoa. The Court of Appeals disagreed. We agree with the Court of Appeals.

Chapter 62 of the General Statutes confers upon the Commission both the power and the duty to compel a public utility to render adequate service to its public customers in return for reasonable rates. *Utilities Commission v. Morgan*, 277 N.C. 255, 177 S.E. 2d 405 (1970). These rates are to be fixed by the Commission as low as may be reasonably consistent with due process requirements of the state and federal constitutions. *Utilities Commission v. Duke Power Co.*, 285 N.C. 377, 206 S.E. 2d 269 (1974). In the setting of such rates, the Commission is required to consider not only those specific indicia of a utility's economic status set out in G.S. 62-133(b),[2] but also "all other material facts of record" which may have a significant bearing on the determination of reasonable and just rates. G.S. 62-133(d); *Utilities Commission v. Edmisten*, 291 N.C. 327, 230 S.E. 2d 651 (1976). Although it is not for an appellate court to dictate to the Commission what weight it should give to material facts before it, a summary disposition which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. *Utilities Commission v. Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469 (1961); G.S. 62-94.[3]

2. G.S. 62-133(b) provides *inter alia* that in the determination of a utility's rates, the Commission shall: (1) ascertain the fair value of the utility's "used and useful" property, taking into account original cost, depreciation, replacement cost, and other factors; (2) estimate the utility's revenue under present and proposed rates; (3) ascertain the utility's reasonable operating expenses, including that accruing through actual depreciation; and (4) fix a reasonable rate of return based on the foregoing factors.

3. G.S. 62-94 provides in pertinent part:

"(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provi-

As a public utility, Nantahala's primary duty is to serve its public customers. These customers have, in effect, "first claim" on all energy actually generated by Nantahala's facilities. *Utilities Commission v. Membership Corporation*, 260 N.C. 59, 131 S.E. 2d 865 (1963). Nantahala may not be allowed to structure its economic affairs or physical operations in such a way as to effect an unreasonable preference or advantage to anyone, including its parent Alcoa. *Utilities Commission v. Mead Corporation*, 238 N.C. 451, 78 S.E. 2d 290 (1953); G.S. 62-140. To the degree, then, that the record in the instant case reveals facts which support an inference that Nantahala's relationship with Tapoco and Alcoa adversely affects Nantahala's service to its North Carolina customers, the circumstances of that relationship are material and must be scrutinized closely by the Commission in the course of its rate making proceedings. The doctrine of corporate entity should not stand as a shield to such an inquiry. *See, e.g., Utilities Commission v. Morgan, supra*, 277 N.C. at 272-73, 177 S.E. 2d at 416.

From uncontradicted statements in the record of witnesses who testified on behalf of Nantahala, it is clear that all of Nantahala's actual electrical output (except that of three small facilities not included in the New Fontana Agreement) "immediately becomes TVA's source" and is distributed pursuant to the New Fontana and 1971 apportionment agreements. Similarly, all the power that Tapoco produces is absorbed by TVA into the same integrated system. In return, Nantahala and Tapoco together receive from TVA a block entitlement of an annual average of over 1.79 billion kwh. Of this amount, Nantahala is ap-

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sions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commission, or

(3) Made upon unlawful proceedings, or

(4) *Affected by other errors of law*, or

(5) *Unsupported by competent, material and substantial evidence in view of the entire record as submitted*, or

(6) Arbitrary or capricious." (Emphasis supplied.)

portioned some 360 million kwh annually, or 30 million kwh monthly, to meet its public service load. When Nantahala's public service demands exceed this apportionment, it must purchase additional energy from TVA to meet its requirements. The cost of such additional power is passed on to Nantahala's retail customers via monthly purchased power cost adjustments to their electric utility bills. Tapoco receives the remainder of the New Fontana entitlements from TVA and "sells" the bulk of these directly to Alcoa. It is undisputed that the amount which Alcoa pays to Tapoco for this power does not reflect the actual value of the energy transferred.[4]

Evidence in the record further shows that Nantahala has not directly sold electricity to Alcoa since 1970. Since 1971, moreover, Nantahala's New Fontana Agreement entitlement to 360 million kwh per year has generally been insufficient to meet the demands of its public customers. During the test year 1975, for example, the Nantahala system load requirement was slightly in excess of 450 million kwh. The cost of additional power purchased that year by Nantahala from TVA was over $1.5 million, an amount presumably passed on at least in part to Nantahala's customers through monthly billing adjustments. During that same year, however, the Nantahala system *generated* in excess of 520 million kwh. These figures support the strong inference, if not the inescapable conclusion, that Nantahala's 1975 purchases of additional power from TVA were often required not by actual need, but merely by virtue of the 360 million kwh allocation ceiling imposed by the 1971 apportionment agreements.[5]

4. Testifying on behalf of Nantahala, witness George Popovich, Power Management Consultant for Alcoa, stated several times that the formula by which Alcoa calculates its payments to Tapoco is totally unrelated to the true value of the Tapoco energy actually received by Alcoa:

> "The amount which Alcoa pays to Tapoco pursuant to that formula is absolutely not a meaningful measure of the value of electricity which it sells to Alcoa. . . . The amount paid by Alcoa, the parent, to Tapoco, the wholly owned subsidiary, is money in one pocket and out the other, so to speak . . . . It would perhaps be more appropriate to describe the transactions between Tapoco and Alcoa in terms of an intra corporate transfer rather than in terms of purchase and sale." (R p 169).
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> ". . . [I]n the case of Tapoco I think the [formula] understates the value rather than overstates it. I think it is unrealistically low. I think it's simply an interdepartmental transaction." (R p 299).

5. It is true that comparison of 1975 total system load requirements with 1975 total generation provides little meaningful indication of how often Nantahala's

In support of its order authorizing Nantahala's rate increase, the Commission concluded *inter alia* that the New Fontana and 1971 apportionment agreements were just and reasonable and to the benefit of Nantahala's customers. It is true that the effect of these agreements is to ensure to Nantahala, and thus to its customers, the continued availability of 360 million kwh of "firm" uninterruptible power annually, whether or not Nantahala's system actually produces that amount of energy on its own. This 360 million kwh entitlement, however, is based upon Nantahala's primary energy capability, *i.e.*, that amount of energy the Nantahala system could theoretically produce in a year under the most critical drought conditions of low rainfall and stream flow.[6] The entitlement figure is *not* derived "from the average amount of energy [Nantahala] could produce on its own under average rainfall conditions," as the Commission erroneously concluded in its order. Thus, while Nantahala's contractual arrangements with TVA and Tapoco may benefit Nantahala with a guarantee that its minimal production capacity will be sustained during adverse conditions, these same arrangements appear to result in the anomalous situation that in periods of favorable stream flow and rainfall in which Nantahala's facilities produce more energy than its customers require, these customers must nevertheless pay extra for extra energy purchased by Nantahala from TVA. Any usable excess generated by Nantahala in such a year appears to accrue not to the benefit of its customers, but rather to that of its parent Alcoa, which "purchases" the remainder of the New Fontana entitlements from Tapoco. Suffice it to say that the assertion that Nantahala's public is fairly served by a contract requiring Nantahala to purchase additional power regardless of the ade-

output was in fact in excess of its requirements. However, a comparison of the 1975 generation and requirement figures on a month by month basis reveals that in February, March, April, May, June, and November of 1975, Nantahala's actual generation was considerably in excess of its public load demand. In March, 1975, for example, the Nantahala system generated over 67 million kwh. Its load requirement that month was slightly over 41 million kwh. Nevertheless, by virtue of the 1971 apportionment agreements, Nantahala's entitlement from TVA was limited to 30 million kwh per month. Nantahala thus would have had to purchase an additional 11 million kwh from TVA to meet its load requirements for March, despite the fact that its actual generation in March resulted in an excess of some 26 million kwh. At least some of the usable part of this excess presumably became part of Tapoco's New Fontana entitlement, to be transferred at low rates to Alcoa.

6. See footnote 1 *supra*.

quacy of its own generation assaults the common sense of this Court. Nantahala's customers should not be denied the benefit of their utility's fairly regular harvests of abundant energy.

Nantahala strenuously maintains that any investigation by the Commission into Tapoco's operations would be a useless gesture, since Tapoco has no power available under the New Fontana Agreement which is suitable for use by a public utility such as Nantahala. This argument is premised on the assumption that a public utility may count on only its *primary energy* as being continuously available to meet the requirements of its customers. Of the 205.1 mw of average power made available to Tapoco and Nantahala by TVA pursuant to the New Fontana Agreement, only 41.1 mw is primary energy, and that entire amount is allocated to Nantahala by the 1971 apportionment agreement. The remaining 164 mw of the New Fontana entitlement is delivered to Tapoco as "secondary" (interruptible) energy, unsuitable by definition for the continuous service demands of a public utility. Thus, the argument goes, Tapoco has "nothing left to give" to Nantahala, and a consideration of Nantahala and Tapoco as one integrated utility would simply fly in the face of reality. The Commission appeared to accept this contention when it concluded in its order that "it does not appear that Nantahala could obtain a better arrangement [than the New Fontana and 1971 agreements] in purchasing additional power from other utilities, *in obtaining power from Tapoco since Tapoco power is not suited for a public utility load*, or in negotiating individually with TVA." This conclusion is not, however, supported by the record. In the first place, a "better arrangement" was clearly had by Nantahala under the 1963 apportionment agreement, which guaranteed to Nantahala the grater of its monthly primary energy capability or its actual energy generation, plus annual cash payments from Alcoa. More importantly, a close examination of the New Fontana and 1971 apportionment agreements reveals that it is by the very terms of these contracts that Tapoco "has" no primary energy. Tapoco's facilities do in fact produce an "adjusted" primary energy component of 86.1 mw.[7] This power flows directly to TVA pursuant to the New Fontana integration agreement. All the entitlements

7. Nantahala's witness George Popovich, see footnote 4 *supra*, testified to a study showing that Tapoco's primary energy contribution to TVA through the New Fontana Agreement is an average of 105.0 mw. When this figure is modified "in

that Tapoco receives in return are blocks of secondary, interruptible energy. Thus it is by the artificial constraints of contractual agreement, not factual necessity, that Tapoco is deemed to *have* no primary power suitable for public utility distribution.

This Court has faced before an attempt by Nantahala to justify its relationships with its parent Alcoa on the basis of distinctions between primary and secondary energy. In *Utilities Commission v. Mead Corp., supra*, 238 N.C. 451, 78 S.E. 2d 290, we upheld the superior court's reversal of a rate increase allowed Nantahala by the Commission. We agreed in that case with the judge below "that the question of whether the power distributed [at low rates] to Alcoa was secondary power, and that to Mead [at higher rates] primary, was to a large extent the mere application of different labels to that which is essentially the same." *Id.* at 465, 78 S.E. 2d at 300. Admittedly the instant case presents a factual matrix far more complex, and a series of contractual arrangements far more sophisticated, than those evidenced in *Mead.* Nevertheless, we cannot help but be struck by the fact that here, as in *Mead*, the distinction between primary and secondary energy availability is offered to explain certain anomalies that arise in the course of Nantahala's contractual relationship with Tapoco and Alcoa. Here, as in *Mead*, special care must be taken to insure that the contractual restrictions placed on Nantahala represent an appropriate response to the demands and necessities of Nantahala's public customers and not merely the product of the draftsman's artful use of technical labels.

In light of the foregoing, we cannot agree with the Commission that the evidence is insufficient to warrant the treatment of Nantahala and Tapoco as a single system for rate making purposes. The "roll-in" device, or technique, for rate making computation seems especially appropriate in a case such as this where one physically integrated system, interconnected in such a way that all power available to the system can be used to enhance its overall reliability and supply its requirements as a whole, is presided over by two corporate entities. *See, e.g., Central Kansas Power Co. v. State Corporation Commission*, 221 Kan. 505, 561 P. 2d 779 (1977). This is especially true when both corporate entities

order to facilitate a comparison" with the New Fontana entitlements, Tapoco's contribution is shown as an average of 86.1 mw of "adjusted" primary energy.

are wholly owned by a parent corporation which benefits from the power generated by the system. This device does nothing more than recognize that the two corporate entities ought, for rate making accounting purposes, be treated as the one electrical power producing and distribution system which, in fact, they are. If then unlawful preferences are indeed accorded to Alcoa to the detriment of Nantahala's customers because of the separate corporate structures and the inter-corporate apportionment agreements, this rate making device would seem to eliminate them. The Commission erred in giving only minimal consideration to the evidence suggesting the propriety of the roll-in device. The case is remanded with directions to the Commission to obtain and consider information and data showing what Nantahala's cost of service to its customers would be if this method of rate making were used and whether Nantahala's customers would benefit thereby.

We leave to the Commission's discretion, however, the method whereby it will have provided to it the additional information necessary for a roll-in computation. The Commission is of course free to direct the applicant Nantahala to furnish such information. G.S. 62-32(b); G.S. 62-37.[8] And under the facts of this case, it would appear that the Commission also has jurisdiction to order Nantahala's parent Alcoa to come forth with the needed information. G.S. 62-3(23)(c).[9] Alternatively, the Commission may seek on its own motion to inspect Alcoa's or Tapoco's books and records under authority of G.S. 62-51.[10] Finally, assuming without deciding the correctness of the Court of Appeals' holding that

8. G.S. 62-32(b) gives the Commission "all power necessary" to compel a public utility to provide reasonable service. G.S. 62-37 authorizes the Commission to investigate and examine the management of any public utility "whenever it may be necessary in the performance of its duties."

9. G.S. 62-3(23)(c) specifies that in rate making cases, the definition of "public utility" shall include a parent corporation of a public utility doing business in the state to the extent that the Commission shall find that the affiliation with the parent "has an effect" on the rates and services of the North Carolina utility. It is obvious from the record that the New Fontana and 1971 apportionment agreements, which arose in the context of Nantahala's affiliation with its parent Alcoa, have a direct bearing upon Nantahala's rates and services.

10. G.S. 62-51 empowers the Commission and its staff to inspect books and records of corporations "affiliated with" regulated public utilities, "*including parent corporations and subsidiaries of parent corporations.*" (Emphasis supplied.) The right to inspect extends to books and records located both within and without the

Tapoco is a public utility subject to the Commission's regulatory authority, we note that the Commission may elect to join Tapoco as a party and order it to produce information relevant to the roll-in inquiry, subject only to the right of Tapoco, should it desire, to appear and contest *de novo* the Commission's assertion of jurisdiction over it.

The Commission's order of 14 June 1977 authorizing an increase in Nantahala's rates was vacated by the Court of Appeals. The effect of the Court of Appeals' decision was stayed, however, by this Court's issuance of a writ of supersedeas pending the outcome of this appeal. Although that writ is hereby dissolved, we believe that essential fairness to all the parties is best served by allowing the increased rates to remain in effect, conditioned upon Nantahala's guarantee that it will in the future refund to its customers any overcharges should the new rates ultimately be determined excessive. Accordingly, we reverse the Court of Appeals' setting aside of the order of 14 June 1977 and direct the Commission to obtain adequate assurances of Nantahala's willingness and continued ability to refund such overcharges as may ultimately result from imposition of the 1977 rate schedule.

This cause is remanded to the Court of Appeals for remand to the Utilities Commission for further proceedings consistent with this opinion.

Affirmed in part.

Reversed in part and remanded.

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

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state. In the case of a refusal by any such affiliated corporation to permit such an inspection, the Commission may order the regulated utility to show cause why it should not itself secure the documents to be inspected from its affiliate.

STATE OF NORTH CAROLINA v. JASPER LEE DREW HARDY

No. 6

(Filed 5 March 1980)

1. Burglary and Unlawful Breakings § 5; Rape § 5—first degree burglary—rape—sufficiency of evidence

Evidence in a prosecution for rape and burglary was sufficient to be submitted to the jury where it tended to show that the victim observed her assailant face to face under lighted conditions and identified defendant at trial as the man who broke into her home and raped her; the town chief of police observed defendant running down the street on which the victim lived around the time the crimes were committed; defendant's body hairs "matched favorably" those found at the crime scene; defendant confessed to police that he committed the crimes; some of the items stolen from the victim's home were found in defendant's possession when he was arrested; and before defendant was arrested he attempted to flee from the police.

2. Constitutional Law § 45— defendant's dismissal of counsel—attorney appointed stand-by counsel—right to counsel not abridged

The trial judge did not err in permitting defendant's counsel to withdraw upon defendant's motion, and defendant was not denied his Sixth Amendment right to effective assistance of counsel where defendant stated that he wished to dismiss his counsel because he was dissatisfied with his services; the trial judge advised defendant that he had a right to dismiss his attorney and to conduct his own trial without counsel but that the trial would nevertheless proceed; defendant intelligently, voluntarily and knowingly dismissed his counsel and elected, despite admonitions from the trial judge not to do so, to proceed to trial without counsel; the trial judge then appointed defendant's lawyer as stand-by defense counsel; and defendant thereafter conferred with the lawyer a number of times in his capacity as stand-by counsel.

3. Constitutional Law § 30— hearing to determine probable cause for arrest or search—confidential informant—no right to learn identity

Neither the Sixth Amendment right to counsel nor the Fourteenth Amendment right to due process entitles the defendant to learn the identity of a confidential informant at a preliminary stage held to determine if there is probable cause for an arrest or search.

4. Criminal Law § 102.11— jury argument—defendant's innocence—no prejudice

Defendant was not prejudiced by the private prosecutor's statement during closing argument, "Can the defendant, based on this evidence, show you a valid conclusion of his innocence?" since no objection was made when the statement was made to the jury, and since any error was cured by the judge when he instructed the jury during his charge at the close of the final arguments that the jury was to understand and apply the law as the judge gave it to them, and he then immediately, completely and accurately instructed regarding the presumption of defendant's innocence.

5. **Criminal Law § 102.6— jury argument—reasonable doubt—no prejudice**

Defendant was not prejudiced by the remark of State's counsel during her closing argument concerning " 'beyond' [being] an unnecessary appendage to the words 'reasonable doubt'," since State's counsel was not thereby expressing an opinion about defendant's guilt, and the trial judge, during his charge at the close of final arguments, correctly instructed on the State's burden of proof.

6. **Criminal Law § 75— admissibility of confession**

Defendant's confession was voluntary and the trial court properly denied defendant's motion to suppress where the evidence tended to show that defendant was given the *Miranda* warnings; defendant executed a written waiver of his right to remain silent; and the police did not improperly induce defendant's confession by threats or other means, nor was defendant under the influence of any drugs at the time of the confession.

7. **Searches and Seizures § 8— warrantless arrest—search incident to arrest proper**

Defendant's warrantless arrest was proper where a police officer had probable cause to make the arrest, and a warrantless search of defendant's person made incident to the arrest was proper.

8. **Arrest and Bail § 3.1— probable cause—no effect of dismissal of another charge**

There was no merit to defendant's contention that the State was collaterally estopped from establishing that there was probable cause to arrest him for burglary and rape because his motion to dismiss a charge of assault on an officer that arose when he was arrested on the burglary and rape charges was granted at the close of the State's evidence on the assault charge in district court.

9. **Burglary and Unlawful Breakings § 7— first degree burglary—no instruction on lesser included offense—no error**

The trial court in a first degree burglary case did not err in refusing to instruct on the lesser included offense of misdemeanor breaking and entering.

10. **Criminal Law § 116— defendant's failure to testify—instruction absent request—no prejudice**

Since defendant did not request an instruction on his failure to testify, it would have been better for the court to make no reference to his silence, but the court's instruction in this case that defendant's failure to testify created no presumption against him and that defendant's silence was not to influence the jury's decision either way was not prejudicial to defendant.

ON appeal by defendant from *Allsbrook, J.* at the 12 February 1979 Session of PITT County Superior Court.

Defendant was charged in indictments, proper in form, with second degree rape and first degree burglary.

The State's evidence tended to show that Mrs. Carolyn Jackson, age 52, was awakened in her home on Pitt Street in Grimesland between 1:00 and 2:00 a.m. by a loud scratching noise outside her home. She went to her telephone and discovered that it was not working. She shined her flashlight into the yard and discovered a man crouched down beside her car. She screamed and the man moved to the front of the house. She went to the back of the house and when she got there a black, bearded man, later identified as the defendant, burst through the wooden door. She struck him with her flashlight and screamed again. He beat her until she assured him she would not scream anymore. He took her to the den, forced her down on the floor, took a drapery and wrapped it around her face, pinned her arms to her side and raped her. He then got up and went to look for the victim's purse. She hid in the bedroom. The defendant entered that room and turned on the light. He then forced her down on the bed, covered her face with a sheet and raped her again. He left after receiving assurances from her that she would not report the incident to the police. When defendant left, she immediately ran down the street to a trailer where a policeman lived but no one was at home. She then proceeded to the house of her sister-in-law, reported the events to her and the police were notified. The Chief of Police of Grimesland was on patrol that evening. At approximately 1:40 a.m. he saw a black man running down Pitt Street. He turned his car around at the next intersection, but was then unable to locate the person he had seen running. At trial, he identified the defendant as the man he had seen on Pitt Street that evening. The victim described her assailant to an SBI agent and a composite drawing was made.

Two days later, two deputy sheriffs of Pitt County went to the home of defendant's grandmother looking for the defendant. Defendant was there. He climbed out of a window but was caught by Deputy Sheriff Moye who placed him under arrest. At trial, the victim positively identified the defendant as the man who broke into her home and raped her.

Hair samples were taken from the defendant's body. Hairs were also taken from the bed where the second rape occurred. An FBI agent testified that the hairs found on the bedsheet "microscopically matched the known pubic hair samples of Jasper Hardy." The agent testified on cross-examination that "science has

not reached the point where I can say positively that a hair came from a certain person." However, the hairs found at the scene of the rape "matched up favorably" with the hair samples taken from defendant's body.

The defendant offered no evidence in his behalf.

The jury found the defendant guilty as charged. He was given two life sentences. The second sentence is to run concurrently with the first. Defendant has appealed from both convictions and sentences.

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

Attorney General Rufus L. Edmisten by Assistant Attorney General Marvin Schiller for the State.

Thomas F. Taft and Paul deVendel Davis for the defendant.

COPELAND, Justice.

For the reasons stated below, we have determined that the defendant received a fair trial free from prejudicial error.

[1] Defendant argues that the State's evidence was not sufficient to take the case to the jury and thus, his motions to dismiss, made at the close of the State's evidence and at the close of all the evidence, should have been granted. We believe that the evidence clearly reveals that these motions were properly denied.

On a motion to dismiss for insufficient evidence, the court must find that there is substantial evidence both that the offense charged has been committed and that defendant committed it, before it can overrule the motions. *State v. Conrad*, 293 N.C. 735, 239 S.E. 2d 260 (1977). Upon such a motion, the evidence is to be considered in the light most favorable to the State and the State is to be given the benefit of every reasonable inference deducible therefrom. *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976).

The victim observed the defendant face to face under lighted conditions and identified the defendant at trial as the man who broke into her home and raped her. The Chief of Police of Grimesland observed the defendant running down the street on which the victim lived around the time the crimes were com-

mitted. The defendant's body hairs "matched favorably" those found at the crime scene. The defendant confessed to the police that he committed the crimes. Some of the items stolen from the victim's home were found in the defendant's possession when he was arrested. Before the defendant was arrested he attempted to flee from the police.

The defendant contends that the State failed to present substantial evidence regarding his *intent* to commit rape and burglary.

In this connection, we note that intent is seldom provable by direct evidence and ordinarily must be proved by circumstances from which it may be inferred. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). We believe that a rational trier of the facts could find from the evidence presented that the defendant possessed the criminal intent to commit the burglary and rape. *See, State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976). These assignments of error, being without merit, are overruled.

[2] Defendant contends that the trial judge erred in permitting defendant's counsel to withdraw upon defendant's motion, and that in so doing the defendant was denied his Sixth Amendment right to effective assistance of counsel.

Defendant was found to be indigent and an attorney was appointed to represent him However, defendant's mother then privately retained Mr. Jerry Paul as defense counsel. Mr. Paul served as defense counsel until the tenth day of the trial. On that day, defense counsel indicated to the court that the defendant was considering entering a plea of guilty to both charges. The plea bargain was to be that he would get not less than twenty nor more than sixty years in each case and that the sentences would run concurrently. He was also to receive psychiatric evaluation from the prison authorities. The plea was typed and defense counsel conferred with his client outside the courtroom. Apparently, after lengthy conferences, Mr. Paul stated to the court, upon inquiry, that it appeared the trial would continue. A few moments later, the defendant stated that he wished to dismiss his privately retained counsel because he was dissatisfied with his services.

The trial judge advised the defendant of the seriousness of the offenses of which he was charged and of the maximum punishment for each. He then stated to the defendant that,

> "Now, I don't think I have the right to deny your motion to relieve Mr. Paul as your attorney since you privately employed him because you are allowed under the law, if you do this freely and voluntarily and knowingly, you can proceed without the assistance of counsel after certain things have taken place.
>
> First of all, I want you to understand that you have a right to be represented by an attorney. And you already have properly employed an attorney, Mr. Paul, who has investigated this matter and who has been representing you for the past ten days and as I said to you in open court, I think Mr. Paul has been representing you well. If, however, you decide to proceed without Mr. Paul as your attorney—and I assume, Mr. Paul you are here and you have been employed, and, of course, you are prepared to see this trial through?"

Mr. Paul replied,

> "I am prepared to see it through, Judge. I have been representing him since November and I have done everything requested of me."

Judge Allsbrook advised the defendant as follows:

> ". . . I think you would be making a very serious mistake to attempt to discharge your attorney at this point and handle this matter on your own. Because we are going forward with the trial. And Mr. Paul has indicated that he is willing to continue representing you to the best of his ability. Now, an attorney, in the course of a trial will make certain recommendations to a client. And, of course, I gather that is what has prompted—that what has prompted this [dismissal of defense counsel] is the fact that perhaps some recommendation may have been made to you regarding his professional opinion as to perhaps what would be in your best interest. However, I am sure that is a decision that Mr. Paul is leaving up to you and is willing to abide by whatever decision you want to make along that line. Am I correct, Mr. Paul?"

Mr. Paul replied that he was willing to abide by the defendant's decision.

After further admonitions from the court, Judge Allsbrook again inquired of defendant,

> "Now, Mr. Hardy, my question to you is do you still want to discharge Mr. Paul as your attorney and go in and continue the trial of these serious felonies without an attorney."

Mr. Hardy replied,

> "I discharged him. I am dissatisfied with a few issues. I would rather him not even represent me."

The trial judge then appointed Mr. Paul as stand-by counsel to assist Mr. Hardy when called upon, and to bring to the court's attention matters favorable to the defendant upon which the court would rule. He further advised counsel to consult with Mr. Hardy the best he could and to be available to answer any questions that defendant might have.

After further conversation, the defendant stated that, "I do not want him [Paul] to say anything in my behalf." The court also advised Mr. Paul that it would be his duty to advise the court about anything that he thought should be brought to the court's attention in the defendant's behalf.

From the above, we believe that the record clearly discloses that the defendant intelligently, voluntarily and knowingly dismissed Mr. Paul as his attorney and elected, despite admonitions from the trial judge not to do so, to proceed with the trial without counsel. In addition, the trial judge properly appointed Mr. Paul as stand-by defense counsel. After this, defendant conferred with Mr. Paul on a number of occasions in his capacity as stand-by counsel. Defendant even asked Mr. Paul to "sit-in" during a recess period in which the decision to call defense witnesses would be considered. The United States Supreme Court held in *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562, 95 S.Ct. 2525 (1975), that a defendant has the right under the Sixth Amendment to conduct his own defense and to proceed without counsel when he voluntarily and intelligently elects to do so. We held in *State v. McNeil*, 263 N.C. 260, 139 S.E. 2d 667 (1965), that, "[t]he United States Constitution does not deny to a defendant the right to

defend himself. Nor does the constitutional right to assistance of counsel justify forcing counsel upon a defendant in a criminal action who wants none." *Id.* at 267-68, 139 S.E. 2d at 672.

Therefore, the trial judge was correct in advising the defendant that he had a right to dismiss his attorney and conduct his own trial without counsel but that the trial would nevertheless proceed. *Faretta v. California, supra; State v. McNeil, supra; State v. Beeson,* 292 N.C. 602, 234 S.E. 2d 595 (1977); *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652, *death sentence vacated,* 409 U.S. 1004 (1972). This assignment of error is overruled.

Defendant maintains that the trial court erred in refusing to allow defendant's attorney to pursue his cross-examination of a deputy sheriff during a pretrial *voir dire* hearing held to determine if there was probable cause to arrest the defendant. Defendant wanted to learn the identity of a confidential informant and he contends that the trial judge acted in violation of G.S. 15A-978 in sustaining the State's objections to the questioning of the deputy sheriff in this regard. The contention of the defendant is misguided. The cited statute concerns "the validity of a *search warrant* and the admissibility of evidence obtained thereunder by contesting the *truthfulness* of the testimony showing probable cause for its issuance." G.S. 15A-978(a). [Emphasis added.]

[3] Here, we are concerned with the defendant's contention that he wished evidence suppressed because there was an illegal arrest. The statute dealing with probable cause to arrest is G.S. 15A-401. Neither the Sixth Amendment right to counsel nor the Fourteenth Amendment right to due process entitles the defendant to learn the identity of a confidential informant at a preliminary stage held to determine if there is probable cause for an arrest or search. *McCray v. Illinois,* 386 U.S. 300, 18 L.Ed. 2d 62, 87 S.Ct. 1056, *rehearing denied,* 386 U.S. 1042 (1967).

The relevant evidence presented at the *voir dire* showed that Deputy Sheriff Moye had been to the home of the victim and had made a thorough investigation. The victim told him what had occurred and she described her assailant and what he was wearing. At the request of Deputy Sheriff Moye, an SBI agent prepared a composite drawing, which was offered into evidence in this case. The trial judge found at the hearing that this drawing portrayed a similar likeness of the defendant. Later Deputy Sheriff Moye

showed this composite drawing to the Chief of Police of Grimesland who identified the picture as being that of the man he saw running down the street on which the victim lived on the night of the crime.

In addition, Deputy Sheriff Moye had a talk with a confidential reliable informant who looked at the composite picture and identified it as that of "Bro" Hardy, which was a name that the defendant went by. It was further determined that the defendant had shaved off his beard on the next day after the crime was committed. Other facts were known by Deputy Sheriff Moye at the time of the arrest pertaining to the background, family, and employment of the defendant. This evidence reveals that the police had probable cause to arrest the defendant for burglary and rape. The trial judge made proper findings of fact and conclusions of law at this *voir dire* hearing. This assignment of error is overruled.

[4] The defendant contends that the trial judge erred in permitting privately employed counsel for the prosecution to make improper and prejudicial remarks during her closing argument to the jury. At one point in the closing argument, the private prosecutor stated, "Can the defendant, based on this evidence, show you a valid conclusion of his innocence?" (At this time counsel was proceeding on the theory that the defendant planned to make a closing argument to the jury. This he later declined to do.) No objection was made when this statement was made to the jury. Ordinarily, objection to an improper argument by State's counsel must be made before the verdict so that the trial judge may be given a chance to stop the argument and instruct the jury to disregard the prejudicial matter. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978). Arguments of counsel are largely in the control and the discretion of the trial judge. We do not review the exercise of the trial judge's discretion in controlling jury arguments unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976).

We do not believe that the error in this remark by State's counsel was so extreme or clearly calculated to prejudice the jury so that the trial judge should have *ex mero motu* instructed the jury to disregard the remark. Whatever error there may have

been, it was cured when the trial judge instructed the jury during his charge at the close of the final arguments that the jury was to understand and apply the law as the judge gave it to them. He then immediately, completely and accurately instructed the jury regarding the defendant's presumption of innocence.

[5] Defendant also complains that he was prejudiced by the remark of State's counsel during her closing argument that,

> "[T]he defendant's counsel emphasized the word 'beyond' as if the State has to go beyond the horizon into the ends of the earth to prove the defendant guilty. That concept is just not accurate. *The word 'beyond' is an unnecessary appendage to the words 'reasonable doubt.'* It is not necessary to prove more than a reasonable doubt or to prove further than a reasonable doubt.
>
> If you do not have a reasonable doubt of this defendant's guilt, convict. If you do have a reasonable doubt, acquit. That is the best way I know to explain it . . . . You will shortly be hearing Judge Allsbrook instruct you on reasonable doubt. That it is a common sense doubt based on reason. It is not just a mere possibility, an imaginary doubt.
>
> . . .
>
> And based on the evidence . . . there is no reasonable doubt in this case." [Emphasis added.]

Counsel is entitled to argue to the jury the law, the facts, and all inferences reasonably deducible therefrom. *State v. Taylor, supra.* Considered in context, the import of this portion of the argument on the law is clear although the underlined portion considered in isolation is a confusing and poor statement. We do not believe that the error was so extreme or clearly calculated to prejudice the jury so as to require, *ex mero motu,* an instruction from the trial judge at this point in the closing argument. Nor do we find that State's counsel was expressing an opinion about defendant's guilt to the jury. Again, the trial judge instructed the jury during his charge to understand and apply the law as he gave it to them. He correctly instructed the jury on the State's burden of proof. We have carefully reviewed the closing argument of State's counsel and we find no prejudicial error. These assignments of error are overruled.

[6] Defendant contends that his confession was involuntary and therefore, it was error for the trial judge to deny his motion to suppress the confession. At the conclusion of the *voir dire* hearing held on this motion, the trial judge made findings of fact and conclusions of law to the contrary. The trial judge found that the defendant was given all the *Miranda* warnings and that he answered all the *Miranda* questions affirmatively except that he did not wish counsel present. The trial judge found that Officer Moye, the arresting officer, secured a written waiver of defendant's right to *silence*. The trial judge found that the police did not improperly induce the confession by threats or other means and that the defendant was not under the influence of any drugs at the time of the confession. The record supports these findings and the conclusion that the confession could be received into evidence. This assignment of error is without merit and is overruled.

[7] The defendant asserts that the trial judge erred in denying his motion to suppress the evidence obtained as a result of the search made pursuant to the warrantless arrest. Defendant argues that there was no probable cause to make the arrest, that a warrantless arrest was improper, and that the search pursuant to the arrest was illegal. We have already held that the police had probable cause to make the arrest. We hold that no arrest warrant was required. *United States v. Watson*, 423 U.S. 411, 46 L.Ed. 2d 598, 96 S.Ct. 820, *rehearing denied*, 424 U.S. 979 (1976). Our statute regarding arrest by an officer *without a warrant* provides in relevant part that, "Offense Out of Presence of Officer—An officer may arrest without a warrant any person who the officer has probable cause to believe: a. Has committed a felony." G.S. 15A-401(b)(2). This statute does not require a warrant where one has not been required by the United States Supreme Court in *Watson*.

A search without a search warrant may be made incident to a lawful arrest; however, the scope of the search is limited to the arrestee's person and the area within his immediate control. *Chimel v. California*, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034, *rehearing denied*, 396 U.S. 869 (1969). Here, defendant's person was searched and incriminating evidence obtained (property that the victim told police was missing from her house after the break-in). This search did not exceed the limits of *Chimel*. This assignment of error is overruled.

[8] The defendant argues that the State was collaterally estopped from establishing that there was probable cause to arrest him for burglary and rape because his motion to dismiss a charge of assault on an officer that arose when he was arrested on the burglary and rape charges was granted at the close of the State's evidence on the assault charge in District Court.

This contention is devoid of merit. A defendant may be charged with severeal offenses arising out of a certain transaction or occurrence but when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed. 2d 469, 90 S.Ct. 1189 (1970). Here, defendant's motion to dismiss the assault charge in District Court was granted at the close of the State's evidence which means that not enough evidence from which the trier of fact could convict the defendant of assault was presented at trial. It does not mean that there was no probable cause to charge the defendant with assault and even if it did, that has nothing to do with probable cause to arrest him for burglary and rape. Those two charges are felonies and are within the original jurisdiction of the Superior Court. The District Court case had nothing to do with the burglary and rape charges. Thus, there was no judgment in that case affecting the ultimate issues in this case. This assignment of error is overruled.

[9] The defendant maintains that the trial judge erred with respect to the burglary charge by refusing to instruct on the lesser included offense of misdemeanor breaking and entering. However, when the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense. *State v. Alston*, 293 N.C. 553, 238 S.E. 2d 505 (1977). Here, the State's evidence was clear and positive with respect to establishing that the defendant broke and entered an occupied dwelling in the nighttime with the intent to commit a felony. Therefore, with respect to this offense, he was either guilty or not guilty of first degree burglary. It was not error for the trial judge to refuse to instruct on any lesser included offense for first degree burglary. This assignment of error is overruled.

[10] Finally, defendant argues that the trial judge erred in charging the jury regarding the defendant's Fifth Amendment right to silence since the defendant did not testify. The trial judge instructed the jury that the defendant's failure to testify created no presumptions against him because the law gives him that privilege. The jury was instructed that the defendant's silence was not to influence their decision either way. The defendant did not request this instruction. When asked by the trial judge whether or not he wanted an instruction on this point, the defendant replied, "I don't have any answer." The trial judge then inquired, "So you have no position either way?" The defendant replied, "No." The trial judge then stated that, "Since you don't object to it, I'm going to charge the jury."

We find no prejudicial error in the charge. However, we shall once again reiterate that when the defendant does not request that the instruction be given, then, in the absence of a request, it is better for the trial judge to make no reference to the defendant's failure to testify. *State v. Cawthorne*, 290 N.C. 639, 227 S.E. 2d 528 (1976).

We commend Judge Allsbrook for the able and patient manner in which this most difficult trial was conducted.

We believe the defendant has had a fair trial free from prejudicial error and we find

No error.

ALFRED P. MACDONALD v. THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

No. 36

(Filed 5 March 1980)

1. State § 4— contract by State—implied consent to be sued—no sovereign immunity—prospective application

The decision of *Smith v. State*, 289 N.C. 303 (1976), which abrogated the doctrine of sovereign immunity for breach of contract, is to be applied only prospectively after 2 March 1976.

2. State § 4.4; Colleges and Universities § 1 -- alleged breach of employment contract by UNC-CH—accrual of cause of action—application of sovereign immunity

Plaintiff's cause of action against the University of North Carolina at Chapel Hill for breach of an employment contract accrued on 31 August 1974, the date upon which funds to pay his salary were exhausted and his employment was terminated, not on 6 June 1976 when William C. Friday, President of the University of North Carolina, sent a letter to plaintiff denying his grievance appeal. Therefore, the decision of *Smith v. State*, 289 N.C. 303, which is to be applied prospectively after 2 March 1976, did not apply to plaintiff's cause of action and it was barred by the doctrine of sovereign immunity.

APPEAL by defendant from *McKinnon, J.*, 7 May 1979 Session of ORANGE Superior Court. Plaintiff's petition for discretionary review pursuant to G.S. § 7A-31 prior to determination by the Court of Appeals was allowed 4 December 1979.

Stipulations and evidence presented at trial is summarized in pertinent part as follows:

The Frank Porter Graham Child Development Center (hereinafter designated as "the Center") was established in 1966 as an integral part of the University of North Carolina at Chapel Hill (hereinafter referred to as UNC-CH or defendant). Its purpose is to conduct scientific research in the area of child development, particularly in the area of learning disabilities, and to make that research available to persons working with handicapped children.

The primary means of support for most programs of the University is appropriations by the General Assembly. The Center, however, receives only 15 to 20 percent of its funds from appropriations by the state. Most of its funds come from grants and contracts with outside sources. Much of this funding, including the funds at issue in the present case, comes from the federal government. Financial support from such outside agencies is known as "soft money" because its continued flow rests not upon the customary state budgetary process but upon the determination of a particular outside agency to maintain the contract or grant.

The issues in the case at hand revolve around a "soft money" grant. The Disabilities Services and Facilities Construction Act of 1970 provided that planning and advisory councils were to be ap-

pointed in each of the fifty states. These councils were to develop plans and programs designed to improve and expand services to the handicapped. Because these councils were to be composed primarily of laymen, the Department of Health, Education and Welfare sought proposals from various institutions and organizations for the development of programs to provide these councils with technical assistance. In 1972, the Center submitted such a proposal. The proposal was subsequently accepted by HEW. The original term of this grant was two years and nine months, subject to annual renewal thereafter. Acceptance by the Center of the grant imposed the obligation of fulfilling the functions set forth in the grant proposal: providing technical service to the various disabilities councils. In order to assure that the technical service needs of the councils were met, the Center stated in its grant proposal that it would undertake a "needs assessment". This assessment was to be accomplished by a systematic survey of all the disabilities councils to ascertain those areas in which the council perceived a need of technical assistance.

Plaintiff was offered employment in the program funded by the HEW grant in a letter dated 6 October 1972 from Dr. James Gallagher, director of the Center. This letter read, in pertinent part:

> "We would be pleased if you would accept a position as Research Associate, Associate Director of our new Technical Assistance Center (DD/RSA), and colleague. Recommended salary is $22,000 for the calendar year. The appointment is contingent upon the receipt and maintenance of funds."

Before the offer of employment was forwarded to plaintiff, he was interviewed by Dr. Gallagher and Dr. Donald J. Stedman, associate director of the Center. During the course of these interviews, they described the program which the grant funded and informed him that his potential role in the program was to be in the area of research utilization. In addition, the possibilities of other employment with the University, including joint appointments with other academic departments, were discussed. Plaintiff was subsequently interviewed by the faculty of the School of Education. In a letter dated 6 December 1972 from N. Ferebee Taylor, Chancellor of UNC-CH, plaintiff was offered an appointment in the School of Education. This letter read, in pertinent part:

"I am happy to inform you that our Board of Trustees has confirmed your appointment as Associate Professor, School of Education, beginning December 9, 1972, with salary of $22,000 contingent upon the availability of funds.

Instructor	One year
Assistant Professor	Three years
Associate Professor	Five years

Each of these is renewable if mutually satisfactory."

Plaintiff began work at the Center in October of 1972. He never taught any classes in the School of Education. His duties at the Center were twofold: (1) responsibility for his particular content area (in this case, research utilization); and (2) coordination of all program activities within a particular region.

In the fall of 1973, a survey of the planning and advisory councils indicated that only 1 percent of the persons responding to the inquiry had any interest in the area of research utilization. This finding was confirmed by the fact that only two of the 108 requests for assistance from the councils in the first two years of the program were for assistance in the area of research utilization. At about the same time of the survey, Dr. Ronald Wiegerink replaced Dr. Stedman as director of the program. Dr. Wiegerink observed that plaintiff needed only 25 percent of his work time to perform his functions under the program. The director suggested ways to plaintiff in which he could increase the interest of the councils in the functions he was charged with performing.

In early October 1973, Dr. Stedman met with plaintiff and advised him of the inability of the Center to continue funding his salary from the HEW grant because of the lack of interest of the councils in the area of research utilization. At that time, plaintiff was told that it would be necessary for him to generate alternative funding to pay his salary if he was to remain at the Center. To assist plaintiff in his efforts, Dr. Stedman indicated that plaintiff could spend up to 75 percent of his time seeking alternative funding. Plaintiff did not generate a proposal for alternative funding.

On 9 January 1974, Dr. Wiegerink circulated a memorandum stating his desire to dissolve the research utilization unit within the program as of the end of the next fiscal year. At approximate-

ly the same time, Dr. Gallagher requested the budget officer to review the availability of other funds within the Center to support plaintiff's salary. The budget officer indicated that the Center was running a deficit of between $30,000 and $60,000 and that there were no funds available which could be used to support plaintiff's position. Plaintiff was advised of the financial situation at the Center and was again urged to seek alternative funding for his position.

In preparing the annual request to HEW for continuation of the funding for the program, no funds were requested for the support of the research utilization unit. At trial, Dr. Wiegerink stated that continued support for research utilization was not sought because "very little work" in that area had been done and that the Center was unable to project any increase in the level of research in the time period covered by the renewal of the grant. The funding for the research utilization unit within the program lapsed as of 30 June 1974. The Center was able, however, to secure funding for plaintiff's position through 31 August 1974, at which time he was terminated.

Plaintiff undertook to follow established University grievance procedures. These procedures culminated in a letter from William C. Friday, President of the University of North Carolina, dated 6 June 1976 which denied plaintiff's appeal.

Plaintiff filed suit on 6 June 1977 in superior court against the University of North Carolina and UNC-CH as well as against numerous other named defendants, including President Friday and Chancellor Taylor. The suit sought recovery for (1) breach of contract, (2) wrongful interference with a contract, (3) wrongful discharge, and (4) conspiracy to wrongfully discharge.

Plaintiff stipulated to a dismissal with prejudice as to all defendants except UNC-CH. He also stipulated to a dismissal with prejudice as to claims 2 and 4. The court allowed defendant's motion to dismiss the wrongful discharge claim but specifically denied all motions to dismiss and for directed verdict on the ground of sovereign immunity.

The case was submitted to a jury on the claim for breach of contract. The jury found for plaintiff and awarded him damages in the amount of $43,000.00. Motions for judgment notwithstanding

the verdict and to set the verdict aside as being against the greater weight of the evidence were denied. Defendant UNC-CH appealed.

Maxwell, Freeman, Beason & Lambe, P.A., by James B. Maxwell and Robert A. Beason, for plaintiff-appellee.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Edwin M. Speas and Assistant Attorney General Elizabeth C. Bunting, for defendant-appellant.

BRITT, Justice.

By its first assignment of error, defendant argues that the trial court erred in denying its motions to dismiss. Defendant contends that it is an agency of the State of North Carolina and thus enjoys the protection of sovereign immunity. The essence of its argument is that this court did not provide for retroactive application of the holding of the case of *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976), in which the doctrine of sovereign immunity for breach of contract was abrogated.

Prior to our decision in *Smith*, it had long been the rule in North Carolina that the doctrine of sovereign immunity prevented the state or one of its agencies from being sued without its consent. *E.g., Great American Ins. Co. v. Gold, Comm'r. of Ins.*, 254 N.C. 168, 118 S.E. 2d 792 (1961). Writing for the court in *Smith v. State*, Chief Justice Sharp held that ". . . whenever the State of North Carolina enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract. Thus, in this case, and in causes of action on contract arising after the filing date of this opinion, 2 March 1976, the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant." *Smith v. State*, 289 N.C. at 320.

The general rule is that decisions are presumed to operate retroactively. *Mason v. Nelson Cotton Co.*, 148 N.C. 492, 62 S.E. 625 (1908); *see generally State v. Rivens*, 299 N.C. 385, 261 S.E. 2d 867 (1980). It is proper to limit the application of a new rule of decision in a solely prospective manner only when there is a compelling reason for so doing. *State v. Rivens, supra; Mason v. Nelson Cotton Co., supra; Hill v. Brown*, 144 N.C. 117, 56 S.E. 693

(1907); *Hill v. Atlantic & N.C. R.R.*, 143 N.C. 539, 55 S.E. 854 (1906). When the law has received a given construction by a court of last resort, and contracts have been made and rights acquired under and in accord with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. *Mason v. Nelson Cotton Co., supra; Hill v. Atlantic & N.C. R.R., supra.*

[1] The contract which gave rise to this litigation was entered into in 1972, at which time the doctrine of sovereign immunity was still a viable proposition of law. Consequently, the rights which had been acquired under the contract were subject to its mandate. Therefore, we reaffirm the conclusion of *Smith* in favor of a wholly prospective application of the abrogation of the doctrine of sovereign immunity.

[2] It is not enough that we reaffirm the wholly prospective application of *Smith*. If we are to complete our inquiry with regard to this assignment of error, we are compelled to consider the subsidiary question as to when plaintiff's cause of action accrued. Plaintiff contends that if this court should reaffirm the wholly prospective application of *Smith*, his cause of action nonetheless remains viable in that it did not accrue until President Friday denied his grievance in the letter of 6 June 1976. We disagree.

A cause of action does not accrue until a right which belongs to a person is invaded in some manner by another. *Thurston Motor Lines v. General Motors Corp.*, 258 N.C. 323, 128 S.E. 2d 413 (1962); *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957). A cause of action for a suit involving a breach of contract accrues as of the date of breach. *See Reidsville v. Burton*, 269 N.C. 206, 152 S.E. 2d 147 (1967). Ordinarily, the time for performance must have expired, *Kelly v. Oliver*, 113 N.C. 442, 18 S.E. 698 (1893), but where an employee has been discharged by his employer, there is total breach for which only a single action lies. *See* 4 A. Corbin, *Contracts* § 958 (1951).

Plaintiff's employment at the Center terminated on 31 August 1974. It follows, therefore, that breach occurred, if at all, no later than that date, and plaintiff's cause of action accrued as of that date, some sixteen months before the decision in *Smith*. Counsel for plaintiff argues forcefully that the ultimate act con-

stituting breach of his contract of employment occurred after 2 March 1976 and was embodied in the letter of 6 June 1976 from President Friday denying the grievance appeal. However, the evidence is uncontroverted that plaintiff was no longer working at the Center in any capacity after 31 August 1974. In pursuing the internal review of his discharge, plaintiff was merely seeking administrative review of a decision which had already been made and implemented. In no way can it be concluded that the accrual of his cause of action was affected by this review. Plaintiff's rights were invaded, if at all, when he was dismissed from the Center on 31 August 1974, the date upon which funds to pay his salary were exhausted and after he was no longer able to act in any capacity at the Center.

At the time of oral argument, plaintiff directed this court's attention to the case of *In Re Metric Constructors*, 31 N.C. App. 88, 228 S.E. 2d 533 (1976), as additional authority for his position. Plaintiff's reliance on the case is inapposite. In *In Re Metric Constructors*, plaintiffs sought judicial review of an administrative decision of the Department of Administration which called for Metric Constructors, Inc., to forfeit a bid bond in the amount of $316,000.00. Metric had submitted a bid in the amount of $6,332,000 for construction of a state office building but later discovered that the bid failed to include an item of more than $896,000 for structural steel. Metric sought to withdraw its bid, but the Department of Administration awarded the contract to the firm anyway. Metric refused to perform the contract. The Department of Administration then held a hearing and denied Metric's request that the bond be released. Plaintiffs thereafter sought judicial review of the decision pursuant to Chapter 143, Article 33, of the General Statutes.

The superior court denied the Department's motion to dismiss, and defendant appealed, arguing that the suit was barred by the doctrine of sovereign immunity. The Court of Appeals affirmed, holding that when the General Assembly has expressly provided a means of judicial review for administrative decisions, the state has impliedly consented to waive the defense of sovereign immunity within the parameters of that review. *In Re Metric Constructors*, 31 N.C. App. at 91; *see generally, Great American Ins. Co. v. Gold, Comm'r. of Ins.*, 254 N.C. at 173, 118 S.E. 2d at 795. The Court of Appeals observed that the plaintiffs had

properly followed the procedures which had been mandated by the statutes for pursuing review of an administrative decision. *Id.*

In the present case plaintiff does not seek judicial review of an administrative decision at all. Instead, he has brought suit on four common law theories of recovery. Had plaintiff sought judicial review of the administrative decision of the University, he would have had to file a petition in Wake Superior Court no later than 30 days after having received a written copy of the final decision of the University. G.S. § 150A-45 (1978). No such review was sought. Instead, plaintiff filed an independent common law action approximately one year after President Friday's decision. In short, plaintiff elected to seek relief on a theory as to which the defense of sovereign immunity had not been waived or abrogated as of the date that his alleged cause of action had accrued. Therefore, he waived any judicial review like that sought by the plaintiffs in *In Re Metric Constructors, supra.*

The second paragraph of G.S. 150A-1(a) exempts the University of North Carolina and its constituent institutions from the provisions of Chapter 150A except for Article 4. Since plaintiff did not seek judicial review under Article 4, we find it unnecessary to determine the effect of the exempting provision on plaintiff's claim.

In light of our holding that the doctrine of sovereign immunity bars plaintiff's action, we decline to discuss the remaining assignments of error which defendant brought before the court.

Reversed.

MERIWETHER W. HUDSON v. FITZGERALD S. HUDSON

No. 32

(Filed 5 March 1980)

1. Divorce and Alimony § 27— consent order as to child custody—action for support only

An action did not remain an action for child custody and support, but became an action for child support only, where the court entered a consent order on the question of custody prior to trial and the issue of custody was not raised again.

2. **Divorce and Alimony § 27— action for child custody or child custody and support—award of attorney fees—requirements of good faith and insufficient means**

In a suit for child custody or child custody *and* support, the trial judge, pursuant to the first sentence of G.S. 50-13.6, has the discretion to award attorney fees to an interested party when that party is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. Whether these statutory requirements have been met is a question of law reviewable on appeal, but when the statutory requirements have been met, the amount of attorney fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion.

3. **Divorce and Alimony § 27— child support action—award of attorney fees—requirements of good faith, insufficient means and refusal to provide support**

An award of attorney fees in an action solely for child support requires findings of "good faith" and "insufficient means" pursuant to the first sentence of G.S. 50-13.6, and a finding "that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding" pursuant to the second sentence of that statute, and whether these requirements have been met is a quesiton of law reviewable on appeal.

4. **Divorce and Alimony § 20.3— action for alimony—award of attorney fees—requirements of entitlement to relief, dependency and insufficient means**

In order to award attorney fees in an alimony case, G.S. 50-16.3 and G.S. 50-16.4 require the court to find that (1) the spouse seeking the fees is entitled to the relief demanded; (2) such spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. Whether these requirements have been met is a question of law reviewable on appeal, and if attorney fees may properly be awarded, the *amount* of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion.

5. **Divorce and Alimony §§ 20.3, 27— action for alimony, child custody, support, or custody and support—award of attorney fees—requirement of insufficient means**

Before attorney fees may be awarded in an alimony case to the dependent spouse under G.S. 50-16.3 and G.S. 50-16.4, and before attorney fees may be awarded to the interested party in a child custody, support, or custody and support suit under G.S. 50-13.6, such person must have insufficient means to defray the expense of the suit; that is, he or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit.

6. **Divorce and Alimony §§ 20.3, 27— action for alimony and child support—award of attorney fees—sufficient means to defray expenses**

Plaintiff wife had sufficient means to defray the expense of this alimony and child support suit, and the trial court erred in ordering defendant husband to pay $22,000 in attorney fees incurred by plaintiff, where the evidence

showed that plaintiff owned marketable securities, real estate, stock in a closely held corporation and other investments worth $930,484; plaintiff had debts of $264,831, leaving a net estate of $665,652; plaintiff had a net income the previous year of $9,192; plaintiff had rental income from apartments of $48,000, most of which was used to amortize indebtedness against the apartments and to pay taxes and insurance thereon; when the parties separated, a corporation paid a note it owed plaintiff in the amount of $105,000; during the pendency of this suit, plaintiff invested $79,000 in a restaurant, loaned her son $3,000 to buy a car which he repaid, paid $3,000 for a horse, and spent $1,500 on a trip to a resort; and defendant husband owned marketable securities, stock in closely held corporations, real estate and other investments worth $747,553 and had an indebtedness of $254,612.

ON defendant-husband's petition for discretionary review pursuant to G.S. 7A-31 from the decision of the Court of Appeals, 42 N.C. App. 647, 257 S.E. 2d 448 (1979) (opinion by *Martin [Harry C.], J.* with *Parker* and *Erwin, JJ.* concurring), which affirmed the order of *Gantt, D.J.* awarding counsel fees to plaintiff-wife in this alimony and child support action.

On 12 February 1976, plaintiff brought this action for alimony without divorce, custody and support of the three children born of the marriage, and attorney's fees. Defendant answered and counterclaimed for divorce from bed and board. On 20 June 1976, the trial judge entered a consent order giving plaintiff custody of the children and giving defendant visitation privileges.

Subsequently, the parties entered into a stipulation that if the trial judge should find plaintiff to be a dependent spouse, then plaintiff was entitled to alimony. The trial judge heard the evidence and entered his order on 20 February 1978. He made findings of fact and concluded that plaintiff is a dependent spouse and that defendant is a supporting spouse. In the order, defendant's counterclaim for divorce from bed and board was dismissed and plaintiff was awarded alimony of $866.67 per month and child support of $150 per month per child (to be reduced to $50 per month during the months the children are in boarding school). Defendant was also ordered to pay all of the boarding school expenses plus $500 per year per child as a clothing allowance.

Plaintiff sought $66,000 in attorney's fees. In a separate order, also entered on 20 February 1978, the trial judge found that,

"[I]n February, 1976, he [defendant] reduced the amount of support being paid directly for the children to the amount of $834 per month. In February, 1977, he again reduced the amount of support being paid directly for the children to the amount of $375 per month and testified during the trial that the reason for the reduction was to require plaintiff to take legal action . . . .

[T]he Court finds that the amount being provided for their support was insufficient and inadequate under the circumstances existing at the time of the institution and prosecution of this action and that at all times the plaintiff was acting in good faith in the prosecution of this action and had insufficient means to defray the expense of the suit."

Defendant was ordered to pay $22,000 in attorney's fees incurred by plaintiff.

The defendant appealed only from the award of attorney's fees. The Court of Appeals affirmed the award and we allowed discretionary review on 4 December 1979.

Other facts pertinent to the decision of this case will be related and discussed in the opinion.

Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd and Robert A. Wicker for defendant-appellant.

Haywood, Denny & Miller by George W. Miller, Jr., for plaintiff-appellee.

COPELAND, Justice.

The sole issue presented in this appeal is when may attorney's fees properly be awarded in an alimony and child support case.

The award of attorney's fees in an alimony action is governed by G.S. 50-16.4. The award of attorney's fees in child custody and/or support actions is governed by G.S. 50-13.6.

G.S. 50-16.4 provides that:

"At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court

may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony."

G.S. 50-16.3(a) provides that:

"A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:

(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and

(2) It shall appear that the dependent spouse *has not sufficient means* whereon to subsist during the prosecution or defense of the suit and *to defray the necessary expenses thereof.*" [Emphasis added.]

The relevant portion of G.S. 50-13.6 provides that:

"In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who *has insufficient means to defray the expense of the suit.* Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. . . ." [Emphasis added.]

The Court of Appeals relied solely on G.S. 50-13.6 in affirming the award of attorney's fees to the plaintiff. In doing so, it correctly noted that this Court held in *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975), that the first sentence of G.S. 50-13.6 as quoted above applies to (1) custody suits, (2) support suits, and (3) custody and support suits, and that the second sentence of the statute applies solely in a support only suit.

The Court of Appeals went on to characterize this action as one for child *custody and* support because the initiation of this action included a claim for custody. The Court of Appeals reasoned that this placed the custody and welfare of the children with the court and the consent order awarding plaintiff custody did not remove the jurisdiction of the court to protect the interests and welfare of the children citing *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963).

I

It is true that the trial courts have jurisdiction over the custody and support of children notwithstanding provisions on those issues in separation agreements and/or consent judgments. *Id.*; *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964) (trial court had jurisdiction even following a consent judgment regarding custody and the amount of child support payments to hear and decide husband's motion for a reduction in child support payments due to changed circumstances because neither agreements nor adjudications remove children from the protective supervision of the court); *see also, Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227 (1964) (court had jurisdiction to decide custody and amount of child support payments notwithstanding the existence of a separation agreement when the wife brought an action for divorce from bed and board, custody and support of the children, and attorney's fees because such an agreement does not remove children from the protective supervision of the court).

[1] The issue of custody was initially raised in this suit but was disposed of in a consent order *and was not raised again.* Custody was not at issue when the 1978 orders were entered and those orders did not deal with custody. They dealt with the issues of alimony and child support. Those are the issues for which plaintiff incurred virtually all of her attorney's fees that she now wants taxed to the defendant during the more than two years that this case was in the trial court.

However, even if the Court of Appeals had been correct in its characterization of this suit as one for custody and support, its holding based upon its interpretation of our decision in *Stanback* cannot stand because that interpretation is erroneous.

II

We did not hold in *Stanback* that under the first sentence in G.S. 50-13.6, the award of attorney's fees is wholly discretionary requiring no findings of fact. The statute does not so read, *Stanback* does not so interpret the statute, and our decision in *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972), analyzed this same issue in an alimony, child custody and support action in which attorney's fees were sought under G.S. 50-16.3 and 16.4.

A

The first sentence contained in G.S. 50-13.6 clearly states that "the court may in its discretion order payment of reasonable attorney's fees to an interested party *acting in good faith* who has *insufficient means to defray the expense of the suit.*" [Emphasis added.]

B

In *Stanback* we held that,

> "Under G.S. 50-13.6 the grant of attorney's fees is within the sound discretion of the trial judge. When that discretion *has been properly exercised in accordance with statutory requirements*, the order must stand on appeal, *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972). Suffice it to say that defendant's uncontested affidavit, stating that due to a number of enumerated factors she was then without funds to meet the costs of preparing for the hearing, *sufficiently supports the trial court's finding that defendant did not have sufficient means to defray the expense of this litigation.*" *Stanback v. Stanback, supra* at 462, 215 S.E. 2d at 40. [Emphasis added.]

C

Additionally, we stated in *Rickert* with respect to G.S. 50-16.3 and 16.4, which we find to be equally applicable to G.S. 50-13.6, that:

> "There is some language in our decisions which leaves the impression that the allowance of counsel fees and subsistence pendente lite lies solely within the discretion of the trial judge, and that such allowance is reviewable only upon a showing of an abuse of the judge's discretion. . . .

> The correct rule, overwhelmingly approved by our Court, is that the facts required by the statutes must be alleged and proved to support an order for subsistence pendente lite. . . . Proper exercise of the trial judge's authority in granting alimony, alimony pendente lite, or counsel fees is a question of law, reviewable on appeal. . . .
>
> . . . It is true that when subsistence pendente lite or counsel fees is allowed pursuant to the statutory requirements, the *amount* of the allowance is in the trial judge's discretion, and is reviewable only upon showing an abuse of his discretion. *Rickert v. Rickert, supra* at 378-79, 193 S.E. 2d at 82-83. [Citations omitted.] [Emphasis in original.]

III

From the foregoing, we gather and set forth the following principles which should already be well recognized:

A

[2] In a custody suit or a custody *and* support suit, the trial judge, pursuant to the first sentence in G.S. 50-13.6, has the discretion to award attorney's fees to an interested party when that party is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. The facts required by the statute must be alleged and proved to support an order for attorney's fees. *Rickert v. Rickert, supra; Stanback v. Stanback, supra.* Whether these statutory requirements have been met is a question of law, reviewable on appeal. *Rickert v. Rickert, supra.* When the statutory requirements have been met, the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. *Id.; Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975). Any cases to the contrary decided by the Court of Appeals are no longer authoritative on this issue.

B

[3] When the action is *solely* one for support, all of the requirements set forth in part III A above apply *plus* the second sentence in G.S. 50-13.6 requires that there be an additional finding of fact "that the party ordered to furnish support has refused

to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding." G.S. 50-13.6; *Stanback v. Stanback, supra.* A finding of fact supported by competent evidence must be made on this issue in addition to meeting the requirements of "good faith" and "insufficient means" before attorney's fees may be awarded in a support suit. *Id.* This issue is a question of law, reviewable on appeal. *Id.; Rickert v. Rickert, supra.* Here, as in *Stanback*, such a finding of fact was made and we find that it is supported by competent evidence.

C

[4] The clear and unambiguous language of G.S. 50-16.3 and 16.4 requires that to receive attorney's fees in an alimony case it must be determined that (1) the spouse is entitled to the relief demanded; (2) the spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. *Rickert v. Rickert, supra.* The facts required by this statute must be alleged and proved to support an order for attorney's fees, whether these requirements have been met is a question of law that is reviewable on appeal, and if attorney's fees may be properly awarded, the *amount* of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. *Id.*

IV

In *Schloss v. Schloss*, 273 N.C. 266, 160 S.E. 2d 5 (1968), it was held that the purpose of the allowance of attorney's fees pursuant to G.S. 50-16 in an alimony case is to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate counsel. G.S. 50-16 was subsequently repealed but the above requirement in *Schloss* was brought forward and preserved under G.S. 50-16.1 *et seq.* by our decision in *Rickert*. This same requirement was most recently applied by this Court in *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980), where the wife was found to be a dependent spouse entitled to alimony although she was not entitled to attorney's fees.

The statutory basis for this requirement is G.S. 50-16.3(a)(2) which states that to receive attorney's fees "[i]t shall appear that

the dependent spouse *has not sufficient means* whereon to subsist during the prosecution or defense of the suit and *to defray the necessary expenses thereof.*" [Emphasis added.] If the dependent spouse is not able as litigant to meet the supporting spouse as litigant on substantially even terms because the dependent spouse is financially unable to employ adequate counsel, *Williams v. Williams, supra, Rickert v. Rickert, supra,* then by definition the dependent spouse "has not sufficient means . . . to defray the necessary [*legal*] expenses [of the suit]." G.S. 50-16.3(a)(2).

[5] This requirement of insufficient means to defray the expense of the suit is found in almost verbatim language in the first sentence in G.S. 50-13.6 which applies to the award of attorney's fees in custody, *support,* and custody and support suits. Thus, before attorney's fees may be awarded in an alimony case to the dependent spouse under G.S. 50-16.3 and 16.4 and before attorney's fees may be awarded to the interested party in a custody, support, or custody and support suit under G.S. 50-13.6, that person must have insufficient means to defray the expense of the suit; that is, as interpreted by our cases, he or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit.

[6] In the case *sub judice,* the trial judge made findings pursuant to G.S. 50-13.6 for a support suit. However, his finding that plaintiff had insufficient means to defray the expense of this suit is not supported by the evidence and therefore cannot stand. (The Court of Appeals did not discuss this finding as they erroneously held that the award was discretionary and thus, no findings were required).

The evidence reveals that at the time of the trial in this case, plaintiff owned marketable securities with a market value of $159,384, real estate worth $649,833, stock in a closely held corporation with a conservative value of $84,237 and other investments worth $37,030, for a total separate estate of $930,484. The plaintiff had debts totalling $264,831 leaving an estate of $665,652. In 1977, she had an income, free and clear of all expenses, of $9,192. Plaintiff had rental income from apartments that she owned of approximately $48,000. Most of that income was used to amortize indebtedness against the apartments and to pay the taxes and insurance thereon.

When the parties separated on or about 9 February 1976, Southern Realty & Agency Company (a corporation in which plaintiff owned 20 percent of the outstanding stock) paid a note it owed to plaintiff in the amount of $105,000. Also, during the pendency of this action at the trial level, plaintiff invested $79,000 in a restaurant, loaned her son $3,900 to buy a car which he repaid, paid $3,000 for a horse which defendant had agreed to pay for but did not, and spent $1,500 on a trip to a resort.

Defendant, at the time of the hearing in this case, owned marketable securities worth $102,603, stock in closely held corporations worth $300,000, real estate worth $307,500, and other investments worth $37,450 for a total estate of $747,553. Defendant's indebtedness was found to be $254,612.

In *Rickert*, the dependent spouse was not allowed to recover attorney's fees of $8,500 under G.S. 50-16.1 *et seq.* The dependent spouse had $141,362 in stocks and bonds and an annual income of $2,253 therefrom. The supporting spouse had stocks and bonds worth $677,637 and a net annual income of $17,657. On the basis of this evidence, it was held that the dependent spouse was able, as litigant, to employ adequate counsel to meet the supporting spouse, as litigant.

We reached the same conclusion in *Williams* (filed 1 February 1980) where the dependent spouse had a net worth of $761,975 and an annual gross income of $22,000. The supporting spouse had a net worth of $870,165 and an annual gross income of $116,660. On the basis of this evidence, attorney's fees of $6,000 were not allowed.

All of the evidence in the case *sub judice* reveals that plaintiff does not meet the statutory requirement of insufficient means to defray the expense of the suit. This requirement is a prerequisite to any award of attorney's fees in both G.S. 50-16.3(a) and G.S. 50-13.6. Therefore, plaintiff is not entitled to attorney's fees under either of these statutes.

We hold that plaintiff, pursuant to G.S. 50-16.3 and 16.4 and G.S. 50-13.6, had sufficient means to defray the expense of this suit and, as required by our decisions in *Rickert* and *Williams*, was able to employ adequate counsel to proceed, as litigant, to meet her spouse, as litigant.

In view of our holding, we do not deem it necessary to consider whether the amount of the award was unreasonable. The fee which plaintiff will pay her attorney is now a matter between them.

The decision of the Court of Appeals is Reversed and the order of the trial judge is Vacated.

Reversed.

NORTH CAROLINA BOARD OF TRANSPORTATION v. W. R. RAND AND WIFE, ELIZABETH P. RAND; GEORGE F. LATTIMORE, JR. AND WIFE, HELEN T. LATTIMORE

No. 20

(Filed 5 March 1980)

1. Eminent Domain § 6.8— general and special benefits defined

With respect to condemnation cases, general benefits are defined as those which are enjoyed not only by the property in litigation, but also by other neighboring tracts, while special benefits are defined as those peculiar to the property in litigation.

2. Eminent Domain § 6.8— general and special benefits—distinction unnecessary—burden of proof

The distinction between general and special benefits in road condemnation cases is unimportant when G.S. 136-112(1) applies to the proceedings, since that statute provides that consideration should be given to any special or general benefits resulting from the taking, but the burden of proving the existence and the amount of benefit is on the condemnor.

3. Eminent Domain § 7.8— highway condemnation—general and special benefits—instruction required

In a highway condemnation action testimony by plaintiff's witness, an expert real estate appraiser, that the value of defendants' land was increased by the taking because a roadway fronting the property was paved and stating the dollar value of the land before taking and the dollar value after taking was sufficient evidence of benefit to require the trial court to instruct on this issue; furthermore, a paraphrase of the law of benefits contained in the trial court's statement to the jury of plaintiff's contentions was insufficient to satisfy the requirement of G.S. 1A-1, Rule 51(a) that the trial judge declare and explain the law arising on the evidence, and plaintiff was not required to request an instruction on benefits.

ON motion for discretionary review of a decision of the Court of Appeals, 42 N.C. App. 202, 256 S.E. 2d 299 (1979), affirming a condemnation award entered by *McLelland, Judge,* at the 10 April 1978 Session of Superior Court, WAKE County.

Plaintiff instituted this condemnation proceeding against approximately .87 of an acre of defendants' land in 1974. The land was needed to pave soil-and-gravel State Secondary Road 1831, known as the Old Creedmoor Road, in northern Wake County. Prior to trial, the parties stipulated the only issue to be determined was the amount of compensation plaintiff owed defendants for the taking.

At trial, defendants introduced testimony tending to show that the value of their land after the taking diminished in an amount ranging from $45,000.00 to $54,300.00. Defendants and their witnesses stated that this diminution was primarily due to the periodic flooding of some 15 acres of land and resulting inaccessibility to a further 25 acres caused by plaintiff's elevation of the level of the roadbed and placement of certain culverts and ditches.

Plaintiff's evidence sharply conflicted with defendants' and tended to show that after the taking and paving, the value of defendants' land was enhanced, not diminished. Plaintiff's witness Frank Gordon, an expert real estate appraiser, testified that he had made a comparison between defendants' land value before the taking and sales of similar properties in that general neighborhood along paved roads. Based on this study of similar properties, it was his opinion that the fair market value of the land prior to the taking was $280,150.00, and after the taking was $386,925.00, a gain in value of some $106,775.00. In his opinion, the property benefited as a result of the paving.

This witness further testified that according to a 1970 Wake County Soil Survey, approximately 15 acres of the tract were classified as alluvial, which is in essence soil subject to flooding. This survey was conducted four years prior to the institution of this suit.

In his charge to the jury, the judge instructed on the measure of damages to apply but gave no instruction as to the law of benefits in condemnation actions. He did, however, include

in the jury charge that plaintiff contended the defendants' land value was enhanced by the taking. The jury returned a verdict of $25,000.00 for the defendants.

On appeal to the Court of Appeals, the plaintiff challenged the sufficiency of the jury charge and argued that an instruction on benefits should have been given. The Court of Appeals upheld the jury charge, stating that the instruction was sufficient, first, because evidence as to any benefit was too speculative and hypothetical to warrant an instruction, and second, even so, the instruction was adequate on the issue of benefits when construed as a whole.

This Court allowed motion for discretionary review on 6 November 1979.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General James B. Richmond for the plaintiff appellant.

William P. Few, Hatch, Little, Bunn, Jones, Few & Berry, for the defendant appellee.

CARLTON, Justice.

At issue in this condemnation case is the sufficiency of a jury charge which did not include an instruction on general or special benefits where plaintiff's evidence tended to show such benefits existed. We hold that the jury charge was inadequate and therefore reverse the Court of Appeals.

It is well settled in this State that where only a portion of a tract of land is appropriated by the Board of Transportation for highway purposes,

> the measure of damages in such proceeding is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking. The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion *which is to be offset under the terms of the controlling statute by any general and special benefits resulting to the landowner from the utilization of the property taken for a highway.* (Emphasis in original.)

Kirkman v. State Highway Commission, 257 N.C. 428, 432-33, 126 S.E. 2d 107, 111 (1962); *Proctor v. State Highway and Public Works Commission*, 230 N.C. 687, 691, 55 S.E. 2d 479, 482 (1949).

General benefits are defined as " 'those which arise from the fulfillment of the public object which justified the taking . . . [and] are those which resulted from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such employment.' " *Kirkman, supra* at 434, 126 S.E. 2d at 112, quoting *Templeton v. State Highway Commission*, 254 N.C. 337, 118 S.E. 2d 918 (1961). Special benefits are defined as " 'those which arise from the peculiar relation of the land in question to the public improvement.' " *Kirkman v. Highway Commission, supra* at 433, 126 S.E. 2d at 112, quoting *Templeton v. Highway Commission, supra.*

[1] Although the distinction between general and special benefits is at times difficult to make, *see, e.g.*, 27 Am. Jur. 2d Eminent Domain § 367 (1966) at p. 225 and cases cited therein, the majority of cases imply a more or less geographical standard—that is, general benefits are defined as those which are enjoyed not only by the property in litigation, but also by other neighboring tracts, while special benefits are defined as those peculiar to the property in litigation. 27 Am. Jur. 2d, *supra* at § 367. Thus in *Phifer v. Commissioners of Cabarrus County*, 157 N.C. 150, 72 S.E. 852 (1911), condemned land was held to receive a special benefit when a portion was taken for road paving because it became fronted on two sides, while neighboring tracts which became fronted on only one side were presumably only generally benefited.

[2] The distinction between general and special benefits in road condemnation cases was important in this jurisdiction under former statutes which gave offset consideration only for special benefits, *see, e.g., Campbell v. Road Commissioners of Davie County*, 173 N.C. 500, 92 S.E. 323 (1917); *Phifer v. Commissioners, supra; Bost v. Cabarrus County*, 152 N.C. 531, 67 S.E. 1066 (1910). This distinction is no longer important, however, when G.S. 136-112(1) applies to the proceedings. That statute provides:

> Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to

said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any *special or general benefits* resulting from the utilization of the part taken for highway purposes. (Emphasis added.)

The burden of proving the existence and the amount of benefit is on the condemnor. *Kirkman v. Highway Commission, supra;* 29A C.J.S., Eminent Domain § 184 (1965).

In the case at bar, plaintiff's expert witness testified:

I went on this property on April 1 of 1974 prior to the taking. . . . I made a comparison between the subject and various other sales of similar property, in order to arrive at an opinion of the value of that property, before the acquisition. I basically did the same thing in the after condition. The comparison sales that I used in the before condition—that is when the road was a soil-and-gravel surface road—I compared sales of properties that had frontage along soil-and-gravel surface roads, and then in the after condition since the subject was a paved road, I made a comparison between it and sales of similar properties in that general neighborhood that were along paved roads.

. . . .

I have an opinion as to the fair market value of this entire tract immediately prior to the taking on October 9, 1974. That value is $280,150.00. In arriving at that figure I considered the highest and best use for this property to be residential development. That was before the taking. That $280,000.00 represented a per acre value of $1800.00 per acre. I have an opinion satisfactory to myself as to the reasonable fair market value of the tract in question immediately after the taking, October 9, 1974, that is $386,925.00.

The Court of Appeals held that this evidence of benefit was so hypothetical and speculative that an instruction on benefits was unwarranted, citing *Kirkman v. Highway Commission, supra,* and *Statesville v. Anderson,* 245 N.C. 208, 95 S.E. 2d 591 (1956).

In *Kirkman, supra,* the defendant State Highway Commission challenged the trial court's refusal to instruct on benefits in a condemnation case where the State closed a motel owner's access to

a major highway. This Court held that an instruction on benefits was unnecessary where the abstract principle of law was unsupported by *any* evidence presented at trial. We reasoned that in such a situation the result of the instruction would only be to confuse the jury. Here, however, the State *has* produced evidence of benefit to defendants' land. Such evidence should be credited with a jury instruction.

Likewise, in *Statesville v. Anderson, supra,* plaintiff sought to condemn some 17 to 29 feet of defendant's land for a road and sidewalk. This taking encompassed part of a dwelling, necessitating either its removal or demolition. The jury apparently compared the value of the property with the dwelling attached before the taking to the value of the remaining property minus the structure after the taking. On appeal, plaintiff argued that the jury should have been instructed on benefits because defendant retained the right to remove the house and the right to continue occupying it once it was moved. No testimony had been given at trial about the cost of moving the structure, the distance it would have to be moved, the construction of the building, the feasibility of moving and the time within which the moving had to be accomplished. In light of all these uncertain measures, this Court held that the benefits accruing from the right to move and continue using the dwelling were "too minute and conjectural to measure." 245 N.C. at 212, 95 S.E. 2d at 594.

Again, the situation is clearly distinguishable in the case *sub judice.* Plaintiff's witness expressly testified to the *specific amounts* he as a real estate appraiser felt that the land values had increased. Such evidence is more than mere hypothesis and speculation. If defendants felt such testimony was conjectural, despite the specific nature of this witness' opinion it was defendants' duty at trial to challenge the testimony at cross-examination. *See Templeton v. State Highway Commission, supra.* This they apparently failed to do.

Furthermore, we note that while courts in other jurisdictions have held that such ephemeral benefits as removal of a "dust problem" on a road, *see Mulberry v. Shipley,* 256 Ark. 635, 509 S.W. 2d 536 (1974) or reduction of traffic on an existing road, *see People v. McReynolds,* 31 Cal. App. 2d 219, 87 P. 2d 734 (1939) do not warrant consideration as benefits, those courts have allowed

the instruction in cases similar to the one at bar. *See, e.g., Annot.*, 13 ALR 3d 1149 at § 13 (1967 and Supp. 1979) and cases cited therein. We therefore hold that evidence of benefit here was clearly not hypothetical and speculative, and plaintiff was entitled to an instruction on this issue.

[3] The Court of Appeals, however, did not rest its decision on this point alone. In addition it held that even though the instruction had not been warranted, the jury charge construed as a whole still included a proper instruction on the question of benefits.

The trial court here charged the jury on the law of damages in condemnation actions:

> The measure of damages when a part of the land is taken is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the remainder immediately after the taking. By this formula, not only is just compensation . . . determined for the value of the land actually taken but also for any damages that might flow as a result of that taking of the remaining land.

Later, when stating the parties' respective contentions, the judge said:

> The Department of Transportation presented evidence tending to show that the fair market value of the land immediately before the taking was $280,150 and $386,920 afterwards, that the portions of the land now subject to flooding were subject to flooding before the taking; that the changes in elevation and the pavement of the dirt roadway existing prior to the taking have caused no diminution in value, but, rather, have enhanced the value of the land remaining. . . .

Nowhere did he inform the jury that the law allowed it to consider benefits when awarding damages. Indeed, nowhere did he even mention the word benefit.

Defendants argue before this Court that the statement of the plaintiff's contentions quoted above, when considered with other portions of the charge, represents a correct statement of the law

of benefits as that law applies to the condemnation case before us and therefore "cures" the omission of a specific charge on benefits in the judge's instructions on the law. We disagree.

The trial judge is required to declare and explain the law arising on the evidence given in the case. G.S. 1A-1, Rule 51(a); *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972). This rule is a continuation of the requirement contained in former G.S. 1-180, *Investment Properties v. Norburn, supra.* As such, it creates a substantial legal right in the parties, *Adams v. Beaty Service Company*, 237 N.C. 136, 74 S.E. 2d 332 (1953), and vests in trial courts the duty, without a request for special instruction, to explain the law and apply it to the evidence on all substantial features of the case. *Investment Properties v. Norburn, supra; Melton v. Crotts*, 257 N.C. 121, 125 S.E. 2d 396 (1962). A failure to do so constitutes prejudicial error for which the aggrieved party is entitled to a new trial. *Investment Properties v. Norburn, supra; Correll v. Gaskins*, 263 N.C. 212, 139 S.E. 2d 202 (1964).

The requirement that the trial court charge on a party's contentions, however, is not accorded the same substantive weight. Indeed, the trial court is not required to state the contentions of the parties at all. *In re Wilson's Will*, 258 N.C. 310, 128 S.E. 2d 601 (1962). The reason for the distinction between stating the law and stating a party's contentions in a jury charge is obvious. Contentions, submitted by the respective parties and given to the jury by the judge without major change or editing, if the evidence supports their submission, merely restate what has been each side's theory of the case and view of the facts. Contentions often, in practice, become an extension of counsel's final argument to the jury, and are no doubt viewed by the jury with the same credibility or skepticism as that final summation calls forth. In view of this, we cannot hold that a paraphrase of the law of benefits contained in the trial court's statement to the jury of the plaintiff's contentions, as happened here, is adequate to satisfy the mandate of G.S. 1A-1, Rule 51(a).

Additionally we cannot agree with defendant's assertion before us that an instruction on benefits in a condemnation case must be specially requested. While it is true that in the absence of a special request on benefits, the judge is not required to *fully*

define the meaning of general or special benefits or to distinguish between them, *Board of Transportation v. Jones*, 297 N.C. 436, 255 S.E. 2d 185 (1979), it is equally true that the case does not involve, as the situation *sub judice* does, a total omission in the jury charge of an instruction on the law of benefits. The requirement of a special request goes only to *elaboration* of the statement on the law of benefits, not to the actual inclusion of the statement on the law itself.

We therefore hold that the omission of an instruction on the law of benefits in the jury charge was erroneous in this case. Accordingly, the decision of the Court of Appeals is reversed and the case is remanded to that court for remand to the Superior Court of Wake County for a new trial on the issue of damages.

Reversed and remanded.

GLADYS SOLES THOMPSON, MILDRED SOLES PARKER, MARY LUCILLE SOLES COOK AND BERTHA PAULINE SOLES v. RICHARD VERNON SOLES

No. 94

(Filed 5 March 1980)

Estoppel § 4.7; Deeds § 16— recital in deed—insufficiency of evidence of equitable estoppel—sufficiency of evidence of equitable election

In an action by plaintiffs seeking an adjudication that they were owners in fee of three tracts of land, plaintiffs were not entitled to go to the jury on the theory of equitable estoppel, since there was no evidence of detrimental reliance, but evidence was sufficient to entitle them to go to the jury on the theory of equitable election where the evidence tended to show that the parties' father devised all of his real property, consisting of the three tracts of land in question, to his wife for life and then to his children; the parties' mother conveyed to defendant a fourth tract of land; the deed to defendant contained a recital that the conveyance was accepted as an advancement of defendant's entire interest in the real property of his parents; defendant accepted the deed and had it recorded; and defendant subsequently claimed an interest in the three tracts of land left by the parties' father.

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

APPEAL by defendant from the decision of the Court of Appeals reported in 42 N.C. App. 462, 257 S.E. 2d 59 (1979), revers-

ing judgment of *Herring, J.*, at the 10 April 1978 Civil Session of COLUMBUS Superior Court dismissing plaintiff's claim. This case was argued as No. 99 at Fall Term 1979.

This action involves title to real estate. S. C. Soles died testate in 1929 survived by his wife, Nettie; four daughters, who are the plaintiffs in this action; and a son, the defendant. Prior to his death, testator owned four tracts of land. In 1928, he sold one of the tracts and secured the balance due by taking back a purchase money mortgage. In his will, decedent devised all of his real property (consisting of the three remaining tracts of land) to his wife, Nettie, for life, remainder to his children as tenants in common. After testator's death, the purchase money mortgage on the fourth tract was foreclosed. Subsequently, the tract was acquired by Nettie who then owned it in fee simple.

In 1946, Nettie Soles conveyed the fourth tract to defendant, reserving a life estate in herself. The deed was executed on 20 December 1946 and it was duly recorded. The deed contained the following recital:

> It is understood and agreed that this conveyance is accepted as an advancement to Richard V. Soles of his entire interest in the real property of the estate of the grantor and of his father, S. C. Soles, deceased.

Defendant took immediate possession of the fourth tract.

Nettie Soles died in February 1972, survived by her four daughters and defendant. Prior to the death of Mrs. Soles, defendant rented the three other tracts of land from her. In 1973 defendant rented the three other tracts from his sisters. In 1974 another individual rented the tracts, at which time defendant demanded a share of the rents and profits. Before defendant's demand, he had attempted to purchase the interests of his four sisters for $3,500 each. Each of the sisters had refused the offer.

Plaintiffs filed this suit on 6 June 1975, seeking an adjudication (1) that they are owners in fee simple of the three tracts of land, or (2) that defendant's interest in the three tracts be held in constructive trust for them. Defendant filed answer generally denying plaintiffs' allegations as well as interposing the defenses of the statute of frauds, the statute of limitations and laches.

At trial each of the plaintiffs attempted to testify as to various matters but most of their testimony was excluded. At the close of plaintiffs' evidence, defendant moved pursuant to G.S. 1A-1, Rule 50(a), for a directed verdict. The motion was granted and judgment was entered dismissing the action.

The Court of Appeals, in an opinion written by Judge Clark, concurred in by Judge Carlton, reversed the trial court and ordered a new trial. Judge Vaughn dissented and defendant appealed pursuant to G.S. 7A-30(2).

Lee and Lee, by J. B. Lee, for plaintiff-appellees.

Sankey W. Robinson for defendant-appellant.

BRITT, Justice.

Plaintiffs contend that the recital in the deed which is set out above operates to prevent defendant from claiming any interest in the three tracts of land which are the subject of this controversy. The Court of Appeals concluded that there was sufficient evidence to enable plaintiffs to go to the jury on the issue of the effect of the recital, and that the trial court erred in entering a directed verdict in defendant's favor. For the reasons hereinafter stated, we agreed with this conclusion.

When a fact which is recited in a deed is of the essence of the contract and it is clear that it is the intention of the parties to put the fact beyond question or to make the fact the basis of the contract, the recital is effective to operate as an estoppel against the parties to the deed and their privies. *Fort v. Allen*, 110 N.C. 183, 14 S.E. 685 (1892); *Brinegar v. Chaffin*, 14 N.C. 108 (1824); *see generally* 6 Thompson on Real Property § 3110 (Grimes Rev. 1962). Recitals in a deed are binding "when they are of the essence of the contract, that is, where unless the facts recited exist, the contract, it is presumed, would not have been made." *Brinegar v. Chaffin, supra* at 109; *see also North Carolina Joint Stock Land Bank* of *Durham v. Moss*, 215 N.C. 445, 2 S.E. 2d 378 (1939).

The doctrine of estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result. *See Hawkins v. M. & J. Finance Corporation*, 238 N.C. 174, 77 S.E. 2d 669 (1953);

H. McClintock, Equity § 31 (2d ed. 1948). The rule is grounded in the premise that it offends every principle of equity and morality to permit a party to enjoy the benefits of a transaction and at the same time deny its terms or qualifications. *See Shuford v. Asheville Oil Co.*, 243 N.C. 636, 91 S.E. 2d 903 (1956); *Pure Oil Co. v. Baars*, 224 N.C. 612, 31 S.E. 2d 854 (1944); *Allen v. Allen*, 213 N.C. 264, 195 S.E. 801 (1938). It will be observed that the rule is not predicated on the formalities of a deed. It is, instead, based upon the principle that one cannot accept the benefits of a transaction and deny the accompanying burdens. *Cook v. Sink*, 190 N.C. 620, 130 S.E. 714 (1925).

Equitable estoppel arises when an individual by his acts, representations, admissions, or by his silence when he has a duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and such other person rightfully relies and acts upon that belief to his detriment. *Boddie v. Bond*, 154 N.C. 359, 70 S.E. 824 (1911); *see also Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1967); *Smith v. Smith*, 265 N.C. 18, 143 S.E. 2d 300 (1965); D. Dobbs, Handbook on the Law of Remedies, § 2.3, p. 42 (1973).

The Court of Appeals held that plaintiffs were entitled to go to the jury on the theories of equitable estoppel and election. Under the evidence presented and tendered by plaintiffs at trial, we hold that they were not entitled to go to the jury on the theory of equitable estoppel because there is no evidence of detrimental reliance. Our examination of the record, however, convinces us that plaintiffs adduced sufficient evidence to entitle them to go to the jury on the theory of equitable election.

The doctrine of equitable estoppel is similar to the equitable doctrine of election which is usually applied to wills. The doctrine of election provides that a beneficiary under a will cannot take under that instrument at the same time he asserts a title or claim which is inconsistent with the same writing. *Rouse v. Rouse*, 238 N.C. 568, 78 S.E. 2d 451 (1953); *see also* 1 N. Wiggins, Wills and Administration of Estate in North Carolina § 147 (1964). In making an election, a person is compelled to choose between accepting a benefit under a written instrument or retaining property already his own which is disposed of in favor of a third party by the same document. *Wells v. Dickens*, 274 N.C. 203, 162 S.E. 2d

552 (1968); *see generally* 5 Page on Wills § 47.2 (Bowe-Parker Rev. 1962).

While the doctrine of election usually is applied in cases dealing with wills, it has, on occasion, been applied to cases dealing with deeds. *Norwood v. Lassiter*, 132 N.C. 52, 43 S.E. 509 (1903). In *Norwood*, plaintiff was the devisee of real estate which was subject to a deed of trust. While plaintiff was a minor, the deed of trust was foreclosed, defendants purchased the land and plaintiff's guardian accepted the balance of the proceeds of the sale after the indebtedness was paid. Part of the balance was used for plaintiff's maintenance and support. When plaintiff reached his majority the unspent balance was paid to and accepted by him. Plaintiff then brought suit to set aside the foreclosure of the deed of trust. In affirming a trial court judgment in favor of defendants, this court held that the doctrine of election precluded plaintiff from attacking the foreclosure sale. We quote from the opinion written by Justice Walker:

> ". . . When the plaintiff received the money he did something that was utterly inconsistent with his right to repudiate or disaffirm the sale. When a party has the right to ratify or reject, he is put thereby to his election, and he must decide, once for all, what he will do; and when his election is once made, it immediately becomes irrevocable. This is an elementary principle. *Austin v. Stewart*, 126 N.C. 525. He could not accept the money derived from the sale and at the same time reserve the right to repudiate the sale. *Keer v. Sanders*, 122 N.C. 635; *Mendenhall v. Mendenhall*, 53 N.C. 287. It is familiar learning that when two inconsistent benefits or alternative rights are presented for the choice of a party, the law imposes the duty upon him to decide as between them, which he will take or enjoy, and after he has made the election he must abide by it, especially when the nature of the case requires that he should not enjoy both, or when innocent third parties may suffer if he is permitted afterwards to change his mind and retract.
>
> "The doctrine of election frequently, though not exclusively, arises in case of wills; but the principle in its very nature seems to apply equally to other instruments and

transactions. 2 Story Eq. Jur., sec. 1075, and notes . . . ." 132 N.C. at 55-56.

While a deed serves as a written memorial of an *inter vivos* conveyance of real property and a will is an ambulatory document which takes effect at the death of the testator, both share a common characteristic and purpose: Each serves as a vehicle whereby the ownership of property is transferred from one person to another. Accordingly, we cannot perceive any reason why the doctrine of election ought not to apply to deeds with the force it applies to wills. *Cf. In re Moore's Estate*, 62 Cal. App. 265, 216 P. 981 (1923) (" . . . he who accepts a benefit under a deed or will must adopt the contents of the whole instrument, conforming to all of its provisions and renouncing every right inconsistent with it.") In the present case, plaintiffs seek a decree of equitable relief. It is a fundamental premise of equitable relief that equity regards as done that which in fairness and good conscience ought to be done. *McNinch v. American Trust Co.*, 183 N.C. 33, 110 S.E. 663 (1922), *cert. denied*, 67 L.Ed. 823 (1923).

The deed from Nettie Soles to defendant contained a recital that the parties understood and agreed that it was given and accepted "as an advancement to [defendant] of his entire interest in the real property of the estate of the grantor and of his father, S. C. Soles, deceased." While the recital fails as an advancement, *see* G.S. § 29-23, plaintiffs seek *equitable* relief. That being true, it is appropriate to regard the substance, not the form, of the transaction as controlling and not be bound by the labels which have been appended to the episode by the parties. *In Re Pendergrass' Will*, 251 N.C. 737, 112 S.E. 2d 562 (1960); *see also Mills v. Mutual Building & Loan Ass'n.*, 216 N.C. 664, 6 S.E. 2d 549 (1940); *Continental Trust Co. v. Spencer*, 193 N.C. 745, 138 S.E. 124 (1927).

We take notice of the fact that lay persons often refer to tracts of land as constituting a deceased person's "estate". *See Peirson v. Insurance Co.*, 248 N.C. 215, 102 S.E. 2d 800 (1958); *Jernigan v. Insurance Co.*, 235 N.C. 334, 69 S.E. 2d 847 (1952); *see generally* 1 Jones on Evidence § 2:41 (Gard Rev. 1972); 1 Stansbury's North Carolina Evidence § 14 (Brandis Rev. 1973). Though the transaction here was cast in terms of an advancement, there is evidence which tends to show that the essence of the arrangement was to convey to defendant a vested remainder

in the 48 acre fourth tract, while consolidating in plaintiffs as tenants in common a vested remainder in the other three tracts. The latter three tracts had once been owned by S. C. Soles, and there had been a division of interests effected by his will. It would not be unusual, therefore, for lay persons to refer to these three tracts as being his estate.

We conclude that it was error for the trial court to direct a verdict in favor of defendant. Although defendant did not sign the deed from Mrs. Soles to him, the recordation of the deed and defendant's acceptance of the benefits granted by the deed are indications that he accepted it. That being true, defendant was bound by the recital. This was sufficient evidence to take the case to the jury on the issue of equitable election.

In its opinion, the Court of Appeals observed that most of the evidence which was offered by plaintiffs was excluded by the trial court, apparently on the ground that the evidence was not admissible to show the creation of a trust or raise the issue of an estoppel. We agree with the Court of Appeals that while there must be a retrial, it is not necessary to discuss each evidentiary question raised by plaintiffs' assignments of error. We also agree with the Court of Appeals that parol evidence ordinarily is admissible to establish an estoppel unless it otherwise contravenes the evidentiary rules of competency and relevancy. Our previous discussion has pointed out the similarity between the doctrines of estoppel and election. We know of no reason why the same evidentiary rule would not also apply to cases proceeding upon a theory of election. However, not being able at this time to forecast all of the evidence which plaintiffs might attempt to introduce, we decline to say which evidence that *might* be offered would be competent and relevant. It must be left to the trial judge to pass upon the admissibility of the evidence offered in light of the pertinent rules.

The decision of the Court of Appeals reversing the judgment of the trial court is

Modified and affirmed.

Justice CARLTON did not participate in the consideration and decision of this case.

STATE OF NORTH CAROLINA v. THOMAS FULTON, JR.

No. 99

(Filed 5 March 1980)

1. Criminal Law § 61— comparison of shoe tracks—non-expert testimony—harmless error

The trial court erred in permitting a police officer who was not qualified as an expert witness to state his opinion that the tread design shown in a photograph of shoe tracks found near the crime scene was the same as the tread design on defendant's tennis shoes since the jury was as well qualified as the witness to draw inferences and conclusions from the facts the witness stated in his opinion; however, such error was harmless beyond a reasonable doubt where the State offered testimony by an S.B.I. agent who was an expert in shoe track comparison that shoe tracks near the crime scene and the track design on defendant's tennis shoes were similar.

2. Criminal Law § 71— shorthand statement of fact

Where an officer testified that he entered defendant's vehicle when he first discovered it, started the motor and moved the vehicle backward and forward, and that the vehicle was parked on an incline, the officer's subsequent testimony that defendant's vehicle could have drifted downhill to the new location where the officer found it "even without power steering and brakes" constituted a permissible shorthand statement of facts within the officer's own knowledge rather than opinion testimony.

3. Criminal Law § 55.1— type of blood on defendant's shoes—blood type of victim—percentage of persons having that type—weak probative value

In a prosecution for armed robbery and felonious assault, testimony by an expert in forensic serology that human blood found on defendant's tennis shoes was consistent with the victim's blood grouping or blood type and that this particular blood type was present in only 11% of the population of the United States was only weakly probative in character but was harmless because its probative value was so minute and exclusion of the testimony could not have changed the result of the trial.

4. Criminal Law § 42.6— chain of custody of shoes sent to S.B.I. laboratory

The chain of custody of defendant's tennis shoes after they were received in the mail by an S.B.I. agent was not broken so as to require the exclusion of tests of bloodstains on the shoes because the S.B.I. agent may have left the shoes unattended for an hour in his unlocked private office or because the shoes were carried to a mail pickup point by some employee of the S.B.I. laboratory other than the S.B.I. agent after they had been examined where the S.B.I. agent testified that upon receiving the shoes he immediately marked them with his initials, the date of receipt, and S.B.I. file number; within an hour after receiving the shoes he examined them and then placed them in a locked file cabinet until he got ready to dictate the case; the shoes were repackaged and mailed to the officer who had sent them to the S.B.I. the next

day; and the markings on the shoes introduced into evidence were those made by the S.B.I. agent and the shoes were the same shoes the agent had received and sent out.

DEFENDANT appeals from judgments of *Walker (Hal H.), J.*, 21 May 1979 Criminal Session, FORSYTH Superior Court. This case was docketed and argued as Case No. 127 at the Fall Term 1979.

Defendant was tried upon separate bills of indictment charging armed robbery and assault with a deadly weapon inflicting serious injury.

The State's evidence tends to show that at 12:30 a.m. on the night of 7 February 1979, a black male entered the Family Grocery at 805 Akron Drive in Winston-Salem, stuck a gun in the back of Sammy Agha, the owner, and demanded money. Mr. Agha opened the cash register and the robber struck him in the head with the pistol, inflicting wounds which required surgery and hospitalization. The robber was wearing white tennis shoes, dark pants, white sox, and a stocking over his head. During the robbery, Mr. Agha activated an alarm which notified the police. The robber took about $300.

Officer Everhart was investigating a 1967 Chrysler parked on the side of the road near the Family Grocery when he received a call concerning the robbery. He took the keys to the Chrysler with him and went to the Family Grocery. There was a grey cap and a tan jacket on the passenger side of the Chrysler which the officer left there. When he arrived at the Family Grocery, Mr. Agha told him he had been robbed by a black man wearing black pants, white sox and a black jacket. Twenty to thirty minutes after receiving the call, Officer Everhart saw defendant walking in the vicinity of the Family Grocery. Defendant ran and Officer Everhart and two other officers chased him into an apartment building and arrested him outside the apartment occupied by defendant's sister. At the time of arrest, defendant was wearing a *tan jacket*, black pants, white sox, and white tennis shoes with blood on them. He had $248.58 in his possession and was unarmed. The officer returned to the Chrysler and found it had been moved and the tan jacket and cap were gone. A stocking mask was found behind the house the Chrysler "had been sitting in front of."

Photographs of footprints found near the Family Grocery were taken and mailed, along with defendant's tennis shoes, to the S.B.I. laboratory in Raleigh on 16 February 1979 for footprint analysis. Officer Everhart testified over objection that the design of the tracks in the photo taken at the scene of the crime was the same as the tread design on defendant's shoes. An S.B.I. agent, expert in shoe track comparison, testified that in his opinion the footprint impressions were consistent with the soles of the tennis shoes.

On 10 April 1979, the tennis shoes were again sent to the S.B.I. laboratory in Raleigh for an analysis of the alleged blood stains on them. An S.B.I. agent testified that human blood on the tennis shoes was consistent with the blood grouping or blood type of Mr. Agha and that this particular blood type was present in only 11% of the population of the United States.

Defendant offered evidence and testified in his own behalf. He said the Chrysler belonged to him; that he had visited his sister on the night in question and, upon leaving her apartment, had trouble steering his car; that he parked it alongside the road and left on foot to get some power steering fluid at a filling station; that he failed to find it, returned to his car where he put his coat on, reached for the key and found it missing; that he thought he had left the key in the car, was looking around the area trying to find it, decided to return to his sister's apartment and was arrested there. Defendant said he was wearing black jeans on the night in question. He further testified that his mother had died within the last year and he had received a check for $1,700. He said he had the $248 which was found on him "folded behind my billfold . . . in my right pocket, back pocket, right behind my billfolder. There was a whole lot of $5 bills in there . . . ."

The jury convicted defendant of armed robbery and assault with a deadly weapon inflicting serious injury. He was sentenced to a term of not less than forty years nor more than life imprisonment for the robbery and not less than five nor more than ten years for the felonious assault, to run consecutively. He appealed both sentences. We allowed a motion to bypass the Court of Appeals in the felonious assault case to the end that all charges against defendant received initial appellate review in this Court. Errors assigned will be discussed in the opinion.

Rufus L. Edmisten, Attorney General, by William W. Melvin, Deputy Attorney General for the State.

Larry G. Reavis, Attorney for Defendant-Appellant.

HUSKINS, Justice.

[1] The court permitted Officer Everhart, over objection, to state his opinion that the tread design shown in the photograph of the shoe tracks which were found near the Family Grocery and the tread design on the bottom of defendant's tennis shoes were identical. This constitutes his first assignment of error.

Officer Everhart was not qualified as an expert witness in the field of latent evidence identification. He was, however, a trained police officer who had participated in the investigation of the armed robbery of Family Grocery and was the officer who found the shoe tracks in the field behind the store. Even so, we are discussing opinion evidence of a non-expert witness.

Ordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury. "The essential question in determining the admissibility of opinion evidence is whether the witness, through study and experience, has acquired such skill that he is better qualified than the jury to form an opinion as to the subject matter to which his testimony applies." *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976), *cert. denied*, 429 U.S. 1123 (1977). *Accord, State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973). Whether a witness has the requisite skill to qualify him as an expert is, nothing else appearing, a question within the exclusive province of the trial judge. *State v. Combs*, 200 N.C. 671, 158 S.E. 252 (1931).

Here, no effort was made to qualify Officer Everhart. It follows, therefore, that his opinion was inadmissible because the jury was apparently as well qualified as the witness to draw the inferences and conclusions from the facts that Officer Everhart expressed in his opinion. *Wood v. Insurance Company*, 243 N.C. 158, 90 S.E. 2d 310 (1955); *State v. Cuthrell*, 233 N.C. 274, 63 S.E. 2d 549 (1951).

Although the trial court erred in permitting Officer Everhart to express his opinion that "the design on the dirt and the design

on the bottom of the tennis shoes were the same," we are of the opinion that defendant was not prejudiced by the error because the State offered expert testimony through S.B.I. Agent Layton that the shoe tracks near the crime scene and the track design on defendant's tennis shoes were similar. Agent Layton said, "it is my opinion that the sole impression or track design on the base of State's Exhibit No. 11 (defendant's tennis shoes) is consistent with the shoe track impression represented on State's Exhibits 8(a), 8(b) and 8(c)." These latter exhibits are photos of shoe tracks in the field near the Family Grocery operated by Mr. Agha. We hold that admission of Officer Everhart's opinion testimony was harmless error beyond a reasonable doubt.

[2] Defendant further complains in his first assignment of error that the court erred in permitting Officer Everhart to testify that defendant's Chrysler could have been drifted downhill to the new location where the officer found it "even without power steering and brakes." Defendant contends this constitutes impermissible opinion testimony. We find no merit in this contention. The officer had previously testified that he had entered the vehicle when he first discovered it, had started the motor and moved the vehicle backward and forward. At that time the vehicle was parked on an incline. Thus, the officer had personal knowledge that the vehicle was not completely disabled and any driver could permit it to drift down the incline without power steering or power brakes. Hence, it is more accurate to say that the officer was giving a shorthand statement of facts within his own knowledge rather than expressing his opinion. Defendant's first assignment of error is overruled.

[3] Laura J. Ward, a member of the S.B.I. and an expert in the field of forensic serology, testified that examination of defendant's tennis shoes revealed the presence of human blood; that the blood type of Mr. Agha was group A, PGM type 1 and Hp type 2-1; that the blood on defendant's tennis shoes was group A, PGM 1, Hp 2-1. The witness then explained her answer as follows: "There are numerous blood groups or blood group systems present in the blood. The ABO system is the one that is most commonly recognized. You can be either a Group A, Group B, Group O, or Group AB. However, there are numerous other blood group systems present that are also genetically controlled, just as your ABO factors are, and two of the systems that were analyzed in

this particular case are the PGM system, and PGM stands for phosphoglucomutase, and the other system is haptoglobin. Within the PGM system you can be basically one of three types: you can be PGM 1, PGM 2, or PGM 2-1. Within the haptoglobin system [Hp], you can be basically one of three types, Haptoglobin 1, Haptoglobin 2, or Haptoglobin 2-1."

Over objection, this witness was then permitted to say: "The combination of these blood groups occurs in approximately 11% of the United States' population." Defendant assigns admission of this statement as error, contends it has no relevancy and that the only effect of allowing the 11% figure into evidence "was to incite prejudice in the minds of the jury." Defendant argues that a city the size of Winston-Salem would contain thousands of persons with the same blood type as the victim in this case, and the challenged evidence could only mislead the jury into believing that the particular blood type allegedly found on defendant's shoes came from an extremely limited source when in fact the source actually encompassed a very large number of people. We see no error here.

Justice Exum, speaking for the Court in *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977), said: "We believe the better view to be that the results of blood grouping tests are generally admissible. While their positive probative value is somewhat tenuous, we see little, if any, ascertainable prejudice which could arise from their admission. As we observed in *State v. Johnson* [280 N.C. 281, 185 S.E. 2d 698 (1972)]: 'At most, analysis of hair and blood samples tended to identify the defendant as belonging to the class to which the guilty party belonged. The analysis might have indicated he did not belong to that class.' Obviously the tests are highly probative negatively." So it is here. Had the blood grouping test shown that the blood on defendant's tennis shoes did not belong to the same group as Mr. Agha's blood, this would have been highly significant in defendant's favor and would tend to exonerate him. On the other hand, since the blood test showed that the victim's blood group was the same as the blood on defendant's shoes, the test was relevant but *weakly* probative in character because 11% of the population has the same blood type as Mr. Agha. In a city the size of Winston-Salem, this 11% would encompass several thousand people whose blood could have been on defendant's shoes. The challenged statement is therefore

mildy unfavorable to defendant but essentially harmless because its probative value is so minute. Certainly no prejudice resulted. Exclusion of the challenged testimony would not have changed the result of the trial. This assignment is overruled.

[4] Finally, defendant contends the court erred in allowing testimony concerning the blood tests because a proper chain of custody showing continuous possession of defendant's tennis shoes was not established. Thus, defendant says, the integrity of the blood test evidence was destroyed. This constitutes his third and final assignment of error.

The record shows that S.B.I. Agent Layton on 20 February 1979 received defendant's tennis shoes through the mails from Officer Everhart for footprint comparisons. Agent Layton kept the shoes in his control, custody and possession while they were in the S.B.I. laboratory and until they were returned to Officer Everhart by mail on 21 February 1979.

On 10 April 1979, S.B.I. Agent Laura J. Ward received by mail from Officer Everhart defendant's tennis shoes for analysis as to blood stains on them. Agent Ward testified: "I did keep that package and those shoes in my custody and control and possession while doing the examination and until I mailed them back to Officer Everhart."

Defendant asserts two prejudicial breaks in the chain of custody during the time Agent Layton had possession of the shoes. Defendant first argues that after Agent Layton received the shoes in the mail on 20 February 1979, he left them unattended for an hour in his unlocked private office. Agent Layton did not remain continuously in his office during that hour. Secondly, defendant asserts that someone other than Agent Layton carried the package to a mail pickup point after Layton had examined the shoes and made the footprint comparisons.

There is no merit in defendant's final assignment of error. The possibility that defendant's tennis shoes (State's Exhibit 11) could have been stolen, or other shoes substituted for them, while S.B.I. Agent Layton's private office was temporarily unlocked or while the shoes were carried to a mail pickup point by some employee of the S.B.I. laboratory other than Agent Layton, is too remote to break the chain of custody and too tenuous to render

the blood test evidence incompetent. Compare *State v. Hunt*, 297 N.C. 258, 254 S.E. 2d 591 (1979). We think the evidence supports the conclusion that the chain of custody of State's Exhibit 11 was unbroken. Immediately upon receiving the shoes on 20 February 1979, Agent Layton marked them with his initials, the date of receipt, and S.B.I. file number. Within an hour after receiving the shoes he examined them and then placed them in a locked file cabinet until he got ready to dictate the case. The shoes were repackaged and mailed to Officer Everhart the next day. Agent Layton testified without reservation that the markings on the shoes were his and that the shoes marked State's Exhibit 11 were the same shoes he had received and the same shoes he had sent out. There is no evidence that the shoes, at any time, had been tampered with. Accordingly, defendant's third assignment of error is overruled.

Defendant received a fair trial free from prejudicial error. The judgments appealed from must therefore be upheld.

No error.

GARFIELD DAVIS AND WIFE, LONA MAE DAVIS v. ROY LEE McREE AND WIFE, DEAN C. McREE, FIRST SOUTHERN SAVINGS AND LOAN ASSOCIATION, AND THOMAS J. WILSON, TRUSTEE

No. 98

(Filed 5 March 1980)

1. Landlord and Tenant § 13.2; Vendor and Purchaser § 2.3— lease with option to purchase—extension of lease—extension of option

Where the original lease of property containing an option to purchase extended from 31 January 1972 through 31 January 1974, and the parties later placed at the end of the typewritten lease a handwritten agreement stating that "The term of this lease shall be from Jan. 31, 1974 through Jan. 31, 1976," the trial court properly determined that the handwritten endorsement incorporated the original lease agreement in its entirety, including the option to purchase, since it was clear that the parties intended to extend the option by their subsequent acts, including defendants' exercising of the option and plaintiffs' having the deed of purchase drawn up.

2. Vendor and Purchaser § 1.3— lease with option to purchase—new term of lease—application of rental payments

Where the parties' lease contained an option to purchase and provided that "all payments made as rental under this lease shall . . . be applied as a part of the purchase price," and where the term of the parties' original lease expired on 31 January 1974 and they later added a handwritten agreement that "The term of [the new] lease shall be from Jan. 31, 1974 through Jan. 31, 1976," the latter agreement created a new estate for years which was separate and distinct from the previous one; therefore, only rental sums paid subsequent to 31 January 1974 could be applied against the purchase price of the premises in question when defendants exercised their option to purchase.

ON discretionary review to review the decision of the Court of Appeals, reported in 40 N.C. App. 238, 252 S.E. 2d 259, finding no error in the judgment entered by *Ferrell, J.*, at the 21 November 1977 Session of CATAWBA Superior Court. This case was docketed and argued as No. 121 at the Fall Term 1979.

Plaintiffs and defendants entered into a lease agreement in December, 1971, whereby defendants agreed to lease certain real property from plaintiffs for a term beginning on 31 January 1972 and ending 31 January 1974. The agreement called for rent of $125.00 per month. Contained in the agreement was an option to purchase which provided as follows:

> OPTION: During the term of this Lease, the Lessee shall have the right to purchase the Demised Premises for a purchase price of Twelve Thousand ($12,000.00) Dollars; all payments made as rental under this lease shall, in the event this option is exercised, be applied as a part of the purchase price.

The agreement had no extension or renewal provision.

Defendants continued in possession of the property following the expiration date of the lease and continued to make rental payments until 13 August 1974. On that date, the parties met and added the following language at the end of the typewritten lease agreement of 4 December 1971:

The term of this lease shall be from Jan. 31, 1974 through Jan. 31, 1976.

August 13, 1974

Agreement
s/ Garfield Davis
s/ Lona Mae Davis
s/ Dean C. McRee

Several months prior to November, 1975, defendants indicated their intention to exercise the option to purchase the property. Defendants arranged to borrow $7,500.00 at First Southern Savings and Loan in Lincolnton, North Carolina. Plaintiffs executed a deed to the property on 13 November 1975, and the deed was recorded 14 November 1975. Upon examining title to the property, the attorney for defendant First Southern Savings and Loan discovered a deed of trust in favor of First Federal Savings and Loan in the sum of $8,700.00.

Defendants then computed the balance due on the purchase price by applying all rents which had been previously paid against the total purchase price in accordance with the option terms contained in the lease dated 4 December 1971. Defendants tendered the amount of $4,750.00 to plaintiffs. Plaintiffs refused the tender and instituted this action to have the deed and deed of trust cancelled on the grounds that they were recorded without plaintiffs' authorization and were not supported by adequate consideration.

At trial, upon issues submitted to it by the judge, the jury found that defendants had exercised the option, and that the balance of the purchase price was $4,750.00. Plaintiffs appealed and the Court of Appeals, in an opinion by Judge Arnold, Judges Parker and Webb concurring, found no error. We allowed plaintiffs' petition for discretionary review, pursuant to G.S. 7A-31, for a limited purpose on 10 September 1979. We subsequently allowed all issues properly presented to the Court of Appeals to be brought before this Court for determination.

Williams, Pannell & Lovekin, by Martin C. Pannell, for plaintiffs.

Lefler, Gordon & Waddell, by Lewis E. Waddell, Jr., for defendants McRee.

Wilson & Lafferty, P.A., by John O. Lafferty, Jr., for defendants Wilson and First Southern Savings & Loan Association.

BRANCH, Chief Justice.

[1] Plaintiffs assign as error the trial court's ruling as a matter of law that the handwritten endorsement of 13 August 1974 incorporated the original lease agreement in its entirety, including the option to purchase. On this matter, the trial judge ruled:

> . . . that the lease and all of its contents was [sic] in effect and binding between the parties up to and through January 31, 1976, and that each and every of the clauses of the lease were binding upon the parties upon any event covered by the lease, *specifically that the option provisions of the lease applied* during the period from January 31, 1974, through and including January 31, 1976. [Emphasis added.]

Plaintiffs contend that the option to purchase died with the expiration of the term of the original lease on 31 January 1974 and that the new agreement of 13 August 1974 was not effective to revive the option.

Defendants, on the other hand, maintain that the intent of the parties should control the interpretation of the August agreement. They contend that the parties intended to incorporate into the new agreement all of the provisions of the prior lease.

The Court of Appeals held that the intent of the parties controls the construction of the August agreement. It held further that the parties intended to extend the option to purchase as well as the terms of the original lease agreement.

It is well settled that the parties to a lease may by subsequent agreement extend the time for which the lease is to run. 51C C.J.S. *Landlord and Tenant* § 55 (1968). The rules governing the interpretation of written instruments generally apply with equal force to the construction of provisions for renewals or extensions of leases. 50 Am. Jur. 2d *Landlord and Tenant* § 1160

(1970). The primary purpose in all events is to ascertain the intent of the parties to the subsequent agreement. *Id.*

We have examined the law governing extensions and renewals of lease contracts which include options to purchase and have found it to be far from well settled. The rule most often stated is that, in the absence of a renewal term in the original lease, "where the tenancy is continued by subsequent agreement, the continuance of the option depends upon the construction to be placed upon that agreement. If it refers to the original lease, the option is also extended. However, if the subsequent agreement merely continues the tenancy, although upon the terms fixed by the original lease, it will not extend an option to purchase contained in the original lease." Annot., 15 A.L.R. 3d 470, 473-74 (1967); 49 Am. Jur. 2d, *supra* § 383.

In our view, this statement of the law is far more confusing than it is enlightening, and the decisions of other courts confronting the issue reflect this confusion. *See e.g., Grummer v. Price*, 101 Ark. 611, 143 S.W. 95 (1912); *Parker v. Lewis*, 267 Pa. 382, 110 A. 79 (1920). The better view, and the one to which we adhere, is that the ultimate test in construing any written agreement is to ascertain the parties' intentions in light of *all* the relevant circumstances and not merely in terms of the actual language used. "Where the parties have made a separate agreement extending the lease, the agreement must be examined in light of all the circumstances in order to ascertain the meaning of its language, with the guide of established principles for the construction of contracts, and in the light of any reasonable construction placed on it by the parties themselves." 51C C.J.S., *supra* § 68a. The parties are presumed to know the intent and meaning of their contract better than strangers, and where the parties have placed a particular interpretation on their contract after executing it, the courts ordinarily will not ignore that construction which the parties themselves have given it prior to the differences between them. *Preyer v. Parker*, 257 N.C. 440, 125 S.E. 2d 916 (1962).

With this in mind, we note that the language of the handwritten August agreement here does not tend to shed any light on whether the parties intended to extend the option to purchase. However, evidence of subsequent acts by both parties clearly indicates their intent to extend the option. Defendants in fact *exer-*

cised the option, and plaintiffs proceeded to have the deed of purchase drawn up. As plaintiff Garfield Davis himself testified, "I went down there to sign the deed and get the money I felt was due under the lease." It is evident from the conduct of the parties here that they intended to incorporate the option to purchase in their August agreement to extend the lease. We so hold.

[2] Plaintiffs' next assignment of error, and the hub of the controversy here, relates to the computation of the amount due on the purchase price. The trial judge instructed the jury to determine the amount due by deducting from the purchase price "any monthly sums paid to the plaintiffs by the defendant during the entire period of the lease." Plaintiffs contend that the August agreement was a new and distinct lease and that only the rental sums paid subsequent to 13 August 1974 should be applied against the purchase price. In the alternative, plaintiffs argue that only those sums paid subsequent to 31 January 1974 should be set off against the purchase price.

Defendants argue that the August agreement operated to extend the original agreement in its entirety and consequently, the purchase price should be offset by all rental payments from 31 January 1972 until the time they exercised the option.

The parties to a lease may provide that the commencement of the lease term operate retrospectively. *Milbourn v. Aska*, 81 Ohio App. 79, 77 N.E. 2d 619 (1946). The parties here provided explicitly that the term of the new lease would be from 31 January 1974 through 31 January 1976. The sole question remaining is whether this "term" is merely a continuation of the original lease term, or is in effect a new and distinct lease "term."

The original lease in this case provided for a leasehold estate for years. J. Webster, *Real Estate Law in North Carolina* § 65 (1971). Such an estate terminates upon the expiration of the term fixed by the lease. *Id.* § 77. Thus, the term of the original lease ended on 31 January 1974, and the option was not exercised while the original lease was in effect. *See Product Co. v. Dunn*, 142 N.C. 471, 55 S.E. 299 (1906). The parties specifically agreed that "[t]he term of [the new] lease shall be from Jan. 31, 1974 through Jan. 31, 1976." The latter handwritten agreement created a new estate for years which was separate and distinct from the previous one. We therefore hold that the August agreement was, in effect, a

new lease, and that only those rental sums paid subsequent to 31 January 1974 are to be applied against the purchase price. *See Gattavara v. Cascade Petroleum Co.*, 27 Wash. 2d 263, 177 P. 2d 894 (1947).

The decision of the Court of Appeals is affirmed in part, reversed in part and this case is remanded to that court with direction that it be returned to Catawba Superior Court for entry of judgment in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, NORTH CAROLINA NATURAL GAS, APPLICANT, AND THE PUBLIC STAFF, INTERVENOR v. CF INDUSTRIES, INC., INTERVENOR

No. 16

(Filed 5 March 1980)

Gas § 1; Utilities Commission § 24— curtailment tracking rate—undercollection for one year as offset to overcollection for next year—no retroactive rate making

An annual "true up" of the curtailment tracking rate of a natural gas company was not a change in a general fixed rate, and an order permitting an undercollection produced in one year by a curtailment tracking rate based on an incorrect base period margin to be rolled forward to offset an overcollection in the next year did not constitute prohibited retroactive rate making.

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

ON appeal by defendant from an opinion of the Court of Appeals reported at 43 N.C. App. 219, 258 S.E. 2d 389 (1979) with one judge dissenting, affirming an order of the North Carolina Utilities Commission entered 4 April 1978.

On January 13, 1978 North Carolina Natural Gas (NCNG) filed an application in Docket No. G-21 Sub 128D for an adjustment and "true up" of its Curtailment Tracking Rate (CTR), based on forecasted gas supply for the period November 1, 1977 through October 31, 1978. This CTR had initially been put into effect as part of NCNG's rate structure by order of the North Carolina

Utilities Commission (Commission) on January 21, 1975, based on NCNG's fiscal year ending September 30, 1974.

NCNG is a distributor of natural gas, and receives 100% of the natural gas it has for sale from its pipeline supplier, Transcontinental Gas Pipeline Corporation (Transco). In 1974 and 1975 the volumes of natural gas available to NCNG fluctuated widely, and on the whole were declining rapidly. As a result of this declining availability of gas, the Commission instituted the CTR to enable NCNG to raise and lower its rates based on the volume of gas received, without perpetually appearing before the Commission requesting general rate adjustments.

The CTR is a surcharge on all volumes of natural gas sold by NCNG, which allows NCNG to raise or lower the price of gas per volumetric unit to maintain the "Base Period Margin." This "Margin" is computed as the difference between gross revenues derived from gas sales, and the total cost of procuring the natural gas during the base period. NCNG's original CTR was computed based on an erroneous calculation of its "Base Period Margin." The company initially used a figure of $10,232,649 which it mistakenly calculated as the actual margin for the base year ending 30 September 1974. The figure of $10,232,649 was adopted by the Commission in its order establishing general rates for NCNG on 12 December 1974. On 22 September 1976, upon discovery of the miscalculation, the Commission adjusted this figure to establish a new "Base Period Margin" of $11,549,778.

As a result of the CTR, when the volume of gas received by NCNG declines, and because of this decline the gross revenues received by NCNG also decrease, the CTR is increased to enable NCNG to maintain the "Base Period Margin." As the volume of gas obtained by NCNG increases, and so do its gross revenues, the CTR surcharge decreases also to maintain this "Margin." The CTR allows NCNG to maintain its "Base Period Margin" in spite of fluctuations in the volume of gas made available to it for sale. The CTR does not track revenues of NCNG for it does not vary with the other expenses of the company. Its sole purpose is to maintain the "Margin" in spite of fluctuating gas supplies.

The CTR is computed on an annual basis based on projected volumes at the start of each yearly period. At the end of the yearly period when the actual volume figures are available, the Com-

mission requires NCNG to "true up" its projected CTR, either by refunding monies overcharged or recouping for undercharges. Establishing a new CTR for the period November 1, 1977 through October 31, 1978 and the "true up" for the period commencing 1 November 1976 and ending 31 October 1977 were the subjects of the January 13, 1978 hearing before the Commission. That "true up" is also the subject of this appeal.

In "trueing up" the projected CTR for the year beginning 1 November 1976, and ending 31 October 1977, it was determined NCNG had overcollected from its customers, including CF Industries, Inc. (CFI) in the amount of $625,586. However, the Commission also determined that in the preceding twelve month period ending 31 October 1976, NCNG had undercollected in the amount of $518,610 due to the miscalculation of its "Base Period Margin." As noted above, the incorrect "Margin" was adjusted upward by the Commission on 22 September 1976. The Commission therefore determined by offsetting this undercollection for the yearly period ending 31 October 1976 against the $625,586 overcollection for the yearly period ending 31 October 1977, that the actual amount of overcollection for the period November 1, 1976 through October 31, 1977 was $106,967. The Commission on 4 April 1978 ordered that this amount (plus an additional amount of $208,413 due to an adjustment for billing under the Transportation Rate, but not an issue in this appeal) be flowed through to NCNG customers.

NCNG complied with this order, distributing monies to customers on a pro rata basis by giving cash refunds to customers no longer requiring service, and by crediting the accounts of those still served by NCNG. From the Commission's order allowing the $625,586 overcollection to be offset by the prior $518,610 undercollection, CFI appealed. The Court of Appeals affirmed the Commission at 43 N.C. App. 219, 258 S.E. 2d 389 (1979). Judge Martin (Robert M.) dissented without assigning a reason therefor. Pursuant to G.S. 7A-30(2) defendant appealed to this Court as a matter of right.

Jerry B. Fruitt, Chief Counsel, by Robert F. Page, Public Staff Attorney, for the North Carolina Utilities Commission, appellee.

McCoy, Weaver, Wiggins, Cleveland and Raper, by Donald W. McCoy, for North Carolina Natural Gas Corporation, appellee.

Sanford, Adams, McCullough and Beard, by William H. McCullough, Charles C. Meeker and Peter J. Sarda, for CF Industries, Inc., appellant.

BROCK, Justice.

The question presented by this appeal is whether or not the Commission may allow an undercollection of $518,610 accrued by NCNG during the year prior to October 31, 1976 to be rolled forward to offset an overcollection of $625,586 during the following annual period ending October 31, 1977; and thereby create a net cash refund to NCNG customers in the amount of only $106,976. For the reasons which follow we hold that the decision of the Commission to allow a roll in of the past undercollection was proper.

Appellant argues to this Court that a CTR undercollection must be treated like any other utility undercollection, and may not be collected from customers of that utility in a subsequent period. In the area of general rate making, it is settled law in this jurisdiction that the Commission has no authority to allow a public utility to increase the rates of its present customers to collect a past deficit. *Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977); *Utilities Commission v. City of Durham*, 282 N.C. 308, 318, 193 S.E. 2d 95, 102 (1972). Justice Lake speaking for the Court in *Edmisten* noted the rationale behind this rule.

> "Such rate making throws the burden of such past expense upon different customers who use the service for different purposes than did the customers for whose service the expense was incurred." *Id.* at 470, 232 S.E. 2d at 195.

We have concluded, however, that a rate adjustment pursuant to an annual CTR "true up" is not a change in a fixed general rate, and thus the rate adjustment in this case which allowed NCNG to offset its overcollection by its previous undercollection does not

constitute retroactive rate making prohibited by *Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977).

The CTR was established as part of NCNG's basic rate structure by order of the Commission on 12 December 1974, and was implemented at a time of uncertainty of the continuing availability of gas supplies. The CTR's purpose was to prevent NCNG and its customers from making continued appearances before the Commission to request general rate adjustments with each increase and decrease of natural gas supplies. The adjustments would have been necessary to maintain the same "Base Period Margin" approved by the Commission. The CTR eliminates the need for such procedure by allowing NCNG to base its price per volumetric unit on projected volumes of gas which it might receive over a yearly period. At the end of the yearly period when the *actual* amount of gas received during that period is known, the rate is "trued up" to reconcile the rate charged with the amount of gas received. This "true up" efficiently maintains the NCNG "Base Period Margin" approved by the Commission at the general rate hearing of 12 December 1974. In *Utilities Commission v. Public Service Company*, 35 N.C. App. 156, 241 S.E. 2d 79 (1978) our Court of Appeals upheld the use of a formula known as the Volume Variation Adjustment Factor (VVAF), which provided for the yearly "true up" of projected volumes of natural gas in a manner identical to that of the CTR. In distinguishing this "true up" from prohibited retroactive rate making in a general rate case, the Court of Appeals noted:

> "The 'true' VVAF rate is based on *actual* curtailment experience. The 'true' VVAF is the incremental rate necessary to allow Public Service to maintain its base period margin. Since the VVAF actually charged is based upon projected curtailment levels, it must be trued-up periodically to reconcile it with actual experience." *Id.* at 162, 241 S.E. 2d at 83.

Also in the case at bar, prior to the annual "true up" of the CTR, NCNG cannot know the actual rate which must be charged in order to maintain its approved "Base Period Margin." Until the annual "true up," no firm rate has been "fix[ed], established or allow[ed]" for the preceding year as required by G.S. 62-130, and thus without the "true up" there is no general rate established for that year. The CTR merely creates an *estimated rate* based

on projected gas availability. It is a system designed by the Commission to enable NCNG to maintain its general rate previously set by the Commission in September of 1974, without the necessity of a general rate hearing with each fluctuation in the availability of natural gas. Therefore like the "true up" of the VVAF, the "true up" of the CTR is a correction of an estimated rate, and does not constitute retroactive general rate making.

We also note that in the case of an approved general rate, "a utility may not properly be denied the right to charge such a rate, for the present use of its service, for the reason that, . . . the utility earned an excessive rate of return due to the fact that an expense which it was expected to incur . . . [in a previous period] did not materialize." *Utilities Commission v. Edmisten*, 291 N.C. 451, 469-70, 232 S.E. 2d 184, 194 (1977). Such is not the case with excess rates collected pursunt to the CTR. As in the case *sub judice* if the rate charged by NCNG during the annual period, prior to the "true up," exceeds the rate necessary for NCNG to maintain its "Base Period Margin," the NCNG is required by the Commission to refund the excess.

We therefore conclude that the CTR is not a general fixed rate, and that rolling forward NCNG's past undercollection does not constitute prohibited retroactive rate making. If pursuant to the CTR, NCNG is required to refund the excess revenues collected during the year ending October 31, 1977, then it is entitled to reduce the amount of this refund by its undercollection due to an error in computing its "Base Period Margin" during the year ending October 31, 1976.

The decision of the Court of Appeals affirming the Commission's order that NCNG refund the amount of $315,389 is affirmed.

Affirmed.

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

KAVANAU REAL ESTATE TRUST, PLAINTIFF APPELLEE, AND THE BANK OF NEW YORK, ASSIGNEE OF PLAINTIFF v. LEE A. DEBNAM, A GENERAL PARTNER OF YORKTOWNE VILLAGE, LTD., AND ALGIE STEPHENS, A GENERAL PARTNER OF YORKTOWNE VILLAGE, LTD., TRADING AND DOING BUSINESS AS YORKTOWNE VILLAGE, LTD., A GENERAL PARTNERSHIP, DEFENDANTS APPELLANTS

No. 89

(Filed 5 March 1980)

1. **Mortgages and Deeds of Trust § 32.1— mortgage on leasehold interest—action on underlying obligation not prohibited**

Because a lease, which is a chattel real, is to be considered personal property for purposes of G.S. 45-21.38, the anti-deficiency statute, the statute does not bar an *in personam* suit and judgment on a purchase money note securing an assignment of a leasehold interest, since the protection provided by the statute applies only to transactions involving the sale of real property.

2. **Rules of Civil Procedure § 56.1— summary judgment before responsive pleading—summary judgment not premature**

The Court of Appeals properly held that G.S. 1A-1, Rule 56(a) allowed summary judgment to be entered for plaintiff before defendants had filed a responsive pleading, since plaintiff could move for summary judgment at any time after the expiration of 30 days from the commencement of the action and since defendants could not rely on their responsive pleading upon plaintiff's showing that it was entitled to summary judgment, but defendants could have come forward with affidavits even though they had filed no answer.

3. **Mortgages and Deeds of Trust § 32.1; Judgments § 54— subject matter jurisdiction—anti-deficiency statute—judgment not satisfied**

There was no merit to defendants' contention that the trial court was without subject matter jurisdiction because the anti-deficiency statute barred an *in personam* suit on a purchase money note and because plaintiff had obtained a judgment on this claim in bankruptcy court, since the anti-deficiency statute applies only to transactions involving real property and therefore was not applicable to this claim, and since a party may pursue and obtain more than one judgment though he may have only one satisfaction.

4. **Rules of Civil Procedure §§ 60.1, 60.2— relief from judgment—motion not timely—grounds**

Defendants were not entitled to relief from judgment pursuant to G.S. 1A-1, Rule 60(b)(1) and (3), since judgment was filed as a matter of record on 18 April 1978, and defendants' motion for relief filed on 15 June 1979 was not timely; nor were defendants entitled to relief under Rule 60(b)(4) since there was no lack of subject matter jurisdiction, or under Rule 60(b)(5) since there was no evidence that plaintiff's judgment in bankruptcy court had been satisfied.

ON defendants' petition for discretionary review pursuant to G.S. 7A-31 from the opinion of the Court of Appeals, 41 N.C. App. 256, 254 S.E. 2d 638 (1979) (opinion by *Chief Judge Morris* with *Clark* and *Arnold, JJ.* concurring), which affirmed the order of *McKinnon, J.* in which he entered summary judgment in favor of the plaintiff. This case was docketed and argued at the Fall Term 1979, as No. 86.

Plaintiff brought this action to recover the principal and the legal rate of interest on the principal dating from 1 June 1977, allegedly due on a promissory note secured by a deed of trust encumbering a leasehold interest assigned by plaintiff to the defendants.

The owner of the property which contains an apartment complex known as Yorktowne Apartments is Ward Realty Company. First mortgagee is the State of Wisconsin Investment Board by assignment from Cameron Brown Company. The property was leased to Consolidated Properties, Inc. Consolidated assigned its interest to plaintiff. Plaintiff assigned the lease to the defendants in this action, Yorktowne Village Ltd. (a general partnership composed of general partners, Lee A. Debnam and Algie Stephens, also defendants in this action). In exchange for the assignment of the lease, the defendants executed in favor of the plaintiff a promissory note in the face amount of $100,000 secured by a deed of trust on the defendants' leasehold interest. The defendants assigned the lease to Yorktowne Apartments, Inc. which later assigned the lease to O.C.G.—Yorkwoods, Ltd. which later assigned the lease to Tudor Associates Ltd., II.

At all times relevant to this action, Tudor has been involved in a Chapter XII bankruptcy proceeding. On 28 September 1978, the Bankruptcy Court for the Eastern District of North Carolina entered its Order Confirming Plan which ordered payment in full to the plaintiff of the debt which is the subject matter of its claim in this action because Tudor took its assignment of the lease, as did the other assignees, subject to defendants' debt to the plaintiff. However, there is nothing to indicate that plaintiff has in fact been paid in satisfaction of this order of the bankruptcy court.

Plaintiff filed its Complaint on 9 November 1977. An order allowing defendants an extension of time within which to file their Answer was entered on 22 November 1977. On 9 January

1978, within the period of this extension of time, defendants filed a Rule 12(b)(6) Motion to Dismiss in lieu of filing an Answer. On 1 February 1978, plaintiff moved for Summary Judgment. Defendants filed a Third Party Complaint on 24 February 1978 and on 3 March 1978 they filed Motions for Election of Remedies, Continuance, and Abatement. On 6 March 1978, the trial judge entered an Order granting Summary Judgment in favor of the plaintiff. A corrected Order of Summary Judgment in favor of the plaintiff was entered by the trial judge on 18 April 1978. The defendants never filed an Answer in this action. Plaintiff has assigned its judgment to the Bank of New York.

We allowed discretionary review on 31 July 1979.

Sanford, Adams, McCullough & Beard by J. Allen Adams, E. D. Gaskins, Jr. and Catharine B. Arrowood for defendant-appellant Algie Stephens.

Seay, Rouse, Johnson, Harvey & Bolton by James L. Seay and Ronald H. Garber for defendant-appellant Lee Debnam.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon by Josiah S. Murray III for plaintiff-appellees.

COPELAND, Justice.

Four issues have been presented for our consideration.

[1] First, defendants complain that the Court of Appeals erred in holding that G.S. 45-21.38 (the anti-deficiency statute) does not bar an *in personam* suit and judgment on a purchase money note securing an assignment of a leasehold interest. The Court of Appeals so held because the anti-deficiency statute bars a suit for a deficiency judgment after foreclosure and bars suit on the note in lieu of foreclosure, *Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979), in "*sales of real property . . .* to secure to the seller the payment of the balance of the *purchase price of real property.*" G.S. 45-21.38. [Emphasis added.]

We held in *Ross Realty* that although the statute is not artfully drawn, the manifest intention of the legislature in enacting the anti-deficiency statute was to leave foreclosure as the only remedy in purchase money situations. However, we cannot ignore

the plain and unambiguous limitation of the statute which makes it applicable only in cases involving sales of *real property.*

The question then becomes whether a lease which is a chattel real is to be considered real property or personal property for purposes of the anti-deficiency statute. The Court of Appeals correctly analyzed the precedent on this question and in a thorough and well reasoned discussion correctly held that a lease is a species of personal property and is therefore outside the scope of the anti-deficiency statute. We have carefully reviewed the Court of Appeals' opinion by Chief Judge Morris, and the briefs and authorities on this question. The reasoning and principles enunciated by it are correct and we affirm its holding on this issue.

[2] Second, defendants complain that the Court of Appeals erred in holding that G.S. 1A-1, Rule 56(a) allows summary judgment to be entered for plaintiff before defendants have filed a responsive pleading. We have carefully reviewed the briefs, authorities and the Court of Appeals' opinion on this issue and find its reasoning and legal principle to be correct and well stated in all respects.

G.S. 1A-1, Rule 56(a) provides that a party may move for summary judgment "at any time after the expiration of 30 days *from the commencement of the action.*" [Emphasis added.] As the Court of Appeals held, even if defendants had filed their answer, they cannot rest on that responsive pleading when the party moving for summary judgment has *prima facie* established that he is entitled to it. The party opposing the motion must come forward with additional evidence in opposition to the motion. Defendants could have come forward with this evidence, *e.g.*, in the form of affidavits, even though they had filed no answer. Summary judgment was correctly entered for the plaintiff and we affirm the Court of Appeals on this issue.

[3] Third, defendants have raised the issue of subject matter jurisdiction. This issue was not raised at the trial level or in the Court of Appeals. Of course, it may be raised for the first time on appeal to this Court. G.S. 1A-1, Rule 12(h); *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E. 2d 617 (1956). The contention is that the trial court was without subject matter jurisdiction because the anti-deficiency statute bars an *in personam* suit on a purchase money note and because plaintiff has obtained a judg-

ment on this same claim in bankruptcy court against Tudor, the bankrupt lessee-assignee who took subject to plaintiff's mortgage on the leasehold interest.

The answer to the first half of defendants' contention is that we have already held above that the anti-deficiency statute does *not* bar this suit. With respect to the second half of the contention, the law is that a party may pursue and obtain more than one judgment but he may have only one satisfaction. *Bowen v. Iowa National Mutual Insurance Co.*, 270 N.C. 486, 155 S.E. 2d 238 (1967).

[4] Fourth, defendants have made a motion in this Court for relief from the judgment pursuant to G.S. 1A-1, Rule 60(b) under subsections (1) due to mistake, (3) on grounds of fraud (4) judgment is void, (5) judgment has been satisfied, and (6) any other reason justifying relief. We have held that decisions on these motions rest within the sound discretion of the trial judges, *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975); *Burwell v. Wilkerson*, 30 N.C. App. 110, 226 S.E. 2d 220 (1976). However, without ruling on the propriety of making this motion for the first time on appeal to this Court since this question was neither briefed nor argued, we simply note that the rule imposes a time limit of one year after entry of the judgment or order within which to make the motion under subsections (1) and (3). Judgment was filed as a matter of record in this case on 18 April 1978. Defendants sought relief from this judgment in this Court on 15 June 1979. Relief was not timely sought under these two subsections.

The defendants are not entitled to relief from judgment under subsection (4) on the ground that the judgment is void because of a lack of subject matter jurisdiction because we have held above that there was no lack of subject matter jurisdiction. Defendants are not entitled to relief under subsection (5) on the ground that the judgment has been satisfied because the record reveals that plaintiff has obtained a judgment in bankruptcy court but there is no evidence in the record that it has been satisfied.

We decline to grant defendants relief from the judgment pursuant to subsection (6) or to decide whether we have the authority to do so because we believe that this case was handled ably and correctly in the trial court. Defendants are not the victims of

an inequitable judgment. Plaintiff has pursued a legally valid claim to judgment and that judgment shall stand.

Affirmed.

STATE OF NORTH CAROLINA v. JAMES WILLIAM RUPARD

No. 7

(Filed 5 March 1980)

1. **Homicide § 20.1— photographs of victims' bodies—admission for illustrative purposes**

Photographs of the bodies of two murder victims taken at the crime scene and at the office of the Chief Medical Examiner in Chapel Hill were properly admitted for the purpose of illustrating testimony of a medical expert as to the nature of the entry and exit wounds which he found, the bullet fragments he recovered from the bodies, and the cause of death of each victim.

2. **Criminal Law § 102.6— improper remark by prosecutor—curative instruction—absence of prejudice**

The prosecutor's remark in his jury argument that "The attorneys for the defendant, I would argue were tied to this story that the defendant told" was not sufficiently grave or prejudicial to warrant a new trial, and any impropriety was cured by the trial court's instruction that the jury should disregard such remark.

3. **Criminal Law § 134.4— youthful offender—failure to make "no benefit" finding**

The trial court erred in sentencing a 17 year old defendant to consecutive terms of life imprisonment for second degree murder without making a finding that defendant should not obtain the benefit of release as a committed youthful offender under G.S. 148-49.15, and the cause is remanded for resentencing after a finding of record as to whether defendant should or should not obtain the benefit of release under G.S. 148-49.15. G.S. 148-49.14.

APPEAL by defendant from *Johnson, J.*, 2 April 1979 Criminal Session of AVERY Superior Court.

Defendant was charged in bills of indictment proper in form with the murders of Lester Rupard and Ruth Rupard. Defendant was arraigned on charges of second-degree murder and entered pleas of not guilty to both charges. The cases were consolidated for trial.

The State offered evidence tending to show that on 25 September 1978, four men were working approximately 900 feet from the residence of Lester and Ruth Rupard. At approximately 10:00 a.m. they observed two men running from the front door of the Rupard residence. The man in the rear carried a rifle and appeared to be chasing the man in front. The witnesses observed that when the man in front turned to face his assailant, the assailant fired two shots. Witnesses testified that the man with the rifle appeared to be wearing a robe. A short while later, officers from the Sheriff's Department arrived at the Rupard residence. The dead body of Lester Rupard was found in the yard; Ruth Rupard's body was found in the bedroom.

The officers found the defendant at a nearby house lying on the couch. The officers questioned defendant concerning the shooting, and specifically asked, "Why did you shoot your parents?" Defendant replied that they were too strict, that they were going to make him go back to school, and that he hated school.

Defendant also told the officers that he had thrown a gun into a pond behind the Rupard residence. Upon searching the pond, the officers found a 30-30 rifle and a .22 caliber pistol. Evidence for the State tended to show that Ruth Rupard died as a result of five gunshot wounds inflicted by a .22 caliber pistol, and that Lester Rupard died as a result of a gunshot wound in the back of his head inflicted by a high caliber rifle.

Defendant offered evidence which tended to show that he had been ill for the entire weekend prior to the death of his parents, and that he was also ill on the morning of the shootings. He testified that at around 9:00 that morning he lay down on the sofa in the den and did not remember anything further until later when he was running through the yard with a gun in his hand. Defendant testified that he threw the gun into a pond and ran to a neighbor's house. He told the neighbor that someone was shooting at his parents. Defendant denied any knowledge or memory of the events transpiring at the time of the shootings. One of defendant's witnesses testified that he was approximately 900 feet from the Rupard residence at the time of the shootings, and that he observed two persons running from the house. He testified, however, that the second person was a woman. He fur-

ther testified that the shots appeared to come from a trailer at the rear of the Rupard residence.

The jury returned verdicts of guilty on both charges of murder in the second degree. Defendant appealed from judgments imposing consecutive life sentences.

Rufus L. Edmisten, Attorney General, by Thomas H. Davis, Assistant Attorney General, for the State.

Hise & Harrison, by Lloyd Hise, Jr., for defendant.

BRANCH, Chief Justice.

[1] Defendant first assigns as error the admission into evidence of certain photographs of the dead bodies of Lester and Ruth Rupard. Defendant contends that the photographs had no probative value and served only to inflame the jury.

If a photograph is relevant and material, and is competent to illustrate the testimony of a witness, it is not rendered inadmissible solely because it is gory or gruesome or otherwise may tend to arouse prejudice. *See generally* 1 Stansbury's North Carolina Evidence, § 34 (Brandis Rev. 1973). If, however, a photograph has no probative value but tends solely to inflame, it must be excluded. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963).

The photographs to which defendant objects were taken at the scene of the crime and at the Office of the Chief Medical Examiner in Chapel Hill, North Carolina. The photographs were introduced during the testimony of Dr. C. Bruce Alexander, Assistant Chief Medical Examiner for the State of North Carolina, and were in fact used by him to explain to the jury the nature of the entry and exit wounds which he found, the bullet fragments he recovered from the bodies, and the cause of death for each victim.

Defendant did not request an instruction limiting the use of the photographs for illustrative purposes; and, therefore, the trial judge's failure to give the instruction was not error. *State v. Cade*, 215 N.C. 393, 2 S.E. 2d 7 (1939).

The photographs were properly authenticated and were relevant for the purpose of showing the cause of decedents' deaths.

We hold that the photographs were properly admitted into evidence for the purpose of illustrating the testimony of Dr. Alexander.

[2] Defendant next assigns as error the following statement, made by the District Attorney during his closing argument:

> I feel like in this case that the State has evidence and has presented evidence that should convince you beyond a reasonable doubt, I like to call it a common sense doubt, beyond a reasonable doubt that the defendant is guilty as charged. The attorneys for the defendant, I would argue were tied to this story that the defendant told—

Defendant objected to the statement, and the trial court sustained the objection. The court then instructed the jury to disregard the District Attorney's last remark. Defendant contends that the statement amounts to an accusation that defendant and his attorneys had conspired to present perjured testimony and to invent a defense. Defendant submits that the statement was highly prejudicial and warrants a new trial.

As a general rule, wide latitude is permitted counsel in their arguments to the jury. *State v. Maynor*, 272 N.C. 524, 158 S.E. 2d 612 (1968); *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955). The control of the arguments must be left largely to the discretion of the trial judge. *Id.* He "hears the argument, knows the atmosphere of the trial and has the duty to keep the argument within proper bounds." *State v. Maynor, supra*, at 526, 158 S.E. 2d at 613. An impropriety must be sufficiently grave to entitle defendant to a new trial. *See State v. Seipel*, 252 N.C. 335, 113 S.E. 2d 432 (1960) (per curiam), and where, upon defendant's objection to an improper remark of the prosecutor, the court instructs the jury not to consider the statement, the impropriety is ordinarily cured. *State v. Best*, 265 N.C. 477, 144 S.E. 2d 416 (1965).

We hold that the prosecutor's remarks were not sufficiently grave or prejudicial to warrant a new trial, and, in any event any impropriety was cured by the trial court's instructions to the jury.

[3] Defendant contends finally that the trial court erred in sentencing defendant to consecutive terms of life imprisonment without making a "no benefit" finding as required by G.S.

148-49.14. That statute in pertinent part provides that "if the court shall find that a person under 21 years of age should not obtain the benefit of release under G.S. 148-49.15, it shall make such 'no benefit' finding on the record." It is uncontradicted here that defendant was seventeen years old. Defendant thus contends that the case must be remanded for resentencing. We agree. The statutory language is clear in its requirement of a "no benefit" finding, and the trial court erred in not making the finding.

We have considered all of defendant's assignments of error, and our careful consideration of the entire record discloses that defendant received a fair trial free from prejudicial error. However, because the court failed to enter a finding of "no benefit" as required by G.S. 148-49.14, the judgment is vacated and the cause is remanded to the Suprerior Court of Avery County for resentencing after a finding of record as to whether defendant should or should not obtain the benefit of release under G.S. 148-49.15.

No error in trial.

Judgment vacated and remanded for resentencing.

STATE OF NORTH CAROLINA v. JOSEPH LEE HAMM

No. 15

(Filed 5 March 1980)

1. Criminal Law §§ 50, 73.2— possible charge against defendant—no opinion on question of law—no hearsay

A State's witness in an armed robbery and murder case was not permitted to express an opinion on a question of law in testifying that he had only been charged with armed robbery but that he knew he could have been charged with murder where the witness was in effect testifying that his testimony was in no way affected by the State's decision not to try him for murder, and the purpose of the testimony was to establish the credibility of the witness. Furthermore, the fact that the witness's knowledge of the potential murder charge may have been based on the out-of-court declarations of law officers did not render his testimony inadmissible since he was not testifying as to the truth of these declarations but was testifying as to his awareness that he could have been charged with murder, and this constituted a permissible non-hearsay use of out-of-court declarations.

2. Criminal Law § 132— motion to set aside verdict—discretion of court

Motions to set aside the verdict and for a new trial based upon insufficiency of the evidence are addressed to the discretion of the trial court, and refusal to grant them is not reviewable on appeal in the absence of abuse of discretion.

3. Criminal Law § 106.5— accomplice testimony—sufficiency for conviction

The unsupported testimony of an accomplice is sufficient to convict if it satisfies the jury beyond a reasonable doubt of the guilt of the accused.

4. Homicide § 21.7; Robbery § 4.3— second degree murder—armed robbery—sufficiency of evidence

Testimony by an accomplice and circumstantial evidence which coincided with and corroborated the accomplice's testimony supported jury verdicts finding defendant guilty of second degree murder and armed robbery.

DEFENDANT appeals from judgments of *Fountain, J.*, 24 September 1979 Session, CARTERET Superior Court.

Defendant was tried on separate bills of indictment charging: (1) first degree murder and (2) armed robbery of Eleanor B. Arthur on 12 July 1979. In the murder case, the State placed defendant on trial for second degree murder only.

The State offered the testimony of Leo Sutton tending to show that on the evening of 12 July 1979 the witness Sutton, defendant and Ronald Bryant were together at Sutton's house. Defendant suggested they could make some quick money by robbing some stores. Defendant said he could get a gun from his "granddaddy" so the three drove to the home of Fred Simmons, where defendant entered the house from the rear, opened the front door and admitted the other two. They found a shotgun and decided to reduce the size of the gun so it would look like a pistol. The three men then went to Sutton's house where they obtained a hacksaw. They went to a baseball park in Bogue, North Carolina, where they sawed off a portion of the barrel and a portion of the stock and threw those parts of the gun into the woods. They went to a night spot and later returned to Sutton's house to change tires on Sutton's car. Ronald Bryant and defendant left and defendant later returned alone. He told Sutton that he knew a Mrs. Arthur who had money and that all Sutton had to do "was to take him up there and drop him off." Sutton then drove defendant to the vicinity of Mrs. Arthur's home and store. Defendant got out of the car and instructed Sutton to drive about one-half

mile down the road, turn into a dirt road and wait. Sutton drove to the agreed upon destination and defendant headed toward Arthur's store, taking the loaded gun with him.

Sutton further testified that defendant was gone about fifteen or twenty minutes and then came running down the road. When he got to the car, he said "go, go, because I blowed her heart out." They jumped in the car and left. Defendant said he had strangled her and then shot her.

They drove to a baseball field where Sutton threw the gun into the woods. While riding along, defendant displayed the money he had taken. It was in a blue or green money bag with a zipper on it. The next day defendant took two hundred to two hundred fifty dollars out of the bag and gave it to Sutton. Later that day they went to Havelock and bought a motorcycle for seven hundred dollars, paying for it with Mrs. Arthur's money.

The motorcycle dealer verified the sale of the motorcycle at trial but said the purchase price was six hundred fifty dollars.

Further evidence tended to show that on the morning of 13 July 1979, S.B.I. Agent Deans went to Mrs. Arthur's home and found her dead body in her bedroom clad only in a three-quarters length gown. She had been shot in the chest. There was a wound two inches in diameter in the victim's chest and damage to the heart was clearly visible. The County Medical Examiner also found evidence that blood had been running from the victim's nose.

The discarded portions of the shotgun were found in the woods near the baseball field to which Sutton guided the officers. The hacksaw was delivered by Sutton to the officers.

Fred Simmons testified he was married to a woman who raised defendant and that defendant called him "Fred", not granddaddy. Simmons stated his house had been entered some time in July and that a shotgun had been taken along with some shells.

The jury convicted defendant of second degree murder and armed robbery and he was given a life sentence in each case, to run consecutively. He appealed to the Supreme Court, assigning errors discussed in the opinion.

Rufus L. Edmisten, Attorney General, by Ben G. Irons II, Assistant Attorney General, for the State.

Glenn B. Bailey, Attorney for Defendant-Appellant.

HUSKINS, Justice.

[1] Leo Sutton testified that he was under arrest for armed robbery and had not been charged with murder. Over objection, he was permitted to say that he knew he could have been charged with murder. Defendant contends that Sutton, who was not learned in the law, was erroneously permitted to express an opinion as to what crimes he might be charged with as a result of his participation in the robbery and murder of Mrs. Arthur. This contention is without merit. When the record is read contextually, it is clear that Leo Sutton was not being asked to give an opinion. Rather, he was being asked whether he had been informed by the authorities that he could have been charged with other crimes. This is clear from the testimony immediately following Sutton's assertion that he knew he could have been charged with murder: "No one promised me anything to testify, and no one has told me what to say and no one has threatened me." In effect, Sutton was testifying that his testimony was in no way affected by the State's decision not to charge him with murder. Thus, the purpose of the testimony in question was to establish the credibility of the witness, not to elicit an opinion on a question of law.

The fact that Sutton's knowledge of the potential murder charges may have been based on the out-of-court declarations of law enforcement officials does not render his testimony inadmissible. Sutton was not testifying as to the truth of these declarations; rather, he was testifying as to his awareness that he could have been charged with murder. This constitutes a permissible non-hearsay use of out-of-court declarations. *State v. Holmes*, 296 N.C. 47, 249 S.E. 2d 380 (1978). *Accord*, 1 Stansbury, N. C. Evidence, § 149 at pp. 469-70 (Brandis Rev. 1973). In any event, review of the record indicates that defendant's objection to the testimony in question was not timely made. The objection was not made until the question was put and the answer given. Only then did defendant object and move to strike the answer. This came too late. Accordingly, defendant has waived his right to assign as error the admission of the testimony in question. See, 1 Stans-

bury, supra, § 27 at p. 69 and cases cited therein. Defendant's first assignment of error is overruled.

Defendant assigns as error the denial of his motions to set aside the verdict and for a new trial based upon insufficiency of the evidence.

[2] Motions to set aside the verdict and for a new trial based upon insufficiency of the evidence are addressed to the discretion of the trial court and refusal to grant them is not reviewable on appeal in the absence of abuse of discretion. *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335, *cert. dismissed*, 423 U.S. 918 (1975); *State v. Lindley*, 286 N.C. 255, 210 S.E. 2d 207 (1974). Review of the record indicates there was substantial evidence to take the case to the jury on second degree murder. Hence, no abuse of discretion has been shown.

[3, 4] It was stipulated that the cause of Eleanor B. Arthur's death was a shotgun wound to her chest. There was plenary, competent evidence that defendant inflicted that wound. Thus, the evidence is abundantly sufficient to repel a motion for nonsuit and to carry the case to the jury and to support the verdicts rendered. Defendant challenges the testimony of his accomplice Leo Sutton, but the law in this jurisdiction is settled that the unsupported testimony of an accomplice is sufficient to convict if it satisfies the jury beyond a reasonable doubt of the guilt of the accused. *State v. Partlow*, 272 N.C. 60, 157 S.E. 2d 688 (1967); *State v. Terrell*, 256 N.C. 232, 123 S.E. 2d 469 (1962); *State v. Saunders*, 245 N.C. 338, 95 S.E. 2d 876 (1957). Moreover, the testimony of Sutton is not entirely unsupported. To the contrary, there is much circumstantial evidence which coincides with, dovetails, and corroborates Sutton's testimony.

The evidence of defendant's guilt of murder in the first degree is strong and convincing. He is the beneficiary of an election by the State to try him only for murder in the second degree. No prejudicial error has been shown in his trial. Hence, the verdict and judgments pronounced will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. SAMMIE LEE CAMP

No. 83

(Filed 5 March 1980)

Criminal Law § 143.1 — probation — revocation hearing — timeliness — defendant not chargeable with delay

Where defendant was convicted of bastardy and placed on probation for five years commencing 1 November 1973, the trial judge was without authority to conduct a probation revocation hearing and activate the suspended sentence on 7 December 1978 after the period of probation and suspension had expired, since failure of the court to enter a revocation judgment within the five year period prescribed by the original judgment was not chargeable to the conduct of defendant who never absconded, never concealed himself to delay or avoid a revocation hearing, and was never charged with the commission of another crime during the probationary period which might toll the running of the probationary period. G.S. 15A-1344(f).

DEFENDANT appeals from judgment of *Friday, J.*, 4 December 1978 Session, GASTON Superior Court. This case was argued as Case No. 53 at the Fall Term 1979.

In a warrant dated 23 July 1973, defendant was charged with willfully failing to provide adequate support for his minor illegitimate child, Timothy Hames, born to Mary Louise Hames on 12 July 1973.

Defendant was convicted in the District Court and appealed to the Superior Court for a trial de novo. At the trial in Superior Court before Judge Friday and a jury at the 29 October 1973 Session of Gaston Superior Court, Mary Louise Hames was the only witness for the State. She testified that she was the mother of Timothy Hames, who was born on 12 July 1973; that she became pregnant in October 1972, and during that month she had sexual intercourse with defendant two or three times a week and did not have intercourse with any other man; that after the child was born, she asked defendant to support it, and he refused to do so, denying that he was the child's father.

Dr. Eugene Dell Rutland, Jr., a physician, was the only witness for defendant. He testified that he had tested the blood of Mary Louise Hames, Timothy Hames, and defendant; that the blood test revealed that both Miss Hames and defendant were of blood group O while the child was of blood group A; that under

the laws of heredity two parents of group O cannot have a child of group A.

The jury found defendant guilty and he was sentenced to six months imprisonment suspended for five years on probation on condition that he pay $15 per week for support of the child plus court costs and certain expenses. Defendant appealed and the Court of Appeals ordered a new trial. In a scholarly opinion by Judge Baley, with Judge Parker and Chief Judge Brock concurring, the Court of Appeals held that the trial court should have taken judicial notice of the principles of heredity upon which blood tests and paternity are based and should have instructed the jury that two parents of blood group O cannot have a child of blood group A. See *State v. Camp*, 22 N.C. App. 109, 205 S.E. 2d 800 (1974).

We allowed the State's petition for discretionary review and reversed in a split decision, the majority holding that under G.S. 49-7 and G.S. 8-50.1 the blood tests are not conclusive on the issue of paternity but simply constitute evidence to be considered by the jury with other evidence in the case. See *State v. Camp*, 286 N.C. 148, 209 S.E. 2d 754 (1974).

Defendant apparently made only two payments of $15 each and thereafter refused to make any further payments on the ground that he was not the father of the child. After many citations for failure to comply with the judgment, he was brought before Judge Friday, who conducted a revocation of probation hearing on 7 December 1978 and found as a fact that defendant had willfully failed to comply with the judgment. Judge Friday thereupon concluded that defendant had breached a valid condition upon which the prison sentence was suspended and ordered the sentence into effect. Defendant appealed to the Court of Appeals and the Supreme Court, *ex mero motu*, transferred the case to this Court for initial appellate review. Errors assigned will be discussed in the opinion.

Rufus L. Edmisten, Attorney General, by William F. Briley, Assistant Attorney General, for the State.

Jesse B. Caldwell III, Assistant Public Defender, for defendant appellant.

HUSKINS, Justice.

Defendant was convicted of bastardy and placed on probation for five years commencing 1 November 1973. Probation was revoked and the six months suspended sentence placed into effect on 7 December 1978. Defendant contends the five-year period of suspension and probation had expired and Judge Friday therefore had no jurisdiction to revoke the probation and activate the sentence. This constitutes defendant's first assignment of error.

G.S. 15A-1342(a) provides in pertinent part: "The court may place an offender on probation for a maximum of five years."

G.S. 15A-1344(d) (Supp. 1979) provides in pertinent part: "If a defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions in G.S. 15A-1345, . . . may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing; . . . ."

G.S. 15A-1344(f) reads as follows:

> "(f) Revocation after Period of Probation.—The court may revoke probation after the expiration of the period of probation if:
>
> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier."

According to the Official Commentary subsection (f) provides that "probation can be revoked and the probationer made to serve a period of active imprisonment even after the period of probation has expired if a violation occurred during the period *and if the court was unable to bring the petitioner before it in order to revoke at that time*." (Emphasis added.)

The foregoing statutes are a codification of a portion of Section 1 of Chapter 711 of the 1977 Session Laws. Section 39 of that Chapter reads in pertinent part as follows: "This act shall become

effective July 1, 1978 and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, ..." Hence these statutes are applicable to this case. *See*, Editor's Note to G.S. 15A-1341.

When a sentence has been suspended and defendant placed on probation on certain named conditions, the court may, *at any time during the period of probation*, require defendant to appear before it, inquire into alleged violations of the conditions, and, if found to be true, place the suspended sentence into effect. G.S. 15A-1344(d) (Supp. 1979). *Accord, State v. Pelley*, 221 N.C. 487, 20 S.E. 2d 850 (1942); *State v. Shepherd*, 187 N.C. 609, 122 S.E. 467 (1924). But the State may not do so *after the expiration of the period of probation* except as provided in G.S. 15A-1344(f). *Accord, State v. Pelley, supra; State v. Gooding*, 194 N.C. 271, 139 S.E. 436 (1927).

Although the record before us contains only two notices to defendant, one dated 14 September 1976 and the other dated 3 March 1978, to report to the court for a probation revocation hearing based upon his failure to make the payments required by the probation judgment, the record recites that defendant was so notified and actually appeared in Superior Court for a revocation hearing "some 23 times." Yet the hearing was always continued and a revocation hearing was never conducted until Judge Friday finally heard evidence, made findings, revoked defendant's probation and activated the six-months suspended sentence on 7 December 1978. The reason the revocation hearing was continued time after time after time appears from the testimony of the public defender who represented defendant: "No trial court I discussed the matter with expressed any desire to hear the matter. Usually what would happen, the Courts would just say they didn't want to send—just didn't want to hear it, they didn't want to send the man off because they didn't think he was guilty and they just didn't want to hear it. So it would be continued over to the next term."

Defendant's probation officer testifed that defendant had always been cooperative, always appeared in court when notified to do so, "followed everything I have asked him" except make the payments required by the judgment. The probation officer further

testified that defendant always contended he was not the father of the child and, for that reason alone, refused to make the payments.

Applying the provisions of G.S. 15A-1344(f) to the foregoing recitals, we hold that Judge Friday was without authority to conduct a probation revocation hearing and activate the suspended sentences after the period of probation and suspension had expired. This is true because the failure of the court to enter a revocation judgment within the five-year period prescribed by the original judgment is not chargeable to the conduct of defendant. He never absconded. He never concealed himself to delay or avoid a revocation hearing. He was never charged with the commission of another crime during the probationary period which might toll the running of the probationary period. Compare, G.S. 15A-1344(d) (Supp. 1979); *State v. Pelley*, supra. Moreover, Judge Friday did not find, as indeed he could not, that the State had "made reasonable effort . . . to conduct the hearing earlier." G.S. 15A-1344(f)(2). Consequently, jurisdiction was lost by the lapse of time and the court had no power to enter a revocation judgment on 7 December 1978. The judgment is therefore void.

The hesitancy of the trial judges to conduct a timely hearing and revoke this defendant's probation is quite understandable since, according to Mendel's Law of Hereditary Characteristics, two parents with type O blood cannot produce a child with type A blood. There is no suggestion in this record that the blood tests were not properly administered or that Dr. Rutland failed to report the test results truthfully.

In light of the conclusion we have reached, other assignments of error need not be passed upon.

For the reasons stated, the judgment appealed from is arrested and defendant discharged.

Judgment arrested.

STATE OF NORTH CAROLINA v. PRESTON WILLIAMS AND ANGELA MILLANDER

No. 23

(Filed 5 March 1980)

Searches and Seizures § 40— search under warrant—items not listed—seizure proper

The trial court properly allowed into evidence letters and photographs seized during the search of a mobile home occupied by defendants, though the items were not specifically listed in the warrant as objects of the search, since the letters and photographs were in plain view of an officer who came across them while conducting an authorized and reasonable search for heroin, and the items were subject to removal or destruction if not immediately seized by the officer; furthermore, the letters and photographs inadvertently seen by the officer prior to the heroin's discovery were clearly subject to seizure pursuant to G.S. 15A-253 as providing evidence tending to show the identity of the persons living in or owning the trailer.

ON the State's petition for discretionary review of an opinion of the Court of Appeals, reported at 42 N.C. App. 662, 257 S.E. 2d 457 (1979), reversing judgments entered by *Stevens, J.* on 16 November 1978 at the 16 November Session Superior Court, ONSLOW County.

Both defendants were charged with felonious possession of heroin, a controlled substance included in Schedule I of the Controlled Substances Act, in violation of G.S. 90-95(a)(1). On pleas of not guilty both defendants were tried by a jury and found guilty of the offense charged. Defendant Millander received a sentence of imprisonment from 2 to 5 years with a recommendation for work release while defendant Williams was sentenced to imprisonment for a period of 3 to 5 years.

At trial the State's evidence tended to show the following: On August 16, 1978 at approximately 11:30 p.m., Deputy Sheriffs Henderson, Parvin, Pridgeon and Cooper of the Onslow County Sheriff's Department conducted a search pursuant to a validly issued search warrant of a mobile home located at 212-K Maplehurst Road. The search warrant was an "occupant warrant" listing the premises to be searched, and that the item to be seized was heroin. Five people were present at the mobile home when the deputies entered to search for the heroin. They were Mr. Williams, Ms. Millander, another unnamed black woman, and a

small baby. Deputy Sheriff Cooper read the search warrant, and then read Mr. Williams his constitutional rights. Detectives Henderson and Parvin then conducted a search of the trailer's master bedroom and bath. While searching in the master bathroom, Detective Henderson discovered a container located in the cabinet under the sink containing a substance later identified as heroin. Upon discovery of the heroin, Deputy Henderson advised Deputy Parvin that they needed evidence tending to show the identity of the persons living in or owning the trailer. Deputy Parvin told him that while he had been searching for the heroin in the master bedroom, that he had seen some letters and photographs in the top right hand drawer of the dresser. After the heroin was discovered Deputy Parvin went back to the dresser and confiscated these previously seen photographs and letters as tending to identify the persons who owned or lived in the trailer.

On the night of 16 August 1978, Deputy Cooper placed defendant Williams under arrest for he was in possession of narcotic "buy money" which the officers were also looking for. [Defendant Williams does not question the legality of his arrest on this appeal.] Defendant Millander was not arrested until 18 September 1978, when the report from the police laboratory confirmed that the substance confiscated from the trailer was heroin. None of the other parties present at the trailer was arrested.

In a pre-trial motion, defendants moved to exclude the letters and photographs from evidence as having been illegally seized in violation of the Fourth and Fourteenth Amendments to the United States Constitution, and in substantial violation of Chapter 15A of the North Carolina General Statutes. Judge Stevens denied the motions ruling that the objects were proper subjects of seizure under the search warrant, and therefore admissible. The Court of Appeals reversed this ruling in *State v. Williams*, 42 N.C. App. 662, 257 S.E. 2d 457 (1979). On 6 November 1979 we granted the State's petition for discretionary review pursuant to G.S. 7A-31.

Attorney General Rufus L. Edmisten by Assistant Attorney General Ralf F. Haskell, for the State.

Billy Sandlin for the defendant, Preston Williams.

Jimmy F. Gaylor for the defendant, Angela Millander.

BROCK, Justice.

The sole question for review by this Court is the admissibility of letters and photographs seized by deputies of the Onslow County Sheriff's Department during a search of the mobile home occupied by the defendants. The deputies searched the mobile home pursuant to a validly issued "occupant warrant" which specified heroin as the object of the search. From the trailer's bathroom, a substance later determined to be heroin was seized, and after the heroin was discovered, letters and photographs which had been seen earlier were also taken from the adjoining bedroom. For the reasons which follow, we hold that the letters and photographs, though not specifically listed on the warrant as objects of the search, were properly seized and admitted into evidence.

In *Katz v. United States*, 389 U.S. 347, 357, 19 L.Ed. 2d 576, 585, 88 S.Ct. 507, 514 (1967), the United States Supreme Court noted, ". . . searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." We are of the opinion that the seizure of these letters and photographs which were not listed on the face of the warrant and therefore seized without prior judicial approval, was proper as coming within just such a well-delineated exception; that of "plain view." The "plain view" exception was discussed by the United States Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 29 L.Ed. 2d 564, 582, 91 S.Ct. 2022, 2037, *reh. den.*, 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971), where that court noted:

> "It is well established that under *certain circumstances* the police may seize evidence in plain view without a warrant . . . . An example . . . of the 'plain view' doctrine is . . . [where] the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." (Citations omitted.) (Emphasis ours.)

In *Coolidge* the United States Supreme Court also defined the *circumstances* which must be present for an object discovered by officers without a warrant to be admissible under the "plain view"

exception. First, the officers must have prior justification for the intrusion onto the premises being searched (other than observing the object which is later contended to have been in plain view). Secondly, the incriminating evidence must be *inadvertently discovered* by the officers while on the premises. *Id.* at 466, 29 L.Ed. 2d at 583, 91 S.Ct. at 2038. *Accord State v. Richards*, 294 N.C. 474, 489, 242 S.E. 2d 844, 854 (1978); *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976).

In the case *sub judice* the officers were justifiably on the premises by virtue of the search warrant issued by a disinterested judicial authority, authorizing them to search the mobile home for heroin. While searching for heroin in the dresser located in the master bedroom, Deputy Parvin saw the pictures and letters which the defendants seek to exclude from evidence. However, at the time of discovery, Deputy Parvin did not seize the letters. Only after Deputy Henderson discovered the heroin in the attached bathroom, and suggested to Deputy Parvin that they needed evidence of the trailer's ownership, did Deputy Parvin go back to the dresser and confiscate the letters and photographs. Since Deputy Parvin had inadvertently seen the letters and photographs earlier while conducting an authorized and reasonable search for heroin, subsequent warrantless seizure of these letters and photographs is permissible coming within the "plain view" exception. Having seen the letters and photographs in a place where he was clearly authorized to search for heroin, Deputy Parvin was not required thereafter to forget or ignore the fact that he had seen them. The items were certainly subject to removal or destruction by defendants if not immediately seized by the officer. We are not here concerned with a situation where, after discovery of the heroin, the officers commenced an additional search for items of identification.

We also note that pursuant to G.S. 15A-253 the photographs and letters are admissible into evidence. G.S. 15A-253 in defining what items *not named* in a search warrant may be seized, provides as follows: ". . . [i]f in the course of the search the officer inadvertently discovers items not specified in the warrant which are subject to seizure under G.S. 15A-242, he may also take possession of the items so discovered." G.S. 15A-242(4) provides that an item is subject to seizure if it "[c]onstitutes evidence of . . . the identity of a person participating in an offense." After

the officers discovered the heroin, the letters and photographs inadvertently seen by Deputy Parvin prior to the heroin's discovery, are clearly subject to seizure pursuant to G.S. 15A-253 as providing evidence of these defendants' identities.

We therefore conclude that Judge Stevens properly allowed the letters and photographs into evidence. The opinion of the Court of Appeals is reversed, the judgment of the trial court is affirmed, and this cause is remanded to the Court of Appeals for further remand to the Superior Court, Onslow County, for issuance of commitments to place the prison sentences into effect.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ELWOOD SMITH

No. 19

(Filed 5 March 1980)

Criminal Law §§ 124.1, 126.2— insufficient written verdict—acceptance of verdict after inquiry and polling of jury

Although written issues submitted to the jury as to whether defendant was "guilty or not guilty" of assault with a deadly weapon with intent to kill and first degree murder were answered "yes" by the jury rather than "guilty," the trial court did not err in accepting the jury's verdicts as verdicts of guilty where the court inquired as to whether the jury had found defendant guilty or not guilty of first degree murder and the foreman answered "guilty"; the court asked the jury if that was the verdict of all of the members of the jury and they replied "yes"; the same procedure was followed with respect to the assault charge; the jury was polled and each juror individually answered that his verdict was that defendant was guilty of first degree murder, that his verdict was that defendant was guilty of assault with a deadly weapon with intent to kill, and that he still assented to each of those verdicts; and after the twelfth juror was polled, the entire jury together answered "yes" when asked if they all agreed that it was their verdict that defendant was guilty of first degree murder and when asked if it was their verdict that defendant was guilty of assault with a deadly weapon with intent to kill. G.S. 15A-1237.

ON appeal by defendant from *Friday, J.* at the 21 May 1979 Schedule "D" Criminal Session of MECKLENBURG County Superior Court.

Defendant was charged in indictments, proper in form, with the first degree murder of Gary Lee Stratton and with assault with a deadly weapon with the intent to kill Deborah Lynn Sloan.

The State's evidence tended to show that Terry Charlene Jewett lived with Stratton for approximately two and one-half years and had a child by him in March of 1976. In late 1977, she met, dated and began living with the defendant.

On 29 October 1978 the defendant had a .22 caliber Winchester semi-automatic rifle in Jewett's apartment and he shot at her. On 30 October 1978 Officer D. L. Beveridge of the Charlotte Police Department took this rifle from Jewett's apartment, which defendant stated belonged to him, and turned it over to defendant's wife. Defendant was found not guilty of assault in connection with this incident.

Jewett stopped living with the defendant at the end of October, 1978. On 10 November 1978 she was with Stratton and they had been "back together" for over a week. At approximately 7:30 p.m. on that date, they went to the Fonz Club in Charlotte. Shortly before 10 p.m. they were talking with friends in the parking lot of the club when Jewett heard a sound "like a firecracker." She looked at her right and "saw Elwood Smith there with a long-handled gun." Defendant fired several shots in the direction of Jewett and her friends. Stratton and Sloan were both wounded. Stratton died of a gunshot wound to his left chest. Sloan testified that she was hospitalized for ten days with a gunshot wound to her right top arm and a gunshot wound to her stomach.

Ten shell casings were recovered at the parking lot of the Fonz Club and on 17 November 1978 Jewett gave Officer Hagler of the Charlotte Police Department a shell casing she had found in her apartment when the defendant shot at her on 29 October 1978. Crime laboratory personnel with the Charlotte Police Department tested the shell casings and testified that the markings on all the shell casings were consistent with being fired from the same firearm and consistent with a Winchester semi-automatic rifle. All of the shells were .22 caliber.

Kimberly Kennedy testified that the defendant picked her up at approximately 7:30 p.m. on 10 November 1978. They went to a restaurant and then around 10 p.m. they went to a bar and pool

hall. She left that establishment alone around 10:05 p.m. At that time, defendant was still there and he was shooting a game of pool.

Defendant was found guilty as charged of both offenses. The State submitted no aggravating circumstances and therefore the jury recommended life imprisonment for the first degree murder conviction. Pursuant to G.S. 15A-2002, the trial judge imposed a life sentence for that conviction and defendant has appealed this conviction to this Court. Defendant was sentenced to a term of imprisonment of ten to twenty years upon his conviction for assault with a deadly weapon with intent to kill. Defendant's motion to bypass the Court of Appeals on his appeal from this conviction was allowed by this Court on 26 November 1979.

Keith M. Stroud for the defendant.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Thomas F. Moffitt for the State.

COPELAND, Justice.

Defendant presents one assignment of error. He contends that the trial judge erred in accepting the jury's written verdict because it was improper in form. On the written verdict form, which is required by G.S. 15A-1237, the relevant issues which were submitted are:

> "Is the defendant, Elwood Smith, guilty or not guilty of assault with a deadly weapon with intent to kill, thereby inflicting serious bodily injury?"
>
> "Is the defendant, Elwood Smith, guilty or not guilty of the unlawful killing of Gary Stratton with malice and with premeditation and deliberation; i.e., first degree murder?"

The jury answered these two issues "yes" rather than "guilty." Defendant argues that he is unable to determine whether the jury found him guilty of the two offenses for which he has been convicted and sentenced.

We hold that the trial judge did not err in accepting the jury's verdicts. The requirement under our case law is that if the verdict substantially answers the issue(s) so as to permit the trial judge to pass judgment in accordance with the manifest intention

of the jury, then the verdict should be received and recorded. *State v. Hampton*, 294 N.C. 242, 239 S.E. 2d 835 (1978). The manifest intention of the jury is absolutely and unequivocally clear in this case from the written verdict form and from the further recorded proceedings had during and after the return of the verdicts. The statutory requirement of a written jury verdict was intended to cure defects that would occur in the verdict if the jury foreman inadvertently omitted some essential element of a verdict in stating it orally. Official Commentary, G.S. 15A-1237. That statute does not bar inquiry from the court or a polling of the jury to insure that the written verdict is sufficiently clear and free from doubt. Indeed, G.S. 15A-1237(a) requires that the verdict be returned in open court and G.S. 15A-1238 requires that the jury be polled if a motion for polling is made by any party after the return of the verdict.

When the jury returned to the courtroom with its verdicts, the court inquired as to whether it had found the defendant guilty or not guilty of first degree murder and the foreman answered "guilty." The trial judge asked the jury if that was the verdict of all of the members of the jury and they replied "yes." The procedure was the same with respect to the assault charge. Furthermore, the defendant moved to have the jury polled. Each juror individually answered "yes" when asked by the Clerk of Court if it was his verdict that defendant was guilty of first degree murder, "yes" when asked if that was still his verdict, "yes" when asked if it was his verdict that defendant was guilty of assault with a deadly weapon with the intent to kill, and "yes" when asked if that was still his verdict. After the twelfth juror was polled, the entire jury stood and together answered "yes" when asked if they all agreed that it was their verdict that defendant was guilty of first degree murder and together they answered "yes" when asked if it was their verdict that defendant was guilty of assault with a deadly weapon with intent to kill.

Whatever uncertainty there may have been in the written verdicts of the jury, it was surely removed upon the trial judge's receipt of the verdicts from the jury foreman and upon the polling of the jury by the Clerk of Court. No doubtful or insufficient verdicts were received in this case. *See, Davis v. Smith*, 273 N.C. 533, 160 S.E. 2d 697 (1968). The trial judge properly received the

verdicts, entered the judgments and sentenced defendant in accordance with those verdicts.

Due to the seriousness of the charges and the severity of the sentences imposed, we have examined the entire record and we find that the defendant has received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. SAMUEL AUSTIN, ALIAS SAMUEL BROWN

No. 27

(Filed 5 March 1980)

1. **Criminal Law § 90— defense witness not declared hostile—no error**

The trial court did not err in failing to grant defendant's motion to declare his witness a hostile witness where defendant was not misled, surprised or entrapped to his prejudice by the witness's testimony, and he knew before he was given the opportunity to present evidence what the witness would testify to.

2. **Criminal Law § 160— correction of record**

There was no merit to defendant's contention that the trial court, in instructing on the elements of first degree burglary, erroneously stated that defendant entered the victim's home "without" the intent to commit a felony therein, since the record had been corrected, upon proper affidavit, to read "with" instead of "without" and thus properly reflected what the trial judge actually said.

APPEAL by defendant from *Kivett, J.*, 29 May 1979 Session of ROWAN Superior Court.

Upon a plea of not guilty, defendant was tried on a bill of indictment, proper in form, charging him with the first-degree burglary of the dwelling house of Priscilla Oglesby between the hours of 1:00 a.m. and 2:00 a.m. on 29 October 1978. The jury returned a verdict finding defendant guilty of first-degree burglary, and defendant appeals from judgment imposing a life sentence.

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

Robert F. McLaughlin for defendant-appellant.

BRITT, Justice.

This opinion does not set forth the usual summary of evidence presented at trial for the reason that the record on appeal does not contain the evidence presented.

[1] Defendant states the first of his two assignments of error thusly: ". . . the trial court erred in failing to grant the defendant's motion to declare Angela Oglesby a hostile witness, prohibiting the defendant from impeaching her testimony, and thus the state's other witnesses, by showing prior inconsistent statements." The assignment has no merit.

While the record does not clearly disclose what defendant was attempting to show with respect to Angela Oglesby's testimony, we glean the following: Angela is the eight-year-old daughter of Priscilla Oglesby whose home defendant was charged with burglarizing. Priscilla and other occupants of the home, except Angela, testified as witnesses for the state relative to occurrences on the night in question. Defendant had information to the effect that previous to the trial Angela had made statements to several persons which were at variance with testimony given by her mother and other members of the family. After the state had rested its case, defendant moved that he be allowed to present Angela as a hostile witness, cross-examine her and present other witnesses to contradict her.

In passing on defendant's motion in the absence of the jury, the court permitted defendant to examine Angela. She gave testimony which apparently was similar to that given by her mother and other state's witnesses. She denied that she had told anyone that "there was no one in my house that night". The court denied defendant's motion to declare Angela a hostile witness.

Defendant recognizes that prior to the enactment of the Rules of Civil Procedure, G.S. 1A-1 et seq., effective 1 January 1970, the general rule was that a party could not impeach his own witness. He argues that the rule was changed in civil cases by

G.S. 1A-1, Rule 43(b), and that the change should also apply to criminal cases.

In several cases decided since the effective date of the Rules of Civil Procedure, this court has refused to change the rule in criminal cases. In *State v. Anderson*, 283 N.C. 218, 224, 195 S.E. 2d 561 (1973), Justice (later Chief Justice) Sharp, speaking for the court, said:

> Until changed by statute applicable to civil cases (G.S. 1A-1, Rule 43(b) (1969)), it was established law in this State that a party could not impeach his own witness in either a civil or a criminal case. 1 Stansbury, *North Carolina Evidence* § 40 (Brandis rev. 1973). *See also* McCormick, *Evidence* § 38 (Cleary Ed., 2d ed. 1972); 3A Wigmore, *Evidence* §§ 896-905 (Chadbourn rev. 1970). This rule, unchanged as to criminal cases, still precludes the solicitor from discrediting a State's witness by evidence that his general character is bad or that the witness had made prior statements inconsistent with or contradictory of his testimony. . . .

In *State v. Pope*, 287 N.C. 505, 510, 215 S.E. 2d 139 (1975), Chief Justice Sharp, speaking for the court, said:

> It remains the general rule in this jurisdiction that the solicitor (or district attorney) may not impeach a State's witness by evidence that the character of the witness is bad or that he has made prior statements inconsistent with or contradictory of his testimony. *State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973); *State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954); *see* 1 Stansbury's North Carolina Evidence (Brandis Rev., 1973) § 40.

See also State v. Peplinski, 290 N.C. 236, 225 S.E. 2d 568, *cert. denied*, 429 U.S. 932 (1976).

While the cited cases pertained to efforts by the district attorney to impeach state's witnesses, we see no reason why efforts by a defendant to impeach his witnesses should be treated differently.

Also in *State v. Pope, supra*, Chief Justice Sharp discussed the recognized exception or corollary to the anti-impeachment rule which allows impeachment "where the party calling the

witness has been misled and surprised or entrapped to his prejudice", citing substantial authority. The Chief Justice went on to say that even then the motion to be allowed to impeach one's own witness by proof of his prior inconsistent statements is addressed to the sound discretion of the trial court. *State v. Pope*, 287 N.C. at 512-513, 215 S.E. 2d at 145.

Clearly defendant's complaint here would not come under the quoted exception or corollary as he was not misled and surprised or entrapped to his prejudice by Angela's testimony. Defendant obviously knew before he was given the opportunity to present evidence what Angela would testify to and, as shown above, the court permitted him to examine the witness in the absence of the jury before making a decision as to whether he would present her.

[2] In his other assignment of error, defendant contends the trial court erred in giving the following instruction to the jury:

> "The defendant has been accused of burglary in the first degree, which is the breaking and entering of the occupied dwelling of another without his or her consent in the nighttime. In this case, *without* the intent to commit the felony of larceny within the particular dwelling house, that of Priscilla Oglesby." (Emphasis added.)

On 21 December 1979 the Attorney General filed a motion in this court asking that the record be corrected to substitute the word "with" for the word "without" in that portion of the jury charge set out above. The motion was accompanied by an affidavit from the court reporter stating that the word "without" was inadvertently used in transcribing the jury charge and that the word "with" was actually used by the trial court. The reporter's affidavit was accompanied by a reproduced copy of her stenotype notes.

We allowed the Attorney General's motion on 8 January 1980, consequently, there is no merit in the assignment.

In defendant's trial and the judgment entered, we find

No error.

NORTH CAROLINA NATIONAL BANK v. R. D. MORGAN, JR., AND WIFE, ELIZABETH M. MORGAN

No. 34.

(Filed 5 March 1980)

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

ON defendants' petition for further review of a decision of the Court of Appeals, opinion by *Judge Arnold* with *Judges Hedrick* and *Vaughn* concurring, reported at 43 N.C. App. 63, 257 S.E. 2d 674 (1979). That court affirmed a judgment for plaintiff entered by *Judge Braswell* on 30 May 1978 in CUMBERLAND Superior Court.

This is an action for the recovery of $23,039.42 against the guarantors of a promissory note in favor of plaintiff. The answer admitted the execution of the note and defendants' guarantee of its payment. Defendants alleged in defense that the proceeds of the note were used to purchase certain heavy logging equipment, to wit, a 1974 Franklin Skidder and a 1974 Hy-Hoe Loader. The promissor on the note, Manchester Woodyard, Inc. (Manchester) obtained this equipment at a foreclosure sale instituted by plaintiff. Prior to foreclosure the equipment was titled in the name of one Edward Reddick. Fire insurance to cover the equipment while it was titled in the name of Reddick was obtained by defendant R. D. Morgan. Before Manchester, in which defendants were apparently principals, purchased the equipment at foreclosure, defendant R. D. Morgan discussed the question of fire insurance with one Ernest Cook, an agent of the plaintiff with whom defendants had for some years dealt. Cook told defendant Morgan that no changes in the fire insurance then covering the equipment would be needed to protect Manchester if Manchester bought the equipment at foreclosure. Cook as a representative of the plaintiff occupied a fiduciary relationship with Morgan as a result of numerous earlier financial dealings between them.

Defendants further alleged that after the foreclosure at which Manchester took title and possession of the equipment, the equipment burned. The insurer in the policy in effect prior to the foreclosure denied coverage of the loss which thereafter occurred. Plaintiff, through its agent Cook, negligently represented to defendants what effect the change in ownership of the equipment as a result of the foreclosure sale would have on the fire insurance coverage. Therefore plaintiff should be estopped from recovering against defendants as guarantors on the note.

At trial plaintiff relied on the documentary evidence and defendants' admissions in their pleading. Defendants relied on the testimony of R. D. Morgan, Jr., and Ernest Cook. Morgan testified that he had had numerous financial transactions with Cook who was an officer of the plaintiff. He described a conversation with Cook during the spring of 1975 to the effect that Reddick was not making payments on the equipment and was abusing it. He and Cook determined that the bank would foreclose and that Manchester would purchase at foreclosure. Cook explained the foreclosure procedures and what Manchester should do to become a purchaser at foreclosure. With regard to insurance coverage Morgan testified only that he told Mr. Cook, "I wanted coverage from all aspects" and that only the bank had a copy of the insurance policy covering the equipment. Cook testified as follows:

"Q. Did you have a—prior to the foreclosure on May 30, 1975, did you have a conversation with Mr. Morgan as to changing title of the equipment if he became a high bidder?

A. Yes.

Q. Did you have an occasion to have a conversation with him concerning the insurance?

A. I assume I did. That would have been one of the things that we would have taken up at that time.

Q. Did you advise him that the insurance policy that you presently had in your possession was good and would not need to be changed?

A. No, I did not. I gave him my opinion that it was good.

Q. Now, will you please describe what you meant by 'good'?

A. That he would be covered, that Manchester Woodyard would be covered under the policy.

Q. Now, when you say 'would be covered' you mean would be covered after the foreclosure?

A. Right."

Cook, however, said that Morgan "did not advise me that he did not have a copy of the insurance policy."

Judge Braswell, sitting without a jury, found, in part,

"no fiduciary relationship existed between plaintiff and defendants . . . no evidence was presented of any duty owed by plaintiff to defendants that was breached, nor any evidence or representations from plaintiff to defendants concerning the subject matter of this action or relating thereto."

Judge Braswell entered judgment for plaintiff. The Court of Appeals, concluding that the conversations between Morgan and Cook provided no defense to plaintiff's action against the guarantors of the note, affirmed.

Smith, Moore, Smith, Schell & Hunter by Benjamin F. Davis, Jr., attorneys for plaintiff-appellee.

Russ, Worth & Cheatwood by Walker Y. Worth, Jr., attorneys for defendants.

PER CURIAM.

Justice Copeland, having recused himself, 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 affirming the judgment of the trial court. 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. *See State v. Insurance Co.*, 298 N.C. 270, 258 S.E. 2d 343 (1979) and cases therein cited.

Affirmed.

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

BILLINGS v. TRUCKING CORP.

No. 187 PC.

Case below: 44 N.C. App. 180.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 March 1980.

COMR. OF INSURANCE v. RATE BUREAU

No. 74.

Case below: 44 N.C. App. 191.

Motion of defendants to dismiss appeal of plaintiff for failure to perfect denied 5 March 1980.

FEIBUS & CO., INC. v. CONSTRUCTION CO.

No. 188 PC.

No. 110 (Spring Term).

Case below: 44 N.C. App. 133.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 5 March 1980.

HALL v. RAILROAD CO.

No. 16 PC.

Case below: 44 N.C. App. 295.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 March 1980.

HOTEL CORP. v. FOREMAN'S, INC. and
HOTEL CORP. v. FOREMAN

No. 183 PC.

Case below: 44 N.C. App. 126.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1980.

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

IN RE ANNEXATION ORDINANCE

No. 3 PC.

No. 111 (Spring Term).

Case below: 44 N.C. App. 274.

Petition by citizens and residents of Stanly County for discretionary review under G.S. 7A-31 allowed 5 March 1980.

IN RE DAIRY FARMS

No. 43.

Case below: 43 N.C. App. 459.

Motion of Milk Commission for reconsideration allowed 5 March 1980. Order of Supreme Court dated 5 February 1980 (299 N.C. 330) allowing motion of Dairy Farms to dismiss appeal for lack of substantial constitutional question vacated and set aside 5 March 1980.

IN RE GARRISON

No. 190 PC.

Case below: 44 N.C. App. 158.

Petition for discretionary review under G.S. 7A-31 denied 5 March 1980. Appeal dismissed 5 March 1980.

PHILLIPS v. WOXMAN

No. 162 PC.

Case below: 43 N.C. App. 739.

Petition by defendants Banks for discretionary review under G.S. 7A-31 denied 5 March 1980.

ROBERTSON v. CONSTRUCTION CO.

No. 6 PC.

Case below: 44 N.C. App. 335.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 March 1980.

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

SIDES v. SIDES

No. 192 PC.

Case below: 44 N.C. App. 379.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 March 1980.

STATE v. GRAY

No. 5 PC.

Case below: 44 N.C. App. 318.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1980.

STATE v. McKOY

No. 32 PC.

Case below: 44 N.C. App. 516.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 March 1980.

STATE v. TRUZY

No. 160 PC.

Case below: 44 N.C. App. 53.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1980.

WOODARD v. INSURANCE CO.

No. 13 PC.

Case below: 44 N.C. App. 282.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 March 1980.

STATE OF NORTH CAROLINA v. THOMAS BRADY

No. 31

(Filed 1 April 1980)

1. **Constitutional Law § 50— speedy trial—compliance with statute**

The State complied with the provisions of G.S. 15A-701(a1) where defendant's trial began within 120 days from the date defendant was indicted.

2. **Constitutional Law § 50— speedy trial—prejudice—pregnancy of prosecutrix**

A defendant charged with rape, kidnapping and burglary was not prejudiced by the delay between his arrest and trial because the married prosecutrix was five months pregnant at the time of the trial where the court found that her pregnancy was not noticeable, and the State agreed not to mention her pregnancy during the trial.

3. **Jury § 7.6— challenge of juror after impanelment**

The trial court had the discretion to permit further examination and challenge of a juror by the State after the jury was impaneled when the juror indicated that he was employed by and worked closely with defendant's brother.

4. **Criminal Law § 66.9— in-court identification—discrepancies in descriptions—photographic identification**

A rape victim's in-court identification of defendant was not rendered inadmissible by discrepancies between her identification testimony at trial and the description of defendant previously given to investigating officers or by a pretrial photographic identification where there was nothing in the record to indicate that the collection of photographs or the manner in which they were exhibited to the prosecutrix was "impermissibly suggestive" or unduly influenced her selection of defendant's photograph; the evidence on *voir dire* showed that the prosecutrix had ample opportunity to observe defendant at the time of the rape and on two subsequent occasions when she saw him at a restaurant and at a furniture store and indicated little likelihood of mistaken identification; and the trial court concluded that the in-court identification was completely independent of the photographic identification and was not influenced in any way by the actions of the State or its officers.

5. **Criminal Law § 66.18— challenge to in-court identification—necessity for objection**

A defendant cannot challenge an in-court identification without at least a timely general objection.

6. **Criminal Law §§ 43, 66.8— photographs—authentication—admission to illustrate identification testimony**

Two photographs were sufficiently authenticated and were properly admitted to illustrate a rape victim's identification testimony where the evidence showed the photographs were taken in a detective's office upon defendant's arrest, and the victim stated that the first photograph was a fair and accurate

representation of her assailant and identified the tattoo of a skeleton shown on the second photograph as a fair and accurate representation of the one she saw on her assailant.

7. Rape § 5— submission procured by use of deadly weapon—sufficiency of evidence

The State's evidence was sufficient for the jury to find that a rape victim's submission was procured by the use of a deadly weapon and that defendant was thus guilty of first degree rape where it tended to show that defendant had a hunting knife with him when he was in the victim's bedroom and when he actually raped her there, and that defendant told the victim he would not hurt her if she would do what he wanted to do.

8. Criminal Law § 50; Rape § 4— opinion that there was insufficient evidence for warrant—testimony on question of law

The trial court in a rape case properly struck an officer's testimony that he told the prosecutrix on a certain date that in his opinion there was insufficient evidence to proceed with a warrant at that time, since the officer was expressing an opinion on a question of law.

9. Criminal Law § 99.7— warning to witness—no prejudicial expression of opinion

The trial court's warning to an officer who testified for defendant, "Mr. Buheller, you are not excused from this Court. I'm sorry, but that is a clear violation of the Court's order. It has nothing to do—it doesn't express any opinion concerning his testimony. . . . I will remind him of the order of the Court," did not constitute a prejudicial comment on the witness's credibility in light of the circumstances and the court's own corrective statements both at the time and later in the charge to the jury.

10. Burglary and Unlawful Breakings § 6— first degree burglary—omission of occupancy requirement in one portion of the charge

In a prosecution for first degree burglary, defendant was not prejudiced when the trial judge in one portion of the charge inadvertently omitted the requirement that the house be occupied at the time of the breaking and entering where, immediately before and after the portion complained of, he included this element in both his initial definition of the crime and in his final charge.

11. Kidnapping § 1.3— instructions on statutory mitigating circumstances—error favorable to defendant

The trial court in a kidnapping prosecution erred in including in the charge the mitigating circumstances relating to punishment as set forth in G.S. 14-39(b), since those factors do not constitute an essential element of the offense of kidnapping and it is for the trial judge to determine their existence or nonexistence from the evidence presented at trial, at a sentencing hearing pursuant to G.S. 15A-1334 or at both proceedings; however, since the inclusion of such factors in the charge obviously placed an added burden upon the State, the error was favorable to defendant.

12. Burglary and Unlawful Breakings § 8; Criminal Law § 26.5; Rape § 7— separate sentences for first degree burglary and rape

The imposition of separate life sentences on defendant for the crimes of first degree burglary and rape did not constitute multiple punishments for the same offense in violation of the double jeopardy clause since the State was not

required to prove the charge of rape in order to convict defendant of burglary but was only required to prove that the purpose of the breaking and entering was to commit the designated crime of rape, and defendant committed two separate and distinct crimes when he proceeded to rape the victim after committing the burglary.

APPEAL by defendant from *Hairston, J.*, at 14 May 1979 Session of RANDOLPH Superior Court.

Defendant was charged in separate bills of indictment with the first-degree rape of Deborah Trogdon on 23 August 1978, first-degree burglary and the first-degree rape and kidnapping of Deborah Trogdon on 23 November 1978. Defendant entered a plea of not guilty to each charge, and the cases were consolidated for trial.

The State's evidence tended to show that late in the afternoon on 23 August 1978, Deborah Trogdon, the prosecuting witness, was driving to her mother-in-law's home to pick up her small son. Suddenly, a dark blue, four-door automobile pulled out in front of her, forcing her to stop. Two men stepped out of the car. The man whom Mrs. Trogdon later identified as defendant walked over to her open car window and at knife point forced her out of the car. The other man pulled her jacket over her head, and she was led to the other car and placed in the back seat.

A third man started the motor. By this time her jacket was partially off her head, and she could see defendant again. She screamed and attempted to resist defendant, and the second man climbed into the back seat and held her wrists. Defendant was holding a knife. He then removed Mrs. Trogdon's pants and penetrated her vagina with his penis. She was returned to her car and was told to sit there and not to move. She was found near her car by James Paul Trogdon, her husband's uncle, who took her to Randolph Hospital in Asheboro. There, she refused a pelvic examination because she did not wish to remove her clothes in a room with four men. She reported the rape on that day and described her assailant to Detective John Buheller of the Randolph County Sheriff's Department.

On 1 September 1978, Mrs. Trogdon was eating at a restaurant in Asheboro when she saw defendant enter the restaurant. She recognized him as the man who had assaulted her

a week earlier and reported this to the Sheriff's Department. However, she was told that she would have to press charges because the Department was not prepared to do so at that time. On 11 September 1978, she was working as a bookkeeper at Kimbrell's furniture store when she again saw defendant, who had come to the store to pay on his wife's account. At this time, she was able to obtain defendant's name for the first time. She called the Sheriff's Department after he had left and spoke with Detective Buheller.

On Thanksgiving Day, 23 November 1978, Mrs. Trogdon went to bed after her husband had left for work on a night shift. Soon thereafter she saw a flashlight in her darkened bedroom, and a person wearing a black ski mask came into the room. He told her that if he was going to be blamed for it, he was going to do it. He had a hunting knife. He dropped his pants, and when she started toward the other side of the bed, he told her that if she would do what he wanted to do he would not hurt her. He removed her underpants and inserted his penis in her vagina. She resisted but did not cry out in fear of waking her sleeping son in the next room. She was able to see a tattoo under his right eye and to recognize defendant's voice.

A second man, dressed in dark clothing and also wearing a ski mask, then came to the bedroom door and asked defendant what was taking so long. Defendant asked him if he had the stuff, and the second man answered in the affirmative. Defendant then put his pants on and held Mrs. Trogdon's arms down by her side while the second man painted her face and arms with white paint. Then they took her out of the house and put her into a car, and defendant got into the back seat with her. The car was the same one she had been forced into on 23 August. The two men drove down a rural road, stopped the car and forced her out into the woods where they laid her on the ground. There, they tore off part of her nightgown, and one of the men painted the letters "TB" across her chest and painted her private parts. She was released at a point about a mile from her home. Mrs. Trogdon ran to the house of her next-door neighbor, Brenda Small, and asked her to call the police. The police took Mrs. Trogdon to the hospital, where she was interviewed by Detective Charles Bulla of the Asheboro Police Department.

Detective Bulla spoke with Mrs. Trogdon again later in the day on 24 November 1978. He also went to her home and found that a small window in the back door had been broken.

Defendant offered the testimony of Detective Buheller who stated that he talked with Mrs. Trogdon on 23 August and at that time obtained a description of her assailant. On 1 September he showed her a series of photographs, and she did not identify any of them as being of her assailant. He talked to her again on 11 September and subsequently showed her a second series of photographs which included a picture of defendant. Mrs. Trogdon identified defendant's photograph as that of her assailant. Although defendant has a tattooed star near his right eye, Mrs. Trogdon initially could not identify any distinguishing characteristics except for facial hair and some kind of mark on his face.

Defendant also offered the testimony of Edward Rich, who as an alibi witness stated that on the evening of 23 November 1978, he left his mother's home at about 9:00 and drove to defendant's house, where he remained with defendant and his wife until approximately 10:55 p.m.

Defendant testified in his own behalf and stated that he had no independent recollection of where he was on 23 August 1978, and that he did not know Deborah Trogdon. He further testified that on the evening of 23 November, he and his wife were visited by Ed Rich, and that he remained at home after Mr. Rich had left. Defendant stated that he owns a blue and white 1966 Volkswagen and a 1969 Chevrolet pickup.

While the jury was deliberating, defendant fled. In the presence of defense counsel and in defendant's absence, the jury returned verdicts of guilty of two counts of first-degree rape, one of first-degree burglary and one of kidnapping. After the verdict was rendered on 17 May 1979, no judgment was entered pending the arrest of defendant. Defendant was placed into custody in Manassas, Virginia, on 25 July 1979. At a one-day special session of Randolph County Superior Court held on 27 July 1979 before Judge Davis, defendant was sentenced to two minimum and maximum terms of life imprisonment, to run consecutively, on the counts of first-degree rape occurring on 23 August 1978 and of first-degree burglary, and on the counts of first-degree rape and

kidnapping occurring 23 November 1978. Defendant appealed to this Court as a matter of right pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Christopher P. Brewer, Associate Attorney, for the State.

Seawell, Robbins, May & Webb, by P. Wayne Robbins, for defendant appellant.

BRANCH, Chief Justice.

[1] Defendant first contends that the trial court erred in not dismissing the indictments against defendant for failure to comply with the provisions of G.S. 15A-701(a1) and by reason of the denial of defendant's constitutional right to a speedy trial.

The applicable language of G.S. 15A-701 provides:

> (a1) Notwithstanding the provisions of G.S. 15A-701(a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1980, shall begin within the time limits specified below:
>
> (1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, *whichever occurs last* . . . . [Emphasis added.]

In this case, the last occurrence from which the statutory time limit could be counted was 9 April 1979, the day on which defendant was indicted. His trial began on 14 May 1979, which was well within the statutory limit.

[2] Defendant's contention that he was denied his constitutional right to a speedy trial is also without merit.

The constitutional right to a speedy trial protects an accused from extended pretrial imprisonment, from public suspicion generated by an untried accusation, from loss of witnesses and from the occurrence of other things which might prejudice his trial as a result of the delay. *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Harrell*, 281 N.C. 111, 187 S.E. 2d 789 (1972). The accused has the burden of showing that the delay com-

plained of was caused by the State's willfulness or neglect. *State v. Spencer, supra; State v. Ball,* 277 N.C. 714, 178 S.E. 2d 377 (1971).

In the instant case, the only factor shown by defendant to support his motion was that the married prosecuting witness was about five months pregnant. In denying defendant's motion, the trial judge stated:

> Let the record show that the Court by its own observation determines that the State's witness who has been exhibited to the Court does not show whether she is or is not pregnant and is not a visible thing with the State having agreed not to mention this during the trial and the State's witness having agreed not to mention this during the trial, the motion is denied on the basis that there is no prejudice shown. I just can't say that I think she looks like she is pregnant.

In view of these circumstances, we hold that the delay of which defendant complains did not violate his constitutional right to a speedy trial.

[3] Defendant contends that the trial court erred in excusing a juror after the jury was originally impaneled. We disagree.

After the jury had been impaneled and the trial had begun, a juror, Mr. Hayes, indicated that he was employed by and worked closely with defendant's brother. After a *voir dire* was conducted, the State challenged juror Hayes and the court excused him from the panel. An alternate juror was seated to replace Mr. Hayes. At the time, defendant stated that he had no objection.

This Court considered the question presented here in *State v. Kirkman,* 293 N.C. 447, 238 S.E. 2d 456 (1977). In that case, the Court held that the trial judge did not commit reversible error by permitting further examination and challenge of a juror by the State after the jury was impaneled, when it was discovered that the juror worked with the wife of one of the defendants. In so holding the Court, speaking through Lake, J., stated:

> It is well established that, prior to the impaneling of the jury, it is within the discretion of the trial judge to reopen the examination of a juror, previously passed by both the State and the defendant, and to excuse such juror upon

challenge, either peremptory or for cause. *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976); *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, death sentence vacated, 429 U.S. 912 (1976); *State v. Harris*, 283 N.C. 46, 194 S.E. 2d 796, *cert. den.*, 414 U.S. 850 (1973).

In the foregoing cases, we held that G.S. 9-21(b) providing that the State's challenge, whether peremptory or for cause, must be made before the juror is tendered to the defendant "does not deprive the trial judge of his power to closely regulate and supervise the selection of the jury to the end that both the defendant and the State may receive a fair trial before an impartial jury." *State v. McKenna, supra*, at 679. In all the foregoing cases, the challenge in question was allowed before the jury was impaneled. We perceive no reason for the termination of this discretion in the trial judge at the impanelment of the jury. This assignment of error is overruled.

Id. at 453-54, 238 S.E. 2d at 460.

[4] Defendant assigns as error the trial court's denial of defendant's motion to suppress the in-court identification of defendant by Mrs. Trogdon. Defendant notes certain discrepancies between the prosecuting witness's identification testimony at trial and the description of her assailant previously given to investigating officers. He also contends that the pretrial photographic displays were so impermissibly suggestive that her in-court identification of defendant was rendered inadmissible.

In *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968), the United States Supreme Court, in expressly approving photographic identifications, set forth the following standard for determining whether an in-court identification following an allegedly suggestive pretrial identification procedure satisfies the demands of due process:

[E]ach must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification 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 State v. Long*, 293 N.C. 286, 237 S.E. 2d 728 (1977); *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972).

In the instant case, the trial judge conducted an extensive *voir dire* hearing on the admissibility of the in-court identification of defendant by the prosecuting witness. Mrs. Trogdon testified on *voir dire* that after she had seen defendant at the restaurant on 1 September, Detective Buheller showed her between twenty-five and forty photographs of different men, the majority of whom were white and between eighteen and thirty years of age. She did not recognize any of these photographs as being of her assailant. After she had again seen defendant at Kimbrell's on 11 September, Mrs. Trogdon called Detective Buheller. He showed her between twenty-five and fifty photographs, which were the same as those shown previously except that more photographs had been added. Once again, most of the photographs were of white men. Mrs. Trogdon testified on cross-examination that "[s]ome had scars, some had short hair, some had long hair, some had tee shirts on." She immediately recognized a photograph of defendant as that of her assailant. She stated that this photograph was the same type as the other photographs. Moreover, there is absolutely nothing in the record to indicate that the collection of photographs or the manner in which they were exhibited to the prosecuting witness was "impermissibly suggestive" or unduly influenced her selection of defendant's photograph.

The United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972), delineated certain factors to be considered in evaluating the likelihood of misidentification. These include:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199-200, 93 S.Ct. at 382, 34 L.Ed. 2d at 411. The court must determine in this manner whether under the "totality of the circumstances" the identification was reliable even in cases where the confrontation procedure may have been suggestive. *Id.*

A review of the testimony of Mrs. Trogdon in light of these factors indicates little likelihood of mistaken identification here. Mrs. Trogdon testified on *voir dire* that she first saw defendant on 23 August when he left his automobile and approached the driver's side of her car. She had never seen him before. The time was between 5:30 and 5:45 in the afternoon, and it was still daylight. Through her open car window, she observed him from a distance of about four or five feet for three or four minutes. After defendant had taken her out of her car and forced her into the back seat of the other automobile, she was able to observe his face again at close range for several minutes during the alleged rape. She later described her assailant to the officers as being between five and six feet tall, with long brown hair and wearing a full beard. She stated that he had something peculiar about his face or eyes, but that she could not recall exactly what it was.

Mrs. Trogdon again saw defendant on 1 September in a restaurant in Asheboro between 5:30 and 6:00 p.m. The lighting in the restaurant was very bright, and it was still daylight outside. She was able to observe his face for about five minutes from a distance of about fifteen or twenty feet away. She recognized him as her assailant and notified Detective Buheller. At this point, she described the man as having long hair, a beard and a moustache, a star tattoo under his eye and tattoos on his arms.

On 11 September Mrs. Trogdon was working at Kimbrell's when defendant entered the store at about 4:30 p.m. She was able to observe him for between ten and fifteen minutes from a distance of about five or six feet in good lighting. As at the restaurant, no one pointed defendant out to her, but she recognized him as the same man who had attacked her on 23 August. Mrs. Trogdon again contacted Detective Buheller.

At the conclusion of the *voir dire* hearing, the trial judge found facts consistent with those recited above. He concluded that the in-court identification of the prosecuting witness was completely independent of the photograph shown to her and was

not influenced in any way by the actions of the State or its officers.

When the trial judge makes findings of fact to determine the admissibility of an in-court identification, the facts when supported by competent evidence are conclusive on appellate courts. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974). Here, the evidence supports the court's findings that the witness had an adequate opportunity to observe her assailant and that the in-court identification was of independent origin and based on such observation. These findings are therefore conclusively binding on this Court.

[5] Defendant also contends under this assignment of error that the trial judge made no findings on *voir dire* concerning the admissibility of identification testimony relating to the crimes alleged to have occurred on 23 November 1978. However, defendant failed to object when this testimony was offered. A defendant cannot challenge an in-court identification without at least a timely general objection. *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534, *cert. denied*, 400 U.S. 946 (1970). When an objection is not timely made, it is waived. *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978).

This assignment of error is without merit.

[6] Defendant next contends that the trial judge erred in allowing the State over defendant's objections to introduce the State's *voir dire* Exhibits 1 and 2, two photographs of defendant, for the purpose of illustrating the testimony of the prosecuting witness. He argues that the photographs were used not to illustrate her testimony but rather for purposes of identification, and that they were not properly authenticated because the source of the photographs was not shown.

Mrs. Trogdon described the man depicted in Exhibit 1, stated that it was a fair and accurate representation of her assailant on 23 August 1978 and identified him as defendant. She identified the tattoo of a skeleton shown in Exhibit 2 as a fair and accurate representation of the one she saw on her assailant that same day. The State offered the photographs into evidence in order to il-

lustrate the testimony of the witness, and the trial judge admitted them with the proper limiting instruction.

It is well settled that a witness may use a photograph to illustrate his testimony and make it more intelligible to the court and jury. *State v. Young*, 291 N.C. 562, 231 S.E. 2d 577 (1977); 1 Stansbury's North Carolina Evidence § 34 (Brandis rev. 1973). If a photograph is relevant and material, it will not be excluded merely because it was not made contemporaneously with the occurrence of the events at issue. *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970); *State v. Lentz*, 270 N.C. 122, 153 S.E. 2d 864, *cert. denied*, 389 U.S. 866 (1967). Here, the photographs were taken in Detective Bulla's office upon defendant's arrest on 7 December 1978. The photographs were properly authenticated and were material and relevant to illustrate the witness's identification of defendant.

We therefore hold that the photographs were properly admitted for illustrative purposes.

We do not consider assignments of error numbers 6, 7, 8, 10, 12, 13, 14, 15, 16 and 19 because defendant has abandoned these assignments on appeal to this Court. N.C. Rules of Appellate Procedure, Rule 28(a).

[7] By assignment of error number 9, defendant contends that the trial court erred in denying his motions for dismissal on the charge of first-degree rape on 23 November 1978. Defendant argues that the State presented insufficient evidence that the victim's resistance was overcome or her submission procured by the use of a deadly weapon.

Defendant was tried and convicted for first-degree rape under G.S. 14-21(1)(b) (Cum. Supp. 1977) (repealed 1979, effective 1 January 1980) which provided as follows:

> If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.

In *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976), this Court held that:

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

Id. at 444, 226 S.E. 2d at 494-95; *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *accord, State v. Dull*, 289 N.C. 55, 220 S.E. 2d 344 (1975), *death sentence vacated*, 428 U.S. 904 (1976).

An examination of the State's evidence in the case *sub judice*, considered in the light most favorable to the State and giving the State the benefit of every reasonable inference to be drawn therefrom, *State v. Strickland*, 290 N.C. 169, 225 S.E. 2d 531 (1976), shows that this case is clearly within the principles enunciated in *State v. Thompson, supra*. Here, Mrs. Trogdon testified that defendant had a hunting knife with him when he was in her bedroom and when he actually raped her there. He told her that if she would do what he wanted to do, he would not hurt her. This evidence is sufficient to permit a reasonable inference that Mrs. Trogdon's submission was procured by the use of a deadly weapon. *See also State v. Carson*, 296 N.C. 31, 249 S.E. 2d 417 (1978); *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978).

Defendant's motions for dismissal were therefore properly denied.

[8, 9] Defendant contends that in two instances the trial judge expressed an opinion regarding the credibility of defense witness John Buheller in violation of G.S. 15A-1222. During the direct examination of Detective Buheller, the trial court ordered certain testimony stricken from the record as inadmissible. The witness

stated that in September 1978 he had told Mrs. Trogdon that in his opinion there was insufficient evidence to proceed with a warrant at that time. Later in the trial, the judge stated to the witness:

> No, sir. Mr. Buheller, you are not excused from this Court. I'm sorry, but that is a clear violation of the Court's order. It has nothing to do—it doesn't express any opinion concerning his testimony. It only concerns him, himself. I will remind him of the order of the Court. All right.

G.S. 15A-1222 provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." It imposes on the trial judge, as did its predecessor G.S. 1-180, the duty of absolute impartiality. *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971); *Nowell v. Neal*, 249 N.C. 516, 107 S.E. 2d 107 (1959). This Court has repeatedly held that:

> The Judge should be the embodiment of even and exact justice. He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the "cold neutrality of the impartial judge" and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged.

Withers v. Lane, 144 N.C. 184, 191-92, 56 S.E. 855, 857-58 (1907); *State v. Frazier, supra; State v. McBryde*, 270 N.C. 776, 155 S.E. 2d 266 (1967).

On the other hand, it does not necessarily follow that every ill-advised comment by the trial judge which may tend to impeach the witness is so harmful as to constitute reversible error. The comment should be considered in light of all the facts and attendant circumstances disclosed by the record, "and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Perry*, 231 N.C. 467, 471, 57 S.E. 2d 774, 777 (1950).

In the case *sub judice*, it is abundantly clear that the trial judge's comments were not so prejudicial as to have had any effect on the result of the trial. The judge properly ordered that the witness's opinion should be stricken from the record, since he was testifying on a question of law. *See* 1 Stansbury's North Carolina Evidence § 130 (Brandis rev. 1973). As for the judge's later warning to the witness, these comments, in light of the circumstances and the judge's own corrective statements both at that time and later in his charge to the jury, were not so prejudicial as to warrant a new trial.

[10] Defendant next assigns as error the trial court's charge on first-degree burglary. He contends that the judge failed to instruct the jury that the house must have been actually occupied at the time of the commission of the crime, as required by G.S. 14-51.

In a portion of his charge discussing the essential elements of the crime seriatim, the trial judge inadvertently omitted the seventh requirement that the house be occupied at the time of the breaking and entering. However, immediately before and after the section complained of, he included this element in both his initial definition of the crime and in his final charge:

> Now, in Case No. 11104, the defendant has been accused of burglary in the first degree. I charge you that burglary in the first degree is breaking and entering *the occupied dwelling house* of another without her consent in the nighttime with the intent to commit a felony, in this case, rape. I charge that for you to find the defendant guilty of burglary in the first degree, the State must prove seven things each beyond a reasonable doubt.
>
> * * *
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the 23rd day of November, 1978, Thomas Brady, the defendant, broke a glass in the back door or the dwelling house of Mr. & Ms. Trogdon—well, Deborah Trogdon in this case without her consent in the nighttime intending at that time to commit rape, *and that Deborah Trogdon was in the house when the defendant broke in and entered*, it would be your duty to return a ver-

dict of guilty of burglary in the first degree. [Emphasis added.]

It is well settled that a charge must be construed as a whole in the same connected way in which it was given. If it fairly and correctly presents the law, it will afford no ground for reversing the judgment even if an isolated expression should be found technically inaccurate. *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970); *State v. Valley*, 187 N.C. 571, 122 S.E. 373 (1924). Here, it is quite clear that, considering the whole charge, the jurors were not misled by the portion of the charge to which defendant excepts. The error in the charge was cured by the trial judge, and thus this assignment of error is without merit.

[11] Defendant contends that the trial judge erred in instructing the jury on the offense of kidnapping.

As amended in 1975, G.S. 14-39 provides in pertinent part:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(b) Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life. If the person kidnapped, as defined in subsection (a), was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not

more than ten thousand dollars ($10,000), or both, in the discretion of the court.

G.S. 14-39(a) defines the offense of kidnapping. Proof of the elements set forth therein is all that the statute requires for a *conviction* of kidnapping.

G.S. 14-39(b) merely prescribes the punishment for one convicted of kidnapping. It does not affect the elements of the offense of kidnapping or create a separate offense. Ordinarily it is the province of the jury to determine whether the defendant has committed the offense of kidnapping as defined in G.S. 14-39(a). Since the factors set forth in subsection (b) relate to sentencing, it is for the trial judge to determine their existence or nonexistence from the evidence presented at trial, at a sentencing hearing pursuant to G.S. 15A-1334 or at both proceedings. *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978).

Here, the trial judge in his charge to the jury erroneously included the mitigating circumstances relating to punishment as set forth in G.S. 14-39(b). These factors do not constitute an essential element of the offense of kidnapping. Thus, their inclusion in the charge obviously placed an added burden upon the State and was therefore favorable to defendant. This assignment of error is overruled.

[12] Finally defendant contends that the trial judge erred in imposing life sentences for the crimes of rape and burglary which occurred on 23 November 1978. He argues that judgment should have been arrested in the rape conviction, since the crime of rape was the underlying felony and an essential element of the crime of burglary.

Defendant relies on the constitutional guaranty against double jeopardy which protects him from multiple punishments for the same offense. In *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967), this Court stated:

> If each of two criminal offenses, as a matter of law, requires proof of some fact, proof of which fact is not required for conviction of the other offense, the two offenses are not the same and a former jeopardy with reference to the one does not bar a subsequent prosecution for the conviction for the other.

Id. at 465, 153 S.E. 2d at 54; *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838 (1962).

The offense of burglary is completed by the breaking and entering of the occupied dwelling of another, in the nighttime, with the intent to commit the designated felony therein. The crime has been committed even though, after entering the house, the accused abandons his intent to commit the designated felony. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); *State v. McDaniel*, 60 N.C. (Win.) 245 (1864). Consequently, the felonious intent required as an element of burglary cannot be equated with the commission of the underlying felony. If a burglar after breaking and entering proceeds to commit the underlying felony inside the dwelling, he can be convicted of both crimes. *See State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902 (1976); *State v. Smith*, 266 N.C. 747, 147 S.E. 2d 165 (1966) (per curiam). Here, the State was not required to prove the charge of rape in order to convict defendant of burglary. It was only necessary to prove that the purpose of the breaking and entering was to commit the designated crime of rape. When he proceeded to rape the victim after committing the burglary, he then had committed two separate and distinct crimes.

This assignment of error is without merit.

We have carefully considered the entire record and find no error warranting a new trial.

No error.

Joyner v. Duncan

REGINALD T. JOYNER AND JANE DUNCAN MILLER, AS TRUSTEES OF THE TRUST UNDER THE WILL OF DAVID CROCKETT DUNCAN v. BESSIE LEE DUNCAN, EDWIN DUNCAN, JR., JANE DUNCAN MILLER, EDWIN DUNCAN, III, KATHERINE DUNCAN WOODRUFF, JANE LEE KING, REGINALD T. JOYNER AND JANE DUNCAN MILLER, AS ADMINISTRATORS, C.T.A. OF THE WILL OF EDWIN DUNCAN, SR., KATHRYN K. HATFIELD, GUARDIAN AD LITEM FOR JOSEPH DUNCAN KING, A MINOR, BESSIE DUNCAN MILLER, A MINOR, AND THE UNBORN CHILDREN OF EDWIN DUNCAN, JR. AND JANE DUNCAN MILLER, AND SAMUEL C. EVANS, JR., GUARDIAN AD LITEM FOR THE UNASCERTAINED HEIRS OF EDWIN DUNCAN, III, KATHERINE DUNCAN WOODRUFF, JANE LEE KING, JOSEPH DUNCAN KING, BESSIE DUNCAN MILLER, AND OF ANY UNBORN CHILDREN OF JANE DUNCAN MILLER AND EDWIN DUNCAN, JR., AND ANY OTHER PERSONS, BORN OR UNBORN, HAVING OR CLAIMING AN INTEREST WHICH WOULD BE AFFECTED BY THE DECLARATION IN THIS ACTION

No. 33

(Filed 1 April 1980)

1. **Wills § 41— rule against perpetuities**

No devise or grant of a future interest in property is valid unless the title thereto must vest in interest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the creation of the interest, and for testamentary devises the period of time prescribed by the rule begins to run at testator's death.

2. **Wills § 41— contingent future interests—rule against perpetuities applicable**

Contingent future interests must vest, if at all, within the period of the rule against perpetuities.

3. **Wills § 37— future interest subject to condition precedent**

A future interest is contingent when it is subject to a condition precedent (other than the natural expiration of the preceding estate) or when the interest is owned by unascertained persons.

4. **Wills § 35.1— vested estate and vested remainder—distinction**

An estate is vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment, while a vested remainder is a present fixed right in the remainderman to take possession upon the natural termination of the preceding estate with no conditions precedent imposed on the time for the remainder to vest in interest.

5. **Wills § 41.1— trust income given to son, widow, grandchildren—no violation of rule against perpetuities**

There was no violation of the rule against perpetuities where testator created a trust which (1) gave his son the net income from the trust, since that was a gift of a present life income interest which expired on the death of the son; (2) gave his son's widow a certain sum from the income of the trust after the death of his son, since that was a vested remainder income interest for life which was subject to no condition precedent save the natural termination of

the preceding interest; and (3) gave to two named grandchildren who were alive at testator's death vested remainder income interests for life.

6. **Wills § 37— future interest devised to class—vesting at testator's death**

When a future interest is devised by will to a class with no contingency other than the natural termination of any preceding interest and some members of the class are alive at the testator's death, then the gift is vested in those members of the class alive at testator's death subject to open to allow after-born members of the class to come in and take a vested interest until it is time for the roll to be called and the class to be closed, but the class gift must cease to be subject to open within the period of the rule against perpetuities.

7. **Wills § 41.1— money to testator's grandchildren at specified ages—no violation of rule against perpetuities**

Language of testator's will that the trustee should pay to testator's grandchildren out of the corpus of the estate $5000 as each grandchild reached the age of 25 years and a like sum at ages 30, 35 and 40 gave testator's grandchildren a vested interest at birth subject to open with enjoyment postponed for each grandchild until he or she reached the ages 25, 30, 35 and 40, and the class gift therefore did not violate the rule against perpetuities.

8. **Wills § 41.1— money to testator's great-grandchildren for college expenses—no violation of rule against perpetuities**

Where testator provided that each of his great-grandchildren should be given $1000 per year for his or her college education, provided the great-grandchild made passing grades and remained in school, testator was referring only to children born or to be born to his two grandchildren who were 24 and 14 years old at the time testator executed his will; since all possible members of the class of great-grandchildren intended by the testator would be born, if at all, within the lifetime of a life in being at testator's death (the two grandchildren) and since the interest given to the great-grandchildren was vested upon birth with enjoyment postponed until they went to college and subject to divestment if they did not go to college and make passing grades, there was no violation of the rule against perpetuities.

9. **Wills § 41.1— remainder of trust to be distributed to great-grandchildren—subclass exception inapplicable—no violation of rule against perpetuities**

Where testator's will provided that each of his great-grandchildren was to receive one-half of his interest in the remainder of a trust when he reached age 25, and final distribution of all remainder interests was to occur when the youngest great-grandchild reached age 25 and the grandchildren were deceased, the subclass exception was not applicable, since testator did not separate the gift into subclasses with devises to take effect at different times upon the respective deaths of the life tenants; but the gift nevertheless did not violate the rule against perpetuities since the remainder interest vested at birth of the great-grandchildren (subject to open until the class was closed), and any great-grandchildren could not possibly be born after the death of the grandchildren, who were lives in being at testator's death, plus any period of gestation.

10. Wills § 35.4— remainder to great-grandchildren or heirs—remainder inheritable

On the death of a remainderman who holds a vested interest in a trust, the interest of that remainderman will pass to his heirs at law since vested estates are inheritable and devisable; language in testator's will that final distribution of the remainder in a trust should be made when the youngest of his great-grandchildren reached 25 years of age and "that at that time each great-grandchild or his or her heirs shall receive per capita the remainder of the distributive share of my estate in full, and each great-grandchild or the heir or heirs of any deceased great-grandchild shall be made equal as to the distributive share of this trust estate" did not create a contingency or a gift or limitation over, but merely denoted the inheritable quality of the vested remainder.

11. Wills § 4.1— rule against perpetuities—wait and see doctrine explained

The doctrine of wait and see prescribes, in a case involving a will or testamentary trust, that events will be viewed as they actually happen rather than as they hypothetically could have happened as of testator's death; if no violation in fact occurred, then, under the wait and see approach, there is no perpetuities violation although, hypothetically, at the time of testator's death, a violation could have occurred.

ACTION for declaratory judgment pursuant to G.S. 1-253 *et seq.* for construction of a will before *McConnell, J.* at the 13 August 1979 Session of ALLEGHANY County Superior Court.

Testator, David Crockett Duncan, died 19 November 1953. He was survived by his son, Edwin Duncan, Sr. (born—25 June 1905, died—7 October 1973); his daughter-in-law, Bessie Lee Duncan; his two grandchildren, Edwin Duncan, Jr. (born—14 July 1927) and Jane Duncan Miller (born—12 September 1937); and two great-grandchildren (both born of Edwin Duncan, Jr.), Edwin Duncan, III (born—18 April 1952) and Katherine Duncan Woodruff (born—8 January 1951). Subsequent to testator's death, three great-grandchildren, Jane Lee King (born—10 November 1960), Joseph Duncan King (born—3 January 1962), and Bessie Duncan Miller (born—10 September 1971), were born of testator's granddaughter, Jane Duncan Miller.

Testator set up a trust in his will. The trustees are Reginald T. Joyner and Jane Duncan Miller. They have brought this action for a determination as to whether any of the provisions of the trust violate the rule against perpetuities. Defendants in this action are testator's daughter-in-law; two grandchildren; five great-grandchildren; Reginald T. Joyner and Jane Duncan Miller as

administrators C.T.A. of the will of Edwin Duncan, Sr.; Kathryn K. Hatfield as guardian ad litem for the two minor great-grandchildren (Joseph Duncan King and Bessie Duncan Miller) and any unborn children of Edwin Duncan, Jr. and Jane Duncan Miller; and Samuel C. Evans, Jr. as guardian ad litem for any unborn children of Edwin Duncan, Jr. and Jane Duncan Miller, the unascertained heirs of the five great-grandchildren and "any other unborn or unknown persons having or claiming an interest which would be affected by the declaration in this action."

The trial judge upheld the validity of the entire trust and found no violations of the rule against perpetuities. We allowed the joint petition for discretionary review pursuant to G.S. 7A-31 prior to determination by the Court of Appeals.

The relevant provisions of the testamentary trust that are the subject matter of this action and any other facts necessary to the decision of this case will be related in the opinion.

W. G. Mitchell for defendant-appellants Bessie Lee Duncan, Edwin Duncan, Jr., Jane Duncan Miller and Reginald T. Joyner and Jane Duncan Miller as administrators C.T.A. of the will of Edwin Duncan, Sr.

Hayes, Hayes and Evans by Samuel C. Evans acting as guardian ad litem.

Sam J. Ervin, Jr. and Womble, Carlyle, Sandridge & Rice by Leon L. Rice, Jr., and Elizabeth L. Quick for plaintiff-appellees Reginald T. Joyner and Jane Duncan Miller as trustees of the testamentary trust of David Crockett Duncan.

Sam J. Ervin, Jr. and Katherine D. Woodruff for defendant-appellees Edwin Duncan, III, Katherine Duncan Woodruff and Jane Lee King.

COPELAND, Justice.

[1] No devise or grant of a future interest in property is valid unless the title thereto must vest in interest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the creation of the interest. *Parker v. Parker*, 252 N.C. 399, 113 S.E. 2d 899 (1960); *McPherson v. First & Citizens National Bank of Elizabeth City*, 240 N.C. 1, 81 S.E. 2d

386 (1954); *McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 68 S.E. 2d 831 (1952). For testamentary devises, the period of time prescribed by the rule begins to run at testator's death. Simes & Smith, *The Law of Future Interests*, § 1226 (2d ed. 1956).

[2] Although the language in some of our cases may be unclear as to the following portion of the rule, Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C.L. Rev. 727, 762, 767 (1979) and cases cited therein, the rule requires that contingent future interests must vest, *if at all*, within the period of the rule. In other words, it is not required that the interest must vest within the perpetuities period. What is required is that the interest must be certain to *either vest or fail* within that period. Thus, if the interest should happen to vest, that vesting must occur within the period of the rule, and if there is *any possibility*, when the interest is created, that it may vest in interest at a remote time, then, under the rule, that interest is void. *Simes & Smith, supra*, § 1228; Bergin and Haskell, *Preface to Estates in Land and Future Interests*, pp. 185-86 (1966).

The rule does not apply to limit the duration of a trust. It simply applies to the time when legal title must vest in the trustee and the time when all beneficial or equitable interests created in the trust vest in the beneficiaries even though the duration of those vested interests may extend beyond the period of the rule. *McQueen v. Branch Banking & Trust Co., supra.*

[3, 4] The rule applies to contingent future interests. A future interest is contingent when it is subject to a condition precedent (other than the natural expiration of the preceding estate) or when the interest is owned by unascertained persons. *Wachovia Bank & Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E. 2d 578 (1952). An estate is vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment. *Wachovia Bank & Trust Co. v. Taylor*, 255 N.C. 122, 120 S.E. 2d 588 (1961); *Parker v. Parker, supra.* A vested remainder is a present fixed right in the remainderman to take possession upon the natural termination of the preceding estate with no conditions precedent imposed on the time for the remainder to vest in interest. *Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E. 2d 341 (1942). The rule is concerned solely with the time for vesting

in interest of estates and not with the time the estates will vest in possession and enjoyment. *Parker v. Parker, supra.*

The essence of the rule in a will case is the search for an answer to the following question: Must the contingent future interest in question vest (if it ever does vest) within the lifetime of some one or more people who were alive at testator's death (plus the 21 year period and any period of gestation)? These lives in being at testator's death are referred to as the measuring life or lives for the interest in question. Frequently the measuring life or lives will be the beneficiary or beneficiaries of an interest in the trust or will that precedes the interest in question. If there is any possibility that the gift will vest in interest in the lifetime of someone who was not a life in being at testator's death and more than 21 years after the death of all possible measuring lives plus any period of gestation, then the interest vests too remotely and is void because it is in violation of the rule against perpetuities.

[5] The testamentary trust that is the subject matter of this action is set forth in Article III of testator's will. The first provision of Article III is as follows:

> "It is my will and desire that all of my property of every kind and nature remaining after the payment of taxes, funeral expenses, just debts, and cost of administration shall be and constitute a TRUST ESTATE, and that Edwin Duncan shall be trustee of my trust estate as long as he shall live or is able to act, and upon his death or inability to act, that The Northwestern Bank, Inc. shall be the trustee of my trust estate and shall succeed to all the powers and duties granted unto Edwin Duncan, Trustee; therefore, I give, devise, and bequeath all of my property remaining in my estate or in the hands of my Executor unto Edwin Duncan, Trustee, and upon his death to The Northwestern Bank, Inc., as Trustee, to be administered by him or it in the following way and manner:
>
> 1. I direct that my Trustee shall pay the net income so derived from my trust estate annually unto Edwin Duncan; however, the said Edwin Duncan shall have the right and privilege of refusing to accept the annual net income of my estate and his decision in that respect shall be final and controlling. In the event he does not elect to accept the net income or any part of it derived from my trust estate annually,

then the net income or the part he does not care to accept shall be added to the corpus and principal of this trust estate."

There is no problem with this interest since it was a gift of a *present* life income interest which expired on the death of Edwin Duncan, Sr. on 7 October 1973.

The second section of the trust provides that:

"2. Upon the death of Edwin Duncan, I direct that my Trustee shall pay out of the net income derived from my trust estate unto Bessie Lee Duncan, the widow of Edwin Duncan, for the remainder of her life or until she remarries, if necessary, the sum of $150.00 per month provided she does not have sufficient income from other sources to maintain and support her. That the remainder of the net income of my trust estate shall be paid equally unto Edwin Duncan, Jr. and Jane Cannon Duncan, and upon the death of Bessie Lee Duncan, that the net income derived from my trust estate shall be paid unto Edwin Duncan, Jr. and Jane Cannon Duncan equally; however, should Edwin Duncan, Jr. or Jane Cannon Duncan elect not to accept the net income or a part of the income, that the same shall be added to the corpus or principal of this trust estate each year such election is made. Provided, further, in the event of the death of Edwin Duncan, Jr. or Jane Cannon Duncan during the life of this trust, that the net income derived from this trust estate going to such deceased grandchild shall be paid *per stirpes* to the child or children of said grandchild."

The interest of Bessie Lee Duncan is a vested remainder income interest for life. It is subject to no condition precedent save the natural termination of the preceding interest. *Parker v. Parker, supra; Wachovia Bank & Trust Co. v. Taylor, supra; Priddy & Co. v. Sanderford, supra.* Since the remainder was vested at testator's death, there is no problem with the rule against perpetuities. If she remarries, her income interest will terminate. This condition subsequent will serve merely to divest a vested interest and raises no perpetuities problem in this case. *See, Elmore v. Austin*, 232 N.C. 13, 59 S.E. 2d 205 (1950).

Edwin Duncan, Jr. and Jane Cannon Duncan (now Jane Duncan Miller) also have vested remainder income interests for life. These income interests were not given to testator's grandchildren as a class. They were given to each of the two named grandchildren who were alive at testator's death; thus, there is no perpetuities violation. *Fuller v. Hedgpeth*, 239 N.C. 370, 80 S.E. 2d 18 (1954). The gift over of the income interest to "be paid *per stirpes* to the child or children of said grandchild" does not violate the rule against perpetuities. That gift over cannot possibly occur at a remote time within the meaning of the rule against perpetuities, since it will occur, if at all, for the children of each of the two named grandchildren, upon the death of each grandchild. The two named grandchildren were lives in being at testator's death and therefore, they are the measuring lives for the respective gifts over to their children. There is no possibility that the gift over will occur within the lifetime of someone who was not a life in being at testator's death since the children of the two named grandchildren cannot be born later than the death of their parent (plus any period of gestation) and their parents were lives in being at testator's death.

The third section of the trust provides that:

"3. I direct and empower the Trustee of my trust estate to pay unto my grandson, Edwin Duncan, Jr. and my granddaughter, Jane Cannon Duncan, or to any other children born to Edwin Duncan out of the corpus of my estate the sum of $5,000.00 as each grandchild shall reach the age of 25 years, and a like sume of $5,000.00 to each grandchild upon reaching the age of 30 years; and a like sum of $5,000.00 to each grandchild upon reaching the age of 35; and a like sum of $5,000.00 to each grandchild upon reaching the age of 40. Provided any payment made by me as herein provided during my lifetime to any grandchild reaching the age of 25 or any other age shall be counted as an advancement to such grandchild against the provisions herein contained. Provided, however, that if any grandchild be not competent or capable in the opinion of my Trustee to receive any of the $5,000.00 payments as herein provided, then I direct and instruct my Trustee to use such proceeds to purchase a home or farm for such grandchild; provided that if the purchase of a home or farm is made by the Trustee under the provisions of this

clause, that the deed for such property shall be made to such grandchild for life and the remainder to his or her heirs in fee simple."

This provision is the one instance in which testator made a class gift to his grandchildren since he provided that the money was to be paid to his "grandson, Edwin Duncan, Jr. and [his] granddaughter, Jane Cannon Duncan, *or to any other children born to Edwin Duncan. . . .*" [Emphasis added.] This class gift to grandchildren was made with respect to this special gift of $5,000.00 to be paid as each grandchild reaches the designated ages.

[6] When a future interest is devised by will to a class with no contingency other than the natural termination of any preceding interest and some members of the class are alive at the testator's death, then the gift is vested in those members of the class alive at testator's death subject to open to allow after-born members of the class to come in and take a vested interest until it is time for the roll to be called and the class to be closed. *Parker v. Parker, supra; Mason v. White*, 53 N.C. 421 (1862). The rule against perpetuities applies to such class gifts. *Simes & Smith, supra*, § 1232. Even though the interest is vested, it is subject to open. As to those members of the class born after testator's death that the class opens to receive, there is a condition precedent to their becoming members of the class and that is the contingency of birth. In other words, there are unascertained persons with respect to a future interest and the rule applies. Both minimum and maximum membership in a class must be determined within the perpetuities period. Simply put, the class gift must cease to be subject to open within the period of the rule. *Simes & White, supra*, § 1265.

In *Wachovia Bank & Trust Co. v. Taylor, supra*, the gift was to testator's widow for life, then to his two named daughters for life, then to his grandchildren. Testator had five grandchildren living at his death. Since the interest of the grandchildren was vested subject to open at testator's death, minimum membership in the class of grandchildren was determined at testator's death. If any grandchild predeceased the life tenants, their vested interest would have passed to their estate. Maximum membership in the class would be determined at the death of the survivor of

the life tenants since the class would have to close at that time in order for distribution of the interests to occur. Both minimum and maximum membership was determined within the period of the rule since the life tenants were lives in being at testator's death. They were the measuring lives for the interest to the grandchildren and all grandchildren would have to be born, if at all, within the lifetime of their mother (the measuring life for their interests). Thus, there was no perpetuities violation.

[7] The issue with respect to the class gift in Section 3 of this will is whether reaching the designated ages is a condition precedent to the vesting in interest of the estate or whether reaching those ages merely prescribes the time when a vested interest (with possession and enjoyment postponed) is to actually be paid to the beneficial interest holder. If the former is the case, then the gift is violative of the rule because a grandchild may not be born and live to age 25, 30, 35, or 40 within lives in being *plus 21 years*. If the latter is the case, then the gift is valid, even though it is a class gift, because then the only contingency to the vesting in interest of the gift is the birth of "any other children of Edwin Duncan." Obviously, such births would have to occur, if at all, within the lifetime of Edwin Duncan who was a life in being at testator's death and therefore, he was the measuring life for this gift to his children.

The law favors the early vesting of estates. *Roberts v. Northwestern Bank*, 271 N.C. 292, 156 S.E. 2d 229 (1967). In *Kale v. Forrest*, 278 N.C. 1, 178 S.E. 2d 622 (1971), it was held that a provision that the share of testator's estate going to his son "shall be put in trust for him and he shall get the interest from this when he reaches 60 years of age" was a gift of a vested remainder with possession and enjoyment postponed until age 60. In *Wachovia Bank & Trust Co. v. Taylor, supra*, it was provided that upon the death of the last surviving life tenant, "their share is to be divided equally between their children when they reach the age of twenty-five years." This Court held that testator's grandchildren took a vested remainder subject to open with the right of partition postponed until age 25. In Clobberie's Case, 2 Vent. 342, 86 Eng. Rep. 476 (1677), it was held that a provision in a gift that it was to be paid at a certain age indicated that the gift vested at testator's death with only the time of payment postponed.

Here, the provision is that the trustee is "*to pay* unto my [grandchildren] out of the corpus of my estate the sum of $5,000.00 *as each grandchild shall reach the age* of 25 years [and a like sum at ages 30, 35 and 40]." We construe this language as giving testator's grandchildren a vested interest at birth subject to open with enjoyment postponed for each grandchild until he or she reaches ages 25, 30, 35, and 40. Minimum membership in this class was determined at testator's death since the two grandchildren alive at that time had a vested right to receive $5,000.00 with enjoyment postponed until they reached the prescribed ages. If any grandchild were to die before reaching any of the prescribed ages, their right is inheritable since it is vested and therefore, the interest would pass to their estate. *Kale v. Forrest, supra.* Viewed at the time of testator's death, maximum membership in the class would be determined at the death of Edwin Duncan, Sr. All of his children would have to be born not later than his death plus any period of gestation. Since he was the measuring life for this gift to his children, there was no violation of the rule against perpetuities.

We further note that testator provided that in the event of an incompetent grandchild, the $5,000.00 payments were to be used to purchase a home or farm with the deed making the gift go to "such grandchild for life and the remainder to his or her heirs in fee simple." Under the Rule in Shelley's case, the grandchild takes a fee simple absolute if this eventuality occurs. *Whitley v. Arenson*, 219 N.C. 121, 12 S.E. 2d 906 (1941); *Williams v. Norfolk Southern R. Co.*, 200 N.C. 771, 158 S.E. 473 (1931).

[8] The next provision of the trust is as follows:

> "4. I direct and empower my Trustee to provide for the education of my great-grandchildren in an accredited college as follows: To pay for each great-grandchild the sum of $1,000.00 per year not to exceed four years for his or her college education and living expenses, provided such great-grandchild shall make passing grades during his or her scholastic career, and in the event any great-grandchild fails to make passing grades or does not remain in school, then such great-grandchild shall cease to have expended for him or her the said $1,000.00 per year. In the event any great-grandchild shall cease to be enrolled in an accredited school

or fails to make passing grades, the $1,000.00 per year not used for educational purposes on behalf of such great-grandchild shall remain in the corpus of this trust."

A condition will be deemed to be a condition subsequent (which will divest a vested interest) rather than a condition precedent to vesting unless the testator's language forbids such a construction. *Elmore v. Austin, supra.* Therefore, under the language in Section 4 we hold that the great-grandchildren have a vested interest at birth to receive the monetary gifts for their college education subject to divestment if the great-grandchild does not go to college and make passing grades. Since the interest vests in each great-grandchild at birth and this is a gift to a class (great-grandchildren), the issue is whether, at testator's death, there was any possibility of a great-grandchild being born at a time beyond that allowed by the rule against perpetuities. If so, the gift fails. *Simes & White, supra,* § 1265. However, before this issue can be addressed, we have the preliminary issue of what group of people testator intended to be referring to when he used the term, "great-grandchildren."

When a will is subject to two constructions, one which results in an illegal perpetuity and another which renders the will valid, the latter construction is preferred. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E. 2d 867 (1963). It is presumed that testator intended a valid disposition of his property and did not intend to dispose of it in a manner violative of the rule against perpetuities. *Clarke v. Clarke*, 253 N.C. 156, 116 S.E. 2d 449 (1960); *Elledge v. Parrish*, 224 N.C. 397, 30 S.E. 2d 314 (1944).

It is the duty of the Court to construe the provisions in a will so as to discover the intent of the testator and to give effect to it if it is not in contravention of some established rule of law or public policy. *Citizens National Bank v. Grandfather Home for Children, Inc.*, 280 N.C. 354, 185 S.E. 2d 836 (1972). Such intention is to be determined by an examination of the will, in its entirety, and in light of all surrounding facts and circumstances known to testator. *Id.*

Where there is ambiguity or uncertainty the Court is to take into consideration the established rules for construction of a will. *Wachovia Bank & Trust Co. v. Wolfe*, 243 N.C. 469, 91 S.E. 2d 246

(1956). Effect must be given to each clause, phrase and word, if a reasonable construction of the will so permits. Each string should give its sound. *Morris v. Morris*, 246 N.C. 314, 98 S.E. 2d 298 (1957).

The intent of the testator is determined from the entire instrument so as to harmonize, if possible, provisions which would otherwise be inconsistent. *Olive v. Biggs*, 276 N.C. 445, 173 S.E. 2d 301 (1970). A phrase should not be given a significance which clearly conflicts with the evident intent of the testator as gathered from the four corners of the will and the Court will adopt that construction which will uphold the will in all its parts if such course is consistent with established rules of law and the intention of the testator. *Johnson v. Salsbury*, 232 N.C. 432, 61 S.E. 2d 327 (1950). However, where provisions are irreconcilably in conflict, then the last expression of intent will ordinarily prevail. *Poindexter v. Wachovia Bank & Trust Co., supra.* Apparent conflicts will be reconciled, if possible to do so consistent with testator's intent, and irreconcilable provisions will be resolved by giving effect to the general prevailing purpose of the testator. *Worsley v. Worsley*, 260 N.C. 259, 132 S.E. 2d 579 (1963).

> "There should be no mystique surrounding the class gift; any legal conclusions concerning a gift to a class, as distinguished from a gift to several individuals, should reflect what the [testator] . . . would have intended had he focused upon the problem." Bergin & Haskell, *supra* at pp. 139-40.

We cannot say that testator did not, under any circumstances, think of the possibility of after-born grandchildren (who could have had children who would be testator's great-grandchildren) since in section 3 of Article III of the will he made a gift to his two named grandchildren and "any other child born to Edwin Duncan." However, in section 2, testator provided for life income interests for his two named grandchildren and did not provide for any other possible grandchildren.

Testator executed his will on 1 January 1952. At that time, testator's son was approaching his forty-seventh birthday and had children who were ages twenty-four and fourteen. Of course, the law presumes that a man can have children as long as he is alive, but from the four corners of this will in this case and from all the surrounding facts and circumstances and after applying all of the

rules of construction set forth above, we do not believe that that is what this testator presumed, contemplated or intended. From a careful scrutiny of the entire will, we are convinced that when testator spoke of his great-grandchildren he was referring to children born or to be born to his two grandchildren, Edwin Duncan, Jr. and Jane Duncan Miller, and was not referring to any children born of a possible after-born grandchild. This is particularly true under sections 5 and 6 of the testamentary trust when testator made a gift of the remainder or corpus of the trust to his great-grandchildren to follow the life income interests that he gave only to his two named grandchildren in section 2 of the trust. Testator intended the same use of the term "great-grandchildren" in section 4 that he intended in sections 5 and 6. This interpretation of testator's intent is, of course, limited to the facts of this case and is based upon the particular language used in this will.

All of the children of Edwin Duncan, Jr. and Jane Duncan Miller would, of course, have to be born within the respective lifetimes of their parents. Since their parents were lives in being at testator's death, they can be and are the measuring lives for the gifts to their children under section 4 of Article III of testator's will. Since all possible members of the class of great-grandchildren intended by the testator will be born, if at all, within the lifetime of a life in being at testator's death and since the interest given to the great-grandchildren is vested upon birth with enjoyment postponed until they go to college and subject to divestment if they do not go to college and make passing grades, there is no violation of the rule against perpetuities.

[9] Sections 5 and 6 provide that:

> "5. I direct and instruct my Trustee upon each great-grandchild reaching the age of 25 years to estimate and determine as nearly as possible the interest such great-grandchild would have in my trust estate, and to pay upon each great-grandchild reaching the age of 25, one-half of the estimated value of such great-grandchild's distributive share of this trust estate.
>
> 6. I direct that this trust estate shall cease and terminate and final distribution of the trust funds to be made at such time that all grandchildren are deceased, and the youngest of

my great-grandchildren shall be 25 years of age, and at that time each great-grandchild or his or her heirs shall receive per capita the remainder of the distributive share of my estate in full, and each great-grandchild or the heir or heirs of any deceased great-grandchild shall be made equal as to the distributive share of this trust estate. Provided, that any funds expended by my Trustee on behalf of any great-grandchild for college education as herein provided shall not be considered as a portion of the distributive share of such great-grandchild or great-grandchildren."

In short, each great-grandchild is to receive one-half of his interest in the remainder of this trust when he reaches age 25 and when the youngest great-grandchild reaches age 25 and the grandchildren are deceased, final distribution of all remainder interests is to occur.

The parties arguing for the validity of this provision of the trust ask the Court to apply the subclass exception to this class gift situation. This exception is available only when testator separates the gift into subclasses with devises to take effect at different times upon the respective deaths of the life tenants. *North Carolina National Bank v. Norris*, 21 N.C. App. 178, 203 S.E. 2d 657 (1974). When it operates, the exception would uphold the validity of gifts to those members of the class whose parents (the life tenants) were alive at testator's death since each parent would be the measuring life for the gift to his children and, as to them there would be no possibility of any remote after-born children in violation of the rule against perpetuities.

The subclass exception is simply not available in the case *sub judice*. Testator did not provide for successive remainders to take effect for each subclass of great-grandchildren upon the death of each grandchild. To the contrary, he unambiguously provided that each great-grandchild "shall receive *per capita* the remainder of the distributive share of my estate in full, and *each great-grandchild* or the heir or heirs of any deceased great-grandchild *shall be made equal as to the distributive share of this trust estate*." [Emphasis added.] Such a provision is the antithesis of a *per stirpes* gift or of a gift of successive remainders. *See*, Link, *supra* at 776. Furthermore, the subclass exception is unnecessary given our construction of the term "great-grandchildren" as used

by this testator in this will under section 4. The same construction applies under sections 5 and 6.

The remainder to the great-grandchildren is subject to no condition precedent other than the natural termination of the preceding life income interests. Therefore, the remainder interest to each great-grandchild vests at birth subject to open to allow after-born great-grandchildren to enter the class until it is time to close the class and call the roll. In providing that each great-grandchild is to take one-half of his remainder when he reaches age 25 and that final distribution is to occur when the youngest great-grandchild reaches age 25 and the grandchildren are deceased, testator was merely prescribing the times when a remainder that is vested in interest is to vest in possession and enjoyment. *Kale v. Forrest, supra; Roberts v. Northwestern Bank, supra; Wachovia Bank & Trust Co. v. Taylor, supra; Parker v. Parker, supra.*

The remainder vested in interest at birth (subject to open until the class is closed) which is within the perpetuities period since the children of Edwin Duncan, Jr. and Jane Duncan Miller cannot possibly be born after the death of their parent plus any period of gestation. Since their parents were lives in being at testator's death they are the measuring lives for the remainder interests to their children who are the complete class of great-grandchildren that testator intended to benefit in this will.

The class of great-grandchildren would close no later than the death of the survivor of the two measuring lives, Edwin Duncan, Jr. and Jane Duncan Miller which is within the perpetuities period. Thus, both minimum and maximum membership would be determined within the period of the rule. However, the class was subject to close and in fact did close (to the exclusion of any children of Edwin Duncan, Jr. and Jane Duncan Miller born after that time) when the first great-grandchild reached age 25. This is true because to be able to determine what is one-half of a distributive share of the remainder which is to be paid to the great-grandchild who has reached age 25, the number of shares into which to divide the remainder must be known.

The great-grandchild who has reached age 25 is entitled to one-half of her remainder interest. As each great-grandchild reaches age 25, he will receive one-half of his remainder interest.

When the youngest great-grandchild reaches age 25 and the grandchildren are deceased, the trust will terminate and final distribution of all remainder interests will occur.

[10] Section 6 of Article III provides for final distribution when the,

> "youngest of my great-grandchildren shall be 25 years of age, and at that time each great-grandchild *or his or her heirs* shall receive per capita the remainder of the distributive share of my estate in full, and each great-grandchild *or the heir or heirs of any deceased great-grandchild* shall be made equal as to the distributive share of this trust estate." [Emphasis added.]

The words emphasized in the above quotation from section 6 create neither a contingency nor a gift or limitation over. On the death of a remainderman who holds a vested interest in a trust, the interest of that remainderman will pass to his heirs at law since vested estates are inheritable and devisable. *Kale v. Forrest, supra; Jackson v. Langley*, 234 N.C. 243, 66 S.E. 2d 899 (1951); *Allen v. Parker*, 187 N.C. 376, 121 S.E. 665 (1924). The above words in section 6 merely denote the inheritable quality of the vested remainder. *See, Priddy & Co. v. Sanderford, supra.*

[11] We further note that application of the doctrine of wait and see to this case would mean that there is no perpetuities violation in the gifts to testator's great-grandchildren. This doctrine prescribes, in a case involving a will or testamentary trust, that events will be viewed as they actually happened rather than as they hypothetically could have happened as of testator's death. If no violation in fact occurred, then, under the wait and see approach, there is no perpetuities violation although hypothetically, at the time of testator's death, a violation could have occurred. *Merchants National Bank v. Curtis*, 98 N.H. 225, 97 A. 2d 207 (1953); *Simes & White, supra*, § 1230; Simes, *Law of Future Interests*, pp. 270-75 (2d ed. 1966); *Bergin & Haskell, supra*, p. 218.

In this case, testator's son died on 7 October 1973. Between testator's death on 19 November 1953, and 7 October 1973 testator's son could have had more children. However, he in fact did not have any more children. Thus, the class of great-grandchildren actually includes only children of Edwin Duncan,

Jr. and Jane Duncan Miller who were lives in being at testator's death so that they are the measuring lives for the gifts to their children (testator's great-grandchildren). Due to our holdings above based on our interpretation of what testator intended by his use of the term "great-grandchildren," application of the wait and see doctrine is not necessary to the decision of this case. Therefore, we will have to wait and see in future decisions of this Court, what application, if any, this doctrine will have in North Carolina.

Our holdings above with respect to the various provisions of this testamentary trust in testator's will are in accord with the result reached by the trial judge that this testamentary trust is valid in all respects and contains no perpetuities violations. Therefore, the decision of the trial judge is

Affirmed.

PAUL B. SCHOFIELD v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., SELF-INSURED

No. 28

(Filed 1 April 1980)

1. Master and Servant § 75— workmen's compensation—employer's inability to provide medical services—employee's selection of doctor—expenses covered

Under G.S. 97-25 an employee is justified in seeking treatment by a physician other than the one selected by the employer in an emergency where the employer's "failure to provide" medical services amounts merely to an inability to provide those services; therefore, plaintiff was confronted with an emergency and was forced to call on another physician on account of the employer's inability to provide medical services where the evidence tended to show that plaintiff was in Reidsville at 11:00 p.m. on a Friday night while the doctors who had been selected by defendant and who had been treating plaintiff were in Charlotte; plaintiff's knee had swollen to four times its normal size and was exuding pus; plaintiff was about to lose his leg or his life; and defendant's disclaimer of responsibility for medical services made nearly two years prior to the emergency treatment in question amounted to a wilful "failure to provide" medical services which justified plaintiff's seeking of treatment by his own doctor.

2. Master and Servant § 75— workmen's compensation—emergency—employee's selection of doctor—medical expenses covered

There was no merit to defendant employer's contention that, even if plaintiff employee was confronted with an emergency, such emergency did not last for the seventeen months he was treated by a physician of his own choosing and defendant should be liable only for medical expenses for the period of the actual emergency, since an injured employee has the right to procure, even in the absence of an emergency, a physician of his own choosing, subject to the approval of the Industrial Commission.

3. Master and Servant § 75— workmen's compensation—substituted physician—notice to Industrial Commission

G.S. 97-25 requires an injured employee to obtain approval of the Industrial Commission within a reasonable time after he has selected a physician of his own choosing to assume treatment, and there was no merit to plaintiff's contention that the Industrial Commission was without jurisdiction to receive notice during the seventeen month period of plaintiff's treatment because, for most of that period, the claim involving defendant's disclaimer of liability was in the process of appellate review and thus within the jurisdiction of the appellate courts, since an appeal from the determination of a controversy between employer and employee does not operate to divest the Industrial Commission of its administrative powers, and therefore does not suspend that agency's authority to accept notification of an employee's decision to select his own doctor.

4. Master and Servant §§ 75, 94— workmen's compensation—emergency medical treatment—substituted physician—findings required

Before approving the cost of emergency treatment rendered by a physician other than the one provided by an employer, the Industrial Commission must make findings, based upon competent evidence, relative to the duration of the emergency, and the Commission must make findings as to whether approval of the injured employee's own doctor by the Commission was sought in this case within a reasonable time.

5. Master and Servant §§ 75, 94— workmen's compensation—medical expenses—substituted physician—findings required for approval

Upon submission of a claim for approval for medical treatment rendered by an employee's own physician, there must be findings based upon competent evidence that the treatment was required to effect a cure or give relief, or where additional time is involved, that it has tended to lessen the period of disability; and there should also be findings that the condition treated is, or was, caused by or was otherwise traceable to or related to the injury giving rise to the compensable claim.

ON appeal from the decision of the Court of Appeals, reported in 43 N.C. App. 567, affirming the order of the Industrial Commission which affirmed the findings and award of Deputy Commissioner Rush, entered 12 June 1978.

On 29 April 1972 plaintiff suffered a knee injury arising out of and in the course of his employment with defendant. Defendant, a self-insurer, provided medical care under the Workmen's Compensation Act, and plaintiff was treated by Drs. Chalmers Carr and Richard Wrenn in Charlotte, North Carolina. This treatment continued until 1976.

Based upon reports submitted by Dr. Carr, defendant concluded that plaintiff had reached his maximum improvement by 5 June 1974 and notified plaintiff on 3 September 1974 that it would not be responsible for any medical payments after 5 June 1974. Plaintiff requested a hearing before the North Carolina Industrial Commission. Chief Deputy Commissioner Forest Shuford conducted a hearing on the claim on 1 April 1976. An award was entered on 23 April 1976 holding defendant liable from and after 5 June 1974 for the cost of plaintiff's medical care which would tend to lessen plaintiff's disability.

On 12 July 1976, the Full Commission affirmed the findings and award of Deputy Commissioner Shuford; and the Court of Appeals affirmed the award. *Schofield v. Tea Co.*, 32 N.C. App. 508, 232 S.E. 2d 874 (1977). This Court denied defendant's petition for discretionary review on 3 May 1977. *Schofield v. Tea Co.*, 292 N.C. 641, 235 S.E. 2d 62 (1977).

On 9 April 1976, shortly after Chief Deputy Commissioner Shuford's initial hearing of the claim, plaintiff was at the home of his sister in Reidsville, North Carolina, when his knee worsened and became swollen. As a result of this condition, he obtained Dr. Frederick R. Klenner to treat the knee. Dr. Klenner testified in the present case regarding the condition of plaintiff's knee as follows:

> I first became acquainted with Mr. Paul B. Schofield when he came to my office at 11:00 at night on Friday, April 9, 1976. His knee was swollen four times the normal size from an opening on top of the knee about eight inches by an inch and a half, and every time he flexed his knee, pus ran profusely as thick as a man's finger from the opening.

Dr. Klenner testified further that at that time plaintiff was in danger of losing his leg, if not his life.

Dr. Klenner began to treat plaintiff's knee with drugs and irrigation and continued treatment almost daily for a period of seventeen months. Dr. Klenner then found that the infection was "completely under control" and, in fact, had been "under control" after six months of treatment. He further stated that at that point plaintiff was ready for surgery, but that he did not refer plaintiff to a surgeon. At no time from 9 April 1976 until the summer of 1977 did plaintiff notify the Commission or defendant that he was undergoing treatment by a physician other than those provided by defendant.

At some point during the summer of 1977, and shortly after appellate review of plaintiff's previous claim had terminated with our denial of discretionary review, Dr. Klenner filed claim with the Industrial Commission seeking to recover $5,965 for medical treatment. Defendant contested these charges, and a hearing was held before Deputy Commissioner Rush on 18 January 1978. Dr. Klenner was the only witness to testify at the hearing.

In the Opinion and Award filed 12 June 1978, Deputy Commissioner Rush made the following Conclusions of Law:

> The plaintiff was confronted with an emergency situation with respect to his knee condition due to the defendant employer's failure to provide medical care and due to the defendant employer's series of appeals, and he accordingly sought and received treatment from a doctor of his own choosing.
>
> He, therefore, is entitled to have the reasonable cost of such medical services paid by the defendant employer. G.S. 97-25.

Based upon his findings of fact and conclusions of law, Deputy Commissioner Rush made an Award which contained the following language:

> 1. The defendant employer shall pay the medical expenses the plaintiff incurred as a result of the treatments he received from Dr. Frederick R. Klenner, when these bills shall have been submitted to and approved by the North Carolina Industrial Commission.

On 27 June 1978, defendant moved that the Opinion and Award be held in abeyance until the testimony of Dr. Frank Bassett of Duke Medical Center could be taken and considered. Deputy Commissioner Rush denied the motion by order filed 6 July 1978.

Upon appeal, the Full Commission affirmed as follows:

> We are of the opinion that the findings of fact by the hearing commissioner as contained in the Opinion and Award filed June 12, 1978 are supported by the evidence and his conclusions of law are without prejudicial error. His decision is hereby adopted as the decision of the Full Commission. The result reached by him is hereby in all respects.
>
> AFFIRMED.

The Court of Appeals, in an opinion by Judge Hill, Judge Erwin concurring, affirmed. Judge Vaughn dissented. Defendants appealed to this Court pursuant to G.S. 7A-30(2).

Caudle, Underwood & Kinsey, by Lloyd C. Caudle and John H. Northey III, for defendant appellant.

R. A. Collier for plaintiff appellee.

BRANCH, Chief Justice.

[1] Defendant first contends that the Commission erred in awarding medical expenses to Dr. Klenner because plaintiff was under the care of defendant's physicians just prior to the Reidsville incident and was therefore without authority to select his own physician. Plaintiff maintains that he was confronted with an emergency and thus was justified in procuring the services of Dr. Klenner.

The authorities in the area of Workmen's Compensation laws agree that, as a general rule,

> an employer has the right, in the first instance, to select the physician, surgeon or hospital to treat and care for an injured employee, and when the employer exercises this right by seasonably providing a competent physician, surgeon or hospital to care for the employee, the employee may not without good cause refuse the services of the physician, sur-

geon, or hospital proffered him, or seek the services of another.

W. Schneider, 10 *Workmen's Compensation Text* § 2005 (3d Ed. 1953); A. Larson, 2 *Workmen's Compensation Law* § 61.12 (1975); Annot., 7 A.L.R. 545 (1920); 82 Am. Jur. 2d "Workmen's Compensation" § 391 (1976). Generally, an employee is not at liberty to procure his own medical treatment at the expense of his employer, without the latter's knowledge and consent. Schneider, *supra* § 2001. However, there are at least three recognized exceptions to this rule. They are: (1) where the employer neglects or refuses to provide prompt and adequate services; (2) where the employee is confronted with an emergency; and (3) where the statute itself authorizes the employee to procure a physician of his own choosing. Larson, *supra*. Most of the compensation acts provide for some, if not all, of the three exceptions. *See e.g.*, Ga. Code Ann., § 114-501 (Cum. Supp. 1979); Mass. Gen. Laws Ann., Ch. 152 § 30 (1932).

Recognizing that Workmen's Compensation acts are creatures of the Legislature, we turn first to our own statutes to determine under what circumstances, if any, they permit an employee to procure his own medical treatment in lieu of that provided by his employer. The relevant statute, G.S. 97-25, reads as follows:

> § 97-25. *Medical treatment and supplies.*—Medical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.
>
> The Commission may at any time upon the request of an employee order a change of treatment and designate other

treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical or other care as herein specified a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission: Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission.

The final paragraph of G.S. 97-25 clearly indicates that the Legislature contemplated the need, in an emergency, for an employee to seek the services of another physician. Defendant argues, however, that plaintiff's emergency was not "*on account of the employer's failure to provide*" medical treatment, since defendant's physicians were treating plaintiff just prior to the Reidsville incident. In our view, defendant's interpretation is unduly restrictive.

In the first place, we do not read the word "failure" to connote only a wilful refusal on the part of the employer to provide medical services. "Failure" means "[d]eficiency, want, or lack," *Black's Law Dictionary* 534 (5th Ed. 1979), and, in our view, an employee is justified under this statute in seeking another physician in an emergency where the employer's "failure to provide" medical services amounts merely to an *inability* to provide those services. In the present case, plaintiff was visiting his sister in

Reidsville, North Carolina, one hundred and fifty miles or more from defendant's physicians in Charlotte. At 11:00 on a Friday night, plaintiff sought medical treatment from a Reidsville doctor because "his knee was swollen four times the normal size . . . and every time he flexed his knee, pus ran profusely as thick as a man's finger from the opening." Common sense dictates that this was an emergency and that plaintiff was forced to call in another physician "on account of the employer's [inability] to provide" medical services. *Cf. Armstrong v. Allstate Insurance Co.*, 135 Ga. App. 278, 217 S.E. 2d 486 (1975) (applying identical statutory language).

Moreover, even assuming that defendant's rigid interpretation of "failure" were valid and that G.S. 97-25 required a refusal on the part of an employer before an employee could seek his own doctor, plaintiff would have been justified in doing so on the facts of this case. On 3 September 1974, defendant notified plaintiff that it would not be responsible for medical services after 5 June 1974. Plaintiff's emergency took place 9 April 1976, just after the hearing officer's initial hearing regarding defendant's disclaimer of responsibility. No findings or award had issued. Neither had a final order been entered. In light of defendant's disclaimer, plaintiff could not have known whether defendant would assume the financial responsibility of providing the treatment. Thus, in our view defendant's disclaimer amounted to a wilful "failure to provide" medical services.

[2] Defendant next contends that, even if plaintiff was confronted with an emergency situation on 9 April 1976 justifying Dr. Klenner's initial treatment, such emergency did not last for the entire seventeen months in which Dr. Klenner continued to treat plaintiff. Defendant maintains it should be liable only for medical expenses for the period of the actual emergency. On the other hand, plaintiff argues that the prolonged treatment was necessary to save his life and thus, was in the nature of an emergency. The Court of Appeals found that the continued treatment was justified by virtue of the proviso attached to the last paragraph of G.S. 97-25.

Our resolution of the question of whether, in the absence of an emergency, an employee may procure a doctor of his own choosing, must again rest with the language of the statute. The

second paragraph of G.S. 97-25 reads, in pertinent part, as follows: "The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission . . . ." This language clearly authorizes a change of treatment upon the request of an employee, and presumably a change of treatment would encompass a change of physician.

The Court of Appeals, however, found statutory authorization for a change of physicians in the following underscored language:

> If in an emergency on account of the employer's failure to provide the medical or other care as herein specified a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission: Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission. [Emphasis added.]

We note, initially, that the above proviso tends to confuse rather than enlighten. While the major portion of G.S. 97-25 was adopted in 1929, the proviso was added in 1933. 1929 N.C. Sess. Laws ch. 120, § 25; 1933 N.C. Sess. Laws ch. 506. By virtue of the connecting colon, the proviso appears to attach solely to the emergency provision and arguably only applies in an emergency. If this were so, however, the proviso would be redundant and mere surplusage, since the emergency clause already permits a change of physicians. It must be presumed, where the Legislature has amended a statute, that it intended to add to or to change the existing enactment. *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E. 2d 481 (1968). Moreover, words of a statute are not to be deemed merely redundant if they can reasonably be construed to add something to the statute which is in harmony with its purpose. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968).

Chapter 506 of the 1933 North Carolina Session Laws reads as follows:

AN ACT TO AMEND SECTION 25 OF CHAPTER 120 OF THE PUBLIC LAWS OF 1929, RELATING TO CHOICE OF PERSONAL PHYSICIAN.

The General Assembly of North Carolina do enact:

Section 1. That section twenty-five of chapter one hundred and twenty, Public Laws of one thousand nine hundred and twenty-nine, be and the same is hereby amended by adding to said section the following: "*Provided, however*, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission."

We note first that the amendment itself does not include a colon; nor is there any indication that the amendment attach solely to the final paragraph of G.S. 97-25. On the contrary, the language of the Session Laws indicates that the proviso attaches to the entire section of G.S. 97-25. Obviously, the connecting colon was inserted inadvertently in the process of codifying the amendment. Nevertheless, the certified transcript of a Session Law controls over the statement of its contents as codified. *Wright v. Casualty Co.*, 270 N.C. 577, 155 S.E. 2d 100 (1967). We therefore hold that the proviso to G.S. 97-25 constitutes a proviso to the entire section, and not solely to the emergency provision. Construed in this light, the proviso clearly states that an injured employee has the right to procure, even in the absence of an emergency, a physician of his own choosing, subject to the approval of the Commission.

[3] Defendant next contends that medical expenses should not have been awarded because plaintiff notified neither the Commission nor defendant that he had selected his own physician to assume treatment. Defendant concedes that an emergency, by its very nature, would preclude the giving of notice prior to the commencement of emergency treatment. Defendant maintains, however, that even if plaintiff were authorized under the statute to obtain his own doctor, he was required once the emergency terminated at least to notify the Commission or defendant that he had selected another doctor. Plaintiff contends, on the other hand, that the statute itself provides only that an employee's selection of a physician be "*subject to* the approval of the Industrial Com-

mission." Plaintiff thus argues that there is no requirement of *prior* approval, and further, that there is no time limit within which approval must be sought.

The Court of Appeals found no error in the Commission's approval of Dr. Klenner's claim and stated simply that "[t]here is no requirement that such approval must be in advance of the change —only that the change must be approved."

We agree that G.S. 97-25 imposes no requirement of notice or approval *prior* to an employee's procurement of his own physician. However, we cannot adhere to the expansive construction urged upon us by plaintiff and approved by the Court of Appeals.

In the case before us, plaintiff sought the services of Dr. Klenner on 9 April 1976. At that time, plaintiff was authorized under the statute's emergency provision to procure his own doctor. However, Dr. Klenner's treatment continued for a period of seventeen months, during which time neither he nor plaintiff made any attempt to notify defendant or the Commission.

In construing a statute, courts will not adopt an interpretation that results in palpable injustice when the statute is susceptible of another interpretation which is consonant with the purpose and intent of the act. *Little v. Stevens*, 267 N.C. 328, 148 S.E. 2d 201 (1966). In addition, "courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results." *Commissioner of Insurance v. North Carolina Automobile Rate Administration Office*, 294 N.C. 60, 68, 241 S.E. 2d 324, 329 (1978).

The Court of Appeals interpreted the statute as imposing no time limits whatsoever on the giving of notice or seeking of approval by an employee who changes physicians. Such a reading of the statute suggests that an employee may wait an indefinite period of time before obtaining authorization and approval from the Industrial Commission. However, it is inconceivable to us that the legislature intended to authorize an employee in this situation to give notice at his whim. Moreover, construing the statute as plaintiff urges would work a burden and an injustice on all parties involved. In fairness to everyone concerned, including the injured employee and his doctor, an employer who is subject to liability

for medical costs ought to be apprised of the fact, as soon as is practicable, that the employee is undergoing treatment and that he has procured a doctor of his own choosing to administer the treatment.

We therefore construe the statute to require an employee to obtain approval of the Commission within a reasonable time after he has selected a physician of his own choosing to assume treatment. In this case, plaintiff procured the services of Dr. Klenner during an emergency. Upon termination of the emergency, plaintiff should have given prompt notice that he was electing to have Dr. Klenner assume further treatment. Furthermore, as we construe the statute, plaintiff was required to obtain approval of the Commission within a reasonable time. We so hold.

Even so, plaintiff submits that the Industrial Commission was without jurisdiction to receive notice during the seventeen-month period of treatment, since, for most of that period, the claim involving defendant's disclaimer of liability was in the process of appellate review and thus within the jurisdiction of the appellate courts. According to plaintiff, Dr. Klenner was justified in waiting to submit his claim until jurisdiction was returned to the Industrial Commission following this Court's denial of defendant's petition for discretionary review in May, 1977. The Court of Appeals held that the Industrial Commission "lost its jurisdiction" while the case was on appeal, and thus there was no reason to give notice to or to file claim with the Commission during the pendency of the appeal. We disagree.

The Industrial Commission is primarily an administrative agency of the State, and its jurisdiction as an administrative agency is a continuing one. *McDowell v. Kure Beach*, 251 N.C. 818, 112 S.E. 2d 390 (1960); *Hanks v. Utilities Co.*, 210 N.C. 312, 186 S.E. 252 (1936). The Industrial Commission acts in a judicial capacity only in respect to a controversy between an employer and employee. *Hanks v. Utilities Co., supra.* The existence of such a controversy, or an appeal from the determination of such a controversy, does not operate to divest the Commission of its administrative powers. Obviously, an appeal of an award of the Industrial Commission does not suspend that agency's authority to accept notification of an employee's decision to select his own doctor; neither does an appeal deprive the Commission of its

jurisdiction to accept the submission of a claim. It may well be that the determination of the particular claim will be delayed until the outcome of the appeal. Nevertheless, the Commission has *jurisdiction* to receive the claim and is, in fact, the only agency vested with that jurisdiction. *Thomason v. Red Bird Cab Company*, 235 N.C. 602, 70 S.E. 2d 706 (1952).

Although we have concluded that plaintiff was statutorily authorized to seek medical services from a physician other than one provided by defendant, we are constrained to remand the case to the Industrial Commission for further findings.

[4] Under the statute, when a doctor is called to treat an employee in an emergency, the Industrial Commission may order the employer to pay the "*reasonable* cost of such service." Implicit in determining whether the cost of emergency treatment is reasonable is a determination of how long the emergency lasted. In this case, no evidence in the record tends to show the duration of plaintiff's emergency, and the hearing officer made no finding as to the length of the emergency. We therefore hold that, before approving the cost of emergency treatment rendered by "a physician other than provided by the employer," the Industrial Commission must make findings, based upon competent evidence, relative to the duration of the emergency. Additionally, in light of our holding today that an employee who procures his own doctor must obtain approval by the Commission within a reasonable time after such procurement, the Commission must make findings relative to whether such approval was sought in this case within a reasonable time.

Deputy Commissioner Rush also concluded that defendant was liable to pay for the medical services which Dr. Klenner provided following the termination of the emergency. Under G.S. 97-25, an employer must provide for medical treatment "as may reasonably be required to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability . . . ." The proviso which authorizes an employee to procure his own physician does not explicitly require that the physician's services be required "to effect a cure or give relief." Neither does the proviso require that the treatment or services "tend to lessen the period of disability." However, the provisions of G.S. 97-25 are *in pari materia* and

must be construed together as a whole. *See Duke Power Co. v. Clayton*, 274 N.C. 505, 164 S.E. 2d 289 (1968). Fairness requires that medical treatment provided by the employee's own doctor be subject to the same limitations, terms and conditions as apply to medical treatment provided by the employer. *See* G.S. 97-25 para. 2.

[5] We therefore hold that, upon submission of a claim for approval for medical treatment rendered by the employee's own physician, there must be findings based upon competent evidence that the treatment was "required to effect a cure or give relief," or where additional time is involved, that it has "tend[ed] to lessen the period of disability." There should also be findings that the condition treated is, or was, caused by, or was otherwise traceable to or related to the injury giving rise to the compensable claim. 99 C.J.S. "Workmen's Compensation," § 269 (1958).

When the instant case was before Chief Deputy Commissioner Shuford on the issue of defendant's attempted disclaimer of medical benefits, he concluded that defendant was liable "for the payment of all medical expenses incurred as a result of the injury by accident giving rise hereto and is responsible for the payment of *any additional medical treatment which will tend to lessen plaintiff's disability.* [Emphasis added.] 32 N.C. App. 508, 232 S.E. 2d 874 (1977). Such a finding became the law of this case upon this Court's denial of defendant's petition for discretionary review in May, 1977. A finding should have been made in this case, based upon competent evidence, that Dr. Klenner's treatment of plaintiff's condition tended "to lessen plaintiff's disability." The case is therefore remanded to the Court of Appeals for further remand to the Industrial Commission. That agency will consider the record evidence as well as any additional evidence either party wishes to present, and make findings with respect to the duration of plaintiff's emergency, whether plaintiff sought approval of the Commission within a reasonable time after electing to retain the services of Dr. Klenner, the extent to which Dr. Klenner's treatment tended to lessen plaintiff's disability, and whether the condition treated was caused by or related to the injury giving rise to plaintiff's compensable claim.

Defendant's final assignment of error relates to the denial of its motion to take the testimony of Dr. Frank H. Bassett in order

to rebut Dr. Klenner's testimony. Following the hearing before Deputy Commissioner Rush on 18 January 1978, defendant requested that the hearing officer take and consider the testimony of Dr. Frank Bassett of Duke Medical Center. Without taking the testimony of Dr. Bassett, the hearing officer entered his findings and award. Defendant subsequently made a motion that the findings and award be held in abeyance until Dr. Bassett's testimony could be taken. The motion was denied.

Defendant contends that it was denied a full and fair hearing and had no opportunity to present rebuttal evidence. According to defendant, Dr. Bassett would have challenged the effectiveness and duration of Dr. Klenner's treatment of plaintiff.

Ordinarily, the question of whether to reopen a case for the taking of additional evidence rests in the sound discretion of the Industrial Commission, and its decision will not be disturbed on appeal in the absence of an abuse of discretion. *Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 139 S.E. 2d 857 (1965). We adhere to this rule. However, we have concluded that the Commission acted under a misapprehension of law in making its award in that, as hereinabove set forth, there was no evidence or findings to support certain conclusions, and that it is necessary that the Commission take further evidence and make appropriate findings. The admissibility of Dr. Bassett's testimony will then be properly before the Commission in light of our holding herein. Thus we need not, at this point, decide whether the Commission abused its discretion in denying defendant's motion to take Dr. Bassett's testimony. *See Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978); *Hall v. Thomason Chevrolet, Inc., supra.*

For the reasons stated, the award is vacated, and the case is remanded to the Court of Appeals with direction that it be remanded to the Industrial Commission for further proceedings in accordance with this opinion.

Vacated and remanded.

STATE OF NORTH CAROLINA v. WILBERT JUNIOR ROGERS

No. 39

(Filed 1 April 1980)

1. **Criminal Law § 89.5 — corroborative evidence — element not included in prior testimony**

Where a witness testified that defendant pulled deceased from defendant's car and "went to the bridge with him," that he heard another person say, "Don't throw that boy in that cold-ass water," and that he then heard a splash, an officer's testimony that the first witness told him defendant took the deceased from defendant's car "over to the side of the bridge and [threw] him over" and that he then heard a splash was admissible to corroborate the first witness's earlier testimony, although the officer's testimony went beyond the testimony of the first witness in stating that the witness told the officer that he actually saw defendant throw deceased over the side of the bridge, since the testimony of the first witness and of the officer constituted substantially the same account of the activities which occurred on the bridge, the clear implication of the first witness's testimony was that defendant threw deceased over the side of the bridge, and the fact that the officer's testimony included an additional element in its narrative of the events on the bridge did not render it incompetent as corroborative evidence.

2. **Homicide § 27.1 — instructions — second degree murder and manslaughter — heat of passion — error cured by further instructions**

Any error in the court's confusing instruction on finding defendant guilty of voluntary manslaughter rather than second degree murder if the State failed to prove that defendant did not act in the heat of passion upon adequate provocation was cured by correct instructions thereafter given to the jury when the jury requested additional instructions on second degree murder and manslaughter.

Justice EXUM concurring.

Justices COPELAND and BROCK join in the concurring opinion.

ON discretionary review to review the decision of the Court of Appeals reported at 43 N.C. App. 177, 258 S.E. 2d 418 (1979), affirming the judgment entered by *McLelland, J.*, at the 21 August 1978 Criminal Session of ALAMANCE Superior Court.

Upon a plea of not guilty, defendant was tried upon a bill of indictment proper in form which charged him with the first-degree murder of Talmage Ray Yancey (Ray Yancey). At the beginning of the trial, the state announced that it would not seek a conviction of any degree of homicide greater than second-degree murder. Evidence by the state is summarized in pertinent part as follows:

On the evening of 24 December 1977, defendant, Clester Massey, Joe-Joe Yancey, Charles Snipes, and Ray Yancey had gathered in a club in Burlington, North Carolina, and were drinking. After a short time, the group left and proceeded to a tavern in Burlington known as Floyd's Place where they continued to drink beer. They travelled in a blue station wagon driven by defendant. While they were at the second club, defendant agreed to drive the group for a price to a discotheque in Burlington known as the Zodiac.

As the group rode to the Zodiac in defendant's car, they began fighting when defendant was accused of charging too much for the ride. Defendant stopped the car, and the fighting continued both inside and outside of the automobile. In the course of the fighting, defendant was beating upon Ray Yancey. The brawl ended as a police car approached the scene. Several persons left the automobile, and defendant then took on more passengers.

After driving a short distance, defendant ordered Charles Snipes to get out of the car. Snipes thereupon requested that he be allowed to remove his friend, Ray Yancey, from the automobile. Defendant refused the request, and he struck Snipes twice in the face with his fist as he sought to get out of the vehicle. Defendant left Snipes on the side of the road as he drove off.

One of the individuals that defendant picked up after the fight was Robert Moore. Moore remained a passenger in defendant's car after Snipes had been forced to exit. Moore and Charlie Phillips, who had also been picked up after the fight, rode with defendant and Ray Yancey to Stoney Creek Bridge on North Carolina Highway 62, north of Burlington. Moore testified for the state that defendant stopped the car on the bridge; that defendant pulled Ray Yancey, who was then asleep, from the automobile and towards the edge of the bridge; that he then heard someone say, "[M]an, don't throw that boy in that cold-ass water," and that he then heard the water splash. Defendant then got back into the vehicle and drove off.

Ray Yancey was reported missing to the Alamance County Sheriff's Department on 26 December 1977 by his aunt. On 2 January 1978, the detective division received an anonymous phone call that Yancey had been thrown in the Haw River at Glencoe Bridge. A search of the area proved unsuccessful. On 5

January 1978, the division received another phone call telling them that the body would be found at Stoney Creek Bridge. This call was from Ruben Totten, an officer at the Alamance County Sheriff's Department. Totten had obtained the information from talking with Robert Moore and Willie Moore. Relying on this information, elements of the Alamance County Rescue Squad and the sheriff's department went to the bridge. After a search of approximately one and a half hours, Yancey's body was found and brought ashore.

The body was then taken to the office of the Chief Medical Examiner of the State of North Carolina in Chapel Hill where an autopsy was performed. At trial, Dr. Bradley B. Randall, a forensic pathologist who had been on the staff of the Chief Medical Examiner on 6 January 1978 when the autopsy was performed, testified that the cause of Yancey's death was fresh water drowning and that the influence of alcohol coupled with a low water temperature would have made it difficult for decedent to have removed himself from the water.

Defendant offered no evidence.

The jury found defendant guilty of second-degree murder. Judge McLelland thereupon entered judgment upon the verdict and sentenced defendant to prison for a term of from seven to twelve years.

Defendant appealed. The Court of Appeals found no error. Defendant gave notice of appeal and petitioned for discretionary review pursuant to G.S. 7A-31. On 4 December 1979, we granted the Attorney General's motion to dismiss the appeal, but we allowed the petition for discretionary review for the limited purposes of: (1) reviewing the admission of certain testimony at trial which was purportedly corroborative in nature, and (2) considering the propriety of the trial court's instructions concerning voluntary manslaughter.

Attorney General Rufus L. Edmisten, by Associate Attorney Grayson G. Kelley, for the State.

H. Clay Hemric, Jr., for defendant-appellant.

BRITT, Justice.

[1] Defendant contends that the trial court committed prejudicial error in admitting the testimony of Lieutenant Daniel Qualls, a detective with the Alamance County Sheriff's Department. The essence of defendant's contention is that the officer was able to testify in a narrative fashion as to his interpretation of the events which occurred on the evening of 24 December 1977. By so doing, he was then able to fill in portions of the narrative which were crucial to the state's case but which had not been testified to by any of the state's witnesses. Defendant therefore concludes that the testimony of the detective was not corroborative in nature but was, in fact, incompetent hearsay whose admission entitles him to a new trial. We disagree.

During the presentation of the state's case-in-chief, Robert Moore testified on direct examination that

> [Defendant] went around the car from the front of it and opened the door and pulled this guy out. There were no lights except the headlights. . . . Well, he—he—he pulled him out and went to the bridge with him. I heard Charlie [Phillips] say, 'Man,' say, 'don't throw that boy in that cold-ass water,' and about this time I heard the water splash. . . . I heard the water splash and just continued sitting in the car. I didn't hear anybody say anything except Charlie. As to what happened outside the car, it was sort of a blur like and dark outside the car. I saw him when he pulled the Yancey boy out of the car onto the bridge with him.

Later on in the state's case-in-chief, Detective Qualls testified regarding a conversation he had with Robert Moore on 12 January 1978. On direct examination, the officer testified that Moore told him that

> . . . the defendant, Wilbert Rogers, gets out, goes around in front of the vehicle, opens the passenger's door on the car, takes the defendant—correction, takes the victim, Talmadge Yancey, out, takes him over to the side of the bridge and throws him over. He heard the man hit the water, hears the splash. From the time he heard the—heard the splash, he didn't hear any more struggling, no more splashing in the water.

Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. *See State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. denied*, 365 U.S. 830 (1961); *Lassiter v. Seaboard Air Line Ry.*, 171 N.C. 283, 88 S.E. 335 (1916). Where testimony which is offered to corroborate the testimony of another witness does so substantially, it is not rendered incompetent by the fact that there is some variation. *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978); *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939 (1972). It is the responsibility of the jury to decide if the proffered testimony does, in fact, corroborate the testimony of another witness. *State v. Lester, supra; State v. Case, supra.*

A careful comparison of the testimony of the detective with that offered by the witness Moore indicates that the two are substantially the same account of the activities which occurred on the Stoney Creek Bridge on the evening of 24 December 1977. This same analysis clearly shows that the testimony of Detective Qualls goes beyond that of Moore in one important respect: At no time did Moore testify that he actually saw defendant throw Talmadge Yancey over the side of the bridge. However, the clear implication of Moore's testimony is that defendant did precisely that act. That Moore did not mention one act which was clearly a component of a series of interrelated acts does not in any way serve to abridge the probative force of the rest of his testimony.

That the testimony of the detective differed from that of Moore in that it embodied an additional element in its narrative of the events of 24 December 1977 does not render it incompetent as corroborative evidence. We do not mean to suggest that we are calling into question the continued viability of the rule of *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963). *Brooks* stands for the proposition that the state may not introduce new evidence through testimony which purportedly corroborates the testimony of a prior witness. On the facts of this case, *Brooks* does not come into play in that the proffered testimony meets the threshold test of substantial similarity. It must be observed also that in the present case, there was no objection to this portion of the officer's testimony, nor was there a motion to strike. Had there been such a request, the court would have been obligated to instruct the jury that the officer's testimony was not substantive

evidence but was to be considered by them with reference to the weight and credit they would give to Moore's testimony if the jury found that it did corroborate his testimony. *See State v. Westbrook, supra.* There was no error.

At a later point in his direct examination, Detective Qualls testified with respect to a trip to the Stoney Creek Bridge with Moore in early March 1978. Over objection, the officer testified about what Moore told him on the trip as to where defendant had stopped the car on the bridge on the evening of 24 December 1977 and Moore's pointing out where the car stopped. We perceive no error in the admission of this evidence as it too was competent to corroborate Moore's testimony. *State v. Westbrook, supra; see generally* 1 Stansbury's North Carolina Evidence §§ 50, 52 (Brandis Rev. 1973).

[2] Defendant assigns as error the following portion of Judge McLelland's charge to the jury:

> If the State does not prove beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation and that his action was so soon after the provocation that the passion of a person of average mind and disposition would not have cooled, then you may not find the defendant guilty of second-degree murder, but he would at most be guilty of voluntary manslaughter.

Defendant argues that the quoted instruction was erroneous and prejudicial to him. The state argues that even if the instruction was erroneous, it was favorable to defendant because it placed a greater burden on the state than is required. The state further argues that any error in the instruction was cured by later instructions given by the court.

Reasonable minds can disagree as to the true meaning of the instruction complained of. We can appreciate the difficulty the trial judge encountered in charging juries in compliance with the decision in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), which mandated our decision in *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd. on other grounds* 432 U.S. 233, 53 L.Ed. 2d 306 (1977). Nevertheless, we must say that the challenged instruction is confusing and difficult, if not impossible, to understand.

Assuming, *arguendo*, that the instruction is erroneous, we hold that it was not prejudicial to defendant in view of the later instructions given by the trial judge.

Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Cousins*, 289 N.C. 540, 223 S.E. 2d 338 (1976); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). Voluntary manslaughter is the unlawful killing of a human being, without malice, express or implied, and without premeditation and deliberation. *State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971).

After the jury had retired to commence its deliberations, they returned to the courtroom and, through their foreman, requested additional instructions on the crimes of second-degree murder and voluntary manslaughter. In his supplemental instructions, Judge McLelland stated that:

> Mr. Foreman and members of the jury, as indicated in the instructions yesterday, second degree murder is defined in law as the intentional, unlawful killing of a human being with malice. The State, to prove second degree murder, must prove that the act which proximately caused the death was intentional. It is not required to prove that the defendant had a specific intent to kill, but specifically intended to do the act which proximately caused the death. The killing of a human being is unlawful unless excused by some circumstances, and I instruct you that there are no circumstances in evidence which would excuse the killing.
>
> The State, to prove second degree murder, must prove by evidence beyond a reasonable doubt that two things, first, that the defendant intentionally and without malice pushed Ray Yancey over a bridge. Malice is hatred, ill will, or spite and is also that condition of mind which prompts a person to take the life of another person by an intentional act which proximately results in the death of that other person without just cause or excuse or wantonly to act in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty and a callous disregard for human life. And secondly, the State must prove beyond a reasonable doubt that the act of pushing Ray Yancey off the bridge was a prox-

imate cause of Yancey's death. Proximate cause is real cause, cause without which Yancey would not have died.

*****

Voluntary manslaughter is the unlawful, intentional killing of a human being without malice. Unlawful is, as I have defined if (sic) before, a killing not justified by any excuse the law recognizes; and I instruct you again there is no evidence of any excuse in this case that the law recognizes as justifying the killing. The intentional aspect again is not a specific intent to kill, but an intent to throw him off the bridge. The State must prove beyond a reasonable doubt that that act was intentional. The State need not prove that he acted with malice. If, however, the State has proved that he acted with malice, then you must consider whether or not the evidence shows, not beyond a reasonable doubt but simply shows, that he acted in the heat of passion, or heat of blood, upon adequate provocation. . . .

If he acted in the heat of passion, or heat of blood, upon adequate provocation though you find there was malice, not considering the action in the heat of passion, then he would be guilty at most of voluntary manslaughter, not second degree murder, for one who acts in the heat of passion acts without malice; and though you find other evidence of malice, if you find, if you believe, the State's duty being to prove beyond a reasonable doubt that he did not act in the heat of passion, if you believe he acted in the heat of passion, then he can be guilty of no higher offense than manslaughter, voluntary manslaughter.

*****

So I instruct you as to voluntary manslaughter, as I instructed you yesterday, that if you find from the evidence beyond a reasonable doubt that on or about December 24-25, 1977, the defendant intentionally pushed Ray Yancey over the bridge, but the State has failed to satisfy you that in doing so he acted with malice either in that the State's evidence does not prove beyond a reasonable doubt that he had malice toward Yancey or the State has not proved beyond a reasonable doubt that he did not act in the heat of

> passion upon adequate provocation; and if the State has further proved beyond a reasonable doubt that the defendant's act was a proximate cause of his death, your duty would be to return a verdict that he is guilty of voluntary manslaughter.

These further instructions stated accurately the applicable rules of law as we have summarized them above. That the jury requested additional instructions indicates that they might have been confused by the earlier instructions.

The charge of the court must be construed contextually, and isolated portions will not be held prejudicial error when the charge as a whole is free from objection. *E.g., State v. Bailey,* 280 N.C. 264, 185 S.E. 2d 683, *cert. denied,* 409 U.S. 948 (1972). The supplemental instructions of Judge McLelland, when coupled with the principal instructions he first gave, correctly informed the jury as to the applicable law and in no way prejudiced defendant's rights to a fair trial.

The decision of the Court of Appeals is

Affirmed.

Justice EXUM concurring.

Although I concur in the result reached by the majority in the case today, I cannot agree that certain portions of the testimony of Detective Daniel Qualls concerning the 12 January conversation Qualls had with the state's witness Robert Moore were competent to "corroborate" Moore's earlier testimony. Moore's testimony about the fatal incident at Stoney Creek Bridge reveals at most that defendant pulled the deceased from defendant's car and "went to the bridge with him"; that Charlie Phillips then said, "Don't throw that boy in that cold-. . . water"; and that Moore then heard a splash. Detective Qualls' testimony, on the other hand, clearly indicates that Moore told Qualls that the defendant took the deceased "over to the side of the bridge *and [threw] him over. He [Moore] heard the man hit the water* . . . ." Far from merely corroborating, strengthening, confirming, or making more certain Moore's direct testimony as to the incidents observed at the bridge, Qualls' testimony goes further to add the crucial element that Moore had told Qualls of actually

seeing the defendant commit the very crime for which he is charged. In this respect, Qualls' testimony was inadmissible hearsay which should have been stricken had a proper and timely objection been offered.

In *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963), this Court recognized that the state may not, under the guise of "corroboration," introduce "new" evidence—i.e., evidence which substantially and materially goes beyond that which it is intended to corroborate. If, however, presumably "corroborative" testimony is generally consistent with the evidence which it purports to buttress, slight variations between the two will not render the testimony inadmissible. "Such variations affect only the credibility of the evidence which is always before the jury." *Id.* at 189, 132 S.E. 2d at 357. The majority's analysis purports to adhere to the continued viability of the rule in *Brooks* by characterizing Qualls' "corroborative" testimony as bearing no more than slight variations from the substance of Moore's statements on the stand. I disagree. A witness' statement that a defendant was in a position, or even in actual preparation, to commit a crime is far different from a statement that the witness *saw* the defendant do the criminal act. The latter does not *corroborate* the former; rather it adds to it an element of central importance to the prosecution's case. Although it may be true in the instant case that "the clear implication of Moore's testimony is that defendant did precisely that act" for which he is charged, such an implication nevertheless was one for the jury to accept or reject on the basis of competent evidence adduced at trial. It should not be embellished by subsequent hearsay testimony improperly admitted under the guise of "corroboration." Corroboration is a matter of supporting the substance of prior evidence, not its inferences or implications.

The cases cited by the majority on this point merely serve to sketch the contours of permissible variation between evidence and its subsequent corroboration. In *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. denied*, 365 U.S. 830 (1961), the prosecuting witness testified that her assailants tied her to a tree and told her she had fifteen seconds to escape before they would come back and take her life. A second witness testified in corroboration that the prosecutrix had told him that she was given sixteen seconds to escape. This Court found no error in the admission of

the corroborating testimony. In *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939 (1972), defendant was on trial for the murder of Carla Jean Underwood. The state's chief witness, defendant's accomplice, testified that defendant shot Miss Underwood and that he and defendant then left the scene of the crime and drove to a residence at which a Mr. and Mrs. Bozart were visiting. A police officer's subsequent testimony as to statements made by the witness to him corroborated the witness' testimony in all respects except that the officer testified that the witness had stated that the purpose of going to the house where the Bozarts were had been to rob a safe in the house. Noting that the officer's testimony "substantially" corroborated the witness' statements from the stand, this Court found no error in its admission. Similarly, in *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978), a first degree murder case based upon a theory of premeditation and deliberation, defendant's accomplice testified that the victim had voluntarily submitted to his and defendant's sexual advances before defendant stabbed her. The witness' brother then testified in corroboration that the witness had told him that the victim had been raped by the witness and defendant. This Court found no prejudice in the admission of the brother's testimony: "The statement objected to substantially corroborated the principal witness *as to the crime of murder*." 294 N.C. at 230, 240 S.E. 2d at 399. (Emphasis supplied.)

In both *Lester* and *Westbrook*, then, the variation between the substantive evidence and its subsequent corroboration was deemed slight where the bits of "new" evidence added by the corroborative testimony had no bearing on any of the elements of the crimes charged. In the instant case, however, the "new" evidence brought in by Detective Qualls' corroborative testimony was that Moore had stated that he had seen the defendant push the victim off the bridge—a fact not testified to by Moore and one which goes to the very heart of the state's case in chief. The additional element embodied in Qualls' testimony thus cannot be casually dismissed as constituting only a "slight variation" from the witness' narrative it is intended to corroborate.

On point is *State v. Fowler*, 270 N.C. 468, 155 S.E. 2d 83 (1967), a first degree murder case wherein State's witness testified that defendant forcibly took a gun from a police officer, forced the officer into a jail cell, and then shot him. Another

witness testified in corroboration that the first witness had stated that defendant, before firing the gun, had said he "was sorry but he had to do this." This Court granted a new trial on the basis that the second witness' hearsay testimony was not corroborative and described an occasion of a fixed and premeditated purpose to kill. *See also State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976), for another instance where prejudice was found in the admission of purportedly corroborative testimony which actually added evidence material to the state's case.

That the quoted portion of Detective Qualls' testimony was improperly admitted, however, does not require a finding of reversible error under the facts of this case. In the first place, defendant made no objection, either general or specific, to the testimony. It is well settled in this state that a general objection will not suffice to challenge the offering of corroborative evidence which is arguably incompetent in some respects. "Rather, it is the duty of the objecting party to call to the attention of the trial court the objectionable part" with a specific objection. *State v. Britt*, 291 N.C. 528, 536, 231 S.E. 2d 644, 650 (1977); *accord, State v. Lester, supra*, 294 N.C. 220, 240 S.E. 2d 391. *A fortiori*, defendant cannot preserve an exception where no objection at all was taken. His counsel will not be heard to complain of error discovered for the first time on appeal. Secondly, there was plenary competent evidence offered at trial from which the jury could have determined defendant's guilt of the crime charged. In the absence of any indication that a different result would have occurred had Detective Qualls' testimony not been admitted, there was no prejudice to defendant such as to warrant a new trial. G.S. 15A-1443. I thus concur with the majority's result in this case.

Justices COPELAND and BROCK join in this concurring opinion.

Sneed v. Board of Education

LINDA FAYE SNEED, ON BEHALF OF HERSELF AND AS GUARDIAN AD LITEM FOR HER MINOR CHILD; MARGIE DEMASTUS, ON BEHALF OF HERSELF, AND AS GUARDIAN AD LITEM FOR HER MINOR CHILD; JANIFAR WILLIAMSON, ON BEHALF OF HERSELF AND AS GUARDIAN AD LITEM FOR HER MINOR CHILDREN; AND ALL OTHER SIMILARLY SITUATED v. GREENSBORO CITY BOARD OF EDUCATION; JAMES F. BETTS, AS CHAIRMAN OF THE GREENSBORO CITY BOARD OF EDUCATION; DR. KENNETH NEWBOLD IN HIS CAPACITY AS SUPERINTENDENT OF THE GREENSBORO PUBLIC SCHOOLS; JOSEPH R. BROOKS, IN HIS CAPACITY AS CHAIRMAN OF THE INTERIM MANAGEMENT COMMITTEE; AND RUFUS L. EDMISTEN, IN HIS CAPACITY AS ATTORNEY GENERAL OF NORTH CAROLINA

No. 84

(Filed 1 April 1980)

1. **Schools § 2— free public schools—incidental course and instructional fees**

The guarantee of a "general and uniform system of free public schools" in Art. IX, § 2(1) of the N. C. Constitution, as amended in 1970, refers to a tuition free education and does not preclude a school board from requiring public school students and their parents who are able to do so to pay modest, reasonable instructional fees for the purchase of supplementary supplies and materials, course fees, and rental and user fees. A fee schedule adopted by the Greensboro City Board of Education was constitutional where the highest instructional fee was the junior high school fee of $7.00 per semester, the highest course fee was $4.00 per semester for typing, and the highest rental or user fee was a $5.00 per semester charge for the rental of a musical instrument.

2. **Schools § 2— unconstitutionality of fee waiver policy**

A fee waiver policy adopted by the Greensboro City Board of Education was unconstitutional where it failed to establish a mechanism by which the schools would affirmatively notify students and their parents of the availability of a waiver or reduction of the fee or by which the students or parents themselves might apply for a partial or complete exemption from the fee requirements, since the waiver policy did not fairly guarantee to low income and indigent students their right under Art. I, § 15 and Art. IX, § 2(1) of the N. C. Constitution of equal access to the educational opportunities available at their schools and did not accord procedural due process to such students.

ON appeal from a judgment entered by *Judge Kivett*, presiding at the 27 November 1978 Civil Session of GUILFORD Superior Court, declaring student fee collection practices of defendants violative of the North Carolina Constitution. Pursuant to G.S. 7A-31 this Court granted petition for discretionary review on 28 June 1979 prior to determination by the Court of Appeals. This case was docketed and argued as No. 69, Fall Term 1979.

Central Carolina Legal Services, Inc., by Richard M. Greene and Jacqueline Forman, Attorneys for plaintiff-appellees.

Nichols, Caffrey, Hill, Evans, and Murrelle, by William D. Caffrey and R. Thompson Wright, Attorneys for defendant appellants Greensboro City Board of Education, James F. Betts, Dr. Kenneth Newbold, and Dr. Joseph R. Brooks.

Rufus L. Edmisten, Attorney General, by Andrew A. Vanore, Jr., Senoir Deputy Attorney General for the state.

Tharrington, Smith & Hargrove, by George T. Rogister, Jr., and Carlyn G. Poole, Attorneys for North Carolina School Boards Association, Inc., amicus curiae.

EXUM, Justice.

[1] The central question presented by this case is whether our state constitutional guarantee of a "general and uniform system of free public schools" precludes the charging of public school students with incidental course and instructional fees. We answer that it does not. We find no constitutional bar to the collecting by our public schools of modest, reasonable fees for the purpose of enhancing the quality of their educational effort.

Article IX, Section 2(1) of the North Carolina Constitution, as amended in 1970, directs that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of *free public schools* . . . wherein equal opportunities shall be provided for all students." (Emphasis supplied.) Relying on this provision, plaintiffs instituted this action on 12 June 1978, seeking declaratory and injunctive relief with regard to the practice in the Greensboro City School System of charging students instructional and course fees, and of requiring students to furnish certain instructional materials and gym uniforms on their own. After hearing cross-motions for summary judgment, Judge Kivett ruled on 19 March 1979 that the imposition by defendants of any instructional or course fees, or any requirement by defendants that students furnish any item which is a "necessary element" to their participation in courses offered for academic credit, violates the "free school" constitutional mandate. The March 19 order permanently enjoined defendant Greensboro City Board of Education from continuing such practices. Judge Kivett further held that

the Board's policy of waiving school fees in cases of indigency was unconstitutional in that it failed to provide a uniform procedure whereby all students and their parents would be notified of the policy and could apply for the waiver. For reasons which follow, we reverse Judge Kivett's order of injunction but affirm his ruling that the waiver policy is constitutionally infirm.

The student fee schedule established by Greensboro City Board of Education is not substantially different from similar schedules established by many other local boards of education throughout the state.[1] The charges imposed fall into three categoreis: (1) "instructional fees" are charges imposed schoolwide on each pupil at the beginning of each school semester. In

1. In 1977-78, nearly 80 percent of the state's 145 school units required fees of one sort or another. Eighty-nine of the units imposed flat "instructional fees" upon every student within a given grade level. Dellinger, "The Unresolved Status of Public School Fees," IX School Law Bulletin, No. 2, p. 2. (April 1978).

The collection of school fees is not uncommon in other states, despite the fact that the constitutions of 49 of the 50 states bear provisions that promise some sort of a "free" public school system. *Id.* Appellate courts of other jurisdictions have reached varying results where faced with state constitutional issues similar to those raised here. *See, e.g., Marshall v. School District Re #3 Morgan City,* 553 P. 2d 784 (Colo. 1976) (constitutional requirement of a "uniform system of free public schools" held not to require the provision of free textbooks or to ban rental fees); *Paulson v. Minidoka County School District No. 331,* 93 Idaho 469, 463 P. 2d 935 (1970) (constitutional mandate of a system of "public, free commmon schools" precludes the charging of a lump sum instructional fee or textbook fees); *Hamer v. Board of Education of School District No. 109,* 47 Ill. 2d 480, 265 N.E. 2d 616 (1970) (constitutional provision of a "thorough and efficient system of free schools" is not violated by the imposition of textbook fees); *Chandler v. South Bend Community School Corp.,* 160 Ind. App. 592, 312 N.E. 2d 915 (1974) (constitutional provision for public schools "whereby tuition shall be without charge" held not to guarantee free textbooks); *Bond v. Public Schools of Ann Arbor School District,* 383 Mich. 693, 178 N.W. 2d 484 (1970) (per curiam) (new language in the 1963 constitution providing for "a system of free public elementary and secondary schools" held to prohibit the charging of textbook or instructional fees); *Concerned Parents v. Caruthersville School District,* 548 S.W. 2d 554 (Mo. 1977) (constitutional requirement of "free public schools for the gratuitous instruction of all persons" interpreted to bar all fees for academic credit courses); *Granger v. Cascade County School District No. 1,* 159 Mont. 516, 499 P. 2d 780 (1972) (constitutional provision for a "general, uniform, and thorough system of public, free, common schools" construed to prohibit fees for any activity "reasonably related to a recognized academic and educational goal of the particular school system"); *Norton v. Board of Education of School District No. 16,* 89 N.M. 470, 553 P. 2d 1277 (1976) (constitutional promise of a "uniform system of free public schools" prevents charging fees for required courses; reasonable fees allowed for elective courses); *Board of Education v. Sinclair,* 65 Wis. 2d 179, 222 N.W. 2d 143 (1974) (constitutional mandate that "schools shall be free and without charge for tuition" allows the charging of textbook fees but prohibits instructional fees for credit courses.)

the Greensboro City System, these charges vary from as little as $5.00 per year ($2.50 per semester) for elementary school students to as much as $14.00 per year ($7.00 per semester) for students at the junior high school level. The fee proceeds are placed in an instructional materials fund in each school and are used to purchase supplemental educational materials and supplies. (2) "Course fees" are special fees imposed to defray the costs of fungible supplies and materials consumed in certain individual courses such as art, typing, vocational education, and laboratory science courses. All of these courses are offered for academic credit. Some are required, in the sense that the North Carolina Department of Public Instruction requires their completion before graduation from high school or junior high school. Others are elective, and can be credited toward the minimum hours of instruction required for graduation or promotion to a higher level. (3) "Rental and use fees" are customarily demanded for locker rentals, musical instrument rentals, and the rental (or required purchase) of gym uniforms for use in required physical education courses.

At the initiation of the present suit, these fees were charged without ascertaining the financial ability of individual students or their parents to pay them. Some exceptions, or waivers of fees, were made on a case by case basis, but there was no uniform waiver policy or procedure. Students who did not pay the required fees were subject to a variety of sanctions. The schools would, for example, withhold diplomas and grade reports, refuse to grant enrollment in the next semester, or deny registration in individual courses.

Plaintiffs contend the collection of any and all such fees is *now* prohibited by the "free public schools" language of the 1970 constitutional amendment to Article IX, Section 2(1). Prior to 1970 this provision read:

> "The General Assembly at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, *wherein tuition shall be free of charge* to all the children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate Public Schools, but there shall be no discrimination in favor of, or to the prejudice of either race." (Emphasis supplied.)

Plaintiffs argue that the 1970 deletion of the reference to free "tuition" and the insertion into the section of the words "free public schools" clearly evidences the intent of both the drafters of the 1970 amendment and the voters who approved it to make a substantive change in Article IX. According to plaintiffs, the constitution now requires that the legislature provide a system of *free* public schools operated completely without any cost or charge to any pupil. Any other interpretation, plaintiffs say, would fly in the face of the plain meaning of clear and unambiguous language. We do not agree with this position.

Few words have so fixed and literal a meaning as to preclude the necessity of examining the circumstances of their context and occasion for use. Where the construction of a constitutional provision is at issue, as here, it is incumbent upon this Court to interpret the organic law in accordance with the intent of its framers and the citizens who adopted it. Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation. "The court should place itself as nearly as possible in the position of the men who framed the instrument." *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E. 2d 512, 514 (1953).

Applying these well established principles of construction to the case, we find first that the use of the word "free" in our constitution's references to the public schools of this state is not a novelty of the 1970 constitutional revision. Although Article IX, Section 2 of the 1868 Constitution spoke only of "free" *tuition*, subsequent sections in the same article were replete with references to our system of "free public schools." For example, Article IX, Section 4 of the 1868 Constitution[2] directed that certain state funds "be faithfully appropriated for establishing and perfecting in this State a system of free public schools . . . ." Section 5 provided that the University of North Carolina "shall be held to an inseparable connection with the free public school system of the State." Section 9 spoke of the power of the State Board of Education to make all needful rules and regulations in relation to "free public schools." Certainly as far as the framers were concerned, our schools were required to be "free" in 1868.

2. Substantially the same as Article IX, Section 6 of the 1970 constitution.

They were no less so by reason of later amendments to Article IX. Section 5 was deleted in 1875 and replaced with a provision directing that monies in the county school fund "shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State . . . ."[3] Section 8, as amended in 1942 and 1944, referred to the responsibility of the State Board of Education for the "general supervision and administration of the free public school system."[4] It is obvious that the language quoted above in each of these sections refers to the general and uniform system of public schools, "wherein tuition shall be free of charge," mentioned in Section 2. *See, e.g., Greensboro v. Hodgin,* 106 N.C. 182, 186-187, 11 S.E. 586, 587-88 (1890). In light of this history, plaintiffs' argument that the incorporation of the word "free" in the 1970 amendment to Section 2 effects *per se* a substantive change becomes less than compelling.

Second, a review of the general history of the development of our public schools establishes that the state's provision of "free" schools has never been understood to require the absence of modest, supplementary support given by those able to pay it. Archibald Murphey's ambitious proposal in 1817 that the state furnish universal education for "the rich and the poor, the dull and the sprightly" called for free instruction in the primary schools for indigent children, but provided that tuition would be charged to children able to pay. Lefler and Newsome, *North Carolina: The History of a Southern State,* 329-30 (1973); Coon, *The Beginnings of Public Education in North Carolina: A Documentary History* Vol. 1, 130, 143-44 (1908). The *charity feature* of Murphey's plan was abandoned in the School Law of 1839, which established for the first time a statewide local option system of "common" schools, "free" in the sense that tuition and capital costs were paid out of state and local funds. 1839 N.C. Sess. Laws, c. 8. During Reconstruction, the state system was reorganized pursuant to Article IX of the 1868 Constitution and the Public School Law of 1869. 1869 N.C. Sess. Laws, c. 184. Even at that time, however, it was not understood that the constitutional requirement of a "free" public school system contemplated a complete prohibition

3. *Compare* Article IX, Section 7 of the 1970 constitution.

4. This language is now contained in Article IX, Section 4 of the 1970 constitution.

of the collection of modest supplemental fees. Commenting on the school legislation of 1871-72, State Superintendent of Public Instruction Alexander McIver wrote:

> "It is much easier for those who are able to pay for the education of their children to supplement the aid which the state can give, and have a public school, than to employ a teacher and have a private school. In this manner a public school may be established in every school district in the state, *wherein tuition or instruction* shall be free of charge to all children between the ages of six and twenty-one years. A public school, however, cannot be maintained free of charge to such parents and guardians as may be able to pay. They must necessarily pay a tax to support the school; and if the law should compel every person, who sends one or more children to a public school, to pay fixed school rates to the teacher, except such persons as the district trustees and school committees might exempt on account of their inability to pay, it would, as I think, be no violation to the letter or spirit of the constitution." Quoted in Noble, *A History of the Public Schools of North Carolina* 360 (1930). (Emphasis original.)

In one form or another, North Carolina has maintained its system of "free" public schools ever since 1840, with the exception of the few years immediately after the Civil War. Yet it was not until 1969 that the General Assembly even required the free furnishing without rental charge of basic text books to all students. 1969 N.C. Sess. Laws, c. 519, s. 1; *see* G.S. 115-206.12, 115-206.16. Furthermore, the widespread practice of imposing "fees, charges, or costs" on students was explicitly recognized by the legislature in 1963, when it was then provided that no such fees "shall be collected from students and school personnel without approval of the [local] board of education as recorded in the minutes of said board." 1963 N.C. Sess. Laws, c. 425, *now codified* as G.S. 115-35(f). Prior to the 1970 constitution revision, then, there was little to indicate that either the members of our General Assembly or the officials responsible for administering our "free" public schools have ever understood the word "free" to encompass more than the notion of free tuition.

Third, an examination into the circumstances of the 1970 constitutional revision reveals not the slightest support for the sug-

gestion that the insertion of the term "free public schools" into Article IX, Section 2(1) was intended to stop the then widespread collection of modest course or instructional fees. In the official commentary on the proposed revision to Article IX, the Constitution Study Commission noted merely that "Article IX has been rearranged to improve the order of treatment of the subject dealt with by that article, and its language has been modified to eliminate obsolete provisions and to make the article *reflect current practice in the administration and financing of schools.*" *Report of the North Carolina State Constitution Study Commission* 34 (1968). (Emphasis supplied.) Among the "obsolete provisions" eliminated from Section 2 was the reference in the 1868 constitution, as amended in 1875, to the separation of the races. That the previous concept of free tuition was not intended to be changed, however, is clearly implied by the Commission's further comment: "Proposed Section 2 extends the mandatory school term from six months to a minimum of nine months and eliminates the restrictive age limits *on tuition-free public schooling.*" *Id.* (Emphasis supplied.) No other pertinent reference to the "free public schools" phrase in Section 2 is to be found in the official commentary.

In the presence of clear indications to the contrary, this Court cannot assume that it was the intent of the framers of the 1970 constitution to have enacted such a radical change in our organic law as plaintiffs contend. Surely "if such was the intention, it is reasonable to presume it would have been declared in direct terms and not be left as a matter of inference." *Perry v. Stancil, supra,* 237 N.C. at 447, 75 S.E. 2d at 516. Nor can we assume that, whatever the intent of the framers, the citizens intended by their adoption at the polls of the 1970 constitutional changes to inaugurate a new era of totally free public education. The ballot issue presented to the state's voters at the November 1970 General Election provided for no more than a vote "FOR revision and amendment of the Constitution of North Carolina" or "AGAINST" the same. *See* 1969 N.C. Sess. Laws, c. 1258, s. 3. With no evidence before us that the meaning of "free public schools" was even raised as an issue in the public discussion and debate surrounding the 1970 constitutional revision, we cannot read into the voice of the people an intent that in all likelihood had no occasion to be born.

We conclude, therefore, that the 1970 reference in Article IX, Section 2(1) to "a general and uniform system of free public schools" requires no substantive change in the state's long standing policy of providing its citizens with a basic *tuition free* education. So long as public funds are used to provide the physical plant and personnel salaries necessary for the maintenance of a "general and uniform" system of basic public education, our public school system is "free"—that is, without tuition—within the meaning of our state constitution. That the administrative boards of certain school districts require those pupils or their parents who are financially able to do so to furnish supplies and materials for the personal use of such students does not violate the mandate of Article IX, Section 2(1). Nor do we perceive any constitutional impediment to the charging of modest, reasonable fees[5] by individual school boards to support the purchase of *supplementary* supplies and materials for use by or on behalf of students. Accordingly, we hold today that the fee schedule adopted by the Greensboro City Board of Education and imposed upon those students and their parents who are financially able to pay contravenes neither the letter nor spirit of our constitutional requirement of "free public schools."[6]

[2] We turn now to the matter of the fee waiver policy recently established by the Greensboro City School System. During the pendency of this suit in superior court, defendant Greensboro City Board of Education adopted a system-wide policy relating to the collection of its school fees. That policy provides *inter alia* that any student suffering economic hardship "shall be referred

5. What is a "modest, reasonable" fee depends of course upon the facts and circumstances of the individual case. According to the fee schedule adopted by defendant Greensboro City Board of Education, the highest instructional fee charged in the Greensboro City Schools in 1977-78 was the junior high school fee of $7.00 per semester. The highest course fee was a $4.00 per semester charge for a typing course. The highest rental or user fee imposed was a $5.00 per semester charge for the rental of a musical instrument. We view these fees to be entirely reasonable and their burden *de minimis*. Other school systems have charged substantially higher fees, especially for such courses as vocational and business education. *See, e.g.*, N.C. Department of Public Instruction, 1978-79 Fee Reporting Forms Results.

6. Our opinion today expresses no judgment upon the social merits of the fee policies of our public schools. We hold only that Article IX of the North Carolina Constitution does not preclude the imposition of supplementary school fees such as are involved in the instant case. Whether the levy of such fees is entirely consistent with certain ideals of universal education is a question of legislative policy, not constitutional prohibition.

to the principal of the school, who in turn, shall determine if the . . . fees for the student should be waived." The principal is to determine whether waiver or the charging of reduced fees is appropriate by referring to a sliding fee schedule based upon state guidelines established for free or reduced price school cafeteria meals. If no waiver is granted, however, failure to pay required fees will result in the denial of school enrollment in the next semester. In his order of 19 March, Judge Kivett found the waiver policy unconstitutional "in that it fails to provide a means for notifying parents and students of the change in the collection policy and a procedure for applying for a waiver." We agree.

As noted above, Article IX, Section 2(1) of our constitution guarantees a uniform public school system "wherein equal opportunities shall be provided for all students." Additionally, Article I, Section 15 provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." The force of these constitutional provisions is recognized in the declared policy of this state "to ensure every child a fair and full opportunity to reach his full potential." G.S. 115-1.1. It is clear, then, that equal access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process. U.S. Constitution, Amendment XIV; North Carolina Constitution, Article I, Section 19; *Givens v. Poe*, 346 F. Supp. 202 (W.D.N.C. 1972). Where that right is threatened with restrictions, the basic fairness of the procedures employed must be evaluated in light of the particular 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.

Defendants in this case concede that it would be unconstitutional to penalize or deny enrollment to a student who cannot pay required fees because of real economic hardship. Defendants' brief further concedes that prior to the adoption of the new uniform waiver policy, economic hardship *which was not brought to the attention* of the school system "could have" resulted in the imposition of sanctions against indigent students delinquent in their fee payments. Defendants contend nevertheless that the new waiver policy now adequately ensures that no student in the Greensboro City School System will be denied educational opportunities because of unfavorable economic status. That policy, how-

ever, provides only that students suffering from economic disabilities "shall be referred" to the principal for a determination on the matter of waiver or reduction of fees. No mechanism is established by which the schools shall affirmatively notify students and their parents of the availability of a waiver or fee reduction, nor by which the students or parents themselves may apply for a partial or complete exemption from fee requirements. The inevitable result is that those students who are finally accorded the benefits of the waiver policy must first risk the stigma of being picked out from their peers on the basis of their economic status and then somehow "referred" to the principal. Other students who may in fact qualify for fee waiver or reduction may instead elect to forego certain educational opportunities, either because they feel inhibited by the possible publicity of their indigency or because they wish to avoid the attendant fees and are simply unaware of the availability of relief. In light of these circumstances, we cannot agree that defendants' waiver policy fairly guarantees to low income and indigent students their constitutional right of equal access to the educational opportunities available at their schools. Due process is not met by a procedure which accords a fundamental right only to the already informed, or which engenders unnecessary obstacles to the right's fulfillment.

We note, however, that these infirmities can be easily cured. Defendants need only amend their waiver policy to ensure that all students and their parents are given adequate and timely notice of the waiver policy's substance and the simple procedures by which they may confidentially apply for its benefits. So amended, the policy would then likely comport with the requirements of procedural due process. Until the waiver policy is sufficiently revised, however, the injunction prohibiting defendants from charging or collecting fees should remain in effect. Accordingly, we remand the case to the jurisdiction of the Superior Court of Guilford County with directions to the court to lift the injunction at such time as it may be satisfied that defendants' fee collection and waiver procedures are constitutionally sound.

For the foregoing reasons, the decision by the trial court that defendant Greensboro City Board of Education cannot constitutionally charge students with instructional, course, or user fees is reversed. The decision by the trial court that defendant Board of Education's fee waiver policy is unconstitutional is affirmed, and

the case is remanded for such further proceedings not inconsistent with this opinion as may be required.

Affirmed in part.

Reversed in part and remanded.

COASTAL READY-MIX CONCRETE CO., INC. v. BOARD OF COMMISSIONERS OF THE TOWN OF NAGS HEAD, ET AL.

No. 93

(Filed 1 April 1980)

1. **Municipal Corporations § 31.2— decisions by municipal boards of commissioners—Administrative Procedures Act inapplicable**

   Decisions of any town boards of commissioners are exempted from the scope of review of the N. C. Administrative Procedure Act. G.S. 150A-2(1).

2. **Municipal Corporations § 31.2— conditional use permit—appeal from decision—scope of review**

   The task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes reviewing the record for errors in law, insuring that procedures specified by law in both statute and ordinance are followed, insuring that appropriate due process rights of a petitioner are protected, including the right to offer evidence, cross-examine witnesses and inspect documents, insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and insuring that decisions are not arbitrary and capricious.

3. **Municipal Corporations § 30.6— concrete mixing bin—violation of height restrictions—conditional use permit properly denied**

   Respondent Board of Commissioners properly concluded that a proposed concrete mixing bin was a structure in and of itself, not a necessary mechanical appurtenance to a conveyor belt and therefore exempt from height restrictions of the town zoning ordinance, and the Board properly denied petitioner's application for a conditional use permit to allow it to build a concrete plant on the land in question because the proposed bin violated the height requirements of the ordinance.

ON respondents' petition for discretionary review, pursuant to G.S. 7A-31(a) of a decision of the Court of Appeals, 41 N.C. App. 557, 255 S.E. 2d 246 (1979), affirming judgment for petitioner by *Fountain, Judge*, entered at the 17 April 1978 Civil Ses-

sion of Superior Court, DARE County. This case was docketed and argued as No. 98 at the Fall Term 1979.

Petitioner Coastal Ready-Mix Concrete Company, Incorporated (Ready-Mix) holds an option to purchase approximately 2.97 acres of land located within the boundaries of the town of Nags Head. The land is in the middle of a parcel personally owned by officers of the Ready-Mix Corporation and is within Nags Head Zoning District C-2. Parties have stipulated that petitioner can bring this action.

Land zoned C-2 in Nags Head is available for general commercial development. This use does not include development of moderately heavy industry such as concrete plants; however, the town Zoning Ordinance (the Ordinance) expressly makes such development a conditional use within the C-2 district provided developers meet certain delineated criteria. Conditional use permits are granted upon application and approval of the Board of Commissioners of the Town of Nags Head (the Commissioners).

Believing it could meet conditional use criteria, Ready-Mix applied to respondents Commissioners for a conditional use permit to allow it to build a concrete plant on the land in question. The application was properly referred to the Nags Head Planning Board which investigated and recommended to the Commissioners that the application be granted, pending certain agreed-upon modifications to Ready-Mix's plan.

After a public hearing at which Ready-Mix was permitted to present evidence and cross-examine witnesses, the Commissioners denied the application, citing, *inter alia*, as findings of fact supporting its denial:

> 4. The site cannot be properly screened from adjoining property as apparently intended with the requirement of Section 10.04 C(4)(d), and the mere erection of screening devices from the majority of activity of Nags Head on a level plain does not constitute the intent of the ordinance requiring screening.
>
> 5. The activity, as proposed, does not, in fact, comply with Section 7.07 of the Zoning Ordinance in height in that the so-called bins are structures and not appurtenances. . . .

7. The site falls under the requirements of the Subdivision Ordinance and as presented does not follow the provisions of the Subdivision Ordinance requiring public access.

Ready-Mix petitioned for writ of certiorari to the Superior Court of Dare County seeking judicial review of the decision of the Commissioners. Judge Fountain allowed certiorari and, after a hearing, entered judgment reversing the denial and ordering the Commissioners to issue the permit.

The Commissioners appealed to the Court of Appeals. That court reviewed some of the facts in the record and concluded that Judge Fountain's judgment was "clearly proper and fully supported by competent evidence that petitioner had met all the requirements of the zoning ordinances of respondents." 41 N.C. App. at 462, 255 S.E. 2d at 249. The Court of Appeals also said that petitioner Ready-Mix had produced evidence that all the requirements of the zoning ordinance for a conditional use permit had been complied with and that there was no evidence to the contrary. So saying, it affirmed reversal of the Commissioners' decision.

We allowed discretionary review 24 August 1979.

Further pertinent facts will be noted within the body of this opinion.

Gerald F. White, White, Hall, Mullen, Brumsey & Small, for the petitioner appellees Coastal Ready-Mix Concrete Co., Inc.

Thomas N. Barefoot and Thomas L. White, Jr., Kellogg, White & Evans, for respondent appellants Board of Commissioners of the Town of Nags Head.

CARLTON, Justice.

The issue before us is whether the superior court properly reversed the Town of Nags Head Board of Commissioners' (Commissioners') denial of petitioner's application for a conditional use permit. Determination of the issue involves the continuing attempt to establish a proper balance between limiting arbitrary exercise of local zoning power while maintaining flexible local authority to control growth and development. We think in this case the denial of the conditional use permit by the Commis-

sioners was based on sound discretion involving no mistaken application of law. We therefore reverse the Court of Appeals which affirmed the superior court.

I.

Authority for a municipality to grant conditional use permits is posited in G.S. 160A-381 which provides in pertinent part

> the board of adjustment or the city council may issue special use permits or conditional use permits in (1) the classes of cases or situations [set forth in the zoning ordinance] and in accordance with the principles, conditions, safeguards and procedures specified therein and (2) may impose reasonable and appropriate conditions and safeguards upon these permits. (Numbered parentheses added.)

As the statute implies, the terms "special use" and "conditional use" are used interchangeably, *see*, Brough, Flexibility without Arbitrariness in the Zoning System: Observations on North Carolina Special Exception and Zoning Amendment Cases, 53 N.C.L. Rev. 925 (1975), and a conditional use or a special use permit "is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist." *Humble Oil & Refining Company v. Board of Aldermen*, 284 N.C. 458, 467, 202 S.E. 2d 129, 135 (1974); *In re Application of Ellis*, 277 N.C. 419, 178 S.E. 2d 77 (1970).

Judicial review of town decisions to grant or deny conditional use permits is provided for in G.S. 160A-388(e) which states, *inter alia*, "Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari."

The scope of this judicial review is currently ambiguous. Under prior law, this Court in *Jarrell v. Board of Adjustment*, 258 N.C. 476, 480, 128 S.E. 2d 879, 883 (1963), stated that review of a special use permit decision was adequate only if the scope of such review was equal to that posited by former G.S. 143-306, the predecessor statute to the current North Carolina Administrative Procedures Act. *Humble Oil & Refining, supra*, built upon this statement and held that the "general administrative agencies review statutes" then in force were applicable to municipal deci-

sions about special or conditional use permits. 284 N.C. at 470, 202 S.E. 2d at 137.

[1] The current "general administrative agencies review statutes," however, are expressly *not* applicable to the decisions of town boards. The North Carolina Administrative Procedure Act provides judicial review only for *agency* decisions, G.S. 150A-50, from which the decisions of local municipalities are expressly exempt, G.S. 150A-2(1). Technically, then, the decision of the Nags Head Commissioners or any town board is exempted from the scope of review currently posited by the North Carolina Administrative Procedure Act. (APA).[1]

Despite this, we cannot believe that our legislature intended that persons subject to zoning decisions of a town board would be denied judicial review of the standard and scope we have come to expect under the North Carolina APA. Such a position would ignore a very long tradition in this State of significant judicial review of town zoning ordinances, *see, e.g., Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E. 2d 128, 168 A.L.R. 1 (1946); *In re Pine Hill Cemeteries, Incorporated*, 219 N.C. 735, 15 S.E. 2d 1 (1941), and would contravene the sound logic of *Jarrell, supra*, and *Humble Oil & Refining, supra.*

1. This scope of review provides:

§ 150A-51. Scope of review; power of court in disposing of case.— The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or

(6) Arbitrary and capricious.

If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modifications. (1973, c. 1331, s. 1.)

Thus, while the specific review provision of the North Carolina APA is not directly applicable, the principles that provision embodies are highly pertinent. Indeed, even *Humble Oil & Refining, supra*, the case which extended the then effective administrative review statutes to municipal zoning decisions, did so not by express reference to statutory provisions but by derivation of certain general principles of judicial review.

In *Humble Oil & Refining,* the Chapel Hill Board of Aldermen had denied petitioner Humble's request for a conditional use permit to build a gas station. The Board had based its denial on unsworn opinion evidence elicited at a public hearing. In remanding the permit decision to the Board of Aldermen for a hearing *de novo*, this Court outlined the two-step decision-making process the town had to follow in granting or denying an application for a special use permit:

> (1) When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. (2) A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Humble Oil & Refining, supra at 468, 202 S.E. 2d at 136, citing *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969); *Utilities Commission v. Tank Line*, 259 N.C. 363, 130 S.E. 2d 663 (1963).

Simply following the two-step process is not enough, however. The *Humble* Court went on to delineate a host of procedural safeguards town boards must provide when denying or granting special zoning requests. Emphasizing the quasi-judicial function of a board of aldermen when it hears evidence to determine the existence of facts and conditions upon which the ordinance expressly authorizes it to issue a conditional use permit, this Court stated the well-established rule that findings of fact and decisions based on those facts are final, subject to the right of the courts to review the record for errors in law and to give relief against orders which are oppressive or abusive of authority. *Humble Oil & Refining, supra* at 469, 202 S.E. 2d at 136-37; *Lee v. Board of Adjustment, supra; In re Pine Hill Cemeteries, supra.*

The Court in *Humble* further stated that a municipal board sitting in a quasi-judicial fashion must insure that an applicant is afforded a right to cross-examine witnesses, is given a right to present evidence, is provided a right to inspect documentary evidence presented against him and is afforded all the procedural steps set out in the pertinent ordinance or statute. Any decision of the town board has to be based on competent, material, and substantial evidence that is introduced at a public hearing.

[2] Extrapolating from these guidelines, it is clear that the task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes:

(1) Reviewing the record for errors in law,

(2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

From the foregoing, it is apparent that both the Court of Appeals and the superior court erred in failing to apply appropriate judicial review standards. The Court of Appeals' mere conclusion that Judge Fountain's order was proper because it was supported by competent evidence is clearly erroneous. In reviewing the sufficiency and competency of the evidence at the appellate level, the question is not whether the evidence before the superior court supported that court's order but whether the evidence before the town board was supportive of its action. In proceedings of this nature, the superior court is not the trier of fact. Such is the function of the town board. *Humble Oil & Refining, supra; Lee v. Board of Adjustment, supra; In re Pine Hill Cemeteries, supra.* The trial court, reviewing the decision of a town board on a conditional use permit application, sits in the posture of an appellate court. The trial court does not review the

sufficiency of evidence presented to it but reviews that evidence presented to the town board.

Moreover, the Court of Appeals' decision represents an incomplete view of a reviewing court's role in a case of this nature. Both the superior court and the appellate courts are bound by *all* the standards of review noted above. Reviewing the sufficiency of the evidence is only one of those standards, and the Court of Appeals erred in limiting its review to this single factor. It failed to recognize the error of law committed by the trial court when Judge Fountain determined that the denial of the conditional use permit by the town board was "not based on findings *contra* which are supported by competent, material and substantial evidence appearing in the record."

With the foregoing in mind, and applying all the applicable standards of review, we turn to the contentions of the parties in this appeal.

II.

Petitioner Ready-Mix contends that it has produced competent, material and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires and so is *prima facie* entitled to a conditional use permit under the holding in *Humble Oil & Refining, supra.* Respondents Commissioners argue otherwise, contending that the petitioner failed in two substantial respects to show its plan met the criteria for conditional use in zone C-2:

(1) Ready-Mix's proposed concrete plant violated the height requirements of Section 7.07 of the Nags Head Zoning Ordinance (Ordinance), and

(2) Ready-Mix failed to provide public access to the proposed plant in violation of the town Subdivision Ordinance and the general lot access requirement of Section 3.08 of the Ordinance.

The Commissioners also contend that they have further produced material and substantial evidence that Ready-Mix cannot possibly meet the "spirit and intent" of the screening requirements of Section 7.06(C)(4)(d) of the Ordinance because of the unique topological features of the proposed site.

III.

[3] As one of the reasons for denying the permit, the Commissioners found that a proposed concrete mixing bin on the site violated the height requirements of the Ordinance. The Court of Appeals did not specifically address the issue of the bin's alleged height violation, relying instead on a general statement that Ready-Mix had produced material and substantial evidence of compliance with conditional use permit requirements. With this holding we cannot agree.

Section 4.02 of the Nags Head Zoning Ordinance defines a conditional use as "a use that would not be appropriate generally or without restriction throughout a particular Zoning District but which, if controlled as to number, area, location or relation to the neighborhood, would preserve the intent of this ordinance to promote the public health, safety, morals and general welfare."

Section 7.06(C)(4) designates ready mix concrete plants a conditional use within Zoning District C-2. However, Section 7.06(D) of the Ordinance further specifies, "All permitted and conditional uses within the C-2 District, unless otherwise specified, shall comply with the dimensional requirements . . . in Section 7.07."

Section 7.07 indicates that the absolute height limit on structures in the C-2 District is 35 feet.

Testimony at public hearing indicated that Ready-Mix's plans include the presence of a concrete mixing bin. This is apparently a structure anchored to the ground with four pillars. Concrete, sand and gravel are deposited in its top by a conveyor belt and, once within the bin, are mechanically mixed and released through a gate to a truck waiting between the pillars below.

There is competent, material and substantial evidence in the record that the bin in question will be higher than 35 feet. Indeed, both sides admit that the bin will be somewhere between 45 and 50 feet high, clearly in violation of the height requirement.

Ready-Mix argues before this Court, however, that the planned bin falls under an exception to the height requirement which is found in Section 3.11 of the Ordinance. That Section, entitled "*Structures* Excluded from Height Limitations" (emphasis added), provides:

> The height limits of these regulations shall not apply to a church spire, belfry, cupola or dome or ornamental tower not intended for human occupancy, monument, water tower, observation tower, transmission tower, chimney, smoke stack, *conveyor*, flag pole, radio or television tower, mast or aerial, parapet wall not extended more than four feet above the roof line of the building and *necessary mechanical appurtenances*. (Emphasis added.)

Ready-Mix asserts that the proposed 45-foot-high concrete mixing bin is not a structure *per se*, but is rather a "necessary mechanical appurtenance" to the conveyor belt and so is expressly exempt from Ordinance height requirements.

In reviewing the conditional use permit application, the Commissioners concluded that the bin was a structure in and of itself and thus was not exempt from height limitations. The question on review, therefore, is not, as the superior court held, merely whether the Commissioners' decision was based on competent, material and substantial evidence but whether the Commissioners made an error of law when they interpreted the exemption section of their own Ordinance.

While Section 4.02 of the Ordinance defines a structure as "[a]nything constructed or erected, the use of which requires location on the ground, or attachment to something having location on the ground," the Ordinance does not define a mechanical appurtenance. In determining what the town meant when it excepted "mechanical appurtenances" to certain structures from height limitations, we must bear in mind that, in general, municipal ordinances are to be construed according to the same rules as statutes enacted by the legislature. *George v. Town of Edenton*, 294 N.C. 679, 242 S.E. 2d 877 (1978). The basic rule is to ascertain and effectuate the intent of the legislative body, *George v. Town of Edenton, supra; Cogdell v. Taylor*, 264 N.C. 424, 142 S.E. 2d 36 (1965); *Bryan v. Wilson*, 259 N.C. 107, 130 S.E. 2d 68 (1963); 56 Am. Jur. 2d Municipal Corporations § 398 (1971). The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972) and cases cited therein.

Taking these indicia one by one, the *language* chosen here clearly contemplates that an appurtenance is something adjunct or secondary *and* necessary to the function of the primary thing. Indeed, appellate courts of this State have several times so construed the term. In *Rickman Manufacturing Company v. Gable*, 246 N.C. 1, 97 S.E. 2d 672 (1957), this Court defined appurtenance as "(1) 'a thing which belongs to another thing as principal, and which passes as incident to the principal thing.' (2) It must have such relation to the principal thing as to be capable of use in connection therewith." *Id.* at 15, 97 S.E. 2d at 682 quoting 4 C.J. 1467, *Foil v. Drainage Commissioners*, 192 N.C. 652, 135 S.E. 781 (1926). *See also Humphreys v. McKissock*, 140 U.S. 304, 313-14, 11 S.Ct. 779, 781, 35 L.Ed. 473, 476 (1891). In *Rickman, supra*, the dispute was whether a heating system in the basement of a building was an appurtenance to the lease of the second and third floors. The Court concluded that the heating system was an appurtenance because it was physically secondary and adjunct *and* was necessary to the use and enjoyment of the lease.

In *Blackwelder v. Holyoke Mutual Fire Insurance Company*, 10 N.C. App. 576, 180 S.E. 2d 37, 43 A.L.R. 3d 1354 (1971), the Court of Appeals defined an appurtenant private structure as (1) an incident of a main insured building (2) necessarily connected with its use and enjoyment. That court concluded that a shed some 400 foot distance from a residence was an appurtenant structure to the dwelling because the shed could be used for storage by the occupants of the main dwelling.

In property law, an easement appurtenant is incident to and exists only in connection with a dominant estate owned by the same person, *Shingleton v. State*, 260 N.C. 451, 133 S.E. 2d 183 (1963), pertains to the enjoyment of the dominant estate, *Shingleton, supra*, and is incapable of existence separate and apart from the land to which it is annexed. *Yount v. Lowe*, 288 N.C. 90, 215 S.E. 2d 563 (1975).

The distillation of these judicial pronouncements is that an appurtenance, as used in the Nags Head Ordinance, is something (1) physically secondary to a primary part which (2) serves a useful or necessary function in connection with the primary part.

Such a definition is in keeping with the *spirit* of the Ordinance. Reading the pertinent Section, Section 3.11, we see that

it expressly exempts several structures which would nearly always have some secondary and necessary mechanical device attached. For example, a transmission tower might have a microwave disc attached and a church spire or belfry might have some mechanism to electronically ring bells attached.

Indeed, all of the exempted structures themselves are adjunct and, in most cases, appended to heavier but lower buildings. Moreover, the phrase "and necessary mechanical appurtenances" immediately follows the exemption of parapet walls not extended more than four feet above the roof line of buildings. A persuasive argument could be made that the reference to necessary mechanical appurtenances is limited to equipment placed on top of buildings which would cause the total height of the structure to exceed 35 feet, such as air conditioning or heating equipment, and not to the other exempted items. We also note that the height limitation of 35 feet applies to *all* buildings in town, regardless of the zoning district.[2]

Such limitations point clearly to a *goal* of the Ordinance to promote planned and orderly growth in a fragile coastal area exposed to strong climatic conditions. We therefore believe the sort of "mechanical appurtenance" contemplated by the Ordinance as necessary to the operation of a conveyor and thus exempt from height limitations is a mechanical device relatively small and necessarily adjunct to the conveyor itself, such as a secondary motor attached to the top of the belt. The 45-foot-tall bin is thus clearly not a "necessary mechanical appurtenance" to the conveyor as contemplated by the makers of the Ordinance. The purpose of a conveyor is to transport material from one place to another. The storage bin is independent of the conveyor in its function of storing and mixing concrete materials. It serves no purpose in the transporting function of the conveyor. The large,

2. The only exception to the 35-foot limitation is District CR, the Commercial Residential District allowing motel and hotel development, where Section 7.04(D) of the Ordinance requires two feet of setback for every one foot of structure over 35 feet. We can only conclude the town realized the value of hotels and motels to its tourist economy but was concerned about the stability of tall structures in strong sea winds. The additional setback requirement is an attempt to make certain that any damage from the toppling of a hotel will be confined to the lot the hotel will be located upon. There is nothing in this exception to the 35-foot limit on buildings which contravenes the spirit and goal of preserving delicate coastal land from excessive building and development.

self-supported bin, some 45 to 50 feet in height, is an independent structure with a function separate and apart from the conveyor. It is clearly not physically secondary to the conveyor.

Moreover, while our reasoning is in response to assertions of counsel it is not at all certain that the phrase in question, "necessary mechanical appurtenances," is limited to mechanical devices appurtenant to the listed "structures." Our review indicates that Section 3.11 lists "structures" usually considered themselves to be appurtenant to other main structures. For example, a TV tower is an appurtenance to a TV station. Thus the phrase "and necessary mechanical appurtenances" could very well have been written to include a catch-all category for other appurtenances similar to those specifically listed in Section 3.11. Under this view we would not even reach the issue whether the bin is appurtenant to the conveyor. The question would be whether the bin was an appurtenance to the concrete plant. Even under this interpretation, however, we do not think the bin would be exempted from height requirements. Surely the town board would not expressly exempt the conveyor and then fail to exclude the much heavier and larger bin. The clear inference is that the Commissioners did not intend to exempt a bin that exceeded 35 feet. Again, this construction is in keeping with the goal of protecting delicate outer bank acreage.

Ready-Mix argues, however, that if we find the bin not to be an appurtenance, then the Ordinance will be rendered illogical. Ready-Mix contends that it is impossible to build a ready mix concrete plant that would ever conform to the 35-foot height limitation so that it would be impossible to ever get a conditional use permit even though concrete plants are an express conditional use. This argument is suspect on two grounds. First, whether a bin could be constructed which is less than 35 feet tall is a question of fact about which little exists in the record beyond counsel for Ready-Mix's argument to the Commissioners. Second, Ready-Mix can apply for a variance from the height requirement if it feels the height requirement unjustly applies to it.

We therefore hold that the Commissioners' conclusion the bin was not excepted from height requirements was a correct one based on a proper interpretation of the applicable section of the Ordinance. In light of this holding, it is unnecessary to reach ap-

pellants' remaining two contentions. The Commissioners' denial of the conditional use permit is supported by the height violation of the bin.

Accordingly, the decisions of the Court of Appeals and the superior court are reversed. This case is remanded to the Court of Appeals which shall remand to the Superior Court, Dare County, with directions to that court to affirm the Commissioners' denial of the conditional use permit.

Reversed and remanded.

MARY LOU WHEELER v. RAYMOND W. WHEELER

No. 82

(Filed 1 April 1980)

1. **Contracts § 23— waiver of breach of contract**

A party may waive the breach of a contractual provision or condition without consideration or estoppel if (1) the waiving party is the innocent, or nonbreaching, party; (2) the breach does not involve total repudiation of the contract so that the nonbreaching party continues to receive some of the bargained-for consideration; (3) the innocent party is aware of the breach; and (4) the innocent party intentionally waives his right to excuse or repudiate his own performance by continuing to perform or accept the partial performance of the breaching party.

2. **Contracts § 23; Divorce and Alimony § 25.12— separation agreement—waiver of breach of child visitation provisions**

In an action to recover alimony payments due under a separation agreement which provided that alimony was payable "so long as plaintiff observes and performs the conditions of this contract" wherein defendant alleged that his failure to pay alimony was excused by plaintiff's breach of the child visitation provisions of the agreement, the trial court adequately instructed the jury on the issue of defendant's waiver of plaintiff's breach of the visitation provisions by continuing performance of his duties under the contract, including charging the jury on the element of intent, and the court did not err in failing to charge that additional consideration or equitable estoppel was necessary in order to have a valid waiver.

3. **Husband and Wife § 11.1; Divorce and Alimony § 25.12— separation agreement—breach of visitation provisions—excusal of duty to pay alimony**

Where a separation agreement required defendant to pay alimony to plaintiff "so long as plaintiff observes and performs the conditions of this con-

tract," plaintiff's breach of the child visitation provisions of the agreement would excuse defendant's duty to pay alimony.

ON motion for discretionary review of a decision of the Court of Appeals, 40 N.C. App. 54, 252 S.E. 2d 106 (1979) granting new trial from judgment entered by *Brown, Judge*, at the 24 October 1977 Session of MECKLENBURG County District Court. This case was docketed and argued as No. 40 at the Fall Term 1979.

This action was instituted by plaintiff on 8 October 1975 seeking back payment of alimony allegedly owed her by defendant pursuant to the terms of a separation agreement. In answer to plaintiff's complaint, defendant alleged his breach was excused because the plaintiff had willfully failed to perform the conditions of the contract.

Testimony at trial indicated that plaintiff, a school teacher, and defendant, a physician, were married in 1942. Against plaintiff's wishes defendant left the marital home in early 1956 and the parties entered into a written separation agreement on 13 July of that year. The written agreement provided that plaintiff, Mrs. Wheeler, agreed to relinquish all rights she had as a lawful spouse, agreed to assume custody of the three minor children, agreed to allow defendant to visit the children at his option, agreed to assume the mortgage and continue making payments on the family home, agreed to allow defendant to declare the children as his deductions for both federal and state income tax purposes and agreed she would make no claims upon defendant for child support beyond the amount specified in the contract. In turn defendant, Dr. Wheeler, promised to relinquish all marital claims on plaintiff, promised to pay $400.00 per month alimony and $50.00 per month child support for each child. He also promised to repay a $1,400.00 home loan down payment and agreed to convey to plaintiff title to the home, title to a 7-year-old car and title to all the household and kitchen furniture. Defendant's duty to pay child support existed until each child reached 18, died or was married. If the child attended college, payments were to continue until age 21. Defendant's duty to pay alimony was conditional, however, and was payable only "so long as plaintiff observes and performs the conditions of this contract." Defendant divorced plaintiff in 1958 or 1959 and subsequently remarried.

At trial, defendant testified that from the time of the separation agreement in 1956 until approximately 1964, he had great difficulty in asserting his child visitation rights. He testified, "There was always a reason why it wasn't convenient for them to come, and it usually resulted in either their not coming or my insisting." In 1964, he gave up trying to enforce his visitation rights, but continued to pay child support until each child reached age 21. He also continued paying alimony until July of 1975, at which time he stopped and plaintiff initiated this action.

Plaintiff denied she had breached her duty to allow visitation rights and produced the testimony of her children tending to show that as children they disliked visiting their father because of the intrusive presence of his second family. Their testimony also tended to show that defendant had made little or no attempt to visit them when they got older and had in fact refused to attend their weddings and graduations.

At the close of the evidence, Judge Brown denied both plaintiff's and defendant's motions for directed verdict and submitted the case to the jury. The jury found that plaintiff had breached the contract of separation by failing to provide the defendant with visitation rights. It also determined that defendant had waived his right to assert those visitation rights by failing to enforce them after 1964. The jury awarded plaintiff $11,200.00 for defendant's failure to pay alimony since 1975.

Defendant appealed. The Court of Appeals found that the judge's instructions to the jury concerning the issue of defendant's waiver were erroneous, and remanded the case for a new trial. We allowed discretionary review of this decision 1 May 1979.

Charles T. Myers, Myers, Ray & Myers, for the plaintiff appellant.

Ernest S. Delaney, Jr., Delaney, Millette, DeArmon & McKnight, for defendant appellee.

CARLTON, Justice.

I.

At issue in this case is the sufficiency of the jury charge on waiver where the evidence indicated that defendant continued

performing his contractual duties and continued accepting plaintiff's partial performance of her contractual duties for some eleven years after plaintiff's breach. We find that the jury charge was sufficient on the issue of waiver and reverse the Court of Appeals.

The judge charged the jury in pertinent part:

> [D]id the defendant waive the express terms of the contract relating to his visitation rights? . . . Waiver is an intentional surrender of a known right or privilege. This intention may be express or implied from acts or conduct which naturally and justly leads the other party to believe that the right has been intentionally foregone. There can be no waiver unless intended by one party, in that case the defendant, and so understood by the other, in this case the plaintiff; or, unless one party has acted so as to mislead the other. In this case, the plaintiff, Mrs. Wheeler, contends and the defendant disagrees, that the defendant waived the exact visitation rights specified in the contract by failing to ask for or exercise those rights after some period in the nineteen sixties and continued to send alimony payments until 1975. The defendant contends he never intended to give up or waive his visitation rights under the contract reached between the parties in 1956. A party who waives certain rights cannot thereafter assert those rights. So Members of the Jury, if you find from the evidence, and by its greater weight, that the defendant intentionally surrendered his visitation rights as granted in the original Separation Agreement between the parties, you will answer Issue No. 2 "Yes", in favor of the plaintiff, Mrs. Wheeler. On the other hand, if you fail to so find by the greater weight of the evidence, you will answer Issue No. 2, "No" in favor of Dr. Wheeler.

The Court of Appeals held that such a charge was inadequate, reasoning that an agreement to alter the terms of a contract is treated as another contract and must be supported either (1) by additional consideration, *Lenoir Memorial Hospital, Incorporated v. Stancil*, 263 N.C. 630, 139 S.E. 2d 901 (1965) or (2) by evidence that one party intentionally induced the other party's detrimental reliance, the doctrine of equitable estoppel, *Matthieu v. Piedmont Natural Gas Company*, 269 N.C. 212, 152 S.E. 2d 336 (1967).

While we agree that an *agreement* to alter the terms of a contract must be supported by new consideration, *Lenoir Hospital v. Stancil, supra*; *Restatement of Contracts* § 297, Comment c, we note that *continued performance* or *continued acceptance of performance* by an innocent party after partial breach of a contract involves another legal principle entirely. Such behavior constitutes a valid waiver of a contractual provision and does not need to be supported by additional consideration or estoppel to effect a binding agreement.

It is well settled in other jurisdictions that after one party has breached a contractual provision, the nonbreaching party has a choice between alternate courses of conduct. He may terminate his further liability and recover damages or he may continue the contract, choosing to receive the promisee's defective performance and regarding his right to damages as adequate compensation. *Restatement of Contracts* § 309; 4 Corbin, *Contracts* § 954; Simpson, *Contracts* § 171; J. Calamari & J. Perillo, *Contracts* § 11-37. *See also, Sitlington v. Fulton*, 281 F. 2d 552 (10th Cir. 1960); *Lichter v. Goss*, 232 F. 2d 715 (7th Cir. 1956); *Graham v. San Antonio Machine & Supply Corporation*, 418 S.W. 2d 303 (Tex. Civ. App. 1967). Where the promisor chooses the second alternative, cases speak of the promisor's *waiver by continuing to perform or to receive performance. See, e.g., Brunswick Corporation v. Vineberg*, 370 F. 2d 605 (5th Cir. 1967); *K. & G. Construction Company v. Harris*, 223 Md. 305, 164 A. 2d 451 (1960); J. Calamari & J. Perillo, *supra* at § 11-37; Simpson, *supra* at § 171; 3a Corbin, *supra* at § 755; 5 Williston, *Contracts* § 688. Because such a waiver is not a mere promise, but is instead a continuation of performance, sometimes called an election by conduct, it is binding without consideration or estoppel. J. Calamari & J. Perillo, *supra* § 11-37 at 451; Simpson, *supra* at § 171; *Restatement of Contracts* § 309. *See, e.g., Brede v. Rosedale Terrace Company*, 216 N.Y. 246, 110 N.E. 430 (1915).

While cases in our own jurisdiction do not specifically label the doctrine "waiver by performance" or "waiver by continuing to accept performance," they do make clear that the same legal principles apply. In *Towery v. Carolina Dairy, Incorporated*, 237 N.C. 544, 75 S.E. 2d 534 (1953), plaintiff dairy continued performing under the terms of a requirements contract even after defendant milk distributor had failed to escalate the price it paid for the

plaintiff's milk as it was required to do under the terms of the contract. Even without evidence of additional consideration or estoppel, this Court held that such facts were evidence of a valid waiver, stating:

> While the breach of a continuing contract may justify a termination of the contract by the innocent party, the mere fact a breach of one of the provisions of the contract has been committed by one party does not necessarily accomplish that result, as the party not in fault may elect to waive the breach and continue performance regardless of the breach. *Lowell v. Wheeler's Estate*, 112 A. 361; *Dudzik v. Degrenia*, 57 A.L.R. 823; *Miller v. Mantik*, 81 A. 797; *Cook & Bernheimer v. Hagedorn*, 131 N.E. 788; *Thomas-Bonner Co. v. Hooven O. & R. Co.*, 284 F. 377.
>
> Where there is a breach of a contract or some provision thereof which does not go to the substance of the whole contract and indicate an intention to repudiate it, the breach may be waived by the innocent party. *Non constat* such breach, he may elect to treat the contract as still subsisting and continue performance on his part. *Manufacturing Co. v. Lefkowitz*, 204 N.C. 449, 168 S.E. 517; *Manufacturing Co. v. Building Co.*, 177 N.C. 103, 97 S.E. 718; *Sinclair Refining Co. v. Costin*, 116 S.W. 2d 894; 12 A.J. 967-8; 17 C.J.S. 981-2, 992.

Id. at 546, 75 S.E. 2d at 535-36.

In *Danville Lumber and Manufacturing Company v. Gallivan Building Company*, 177 N.C. 103, 97 S.E. 718 (1919), a buyer accepted defective window sashes after he inspected them and knew of the defective condition. This Court there held this acceptance to be a waiver of the buyer's right to excuse his own performance, stating, "Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so he neglects to enforce them." *Id.* at 107, 97 S.E. at 720. The *Danville Manufacturing* Court did not require additional consideration or evidence of estoppel to enforce the contract but instead concluded that the foundation of the doctrine was *intention* which "should be proven and found as a fact and is rarely to be inferred as a matter of law." *Id.*, 97 S.E. at 720.

In *Industrial Lithographic Company v. Mills*, 222 N.C. 516, 23 S.E. 2d 913 (1943), this Court reversed a lower court's order of

compulsory reference in an accounting action for damages for breach of an exclusive dealership contract where there was some evidence that the plaintiff had known that defendant dealer was selling products other than the plaintiff's and had acquiesced to that breach. Again, there was no showing of consideration or estoppel. The Court made clear that the crucial question was whether plaintiff intended to waive the breach, and that this factual determination had to be made prior to any compulsory reference.

More recently, in *Fairchild Realty Company v. Spiegel Incorporated*, 246 N.C. 458, 98 S.E. 2d 871 (1957), this Court held that where a landlord received rent after full knowledge of tenant's breach of a lease condition, the landlord's behavior constituted a waiver of its contractual right to terminate the lease. The reasoning of the Court was that where a party accepted continuing benefits under the contract, with full knowledge of a prior breach, he waived his right to declare the contract terminated for the prior breach.

[1] From these cases it is clear that in this jurisdiction, a party may waive the breach of a contractual provision or condition without consideration or estoppel if

(1) The waiving party is the innocent, or nonbreaching party, and

(2) The breach does not involve total repudiation of the contract so that the nonbreaching party continues to receive some of the bargained-for consideration. Generally this means either that the contract involved is a continuing one, such as the requirements contract in *Towery v. Carolina Dairy, supra*, or the exclusive dealership contract in *Industrial Lithographic v. Mills, supra*, or it means that the breach of the contractual provision did not go to the totality of the contract as the defective delivery in *Danville Manufacturing v. Gallivan* was not a total failure of consideration, and

(3) The innocent party is aware of the breach, and

(4) The innocent party intentionally waives his right to excuse or repudiate his own performance by continuing to perform or accept the partial performance of the breaching party.

It seems to make little difference in the case law whether the breach of the contract provision was allegedly material or not. The mere fact that the nonbreaching party elects to continue performance or accept performance is enough to trigger the waiver. The presumption is that a party's intentional election to continue performing or receiving performance after knowledge of a breach is an indication that he does not consider the contract totally repudiated and in fact probably still receives considerable benefit under it. This would not be the case, of course, if the nonbreaching party's election was elicited by duress or exigent circumstances, *see, e.g., Rose v. Vulcan Materials Company*, 282 N.C. 643, 194 S.E. 2d 521 (1973).

In the case *sub judice*, there is abundant evidence that defendant waived the visitation provisions of the contract by continuing to accept plaintiff's alleged faulty performance of her duties under the separation agreement and by continuing his own performance in the face of plaintiff's breach:

(1) The jury found that defendant was the initial nonbreaching party.

(2) The breach did not involve a total repudiation of the contract and defendant continued receiving some of his bargained-for consideration from plaintiff's defective performance. Thus while plaintiff may have failed to allow adequate visitation rights, she continued to keep custody of the children, continued not to declare them as dependents for tax purposes, and continued to make no claim for more child support over a period of some 15 years during which time she sent all three to college without additional financial assistance from defendant. The fact that defendant continued performing his part of the bargain is some indication that he continued to receive benefits from plaintiff's partial performance, not the least of which, we note, was his double tax benefit at being able to declare both alimony payments and the children as deductions.

(3) The defendant was clearly aware of the breach and testified to that effect.

(4) Based on testimony such as this:

> I knew there were ways I could get a judge here in Mecklenburg County to issue an order giving me visitation rights

> that I wanted. It is correct that I purposely refrained from going to court and getting an order from a judge setting forth visitation rights. This was for a very good reason. I have never gone to court. I testified that about 1964 or 1965 I just quit altogether in attempting to see my children. I was a very busy man during the time the children were seeing me even though it was limited. I spent 55 or 60 hours a week in my profession of being a doctor.

and other evidence, the jury found that defendant had intentionally waived his right to assert his rights at plaintiff's breach.

[2] Although the judge did not instruct the jury on the need for additional consideration or the need for evidence of estoppel in order to have a valid waiver, he did give an adequate statement of the law as it relates to the doctrine of waiver by continuing performance, including charging the jury on the central factual issue of intention. Accordingly, we hold the jury charge was adequate and therefore reverse the decision of the Court of Appeals on this issue.

II.

[3] Plaintiff, however, also asserts on this appeal that her motion for directed verdict should have been granted. She cites *Smith v. Smith*, 225 N.C. 189, 34 S.E. 2d 148 (1945) and *Williford v. Williford*, 10 N.C. App. 451, 179 S.E. 2d 114, *cert. denied*, 278 N.C. 301 (1971), to the effect

> (1) that it is not every violation of the terms of a separation agreement by one spouse that will exonerate the other from performance; (2) that in order that a breach by one spouse of his or her covenants may relieve the other from liability from the latter's covenants, the respective covenants must be *interdependent rather than independent;* and (3) that the breach must be of a substantial nature, must not be caused by the fault of the complaining party, and must have been committed in bad faith. (Emphasis added.)

Smith v. Smith, supra at 197-98, 34 S.E. 2d at 153; *Williford v. Williford, supra* at 455, 179 S.E. 2d at 117. She argues that her breach did not excuse defendant's duty to pay alimony.

In *Smith, supra*, this Court held that a husband's covenant to pay alimony was not conditioned on his wife's covenant not to molest him and so held that her molesting did not excuse his duty to pay. In *Williford, supra*, the Court of Appeals held that payment of the wife's support and maintenance was entirely independent of her husband's right to visit his children under a separation agreement. Her breach of those visitation rights did not excuse his duty to pay alimony. In both of those cases, however, the contract being construed did not condition alimony payments on performance of visitation rights. Here, defendant has contracted to pay alimony only so long as plaintiff "performs the conditions of the contract." Each party's respective duties are clearly interdependent, not independent, and defendant's duty to pay alimony existed only so long as plaintiff performed her duties under the contract. To argue therefore that plaintiff's breach did not excuse defendant's duty to pay alimony is to ignore the clear language of the separation agreement and to overlook the central place the law of contracts has in interpreting separation agreements. *See, e.g., Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E. 2d 622, 624 (1973); *Stanley v. Cox*, 253 N.C. 620, 635, 117 S.E. 2d 826, 836 (1961); 24 Am. Jur. 2d, *Divorce and Separation* § 904 (1966). This we are unwilling to do. Accordingly, this assignment of error is overruled.

For the reasons stated above, the decision of the Court of Appeals is reversed and this case is remanded to that court for remand to the District Court of Mecklenburg County for reinstatement of judgment for plaintiff.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ALVIN DEXTER LOVETTE

No. 14

(Filed 1 April 1980)

1. Criminal Law § 90— witness's pretrial statement repudiated—prosecution not surprised—impeachment of witness improper

Where a State's witness made a pretrial statement to investigating officers concerning statements made by defendant to him and concerning state-

ments made in his presence by and between defendant and witnesses to an altercation between defendant and the victim, but three weeks later the witness informed investigating officers and the district attorney that he did not want to testify because he did not want to be responsible for people being imprisoned, the prosecuting attorney was not genuinely surprised or taken unawares by the witness's repudiation of his pretrial statement, and the trial court erred in permitting the prosecuting attorney to impeach his own witness; even if the prosecution was genuinely surprised, the witness's testimony as to what the eyewitnesses said to defendant would still be incompetent on the issue of defendant's guilt or innocence, since testimony tending to show the witness's prior inconsistent statement was admissible only to show that the State was surprised by his testimony and to explain why the witness was called, and such testimony was not to be used as substantive evidence for any purpose.

2. Homicide § 20— stick near deceased's body—admissibility

The trial court in a homicide prosecution did not err in admitting into evidence a stick found in a creek near deceased's body, since various State witnesses testified that it "looked about like" the stick defendant had in his hand when the victim was first assaulted.

DEFENDANT appeals from judgments of *Davis, J.*, 25 June 1979 Criminal Session, GUILFORD Superior Court.

Defendant was tried upon separate bills of indictment charging him with first degree murder and armed robbery of James Banner Wilson on 28 February 1979. In the murder case, defendant was arraigned on the charge of second degree murder only or lesser included offense as the jury might find. In the robbery case, the district attorney sought a verdict of guilty of attempted armed robbery. Defendant pled not guilty in each case.

The State offered evidence tending to show that on the evening of 28 February 1979 defendant, accompanied by Minnie Morrison and Sharon McDuffie, arrived about 7 p.m. at the home of Dorothy Medley at 508 Wise Street in High Point. Soon thereafter two white men, one of whom was James B. Wilson, came to the house. Wilson sat in a chair and Sharon McDuffie sat on the arm of Wilson's chair. She kept asking him to go home with her and kept trying to "go into his back pockets." At this time defendant and Minnie Morrison were playing cards with other people at a table across the room.

Around 8 p.m. defendant and James B. Wilson left the house accompanied by the two women, Morrison and McDuffie. Mary Medley and Linda Hampton testified they then heard a "bump"

on the front porch like somebody falling, looked out and saw Wilson lying on the porch floor while the two women were stooped over him going through his pockets. Defendant was standing near Wilson's head holding a stick and "kind of" kicked Wilson in the stomach and hit him once on the head with the stick. James Froneyberger, who had been playing cards inside the house, then came out and told defendant he "couldn't do that in this yard." Froneyberger asked Wilson twice about his condition and Wilson said he was all right. Defendant and the two girls were standing across the street and defendant still had the stick in his hand when Wilson arose and walked up Wise Street toward Park Street. Wilson "staggered some but walked pretty good." Defendant and the two girls walked down the street to the "Player's Lounge" where they met Clifford Johnson.

The State's evidence further tends to show that a little after 7 a.m. the next morning Minnie McFayden, who lived on Park Street, two and one-half blocks south of Wise Street, saw Wilson's body beside a rock in a creek that runs just south of her house. Where Park Street crosses the creek there is a bridge without a railing with large rocks under the bridge and along the edge of the creek. A search of the creek from Park Street to where the body was found yielded two black shoes, one upper denture plate, a shirt, a sweater, and a stick (State's Exhibit 3). Wilson's car was found parked near Dorothy Medley's home on Wise Street.

An autopsy revealed many injuries on Wilson's body, including hemorrhages, cuts, bruises, abrasions, seventeen broken ribs, and fractures of four vertebrae in the spine. It was Dr. Morton's opinion that Wilson died of severe blunt trauma.

Defendant Lovette did not testify but offered the testimony of James McFayden and Richard Cox. McFayden said he arrived at the house of Minnie McFayden, the woman who first spotted Wilson's body, at about 7:30 p.m. on the evening of 28 February 1979. When he drove up he saw "two white girls and a white boy" in her yard near the creek and saw the "boys" go down into the creek.

Richard Cox, a self-employed private detective, testified that he made measurements of the area; that it is 235 feet from 508 Wise Street to its intersection with Park Street; that it is 507 feet from that intersection to the creek bed; that it is 152 feet

from the bridge over the creek to where Wilson's body was found; and the height of the bridge over the creek is about ten feet. This witness testified that he went to the evidence room at the High Point Police Department to view all of the physical evidence the State had at that time. He viewed Mr. Wilson's clothing and shoes and was informed that the only other physical evidence available was photographs and a diagram. He was never shown the stick identified as State's Exhibit No. 3.

Additional evidence necessary to understand the various assignments of error will be narrated in the discussion of the assignment to which the evidence relates.

The jury convicted defendant of second degree murder and attempted robbery with a dangerous weapon. He was sentenced to life imprisonment for the murder and not less than twenty nor more than forty years for the attempted armed robbery. He appealed to the Supreme Court in the murder case, and we allowed motion to bypass the Court of Appeals in the robbery case. Both cases are now before this Court for initial appellate review.

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

Charles L. Cromer, attorney for defendant appellant.

HUSKINS, Justice.

Defendant contends the trial court erred in allowing the district attorney to impeach the testimony of State's witness Clifford Johnson. This constitutes his first assignment of error.

Clifford Johnson testified he knew defendant Lovette, saw him and talked with him during the nighttime hours of 28 February 1979. However, Johnson claimed that defendant Lovette did not in that conversation discuss with him the incidents that had occurred that night. At this point, the prosecutor, claiming he had been surprised, moved the court to declare Johnson a hostile witness. After a voir dire examination, the court granted the motion and permitted the prosecutor to cross-examine State's witness Clifford Johnson as a hostile witness. This witness had made a pretrial statement to investigating officers Sink and Finch concerning statements made by defendant Lovette to him and concerning statements made in his presence by and between

Sharon McDuffie, Minnie Morrison and defendant. These statements were tape-recorded and transcribed. The prosecutor, over consistent objections timely made, was allowed, in the presence of the jury, to read from Johnson's pretrial statement in formulating his questions and then ask not only about statements made to him by defendant but also about accusatory statements made to defendant by Sharon McDuffie and Minnie Morrison. The following are representative:

"Q. Did Sharon McDuffie ever make any statements to you in front of Alvin Lovette?
A. She mentioned something in front of him.

Q. What did she say to Alvin Lovette in your presence?
A. Well, she just said, 'Lovette you just—you hit the man.' That's all she said.

Q. And when she said, 'Lovette, you hit that man.' What did he say or do?
A. He didn't say nothing."

After additional voir dire the State's examination continued:

"Q. Mr. Johnson, you recall the statement you gave to the police officers on March 12th, 1979; is that correct?
A. Yeah.

Q. Mr. Johnson, didn't you tell Detective Finch that Alvin Lovette told you that Sharon McDuffie hit the man in the head with her shoe? Didn't you tell him that?
A. Yeah.

Q. Didn't you tell him that when Sharon McDuffie confronted Alvin Lovette that she got up into his face and Sharon McDuffie said, 'Duck, you know that ain't the man you saw. You're the one that beat that man up.' She said, 'Ya'll the one that runned him down.' Didn't you tell Detective Sink that that's what Sharon McDuffie said to Alvin Lovette?
A. I ain't said he run him down. I said he beat him up.

Q. In fact, Sharon McDuffie did say that in front of Alvin Lovette, didn't she?
A. Yeah.

Q. And what did Alvin Lovette do when Sharon McDuffie said that?
A. Nothing.

Q. Did he say anything?
A. Nope.

Q. Did you hear Sharon McDuffie say anything else to Alvin Lovette?
A. No.

Q. Isn't it a fact, Mr. Johnson, that you told the police officers that Sharon McDuffie also said, 'Duck, you know—know you hit the man in the head with them shoes.' Said, 'You're the one that beat the man up.'
A. No.

Q. Answer my question. Didn't you tell the police officers that?
A. Yeah. Uh-huh."

* * * *

"Q. Did Alvin Lovette or anybody—did Sharon McDuffie or Minnie Morrison in Alvin Lovette's presence, did you hear them say anything about having to chase a man down?
A. No.

Q. Didn't you tell the police officers on March 12, 1979, what they said was that they had to chase him? Did you tell the police officers that?
A. I told them that, but they didn't tell me that they chased anybody.

Q. You told the police officers that, didn't you?"

* * * *

"Q. Now, I believe that you had all three of the people—in your car on the 28th?
A. Yep.

Q. And they made certain statements to you in your car on the 28th, is that correct?
A. They weren't talking to me in my car."

* * * *

"Q. Isn't it a fact that you told police officers on March 12, 1979, that one of them made the statement that when they started beating him up, the man said, 'I ain't got no money. I gave it to my partner. The other dude got the money.' Didn't you tell the police officers that?
A. Yep."

* * * *

"Q. Mr. Johnson . . . was it said in Alvin Lovette's presence by Alvin Lovette or Minnie Morrison or Sharon McDuffie about what they did to the man after he told them that he didn't have any money? Do you recall any of them saying that?
A. No.

Q. You didn't tell the police officers on March 12, 1979, in response to the question . . . 'And what did they say they did?' And you said, 'They went on and beat him up.' Didn't you tell the police officers that?
A. I probably did."

Albeit with some criticism, it is the rule in criminal cases in North Carolina that the district attorney may not impeach a State's witness by evidence that his character is bad or that he has made prior statements inconsistent with or contradictory to his testimony. *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975); *State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973); 1 Stansbury's North Carolina Evidence § 40 (Brandis rev. 1973). Even so, when the State is genuinely surprised, *i.e.*, taken unawares, by its own witnesses, the trial judge in his discretion may allow the prosecutor to cross-examine the hostile or unwilling witness for the purpose of refreshing his recollection or awakening his conscience, thus enabling him to testify correctly. *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976); *State v. Pope, supra; State v. Anderson, supra.* In doing so, the prosecutor may call the attention of the hostile witness directly to prior statements made by the witness which are inconsistent with or contradictory to his "surprise" testimony at trial. *State v. Pope, supra; State v. Anderson, supra.*

Where a witness treacherously induces the State to call him by representing that he will testify favorable to the State's con-

tentions and then surprises the prosecutor with testimony contra, cross-examination is unlikely to refresh his memory or awaken his conscience. In such circumstances, cross-examination of the hostile witness by prior inconsistent statements is permitted in order to allow the State to show that it was induced to call the witness by a previous statement of the witness " 'made under such circumstances as to warrant a reasonable belief that the witness would repeat the statement when called to testify.' " *State v. Pope, supra*, quoting 58 Am. Jur., Witnesses, § 799 (1948). However, before granting the prosecutor's motion to treat his witness as hostile or unwilling and to cross-examine him, "the court must be satisfied that the State's attorney has been misled and surprised by the witness, whose testimony as to a material fact is contrary to what the State had a *right* to expect. . . . If the trial judge finds that the State should be allowed to offer prior inconsistent statements, his findings should also specify the extent to which such statements may be offered." *State v. Pope, supra*, 287 N.C. at 513.

We further held in *Pope* that where the prosecuting attorney "knows at the time the witness is called that he has retracted or disavowed his statement, or has reason to believe that he will do so if called upon to testify, he will not be permitted to impeach the witness. He must first show that he has been genuinely 'surprised or taken unawares' by testimony which differed in material respects from the witness's prior statements, which he had no reason to assume the witness would repudiate." 287 N.C. at 514.

[1] Applying the foregoing principles to the case at hand, we hold that the prosecuting attorney was not genuinely surprised or taken unawares. Officer Sink, testifying on voir dire in the absence of the jury, stated that three weeks after Clifford Johnson made his statement on 12 March 1979, he came to the police department and informed Officer Sink that the statement he had given on March 17 was true "but that he did not want to testify due to the fact that it might get the three people some time and he did not want to be responsible for that. . . . He came back the next day, at which time he along with myself and Sergeant Finch had a meeting with the district attorney, Mr. Kimel." At the trial of this case, after four witnesses had been examined, Clifford Johnson was called and took the stand. After giving his name and place of residence, he testified he knew de-

fendant, had a conversation with him on the night of February 28, but said defendant "did not discuss with me the incident that has been discussed here today." At that point the prosecutor said: "At this time the State has a motion to make outside the presence of the jury." The jury was excused and a lengthy voir dire conducted, finally resulting in a finding that Johnson was a hostile witness and the State entitled to cross-examine him based on surprise. It thus appears that prior to calling the witness Johnson, the district attorney had substantial reason to believe that Johnson would likely repudiate his pretrial statement if called upon to testify. The record strongly suggests that the prosecutor could not have been genuinely surprised or taken unawares by the testimony of Johnson. To the contrary, he knew, or had every reason to believe, that Johnson would not testify consistent with his pretrial statement. Under these circumstances the district attorney was not entitled to impeach his own witness and the court erred to defendant's prejudice in permitting him to do so. *See State v. Pope, supra; State v. Anderson, supra.*

But if we assume *arguendo* that the prosecution was genuinely surprised, Johnson's testimony as to what the girls said to defendant would still be incompetent on the issue of defendant's guilt or innocence. Testimony tending to show a witness's prior inconsistent statement "is admitted only to show that the State was surprised by his testimony and to explain why the witness was called. Such statements 'are not probative evidence on the merits and are not to be treated as having any substantive or independent testimonial value.' [Citations omitted.] Their only effect is to impeach the credibility of the witness." *State v. Pope, supra,* 287 N.C. at 514. *Accord,* 1 Stansbury's North Carolina Evidence § 46 (Brandis rev. 1973). Thus, neither the recording nor the typewritten transcript of Johnson's statement could be used against defendant to prove an implied admission or as substantive evidence for any purpose. In fact, neither was offered for any purpose, yet the prosecutor's questions unmistakably placed both before the jury and the jury was permitted to consider the accusatory statements of Minnie Morrison and Sharon McDuffie on the question of defendant's guilt or innocence. In effect, the prosecutor's cross-examination of Johnson was calculated not only to impeach him but also to prove the contents and the truth of his prior inconsistent statement to Officers Sink and Finch on 12

March 1979. This violated the rule which forbids a prosecutor to place before the jury incompetent and prejudicial matters not legally admissible in evidence. *State v. Smith, supra,* 289 N.C. at 158; *State v. Anderson, supra,* 283 N.C. at 226; *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762 (1954). In any event, since the prosecutor was not entitled to impeach his own witness on the facts revealed by the record here, the evidence elicited from Johnson by the improper cross-examination was not competent for any purpose. This requires a new trial. Defendant's first and third assignments of error are sustained.

Defendant's second and fourth assignments address insignificant items of evidence, and both are overruled without discussion.

[2] Defendant's fifth and final assignment of error relates to the introduction, over objection, of the stick (State's Exhibit 3) found in the creek near the body of James B. Wilson on the morning of 1 March 1979. Defendant contends the stick was not properly identified and had no relevant connection with this case. He further contends the State concealed its existence when defendant sought to inspect tangible objects in the possession of the State which the State intended to use as evidence at his trial.

Various State's witnesses testified that State's Exhibit 3 "looked about like" the stick defendant had in his hand when the victim was first assaulted on the porch at the home of Dorothy Medley. Dorothy Medley said it "could be the stick."

Under many decisions of this Court, "every circumstance that is calculated to throw any light upon the supposed crime is admissible." *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965). Articles shown by the evidence to have been used in connection with the crime charged are competent and properly admitted in evidence. *State v. Stroud,* 254 N.C. 765, 119 S.E. 2d 907 (1961). "So far as the North Carolina decisions go, any object which has a relevant connection with the case is admissible in evidence, in both civil and criminal trials. Thus, weapons may be admitted where there is evidence tending to show that they were used in the commission of a crime or in defense against an assault." 1 Stansbury, *supra,* § 118. *See, e.g., State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970) (a case of murder and robbery in which a pistol which "looked like" the one used in the crime was admitted); *State v. Macklin,* 210 N.C. 496, 187 S.E. 785 (1936) (shotgun found

in defendant's room admitted where there was evidence that it was like one defendant possessed on the night of the shooting). Accordingly, we conclude that State's Exhibit 3 was properly admitted in evidence.

The record does not disclose why the district attorney failed to allow defense counsel to inspect the stick or why he failed to inform defense counsel the State had such an object which it intended to offer into evidence. There being no evidence of bad faith on the part of the State, and considering defendant's failure to indicate surprise and move for alternate sanctions under G.S. 15A-910, we hold that the trial court was within its discretion in overruling defendant's general objection and allowing the stick to be offered in evidence. *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978). In any event, since there must be a new trial on other grounds, this assignment no longer has any significance. It is overruled.

Defendant is entitled to a new trial on both charges.

New trial.

STATE OF NORTH CAROLINA v. TONY WILLIAMS AND SAM WILLIAMS

No. 100

(Filed 1 April 1980)

1. Criminal Law § 113.7— instructions on acting in concert—failure to instruct on aiding and abetting—no error

The trial court in a murder prosecution properly submitted to the jury the theory of concerted action by the two defendants and did not err in failing to submit the theory of aiding and abetting, since all of the evidence tended to show that defendant son was present at the scene of the crime and was acting together with defendant father pursuant to their common plan or purpose murderously to assault the victim, and that the evidence tended to show that it was the father who actually pulled the trigger did nothing to mitigate the culpability of the son, nor did it change his role to that of an aider and abettor.

2. Criminal Law § 113.7— acting in concert—instructions applying law to facts

From the evidence in a murder prosecution and the court's charge as a whole, the jury must have understood that it would have to find defendant son and his father were acting together in executing the crime before it could find

that defendant son acted in concert, and the jury must have understood from the judge's instructions that, if either defendant son or his father fired a shot and killed the victim while acting together, both would be guilty.

3. Criminal Law § 117— character evidence incompetent—failure to instruct proper

In a prosecution of a father and son for murder, there was no merit to the son's contention that, because the trial judge gave instructions on character evidence for the father, his failure to do so for the son was prejudicial, since the testimony offered in the son's behalf, a witness's personal opinion of the son's character rather than his general reputation among a group of people, did not rise to the level of competent character evidence.

DEFENDANTS appeal as a matter of right pursuant to G.S. 7A-27(a) from judgments of life sentence imposed by *Preston, Judge*, at the 11 June 1979 Session of HARNETT County Superior Court. These appeals were docketed and argued as No. 128 at the Fall Term 1979.

Upon indictments, proper in form, defendants, a father (Sam) and son (Tony), were charged with the murder of one Bobby Seaberry. The cases were consolidated for trial.

At trial, evidence for the State tended to show that in September, 1978, the deceased, Bobby Seaberry, shot defendant Tony Williams causing Tony Williams to be hospitalized for some 21 days. Months later, on Saturday, 31 March 1979, defendant Tony Williams was driving his father Sam's car with Sam as a passenger on Old Wire Road in Harnett County, heading toward Bunnlevel. Bobby Seaberry approached the Williams car on the opposite side of the road, riding a motorcycle. Tony Williams swerved his father's car to the left and knocked Bobby Seaberry from his motorcycle. The car came to rest in a ditch on the left-hand side of the road with the motorcycle beneath its front bumper.

Seaberry was observed picking himself up after the impact and running across a field. Witnesses saw defendants Tony and Sam jump from their car and chase him, Tony in front and Sam behind. Sam was carrying "a long gun" which he fired once. Seaberry momentarily stumbled, losing his helmet, but righted himself and ran on, into a patch of woods. Defendants disappeared into the same woods and another shot was heard. Defendants emerged from the woods and walked to the car around which

several people had gathered. These people helped the defendants push the car out of the ditch. Ambulance drivers called to the scene arrived after the defendants had driven off. They found Bobby Seaberry in the woods where defendants were seen chasing him, dead of a shotgun wound to the back.

Defendants testified for themselves and presented several character witnesses. Their testimony was that Sam, not Tony, was driving the car on the day in question. Riding along, they saw a motorcycle in the ditch on the left-hand side of the road and pulled over to see what the problem was. Finding no one around the motorcycle, they got out of their car which then rolled into the ditch. They pushed the car out of the ditch with the help of some people who dropped by and then left the scene, never having seen Bobby Seaberry and knowing nothing of his murder.

The jury found each defendant guilty of second degree murder. Each was sentenced to life imprisonment.

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

Robert C. Bryan for the defendant.

CARLTON, Justice.

Defendant Sam Williams requests that we review the record as a whole for error in his trial. Defendant Tony Williams submits four assignments of error. We have reviewed the record as a whole for both defendants and have carefully examined the four questions defendant Tony Williams brings forward and find no error in either defendant's case.

I.

[1] Defendant Tony Williams, the son, first asserts that the trial court committed error by failing to instruct the jury on the law of "aiding and abetting" as required by the evidence in the case.

In pertinent part, the trial court instructed the jury:

> With respect to Tony Williams, for a person to be guilty of a crime, it is not necessary that he, himself, do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit the crime of Sec-

> ond Degree Murder, each of them is held responsible for the acts of the other done in the commission of the crime of Second Degree Murder.

Defendant Tony Williams argues that such an instruction was improper because "the theory of the State was that Tony Williams was guilty of murder by virtue of aiding and abetting his father." Thus, defendant Tony Williams contends that the theory of *acting in concert* should never have been given to the jury because all the State's evidence tended to show that his father did the shooting and that he (Tony) committed no act "which forms a part of the offense charged." Defendant relies on the quoted language from *State v. Robinette*, 33 N.C. App. 42, 234 S.E. 2d 28 (1977).

The general common law rule is that a person is not liable for the criminal acts of another if he did not participate in the crimes either directly or indirectly. *State v. Keller*, 268 N.C. 522, 151 S.E. 2d 56 (1966).

> A person is a party to an offense, however, if he either (1) actually commits the offense or (2) does some act which forms a part thereof, or (3) if he assists in the actual commission of the offense or of any act which forms part thereof, or (4) directly or indirectly counsels or procures any person to commit the offense or to do any act forming a part thereof. (Numbered parentheses added.)

State v. Keller, supra at 526, 151 S.E. 2d at 58; *State v. Spears*, 268 N.C. 303, 150 S.E. 2d 499 (1966); *State v. Burgess*, 245 N.C. 304, 96 S.E. 2d 54 (1957); 22 C.J.S., Criminal Law § 79 (1961).

The only distinction in criminal culpability between one who actually commits the crime and one of the other guilty parties to the offense as described in *Keller, supra*, is the technical difference between being a principal in the first degree and being a principal in the second degree. A principal in the first degree is the person who actually perpetrates the deed and a principal in the second degree is one who is actually or constructively present when the crime is committed and aids and abets another in its commission. *State v. Allison*, 200 N.C. 190, 194, 156 S.E. 547, 549 (1931). The law, however, recognizes no difference between a principal in the first degree and a principal in the second; both are

equally guilty. *State v. Allison, supra; State v. Whitt,* 113 N.C. 716, 18 S.E. 715 (1893).

Defendant contends he should have been charged at the very most as an aider and abettor of his father's crime. The distinction between aiding and abetting and acting in concert, however, is of little significance. Both are equally guilty, *see, e.g., State v. Allison, supra* at 195, 156 S.E. 2d at 550; *State v. Powell,* 168 N.C. 134, 83 S.E. 310 (1914), and are equally punishable.

Furthermore, the jury in this case was properly charged on the issue of acting in concert. Defendant's contention that it is necessary to perform *some act* which forms an *element* of the crime charged in order to be guilty of acting in concert is erroneous. Such has never been the law in this State. Thus, in *State v. Vaden,* 226 N.C. 138, 36 S.E. 2d 913 (1946), a case very similar to the one at bar, three defendants were indicted and tried for the killing of a fourth man in a fight. The evidence tended to show that all of the defendants acted together to bring about the fight and all participated actively although only one of the three was armed with a gun and shot and killed the deceased. This Court held that such evidence was sufficient on motion of nonsuit to show "a concert of action on the part of these defendants which culminated in the death of the deceased," *Id.* at 142, 36 S.E. 2d at 915, and held that the conviction of all three for the killing was proper.

In this Court's most recent explanation of acting in concert, *State v. Joyner,* 297 N.C. 349, 255 S.E. 2d 390 (1979), we defined acting in concert as "to act together in harmony or in conjunction one with another pursuant to a common plan or purpose."

There, a defendant who was present at the gang rape of a victim argued he was not culpable of all the charged crimes because he had not personally participated in some of the many unnatural acts performed on the victim. He asserted that the instruction that he was acting in concert with his fellows as to these certain unnatural acts was in error. This Court, speaking through Justice Exum, overruled this assertion, reasoning:

> It is not . . . necessary for a defendant to do *any particular act* constituting at least part of a crime in order to be convicted of that crime under the concerted action principal so

> long as (1) he is present at the scene of the crime *and* (2) the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. (Numbered parentheses and emphasis added.)

297 N.C. at 357, 255 S.E. 2d at 395. One of the essential elements of acting in concert is that there is evidence of a common plan or purpose.

So here, the charge on concerted action was proper. All of the evidence tended to show that the defendant Tony Williams was present at the scene of the crime and was acting together with his father pursuant to their common plan or purpose to murderously assault the victim. That the evidence tended to show it was Sam who actually pulled the trigger does nothing to mitigate the culpability of Tony, nor does it change his role to that of an aider and abettor. The action of both defendants created one orchestated sequence of events, with both defendants maliciously pursuing and assaulting the deceased.

There is absolutely no showing from the evidence that the defendant Tony Williams merely aided and abetted his father. In this regard the case is clearly distinguishable from *State v. Robinette, supra*, upon which defendant Tony Williams primarily relies. There, the defendant was not present at a breaking and entering but merely drove a car which picked up other participants in the crime at a spot in front of the crime scene. The Court of Appeals, speaking through Judge Parker, held that in such a case, an instruction on acting in concert was erroneous because the defendant was not present at the scene of the crime. Here the evidence overwhelmingly establishes Tony's presence and participation. The trial court correctly submitted to the jury the theory of concerted action by the two defendants and did not err in failing to submit the theory of aiding and abetting. This assignment of error is overruled.

II.

Defendant Tony Williams secondly asserts that the trial court failed to properly instruct the jury that he would not be guilty of murder by aiding and abetting in the crime of murder, unless he knew that Sam Williams intended to assault the deceased and that he, Tony, intended to render aid in the assault. We have held above that the evidence did not warrant a submis-

sion of the charge of aiding and abetting to the jury. This assignment of error is therefore overruled.

III.

[2] Defendant Tony Williams thirdly argues that in submitting the charge of acting in concert, the trial court failed to apply the facts to the law in that it did not instruct the jury as to what findings of fact would constitute the meaning of acting together with the common purpose of committing the crime of second degree murder.

G.S. 15A-1232 (formerly G.S. 1-180) requires the trial judge to explain the law arising on the evidence. Cases construing the prior statute have held that the law should be applied to the particular facts in evidence and not to a set of hypothetical facts. *State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977); *State v. Hollingsworth*, 263 N.C. 158, 139 S.E. 2d 235 (1964); *State v. Campbell*, 251 N.C. 317, 111 S.E. 2d 198 (1959); *State v. Street*, 241 N.C. 689, 86 S.E. 2d 277 (1955).

Defendant Tony Williams argues that the judge's instruction in this trial merely stated general principles of law without an application of the law to the specific facts. Such an instruction, he asserts, is inadequate, citing *State v. Ardrey*, 232 N.C. 721, 62 S.E. 2d 53 (1950).

We do not agree the charge is inadequate. The record reveals the judge charged in part:

> With respect to Tony Williams, for a person to be guilty of a crime, it is not necessary that he, himself, do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit the crime of Second Degree Murder, each of them is held responsible for the acts of the other done in the commission of the crime of Second Degree Murder.
>
> So, I charge that, if you find from the evidence beyond a reasonable doubt, that on or about the Thirty-First day of March, Nineteen Seventy-Nine, the said Tony Williams, acting either by himself, or acting together with Sam Williams, intentionally and with malice shot the said Bobby Seaberry with a deadly weapon, to wit, a twelve-gauge shotgun,

thereby proximately causing Bobby Seaberry's death, it would be your duty to return a verdict of "guilty of Second Degree Murder."

Other decisions of this Court have approved such an instruction. In *State v. Hood*, 294 N.C. 30, 239 S.E. 2d 802 (1978), defendant was tried along with two others for murder. The evidence tended to show that the defendant's part in the affair was to slow down the victim's truck long enough for a codefendant to shoot the victim. There, the trial judge gave a charge quite similar to the one given in the case at bar:

"Members of the jury, one of the principles of law involved in this case involves the law relating to ACTING IN CONCERT. For a person to be guilty of a crime, it is not necessary that he, himself, do all the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit the crime of murder, each of them is held responsible for the acts of the others done in the commission of the crime of murder.

* * *

". . . If the State has satisfied you from the evidence beyond a reasonable doubt that the defendant, Bobby Ervin Hood acting either by himself or acting together either with Bobby Joe Burns or Isaiah Hood or both of them and either Bobby Ervin Hood himself, or either Bobby Joe Burns or Isaiah Hood acting in concert with Bobby Ervin Hood on May 7th, 1975, unlawfully and with malice shot and killed Herman Lee Philyaw with a firearm and the State has further satisfied you from the evidence beyond a reasonable doubt that the defendant, Bobby Ervin Hood or persons acting in concert with him shot and killed Herman Lee Philyaw with a firearm, such as a shot gun, willfully, in execution of an actual specific intent to kill formed after premeditation and deliberation, as these terms have been defined to you and that the death of Herman Lee Philyaw was proximately caused by the wound so inflicted, the defendant would be guilty of murder in the first degree."

294 N.C. at 42-43, 239 S.E. 2d at 809.

This Court upheld the instruction reasoning that:

> According to this testimony, defendant and witness Burns were "acting in concert." Considering the instruction as a whole the jury must have understood that it would have to find that defendant and others were acting together in planning and executing the crime before it could find that defendant acted in concert with another person. And the jury must have understood from the judge's instruction that if either Burns or defendant shot and killed Mr. Philyaw while acting together, both would be guilty.

Id. at 243-44, 239 S.E. 2d at 810.

Likewise, in *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978), defendant objected to a jury charge of acting in concert where the judge instructed "that if the jury should find that '. . . the defendant, Mr. Watson, another person or persons acting with him . . .' had committed the robbery, it would be the duty of the jury to return a verdict of guilty." *Id.* at 168, 240 S.E. 2d at 447. In *Watson, supra*, the evidence indicated that four men robbed and stabbed a storekeeper. This Court, in overruling the exception to a charge on acting in concert, relied on the general principle that a charge is to be construed as a whole. If, when so construed, it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed, any exception to it will not be sustained even though the instruction could have been more aptly worded. *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091, 47 L.Ed. 2d 102, 96 S.Ct. 886 (1976); *State v. Watson, supra* at 168-69, 240 S.E. 2d at 447.

The selfsame principles apply here. Evidence presented at trial was to the effect that Sam and Tony acted together in initiating and carrying out this killing. Considering this evidence and construing the charge as a whole, we believe the jury must have understood that it would have to find the defendant Tony Williams and his father were acting together in executing the crime before it could find that the defendant Tony Williams acted in concert. And the jury must have understood from the judge's instructions that if either defendant or his father fired a shot and killed Bobby Seaberry while acting together, both would be guilty. *See State v. Hood, supra; State v. Davis*, 290 N.C. 511, 227 S.E. 2d 97 (1976). While the charge might have been worded differently as to the codefendants acting pursuant to a common

goal or purpose, the instruction as given was fair and adequate. This assignment of error is overruled.

IV.

[3] Defendant Tony Williams lastly asserts that the trial judge failed to charge the jury as to the legal effect of the character evidence he introduced. The effect of such an omission, he argues, was to express a judicial opinion in contradiction of G.S. 15A-1222 and G.S. 15A-1232.

The record reveals that both Sam and Tony Williams introduced evidence of character. Tony's evidence consisted of a witness's statement that the witness "had not never seen anything that would indicate that but what [Tony Williams] is a pretty good fellow." The trial judge explained the law as to character evidence on behalf of Sam, but did not instruct the jury about character evidence on behalf of Tony.

At oral argument, defendants' counsel asserted this omission prejudiced not only Tony but Sam as well because Sam relied on Tony's testimony to corroborate his own story. Anything which tended to undermine Tony's character, then, was as harmful to the father as to the son.

Character is a subordinate feature of a case and a defendant must request a character instruction before he can allege error in a court's failure to charge the jury. *State v. Burell*, 252 N.C. 115, 113 S.E. 2d 16 (1960); *State v. Bridgers*, 233 N.C. 577, 64 S.E. 2d 867 (1951); *State v. Jones*, 35 N.C. App. 388, 241 S.E. 2d 523 (1978).

The record reveals that neither Tony nor Sam Williams made requests for jury instructions on character evidence. Tony, however, argues that because the trial court gave character instructions for Sam, his failure to do so for Tony was prejudicial to Tony. With this we cannot agree for the simple reason that the testimony offered in Tony's behalf did not rise to the level of competent character evidence.

A criminal defendant is always permitted to offer evidence of his good character as substantive evidence of his guilt or innocence. *State v. Denny*, 294 N.C. 294, 240 S.E. 2d 437 (1978); *State v. Davis*, 231 N.C. 664, 58 S.E. 2d 355 (1950); *State v. Moore*, 185 N.C. 637, 116 S.E. 161 (1923); 1 Stansbury, North Carolina

Evidence § 104 (Brandis rev. ed. 1973); McCormick, Evidence § 191 (2d ed. 1972). However, it is well settled in this jurisdiction that such character evidence cannot be a witness's personal opinion, *State v. Denny, supra; Johnson v. Massengill,* 280 N.C. 376, 186 S.E. 2d 168 (1972); Stansbury, *supra* at § 110, but must be testimony concerning "his *general* reputation, held by an appreciable group of people who have had adequate basis upon which to form their opinion." *State v. McEachern,* 283 N.C. 57, 67, 194 S.E. 2d 787, 793-94 (1973) (Emphasis in original). *Accord, State v. Denny, supra.*

Testimony offered in Tony's behalf did not contemplate his general reputation among a group of people, but gave only the witness's personal opinion of Tony's character. Such evidence is not competent character evidence and the trial judge's failure to instruct the jury on this evidence is accordingly not error. This assignment of error is overruled as to both defendants.

We have also reviewed the record as a whole and find no error with respect to those portions of the trial affecting the defendant Sam Williams. Thus in the trial below we find as to defendant Sam Williams and defendant Tony Williams

No error.

RAY M. MANSFIELD, PLAINTIFF v. DALE RAY ANDERSON, DEFENDANT, AND REUBEN ANDERSON GALYEANS, DEFENDANT AND THIRD-PARTY PLAINTIFF v. DIMENSION MILLING COMPANY, INC., THIRD-PARTY DEFENDANT, AND WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY, PLAINTIFF v. DALE RAY ANDERSON, DEFENDANT, AND REUBEN ANDERSON GALYEANS, DEFENDANT AND THIRD-PARTY PLAINTIFF v. DIMENSION MILLING COMPANY, INC., THIRD-PARTY DEFENDANT

No. 13

(Filed 1 April 1980)

Railroads § 5.8— grade crossing accident—obstructed view at crossing—motorist not contributorily negligent as matter of law

The evidence did not show that the driver of a tractor-trailer which collided with a train at a grade crossing was contributorily negligent as a matter of law where there was evidence that the driver approached the crossing from the east and his view of the tracks to the north from whence the train came

was obstructed by a fence and vegetation; one interpretation of the driver's testimony was that he had to get as close as one foot or one to two feet from the track in order to see a sufficient distance northwardly to allow him to know whether he could cross safely; the driver testified that he was going three to four miles per hour as he neared the track, and that he observed the train some fifty to sixty feet away, slammed on his brakes, and then accelerated in order to get the cab off the track; and other witnesses familiar with the crossing testified that there was no place east of the crossing from which a motorist could safely stop and see a sufficient distance to the north, since it was for the jury to determine whether any driver could safely stop one foot or one to two feet from a railroad track and whether there was any point east of the crossing at which the driver had an opportunity to stop safely and see a sufficient distance up the tracks to know whether he could safely cross, and the jury could find that the driver had a severely obstructed view of the track which precluded him from having a safe position from which to look and listen, and that he was exposed without fault on his part to a sudden peril and had to make a quick decision.

Justices HUSKINS and BRITT dissent.

APPEAL pursuant to G.S. 7A-30(2) by defendants Dale Ray Anderson and Reuben Anderson Galyeans and third-party defendant Dimension Milling Company, Inc., from a decision of a divided panel of the Court of Appeals, 43 N.C. App. 77, 258 S.E. 2d 366 (1979), reversing a judgment entered by *Judge Mills* at the 15 May 1978 Session of DAVIDSON Superior court.

Brinkley, Walser, McGirt & Miller by Charles H. McGirt, Attorneys for plaintiff-appellee Ray M. Mansfield.

Craige, Brawley, Liipfert & Ross by C. Thomas Ross, Attorneys for plaintiff-appellee Winston-Salem Southbound Railway Company.

Stoner, Bowers and Gray by Bob W. Bowers, Attorneys for defendant-appellant Dale Ray Anderson.

Womble, Carlyle, Sandridge & Rice by Daniel W. Donahue, Attorneys for defendant and third-party plaintiff-appellant Reuben Anderson Galyeans.

Jack E. Klass, Attorney for third-party defendant-appellant Dimension Milling Company, Inc.

EXUM, Justice.

The several claims, cross-claims, and counterclaims asserted all arise out of a collision on 19 March 1976 between a train and a

tractor-trailer at a grade crossing of the railroad and the roadway. The sole question presented is whether the Court of Appeals' majority erred in concluding that the operator of the tractor-trailer was contributorily negligent as a matter of law. We hold this conclusion to be error and reverse. We order that the judgment of the trial court be reinstated.

The Winston-Salem Southbound Railway Company owned the train, and Ray Mansfield, its engineer, operated it. Reuben Galyeans owned the tractor-trailer, and Dale Anderson operated it. Dimension Milling Company, Inc., owned a load of lumber being hauled by the tractor-trailer. The collision resulted in personal injury to Mansfield and in property damage to the Railway Company, Galyeans, and the Milling Company. Anderson was not hurt. The intricacies of the pleadings resulting from this milieu are fully set out in the Court of Appeals' majority opinion and need not be here repeated. At trial the jury found that Mansfield and the Railway Company were not injured or damaged by the negligence of Anderson but that Galyeans and the Milling Company were both damaged by the negligence of Mansfield. It also found Anderson to be the agent of Galyeans; the Milling Company conceded Anderson was its agent. It awarded damages in favor of Galyeans in the sum of $10,000 and in favor of the Milling Company in the sum of $267.66. Judgment on the verdict was entered in favor of Galyeans and the Milling Company against both plaintiffs. The Court of Appeals' majority concluded that Anderson, as agent of both Galyeans and the Milling Company, was contributorily negligent as a matter of law and reversed the judgment. We disagree with this conclusion and reverse the Court of Appeals.

We agree with the well-established principles of law relied on by the Court of Appeals in determining whether a motorist approaching a railroad crossing is contributorily negligent as a matter of law and will not repeat those principles. We disagree with the Court of Appeals' application of the principles to the facts.

The parties stipulated that between 8:00 a.m. and 9:00 a.m. on 19 March 1976 the train was proceeding south toward the crossing of the railroad track and highway 47 south of Lexington. At the same time the tractor-trailer was proceeding west on highway 47 toward the crossing. The weather was clear.

The evidence most favorable to Galyeans and the Milling Company tended to show as follows:

The crossing was at right angles with highway 47 running east-west and the railroad track running north-south. The crossing was marked, but there were no electrical or mechanical devices to warn of an approaching train. The view to the north up the track of a motorist proceeding west toward the crossing was obstructed by a fence and vegetation. The fence ran along the north side of the road east of the crossing and northward along the east side of the track. A mixture of "trees, evergreens, sycamore and what-not, briars and honeysuckle" grew "along the railroad track looking north." One witness, thoroughly familiar with the crossing, testified, "[y]ou can't see the railroad when you approach because of the trees" and in order "to see a train north of that crossing 50 feet away . . . you have to just get about on the track." This witness testified further that in order to safely cross this track "you need somebody to ride with you and run in front of you and tell you to come on." Another witness, who drove the crossing every day, testified that as you approach the crossing from the east "you have to get the front of your wheels on the first track before you can see up the track because of the undergrowth, you just can't see." This same witness testified that he observed the train just before the accident about a quarter of a mile north of the crossing heading south. His attention was attracted to it by the loud noise it made. He testified that the train "was coming down and the wheels sounded like they was coming out from under it." He estimated the speed of the train at that time to be 40 to 50 mph.

Anderson, himself, testified that he had driven over this crossing many times. As he approached it on the day in question, he remarked to his passenger about "how bad the track was." He slowed his rig to 25 to 30 mph as he crested a hill some 75 to 100 yards east of the crossing. As he approached the track he continued to slow down and to be alert for an approaching train. He looked to the extent that he could see up and down the track and he listened. His view to the north was obstructed. He heard nothing. As he got "about two feet" from the track he was going three to four miles per hour. At that point he observed the train some 50 to 60 feet away and slammed his brakes. Realizing that if he stopped, the cab of his rig would be resting on the track, he

accelerated in order to get the cab off the track. He succeeded in doing this but only "about half of the trailer" cleared the track. The train struck the trailer. Anderson heard no warning whistle from the train until about three seconds before the collision. The train traveled some six to seven hundred feet beyond the collision before stopping.

Anderson testified that his rig, including its load of lumber, weighed 75,000 to 79,000 pounds. At three to four miles per hour, Anderson testified on cross-examination, the rig would probably require five or six feet to come to a stop. On recross-examination Anderson said that he "knew I couldn't see until I got within 3 or 4 feet of the track . . . . If I wanted to look I know I would have to get to that area and stop and look, but I didn't stop." Seizing on this testimony, the Court of Appeals concluded that Anderson, as a matter of law, was contributorily negligent. It reasoned that this testimony established beyond rational debate that by the time Anderson "could know whether a train was coming, his speed was such that it was already too late for him to avoid being hit. Albeit he was moving slowly and looking from side to side, he knew that his rate of travel was still too great to permit these cautions to be effective." 43 N.C. App. at 87, 258 S.E. 2d at 372. The Court of Appeals relied on this language from *Parker v. R.R.*, 232 N.C. 472, 474, 61 S.E. 2d 370, 371 (1950):

> "It does not suffice to say that plaintiff stopped, looked, and listened. His looking and listening must be timely (Citations omitted.) so that his precaution will be effective. (Citations omitted.) It was his duty to 'look attentively, up and down the track,' in time to save himself, *if opportunity to do so was available to him*." (Emphasis supplied.)

The Court of Appeals then concluded that Anderson, as a matter of law, had an opportunity

> "to know whether he could cross the tracks in safety . . . . The conclusion is inescapable that, with full knowledge both of the danger and of the means readily available to save himself from it, he elected to take the chance that no train would be coming. Making such an election was contributory negligence as a matter of law." 43 N.C. App. at 88, 258 S.E. 2d at 372.

We disagree with these conclusions. Even if other evidence more favorable to Galyeans and the Milling Company than Anderson's testimony is disregarded, Anderson's testimony standing alone does not make out his contributory negligence as a matter of law because it does not demonstrate conclusively, as the Court of Appeals thought it did, that there *was* a point east of the crossing at which Anderson had an opportunity to stop safely and see a sufficient distance up the track to know whether he could safely cross. Whether such a point existed was, we think, a question for the jury.

The Court of Appeals seemed to conclude that as a matter of law this point existed some three to four feet east of the track. It based this conclusion on portions of Anderson's testimony. Actually Anderson's testimony is equivocal, if not conflicting, as to precisely how close to the track he had to be before he could see a sufficient distance to the north. Anderson testified that he first saw the train when he was two or three feet from the track and it was approximately 50 to 60 feet away at the time. He said then in order to see "60 feet or more" up the track you would have to get "one or two feet" from it and that "if I had stopped one or two feet from the track I could have seen a long way." Again, "[w]hen I first saw the train it was about 50 to 60 feet from the crossing and I was right up on the track. I couldn't see more than 50 to 60 feet in the direction the train was coming. No, there was no point when I was coming down the road, any point other than when I was *within* 3 or 4 feet of the tracks that I could see beyond 50 to 60 feet." (Emphasis supplied.) Anderson also testified that he couldn't see "any point up that track . . . until you get right on the track" and that he couldn't see "clearly" up the track until he got "about a foot away from the track." A fair interpretation of Anderson's testimony and certainly one that could be accepted by the jury is that at three to four feet east of the track he could not see a sufficient distance northwardly to allow him to know whether he could cross in safety. In order to see such a distance, he had to get as close as one foot, or one to two feet, from the track.

It is true that Anderson, on cross-examination, also testified, "You ask if I stop the cab one foot from those tracks or 2 feet from the track I wouldn't have been hit, and I answer no, I don't guess I would." Notwithstanding this testimony we think it a

question for the jury whether any driver, including Anderson, can safely stop one foot, or one to two feet, from a railroad track. Rarely should a court decide the legal effect of such minute distances in a negligence action being tried by a jury. The decision is best left to the jury. "Mathematical possibilities and the results of exact measurements, showing minimal space in which observations could be made, should not be controlling factors in determining whether nonsuit should be allowed as a matter of law." *Johnson v. R.R.*, 257 N.C. 712, 716, 127 S.E. 2d 521, 524 (1962); *accord, Neal v. Booth*, 287 N.C. 237, 214 S.E. 2d 36 (1975).

While evidence for the Railway Company was generally to the contrary, other witnesses as familiar as Anderson with the crossing testified, as we have already noted, that *there was no place* east of the crossing from which a motorist could safely stop and see a sufficient distance to the north. The jury was entitled to consider this evidence. Galyeans and the Milling Company were entitled to the benefit of it on a determination of whether Anderson was contributorily negligent as a matter of law.

Johnson v. R.R., supra, and *Neal v. Booth, supra*, support our decision here. *Johnson* was tried twice. Plaintiff motorist was nonsuited at the first trial and this Court reversed. *Johnson v. R.R.*, 255 N.C. 386, 121 S.E. 2d 580 (1961). At the second trial, evidence for the motorist was somewhat less favorable to him than at the first. He was again nonsuited at trial. This Court again reversed, 257 N.C. 712, 127 S.E. 2d 521 (1962). Both nonsuits were on the ground of the motorist's contributory negligence. In *Johnson* plaintiff motorist stopped some 30 feet from the track and looked. At this point his view was so obstructed that he could not see beyond 75 feet northwardly up the track. Receiving no indication that a train was approaching, he slowly proceeded toward the track. Proceeding onto the track without further stopping, his automobile was struck by a southbound train. Measurements made at the scene indicated that the motorist "might have stopped just short of the mainline track and gained a clear view up the track to the north for a distance which would have permitted him to see the oncoming train in time to avoid a collision." *Id.* at 716, 127 S.E. 2d at 524. It is true that in *Johnson*, certain automatic mechanical signals at the crossing were not working. The Court stressed this fact, saying this event had the tendency "to abate the ordinary caution of a traveler on the

highway [who] has the right to place some reliance on such failure." *Id.* The Court, however, recognized that although a motorist "has the right to place some reliance upon an automatic crossing signal, especially if his view is obstructed . . . the fact that an automatic warning signal is not working does not relieve the traveler of the duty to look and listen for approaching trains when from a safe position such looking and listening will suffice to warn him of danger." *Id.* Thus, in *Johnson*, the essential error in the nonsuit was the trial court's failure to take properly into account the obstruction to the view of the motorist and in placing too much stress on the evidence that the motorist might have gained a clearer view up the track had he stopped just short of it. We also note that in *Johnson* the motorist exercised less caution in approaching the track than did Anderson here. In *Johnson* the motorist testified that after he stopped some 30 feet from the track he continued without further stopping. As he continued he "glanced in the direction of north and south, but I was centering my attention primarily on the road. I never saw the train that hit me." *Id.* at 715, 127 S.E. 2d at 523.

In *Neal v. Booth, supra*, 287 N.C. 237, 214 S.E. 2d 36 (1975), this Court reversed a directed verdict entered at trial against plaintiff whose intestate motorist was struck by a train at a crossing where his view of the track was obstructed. The directed verdict was entered on the ground that plaintiff's intestate was contributorily negligent as a matter of law since the evidence "tends to show that . . . [intestate] was traveling at the rate of 5 miles per hour and that his view was obstructed until he was 21 feet from the southernmost track." *Id.* at 240-241, 214 S.E. 2d at 38. Plaintiff's evidence was that his intestate was crossing three tracks where they intersected at right angles with the roadway. His view of the tracks to the east from whence the train came was obstructed by the depot, parked automobiles, and boxcars on a side track, the first of three tracks which the intestate had to cross. Because of these obstructions intestate could not see the train approaching on the third track until he had crossed the side track. He was proceeding at a speed of five miles per hour. In the 21 feet between the side track and the mainline track on which the train was proceeding, the intestate did not stop. The train, proceeding at a speed of 80 mph, collided with the vehicle killing the intestate instantly. There was no signal from the train, and

the electrical warning device did not activate. This Court, speaking through then Chief Justice Sharp, said, 287 N.C. at 242, 214 S.E. 2d at 39-40:

> "The train has the right of way at a public crossing, but it is the duty of the engineer to sound the customary warnings of the train's approach. A traveler on the highway has the right to expect timely warning, but the engineer's failure to give such warning will not justify an assumption that no train is approaching. Before going upon the track, and at a point where lookout will be effective, 'a traveler must look and listen in both directions for approaching trains, *if not prevented from doing so by the fault of the railroad company.*' He has the right to place some reliance upon an automatic crossing signal, especially if his view is obstructed. But the fact that an automatic warning signal is not working does not relieve the traveler of the duty to look and listen for approaching trains when, *from a safe position*, such looking and listening will suffice to warn him of danger. '*Where there are obstructions to the view and the traveler is exposed to sudden peril, without fault on his part, and must make a quick decision, contributory negligence is for the jury.*' *Johnson v. R.R.*, 255 N.C. at 388-389, 121 S.E. 2d at 581-582." (Emphasis supplied.)

We believe there is evidence in the instant case which tends to show that Anderson had a severely obstructed view of the track which precluded him from having a safe position from which to look and listen; that he was exposed without fault on his part to a sudden peril and had to make a quick decision. The case is for the jury. The decision of the Court of Appeals is, therefore,

Reversed.

Justices HUSKINS and BRITT dissent.

STATE OF NORTH CAROLINA v. BOBBY RAYE MYERS

No. 97

(Filed 1 April 1980)

1. **Criminal Law § 71— victim "afraid" husband would kill her—shorthand statement of fact**

A witness's testimony that a murder victim was "afraid " her husband would kill her was competent as a shorthand description of the victim's emotional state based on the witness's observations of the victim's demeanor.

2. **Criminal Law § 71— defendant's "complete control" of gun—shorthand statement of fact**

A witness's testimony that defendant had "complete control" of a gun at the time he came up over the front seat of a car to shoot his wife was competent as a shorthand description of a sequence of movements observed by the witness while standing thirty feet from the front of the car in which the shooting occurred.

3. **Homicide § 17.2— threats to kill deceased—effect of remoteness**

A witness's testimony that defendant on earlier occasions had threatened to kill deceased was not inadmissible because the threats were made some twelve to fifteen months before deceased was killed, since remoteness goes only to the weight of such testimony.

4. **Bills of Discovery § 6; Criminal Law § 87— prosecutor's statement naming State's witnesses—testimony by witnesses not named**

In a murder prosecution in which the prosecutor, at defendant's request, stated in the presence of the potential jurors the names of all persons the State would call to testify, the trial court did not err in permitting two witnesses whose names had not been so mentioned to testify for the State where the *voir dire* examination conducted by the court showed that the jurors did not know either of the witnesses the State had failed to name and that the prosecutor did not act in bad faith and defendant was not prejudiced thereby.

5. **Homicide § 17.1— husband's continuing abuse of wife—competency**

In a prosecution of defendant for the first degree murder of his wife, testimony by two of defendant's neighbors concerning defendant's continuing verbal abuse of his wife was admissible as bearing on intent, malice, motive, premeditation, and deliberation on the part of defendant.

6. **Homicide § 4.3— premeditation defined**

Premeditation means thought beforehand for some length of time, however short, but no particular time is required for the mental process of premeditation.

7. Homicide § 4.3— deliberation defined

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.

8. Homicide § 4.3— premeditation and deliberation

An unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding defendant was angry or in an emotional state at the time, unless such anger or emotion was such as to disturb the faculties and reason.

9. Homicide § 18— premeditation and deliberation—circumstantial evidence

Since premeditation and deliberation refer to processes of the mind, they must almost always be proved, if at all, by circumstantial evidence, and among circumstances which may tend to prove premeditation and deliberation are (1) want of provocation on the part of deceased; (2) conduct and statements of the defendant both before and after the killing; (3) threats made against deceased by the defendant; and (4) ill will or previous difficulty between the parties.

10. Homicide § 21.5— first degree murder—sufficient evidence of malice, premeditation and deliberation

There was sufficient evidence of intent, premeditation and deliberation and malice to sustain defendant's conviction of first degree murder of his wife where the evidence tended to show that defendant expressed extreme hatred toward his wife and subjected her to continuing verbal and physical abuse during the months prior to her death; during the previous year he had threatened to a co-worker that he was going to kill his wife "before it is over with"; defendant's wife left defendant and was staying at her father's house; defendant purchased a shotgun and shells on the morning of the killing; defendant, brandishing his gun and wearing an ammunition belt full of shotgun shells, confronted his wife as she left her place of work and told her, "Let's go. I told you what I would do if you left the next time."; defendant marched his wife to his car and sat in the back seat while she began to drive the car slowly; two police cars blocked the path of the car and caused it to stop; defendant's wife grabbed the bun barrel and pointed it toward the car ceiling; and defendant pushed his wife down into the front seat, rose in the back seat and regained complete control of the gun, pointed it into the front seat, and fired the shots which killed his wife.

11. Criminal Law § 102.10— first degree murder case—prosecutor's remarks not improper

In a prosecution of defendant for first degree murder of his wife, remarks made by the prosecutor during his jury argument concerning the demeanor of defendant when he looked at pictures of his wife's body during the trial, defendant's previous conviction of involuntary manslaughter for the death of his wife's first husband, who was the father of his wife's nine year old child, and defendant's attitude and conduct toward his wife were rooted in the evidence before the jury and were within the bounds of permissible argument.

State v. Myers

APPEAL by defendant from judgment of *Albright, J.*, 9 April 1979 Session, SURRY Superior Court. This case was docketed and argued as Case No. 118 at the Fall Term 1979.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of Jan Charlsie Myers on 31 August 1978.

The State offered evidence tending to show that on 24 August 1978 defendant was estranged from his wife, Charlsie Myers, who was staying at her father's house. On the afternoon of 28 August 1978 defendant drove a white Dodge Dart into the parking lot of the Proctor-Silex plant where his wife was leaving work with Mr. and Mrs. Hawks. That morning defendant had bought a double barrel twelve gauge shotgun and shells from Sky City. He took the loaded shotgun with him to the parking lot. He was also wearing an ammunition belt which was full of shotgun shells. When he saw his wife defendant brandished his gun, walked rapidly toward her and said: "Get your damn pocketbook. Let's go. I told you what I would do to you if you left the next time." Holding the gun, defendant marched his wife to the car. She sat in the driver's seat. He sat in the center of the back seat and pointed the shotgun at his wife's head. The wife began driving the car very slowly. The car was forced to a halt by police, the wife grabbed the gun barrel, but defendant regained control of the gun and fired. Defendant was immediately shot by the police but survived. His wife died three days later.

There was evidence that defendant didn't get along with his wife, that he had verbally and physically abused her, and that he had previously threatened to kill her.

Defendant testified that he had been previously convicted of involuntary manslaughter for the death of his wife's first husband and had received a suspended sentence. He also testified that the shotgun had been bought for squirrel hunting and had been fired in the woods several times that morning; that he didn't realize he had the ammunition belt on because he was accustomed to wearing heavy pouches in his work; that the gun discharged accidentally; that he loved his wife and was trying to work things out on the day of her death.

The jury found defendant guilty of murder in the first degree and recommended life imprisonment. Defendant appeals to this Court from judgment imposing life imprisonment.

Additional evidence necessary to an understanding of various assignments of error will be narrated in the opinion.

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

Charles M. Neaves, attorney for defendant appellant.

HUSKINS, Justice.

State's witness Ruth Watson testified that Charlsie Myers stayed at her father's house from 24 August 1978 to 28 August 1978, the day the shooting occurred; that on Friday morning, 25 August, she picked up Charlsie at her father's house and gave her a ride to work; that she visited with Charlsie on Saturday and Sunday; that on Monday morning, 28 August, she gave Charlsie a ride to work; that Charlsie's father had hidden her car at the Leonard Aluminum plant; that Charlsie had asked for a ride because she was afraid defendant would kill her; that Charlsie had hidden her car because she was afraid defendant would follow her and kill her. Ruth Watson was Charlsie's mother and was divorced from Charlsie's father.

[1] Defendant contends the trial court erred in permitting Mrs. Watson to testify that Charlsie Myers was "afraid" her husband would kill her. This assignment is without merit. Mrs. Watson's testimony indicates that she had numerous opportunities to observe firsthand Charlsie Myers' demeanor shortly before the shooting occurred. Her testimony that Charlsie feared for her life is but a shorthand description of Charlsie's emotional state based on her observations of Charlsie's demeanor. "The emotion displayed by a person on a given occasion is a proper subject for opinion testimony by a non-expert witness." *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978). *Accord*, 1 Stansbury, N.C. Evidence, § 129 at p. 413 (Brandis Rev. 1973). Defendant's first assignment is overruled.

[2] Similarly, defendant contends that State's witness Garnett Steele should not have been permitted to testify that defendant

had "complete control" of the gun at the time he came up over the front seat of the car to shoot his wife. This assignment is likewise without merit. The testimony objected to is but a shorthand description of a sequence of movements observed by Mr. Steele while standing thirty feet from the front of the car in which the shooting occurred. Such shorthand statements are admissible when, as here, "the facts on which the opinion or conclusion is based cannot be so described that the jury will understand them sufficiently to be able to draw their own inferences." 1 Stansbury, *supra*, § 125, and cases cited therein. Defendant's third assignment is overruled.

[3] Defendant contends the court erred in allowing Mrs. Annie Harrell to testify that on earlier occasions the defendant had threatened to kill deceased. Mrs. Harrell testified that during the summer of 1977 she worked with defendant in a knitting mill and twice during that time defendant told her he was going to kill deceased. Defendant argues that the threat is inadmissible because it was made some twelve to fifteen months before the killing. This contention is without merit. "In homicide cases, threats by the accused have always been freely admitted either to identify him as the killer or to disprove accident or justification or to show premeditation and deliberation." 1 Stansbury, supra, § 162a, and cases cited therein. Moreover, such threats are not rendered inadmissible merely because they were made a considerable time before the killing. *See, e.g., State v. Bright*, 215 N.C. 537, 2 S.E. 2d 541 (1939) (two years); *State v. Payne*, 213 N.C. 719, 197 S.E. 573 (1938) (three or four years). "Ordinarily, remoteness in time in the making of a threat otherwise admissible does not render it incompetent as evidence, but only goes to its weight and effect." *State v. Shook*, 224 N.C. 728, 32 S.E. 2d 329 (1944). Defendant's second assignment of error is overruled.

[4] During selection of the jury, counsel for defendant asked the prosecutor to state, in the presence of the potential jurors, the names of all persons the State would call to testify. The prosecutor complied with this request. At trial, however, three witnesses whose names had not been mentioned to potential jurors during jury selection were permitted to testify for the State. Defendant contends the trial court erred in permitting two of these witnesses, Ronald Dean Sawyer and Mrs. Louise Sawyer, to testify.

In North Carolina defendant does not have the right to discover in advance of trial the names and addresses of the State's prospective witnesses. *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). However, where the State voluntarily furnishes names of prospective witnesses and subsequently seeks to call a witness not previously named, the court will look to see whether the district attorney acted in bad faith and whether defendant was prejudiced thereby. *State v. Smith*, supra. In the instant case, the trial judge conducted a voir dire examination of the jury to determine whether the district attorney had acted in bad faith. The voir dire established that the jurors did not know either of the witnesses the State had failed to name during jury selection. Such inquiry negated the possibility that the State was surreptitiously attempting to place before the jury witnesses who were friendly or influential with the jurors. In sum, the trial court's inquiry satisfied the requirements of *State v. Smith*, supra. Bad faith by the omission of names was not shown. Defendant's fourth assignment is overruled.

[5] Defendant contends the trial court erred in permitting Ronald Dean Sawyer, a thirteen-year-old, and Mrs. Louise Sawyer, his mother, to testify as to defendant's treatment of his wife in the spring and summer of 1978. The Sawyers were neighbors of defendant at that time. While visiting with defendant's children, the Sawyer boy saw defendant pull his wife's hair. Mrs. Sawyer testified that defendant would never let his wife out of the house "and didn't want her to do nothing with anybody." On several occasions Mrs. Sawyer heard defendant order his wife to go upstairs, remove her clothes, and stay in bed. On one occasion, while Mrs. Myers was picking beans in Mrs. Sawyer's backyard at five or six in the afternoon, defendant ordered her to "get the hell up here and get your clothes off." Defendant would make his wife stay in bed most of the time and would not let her sleep. On other occasions, defendant would speak to his wife as if she were a child and order her "to sit down in the chair and sit there like a youngun and be smart." This evidence of defendant's continuing verbal and physical abuse of his wife was admissible as bearing "on intent, malice, motive, premeditation, and deliberation on the part of [defendant]." *State v. Gales*, 240 N.C. 319, 82 S.E. 2d 80 (1954). *Accord, State v. Moore*, 275 N.C. 198, 166 S.E.

2d 652 (1969), and cases cited therein. Accordingly, defendant's fifth assignment is overruled.

Defendant assigns as error the trial court's denial of his motion for judgment as of nonsuit at the close of all the evidence. In effect, defendant contends there was not sufficient evidence of intent, premeditation, deliberation, and malice to sustain a conviction for first degree murder.

Murder in the first degree is the unlawful killing of a human being with malice, premeditation, and deliberation. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); *State v. Moore*, *supra*.

"Malice is not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Benson*, 183 N.C. 795, 111 S.E. 869 (1922). *Accord*, *State v. Moore*, *supra*. "The intentional use of a deadly weapon proximately causing death gives rise to the presumption that (1) the killing was unlawful, and (2) the killing was done with malice." *State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333, *death sentence vacated*, 429 U.S. 809 (1976).

[6-9] Premeditation means thought over beforehand for some length of time, however short, but no particular time is required for the mental process of premeditation. *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969). 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, 204 S.E. 2d 817 (1974). The requirement of "cool state of blood" does not mean that defendant must be calm or tranquil. 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, unless such anger or emotion was such as to disturb the faculties and reason. *Id.* Since premeditation and deliberation refer to processes of the mind, they must almost always be proved, if at all, by circumstantial evidence. *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978). Among circumstances which may tend to prove premeditation and deliberation are: (1) want of provocation on the part of deceased; (2) conduct and statements of

the defendant both before and after the killing; (3) threats made against the deceased by the defendant; and (4) ill will or previous difficulty between the parties. *State v. Potter, supra; State v. Fountain,* 282 N.C. 58, 191 S.E. 2d 674 (1972).

[10] Taken in its most favorable light, and given every reasonable inference to be drawn therefrom, the State's evidence on the elements of malice, premeditation and deliberation tends to show that defendant expressed extreme hatred toward his wife, the deceased, during the spring and summer of 1978. During that time he subjected her to continuing verbal and physical abuse. The previous summer he had twice threatened to a co-worker that he was going to kill his wife "before it is over with." By 24 August 1978 the deceased, Charlsie Myers, had left defendant and was staying at her father's house. While staying there, Charlsie arranged to have her car hidden and to be driven to work by her mother. Charlsie was afraid her husband would follow her and kill her. On the morning of 28 August 1978 Charlsie was dropped off at the Proctor-Silex plant by her mother. At ten o'clock that morning defendant went to the Sky City store and began looking at shotguns. Within ten minutes he decided to purchase a double barrel twelve gauge shotgun. A box of shells was thrown in with the purchase. By three o'clock that afternoon, defendant had driven to the Proctor-Silex parking lot. At four-thirty that afternoon Charlsie Myers left work and walked toward the parking lot with some friends who were giving her a ride home. Brandishing his gun and wearing an ammunition belt full of shotgun shells, defendant walked rapidly toward his wife and said "Get your damn pocketbook. Let's go. I told you what I would do if you left the next time." Holding the gun, defendant marched Charlsie toward his car. Charlsie sat in the driver's seat. Defendant sat in the center of the back seat and pointed the shotgun at Charlsie's head. Charlsie began to drive the car very slowly. Two police cars blocked the path of the car and caused it to come to a halt. Soon thereafter, Charlsie Myers grabbed the gun barrel and pointed it toward the ceiling of the car. Defendant pushed Charlsie down into the front seat with his left arm. He then rose in the back seat, regained complete control of the gun, pointed it into the front seat, and fired the shots which killed his wife.

The foregoing constitutes substantial evidence from which a jury could determine that the unlawful killing of Charlsie Myers was committed with malice, premeditation and deliberation as those terms are defined in our cases. This evidence is sufficient to carry the case to the jury on the elements of malice, premeditation and deliberation. Accordingly, defendant's motion for nonsuit was properly denied. *See generally, State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979) (stating guiding principles applicable on a motion for judgment as of nonsuit). Defendant's seventh assignment is overruled.

[11] Defendant contends the following remarks of the district attorney resulted in prejudicial error:

> "You will recall that as the State was required to do, I carried the pictures that I passed among you to his counsel to observe and you observed that the defendant observed those pictures too and I watched specifically to see his reaction as those pictures of the blood were handed to him and then finally the three pictures of his wife, the woman that he said that he loved, with a gaping hole in her head. He didn't flinch. Didn't bat an eye. I don't know if you were watching him but no remorse and that I contend to you, ladies and gentlemen of the jury, is the first among many things that the State asks that you consider on the question of premeditation and deliberation."
>
> * * * *
>
> "He has killed Tammy's daddy. He killed her mother. It was no accident and that little girl, sometime on about Labor Day, September 3rd or 4th, had to follow that casket to the grave. Nine years old, daddy gone and mother dead at his hands. And of what did that little girl think as she followed that casket to the grave? Undertaker, undertaker, please drive slow, for that body you are hauling, Lord, I hate to see it go. Two people dead at his hands."
>
> * * * *
>
> "If sympathy were to enter into it then I would nominate Charlsie Myers and her child and the others who have suffered as a result of this horrible crime but sympathy does not enter into it. Not at all."

* * * *

"I argue to you, ladies and gentlemen of the jury, he was of the same attitude on that occasion and state of mind that has prompted him from the very beginning of their marriage and the same attitude that prompted him when he shot down her first husband. Not a word of remorse and not a sign of it here in the courtroom during this trial."

"It is the duty of the prosecuting attorney to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction. . . . Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom." *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). *Accord, State v. Thompson*, 293 N.C. 713, 239 S.E. 2d 465 (1977). Whether counsel has abused the wide latitude accorded him in the argument of hotly contested cases is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).

Due consideration of the challenged remarks leads us to conclude they are rooted in the evidence before the jury and are within the bounds of permissible argument. The first challenged remark relates to the demeanor of defendant, which was before the jury at all times. The second and third remarks relate to defendant's testimony that he had been previously convicted of involuntary manslaughter for the death of his wife's first husband, who was "Tammy's daddy," and that "Tammy" was the child of his wife by her first husband. The fourth remark adverts to the substantial evidence of defendant's attitude and conduct toward his wife. In sum, the challenged remarks vigorously and zealously discuss matters which were in evidence before the jury. There are no gross improprieties in the argument of this capital case such as would warrant a new trial. We find no prejudicial error in the argument of the district attorney. Defendant's eighth and ninth assignments are overruled.

We have carefully considered the remaining assignments of error brought forward by defendant and find them to be without merit. Further discussion will serve no useful purpose.

No prejudicial error having been shown, the judgment of the trial court must be upheld.

No error.

STATE OF NORTH CAROLINA v. CARL RAY BOONE

No. 81

(Filed 1 April 1980)

1. **Homicide § 15; Criminal Law § 162— what witness believed or thought—no motion to strike— defendant not prejudiced**

Defendant was not prejudiced by a witness's testimony regarding her beliefs or thoughts as to defendant's residence, since defendant made no motion to strike, and since a different result probably would not have been reached at trial had the complained of testimony been excluded.

2. **Homicide § 15— manner of shooting gun—admissibility of evidence**

Defendant in a second degree murder prosecution was not prejudiced by a witness's testimony concerning the manner in which defendant was shooting a gun, since the crux of the testimony was that defendant was running behind the deceased shooting a pistol, and the manner in which he was shooting it was of little moment.

3. **Homicide § 15; Criminal Law § 162— evidence of bullet hole—no motion to strike—defendant not prejudiced**

Defendant was not prejudiced by testimony that a bullet hole in a cabinet at the crime scene "was shot in there that morning," meaning at the time of the incident in question, since defendant did not move to strike the testimony, and there was no reasonable possibility that, had the testimony been excluded, a different result would have been reached.

4. **Homicide § 14.6— self-defense—burden of proof not on State**

There was no burden on the State in a second degree murder prosecution to prove the non-existence of self-defense where the evidence tended to show that defendant, unprovoked, first accosted deceased with a deadly weapon in a third person's home; then, while continuing to fire the weapon, he chased deceased to the home of another person; witnesses heard the firing of the weapon while defendant and deceased were in the second house; shortly thereafter deceased was found on the kitchen floor, dead of a bullet wound and holding a butcher knife in his hand; and there was no evidence of precisely what happened in the kitchen.

5. **Homicide § 27— involuntary manslaughter and manslaughter interchangeable terms—instruction not prejudicial**

Defendant in a second degree murder case was not prejudiced by the trial judge's instruction that the terms "involuntary manslaughter" and

"manslaughter" had the same meaning for purposes of the trial and were interchangeable, since the instruction was clearly precautionary and designed to prevent confusion in the minds of the jurors should the trial judge inadvertently use the term "involuntary manslaughter" in his further instructions.

6. **Homicide § 28— self-defense—defendant not entitled to instruction—instruction not prejudicial**

The trial court's instruction designed to permit the jury to find defendant guilty of manslaughter on the theory that he shot deceased in the exercise of an imperfect right of self-defense was not prejudicial to defendant, since he was not entitled to an instruction on self-defense, perfect or imperfect.

7. **Homicide § 28— self-defense—instruction not misleading**

The jury was not misled by the trial judge's instruction that he was referring to self-defense when he used the phrase "without lawful justification or excuse," since the judge intended to convey to the jury the notion that "justification or excuse" referred to the doctrine of "self-defense," and the judge properly defined self-defense elsewhere in his charge.

BEFORE *Judge Small* at the 27 November 1978 Session of GATES Superior Court defendant was convicted by a jury of murder in the second degree. He was sentenced to life imprisonment. He appeals pursuant to G.S. 7A-27(a). This case was argued as No. 25 at the Fall Term 1979.

Rufus L. Edmisten, Attorney General, by W. A. Raney, Jr., Special Deputy Attorney General, for the state.

Philip P. Godwin, Attorney for defendant.

EXUM, Justice.

Defendant assigns as error: (1) the admission of certain testimony; (2) denial of his motion for dismissal for insufficiency of the evidence; (3) certain aspects of the trial court's jury instructions; and (4) denial of his motion to set aside the verdict as being contrary to the greater weight of the evidence. We find no merit in any of these assignments and no prejudicial error in the trial.

The state's evidence tended to show as follows:

On 4 July 1978 the deceased, Ervin Cross, came to the home of Virginia Cross in the Boonetown Community in Gates County. He had earlier repaired a window in the Virginia Cross home. He was there on the occasion in question to determine if the window

was working properly. Defendant entered the house through the back door. He said to Virginia Cross, who was also present, "Move, [I am] going to shoot." Defendant pushed Virginia Cross against the refrigerator. She then observed defendant pull a pistol out of his pants' pocket. Virginia Cross ran out on the porch and "froze." She heard a pistol go off in the house. She then observed defendant and the deceased running across a field heading toward Vandell Cross' house. Defendant was running behind Ervin Cross. As he ran defendant shot the pistol three times. Both Ervin Cross and the defendant entered Vandell Cross' back door.

Essie Brown was present in Vandell Cross' residence when the deceased and defendant entered. Being scared, Essie Brown locked herself in the bathroom. She heard shots "that sounded like they were coming from the backyard of Vandell's house." She stayed in the bathroom for two or three minutes. She then left the bathroom and ran out of the house through the living room. When she ran by the kitchen door she saw Ervin Cross lying on the floor.

Vandell Cross, who was in the area at the time, observed the deceased and defendant run toward his house. When he arrived at his house he went in the kitchen. He observed the deceased lying on the floor. Defendant "was going back the same direction that he came, down across my yard, and Virginia's yard, on back around by the hog pasture." The deceased, Vandell Cross testified, was "laying there dead with a butcher knife in his hand. I never saw Carl Ray [defendant] with anything in his hand. I was getting out of my truck and heard one shot that sounded like it came from my back door. I didn't see anybody else but Carl Ray and I didn't say anything to him nor did he speak to me." Vandell Cross testified that the knife he observed in the deceased's hand had been placed on the kitchen table "where I left it . . . that morning . . . ."

The coroner testified that the deceased died from a bullet wound to his chest which pierced his heart, esophagus, aorta, and left lung. The bullet itself was identified by a firearms expert as being a .32 caliber bullet. Efforts by investigators to recover the weapon were unsuccessful.

Defendant offered no evidence.

The trial judge instructed the jury that they might return verdicts of guilty of second degree murder, manslaughter, not guilty, and not guilty by reason of self-defense. The jury returned a verdict of guilty of second degree murder. Defendant was sentenced to life imprisonment.

Defendant first assigns error to the admission of certain testimony.

[1] During the examination of state's witness Virginia Cross, she gave the following testimony:

> "I also had occasion to see Carl Ray Boone at my house on the morning of July 4, 1978. I have known Carl Ray ever since I have been living here in Boonetown.
>
> Q. Does Carl Ray live in that community, or not?
>
> A. Not in the community we do, off from where we do.
>
> Q. Had he been living there around July 4th, or somewhere else?
>
> A. I think he was in New York or Philadelphia, or some place.
>
> OBJECTION to what she 'thinks.'
>
> OVERRULED."

Assuming arguendo that Virginia Cross should not have been permitted to testify regarding her beliefs or thoughts as to defendant's residence, nevertheless we find no prejudicial error in this incident. Defendant's proper response to the witness' objectionable answer was a motion to strike. Failure to make such a motion precludes defendant from relying on the objectionable answer on appeal. *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975); *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966). Furthermore we are satisfied that this answer, even if improperly admitted, did not prejudice defendant. Defendant argues that the evidence put him in the position of an "outsider" and thereby prejudiced him in the eyes of the jury. This argument falls, however, inasmuch as Virginia Cross also testified that she had "known Carl Ray ever since I have been living here in Boonetown." She consistently referred to him in her testimony as "Carl Ray" indicating that defendant was familiar to her. Both

Essie Brown and Vandell Cross also referred to the defendant as "Carl Ray" indicating that he was likewise familiar to them. G.S. 15A-1443(a) provides, "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." We are satisfied that there is no reasonable possibility that a different result would have been reached at this trial had the complained of testimony been excluded.

[2] Another incident complained of by the defendant also occurred during the testimony of Virginia Cross:

"Q. Can you describe what you observed Carl Ray doing as he was running behind Ervin?

OBJECTION.

OVERRULED.

A. He was shooting that pistol, he shot that pistol three times running across the path.

Q. Carl Ray did?

A. Yes, three times.

Q. Can you describe how Carl Ray was holding the pistol?

A. Not exactly, but he must have been shooting like this (indicating with hand), because he was running, and Ervin was running.

OBJECTION AND MOTION TO STRIKE.

MOTION TO STRIKE DENIED. OBJECTION OVERRULED.

Q. Could you see the pistol at that time?

A. No, I heard the pistol."

Again, defendant complains of Virginia Cross' testimony that "he must have been shooting like this (indicating with hand)" inasmuch as this seems to be an impermissible conclusion on the part of the witness. Suffice it to say that the crux of this

testimony was that defendant was running behind the deceased shooting a pistol. The manner in which he was shooting is of little moment. Assuming the testimony was incompetent and should have been stricken, we are satisfied defendant was not prejudiced by it. G.S. 15A-1443(a).

[3] Investigating SBI Agent Eugene Bryant testified, without objection, that his investigation of the scene of the shooting revealed a bullet hole in the top door of one of the kitchen cabinets, several broken dishes, a projectile, and fragments of lead lying inside the cabinet. During the redirect examination of Vandell Cross the following occurred:

"Q. Now this hole that you described in the cabinet, had that been there, had that hole been there before this day?

A. No—

OBJECTION.

A. It was shot in there that morning.

OVERRULED.

Q. Would you repeat that?

A. I said that was shot in there that morning.

OBJECTION.

OVERRULED."

Defendant assigns as error the admission of this testimony. It was, of course, proper for Vandell Cross to testify that the hole had not been in the cabinet before the day of the shooting. Assuming the statements as to when it was "shot in there" were inadmissible since the witness did not actually see the shooting, defendant's assignment of error insofar as it is based on this incident must nevertheless fail. Defendant did not move to strike the testimony. Again, we are satisfied that there is no reasonable possibility that had this testimony been excluded a different result would have been reached. The hole not having been in the cabinet before the day in question and being discovered there immediately after the incident, the conclusion is inescapable that the hole was "shot in there" during the incident under investigation.

[4] Defendant next assigns as error the denial of his motion for dismissal at the close of the evidence. Defendant argues that the motion should have been allowed because the state failed to prove beyond a reasonable doubt that defendant did not act in self-defense. The state must prove that a defendant did not act in self-defense only when there is some evidence of self-defense in the case. *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975). We said in *Hankerson*, 288 N.C. at 649-50, 220 S.E. 2d at 588:

> "The *Mullaney* ruling does not, however, preclude all use of our traditional presumptions of malice and unlawfulness. It precludes only utilizing them in such a way as to relieve the state of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and, we believe, constitutional. *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975); *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974), pet. for cert. filed, 43 U.S.L.W. 3392 (U.S. Nov. 29, 1974) (No. 669). Neither, by reason of *Mullaney*, is it unconstitutional to make the presumptions mandatory in the absence of contrary evidence nor to permit the logical inferences arising from facts proved (killing by intentional use of deadly weapon), *State v. Williams, supra*, to remain and be weighed against contrary evidence if it is produced. The effect of making the presumptions mandatory in the absence of any contrary evidence is simply to impose upon the defendant a burden to go forward with or produce some evidence of all elements of self-defense or heat of passion on sudden provocation, or rely on such evidence as may be present in the State's case. The mandatory presumption is simply a way of stating our legal rule that in the absence of evidence of mitigating or justifying factors all killings accomplished through the intentional use of a deadly weapon are deemed to be malicious and unlawful."

In this case there is no evidence of a killing in self-defense. The evidence is that defendant, unprovoked, first accosted the deceased with a deadly weapon in the home of Virginia Cross. He then, while continuing to fire the weapon, chased the deceased to the home of Vandell Cross. While inside the home of Vandell Cross the weapon was heard to fire. Shortly thereafter the deceased was found dead of a bullet wound on the floor of Vandell Cross' kitchen with a butcher knife in his hand. There is no

evidence of precisely what happened in the kitchen. Defendant, however, if he desires to rely on the defense of self-defense has the burden to go forward with or produce some evidence of it in the absence of its production by the state. *State v. Hankerson, supra.* This he failed to do. There was, consequently, no burden on the state to prove the nonexistence of self-defense in this case. This assignment of error is overruled.

[5] Defendant next assigns as error the following instruction of the trial judge:

> "During the course of my instructions to you I may use the term 'involuntary manslaughter.' I instruct you now that if I use the term 'involuntary manslaughter' it has the same meaning as manslaughter, and for the purposes of this trial the two interchangeable."

Obviously by this instruction the trial court was guarding against a possible later *lapsus linguae.* The trial court never submitted involuntary manslaughter as an alternative verdict. Neither did he commit the slip of the tongue which he attempted to guard against by the introductory instruction complained of. Defendant does not argue that involuntary manslaughter should have been submitted as an alternative verdict. He argues, rather, that the instruction in question created "confusion as to the lesser degrees of homicide" and prejudiced him "by virtualy removing manslaughter from the list of understandable verdicts which the jury might return." We find no merit in this argument. The instruction is clearly precautionary and designed to prevent confusion in the jury's mind should the trial judge inadvertently use the term "involuntary manslaughter" in his further instructions. This assignment of error is overruled.

[6] Defendant assigns error to the following instruction:

> "If the State proved by the evidence beyond a reasonable doubt that the defendant, while acting in self-defense, used excessive force, or was the aggressor in bringing on the dispute with Ervin Cross, and shot Ervin Cross with a .32 caliber firearm, thereby proximately causing the death of Ervin Cross, the defendant may not avail himself of the claim of self-defense and be lawfully justified or excused of the homicide, and it would be your duty to return a verdict of guilty of manslaughter."

Defendant argues that by using the words "or was the aggressor in bringing on the dispute" the trial judge inadvertently expressed an opinion in light of the fact that there was no evidence of any "dispute" between defendant and his victim. Defendant's argument points up the real error of the instruction, but it is error in favor of the defendant. The instruction is designed to permit the jury to find defendant guilty of manslaughter on the theory that he shot the deceased in the exercise of an imperfect right of self-defense. The theory presented by this instruction is that although defendant was the aggressor in the matter, at the time he shot defendant he did so in order to save himself from death or great bodily harm. *See State v. Potter*, 295 N.C. 126, 144, 244 S.E. 2d 397, 408-409 (1978). There being, however, no evidence of a dispute which gave rise to the shooting and no evidence of self-defense, defendant was not entitled to an instruction giving him the benefit of the doctrine of self-defense, perfect or imperfect. When a defendant in a homicide case is not entitled to an instruction on the lesser offense of voluntary manslaughter because there is no evidence supporting it, any error in such an instruction is not prejudicial as a matter of law. *State v. Wetmore*, 298 N.C. 743, 259 S.E. 2d 870 (1979). This assignment is overruled.

[7] Defendant next assigns as error the following instruction:

> "Now I will further attempt to explain those definitions to you, but before doing so I will, in the course of my instructions, refer to the term 'self-defense,' which I will define for you later.
>
> I will also be referring to the term 'without lawful justification or excuse.' When I use the phrase, 'without lawful justification or excuse,' in this trial, I am referring to the term 'self-defense.' "

Defendant argues that the charge was incorrect in that the trial judge intimated "that the right of self-defense is an act done 'without lawful justification or excuse' rather than an act done 'with lawful justification or excuse.' " Inasmuch as defendant was not entitled to an instruction on self-defense, this statement of the trial judge could not have prejudiced him. *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969). It is, moreover, clear to us

that the trial judge intended to convey to the jury the notion that "justification or excuse" referred to the doctrine of "self-defense." He was not attempting to define at this point in his instructions the doctrine. He did correctly define it at other places in his instructions. While it would have been preferable for the judge to have told the jury that the phrase "lawful justification or excuse" referred to the doctrine of self-defense, we don't believe the jury was misled by the instruction as given. This assignment of error is overruled.

Defendant next assigns as error the failure of the trial court to set aside the verdict as being contrary to the weight of the evidence "since the State relied solely upon circumstantial evidence of a conjectural nature." Suffice it to say that we find the circumstantial evidence utilized by the state in this case rather overwhelming against defendant. There was no error in the trial judge's failure to set aside the verdict as being contrary to the weight of the evidence.

In defendant's trial we find

No error.

STATE OF NORTH CAROLINA v. PERCELL L. HORTON

No. 1

(Filed 1 April 1980)

1. **Homicide § 20.1— photographs of deceased—admissibility for illustrative purposes**

Two black and white photographs showing the wounds and face of the deceased were properly admitted for the purpose of illustrating the testimony of a medical expert who described the wounds and stated his opinion as to the cause of death.

2. **Criminal Law § 42; Homicide § 20— clothes worn by murder victim—admissibility**

Clothes worn by the decedent at the time he was shot to death were properly admitted into evidence.

3. **Criminal Law § 76.6— voluntariness of confession—adequacy of findings**

The trial court made adequate findings of fact that defendant's confession was made freely and voluntarily.

4. **Criminal Law §§ 89, 95.2— instructions limiting use of confession to impeachment or corroboration**

The trial court properly gave the jury an instruction limiting the use of defendant's in-custody statements to purposes of impeachment or corroboration, and the court did not err in failing to define the words impeachment and corroboration.

5. **Criminal Law §§ 63, 75.14— low mentality of defendant—insufficient basis for expert testimony—irrelevancy on admissibility of confession**

The trial court in a homicide case properly excluded the testimony of an expert in clinical psychology concerning defendant's low mental capacity where the expert testified on *voir dire* that he had not personally examined defendant and had performed no psychiatric tests on defendant; the tests which formed the basis of his opinion testimony were administered four years earlier by a third party; at the time the tests were administered the defendant was not receiving treatment from the medical center where the expert practiced; and the expert stated that he did not personally know the defendant and was talking in terms of the general category of mildly retarded people. Furthermore, the testimony was not relevant to the admissibility of defendant's confession since the trial judge during a previous *voir dire* had ruled that the confession was voluntary and admissible.

6. **Criminal Law § 71— testimony that defendant "was going to shoot him again"—shorthand statement of fact**

In this homicide prosecution, a witness's testimony that defendant, after shooting deceased, reloaded his gun and "was going to shoot him again" was competent as a shorthand statement of the facts describing for the jury what he had seen.

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

The evidence was sufficient to support defendant's conviction of first degree murder where it tended to show that deceased and defendant engaged in an argument; defendant walked to the trunk of his car and removed a .12 gauge shotgun; defendant leveled the gun at deceased who was some 10 feet away; deceased began backing up with his hands empty and in the air; and defendant then cocked the hammer on the shotgun and shot deceased in the stomach, causing his death.

ON appeal by defendant to review a trial before *Allsbrook, J.* Judgment entered 10 November 1978.

Defendant was charged by indictment, proper in form, with the murder of Kelly Winborne on 15 August 1978. He was tried by a jury and convicted of first degree murder and upon recommendation of the jury, was sentenced to life imprisonment.

The State's evidence tended to show the following: On the morning of August 15, 1978 defendant, Percell Horton, the de-

ceased, Kelly Winborne, and two others pulled tobacco on the farm of Carroll Brown. They worked from around 7:30 a.m. until approximately 2:00 p.m. After finishing work they proceeded to Harrell & Sons Store in Trap, North Carolina where each of the four bought a quart of beer. After drinking the beer and allowing defendant to clean up, the four men drove to Colerain, North Carolina to enable defendant to purchase car insurance. After obtaining the insurance defendant left Colerain in order to drive to Ahoskie, North Carolina to obtain a license plate for his automobile. Deceased, who had ridden to Colerain with the defendant, was left behind. Returning from Ahoskie, defendant and Steve Palmer (one of the four men present throughout the day) stopped in Trap to get gas for the car. While they were stopped, the deceased arrived in a truck and became angry about defendant having left him in Colerain. The deceased's anger precipitated an argument between him and the defendant. During the argument defendant walked to the trunk of his car and removed a single barrel .12 gauge shotgun. Defendant leveled the gun at the deceased who was approximately 10 feet away. Deceased began backing up with his hands empty and held in the air. Defendant then cocked the hammer on the shotgun and shot deceased in the stomach. After reloading his shotgun, defendant replaced it in the trunk of his automobile and drove away from the station. Kelly Winborne died as a result of the shotgun wound to his stomach.

Defendant did not deny shooting the deceased, but contended the gun when placed to his shoulder just "went off." He also contended he shot Kelly Winborne, for he thought the deceased was going to kill him with "Kung Fu."

Attorney General Rufus L. Edmisten by William F. Briley, Assistant Attorney General and William R. Shenton, Associate Attorney for the State.

W. C. Cooke for the defendant Percell Horton.

BROCK, Justice.

Defendant's first two assignments of error concern the admission into evidence of two photographs of the deceased, and the clothing which the deceased was wearing at the time of the alleged murder. Defendant contends that these photographs and

clothes had no probative value with respect to any issue to be determined by the jury, and were submitted solely for inflammatory purposes.

[1] Turning first to the photographs, it is settled law in this jurisdiction that:

> "Photographs are admissible . . . to illustrate the testimony of a witness, and their admission for that purpose under proper limiting instructions is not error. (Citations omitted.)
>
> The fact that a photograph may depict a horrible, gruesome or revolting scene . . . does not render it incompetent . . . ." *State v. Crowder*, 285 N.C. 42, 49, 203 S.E. 2d 38, 43 (1974), *death penalty vacated*, 428 U.S. 903, 49 L.Ed. 2d 1207, 96 S.Ct. 3205 (1976).

The photographs complained of by the defendant were black and white photographs showing the wound and face of the deceased. Both photographs were introduced into evidence to illustrate the testimony of Dr. Gallaway in describing the wounds and giving his opinion as to the cause of death of the deceased. Prior to viewing by the jury, the trial judge gave the proper limiting instruction that the photographs were being admitted for the sole purpose of illustrating the testimony of Dr. Gallaway. Defendant's reliance on *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969), *rev'd. on other grounds*, 287 N.C. 266, 215 S.E. 2d 348 (1975) is misplaced. In *Mercer* the trial judge erred for he admitted an excessive number of gruesome photographs with no probative value. Such is not the case here. Defendant's assignment of error No. 1 is overruled.

[2] As to the admissibility of the clothes worn by the decedent at the time of the shooting, we hold these were also properly admitted into evidence. The pants were introduced to illustrate the testimony of Dr. Gallaway, and the shirt was introduced during the testimony of Detective Wallace Perry as being part of the deceased's clothes picked up at the hospital. In *State v. Rogers*, 275 N.C. 411, 430, 168 S.E. 2d 345, 356-57 (1969), Justice Huskins writing for the Court held, "[a]rticles of clothing identified as worn by the victim at the time the crime was committed are competent evidence, and their admission has been approved in many decisions of this court. (Citations omitted.)" *See also* 1 Stansbury's

N.C. Evidence (Brandis Rev.) § 118 (1973). Defendant's assignment of error No. 2 is overruled.

[3] In his third assignment of error defendant presents four contentions. By his first contention defendant argues the trial court failed to make adequate findings of fact that his confession was freely and voluntarily given, and therefore introduction of defendant's confession for impeachment purposes was error. Following the voir dire concerning the admissibility of defendant's confession, Judge Allsbrook found:

> ". . . having observed the defendant testify on direct examination and cross-examination it is the Court's opinion and the Court finds as fact that the statements made [by the defendant] on August 16, 1978 . . . were voluntarily and understandingly made and for the purpose of cross-examination may be utilitized."

Defendant did not take exception to Judge Allsbrook's finding of fact and it is clearly adequate. This assignment is without merit.

[4] Defendant next argues that the court's instructions to the jury during the trial as to the limited purpose for which the in-custody statements were admitted were so confusing and ambiguous that the jury could not understand whether the State was attempting to impeach or corroborate the witness. Judge Allsbrook instructed that the defendant's statements, if the jury found such statements were made, could be admitted for the purposes of:

> ". . . [I]mpeaching or corroborating this witness, as you so find, and therefore any such statements that he may have made are admitted only for—only as bears upon his credibility as a witness and will not be considered by you for any other purpose. . . ."

Since the court had previously found as fact that the confession was voluntary, the confession was admissible to impeach the defendant once he took the stand. *State v. Overman*, 284 N.C. 335, 347, 200 S.E. 2d 604, 612 (1973). It is also settled law in this jurisdiction that the prior consistent statements of a witness may be introduced to strengthen his credibility. *State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977); *State v. Yancey*, 291 N.C. 656, 666, 231 S.E. 2d 637, 643 (1977); *see also* 1 Stansbury's N.C.

Evidence (Brandis Rev.) § 51 (1973) and cases cited in Note 42. The trial judge's instruction explained and limited the use of defendant's prior statements to their proper purposes. Defendant's second contention is without merit.

By his next argument under assignment No. 3 defendant contends the trial judge erred by giving the above noted instruction that the defendant's confession could be used for either impeachment or corroboration without defining the two terms. At trial, defendant made no request for a limiting instruction informing the jury as to the restricted purpose for which the defendant's confession could be considered. It was incumbent on the defendant as the objecting party, to request a limiting instruction, and in light of defendant's failure to do so, had the trial court failed to give *any* instruction limiting the jury's consideration of the evidence, no error would have been committed. *State v. Goodson*, 273 N.C. 128, 159 S.E. 2d 310 (1968); *State v. Ray*, 212 N.C. 725, 194 S.E. 482 (1938); *see also* 4 Strong's N.C. Index 3d, Criminal Law, § 95.1 (1976). However, in spite of defendant's failure to request such an instruction, the trial court did give a proper limiting instruction as to the jury's use of defendant's confession. Assuming arguendo the defendant has standing to challenge this instruction without having requested any limiting instruction at trial, the instruction given was clear and the words impeach and corroborate are words of everyday language and mean what they are generally intended to mean. Therefore the court made no error in not instructing the jury as to the terms' dictionary definitions. This argument is without merit.

[5] In his fourth contention under assignment No. 3 defendant argues that the confession was not voluntary and that defendant was of such a low mentality he did not understand the significance of what he was doing. Defendant argues that testimony concerning the low mental capacity of the defendant by Dr. John Wigglesworth, an expert in clinical psychology, was erroneously excluded. In his voir dire testimony Dr. Wigglesworth, admittedly an expert in clinical psychology, stated he had not personally examined the defendant, nor had he performed psychiatric tests on the defendant. The tests, on the basis of which Dr. Wigglesworth testified, were administered four years ago by a third party. At the time these tests were administered the defendant was not even receiving treatment from the Roanoke-Chowan Med-

ical Center where Dr. Wigglesworth practiced medicine. Dr. Wigglesworth also stated that as a result of these tests, the defendant had not been evaluated as mentally ill. The defendant enlisted Dr. Wigglesworth's testimony on voir dire subsequent to the State's cross-examination of the defendant, where the defendant's confession had been admitted into evidence for impeachment purposes. After his voir dire testimony, the trial judge ruled Dr. Wigglesworth's testimony not relevant and refused to allow his testimony before the jury. We agree with the trial judge and hold that the testimony of Dr. Wigglesworth was irrelevant and properly excluded. In his own testimony Dr. Wigglesworth stated, "I personally do not know the defendant so I am talking in the terms of the general category of mildly retarded people." His testimony would in no way have proved a fact in issue and was properly excluded. *Corum v. Comer*, 256 N.C. 252, 123 S.E. 2d 473 (1962); *see also* 1 Stansbury's N.C. Evidence (Brandis Rev.) § 78 (1973).

The lack of relevance of Dr. Wigglesworth's testimony is even more apparent since prior to allowing the defendant's confession before the jury, the trial judge during the previous voir dire had, based on competent evidence, concluded the statements made by the defendant were freely and voluntarily given. Defendant offered no evidence at this voir dire. This finding, since it was supported by competent evidence, is conclusive. *Fast v. Gulley*, 271 N.C. 208, 155 S.E. 2d 507 (1967). The trial judge having previously ruled the confession voluntary, the testimony of Dr. Wigglesworth as to defendant's mental capacity was on this ground also properly excluded as irrelevant. Defendant's contention that such testimony should have been admitted as part of the *res gestae* is without merit.

[6] By his fourth assignment of error defendant contends the trial court committed reversible error by allowing the State's witness, Ray Lassiter, to testify that the defendant was going to shoot Kelly Winborne again. After having testified that the defendant shot Kelly Winborne, Lassiter then testified that defendant put his gun back in the car but reloaded it first. This exchange followed:

"Q. How did he reload the gun?

A. This popped back and put the bullet in there and was going to shoot him again.

Q. He got ready to do what?

A. He was going to shoot him again.

Q. Shoot who again?

A. He . . . .

MR. COOKE: Objection.

THE COURT: Overruled.

Q. At the time he got ready to shoot Kelly Winborne again what position was Kelly Winborne in?

OBJECTION. OVERRULED.

A. In the same."

Defendant argues the statement that defendant was going to "shoot him again" should have been excluded as a conclusion or opinion of the witness of a fact beyond his knowledge. We disagree. The testimony of Ray Lassiter was merely a description of what the defendant did after firing the first shot. Lassiter testified that the defendant reloaded the gun and pointed it again at the deceased who was then down on his knees, and that two of the eyewitnesses told him not to shoot Kelly Winborne again. The statement "he was going to shoot him again," constituted the defendant's shorthand statement of the facts describing for the jury what he had seen. As such, it is admissible. *State v. Goss*, 293 N.C. 147, 235 S.E. 2d 844 (1977); *State v. Yancey, supra; see also* 1 Stansbury's N.C. Evidence (Brandis Rev.) § 125 (1973). Defendant's fourth assignment of error is overruled.

By his fifth assignment of error defendant contends the exclusion of Dr. Wigglesworth's testimony was error. This assignment was discussed under assignment of error No. 3 and is overruled.

[7] In assignments of error Nos. 6 and 7, defendant contends the trial court erred in refusing to dismiss the charge of murder, or in the alternative, the charge of first degree murder at the close of the State's evidence. He also contends the court committed error in its failure to dismiss the charge at the conclusion of all the evidence.

At the close of the State's evidence, defendant moved for dismissal which was denied. Following this denial defendant proceeded to offer evidence. Having made this election, defendant waived his motion to dismiss at the close of the State's evidence and proper consideration was thereafter upon his motion to dismiss at the close of all the evidence. G.S. 15-173. *Accord, State v. Jones*, 296 N.C. 75, 248 S.E. 2d 858 (1978); *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972). With regard to defendant's motion to dismiss at the close of all the evidence, by the way of testimony of three eyewitnesses, when viewed in the light most favorable to the State, the evidence was clearly sufficient to support a verdict of guilty of first degree murder. *See State v. Haywood*, 295 N.C. 709, 717, 249 S.E. 2d 429, 434 (1978). Assignments of error Nos. 6 and 7 are overruled.

By his eighth assignment of error defendant contends the trial court erred by failing to set aside the verdict as against the weight of the evidence. The decision of the trial court in ruling on a motion to set aside a verdict as contrary to the weight of the evidence is an exercise of its discretion. Absent an abuse of this discretion, the trial court's decision is not reviewable on appeal. *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335, *cert. dismissed*, 423 U.S. 918, 46 L.Ed. 2d 367, 96 S.Ct. 228 (1975); *see also* 4 Strong's N.C. Index 3d, Criminal Law, § 132 (1976) and cases cited in Note 47. Given the amount of evidence presented in this case, we hold the trial court did not abuse its discretion in refusing to overturn the verdict. Defendant's eighth assignment of error is overruled.

Defendant's final argument is that the trial court committed error in entry of judgment and committing defendant to a term of life imprisonment. The evidence was clearly sufficient for the jury to find the defendant guilty of first degree murder. Pursuant to G.S. 14-17, life imprisonment is the lesser of the two penalties authorized as punishment for the offense of first degree murder; the other being death. The jury returned a verdict of first degree murder and recommended the defendant be punished by life imprisonment. The judge had no alternative but to enter judgment in accordance with this verdict. This assignment is overruled.

We therefore hold the defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. GEORGE ALEXANDER ADAMS

No. 12

(Filed 1 April 1980)

1. Rape § 4.2— physical condition of victim—testimony admissible

In a prosecution for rape and crime against nature the trial court did not err in permitting the victim to testify concerning her physical condition, since her ailment was not so complicated that only an expert witness could give testimony as to its cause and she had previously given substantially similar testimony without objection by defendant; furthermore, testimony by the physician who treated the victim concerning the permanency of her condition was relevant because it tended to corroborate the victim and prove penetration, an essential element of both rape and sodomy.

2. Criminal Law § 169— evidence excluded—failure of record to show what evidence would have been

In a prosecution for kidnapping, rape and crime against nature, the trial court did not err in refusing to allow the victim to testify whether the intersection near her home was a busy one, though defendant argued that testimony showing that the intersection was a busy one would have been relevant on the question of the victim being restrained against her will, since defendant's questions did not seek answers with respect to traffic at the intersection at the time relevant to this case, and defendant failed to show prejudice where the record did not disclose what the witness's answers would have been.

3. Criminal Law § 87.3— witness's use of notes to refresh recollection

There was no merit to defendant's contention that the trial court erred in permitting a witness to testify from his notes where the court, after defendant's objection, instructed the witness that he could use his notes to refresh his recollection but he could not read them to the jury, and there was nothing in the record to show that the witness did not follow the instructions of the court.

4. Kidnapping § 1— restraint shown—showing of asportation unnecessary

Under G.S. 14-39 no showing of asportation as an element of kidnapping is necessary where confinement or restraint is shown.

5. Kidnapping § 1.2— three crimes charged—asportation as well as restraint shown

Where defendant was charged with kidnapping, rape and crime against nature, the State showed not only a restraint of the victim but also an asportation where the evidence tended to show that the victim was accosted by the defendant on the street near the front of her home; she was intending to go to another person's house, but she unwillingly went to and entered her own home because defendant threatened to blow her brains out; and defendant admitted that he told her she was not "going any place."

6. Crime Against Nature § 1— constitutionality of statute

The statute under which defendant was indicted for crime against nature, G.S. 14-177, is constitutional.

7. Criminal Law § 1— consent—other offenders not prosecuted—no defense

As a general rule, consent is not a defense to a prosecution for acts which are breaches of the criminal law, nor is it a valid defense to a criminal charge that other persons have not been prosecuted for the same conduct as that which a defendant is alleged to have committed.

APPEAL by defendant from *Hobgood, J.*, May 1979 Session of VANCE Superior Court.

Upon pleas of not guilty defendant was tried on bills of indictment charging him with rape, kidnapping and two counts of crime against nature. Collie R. Bond was the alleged victim of the crimes. Evidence prsented by the state is summarized in pertinent part as follows:

Mrs. Bond was a 62-year-old widow who lived alone in a house on West Rock Spring Street in Henderson, N.C. She was employed as a reading coordinator by the Vance County School System. At other times she had been employed as a reading teacher and a classroom teacher.

At 1:00 p.m. on Sunday, 1 April 1979, Mrs. Bond was returning from church services to the vicinity of her home. She did not intend to go directly to her home, wishing instead to visit a neighbor who lived nearby. As she neared her home, defendant approached her. She was acquainted with defendant as he had done a number of odd jobs for her. Mrs. Bond spoke to defendant and he asked her where she was going. When she told him that she was going to Mrs. Talley's house, defendant told her that she was not, that if she went another step he would blow her "damn brains out", and that she was going into her house with him.

Because of her fear of defendant, Mrs. Bond went into the house with him. He ordered her into a downstairs bedroom and told her to remove her clothing. She tried to talk defendant out of harming her, telling him that she was an old woman and that a young man like him did not want an old woman. Defendant told her that age did not make any difference to him, that he had "experienced" with virgins and with eighty-year-old women and that he had planned this occasion with her for a long time.

After Mrs. Bond eventually removed her clothing, defendant removed his and got on the bed with her. In spite of her continued pleas that he leave her alone, between then and around 5:00 p.m. defendant performed numerous acts of cunnilingus, vaginal intercourse and anal intercourse on the victim. On one occasion he forced Mrs. Bond to perform fellatio on him.

Finally, at around 5:00 p.m., defendant allowed Mrs. Bond to put on a house robe for the purpose of going upstairs to the bathroom. Instead of going upstairs, she went out the front door and to a neighbor's house where police were called. When police entered the Bond home, they found defendant hiding in an upstairs closet.

Mrs. Bond was taken to the hospital where she was admitted as a patient and treated for several days. In describing the Sunday afternoon ordeal, the victim stated that the anal intercourse was "the most painful thing that has ever happened to me."

Defendant offered evidence, including his own testimony, which is summarized in pertinent part as follows:

On the day in question he was 33 years old. He lived on the same street as Mrs. Bond and had known her all of his life. For several months prior to 1 April 1979, defendant had been employed by her to do various types of work in and around her home, including painting and carpentry, brick and yard work. He worked short hours, mostly at night. During the time he worked for Mrs. Bond they had several personal conversations, including talk regarding marriage. He also ate several meals at Mrs. Bond's house and, although he had kissed her on several occasions, he never had sexual relations with her prior to 1 April 1979.

On the afternoon of that date, he saw her walking out of her driveway. He told her she was not going any place and she went with him into her home. During the afternoon she willingly undressed herself, he undressed himself, and they "had oral, vaginal and anal sex. She never said that she did not want to have sex."

Defendant admitted that he had been convicted of transporting tax-paid liquor, two counts of car theft, breaking and entering and fornication.

The jury found defendant guilty of second-degree rape, kidnapping and two counts of crime against nature. The court entered judgments imposing prison sentences as follows: in one case of crime against nature, 10 years; in the other case of crime against nature, 10 years, this sentence to commence at expiration of the first 10-year sentence; in the kidnapping case, 80 years, this sentence to begin at expiration of sentence in the second crime against nature case; and in the rape case, life sentence to begin at expiration of sentence in the kidnapping case.

Defendant appealed from all judgments, and this court allowed motions to bypass the Court of Appeals in the cases in which less than life sentences were imposed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Paul J. Stainback, Kermit W. Ellis, Jr., and Michael E. Satterwhite for defendant-appellant.

BRITT, Justice.

[1] By his second and fifth assignments of error, defendant contends the trial court erred in permitting Mrs. Bond to give certain testimony regarding her physical condition and in allowing Dr. J. P. Green to testify with respect to the permanency of her condition. These assignments have no merit.

Mrs. Bond testified that she was under the care of Dr. Green the entire time that she was in the hospital; that she was given a proctoscopic examination; that she suffered extended soreness in the area of her hips; and the soreness was caused by the antics defendant put her through, including his placing her legs on one occasion over his shoulder.

Dr. Green testified that he examined Mrs. Bond while she was in the hospital and afterwards; that he found torn places in her vagina and rectum; that several days after she was released from the hospital, she told him that she had developed some loss of rectal control; that he determined that her rectal muscles were damaged to the extent they were not capable of providing tight control of her lower rectum; that he also found a partial prolapse of her vagina; that he had not detected those conditions prior to 1

April 1979; and that any repeated violent penetration of the vagina or rectum could have caused Mrs. Bond's injuries.

Defendant argues that Mrs. Bond was not a competent witness to say what caused soreness to her hips; that the permanency of her injuries had no relevance to the question of defendant's guilt or innocence; and that the only effect of the challenged testimony was to inflame the jury to defendant's prejudice.

We do not find defendant's argument persuasive. As to Mrs. Bond's testimony regarding soreness in the area of her hips and that defendant's acts caused the soreness, we do not think the ailment was so complicated that only an expert witness could give testimony as to its cause. *See generally* 1 Stansbury's North Carolina Evidence § 129 (Brandis Rev. 1973). Furthermore, the victim had previously testified without objection that defendant had bruised her wrists, that his penetration of her rectum was the most painful experience she had ever endured, and that she was very sore in the "private areas" of her body. The admission of testimony over objection is ordinarily harmless when testimony of the same import is theretofore or thereafter admitted without objection. 4 Strong's N.C. Index 3d, Criminal Law § 169.3.

Dr. Green's testimony was relevant because it tended to corroborate the victim and prove penetration, an essential element of both rape and sodomy. *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973); *State v. McNeil*, 277 N.C. 162, 176 S.E. 2d 732 (1970), *cert. denied*, 401 U.S. 962 (1971); *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). Evidence that is relevant will not be excluded merely because it is inflammatory. *See generally State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093 (1977); *State v. Williams*, 289 N.C. 439, 222 S.E. 2d 242, *death sentence vacated* 429 U.S. 809 (1976).

[2] By his third assignment of error defendant contends the trial court erred in refusing to allow Mrs. Bond to testify whether the intersection of Chestnut Street and West Rock Spring Street in the City of Henderson was a busy intersection. Defendant argues that he had shown that the Bond home was only a short distance from Chestnut Street and that testimony showing that the in-

tersection was a busy one would have been relevant on the question of Mrs. Bond being restrained against her will.

There are at least two reasons why this assignment has no merit. In the first place defendant's questions did not seek answers with respect to traffic at the intersection at the time relevant to this case. In the second place, the record does not disclose what the witness' answers would have been, therefore, defendant has failed to show prejudice. *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971). It is true that defendant's counsel asked to be heard when the court sustained objections to the questions, but there was no request that the witness be allowed to answer "for the record".

[3] There is no merit in defendant's fourth assignment of error by which he contends the trial court erred in permitting the witness Lt. Samuel Pearson to testify from his notes. The record reveals that when the witness began testifying defendant objected to his testifying from notes. The court thereupon overruled the objection but instructed the witness that while he could use notes to refresh his recollection, he could not read them (to the jury). There is nothing in the record to show that the witness did not follow the instructions of the court. We perceive no error. *State v. Peacock*, 236 N.C. 137, 72 S.E. 2d 612 (1952).

We find no merit in defendant's assignments of error wherein he contends the trial court erred in denying his motion for directed verdict in the kidnapping case.

G.S. 14-39 provides, in pertinent part, that "any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of: . . . (2) Facilitating the commission of any felony . . . ; or (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed. . . ."

[4] Defendant recognizes that under G.S. 14-39 as now written, no showing of asportation as an element of kidnapping is necessary where confinement or restraint is shown. However, he argues that when, as in this case, a defendant is charged with kidnapping, rape and sodomy, a restraint, which is an inherent, in-

evitable feature of the other felonies, also of kidnapping, cannot support verdicts of all three crimes. Defendant cites *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978).

In *Fulcher*, this court, in an opinion by Justice Lake, said:

> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. Pursuant to the above mentioned principle of statutory construction, we construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony. 294 at 523.

[5] We adhere to the principle quoted from *Fulcher*. However, in the case at hand the state showed not only a restraint of the victim but that there was an asportation, that she was removed from one place to another without her consent. She testified that she was on the street near the front of her home intending to go to Mrs. Talley's home and that she unwillingly went to and entered her own home because defendant threatened to blow her brains out. Defendant admitted that he told her she was not "going any place".

In *Fulcher* this court pointed out that the present statutory definition of the crime of kidnapping enacted in 1975 changed the law as theretofore declared by this court. *See State v. Dix*, 282 N.C. 490, 193 S.E. 2d 897 (1973); *State v. Roberts*, 286 N.C. 265, 210 S.E. 2d 396 (1974). Again we quote from the opinion in *Fulcher*:

> It is equally clear that the Legislature rejected our determinations in *State v. Dix, supra*, and in *State v. Roberts, supra*, to the effect that, where the State relies upon asportation of the victim to establish a kidnapping, the asportation must be for a substantial distance and where the State relies upon "dominion and control," i.e., "confinement"

of "restraint," such must continue "for some appreciable period of time." Thus, it was clearly the intent of the Legislature to make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed. 294 N.C. at 522.

We hold that the showing of asportation in the case at hand was sufficient to support the verdict finding defendant guilty of kidnapping.

By his assignments of error Nos. 7, 8, 10 and 11 defendant contends the trial court erred in denying his motions for directed verdict as to the charges of crime against nature, in failing to allow him to testify concerning Mrs. Bond's consent to the crimes alleged, in failing to instruct the jury that consent is or should be a defense to charges of crime against nature, and in failing to grant his motion for a new trial on the ground that our sodomy statute is unconstitutional. We find no merit in any of these assignments.

[6] The statute under which defendant was indicted for crime against nature, G.S. 14-177, is constitutional. *State v. Enslin*, 25 N.C. App. 662, 214 S.E. 2d 318, *appeal dismissed*, 288 N.C. 245, 217 S.E. 2d 669 (1975), *cert. denied*, 425 U.S. 903 (1976). *See also, Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *affd. mem.* 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed. 2d 751 (1976) (upholding the constitutionality of Virginia's crime against nature statute).

We reject defendant's other arguments relating to these assignments. "It is manifest that the legislative intent and purpose of G.S. 14-177 prior to the 1965 amendment and since is to punish persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality." Justice (later Chief Justice) Parker in *State v. Stubbs*, 266 N.C. 295, 298, 145 S.E. 2d 899 (1966).

[7] As a general rule, consent is not a defense to a prosecution for acts which are breaches of the criminal law. *Ange v. Woodmen of the World*, 173 N.C. 33, 91 S.E. 586 (1917); *State v. Williams*, 75 N.C. 134 (1876); *Bell v. Hansley*, 48 N.C. 131 (1855). Nor is it a valid defense to a criminal charge that other persons

have not been prosecuted for the same conduct as that which a defendant was alleged to have committed. *Gastonia v. Parrish*, 271 N.C. 527, 157 S.E. 2d 154 (1967).

Finally, defendant's court appointed counsel asks that we examine the record beyond the specific assignments of error he has argued to determine if his client received a fair trial. This we have done and conclude that in defendant's trial and the judgments appealed from, there was

No error.

STATE OF NORTH CAROLINA v. ERNEST GLENN KING

No. 10

(Filed 1 April 1980)

1. **Constitutional Law § 60; Grand Jury § 3.6; Jury § 5.2— jury list—tax list names from certain letters of alphabet—no systematic exclusion**

Names for the list of grand and petit jurors were not chosen arbitrarily or nonsystematically in violation of G.S. 9-2 where every fourth name from the tax list was taken only from the letters A, B, C, D and M rather than from the entire alphabet, although the practice of choosing names only from certain letters of the alphabet is not approved since G.S. 9-2 seems to contemplate systematic selection of names from the entire alphabet.

2. **Homicide § 20.1— photographs of deceased—admissibility for illustrative purposes**

Photographs of a homicide victim's body at the crime scene and in the autopsy room were properly admitted for the purpose of illustrating the testimony of witnesses as to the location, position and condition of the body at the scene and the nature and extent of wounds to the body.

3. **Criminal Law § 42; Homicide § 20— clothing worn by murder victim—admissibility**

Clothing worn by a homicide victim is admissible to identify the body, to establish a fact relevant to the State's theory of the case, or to enable the jury to realize more completely the cogency and force of the testimony of witnesses.

4. **Criminal Law § 102.6— remarks of prosecutor—no gross impropriety**

The remarks of the prosecutor in his argument to the jury in a homicide case concerning the thoughts of the victim as he was stabbed and lay dying and the thoughts of the victim's family were not so grossly improper so as to require the trial judge to take corrective action *ex mero motu*.

5. Robbery § 4.3— armed robbery—sufficiency of taking

The State's evidence was sufficient to show that defendant took personal property from the owner with the intent to steal after stabbing the victim numerous times so as to support defendant's conviction of armed robbery where it tended to show that the victim, a taxi driver, usually wore a money pouch attached to his belt in which to place the fares that he collected; on the day of the crime, he had collected $1.45 in fares; when the driver's body was found, his belt had been cut, permitting the inference that defendant, who was placed at the scene by identification of his palm prints on the taxi, removed the pouch from the driver's possession and control in a forcible manner; and coins were found scattered around the body and the pouch was found several hundred yards from the body, giving rise to the inference that defendant had possession and control of the coins and the money pouch and decided to discard them.

ON appeal by defendant from *Albright, J.* at the 7 May 1979 Criminal Session of CASWELL County Superior Court.

Defendant was charged in indictments, proper in form, with first degree murder and robbery with a dangerous weapon. The State's evidence tended to show that at approximately 1:50 p.m. on 15 July 1978, Robert Johnson travelled down Ware Road, a dead-end dirt road in the community of Providence in Caswell County, in order to eat lunch in the home of a lady who lived near the end of the road. He finished his lunch at 2:40 p.m. and on his way back up Ware Road he saw a yellow taxicab and a body lying nearby. Johnson summoned the Sheriff of Caswell County who lived nearby.

The body was that of Oscar Leonard Keatts. The fare meter in the taxi showed $6.35 indicating the amount due for Keatts' last trip. Keatts maintained a log or manifest in which he entered the times for his trips, their origination, distances, and destination. According to his log, Keatts had made two previous trips that day, each totaling $1.45. One was a cash fare but the other one was charged to the Norfolk and Western Railroad Company for taking employees to work. The cab company does not furnish its employees with money to make change. Mr. Keatts usually wore a money pouch on his belt in which to collect his fares. A pouch similar to the one usually worn by Keatts was found on Walters Mill Road 450 feet north of its intersection with Ware Road. The deceased's belt had been cut and $1.10 in coins were scattered in the vicinity of the body. One nickel was found across the road from the body and two nickels were found in the same

area in which the money pouch was found. A total of $1.25 was found.

Jimmy Carter testified that while travelling in his pickup truck on Walters Mill Road on the afternoon of 15 July 1978, he picked up a man he identified as the defendant and gave him a ride to Danville, Virginia. The defendant "was more or less in a trot, . . . was wet with sweat, . . . was dressed in dark pants, tennis shoes, and no shirt." He noticed that defendant's hand was hurt. Defendant told him that "he had been getting up hay and that he had cut his hand getting up hay."

When the defendant was arrested, an S.B.I. agent obtained a pair of tennis shoes from the defendant. Shoe tracks at the scene appeared to have been made by defendant's tennis shoes. Two palm prints on the taxicab were identified as the defendant's prints. Dr. Page Hudson, Chief Medical Examiner of North Carolina, testified that the victim was stabbed on his arms, neck, face, chest, back, and abdomen, a total of seventeen times. In addition, there were many cuts on the victim's hands. The victim's heart, lungs, diaphragm, liver, stomach, and several large blood vessels were all penetrated by the stab wounds. In Dr. Hudson's opinion, approximately six of the wounds were fatal and the deceased died of "multiple incised cuts and stab wounds."

Defendant offered no evidence.

The jury found the defendant guilty of second degree murder and robbery with a dangerous weapon. The trial judge imposed two consecutive life sentences and recommended that defendant serve them "without the benefit of parole, commutation, work release or community leave privileges."

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

D. Leon Moore and W. Osmond Smith III for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Henry T. Rosser for the State.

COPELAND, Justice.

[1] Defendant is black and he contends that the trial judge erred in denying his motion to dismiss the indictments since members

of his race were systematically excluded from the jury list for grand and petit juries in Caswell County. Defendant's argument is that the names for the jury list were not chosen systematically as required by G.S. 9-2 since every fourth name from the tax list was taken only from the letters A, B, C, D and M rather than from the entire alphabet.

G.S. 9-2 provides in relevant part that:

> "In preparing the list, the jury commission shall use the tax lists of the county and voter registration records, and, in addition, may use any other source of names deemed by it to be reliable, but it shall exercise reasonable care to avoid duplication of names. The commission may use less than all of the names from any one source if it uses a systematic selection procedure (e.g., every second name), and provided the list contains not less than one and one-quarter times and not more than three times as many names as were drawn for jury duty in all courts in the county during the previous biennium, but in no event shall the list include less than 500 names."

While we do not condone the practice of choosing names only from certain letters of the alphabet because the statute seems to contemplate systematic selection of names from the entire alphabet, we perceive no prejudicial error to the defendant in this case. The procedure was not so arbitrary or nonsystematic as to fail to comply with G.S. 9-2. The purpose of G.S. 9-2 is to insure that jury lists are systematically compiled so as to rule out arbitrary, subjective, discriminatory selection methods which would be violative of defendant's constitutional rights. There has certainly been no constitutional violation since defendant has not shown any significant underrepresentation of his race on the jury list or jury venire from which to infer there was intentional discrimination. *State v. Hough*, 299 N.C. 245, 262 S.E. 2d 268 (1980). As a matter of fact, 19 of the 45 jurors drawn for jury duty were black. The petit jury as chosen was composed of 6 white persons and 6 black persons. This assignment of error is overruled.

[2] Defendant contends that it was error to allow pictures of the deceased at the scene and in the autopsy room to be viewed by the jury. The rule is that even though photographs may be

gory and gruesome, they may nevertheless be used, when properly authenticated, to illustrate a witness' testimony so long as excessive numbers of photographs are not used solely to arouse the passions of the jury and thus deny the defendant a fair trial. *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979). Here, the photographs were relevant and material because they were used to illustrate the testimony of various witnesses as to the location, position and condition of the body at the scene and regarding the nature and extent of the wounds to the body. *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *death sentence vacated*, 403 U.S. 948 (1971). The photographs were not merely repetitious. They portrayed somewhat different scenes and therefore the total number used was not excessive. *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977). The jury was properly instructed to consider the photographs for the sole purpose of illustrating the testimony of the witnesses.

[3] Defendant further contends that it was error to admit the deceased's clothing into evidence because the clothing had no probative value. The rule is that the clothing of a homicide victim is admissible into evidence since it is competent to "identify the body, or to establish a fact relevant to the State's theory of the case or to enable the jury to realize more completely the cogency and force of the testimony of witnesses." *State v. Atkinson, supra* at 310-11, 167 S.E. 2d at 254. This assignment of error is overruled.

[4] Defendant maintains that certain remarks of the district attorney during his closing argument constitute prejudicial error and were so shocking that even if defense counsel had objected, no instructions from the trial judge could have removed the prejudice.

The portion of the argument complained of reads as follows:

> "When the defendant's attorneys call on you, call on you to think about the defendant, I ask you to think about Oscar Keatts. Ask you to think about a man fifty or fifty-one years of age, who worked for a number of years at two jobs. A good man. Who is carried out on this isolated dead end road and stabbed seventeen times in and about the body and had his throat cut and bled to death. And as the life flowed from him and flowed from that neck where the defendant had cut and cut and Dr. Hudson said one cut went around to the back of the neck, and what did he think of as he lay there dying

and the blood rolling out of his neck on the dirt road, did he think about his mother that he lived with and cared for? Did he think will the roses bloom in Heaven, are there any gardens there? Will the branches bloom with blossoms and in winters fill with snow? Will the roses bloom in Heaven, tell me mother ere I go. Did he think of his brothers and sisters when he knew that his life was sputtering from his neck that he would never see again. Did he think of them? What does a person who knows that he is dying a horrible death think of? And what of his family?

Ladies and gentlemen of the jury, this man died. There had been a death here. A horrible death, and there was a funeral and his family has been brave and tried to be brave but what went through their minds as they went to the cemetery?

Undertaker, undertaker, please drive slow for the body that you are hauling, Lord, I hate to see it go."

G.S. 15A-1230(a) provides that:

"During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue."

Our cases provide that argument of counsel must be left largely to the control and discretion of the trial judge and counsel must be allowed wide latitude in the argument of hotly contested cases. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Seipel*, 252 N.C. 335, 113 S.E. 2d 432 (1960); *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955). Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom. *State v. Monk, supra; State v. Conner*, 244 N.C. 109, 92 S.E. 2d 668 (1956).

On the other hand, we have held that counsel may not place before the jury incompetent and prejudicial matters and may not

"travel outside the record" by injecting into his argument facts of his own knowledge or other facts not included in the evidence. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939 (1972). Upon objection, the trial judge has a duty to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. *State v. Monk, supra* and cases cited therein. Ordinarily, the objection to such improper remarks must be made before verdict to give the trial judge the opportunity to take appropriate action, or else the objection is deemed waived and cannot be raised on appeal except in a death case where the remark was so prejudicial that no instruction from the trial judge could have removed its prejudicial effect from the jurors' minds. *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, 429 U.S. 809 (1976); *State v. Locklear*, 291 N.C. 598, 231 S.E. 2d 256 (1977); *State v. Coffey*, 289 N.C. 431, 222 S.E. 2d 217 (1976). However, if the impropriety is gross the trial judge should, even in the absence of objection, correct the abuse *ex mero motu*. *State v. Monk, supra; State v. Smith*, 240 N.C. 631, 83 S.E. 2d 656 (1954).

We do not find that the jury argument in this case required any action from the trial judge to correct any gross improprieties *ex mero motu*. Defense counsel did not find the remarks so shocking when he heard them at trial to lead him to make an objection. We perceive no error in the argument prejudicial to the defendant.

> "It is the duty of the prosecuting attorney to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction. In the discharge of that duty he should not be so restricted as to discourage a vigorous presentation of the State's case to the jury." *State v. Monk, supra* at 515, 212 S.E. 2d at 130; *State v. Westbrook, supra.*

This assignment of error is overruled.

[5] Defendant contends that his motion to dismiss the armed robbery charge was improperly denied since there is no evidence that defendant took anything of value from the deceased. Defendant concedes in his brief that he was armed, but argues that

there was no showing that he took the property of another since $1.25 of the $1.45 known to have been in the deceased's possession, was recovered.

Robbery is the taking, with intent to steal, of personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation. *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971), *cert. denied*, 409 U.S. 948 (1972); *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971); *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966). On a motion to dismiss charges due to insufficiency of the evidence, all of the evidence is to be considered in the light most favorable to the State and the State is to be given the benefit of every reasonable inference to be drawn therefrom. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Murphy*, 280 N.C. 1, 184 S.E. 2d 845 (1971).

In *State v. Carswell*, 296 N.C. 101, 249 S.E. 2d 427 (1978), we held that removal of an air conditioner from its base in the window to a point on the floor four to six inches toward the door was a sufficient taking and asportation of the personal property of another to support a larceny conviction. In *State v. Walker*, 6 N.C. App. 740, 171 S.E. 2d 91 (1969), it was held that a sufficient taking was accomplished when the defendant took rings from the jewelry store counter and placed them in his pockets although he threw them on the floor as he fled from the store. There it was stated that,

> "[t]he fact that the property may have been in defendant's possession and under his control for only an instant is immaterial if his removal of the rings from their original status was such as would constitute a complete severance from the possession of the owner." *Id.* at 743, 171 S.E. 2d at 93.

See also, State v. Green, 81 N.C. 560 (1879) (removal of a drawer containing money from a safe is a sufficient taking although the money was never removed from the drawer and the drawer was never removed from the room containing the safe). In other words, it is not necessary that a defendant be successful in permanently depriving the rightful owner of his possession. It is sufficient if there is a taking with the intent to permanently deprive the owner of his possession at the time of the taking.

Here, the circumstantial evidence for the State permits the reasonable inferences of a sufficient severance of possession from the owner and reduction to possession by the defendant in a most violent manner with the intent to steal, so as to support a conviction for armed robbery. The evidence tended to show that the deceased usually wore a money pouch attached to his belt in which to place the fares that he collected. On 15 July 1978, he had collected $1.45 in fares. When his body was found his belt had been cut permitting the inference that defendant, who was placed at the scene by identification of his palm prints on the taxi, removed the money pouch from Keatts' possession and control in a forcible manner. Coins were found scattered around the body and the money pouch was found along Walters Mill Road several hundred yards from the body. These facts give rise to the inference that the defendant had possession and control of the coins and the money pouch and decided to discard them. Although all but twenty cents of the money was ultimately recovered, indicating that the defendant did not keep any of the money, the crime of armed robbery was complete as the defendant stood over the man he had mercilessly stabbed so many times and made the decision as to whether to keep the small sum of money that he had taken from his victim or discard it before fleeing. This assignment of error is overruled.

This was indeed a cruel and utterly senseless crime. The convictions and sentences shall stand because in the trial we find

No error.

MARY FRANCES BELL v. BOBBY MARTIN, JR.

No. 62

(Filed 1 April 1980)

1. Rules of Civil Procedure § 56— summary judgment—failure to file responsive pleading—allegations of complaint not deemed admitted

For the purposes of a summary judgment, a defendant's failure to file responsive pleadings does not constitute a conclusive admission of the allegations contained in plaintiff's complaint precluding a defendant from offering affidavits or testimony in opposition to the motion.

2. Bastards § 10; Rules of Civil Procedure § 38— civil action to establish paternity—failure to demand jury trial—jury trial waived

A suit brought for the sole purpose of establishing paternity pursuant to G.S. 49-14 is not a criminal prosecution and cannot be considered criminal in nature simply because plaintiff must meet a higher burden of proof and establish such paternity beyond a reasonable doubt or because the court may enter an order requiring the father to make child support payments, such order being enforceable by contempt; therefore, defendant was not a criminal defendant, and he waived his right to a jury trial by his failure to demand a trial by jury and file such demand with the court. G.S. 1A-1, Rule 38.

ON both plaintiff's and defendant's petitions for discretionary review of an opinion of the Court of Appeals reported at 43 N.C. App. 134, 258 S.E. 2d 403 (1979), affirming an order of summary judgment entered in favor of the plaintiff by *Saunders, J.*, on 28 August 1978 in District Court, MECKLENBURG County, and reversing an order of *Bennett, J.*, dismissing defendant's motion for relief of judgment filed 3 November 1978.

This action was originated by plaintiff seeking an adjudication pursuant to G.S. 49-14 that the defendant was the father of her illegitimate child, and also requesting custody and child support. On 23 November 1977 plaintiff filed a verified complaint containing the allegations noted above, and this complaint along with a civil summons was personally served on defendant Martin on 14 December 1977. On 23 June 1978, plaintiff filed a motion for summary judgment pursuant to G.S. 1A-1 Rule 56, alleging that defendant was served with summons and complaint as of 14 December 1977, and failed to file answer within the time required by G.S. 1A-1 Rule 12(a)(1). Hearing on plaintiff's motion was scheduled for 26 July 1978. At that hearing defendant was present and represented by counsel; however, by order of Saunders, J., the hearing on plaintiff's motion for summary judgment was continued until August 24, 1978. Judge Saunders further ordered that "either party may file such documents as may be permissible under and in accord with the Rules of Civil Procedure." In accordance with this order, plaintiff amended her complaint by adding a certified copy of the child's birth certificate. Plaintiff also obtained the affidavits of Don M. Ward, defendant's employer, alleging defendant's financial ability to pay child support, and of Mrs. K. Sumerford, alleging that plaintiff was presently receiving $80.00 per month in State funded child support.

During the period of the continuance, no responsive pleading was filed by the defendant. On August 24, 1978 the matter of plaintiff's motion for summary judgment came on for hearing before Judge Saunders. Both plaintiff and defendant were represented by counsel, and defendant was present in court. At this hearing Judge Saunders held that "from the allegations of the duly verified complaint, and the amendment thereto, none of which has been answered by the defendant, and from the affidavits filed by the plaintiff, . . . there is not an issue as to any material fact. . . ." Summary judgment was then entered in favor of the plaintiff on 28 August 1978. By this order, defendant was adjudged the father of plaintiff's child and required to pay child support in the amount of $80.00 per month. Defendant gave notice of appeal to the Court of Appeals from Judge Saunders' order. Following this notice of appeal, on September 20, 1978, defendant filed answer to plaintiff's amended complaint, setting forth affirmative defenses as well as denials to plaintiff's allegations. On that same date, defendant filed a motion for relief of judgment pursuant to G.S. 1A-1 Rule 60(b). On September 22, 1978 plaintiff filed a motion to strike defendant's purported answer as having been filed after the time permitted. On 3 November 1978, Judge Walter Bennett dismissed defendant's Rule 60(b) motion for relief of judgment, and plaintiff's motion to strike, on the grounds that with the case pending on appeal, the district court had no jurisdiction to determine either motion. From this order, defendant also appealed.

The Court of Appeals in *Bell v. Martin*, 43 N.C. App. 134, 258 S.E. 2d 403 (1979), consolidated both defendant's appeals in one opinion. That court affirmed Judge Saunders' granting of summary judgment, but reversed Judge Bennett's holding that the district court was without jurisdiction to hear the Rule 60(b) motion for relief of judgment.

From the Court of Appeals' opinion both plaintiff and defendant petitioned this Court for further review pursuant to G.S. 7A-31. Both petitions were allowed 8 January 1980.

Ruff, Bond, Cobb, Wade and McNair by Timothy M. Stokes, for plaintiff-appellee Bell.

McConnell, Howard, Pruett, and Bragg by Rodney S. Toth, for defendant-appellant Martin.

BROCK, Justice.

Plaintiff's petition to this Court presented the question of the trial tribunal's jurisdiction to hear a Rule 60(b) motion for relief of judgment subsequent to an appeal of the action. At oral argument this question was abandoned by counsel for the plaintiff, and thus will not be addressed by this opinion. Therefore, the sole question presented for review is the propriety of summary judgment entered by Judge Saunders against the defendant on August 28, 1978.

Under G.S. 1A-1 Rule 56(c), summary judgment is appropriate if the moving party can show by the use of pleadings, depositions, answers to interrogatories, admissions on file and affidavits that (1) there is no genuine issue as to any material fact, and (2) that any party is entitled to judgment as a matter of law. *Accord, Page v. Sloan*, 281 N.C. 697, 704, 190 S.E. 2d 189, 193 (1972); *Pitts v. Pizza, Inc.*, 296 N.C. 81, 85, 249 S.E. 2d 375, 378 (1978). In the case *sub judice*, in support of her motion for summary judgment, plaintiff submitted her verified complaint alleging that "defendant is the father of the minor child De'lancey Monte Bell," and a certificate verifying the child's live birth with plaintiff as its mother. She also submitted two separate affidavits: One from defendant's employer alleging the financial status of the defendant showing his ability to assume payment of child support; and a second affidavit from an employee of the Mecklenburg County Department of Social Services alleging the amount of child support presently being paid by the State of North Carolina. On these pleadings, and noting that due to the defendant's failure to answer there were no controverted issues of material fact remaining, Judge Saunders rendered summary judgment for plaintiff requiring defendant to pay into the clerk Superior Court, Mecklenburg County, $80.00 per month in child support. Judge Saunders concluded, and the Court of Appeals agreed, that by failure of the defendant to answer plaintiff's complaint, for purposes of summary judgment, he admitted all the allegations contained therein.

[1] We agree that in certain circumstances failure to file a responsive pleading will result in an admission of the complaint's allegations. (See discussion of G.S. 1A-1 Rule 55 *infra.*) However for the purposes of a summary judgment, we hold that a defendant's failure to file responsive pleadings does not constitute

a conclusive admission of the allegations contained in plaintiff's complaint precluding a defendant from offering affidavits or testimony in opposition to the motion.

As noted above, for plaintiff as the party moving for summary judgment, to be entitled to such a judgment, she must show that there are no material factual issues remaining, and that she is entitled to judgment as a matter of law. To meet this burden she may use any of the means authorized by G.S. 1A-1 Rule 56(c). If plaintiff, as movant, comes forward with evidence showing the lack of a material issue of fact, it would then become incumbent upon the defendant, as non-movant, to present affidavits showing why summary judgment would not be appropriate. G.S. 1A-1 Rule 56(e). By holding that a defendant's failure to answer conclusively admits all the allegations in a plaintiff's complaint for the purposes of summary judgment, the trial court and the Court of Appeals effectively eliminated such a defendant's right to present affidavits showing a material factual issue in order to prevent summary judgment from being entered against him. In holding failure to answer constitutes admission for purposes for summary judgment, the burden of showing no material factual issues is shifted from the plaintiff, movant. This is contra to the purpose of G.S. 1A-1 Rule 56, for pursuant to that rule, the burden of initially coming forward with affidavits "clearly establishing the lack of any triable issue of fact" rests solely with the movant. 281 N.C. at 704, 190 S.E. 2d at 193.

G.S. 1A-1 Rule 56(a) provides in part as follows:

> "A party seeking to recover upon a claim . . . may, at any time after the expiration of 30 days from the commencement of the action . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

G.S. 1A-1 Rule 12(a)(1) provides in part: "[a] defendant shall serve his answer within 30 days after service of the summons and complaint upon him." Under the ruling of the trial court and of the Court of Appeals that failure to answer constitutes a conclusive admission of the complaint's allegations for the purpose of summary judgment, the following scenario is possible:

> Plaintiff files complaint and civil summons and both are served on defendant on March 1. On 30 March, 30 days from service of the complaint, plaintiff moves for summary judgment pursuant to G.S. 1A-1 Rule 56(a). Due to defendant's failure to file answer during the time period required by G.S. 1A-1 Rule 12(a)(1), all the allegations of plaintiff's complaint would be conclusively admitted. Therefore with no material issues of fact remaining, summary judgment would properly be granted in favor of plaintiff.
>
> Defendant's failure to file answer during the first 30 days of March was due to excusable neglect, and caused no prejudice to plaintiff. In all probability, defendant also has a meritorious defense to plaintiff's action.

Premised upon the theory that by failing to answer, defendant has conclusively admitted the allegations contained in plaintiff's complaint for the purposes of summary judgment, defendant would not be given the opportunity to show excusable neglect for his failure to file. Nor would defendant be able to demonstrate the merits of his defense to plaintiff's action. We are of the opinion that this result is erroneous. We hold therefore, that for purposes of summary judgment, a defendant's failure to file answer does *not* constitute a conclusive admission of the allegations in a plaintiff's complaint so as to preclude such defendant from offering affidavits or testimony in opposition to the motion.

Under the facts of this case, we do not suggest that a defendant may simply refuse to answer plaintiff's complaint and thereby indefinitely forestall litigation. If after he receives the complaint and summons, defendant fails to file answer within the 30 day period as required by G.S. 1A-1 Rule 12(a)(1) plaintiff may move for entry of default under G.S. 1A-1 Rule 55(a), and thereafter seek judgment by default under G.S. 1A-1 Rule 55(b). Rule 55(a) provides specifically that entry of default would have been appropriate here. In its pertinent part, Rule 55(a) provides as follows:

> "(a). ENTRY. When a party against whom a judgment for affirmative relief is sought has failed to plead . . . and that fact is made to appear by affidavit [or] motion of attorney for the plaintiff, . . . the clerk shall enter his (the party failing to file) default."

In Wright and Miller, Federal Practice and Procedure: Civil, § 2688, it is stated:

> "Once the default is established defendant has no further standing to contest the factual allegations of plaintiff's claim for relief. If he wishes an opportunity to challenge plaintiff's right to recover, his only recourse is to show good cause for setting aside the default . . . and, failing that, to contest the amount of recovery." (*See Harris v. Carter*, 33 N.C. App. 179, 234 S.E. 2d 472 (1977) holding G.S. 1A-1 Rule 55 to be the counterpart to Federal Rules of Civil Procedure Rule 55.)

When default is entered due to defendant's failure to answer, the substantive allegations raised by plaintiff's complaint are no longer in issue, and for the purposes of entry of default and default judgment are deemed admitted. *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 509, 181 S.E. 2d 794, 798 (1971). However, following entry of default in favor of plaintiff, defendant is entitled to a hearing where he may move to vacate such entry. His motion to vacate is governed by the provisions of G.S. 1A-1 Rule 55(d) which provides as follows:

> "(d) SETTING ASIDE DEFAULT. For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)."

In moving for relief of judgment pursuant to Rule 55(d), the burden is on the defendant, as the defaulting party, not to refute the allegations of plaintiff's complaint, nor to show the existence of factual issues as in summary judgment, but to show *good cause* why he should be allowed to file answer to plaintiff's complaint. *See Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970).

In the case *sub judice* had plaintiff moved for entry of default, upon entry, defendant would have been without standing to challenge the complaint's allegations, and unless he could show good cause for his failure to file answer would have been deemed to have admitted the allegations contained therein. In that situation judgment could have properly been entered against him if he could not show *good cause* for having failed to file answer. Upon defendant's failure to answer, plaintiff also could have requested a trial on the merits. Here, however, plaintiff moved *only* for sum-

mary judgment. For reasons noted earlier in this opinion, we hold the defendant's failure to answer did *not*, for the purpose of summary judgment, constitute a conclusive admission eliminating all controverted issues of material fact. Plaintiff was not entitled to judgment as a matter of law.

[2] Based upon the foregoing discussion, it is clear that plaintiff could have proceeded either by seeking a judgment by default, or a trial upon the merits of her case. Defendant argues that because plaintiff must prove his paternity beyond a reasonable doubt pursuant to G.S. 49-14(b), the proceeding to establish paternity is quasi-criminal in nature, and as a criminal defendant he is entitled to a jury trial. We disagree. First, we hold that a paternity suit maintained under G.S. 49-14 is a civil action the purpose of which is to force a father to recognize and support his illegitimate child. There are three Articles contained within G.S. 49. Article III (G.S. 49-14 *et seq.*) is entitled *Civil Actions Regarding Illegitimate Children.* This Article creates no criminal offenses, nor does it contain criminal penalties which would punish a defendant for failure to comply with its provisions. In the present case plaintiff brought her action under Article III—G.S. 49-14. Article II provides for the legitimation of children, and Article I (G.S. 49-2 through 49-8) provides for *support* of illegitimate children. G.S. 49-2 makes failure of a parent to support an illegitimate child a misdemeanor, and subjects the non-supporting parent to criminal penalties as therein provided. This Court has held G.S. 49-2 to be criminal in nature with the "only prosecution contemplated under this statute . . . grounded on the wilful neglect or refusal of a parent to support his or her illegitimate child." *State v. Ellis*, 262 N.C. 446, 449, 137 S.E. 2d 840, 843 (1964). The crime punishable by G.S. 49-2 is wilful neglect or refusal *to pay child support*, not paternity. Under G.S. 49-2 paternity is not in and of itself a crime. It is the additional finding of non-support which authorizes criminal prosecution. Therefore a suit brought for the sole purpose of establishing paternity pursuant to G.S. 49-14, is not a criminal prosecution and cannot be considered criminal in nature simply because plaintiff must meet a higher burden of proof, and establish such paternity beyond a reasonable doubt. The fact that a judgment of paternity under G.S. 49-14 authorizes the entry of an order requiring the father to make child support payments, which order is enforceable by contempt, does not convert the

paternity action to a criminal proceeding. If that were the case, actions for alimony or any other injunctive relief would also have to be considered criminal actions.

Having determined the action by plaintiff to establish paternity to be civil in nature, we also hold that by his failure to demand a trial by jury, and file it with the court, defendant waived his right to a jury trial. G.S. 1A-1 Rule 38(d). *See Sykes v. Belk*, 278 N.C. 106, 123, 179 S.E. 2d 439, 449 (1971). If during further proceedings in this cause defendant obtains the right to file answer, either party may of course demand trial by jury as provided by G.S. 1A-1 Rule 38(b).

The opinion of the Court of Appeals is reversed, and this cause is remanded to the Court of Appeals for its remand to the District Court, Mecklenburg County for further proceedings.

Reversed and remanded.

BETTY W. ANDREWS, WIDOW, AND GUARDIAN AD LITEM OF SYLVIA DENISE ANDREWS, MINOR CHILD, DOLF OTIS ANDREWS, DECEASED v. NU-WOODS, INC., EMPLOYER, AND INTERNATIONAL INSURANCE CO., CARRIER

No. 42

(Filed 1 April 1980)

Master and Servant § 69— workers' compensation death benefits—maximum weekly benefit

The amendment to G.S. 97-29 by Ch. 1103 of the 1973 Session Laws, governing the maximum weekly workers' compensation benefit, applies to G.S. 97-38 so that G.S. 97-38 no longer limits recovery for death claims to $80.00 per week, and the Industrial Commission properly determined that by computing benefits pursuant to G.S. 97-29, plaintiffs are entitled to weekly benefits of $158.00 per week for 400 weeks.

ON appeal by the defendants from an opinion of the Court of Appeals reported at 43 N.C. App. 591, 259 S.E. 2d 306 (1979), with one judge dissenting, affirming an opinion and award of the North Carolina Industrial Commission (Commission) filed 19 July 1978.

The facts pertinent to this action are not in dispute. It was stipulated by the parties, with such stipulations being adopted by the Commission, that the deceased, Dolf Otis Andrews, was an employee of Nu-Woods, Inc. earning a weekly wage of $420.28; that Nu-Woods, Inc. and deceased were bound by the provisions of the Workmen's Compensation Act, and that International Insurance Co. was the insurance carrier on the risk. It was also stipulated that on 20 February 1977, deceased sustained an injury by accident arising out of and in the course of his employment with defendant employer, and died as a result thereof on 26 February 1977. Since the death of Dolf Otis Andrews, the defendants have paid to the plaintiffs in this action, Betty W. Andrews, wife of the decedent, and Sylvia Denise Andrews, minor child of the decedent, the sum of $80.00 per week in death benefits.

In January of 1978 plaintiffs petitioned the Commission for a hearing to make a determination as to the amount of weekly compensation to which they were entitled. Such a hearing was scheduled before Deputy Commissioner Christine Y. Denson for 10 May 1978. However on May 2, 1978 based on the factual stipulations of the parties, Deputy Commissioner Denson concluded as a matter of law that plaintiffs, as beneficiaries under N.C.G.S. 97-36, were entitled to recover death benefits in the amount of $158.00 per week for the period of 400 weeks, plus burial expenses and attorneys fees. Defendants were to receive credit for the $80.00 per week payments made since Dolf Otis Andrews' death on February 26, 1977. Defendants appealed this award to the full Industrial Commission which on July 19, 1978 adopted *in toto* the findings of fact and conclusions of law of Deputy Commissioner Denson. From the decision of the full Commission defendants appealed to the Court of Appeals, which affirmed the decision of the full Commission in *Andrews v. Nu-Woods, Inc.*, 43 N.C. App. 591, 259 S.E. 2d 306 (1979), Chief Judge Morris dissenting. Defendants appealed to this Court as a matter of right pursuant to G.S. 7A-30(2).

Hatcher, Sitton, Powell and Settlemyer by Steve B. Settlemyer for Betty W. Andrews and Sylvia Denise Andrews, plaintiff-appellees.

Hedrick, Parham, Helms, Kellam, Feerick and Eatman by Hatcher Kincheloe, for Nu-Woods, Inc., and International Insurance Co., defendant-appellants.

BROCK, Justice.

The sole question presented by this appeal is the amount of compensation to which plaintiffs are entitled as a result of the death of Dolf Otis Andrews, caused by an accident arising out of and in the course of his employment with defendant Nu-Woods, Inc. Defendants argue, relying on N.C.G.S. 97-38, that plaintiffs' weekly recovery be limited to a maximum of $80.00 for the 400 week compensable period. In its pertinent part G.S. 97-38 provides as follows:

> "If death results proximately from the accident . . . the employer shall pay or cause to be paid, subject to the provisions of the other sections of this Article, *weekly payments of compensation equal to 66-2/3% of the average weekly wages of the deceased employee at the time of the accident, but not more than Eighty Dollars ($80.00) . . . per week . . . .*" (Emphasis ours.)

On the other hand, plaintiffs contend, and the Court of Appeals and Commission so held, that N.C.G.S. 97-29 as amended in 1973 (1973 Session Laws, Chapter 1103) requires that plaintiffs receive benefits at an increased weekly rate. The amendment of G.S. 97-29 provides:

> "Notwithstanding any other provision of this Article, beginning August 1, 1975, and on August 1 of each year thereafter, a maximum weekly benefit shall be derived by obtaining the average weekly insured wage in accordance with G.S. 96-8(22) and by rounding such figure to its nearest multiple of two dollars ($2.00), and this said maximum weekly benefit shall be applicable to all injuries and claims arising on and after November 1 following such computation. *Such maximum weekly benefit shall apply to all provisions of this Chapter effective August 1, 1975,* and shall be adjusted August 1 and effective October 1 of each year thereafter as herein provided." (Emphasis added.)

The Commission determined that by computing benefits as per G.S. 97-29, plaintiffs are entitled to weekly benefits in the amount of $158.00. There is no issue raised by this appeal as to the plaintiff's right to receive death benefits as per G.S. 97-38. The only question raised concerns the appropriate amount of such death

benefits. For the reasons that follow we hold that the Commission correctly concluded that G.S. 97-29 as amended, entitled plaintiff to receive weekly death benefits in the amount of $158.00 per week for the period of 400 weeks.

In *School Commissioners v. Aldermen*, 158 N.C. 191, 196, 73 S.E. 905, 907 (1912), this Court noted:

> ". . . it is the well-recognized principle that the object of all interpretation is to ascertain the meaning of the Legislature as contained in the statute, and to this end, resort must primarily be had to the language of the act itself. *Where the statute is free from ambiguity, explicit in terms and plain of meaning, it is the duty of the courts to give effect to law as it is written and they may not resort to other means of interpretation." Phillips v. Shaw Comr. of Revenue*, 238 N.C. 518, 78 S.E. 2d 314 (1953); *Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973). (Emphasis ours.)

In reading the language of G.S. 97-29, we conclude that the words of the 1973 amendment are explicit in terms and plain of meaning requiring that we give effect to the law as written. As noted above, the amendment provided in part that, "such maximum weekly benefit *shall apply to all provisions of this chapter effective August 1, 1975.*" To hold that the amended maximum weekly benefit applies only to section 97-29 and not to section 97-38 when both sections are within the same chapter of the Workmen's Compensation Act, and the amendment specifically provides that the new maximum applies to *all* provisions of the chapter, would be in direct contravention to the plain language of the amendment. This we cannot and will not do. In *Montague Brothers v. Shepherd Co.*, 231 N.C. 551, 556, 58 S.E. 2d 118, 122 (1950), Justice Ervin speaking for the court noted, "[j]udges must interpret and apply statutes as they are written." As written, the 1973 amendment to G.S. 97-29 clearly establishes maximum weekly benefits for all sections of the Workmen's Compensation Act including benefits for total incapacity and death. In this case that maximum was determined to be $158.00 per week. It is this amount to which plaintiffs are entitled.

The Court of Appeals' decision affirming the order of the full Commission is therefore affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. STEVEN ANTHONY PUCKETT

No. 40

(Filed 1 April 1980)

Criminal Law §§ 23, 138— guilty plea—plea bargain violated by imposition of two sentences

Where a plea agreement provided that charges against defendant would be consolidated and the sentence imposed would run concurrently with the sentence then being served, and the court during its interrogation of defendant repeatedly referred to "any sentence," "the sentence" and "a concurrent sentence," the court erred in imposing upon defendant two consecutive two-year sentences, since all five misdemeanors should have been consolidated for purpose of one sentence; and the court should have permitted defendant to withdraw his guilty plea and should have placed the cases on the docket for trial.

ON petition for discretionary review of the decision of the Court of Appeals, 43 N.C. App. 153, 258 S.E. 2d 393 (1979), affirming judgments of *Washington, J.*, entered at the 8 January 1979 Criminal Session of FORSYTH Superior Court.

Attorney General Rufus L. Edmisten by Associate Attorney Grayson G. Kelley, for the State.

Stephens, Peed & Brown, by Herman L. Stephens, for defendant-appellant.

BRITT, Justice.

Defendant was tried in district court on a magistrate's order and four warrants charging him with five misdemeanors: simple assault, possession of marijuana, illegally carrying weapons on school property, rioting, and assault with a deadly weapon. From verdicts of guilty and judgments entered in district court, he appealed to the superior court.

When the cases were called for trial in superior court, the court was advised that a plea arrangement had been agreed to by the state and defendant. A sentencing hearing was conducted, and defendant testified with respect to his willingness to plead guilty and his understanding of the arrangement that had been agreed to by the district attorney and his attorney. At the sentencing hearing, the following exchange took place:

Have you agreed to plead as a part of a plea bargain—now, let me advise you what is written on this piece of paper; that all charges be consolidated and that *any sentence*, if imposed, would run concurrent with the sentence you are now serving. This agreement includes probationary sentences in Davie County and two counts of aiding and abetting the charge of contributing to the delinquency of a minor. What sentence are you now serving?

A. Twelve years.[1]

Q. Twelve years?

A. Yes, sir.

Q. And your understanding is that if you enter these pleas of guilty, that *the sentence* will run concurrently with that twelve year sentence, is that right?

A. Yes, sir.

Q. Other than what I have just said and you have said to me, has there been any promise made to you or any threat made to you for you to enter these pleas of guilty?

A. No, sir.

Q. Do you have any questions you want to ask me about anything I have said to you?

A. No, sir.

Q. Do you know what you are doing?

A. Yes, sir.

Q. Do you now tell the Court of your own free will you wish to enter pleas of guilty to these charges?

A. Yes, sir.

1. The twelve years referred to here consisted of a 10-year sentence and a 2-year sentence imposed by Judge Wood at the 30 November 1978 Session of Forsyth Superior Court. The sentences imposed in the instant cases are now quite significant to defendant in view of the fact that the Court of Appeals [*State v. Puckett*, 43 N.C. App. 596, 259 S.E. 2d 310 (1979)] vacated the 10-year sentence imposed by Judge Wood.

THE COURT: All right, Mr. District Attorney, as I understand the plea transcript, no objection to *a concurrent sentence.*

MR. LYLE: No, sir. (Emphasis added.)

Thereupon, the court, in the assault with a deadly weapon case, entered a judgment imposing a prison sentence of two years. The court consolidated the other four cases and entered a judgment imposing a prison sentence of two years, to begin at expiration of sentence in the assault with a deadly weapon case. The court then provided that "these sentences are to run concurrently with the twelve year sentence the defendant is now serving".

Later in the day after these judgments were entered, defendant, through his counsel, filed a written motion asking that the judgments be set aside, that he be allowed to withdraw his pleas of guilty, and that the cases against him revert to the status existing prior to the entry of the pleas. The reasons stated in the written motion for asking that the judgments and pleas be stricken were: (1) that at the time of entry of the pleas defendant thought that he would be freed on bond in these cases pending his appeal of the 12-year sentence; and (2) that he did not know that entering the pleas would result in the activation of a probationary sentence previously imposed in Davie County.

The court conducted a hearing on the motion. At that time defendant testified: "It was my understanding that any sentence that would be imposed upon me would run concurrent with the time I'm now serving. It was also my opinion that all charges would be consolidated together as one and the sentence would be imposed." Defendant then read from the written plea arrangement as follows: "Consolidate all charges and sentence to run concurrent with sentence now being served. Agreement includes probation sentence in Davie County on two counts of aiding and abetting contributing delinquency of a minor to run concurrent also".[2] He further testified that "I was of the opinion that all of these cases would be consolidated into one case for the purpose of judgment. It is my desire now that the Court set aside this plea

2. While the record clearly discloses that there was a written plea arrangement entered into, the full text of the arrangement is not set forth in the record.

bargaining, the transcript, and that I am ready to stand trial on all these cases."

On cross-examination defendant testified that the sentences he had received were not "exactly in accordance with that plea negotiation"; that the agreement stated that "all charges would be consolidated together" but they were not consolidated because he got two sentences.

We recognize the inconsistencies between what is said in the written motion filed by defendant's counsel and some of the statments made by defendant when he testified at the hearing on the motion. However, it does appear that defendant's contention that all five misdemeanors would be consolidated for purpose of *one* sentence is supported by the written plea arrangement. It is also noted above that the court in its interrogation of defendant repeatedly referred to "any *sentence*", "*the* sentence", and "a concurrent sentence".

Clearly, if the court had consolidated the five cases for purpose of one judgment, not more than a two-year prison sentence —the most severe statutory penalty for any one of the offenses—could have been imposed. *State v. Austin*, 241 N.C. 548, 85 S.E. 2d 924 (1955); *see also State v. Stafford*, 274 N.C. 519, 164 S.E. 2d 371 (1968). Defendant strenuously contends that the court violated the plea arrangements when it imposed two consecutive two-year sentences.

Defendant's contention is supported by the record. That being true, when the trial court determined that it would not agree to consolidate the five cases for purpose of imposing *one* sentence, it should have followed the provisions of G.S. 15A-1024 which are as follows:

> § 15A-1024. Withdrawal of guilty plea when sentence not in accord with plea arrangment.—If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

For the reasons stated, the decision of the Court of Appeals affirming the judgments of the trial court is reversed. This cause is remanded to the Court of Appeals for entry of order requiring that the judgments of the trial court be vacated, that defendant's pleas of guilty be stricken, and that the cases be reinstated on the trial docket.

Reversed and remanded.

THE STATE OF NORTH CAROLINA, THE CHILD DAY-CARE LICENSING COMMISSION OF THE DEPARTMENT OF ADMINISTRATION AND JOSEPH W. GRIMSLEY, SECRETARY OF THE DEPARTMENT OF ADMINISTRATION, EX REL., RUFUS L. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA v. FAYETTEVILLE STREET CHRISTIAN SCHOOL AND ITS OPERATOR MR. BRUCE D. PHIPPS; GOSPEL LIGHT CHRISTIAN SCHOOL AND ITS OPERATOR MRS. DELORIES B. YOKELY; GRACE CHRISTIAN SCHOOL AND ITS OPERATOR MR. EARL R. EATON; IMMANUEL DAY CARE CENTER AND ITS OPERATOR MRS. ELIZABETH HARRELL; BAPTIST TEMPLE SCHOOL AND ITS OPERATOR MR. DONALD R. CARTER; GRACE CHRISTIAN SCHOOL AND ITS OPERATOR MR. ROBERT DURHAM; BETHANY CHURCH SCHOOL AND ITS OPERATOR REVEREND GENE WOODALL; TABERNACLE CHRISTIAN SCHOOL DAY CARE AND ITS OPERATOR MR. RANDALL SHOOK; SOUTH PARK BAPTIST SCHOOL AND ITS OPERATOR MR. DANIEL D. CARR; GOSPEL LIGHT BAPTIST CHURCH AND ITS OPERATOR REVEREND GARY BLACKBURN; FRIENDSHIP CHRISTIAN SCHOOLS AND ITS OPERATOR MR. CHARLES STANLEY; AND ALL OTHERS SIMILARLY SITUATED

No. 138

(Filed 8 April 1980)

1. **Appeal and Error § 6.2— preliminary injunction—nonappealable interlocutory order**

The Supreme Court adheres to its prior decision in this case, *State v. School*, 299 N.C. 351, holding that a preliminary injunction restraining defendants from operating day-care centers without complying with the licensing requirements of the Day-Care Facilities Act of 1977 constituted a nonappealable interlocutory order.

2. **Appeal and Error § 9— compliance with preliminary injunction—constitutional questions not moot**

Defendants' compliance with a preliminary injunction requiring them to comply with the licensing requirements of the Day-Care Facilities Act of 1977 until a final determination can be made on fully developed facts of the ultimate

question as to whether the Act can be constitutionally applied to church-operated day-care facilities does not moot the issues raised by defendants' alleged constitutional defenses to the State's action for a declaratory judgment and permanent injunction.

ON defendants' petition to rehear our decision, No. 125 Fall Term, 1979, filed 1 February 1980 and reported at 299 N.C. 351, 261 S.E. 2d 908.

Rufus L. Edmisten, Attorney General, by Andrew A. Vanore, Jr., Senior Deputy Attorney General, and Ann Reed, Special Deputy Attorney General, for the State.

Strickland & Fuller, by Thomas E. Strickland, and Lake & Nelson, P.A., by I. Beverly Lake, Jr., and I. Beverly Lake, for defendant-appellants.

PER CURIAM.

On 20 February 1980 we allowed defendants' petition for rehearing pursuant to App. Rule 31 to the extent of permitting both sides to file briefs on the questions: (1) whether the trial court's order granting plaintiffs' motion for a preliminary injunction was immediately appealable and (2) whether defendants' compliance with the injunction moots the issues raised by defendants' alleged constitutional defenses. We did not order that further arguments be held. We withheld certification of the opinion and reinstated our writ of supersedeas pending further consideration of the cause.

Having further considered the parties' briefs on the questions delineated, we are of the opinion and hold: (1) the preliminary injunction issued by the trial court was not immediately appealable and (2) defendants' compliance with the preliminary injunction does not moot the issues raised by defendants' alleged constitutional defenses.

[1] We adhere to the reasoning and authority in our former opinion by which we determined that the preliminary injunction was not immediately appealable. Contrary to defendants' assertion in their new brief, this preliminary injunction does maintain the status quo as it existed before defendants' asserted their right to operate without state licenses and refused to obtain licenses. This assertion and refusal precipitated the state's action. The

preliminary injunction serves to place the parties in the position they were before the dispute between them arose. Thus, it maintains the last peaceable status quo between the parties just as did the preliminary injunction issued in *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975), relied on in our former opinion.

[2] We did not address in our former opinion the mootness question. Clearly defendants' compliance with the preliminary injunction does not moot the issues raised by defendants' assertions of constitutional defenses to the state's action. The preliminary injunction requires defendants to comply with the statutory licensing requirements until a final determination can be made on fully developed facts of the ultimate question in the case, *i.e.*, whether the licensing statutes can be constitutionally applied to these defendants. Until such a determination is made the statutes, conceded to be facially valid, are presumably applicable to defendants and defendants must perforce comply with them.

Furthermore the state is seeking declaratory as well as injunctive relief, both preliminary and permanent. To require defendants, preliminarily and pending final judgment, to obtain licenses does not mean defendants cannot continue to assert and attempt to prove that the licensing statutes do infringe upon the free exercise of their religion. If they succeed, and if the state cannot then show a compelling state interest justifying the infringement, defendants will be entitled to a final declaratory judgment in their favor and dissolution of the preliminary injunction. The result will be that defendants will thereafter be free to operate their day-care centers without state licenses. If, of course, defendants fail in their initial burden, or succeeding in it, the state demonstrates a compelling state interest justifying the licensing scheme, the state will be entitled to a final declaratory judgment and a permanent injunction in its favor. *See Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963); *see generally*, Tribe, *American Constitutional Law* § 14-10 (1978).

Defendants argue that they might prefer to close their schools rather than comply with the preliminary injunction. Such action would moot the case for it would amount to defendants' surrender of their legal position and an end to the controversy. There would be nothing left to adjudicate. Defendants may choose this course. The preliminary injunction does not require them to

do so. There is, as we have noted, much at stake in the cause between the parties even after defendants comply with the preliminary injunction.

The former opinion and decision of the Court remains the Court's opinion and decision. It shall be certified with this *per curiam* opinion. The decision of the Court of Appeals, consequently, is vacated and the writ of supersedeas issued by this Court is hereby dissolved. The case is remanded to the Court of Appeals to be further remanded to the superior court for further proceedings.

Vacated and remanded.

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

BUCK v. RAILROAD

No. 47 PC.

Case below: 44 N.C. App. 588.

Petition by defendant Goforth Brothers for discretionary review under G.S. 7A-31 denied 1 April 1980. Motion of defendant Railroad to withdraw petition allowed 1 April 1980.

COMR. OF INSURANCE v. RATE BUREAU

No. 159 PC.

Case below: 43 N.C. App. 715.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 April 1980.

DEVELOPMENT CO. v. COUNTY OF WILSON

No. 39 PC.

Case below: 44 N.C. App. 469.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 1 April 1980. Motion of defendants to dismiss appeal for lack of substantial constitutional question allowed 1 April 1980.

ETHERIDGE v. ETHERIDGE

No. 24 PC.

Case below: 44 N.C. App. 614.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 April 1980.

EUBANKS v. INSURANCE CO.

No. 9 PC.

Case below: 44 N.C. App. 224.

Petitions by plaintiff and defendant for discretionary review under G.S. 7A-31 denied 1 April 1980.

FLIPPIN v. JARRELL

No. 40 PC.

No. 129 (Spring Term).

Case below: 44 N.C. App. 518.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 1 April 1980. Motion of defendant to dismiss appeal for lack of substantial constitutional question denied 1 April 1980.

HALL v. HALL

No. 11 PC.

Case below: 44 N.C. App. 379.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 April 1980.

IN RE CLAY COUNTY GENERAL ELECTION

No. 143 PC.

Case below: 45 N.C. App. 556.

Petition by petitioners for discretionary review under G.S. 7A-31 denied 14 April 1980.

INSURANCE CO. v. INGRAM, COMR. OF INSURANCE

No. 4 PC.

Case below: 43 N.C. App. 621.

Petition by Wake Anesthesiology Assoc. and its employees for discretionary review under G.S. 7A-31 denied 1 April 1980. Motion of plaintiffs to dismiss appeal for lack of substantial constitutional question allowed 1 April 1980.

KOURY v. JOHN MEYER OF NORWICH

No. 38 PC.

Case below: 44 N.C. App. 392.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 April 1980.

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

LEE v. SIMPSON

No. 46 PC.

Case below: 44 N.C. App. 611.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 April 1980.

LEVINE v. DONATHAN

No. 34 PC.

Case below: 44 N.C. App. 730.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 April 1980.

LOVING CO. v. CONTRACTOR, INC.

No. 23 PC.

Case below: 44 N.C. App. 597.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 April 1980. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 1 April 1980.

MANUFACTURING CO. v. MANUFACTURING CO.

No. 12 PC.

Case below: 44 N.C. App. 347.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 April 1980.

ROBINHOOD TRAILS NEIGHBORS v. BOARD OF ADJUSTMENT

No. 50 PC.

Case below: 44 N.C. App. 539.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 1 April 1980.

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

SMITH v. MITCHELL

No. 36 PC.

No. 127 (Spring Term).

Case below: 44 N.C. App. 474.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 1 April 1980.

STATE v. CAMPBELL

No. 99 PC.

Case below: 42 N.C. App. 361.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 1 April 1980.

STATE v. ELAM

No. 55 PC.

No. 131 (Spring Term).

Case below: 44 N.C. App. 731.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 1 April 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 1 April 1980.

STATE v. GOODE

No. 33 PC.

No. 128 (Spring Term 1980).

Case below: 44 N.C. App. 498.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 1 April 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 1 April 1980.

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

STATE v. HOBBS

No. 15 PC.

Case below: 44 N.C. App. 380.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 April 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 April 1980.

STATE v. HUNNICUTT

No. 26 PC.

Case below: 44 N.C. App. 531.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 April 1980.

STATE v. LAMB

No. 7 PC.

Case below: 44 N.C. App. 251.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 1 April 1980.

STATE v. OXENDINE

No. 96 PC.

No. 133 (Spring Term 1980).

Case below: 43 N.C. App. 391.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 1 April 1980.

STATE v. POOLE

No. 8 PC.

Case below: 44 N.C. App. 242.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 April 1980.

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

STATE v. TURGEON

No. 51 PC.

Case below: 44 N.C. App. 547.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 April 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 April 1980.

STATE v. WOMBLE

No. 44 PC.

Case below: 44 N.C. App. 503.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 April 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 April 1980.

STATE BAR v. COMBS

No. 27 PC.

Case below: 44 N.C. App. 447.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 April 1980. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 1 April 1980.

TALLEY v. TALLEY

No. 30 PC.

Case below: 44 N.C. App. 613.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 April 1980. Motion of plaintiffs to dismiss appeal for lack of substantial constitutional question allowed 1 April 1980.

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

TEXFI INDUSTRIES v. CITY OF FAYETTEVILLE

No. 14 PC.

No. 126 (Spring Term 1980).

Case below: 44 N.C. App. 268.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 1 April 1980. Motion of defendants to dismiss appeal for lack of substantial constitutional question denied 1 April 1980. Petition by defendants for discretionary review under G.S. 7A-31 denied 1 April 1980.

TRUST CO. v. MARTIN

No. 2 PC.

Case below: 44 N.C. App. 261.

Petition by defendants for discretionary review under G.S. 7A-31 denied 1 April 1980. Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 1 April 1980.

APPENDIX

AMENDMENTS TO
NORTH CAROLINA SUPREME COURT
LIBRARY RULES

AMENDMENT TO CODE OF
PROFESSIONAL RESPONSIBILITY

AMENDMENTS TO NORTH CAROLINA SUPREME COURT LIBRARY RULES

Pursuant to Section 7A-13(d) of the General Statutes of North Carolina, the following amendments to the Supreme Court Library Rules as promulgated December 20, 1967 (275 N.C. 729) and amended November 28, 1972 (281 N.C. 772) and April 14, 1975 (286 N.C. 731), have been approved by the Library Committee and hereby are promulgated:

Section 1. Rule 3 is amended to read as follows:

> Except when the Library Committee authorizes that it be closed, the Library shall be open for public use on Monday through Friday from nine o'clock in the morning until five o'clock in the afternoon and on Saturday, except during July and August, from nine o'clock in the morning until twelve o'clock noon.

Section 2. Rule 5, subsection (b), is amended to read as follows:

> (b) Members of the North Carolina State Bar, Inc., upon presentation of a valid State Bar membership card, may use the Library between the hours of five o'clock in the afternoon and twelve o'clock midnight, Monday through Friday.

Section 3. Rule 5 is further amended by striking subsection (c) therefrom.

Section 4. Rule 11 is amended by adding subsection (f) as follows.

> (f) Patrons may make their own photocopies for ten cents ($.10) per page.

Section 5. Rule 13, subsection (f), is amended to read as follows:

> (f) The Secretary-Treasurer of the North Carolina State Bar, Inc.

Section 6. Appendix I is amended to read as follows:

Appendix I

OFFICIAL REGISTER
STATE OF NORTH CAROLINA

(1) The Senators, Representatives, Legislative Services Officer, Director of Legislative Drafting, and Director of Research for the General Assembly.

(2) The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

(3) The Secretary of the Department of Administration, Secretary of the Department of Commerce, Secretary of the Department of Correction, Secretary of the Department of Crime Control and Public Safety, Secretary of the Department of Cultural Resources, Secretary of the Department of Human Resources, Secretary of the Department of Natural Resources and Community Development, Secretary of the Department of Revenue, and Secretary of the Department of Transportation.

(4) The Judges of the Superior Court and the Judges of the District Court.

(5) The District Attorneys and the Public Defenders.

(6) The State Librarian.

(7) The Director of the Division of Archives and History.

(8) The Director, Assistant Director, and Counsel of the Administrative Office of the Courts.

(9) The Chairman of the Judicial Standards Commission.

(10) The Secretary-Treasurer of the North Carolina State Bar, Inc.

This the twenty-fourth day of July, 1980.

Frances H. Hall
Librarian

APPROVED:
James G. Exum, Jr.
Chairman, For the Library Committee

AMENDMENT TO CODE OF PROFESSIONAL RESPONSIBILITY

The following amendment to the Rules, Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 18, 1980.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article X, Canon 2 of the Canons of Ethics and Rules of Professional Conduct of the Certificate of Organization of the North Carolina State Bar, as appears in 205 NC 865 and as amended in 212 NC 840; 216 NC 809; 221 NC 592; 241 NC 750; 243 NC 48; 250 NC 734; 251 NC 857; 253 NC 819; 261 NC 784; 275 NC 702; 281 NC 770; 283 NC 783; 293 NC 767; 294 NC 757; and 296 NC 744 is hereby amended by rewriting section DR2-102(C) as follows:

DR2-102 Professional Notices, Letterheads, Offices, and Law Lists.

"(C) A lawyer shall not hold himself out as having a partnership with one or more lawyers or professional corporations unless they are in fact partners."

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 25th day of April, 1980.

B. E. James, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 14 day of May, 1980.

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 it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 14 day of May, 1980.

Carlton, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court

In an appeal from a decision of the Court of Appeals, questions not brought forward from those properly presented in the Court of Appeals are deemed abandoned. *Williams v. Williams*, 174.

§ 6.2. Finality as Bearing on Appealability, Premature Appeals

Plaintiff could appeal from the court's order entering summary judgment for defendant in plaintiff's action for a declaratory judgment. *Whalehead Properties v. Coastland Corp.*, 270.

Denial of defendants' claim for specific performance prior to hearing evidence on the question of damages for breach of contract affected a substantial right of defendants and was appealable. *Ibid.*

Trial court's order granting the State's motion for a preliminary injunction restraining defendants from operating day-care centers without complying with the licensing requirements of the Day-Care Facilities Act of 1977 constituted a nonappealable interlocutory order. *S. v. School*, 351; *S. v. School*, 731.

§ 6.3. Appeals Based on Jurisdiction, Venue and Related Matters

Trial court's denial of defendant's motion to dismiss on grounds of (1) improper venue and (2) lack of class action certification constituted a nonappealable interlocutory order. *S. v. School*, 351.

§ 6.6. Appeals Based on Motions to Dismiss

Trial court's denial of defendants' motion to dismiss a complaint on the ground that (1) the Day-Care Facilities Act of 1977 could not be constitutionally applied to church-operated day-care centers and (2) defendant institutions are not "day-care facilities" as defined in the Act constituted a nonappealable interlocutory order. *S. v. School*, 351.

§ 9. Moot Questions

Defendants' compliance with a preliminary injunction requiring them to comply with the licensing requirements of the Day-Care Facilities Act did not moot the issues raised by defendants' alleged constitutional defenses to the State's action for a declaratory judgment and permanent injunction. *S. v. School*, 731.

§ 64. Equally Divided Court

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. *Bank v. Morgan*, 541.

ARREST AND BAIL

§ 3.1. Probable Cause for Arrest Without Warrant

There was no merit to defendant's contention that his confession was secured as the result of an illegal, warrantless arrest, since officers had probable cause to believe defendant had committed a felony and the officers therefore could properly arrest defendant. *S. v. Whitt*, 393.

AUTOMOBILES

§ 62.2. Negligence in Striking Pedestrian

In an action to recover for injuries sustained by plaintiff pedestrian, trial court erred in entering summary judgment for defendant where there was evidence that defendant driver was speeding. *Ragland v. Moore*, 360.

§ 83.4. Contributory Negligence of Pedestrians

In an action to recover for injuries sustained by plaintiff pedestrian when she was struck by defendants' vehicle, there was no showing that plaintiff was contributorily negligent as a matter of law in starting to walk across the highway or later increasing her pace. *Ragland v. Moore*, 360.

BASTARDS

§ 10. Action to Establish Paternity

Defendant in an action to establish paternity waived his right to a jury trial by his failure to demand one and to file his demand with the court. *Bell v. Martin*, 715.

BILLS OF DISCOVERY

§ 6. Criminal Cases

In a murder prosecution in which the prosecutor, at defendant's request, stated in the presence of potential jurors the names of all persons the State would call to testify, trial court did not err in permitting two witnesses whose names had not been so mentioned to testify for the State. *S. v. Myers*, 671.

BURGLARY AND UNLAWFUL BREAKINGS

§ 4. Competency of Evidence

In a prosecution for burglary and murder at a rest home, trial court properly admitted testimony of the rest home assistant supervisor concerning her custom of keeping the windows and screens of the rest home closed. *S. v. Simpson*, 335.

§ 5. Sufficiency of Evidence

Evidence of first degree burglary was sufficient to be submitted to the jury though defendant contended that he entered a rest home, the crime scene, through an open window. *S. v. Simpson*, 335.

Evidence was sufficient for the jury in a burglary case where it tended to show that defendant broke into the victim's house in the nighttime for the purpose of committing rape. *S. v. Hardy*, 445.

§ 6. Instructions Generally

Defendant in a first degree burglary prosecution was not prejudiced when the trial judge in one portion of the charge inadvertently omitted the requirement that the house be occupied at the time of the breaking and entering. *S. v. Brady*, 547.

§ 6.2. Instructions on Felonious Intent

Trial court in a first degree burglary case properly defined intent as a mental attitude which could be inferred from the act of larceny itself, the nature and conduct of defendant, and other relevant circumstances. *S. v. Simpson*, 377.

BURGLARY AND UNLAWFUL BREAKINGS — Continued

§ 6.3. Instructions on Felony Attempted or Committed

Use of the word "larceny" as it is commonly used and understood by the general public was sufficient to define for the jury the requisite felonious intent needed to support a conviction of burglary. *S. v. Simpson*, 377.

§ 7. Instructions on Lesser Included Offenses

Trial court in a burglary case did not err in failing to submit misdemeanor or nonfelonious breaking and entering as a permissible verdict. *S. v. Simpson*, 377; *S. v. Hardy*, 445.

§ 8. Sentence and Punishment

The imposition of separate life sentences on defendant for the crimes of first degree burglary and rape did not constitute multiple punishments for the same offense in violation of the double jeopardy clause. *S. v. Brady*, 547.

CHARITIES AND FOUNDATIONS

§ 2. Solicitation of Funds

The statute exempting from compliance with the requirements of the Solicitation of Charitable Funds Act all religious organizations except those whose "financial support is derived primarily from contributions solicited from persons other than its own members" constitutes an impermissible establishment of religion in violation of the U.S. and N.C. Constitutions. Furthermore, certain other provisions of the Act, when applied to religious organizations, cause the State to become excessively entangled with religion so as to constitute an impermissible establishment of religion. *Church v. State*, 399.

CONSTITUTIONAL LAW

§ 22. Religious Liberty

The statute exempting from compliance with the requirements of the Solicitation of Charitable Funds Act all religious organizations except those whose "financial support is derived primarily from contributions solicited from persons other than its own members" constitutes an impermissible establishment of religion in violation of the U.S. and N.C. Constitutions. Furthermore, certain other provisions of the Act, when applied to religious organizations, cause the State to become excessively entangled with religion so as to constitute an impermissible establishment of religion. *Church v. State*, 399.

§ 28. Due Process and Equal Protection in Criminal Prosecutions

In a prosecution for armed robbery and assault with a deadly weapon, defendant, who contended that the prosecuting witnesses did not wish to press charges, was not denied equal protection of the laws by the district attorney's refusal to drop the charges. *S. v. Spicer*, 309.

§ 30. Discovery; Access to Evidence

Trial court did not err in admitting testimony by an expert in the field of analytical chemistry, though defendant was not provided prior to trial with any information regarding the witness's testimony. *S. v. Matthews*, 284.

Defendant was not entitled to learn the identity of a confidential informant at a preliminary hearing held to determine if there was probable cause for arrest and search. *S. v. Hardy*, 445.

CONSTITUTIONAL LAW — Continued

§ 33. Ex Post Facto Laws

There is no violation of the ex post facto clause when a court decision is applied retroactively. *S. v. Rivens*, 385.

§ 45. Right of Defendant to Appear Pro Se

Defendant was not denied his right to effective counsel where he dismissed his counsel, conducted his own trial, and conferred with his attorney whom the court appointed as stand-by counsel. *S. v. Hardy*, 445.

§ 50. Speedy Trial

A defendant charged with rape, kidnapping and burglary was not prejudiced by a delay between his arrest and trial because the married prosecutrix was five months pregnant at the time of trial. *S. v. Brady*, 547.

The State complied with the provisions of the Speedy Trial Act where defendant's trial began within 120 days from the date defendant was indicted. *Ibid.*

§ 60. Racial Discrimination in Jury Selection

Defendant was not prejudiced by the court's gratuitous finding after verdict and judgment that a black prospective juror was challenged for cause because she had been restrained by the trial judge from issuing further bail bonds or by the court's gratuitous conclusion that blacks were not systematically excluded from the jury pools in the county. *S. v. Hough*, 245.

Defendant failed to show systematic exclusion of blacks from the grand and petit juries in violation of the Equal Protection Clause or in violation of his right to be tried by a jury drawn from a representative cross-section of the community. *S. v. Avery*, 126; *S. v. Hough*, 245.

Names for the list of grand and petit jurors were not chosen arbitrarily in violation of G.S. 9-2 where every fourth name from the tax list was taken only from the letters, A, B, C, D and M rather than from the entire alphabet. *S. v. King*, 707.

§ 63. Exclusion from Jury For Opposition to Capital Punishment

Trial court did not err in allowing the State's challenge for cause of two prospective jurors who answered "I don't believe I would" and "I don't think so" when asked whether they could impose the death penalty under any circumstances. *S. v. Avery*, 126.

Defendant was not deprived of a jury composed of a fair cross-section of the community by exclusion of jurors who indicated that they could not impose the death penalty under any circumstances. *Ibid.*

CONTRACTS

§ 20.1. Impossibility of Performance

Plaintiff was not excused on the ground of impossibility of performance from compliance with its contract with defendant to redesign its plans for development of its property to comply with the "Currituck Plan" for development of outer banks property. *Whalehead Properties v. Coastland Corp.*, 270.

§ 23. Waiver of Breach

Trial court adequately instructed the jury on the issue of defendant's waiver of plaintiff's breach of child visitation provisions of a separation agreement by continuing performance of his duties under the contract. *Wheeler v. Wheeler*, 633.

COURTS

§ 21.7. Conflict of Laws in Contract Actions

The laws of Virginia governed the validity of an executory contract for the sale of land since the contract was executed in Virginia and since the contract itself provided that the laws of that state should be controlling. *Land Co. v. Byrd*, 260.

CRIME AGAINST NATURE

§ 1. Elements of Offense

The statute under which defendant was indicted for crime against nature, G.S. 14-177, is constitutional. *S. v. Adams*, 699.

CRIMINAL LAW

§ 1. Nature of Crime in General

As a general rule consent is not a defense to a prosecution for acts which are breaches of the criminal law, nor is it a valid defense to a criminal charge that other persons have not been prosecuted for the same conduct as that which a defendant is alleged to have committed. *S. v. Adams*, 699.

§ 23. Plea of Guilty

Where a plea agreement provided that charges against defendant would be consolidated and the sentence imposed would run concurrently with the sentence being served, trial court erred in imposing upon defendant two consecutive two-year sentences. *S. v. Puckett*, 727.

§ 23.4. Withdrawal of Guilty Plea

A question of fact existed as to whether defendant's guilty pleas were tendered under the impression that a plea bargain had been made and had to be concealed in order for defendant to benefit from it. *S. v. Dickens*, 76.

§ 26.5. Double Jeopardy; Same Acts Violating Different Statutes

The imposition of separate life sentences on defendant for the crimes of first degree burglary and rape did not constitute multiple punishments for the same offense in violation of the double jeopardy clause. *S. v. Brady*, 547.

§ 34. Evidence of Defendant's Guilt of Other Offenses Generally

In a prosecution for first degree murder, first degree burglary and assault with a firearm with intent to kill, trial court erred in admitting evidence that defendant had committed sodomy with a dog even though that evidence was contained in defendant's confession to the crimes charged. *S. v. Simpson*, 335.

§ 34.7. Evidence of Other Offenses to Show Motive, Intent, Etc.

Evidence that defendant and the victim had been jointly involved in certain thefts of tobacco and cars was properly admitted to show that defendant's motive for killing the victim was because he was afraid the victim would tell about those prior crimes. *S. v. Jones*, 298.

§ 38. Evidence of Like Facts and Conditions

In a prosecution for burglary and murder at a rest home, trial court properly admitted testimony of the rest home assistant supervisor concerning her custom of keeping the windows and screens of the rest home closed. *S. v. Simpson*, 335.

CRIMINAL LAW — Continued

§ 42.6. Chain of Custody of Articles Connected With Crime

The chain of custody of defendant's tennis shoes after they were received in the mail by an S.B.I. agent was not broken so as to require the exclusion of tests of bloodstains on the shoes because the S.B.I. agent may have left the shoes unattended for an hour in his unlocked private office or because the shoes were carried to a mail pickup point by some employee of the S.B.I. laboratory other than the agent who received and examined them. *S. v. Fulton*, 491.

§ 46.1. Sufficiency of Evidence of Flight

Trial court's instruction on flight in a murder prosecution was supported by evidence that defendant went to N.Y. a few days after the crime though defendant was actually from N.Y. and the inference could be drawn that he was returning home. *S. v. Avery*, 126.

§ 50. What Constitutes Opinion Testimony

A State's witness in an armed robbery and murder case was not permitted to express an opinion on a question of law in testifying that he had only been charged with armed robbery but that he knew he could have been charged with murder. *S. v. Hamm*, 519.

Trial court in a rape case properly struck an officer's testimony that he told the prosecutrix on a certain date that in his opinion there was insufficient evidence to proceed with a warrant at that time. *S. v. Brady*, 547.

§ 53. Medical Expert Testimony

A forensic pathologist could properly give his opinion as to the cause of death without the necessity of hypothetical questions. *S. v. Morgan*, 191.

§ 55.1. Blood Tests

Expert testimony that human blood found on defendant's tennis shoes was consistent with the victim's blood type and that this particular blood type was present in only 11% of the population of the U.S. was only weakly probative in character but was harmless. *S. v. Fulton*, 491.

§ 61. Footprints and Shoe Prints

Trial court erred in permitting a police officer who was not qualified as an expert witness to state his opinion that the tread design shown in a photograph of shoe tracks found near the crime scene was the same as the tread design on defendant's tennis shoes, but such error was not prejudicial. *S. v. Fulton*, 491.

§ 63. Evidence as to Mental Condition of Defendant

Trial court properly excluded testimony concerning defendant's low mental capacity by an expert in clinical psychology who had not previously examined defendant and had performed no psychiatric tests on defendant. *S. v. Horton*, 690.

§ 66.1. Identity by Sight; Opportunity for Observation

In-court identification testimony of a witness who drove by the crime scene in her car was not inherently incredible. *S. v. Matthews*, 284.

§ 66.9. Pretrial Photographic Procedure

A rape victim's in-court identification of defendant was not rendered inadmissible by discrepancies between her identification testimony at trial and the description of defendant previously given to officers or by a pretrial photographic identification. *S. v. Brady*, 547.

CRIMINAL LAW — Continued

§ 71. Shorthand Statements of Fact

An expert witness's statement in a rape case that the prosecutrix had been penetrated by an "assailant" was admissible as a shorthand statement of fact. *S. v. Hunter*, 29.

An officer's testimony that defendant's vehicle could have drifted downhill to a new location "even without power steering and brakes" constituted a permissible shorthand statement of facts. *S. v. Fulton*, 491.

Testimony that a murder victim was "afraid" her husband would kill her was competent as a shorthand description of the victim's emotional state. *S. v. Myers*, 671.

Testimony that defendant had "complete control" of a gun at the time he came up over the front seat of a car to shoot his wife was competent as a shorthand statement of fact. *Ibid.*

A witness's testimony that defendant, after shooting deceased, reloaded his gun and "was going to shoot him again" was competent as a shorthand statement of fact. *S. v. Horton*, 690.

§ 75. Admissibility of Confession in General

Defendant's confession was voluntary and the trial court properly denied defendant's motion to suppress. *S. v. Hardy*, 445.

§ 75.1. Effect on Confession of Fact Defendant is Under Arrest; Delay in Arraignment

Defendant's confession was not the result of an illegal arrest though he was in the sheriff's office at the time of making the statement since officers did not consider him to be a suspect in the case and defendant was told on two occasions during his interview that he could leave the sheriff's office. *S. v. Morgan*, 191.

The fact that Philadelphia officers failed to take defendant before a proper issuing official in Philadelphia for issuance of a warrant and preliminary arraignment in accordance with Pennsylvania Rules of Criminal Procedure was not grounds for suppression of defendant's inculpatory statement in a trial in N.C. *S. v. Simpson*, 335.

There was no merit to defendant's contention that his confession was secured as the result of an illegal warrantless arrest, since officers had probable cause to believe defendant had committed a felony and the officers therefore could properly arrest defendant. *S. v. Whitt*, 393.

§ 75.2. Effect of Promises, Threats or Other Statements by Officers

Where defendant was questioned over a period of six hours by four different officers and one officer insisted that defendant tell the truth, defendant was not subjected to such mental or psychological pressure as to render his confession involuntary. *S. v. Morgan*, 191.

§ 75.9. Volunteered Statements

Defendant's inculpatory statement was voluntarily and understandingly made where defendant voluntarily went to the police station to discuss the investigation with officers, defendant was advised of his constitutional rights and he nevertheless made a statement to officers. *S. v. Simpson*, 335.

§ 75.11. Waiver of Constitutional Rights

Evidence was sufficient to support trial court's conclusion that defendant's confession was voluntarily made after he was advised of his constitutional rights. *S. v. Whitt*, 393.

CRIMINAL LAW — Continued

§ 75.14. Defendant's Mental Capacity to Confess

Testimony concerning defendant's low mental capacity was not relevant to the admissibility of defendant's confession where the trial judge had previously ruled that the confession was voluntary and admissible. *S. v. Horton*, 690.

§ 87. Direct Examination of Witnesses; What Witnesses May be Called

Defendant was not entitled to a new trial because his attorney refrained from calling a witness who he knew would plead the Fifth Amendment after the trial court erroneously stated it would be unethical for defendant's attorney to call such a witness. *S. v. Bumgarner*, 113.

In a murder prosecution in which the prosecutor, at defendant's request, stated in the presence of potential jurors the names of all persons the State would call to testify, trial court did not err in permitting two witnesses whose names had not been so mentioned to testify for the State. *S. v. Myers*, 671.

§ 87.3. Use of Writings to Refresh Recollection

Defendant was not prejudiced where the court instructed a witness that he could use his notes to refresh his recollection but he could not read them to the jury, and there is nothing in the record to show the witness did not follow the instructions of the court. *S. v. Adams*, 699.

§ 89.5. Slight Variances in Corroborating Testimony

The fact that an officer's testimony included an element which was not included in the witness's prior testimony did not render it incompetent as corroborative evidence. *S. v. Rogers*, 597.

§ 90. Rule that Party May Not Discredit Own Witness

Trial court did not err in failing to grant defendant's motion to declare his witness a hostile witness. *S. v. Austin*, 537.

The prosecuting witness was not genuinely surprised or taken unawares by the witness's repudiation of his pretrial statement, and the court erred in permitting the prosecuting attorney to impeach his own witness. *S. v. Lovette*, 642.

§ 99.7. Expression of Opinion; Court's Admonition of Witnesses

Trial court did not comment on a witness's credibility in warning an officer who testified for defendant, "I'm sorry, but that is a clear violation of the Court's order. It has nothing to do—it doesn't express any opinion concerning his testimony. . . . I will remind him of the order of the court." *S. v. Brady*, 547.

§ 102.6. Comments in Argument to Jury

Defendant was not prejudiced by the prosecutor's remark during closing argument concerning the meaning of reasonable doubt. *S. v. Hardy*, 445.

The prosecutor's remark in his jury argument that "The attorneys for the defendant were tied to this story that the defendant told" was not sufficiently prejudicial to warrant a new trial and any error was cured by the trial court's instructions. *S. v. Rupard*, 515.

Remarks of the prosecutor in his argument to the jury concerning the thoughts of the homicide victim as he was stabbed and lay dying and the thoughts of the victim's family were not so grossly improper as to require the judge to take corrective action ex mero motu. *S. v. King*, 707.

CRIMINAL LAW — Continued

§ 102.10 Jury Argument About Defendant's Character and Prior Criminal Conduct

The prosecutor's remarks during his jury argument concerning the demeanor of defendant when he looked at pictures of his wife's body during trial, defendant's previous conviction of involuntary manslaughter for the death of his wife's first husband, and defendant's attitude and conduct toward his wife were rooted in evidence and were within the bounds of permissible argument. *S. v. Myers*, 671.

§ 102.11. Comment in Jury Argument on Defendant's Guilt or Innocence

Defendant was not prejudiced by the prosecutor's statement during the closing argument concerning the defendant's failure to show a valid conclusion of his innocence. *S. v. Hardy*, 445.

§ 112.1. Instructions on Reasonable Doubt

Trial judge did not abuse his discretion in refusing to review certain testimony when the jury returned to the courtroom with questions during its deliberations. *S. v. Hough*, 245.

§ 113.6. Instructions Where There Are Several Defendants

In a trial of two defendants on two charges, trial court did not err in its jury charge relating to the second defendant in telling the jury that the court would not repeat the elements of the crimes charged. *S. v. Matthews*, 284.

§ 113.7. Charge as to Acting in Concert or Aiding and Abetting

Trial court did not err in instructing on aiding and abetting where evidence tended to show that defendant was actually present at the time the crimes were committed, and defendant's own evidence showed that he was constructively present. *S. v. Matthews*, 284.

Trial court in a murder prosecution properly submitted to the jury the theory of concerted action by two defendants and did not err in failing to submit the theory of aiding and abetting. *S. v. Williams*, 652.

§ 114.2. No Expression of Opinion in Statement of Evidence or Contentions

Trial judge did not express an opinion on the evidence by failing, during his statement of the State's contentions, to qualify his statements with remarks such as "the evidence tends to show" or "she testified that." *S. v. Hough*, 245.

Trial court did not express an opinion on the evidence in stating that a doctor's examination was made some hour or so after the victim had testified defendant had "raped" her. *Ibid.*

§ 114.3. No Expression of Opinion in Other Instructions

Trial court did not express an opinion on the evidence by stating to the jury, "before you return a verdict of guilty of either charge." *S. v. Hough*, 245.

§ 116. Charge on Failure of Defendant to Testify

Trial court's instruction on defendant's failure to testify was not prejudicial to defendant though he made no request for such instruction. *S. v. Hardy*, 445.

§ 117. Charge on Character Evidence

In a prosecution of a father and son for murder, there was no merit to the son's contention that because the trial judge gave instructions on character evidence for the father his failure to do so for the son was prejudicial. *S. v. Williams*, 652.

CRIMINAL LAW — Continued

§ 118.2. Disparity in Time or Stress Given to Contentions as Not Erroneous

Trial court did not fail to give equal stress to the contentions of both parties where the court stated the contentions of defendant, defined the elements of the offenses, and then restated the contentions of the State. *S. v. Hough*, 245.

§ 119. Requests for Instructions

Trial court did not err in failing to use the exact language of defendant's requested instructions on the presumption of innocence and on reasonable doubt. *S. v. Hough*, 245.

§ 124.1. Ambiguity or Uncertainty in Verdict

Although written issues submitted to the jury as to whether defendant was "guilty or not guilty" of assault and first degree murder were answered "yes" by the jury rather than "guilty," the trial court properly accepted the verdicts as verdicts of guilty where the court's inquiry of the jury and the jury poll showed that the jury intended to return verdicts of guilty. *S. v. Smith*, 533.

§ 131. New Trial for Newly Discovered Evidence

Trial court properly denied defendant's motion for appropriate relief made on the ground of newly discovered evidence since such evidence was a document which defendant had in his possession three or four days prior to trial. *S. v. Cronin*, 229.

§ 131.2. Sufficiency of Showing Upon Motion for New Trial for Newly Discovered Evidence

Defendant's motion for a new trial for newly discovered evidence is remanded for determination of pertinent facts. *S. v. Saults*, 319.

§ 134.4. Sentencing of Youthful Offenders

Trial court erred in sentencing a 17-year-old defendant to consecutive terms of imprisonment for second degree murder without making a finding that defendant should not obtain the benefit of release as a committed youthful offender under G.S. 148-49.15. *S. v. Rupard*, 515.

§ 135.4. Sentence in Capital Case Under G.S. 15A-2000

In a prosecution for first degree murder in which the jury could have found at least one aggravating circumstance beyond a reasonable doubt, the presiding judge, district attorney and defense counsel had no legal authority to eliminate the separate sentencing proceeding to determine whether the punishment should be death or life imprisonment and by consent to fix the punishment at life imprisonment should the jury convict defendant of first degree murder. *S. v. Jones*, 298.

§ 138. Severity of Sentence; Plea Arrangement

Where a plea agreement provided that charges against defendant would be consolidated and the sentence imposed would run concurrently with the sentence being served, trial court erred in imposing upon defendant two consecutive two-year sentences. *S. v. Puckett*, 727.

§ 138.6. Matters Considered in Sentencing

It is not error for the trial judge during the sentencing phase of trial to see the entire record, including charges of which defendant was acquitted or in which the conviction was overturned on appeal, so long as he does not sentence the defendant while operating upon any erroneous assumptions concerning defendant's criminal record. *S. v. Spicer*, 309.

CRIMINAL LAW — Continued

§ 143.1. Time for Commencement of Probation Revocation Proceedings

The trial judge was without authority to conduct a probation revocation hearing and activate the suspended sentence after the period of probation and suspension had expired since failure of the court to enter a revocation judgment within the time allowed was not chargeable to the conduct of defendant. *S. v. Camp*, 524.

§ 168. Harmless Error in Instructions

A verdict based on the erroneous submission of a lesser included offense not supported by the evidence does not invariably constitute error favorable to defendant as a matter of law. *S. v. Ray*, 151.

DEEDS

§ 16. Conditions Generally

In an action by plaintiffs to have themselves declared owners in fee of three tracts of land, evidence was sufficient for the jury on the theory of equitable election. *Thompson v. Soles*, 484.

DIVORCE AND ALIMONY

§ 16. Alimony Without Divorce

To qualify as a dependent spouse as one "actually substantially dependent" upon the other spouse, the spouse seeking alimony must actually be unable to maintain the accustomed standard of living from his or her own means. *Williams v. Williams*, 174.

To qualify as a dependent spouse as one who is "substantially in need of maintenance and support from the other spouse," the spouse seeking alimony must establish that he or she would be unable to maintain his or her accustomed standard of living without financial contribution from the other. *Ibid.*

The legislature did not intend that one seeking alimony be disqualified as a dependent spouse because, through estate depletion, such spouse would be able to maintain his or her accustomed standard of living. *Ibid.*

When determining dependency, the court's consideration of "other facts of the particular case" should include a consideration of the length of the marriage and the contribution each party has made to the financial status of the family over the years. *Ibid.*

Considering G.S. 50-16.2 and G.S. 50-16.5(b) in pari materia, it was the intent of the legislature that fault be a consideration in awarding alimony. *Ibid.*

Trial court properly concluded that plaintiff wife was the dependent spouse and defendant husband was the supporting spouse, although plaintiff had a net worth of $761,975 and defendant had a net worth of $870,165. *Ibid.*

§ 20.3. Attorney's Fees and Costs

When attorney fees may be awarded in an action for alimony. *Hudson v. Hudson*, 465.

Plaintiff wife had sufficient means to defray the expense of an alimony and child support suit, and the trial court erred in ordering defendant husband to pay $22,000 in attorney fees incurred by plaintiff where the evidence showed that plaintiff has a net estate of $665,652. *Ibid.*

DIVORCE AND ALIMONY — Continued

§ 25.12. Child Visitation Privileges

Where a separation agreement required defendant to pay alimony to plaintiff "so long as plaintiff observes and performs the conditions of this contract," plaintiff's breach of the child visitation provisions of the agreement would excuse defendant's duty to pay alimony. *Wheeler v. Wheeler*, 633.

Trial court adequately instructed the jury on the issue of defendant's waiver of plaintiff's breach of child visitation provisions of a separation agreement by continuing performance of his duties under the contract. *Ibid.*

§ 27. Attorney's Fees in Child Custody and Support Action

When attorney fees may be awarded in an action for child custody, child support, or child custody and support. *Hudson v. Hudson*, 465.

ELECTRICITY

§ 3. Rates

The Utilities Commission erred in failing to consider a rate structure based on the rolling in of the properties, revenues and expenses of two affiliated utility companies. *Utilities Comm. v. Edmisten*, 432.

EMINENT DOMAIN

§ 7.8. Proceedings by Board of Transportation; Instructions

Testimony by an expert real estate appraiser in a highway condemnation action that the value of defendants' land was increased by the taking and stating the dollar value of the land before and after taking was sufficient evidence of benefit to require the trial court to instruct on this issue. *Board of Transportation v. Rand*, 476.

ESTOPPEL

§ 4.7. Sufficiency of Evidence of Equitable Estoppel

In an action by plaintiffs seeking an adjudication that they were owners in fee of three tracts of land, plaintiffs were not entitled to go to the jury on the theory of equitable estoppel since there was no evidence of detrimental reliance. *Thompson v. Soles*, 484.

EVIDENCE

§ 36.1. Declarations by Agent; Scope of Authority

Statements made by defendant telephone company's service foreman concerning defendant's liability for injuries sustained when plaintiff fell over anchor brackets left in a sidewalk after removal of a telephone booth were not admissible against defendant. *Pearce v. Telegraph Co.*, 64.

FALSE PRETENSE

§ 1. Nature and Elements of the Crime

Trial court's instruction that in order to return a verdict of guilty, the jury must find that defendant intended to deceive a bank and did in fact deceive the bank was sufficient. *S. v. Cronin*, 229.

FALSE PRETENSE — Continued

§ 2.1. Indictment Sufficient

In a prosecution for obtaining property by false pretense in violation of G.S. 14-100, there was no merit to defendant's contention that the bill of indictment was fatally defective because there was no specific allegation that defendant's false representations did in fact deceive a named bank and because the bill of indictment failed to allege that the accused obtained property from the victim without compensation. *S. v. Cronin*, 229.

§ 3.1. Sufficiency of Evidence

In a prosecution for obtaining property by false pretense, evidence was sufficient for the jury where it tended to show that defendant made false representations to a bank that he was offering as security for a loan a new mobile home while the offered security was a fire damaged mobile home worth considerably less. *S. v. Cronin*, 229.

FRAUD

§ 12. Sufficiency of Evidence

Trial court erred in granting summary judgment for defendant mortgage corporation on the issue of fraud in procuring the subordination of plaintiff's purchase money deed of trust to defendant's deed of trust. *Odom v. Little Rock & I-85 Corp.*, 86.

GAS

§ 1. Regulation

An order permitting an undercollection produced in one year by a curtailment tracking rate based on an incorrect base period margin to be rolled forward to offset an overcollection in the next year did not constitute prohibited retroactive rate making. *Utilities Comm. v. Industries, Inc.*, 504.

GRAND JURY

§ 3.3. Sufficiency of Evidence of Racial Discrimination

Defendant failed to show systematic exclusion of blacks from the grand and petit juries in violation of the Equal Protection Clause or in violation of his right to be tried by a jury drawn from a representative cross-section of the community. *S. v. Avery*, 126; *S. v. Hough*, 245.

§ 3.6. Use of Tax List

Names for the list of grand and petit jurors were not chosen arbitrarily in violation of G.S. 9-2 where every fourth name from the tax list was taken only from the letters, A, B, C, D and M rather than from the entire alphabet. **S. v. King**, 707.

HOMICIDE

§ 14.1. Necessity for Proof of Intentional Use of Deadly Weapon

The State was entitled to rely upon the inference of an unlawful killing when the evidence showed deceased's death was proximately caused by defendant's intentional use of a deadly weapon. *S. v. Benton*, 16.

HOMICIDE — Continued

§ 14.6. Burden of Proving Self-Defense

There was no burden on the State in a second degree murder prosecution to prove the nonexistence of self-defense. *S. v. Boone*, 681.

§ 15. Relevancy and Competency of Evidence in General

Defendant was not prejudiced by a witness's testimony regarding her beliefs or thoughts as to defendant's residence, or a witness's testimony concerning the manner in which defendant was shooting a gun, or testimony that a bullet hole in a cabinet at the crime scene "was shot in there that morning," meaning at the time of the incident in question. *S. v. Boone*, 681.

§ 17.1. Evidence of Intent and Motive in Prosecutions for Homicide

In a prosecution of defendant for murder of his wife, testimony by two of defendant's neighbors concerning defendant's verbal abuse of his wife was admissible as bearing on intent, malice, motive, premeditation and deliberation. *S. v. Myers*, 671.

§ 17.2. Evidence of Threats

Testimony that defendant on earlier occasions had threatened to kill deceased was not inadmissible because the threats were made 10 to 15 months before deceased was killed. *S. v. Myers*, 671.

§ 20. Real and Demonstrative Evidence

Clothing worn by a homicide victim was admissible in evidence. *S. v. King*, 707; *S. v. Horton*, 690.

§ 20.1. Photographs

Photographs of the wounds and face of the deceased were properly admitted for illustrative purposes. *S. v. Horton*, 690.

Photographs of a homicide victim's body at the crime scene and in the autopsy room were properly admitted for illustrative purposes. *S. v. Rupard*, 515; *S. v. King*, 707.

§ 21. Sufficiency of Evidence Generally

Evidence was sufficient for the jury to infer that defendant was the aggressor in a fight with deceased. *S. v. Benton*, 16.

§ 21.5. Sufficiency of Evidence of First Degree Murder

Evidence was sufficient for the jury in a first degree murder case where it tended to show that defendant killed and raped deceased. *S. v. Powell*, 95.

There was sufficient evidence of intent, premeditation and deliberation and malice to sustain defendant's conviction of first degree murder of his wife. *S. v. Myers*, 671.

Evidence was sufficient to support defendant's conviction of first degree murder by shooting the victim with a shotgun. *S. v. Horton*, 690.

§ 21.7. Sufficiency of Evidence of Second Degree Murder

The State, by introducing defendant's confession in which he claimed the killing of the victim was an accident, was not bound entirely by the purported truth of that statement since the State offered evidence which cast doubt on the truth of the statement. *S. v. Morgan*, 191.

HOMICIDE — Continued

Testimony by an accomplice and circumstantial evidence which coincided with and corroborated the accomplice's testimony supported jury verdicts finding defendant guilty of second degree murder and armed robbery. *S. v. Hamm*, 519.

§ 21.9. Sufficiency of Evidence of Manslaughter

Trial court should have instructed on involuntary manslaughter where the jury could have found that deceased provoked defendant by suddenly arousing defendant's passion by threatening injury to defendant's close relatives. *S. v. Jones*, 103.

§ 24.3. Burden of Proof on Matters of Mitigation, Justification or Excuse

Trial court's instruction with respect to death by accident properly placed the burden on the State to prove each element of the crime charged beyond a reasonable doubt, thereby disproving defendant's assertion of an accidental death. *S. v. Morgan*, 191.

§ 27. Instructions on Manslaughter Generally

Trial court's distinction between the intentional homicides of murder and voluntary manslaughter and the unintentional homicide of involuntary manslaughter was not altogether correct where the court instructed that the former crimes required an intent to kill while the latter did not. *S. v. Ray*, 151.

Defendant in a second degree murder case was not prejudiced by the trial judge's instruction that the terms "involuntary manslaughter" and "manslaughter" had the same meaning for purposes of the trial and were interchangeable. *S. v. Boone*, 681.

§ 27.1. Instructions on Voluntary Manslaughter; Heat of Passion

Any error in the court's confusing instruction on finding defendant guilty of voluntary manslaughter rather than second degree murder if the State failed to prove that defendant did not act in the heat of passion upon adequate provocation was cured by correct instructions thereafter given to the jury. *S. v. Rogers*, 597.

§ 28. Instructions on Self-Defense

Defendant was not prejudiced by the trial court's instruction on self-defense which made it clear that the State must prove the absence of self-defense beyond a reasonable doubt. *S. v. Benton*, 16.

Trial court did not violate G.S. 15A-1232 by failing to relate the evidence to the law of self-defense. *Ibid.*

Trial court's instruction designed to permit the jury to find defendant guilty of manslaughter on the theory that he shot deceased in the exercise of an imperfect right of self-defense was not prejudicial to defendant. *S. v. Boone*, 681.

§ 28.3. Instructions on Use of Excessive Force

Defendant in a homicide case was not entitled to an instruction that an honest but unreasonable belief that it was necessary to kill deceased in defense of a family member should result in a verdict of guilty of voluntary manslaughter. *S. v. Jones*, 103.

§ 28.4. Instructions on Duty to Retreat, Right to Stand Ground

Trial court in a homicide case was required to instruct the jury both on defense of home and defense of a family member. *S. v. Jones*, 103.

§ 30.3. Submission of Lesser Offense of Involuntary Manslaughter

Defendant in a murder prosecution was prejudiced by the trial court's erroneous submission of the lesser offense of involuntary manslaughter and by the

HOMICIDE — Continued

court's misleading definition of that offense since the jury never really considered defendant's evidence of self-defense and there was a reasonable possibility that a verdict of acquittal might have resulted had they considered such evidence. *S. v. Ray*, 151.

HUSBAND AND WIFE

§ 11.1. Operation and Effect of Separation Agreement

Where a separation agreement required defendant to pay alimony to plaintiff "so long as plaintiff observes and performs the conditions of this contract," plaintiff's breach of the child visitation provisions of the agreement would excuse defendant's duty to pay alimony. *Wheeler v. Wheeler*, 633.

INSURANCE

§ 148. Title Insurance

Plaintiff lender was not entitled to recover under its policy of title insurance for losses it allegedly suffered by reason of the invalidity of the lien of its deed of trust where the loss of plaintiff lender was caused by plaintiff's disbursement of loan proceeds and the subsequent misappropriation of those funds after the effective date of the title insurance and thus cannot be attributed to matters in existence on the date the policy was issued. *Mortgage Corp. v. Insurance Co.*, 369.

JUDGMENTS

§ 2.1. Judgment Rendered Out of Term and Out of County

Trial court's order denying defendant's motion for a new trial for newly discovered evidence was void where it was entered out of term, out of session, out of county, and out of district in which the hearing was held. *S. v. Saults*, 319.

§ 54. Payment and Discharge Generally

There was no merit to defendant's contention that the trial court was without subject matter jurisdiction because plaintiff had obtained a judgment on his claim in bankruptcy court since a party may pursue and obtain more than one judgment though he may have only one satisfaction. *Real Estate Trust v. Debnam*, 510.

JURY

§ 5.2. Selection; Discrimination and Exclusion

Names for the list of grand and petit jurors were not chosen arbitrarily in violation of G.S. 9-2 where every fourth name from the tax list was taken only from the letters, A, B, C, D and M rather than from the entire alphabet. *S. v. King*, 707.

§ 7.4. Sufficiency of Evidence of Racial Discrimination

Defendant failed to show systematic exclusion of blacks from the grand and petit juries in violation of the Equal Protection Clause or in violation of his right to be tried by a jury drawn from a representative cross-section of the community. *S. v. Avery*, 126; *S. v. Hough*, 245.

Defendant was not prejudiced by the court's gratuitous finding after verdict and judgment that a black prospective juror was challenged for cause because she had been restrained by the trial judge from issuing further bail bonds or by the court's gratuitous conclusion that blacks were not systematically excluded from the jury pools in the county. *S. v. Hough*, 245.

JURY — Continued

§ 7.6. Challenge for Cause; Time and Order of Challenge

Trial court did not err in allowing the State to challenge a juror after the State had accepted him where the juror worked at the same place as one defendant's mother and the mother spoke to the juror concerning her son during a recess before the jury was impaneled. *S. v. Matthews*, 284.

Trial court had the discretion to permit further challenge and examination of a juror by the State after the jury was impaneled where the juror indicated he was employed by defendant's brother. *S. v. Brady*, 547.

§ 7.11. Challenge for Cause; Scruples Against Capital Punishment

Defendant was not deprived of a jury composed of a fair cross-section of the community by exclusion of jurors who indicated that they could not impose the death penalty under any circumstances. *S. v. Avery*, 126.

Trial court did not err in allowing the State's challenge for cause of two prospective jurors who answered "I don't believe I would" and "I don't think so" when asked whether they could impose the death penalty under any circumstances. *Ibid.*

§ 7.14. Peremptory Challenge; Order and Time of Exercising Challenge

Trial court did not err in allowing the State to challenge a juror after the State had accepted her where she told defense counsel she did not want to sit on the case and that she did not want this matter on her conscience. *S. v. Matthews*, 284.

KIDNAPPING

§ 1. Elements of Offense

An indictment which charged defendant kidnapped a named person without her consent for the purpose of committing the felonies of rape and crime against nature was constitutionally sufficient. *S. v. Hunter*, 29.

There was no merit to defendant's contention that in order to convict him of kidnapping the jury must find that the victim was 16 years of age or older. *Ibid.*

Under G.S. 14-39 no showing of asportation as an element of kidnapping is necessary where confinement or restraint is shown. *S. v. Adams*, 699.

§ 1.2. Sufficiency of Evidence

Where defendant was charged with kidnapping, rape and crime against nature, the State showed restraint and asportation of the victim. *S. v. Adams*, 699.

§ 1.3. Instructions

Trial court in a kidnapping prosecution erred in including in the charge the mitigating circumstances relating to punishment as set forth in G.S. 14-39(b). *S. v. Brady*, 547.

LANDLORD AND TENANT

§ 13.2. Renewals and Extensions

The parties' extension of a lease incorporated the original lease agreement in its entirety, including an option to purchase. *Davis v. McRee*, 498.

MALICIOUS PROSECUTION

§ 13.3. Sufficiency of Evidence of Malice

Summary judgment was properly entered for defendant in an action for malicious prosecution based upon allegations that defendant planted illegal drugs in plaintiff's truck and caused the prosecution of plaintiff for unlawful possession of the drugs. *Middleton v. Myers*, 42.

MASTER AND SERVANT

§ 69. Workers' Compensation; Amount of Recovery Generally

The 1973 amendment to G.S. 97-29 governing the maximum weekly workers' compensation benefit applies to G.S. 97-38 so that G.S. 97-38 no longer limits recovery for death claims to $80 per week. *Andrews v. Nu-Woods, Inc.*, 723.

§ 75. Workers' Compensation; Recovery of Medical and Hospital Expenses

Under G.S. 97-25 an employee is justified in seeking treatment by a physician other than the one selected by the employer in an emergency where the employer's failure to provide medical services amounts to an inability to provide those services. *Schofield v. Tea Co.*, 582.

An employee's medical expenses for 17 months of emergency treatment were covered by workmen's compensation. *Ibid.*

§ 94. Workers' Compensation; Necessity for Specific Findings of Fact by Industrial Commission

Before approving the cost of emergency treatment rendered by a physician other than the one provided by an employer, the Industrial Commission must make findings as to the duration of the emergency and as to whether approval of the injured employee's own doctor by the Commission was sought within a reasonable time. *Schofield v. Tea Co.*, 582.

MORTGAGES AND DEEDS OF TRUST

§ 2. Purchase Money Mortgages

Trial court erred in granting summary judgment for defendant mortgage corporation on the issue of fraud in procuring the subordination of plaintiff's purchase money deed of trust to defendant's deed of trust. *Odom v. Little Rock & I-85 Corp.*, 86.

§ 32.1. Restriction of Deficiency Judgments Respecting Purchase Money Mortgages

The anti-deficiency statute does not bar an in personam suit and judgment on a purchase money note securing an assignment of a leasehold interest. *Real Estate Trust v. Debnam*, 510.

MUNICIPAL CORPORATIONS

§ 2.2. Annexation; Use and Size of Tracts

Two parcels of land which are completely separated from each other by a previously annexed satellite area may not be annexed as one area. *Hawks v. Town of Valdese*, 1.

§ 2.3. Annexation; Compliance with Statutory Requirements

Territory which is contiguous solely to the boundaries of a satellite area does not satisfy the statutory requirement that the area to be annexed be contiguous to

MUNICIPAL CORPORATIONS — Continued

the "municipal boundaries" of the city seeking annexation. *Hawks v. Town of Valdese*, 1.

The distance around the western, northern and eastern boundaries of a satellite should have been included in the measurement to determine whether an area to be annexed satisfied the statutory requirement that at least one-eighth of the aggregate external boundaries of the area must coincide with the municipal boundary. *Ibid.*

§ 30.6. Zoning; Special Permits and Variances

Where applicants for a conditional use permit for a planned unit development met their burden of showing compliance with the specific standards and requirements of the ordinance for such a permit, the applicants had no burden to establish the adequacy of fire-fighting facilities for the planned development. *Woodhouse v. Board of Commissioners*, 211.

A town's board of commissioners erred in denying a conditional use permit for a planned unit development on the ground that the installation of a sewage treatment facility on the property would be the equivalent of taking a nuisance to the property owners in the area. *Ibid.*

A town's board of commissioners improperly denied an application for a conditional use permit for a planned unit development on the ground that the development did not meet the test of suitability as outlined in the intent section of the zoning ordinance. *Ibid.*

There was no restriction on the types of residential dwellings permitted in a planned unit development regardless of the particular zoning restrictions in the district in which the development was located. *Ibid.*

A town board of commissioners properly concluded that a proposed concrete mixing bin was a structure in and of itself, not a necessary mechanical appurtenance to a conveyor belt and therefore exempt from provisions of the town zoning ordinance. *Concrete Co. v. Board of Commissioners*, 620.

§ 31.2. Zoning; Scope and Extent of Judicial Review

Decisions of any town boards of commissioners are exempted from the scope of review of the N.C. Administrative Procedures Act. *Concrete Co. v. Board of Commissioners*, 620.

RAILROADS

§ 5.8. Crossing Accidents; Sufficiency of Evidence of Contributory Negligence

The evidence did not show that the driver of a tractor-trailer which collided with a train at a grade crossing was contributorily negligent as a matter of law. *Mansfield v. Anderson*, 662.

RAPE

§ 3. Indictment

An indictment which is drawn under the provisions of G.S. 15-144 which omits averments that defendant's age was greater than 16 is sufficient to charge him with first degree rape. *S. v. Hunter*, 29.

§ 4. Relevancy and Competency of Evidence

Trial court in a rape case properly struck an officer's testimony that he told the prosecutrix on a certain date that in his opinion there was insufficient evidence to proceed with a warrant at that time. *S. v. Brady*, 547.

RAPE — Continued

§ 4.2. Competency of Evidence of Physicial Condition of Prosecutrix

Trial court did not err in permitting a forensic serologist to give opinion testimony concerning the possibility of intercourse having taken place between defendant and the prosecutrix. *S. v. Hunter*, 29.

Trial court did not err in receiving into evidence expert testimony that the prosecuting witness had been sexually penetrated a short time before a medical examination was conducted. *Ibid.*

Trial court did not err in permitting the victim to testify concerning her physicial condition. *S. v. Adams*, 699.

§ 5. Sufficiency of Evidence

Evidence was sufficient for the jury in a first degree rape case where it tended to show that the victim's body was strangled and stabbed and she had been sexually abused. *S. v. Powell*, 95.

Evidence was sufficient for the jury where it tended to show that defendant was identified as the man who broke into the victim's home and raped her. *S. v. Hardy*, 445.

The State's evidence was sufficient for the jury to find that a rape victim's submission was procured by use of a deadly weapon and that defendant was thus guilty of first degree rape. *S. v. Brady*, 547.

§ 6.1. Instructions on Lesser Degrees of Crime

Trial court in a first degree rape case did not err in failing to submit to the jury lesser included offenses where there was no dispute that defendant had a gun in his possession at or near the time he allegedly raped the prosecutrix. *S. v. Hunter*, 29.

ROBBERY

§ 3. Competency of Evidence

Defendant in an armed robbery prosecution was not prejudiced by testimony concerning the amount of money taken. *S. v. Matthews*, 284.

§ 4.3. Sufficiency of Evidence of Armed Robbery

Testimony by an accomplice and circumstantial evidence which coincided with and corroborated the accomplice's testimony supported jury verdicts finding defendant guilty of second degree murder and armed robbery. *S. v. Hamm*, 519.

State's evidence was sufficient to support defendant's conviction of armed robbery of a taxi driver. *S. v. King*, 707.

§ 4.7. Insufficiency of Evidence

Where the evidence indicated that a victim was murdered during an act of rape, evidence that defendant possessed the victim's television and automobile gave rise to the inference that defendant took the objects but not that he took them from the victim's presence by use of a dangerous weapon. *S. v. Powell*, 95.

§ 5.4. Instructions on Lesser Included Offenses

Supreme Court decision that the failure of a witness to positively testify on cross-examination that the instrument used in an armed robbery was in fact a firearm is not of sufficient probative value to warrant submission of the lesser included offense of common law robbery applies retroactively to a case which was in the appellate division when that decision was rendered. *S. v. Rivens* 385.

RULES OF CIVIL PROCEDURE

§ 38. Jury Trial of Right

Defendant in an action to establish paternity waived his right to a jury trial by his failure to demand one and to file his demand with the court. *Bell v. Martin*, 715.

§ 56. Summary Judgment

For the purposes of a summary judgment, a defendant's failure to file responsive pleadings does not constitute a conclusive admission of the allegations contained in plaintiff's complaint precluding a defendant from offering affidavits or testimony in opposition to the motion. *Bell v. Martin*, 715.

§ 56.1. Summary Judgment; Timeliness of Motion

G.S. 1A-1, Rule 56(a) allowed summary judgment to be entered for plaintiff before defendants had filed a responsive pleading. *Real Estate Trust v. Debnam*, 510.

SCHOOLS

§ 2. Fees

The guarantee of a "general and uniform system of free public schools" in the N.C. Constitution does not prevent a school board from requiring public school students to pay modest, reasonable instructional fees, course fees, and rental and user fees. *Sneed v. Board of Education*, 609.

SEARCHES AND SEIZURES

§ 8. Search Incident to Warrantless Arrest

A warrantless search of defendant's person made incident to his arrest was proper. *S. v. Hardy*, 445.

§ 15. Standing to Challenge Lawfulness of Search

Defendant failed to establish standing to object to the seizure of a hatchet and welder's gloves from his parents' garage. *S. v. Jones*, 298.

§ 23. Application for Warrant; Sufficiency of Showing of Probable Cause

An SBI agent's affidavit was sufficient to establish probable cause for issuance of a warrant to search the house, barn and garage of defendant's parents for a hatchet and welder's gloves allegedly used by defendant in a murder. *S. v. Jones*, 298.

Probable cause for the issuance of a warrant to search the home and garage of defendant's parents for a hatchet and welder's gloves used in a murder was not dissipated by the passage of some five months between the time an informant last saw defendant's hatchet and welder's gloves and the date the informant told officers of the whereabouts of those items. *Ibid.*

§ 34. Search of Vehicle

Trial court in a prosecution for kidnapping and rape did not err in allowing into evidence a pistol and other items seized from defendant's car without a warrant. *S. v. Hunter*, 29.

§ 40. Execution of Warrant; Items Which May Be Seized

Trial court properly allowed into evidence letters and photographs seized during a search of a mobile home occupied by defendants where the items taken were not specifically listed in the warrant as objects of the search. *S. v. Williams*, 529.

SPECIFIC PERFORMANCE

§ 1. Generally

Trial court erred in peremptorily denying the equitable relief of specific performance when it granted summary judgment establishing plaintiff's liability for breach of contract and ordered that the issue of damages be decided at a subsequent trial. *Whalehead Properties v. Coastland Corp.*, 270.

STATE

§ 4. Sovereign Immunity

The decision which abrogated the doctrine of sovereign immunity for breach of contract is to be applied prospectively only after 2 March 1976. *MacDonald v. University of N.C.*, 457.

§ 4.4. Actions Against the State

Plaintiff's cause of action against UNC-CH for breach of an employment contract accrued on the date his employment was terminated, not on the date a letter was sent to him denying his grievance appeal, and the action was barred by the doctrine of sovereign immunity. *MacDonald v. University of N.C.*, 457.

UTILITIES COMMISSION

§ 24. Rate Making in General

An order permitting an undercollection produced in one year by a curtailment tracking rate based on an incorrect base period margin to be rolled forward to offset an overcollection in the next year did not constitute prohibited retroactive rate making. *Utilities Comm. v. Industries, Inc.*, 504.

§ 36. Rate Base; Transactions with Subsidiaries or Affiliates

The Utilities Commission erred in failing to consider a rate structure based on the rolling in of the properties, revenues and expenses of two affiliated utility companies. *Utilities Comm. v. Edmisten*, 432.

VENDOR AND PURCHASER

§ 1. Requisites and Validity of Contracts to Convey and Options

A contract for the sale of land was not unconscionable and unsupported by valid consideration because plaintiff seller reserved the right to convey its interest in the land in question and to mortgage the premises, nor was the contract illusory because it provided that such contract would be voided by prior sale of the land. *Land Co. v. Byrd*, 260.

§ 1.3. Construction of Options

Defendant tenants who exercised their option to purchase were entitled to have applied to the purchase price only rental sums paid subsequent to an extension of the lease. *Davis v. McRee*, 498.

§ 2.3. Extension of Time

The parties' extension of a lease incorporated the original lease agreement in its entirety, including an option to purchase. *Davis v. McRee*, 498.

WILLS

§ 21.4. Sufficiency of Evidence of Undue Influence

Evidence in a caveat proceeding was sufficient to be submitted to the jury on the question of undue influence. *In re Andrews*, 52.

§ 41.1. Rule Against Perpetuities; Illustrations

There was no violation of the rule against perpetuities where testator created a trust which gave his son the net income from the trust for life, gave the son's widow a certain sum from the income of the trust after the death of the son, gave two named grandchildren who were alive at testator's death vested remainder income interests for life, gave to the grandchildren $5000 when the grandchildren reached specified ages, gave great-grandchildren money for college expenses, and ultimately devised the remainder of the trust to the great-grandchildren. *Joyner v. Duncan*, 565.

WORD AND PHRASE INDEX

COMMERCIAL PRINTING COMPANY
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