NORTH CAROLINA REPORTS

VOLUME 302

SUPREME COURT OF NORTH CAROLINA

FALL TERM 1980
SPRING TERM 1981

RALEIGH
1982

CITE THIS VOLUME
302 N.C.

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

JOSEPH BRANCH

Associate Justices

J. FRANK HUSKINS
J. WILLIAM COPELAND
JAMES G. EXUM, JR.
DAVID M. BRITT
J. PHIL CARLTON
LOUIS B. MEYER

Retired Chief Justices

WILLIAM H. BOBBITT
SUSIE SHARP

Retired Justices

J. WILL PLESS, JR.
I. BEVERLY LAKE
DAN K. MOORE
WALTER E. BROCK

Clerk

J. GREGORY WALLACE

Librarian

FRANCES H. HALL

ADMINISTRATIVE OFFICE OF THE COURTS

Director

FRANKLIN FREEMAN, JR.

Assistant Directors

DALLAS A. CAMERON, JR.
J. DONALD CHAPPELL

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

SHERRY M. COCHRAN[1]

---

1. Resigned 16 July 1981.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. Herbert Small	Elizabeth City
2	Elbert S. Peel, Jr.	Williamston
3	Robert D. Rouse, Jr.	Farmville
	David E. Reid	Greenville
4	Henry L. Stevens III	Kenansville
	James R. Strickland	Jacksonville
5	Bradford Tillery	Wilmington
	N.B. Barefoot	Wilmington
6	Richard B. Allsbrook	Roanoke Rapids
7	George M. Fountain	Tarboro
	Franklin R. Brown	Tarboro
8	R. Michael Bruce	Mount Olive
	James D. Llewellyn	Kinston

Second Division

9	Robert H. Hobgood	Louisburg
10	James H. Pou Bailey	Raleigh
	A. Pilston Godwin, Jr.	Raleigh
	Edwin S. Preston, Jr.	Raleigh
	Robert L. Farmer	Raleigh
11	Wiley F. Bowen	Dunn
12	E. Maurice Braswell	Fayetteville
	D.B. Herring, Jr.	Fayetteville
	Coy E. Brewer, Jr.	Fayetteville
13	Giles R. Clark	Elizabethtown
14	Thomas H. Lee	Durham
	Anthony M. Brannon	Bahama
	John C. Martin	Durham
15A	D. Marsh McLelland	Burlington
15B	F. Gordon Battle	Chapel Hill
16	Samuel E. Britt	Lumberton

Third Division

17A	Melzer A. Morgan, Jr.[1]	Wentworth
17B	James M. Long	Pilot Mountain
18	Charles T. Kivett	Greensboro
	W. Douglas Albright	Greensboro
	Edward K. Washington	High Point
19A	Thomas W. Seay, Jr.	Spencer
	James C. Davis	Concord
19B	Hal Hammer Walker	Asheboro
20	F. Fetzer Mills	Wadesboro
	William H. Helms	Wingate
21	William Z. Wood	Winston-Salem
	Judson D. DeRamus, Jr.	Winston-Salem

DISTRICT	JUDGES	ADDRESS
22	ROBERT A. COLLIER, JR.	Statesville
	PETER W. HAIRSTON	Advance
23	JULIUS A. ROUSSEAU	North Wilkesboro
	Fourth Division	
24	RONALD W. HOWELL	Burnsville
25	FORREST A. FERRELL	Hickory
	CLAUDE S. SITTON	Morganton
26	FRANK W. SNEPP, JR.	Charlotte
	WILLIAM T. GRIST	Charlotte
	KENNETH A. GRIFFIN	Charlotte
	CLIFTON E. JOHNSON	Charlotte
	ROBERT M. BURROUGHS	Charlotte
27A	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES	Gastonia
27B	JOHN R. FRIDAY	Lincolnton
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	HOLLIS M. OWENS, JR.	Rutherfordton
30	LACY H. THORNBURG	Webster

SPECIAL JUDGES

DONALD L. SMITH	Raleigh
JOHN R. JOLLY, JR.	Rocky Mount
ARTHUR L. LANE	Fayetteville
CHARLES C. LAMM, JR.	Boone
PRESTON CORNELIUS	Mooresville
WILLIAM H. FREEMAN	Winston-Salem
CHARLES WINBERRY	Rocky Mount
JAMES ARTHUR BEATY, JR.[2]	Winston-Salem

EMERGENCY JUDGES

ALBERT W. COWPER	Kinston
HENRY A. MCKINNON, JR.	Lumberton

1. Appointed 1 September 1981.
2. Appointed 11 December 1981.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
	J. RICHARD PARKER	Manteo
2	HALLETT S. WARD (Chief)	Washington
	JAMES HARDISON	Williamston
3	HERBERT O. PHILLIPS III (Chief)	Morehead City
	ROBERT D. WHEELER	Grifton
	E. BURT AYCOCK, JR.	Greenville
	JAMES E. RAGAN	Oriental
	JAMES E. MARTIN	Bethel
	H. HORTON ROUNTREE	Greenville
4	KENNETH W. TURNER (Chief)	Rose Hill
	WALTER P. HENDERSON	Trenton
	STEPHEN M. WILLIAMSON	Kenansville
	E. ALEX ERWIN III	Jacksonville
	JAMES NELLO MARTIN	Clinton
5	GILBERT H. BURNETT (Chief)	Wilmington
	JOHN M. WALKER	Wilmington
	CHARLES E. RICE	Wilmington
	CARTER TATE LAMBETH	Wilmington
6	NICHOLAS LONG (Chief)	Roanoke Rapids
	ROBERT E. WILLIFORD	Lewiston
	HAROLD P. MCCOY, JR.	Scotland Neck
7	GEORGE BRITT (Chief)	Tarboro
	ALLEN W. HARRELL	Wilson
	JAMES EZZELL, JR.	Rocky Mount
	ALBERT S. THOMAS JR.	Wilson
8	JOHN PATRICK EXUM (Chief)	Kinston
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS	Fremont
	PAUL MICHAEL WRIGHT	Goldsboro
	RODNEY R. GOODMAN, JR.	Kinston
9	CLAUDE W. ALLEN, JR. (Chief)	Oxford
	BEN U. ALLEN	Henderson
	CHARLES W. WILKINSON	Oxford
	J. LARRY SENTER	Franklinton
10	GEORGE F. BASON (Chief)	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	GEORGE R. GREENE	Raleigh
	JOHN HILL PARKER	Raleigh
	RUSSELL G. SHERRILL III	Raleigh
	PHILIP O. REDWINE[1]	Raleigh
11	ELTON C. PRIDGEN (Chief)	Smithfield
	W. POPE LYON	Smithfield
	WILLIAM A. CHRISTIAN	Sanford
	KELLY EDWARD GREENE	Dunn
12	DERB S. CARTER (Chief)	Fayetteville
	JOSEPH E. DUPREE	Raeford
	CHARLES LEE GUY	Fayetteville
	SOL G. CERRY	Fayetteville
	LACY S. HAIR	Fayetteville
13	WILLIAM E. WOOD (Chief)	Whiteville

DISTRICT	JUDGES	ADDRESS
	J. WILTON HUNT, SR.	Whiteville
	ROY D. TREST	Shallotte
	WILLIAM C. GORE, JR.	Whiteville
14	J. MILTON READ, JR. (Chief)	Durham
	WILLIAM G. PEARSON II	Durham
	DAVID Q. LABARRE	Durham
	KAREN B. GALLOWAY	Durham
15A	JASPER B. ALLEN, JR. (Chief)	Burlington
	WILLIAM S. HARRIS, JR.	Graham
	JAMES KENT WASHBURN	Burlington
15B	STANLEY PEELE (Chief)	Chapel Hill
	DONALD LEE PASCHAL	Siler City
	PATRICIA HUNT[2]	Chapel Hill
16	JOHN S. GARDNER (Chief)	Lumberton
	CHARLES G. MCLEAN	Lumberton
	B. CRAIG ELLIS	Laurinburg
	HERBERT LEE RICHARDSON	Lumberton
17	LEONARD H. VAN NOPPEN (Chief)	Danbury
	FOY CLARK	Mount Airy
	PETER M. MCHUGH	Reidsville
	JERRY CASH MARTIN	Mount Airy
18	ROBERT L. CECIL (Chief)	High Point
	JOHN F. YEATTES, JR.	Greensboro
	JOSEPH R. JOHN	Greensboro
	THOMAS G. FOSTER, JR.	Greensboro
	WILLIAM L. DAISY	Greensboro
	EDMUND LOWE	High Point
	ROBERT E. BENCINI	High Point
	WILLIAM K. HUNTER	High Point
19A	ROBERT L. WARREN (Chief)	Concord
	FRANK M. MONTGOMERY	Salisbury
	ADAM C. GRANT, JR.	Concord
	CLARENCE E. HORTON, JR.	Kannapolis
19B	L.T. HAMMOND, JR. (Chief)	Asheboro
	WILLIAM M. NEELY	Asheboro
20	DONALD R. HUFFMAN (Chief)	Wadesboro
	WALTER M. LAMPLEY	Rockingham
	KENNETH W. HONEYCUTT	Monroe
	RONALD W. BURRIS	Albemarle
	MICHAEL EARLE BEALE[3]	Southern Pines
21	ABNER ALEXANDER (Chief)	Winston-Salem
	GARY B. TASH	Winston-Salem
	JAMES A. HARRILL, JR.	Winston-Salem
	R. KASON KEIGER	Winston-Salem
	DAVID R. TANIS	Winston-Salem
22	LESTER P. MARTIN, JR. (Chief)	Mocksville
	ROBERT W. JOHNSON	Statesville
	SAMUEL ALLEN CATHEY	Statesville
	GEORGE THOMAS FULLER[4]	Lexington
23	SAMUEL L. OSBORNE (Chief)	Wilkesboro
	JOHN T. KILBY	Jefferson
	MAX F. FERREE	Wilkesboro
24	ROBERT HOWARD LACEY (Chief)	Newland

DISTRICT	JUDGES	ADDRESS
	ROY ALEXANDER LYERLY	Banner Elk
	CHARLES PHILIP GINN[5]	Boone
25	LIVINGSTON VERNON (Chief)	Morganton
	ROBERT A. MULLINAX	Newton
	SAMUEL McD. TATE	Morganton
	L. OLIVER NOBLE, JR.	Hickory
	EDWARD J. CROTTY	Hickory
26	CHASE BOONE SAUNDERS (Chief)	Charlotte
	L. STANLEY BROWN	Charlotte
	JAMES E. LANNING	Charlotte
	WILLIAM G. JONES	Charlotte
	WALTER H. BENNETT, JR.	Davidson
	DAPHENE L. CANTRELL	Charlotte
	T. MICHAEL TODD	Charlotte
	WILLIAM H. SCARBOROUGH	Charlotte
	T. PATRICK MATUS II[6]	Charlotte
	RESA L. HARRIS[7]	Charlotte
27A	LEWIS BULWINKLE (Chief)	Gastonia
	J. RALPH PHILLIPS	Gastonia
	DONALD E. RAMSEUR	Gastonia
	BERLIN H. CARPENTER, JR.	Gastonia
27B	ARNOLD MAX HARRIS (Chief)	Ellenboro
	GEORGE HAMRICK	Shelby
	JAMES THOMAS BOWEN III	Lincolnton
28	JAMES O. ISRAEL, JR. (Chief)	Candler
	WILLIAM MARION STYLES	Black Mountain
	EARL JUSTICE FOWLER, JR.	Arden
	PETER L. RODA	Asheville
29	ROBERT T. GASH (Chief)	Brevard
	ZORO J. GUICE, JR.	Hendersonville
	THOMAS N. HIX	Hendersonville
	LOTO J. GREENLEE	Marion
30	ROBERT J. LEATHERWOOD III (Chief)	Bryson City
	J. CHARLES McDARRIS	Waynesville
	JOHN J. SNOW, JR.	Murphy

EMERGENCY JUDGE

P.B. BEACHUM, JR.	Charlotte

1. Appointed 28 July 1981.
2. Appointed 9 November 1981.
3. Appointed 4 September 1981.
4. Appointed 1 October 1981 to succeed Hubert E. Olive, Jr., who retired 30 September 1981.
5. Appointed 19 September 1981.
6. Appointed 18 September 1981 to succeed Larry Thomas Black who resigned 30 June 1981.
7. Appointed 18 September 1981.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

RUFUS L. EDMISTEN

Administrative Deputy Attorney General

CHARLES H. SMITH

Deputy Attorney General For Legal Affairs

JAMES M. WALLACE JR.

Special Assistant to the Attorney General

JOHN A. ELMORE II

Senior Deputy Attorneys General

JAMES F. BULLOCK
ANDREW A. VANORE, JR.
EUGENE A. SMITH, JR.

Deputy Attorneys General

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

Special Deputy Attorneys General

MYRON C. BANKS
T. BUIE COSTEN
JACOB L. SAFRON
JAMES B. RICHMOND
HERBERT LAMSON, JR.
WILLIAM F. O'CONNELL
JOHN R.B. MATTHIS
EDWIN M. SPEAS, JR.
WILLIAM A. RANEY, JR.
LESTER V. CHALMERS, JR.
ANN REED DUNN
CHARLES J. MURRAY
ISAAC T. AVERY III
H. AL COLE, JR.
RICHARD N. LEAGUE
CLAUDE W. HARRIS
I.B. HUDSON, JR.
JO ANNE SANFORD

Assistant Attorneys General

WILLIAM B. RAY
WILLIAM F. BRILEY
THOMAS B. WOOD
CHARLES M. HENSEY
ROBERT G. WEBB
ROY A. GILES, JR.
JAMES E. MAGNER, JR.
GUY A. HAMLIN
ALFRED N. SALLEY
GEORGE W. BOYLAN
RALF F. HASKELL
ROBERT R. REILLY, JR.
RICHARD L. GRIFFIN
ARCHIE W. ANDERS
DAVID S. CRUMP
DANIEL C. OAKLEY
ELIZABETH C. BUNTING
ELISHA H. BUNTING, JR.
ALAN S. HIRSCH
SANDRA M. KING
JOHN C. DANIEL, JR.
JOAN H. BYERS
J. MICHAEL CARPENTER
BEN G. IRONS II
DONALD W. GRIMES
NONNIE F. MIDGETTE
DOUGLAS A. JOHNSTON
JAMES PEELER SMITH
THOMAS G. MOFFITT
FRANK P. GRAHAM
GEORGE W. LENNON
MARILYN Y. RICH
DAVID R. BLACKWELL
NORMA S. HARRELL
THOMAS H. DAVIS, JR.
JANE R. THOMPSON
DENNIS F. MYERS
KAYE R. WEBB
DANIEL F. MCLAWHORN
TIARE B. SMILEY
DONALD W. STEPHENS
HENRY T. ROSSER
HENRY H. BURGWYN
LUCIEN CAPONE III
FRANCIS W. CRAWLEY
MICHAEL D. GORDON
JAMES C. GULICK
HARRY H. HARKINS, JR.
J. CHRISTOPHER PRATHER
GRAYSON G. KELLEY
R. BRYANT WALL
RICHARD L. KUCHARSKI
ROBERT E. CANSLER
LEMUEL M. HINTON
ROBERT L. HILLMAN
SARAH C. YOUNG
STEVEN M. SHABER
W. DALE TALBERT
THOMAS G. MECHAM, JR.
FRED R. GAMIN
RICHARD H. CARLTON
BARRY T. MCNEILL
LISA K. SHEPHERD
CLIFTON H. DUKE
WILLIAM R. SHENTON
REGINALD L. WATKINS

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	Thomas S. Watts	Elizabeth City
2	William C. Griffin, Jr.	Williamston
3A	Eli Bloom	Greenville
3B	William D. McFadyen	New Bern
4	William H. Andrews	Jacksonville
5	William Allen Cobb	Wilmington
6	Willis E. Murphrey III	Jackson
7	Howard S. Boney, Jr.	Tarboro
8	Donald Jacobs	Goldsboro
9	David Waters	Oxford
10	Randolph Riley	Raleigh
11	John W. Twisdale	Smithfield
12	Edward W. Grannis, Jr.	Fayetteville
13	Lee J. Greer	Whiteville
14	Dan K. Edwards, Jr.	Durham
15A	Herbert F. Pierce	Graham
15B	Wade Barber, Jr.	Pittsboro
16	Joe Freeman Britt	Lumberton
17A	Philip W. Allen	Wentworth
17B	Terry L. Collins	Dobson
18	Michael A. Schlosser	Greensboro
19A	James E. Roberts	Kannapolis
19B	Garland N. Yates	Asheboro
20	Carroll R. Lowder	Monroe
21	Donald K. Tisdale	Clemmons
22	H.W. Zimmerman, Jr.	Lexington
23	Michael A. Ashburn	Wilkesboro
24	Clyde M. Roberts	Marshall
25	Donald E. Greene	Hickory
26	Peter S. Gilchrist III	Charlotte
27A	Joseph G. Brown	Gastonia
27B	W. Hampton Childs, Jr.	Lincolnton
28	Ronald C. Brown	Asheville
29	M. Leonard Lowe	Caroleen
30	Marcellus Buchanan III	Sylva

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3	DONALD C. HICKS III	Greenville
12	MARY ANN TALLY	Fayetteville
18	WALLACE C. HARRELSON	Greensboro
26	FRITZ Y. MERCER, JR.	Charlotte
27	CURTIS O. HARRIS	Gastonia
28	J. ROBERT HUFSTADER	Asheville

CASES REPORTED

PETITIONS TO REHEAR

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

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1A-1	See Rules of Civil Procedure infra
6-21(2)	In re Kirkman, 164
8-51.1	State v. Hamlette, 490
8-57	State v. Freeman, 591
14-21	State v. Squire, 112
14-27.1(4)	State v. Lucas, 342
14-39	State v. Squire, 112
14-39(a)	State v. Boone, 561
14-39(b)	State v. Squire, 112
	State v. Boone, 561
14-71	State v. Davis, 370
14-71.1	State v. Davis, 370
14-177	State v. Elam, 157
14-202.1	State v. Elam, 157
15-166	State v. Burney, 529
15A, Art. 14	State v. Temple, 1
15A-533	State v. Oliver, 28
15A-606(a)	State v. Oliver, 28
15A-701(b)(1)(a)	State v. Harren, 142
15A-701(b)(1)(d)	State v. Oliver, 28
	State v. Avery, 517
15A-903(d)	State v. Silhan, 223
15A-903(e)	State v. Silhan, 223
15A-910(2)	State v. Silhan, 223
15A-926	State v. Avery, 517
15A-1214(h)	State v. Silhan, 223
15A-1214(i)	State v. Silhan, 223
15A-1222	State v. Silhan, 223
15A-1371	State v. Wright, 122
15A-1446(d)(6)	State v. Elam, 157
15A-2000(e)(3)	State v. Silhan, 223
	State v. Hamlette, 490

G.S.

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
4(j)(9)(b)	Lynch v. Lynch, 189
7(b)(1)	Hamlin v. Hamlin, 478
9(b)	Terry v. Terry, 77
12(a)(1)	Brenner v. School House, Ltd., 207
15(a)	Brenner v. School House, Ltd., 207
41(a)(2)	West v. Reddick, Inc., 201
50(b)(1)	Graves v. Walston, 332
55(a)	Peebles v. Moore, 351

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. 1, § 1	Stam v. State, 357
Art. I, § 14	State v. Felmet, 173
Art. I, § 18	State v. Burney, 529
Art. I, § 19	Stam v. State, 357
Art. I, § 24	State v. Burney, 529
Art. IV, § 13(2)	State v. Elam, 157
Art. V, § 5	Stam v. State, 357

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

I Amendment	State v. Elam, 157
	State v. Felmet, 173
VI Amendment	State v. Silhan, 223
	State v. Burney, 529

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.	
2	State v. Elam, 157

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 22nd day of August, 1981, and said persons have been issued certificates of this Board:

REID CALWELL ADAMS, JR. ..... Kinston
PHILIP SCHEAFFER ADKINS ..... Durham
THOMAS HARGRAVES AINSWORTH III ..... Winston-Salem
R. LEWIS ALEXANDER, JR. ..... Elkin
JUNE K. ALLISON ..... Raleigh
K. MICHELE ALLISON ..... Durham
JAMES FLOYD AMMONS, JR. ..... Fayetteville
BARBARA DEATON ANDERSON ..... Durham
MARGARET ANN COCKERHAM ANDERSON ..... Elkin
WAYNE THOMAS ARCENEAUX ..... Lewisville
LAW LAMAR ARMSTRONG, JR. ..... Smithfield
BLAS P. ARROYO ..... San Mateo, FL
HAROLD FRANKLIN ASKINS ..... Butner
JAMES RALPH ATTAWAY, JR. ..... Raeford
YVONNE CLARE BAILEY ..... Wilmington
ANTHONY V. BAKER ..... Havelock
MALLORY MOSER BARBER ..... Winston-Salem
SALLY NAN BARBER ..... Spartanburg, SC
WILLIAM GORDON BARBOUR ..... Hillsborough
SHARON ANN BARCLAY ..... Morristown, TN
NED MILTON BARNES ..... Wilson
GRADY MICHAEL BARNHILL ..... Winston-Salem
NANCY L. BARTLETT ..... Raleigh
SHELLY SVEDA BARWICK ..... Hudson, OH
PAMELA ANN BATES-SMITH ..... Chapel Hill
HAROLD WADE BEAVERS ..... Greensboro
NORMAN ALAN BENNETT ..... Kernersville
FREDERICK LINDSAY BERRY ..... Greensboro
HENRY ALLEN BETTENDORF ..... Houston, TX
DAVID HAROLD BLACK ..... Concord
FRANCIS JOSEPH BLANCHFIELD, JR. ..... Charlotte
JOSEPH ALFRED BLICK, JR. ..... Jacksonville
HENRY DAVID BLINDER ..... Princeton, NJ
JAMES LEE BLOMELEY, JR. ..... Davidson
ROBERT TROUTMAN BOCKMAN ..... Raleigh
MICHAEL CULLEN BOOSE ..... Fayetteville
JEFFREY CHARLES BORDEN ..... Winston-Salem
ROBERT S. BOYAN ..... Winston-Salem
RICHARD COLEMAN BOYD ..... Wytheville, VA
CAROL FRANCES BOYLES ..... Hickory
CHARLES ALVIN BRADY, III ..... Hickory
DAVID FERRELL BRANCH, JR. ..... Lumberton
KAREN SUZANNE BRANDE ..... Greensboro
WILLIAM HUGHES BREEZE, JR. ..... Rougemont
KATHRYN LEIGH BRINGLE ..... Reidsville
ROBERT GENTRY BRINKLEY ..... Greenville
MALLARD GUY BROOKS, III ..... Shelby

JAMES MICHAEL BROWN ..... Colerain
SIGNE AHMUTY BROWN ..... Durham
PATRICIA GRAY BRUCE ..... Mooresville
ROBERT ANDREWS BRUCE ..... Norwood, PA
DAWN STROUD BRYANT ..... High Point
BRUCE ALAN BUCKLEY ..... Chapel Hill
DONALD RAY BUIE ..... Red Springs
MADISON EARL BULLARD, JR. ..... Salisbury
KEMP BURPEAU ..... Wilmington
TUCKER HARRISON BYRD ..... Rural Hall
KEVIN PATRICK BYRNES ..... Berwyn, IL
HENRY CLAYTON BYRUM, JR. ..... Waxhaw
JEFFREY LEWIS CADDELL ..... Charlotte
MICHAEL KEVIN CAMERON ..... Charlotte
MARGARET FRANCES CAMPBELL ..... Chapel Hill
ELAINE FOLK CAPPS ..... Dunn
KAREN ESTELLE CAREY ..... Manson
ROBERT WINFIELD CARLTON ..... Clinton
CARSON CARMICHAEL, III ..... Raleigh
BRENDA JOYCE CARTER ..... Raleigh
DEBORAH POWERS CARTER ..... Fayetteville
JULIA HINES TURNER CASH ..... Pink Hill
WILLIAM JOHNSON CATHEY, III ..... Roanoke Rapids
LORETTA ARLENE CECIL ..... High Point
EUGENE JOSEPH CELLA ..... New Bern
BRUCE ALLEN CHAPLIN ..... Sacramento, CA
LEONIDAS MCNEIL CHESTNUT ..... Roanoke Rapids
DAVID CHRISTIAN CHILDERS ..... Mount Holly
ROBERT HAROLD CHRISTY, JR. ..... Asheville
WILLIAM A. CLARK ..... Charlotte
MYNELL JAMES CLARKE, II ..... Southern Pines
GEORGE RUSSELL CLARY, III ..... Concord
JULIA LATHAM CLAY ..... Salisbury
DAVID LOUIS CLEGG ..... Sanford
GARY HAMILTON CLEMMONS ..... Wilmington
JOHN GRANT CLIFFORD ..... Winston-Salem
JOHN CRAIG CLONINGER ..... Asheville
PAUL D. COATES ..... Charlotte
DAN THOMAS COENEN ..... Greenville, SC
JOSEPH HENRY COFFEY, JR. ..... Charlotte
MARY RUFFIN COLLETT ..... Morganton
THOMAS E. CONE ..... Greensboro
JOHN MICHAEL CONSTANTINOU ..... Greensboro
J. WESLEY COVINGTON ..... Durham
JESSE THOMAS COX, JR. ..... Fayetteville
PATRICIA CHALLENGER CRAWFORD ..... Chapel Hill
DAVID E. CRESCENZO ..... Winston-Salem
SARAH ALICE CROWDER ..... Charlotte
SEAN B. CURLEY ..... Chapel Hill
TONY CARLTON DALTON ..... Etowah
BETH HENRY DANIEL ..... Greensboro
THOMAS FRANCIS DARDEN, II ..... Morehead City

KAREN PAULINE DAVIDSON ..... Chapel Hill
MARK TIMOTHY DAVIS ..... Taylorsville
ROBERT WALLACE DAVIS ..... High Point
CHARLES THOMAS DAY, III ..... Asheville
PAMELA DEANGELIS ..... Savannah, GA
JOHN BRITT DELUCA ..... Dudley
JOSEPH J. DELUCA, JR. ..... Jacksonville
JOHN NORWOOD DINAN ..... Rocky Mount
JANE HELEN DITTMANN ..... Winston-Salem
JO HILL DOBBINS ..... Durham
MARY HELEN DOMBALIS ..... Raleigh
JENNIE DORSETT ..... Raleigh
GEORGE PATRICK DOYLE ..... Greensboro
WILLIAM ALAN DRUSCHEL ..... Buies Creek
PHILIS HERSKOWITZ EDELMAN ..... Winston-Salem
KIMBERLEY ANNE EGERTON ..... Greensboro
JOHN CLAIBOURNE ELAM ..... Greensboro
CAROL ANN ELLER ..... Winston-Salem
BRADLEY ARTHUR ELLIOTT ..... Rich Square
RHONDA HARDY ENNIS ..... Lillington
SAMUEL JAMES ERVIN, IV ..... Morganton
SARA CONTI ERWIN ..... Greensboro
VIRGINIA MARIE ESPENSHADE ..... Pfafftown
JEFF ERICK ESSEN ..... Chapel Hill
DOLORES JONES FAISON ..... New Bern
DOUGLAS MCGRUDER FARIS ..... Winston-Salem
JAMES RUFUS FARRIOR, JR. ..... Rose Hill
JOHN H. FENNER ..... Rocky Mount
JAMES ROBERT FINCH ..... Charlotte
WALKER GRAHAM FLANARY ..... Charlotte
CHARLES EDWARD FLOYD ..... Fairmont
MARY MARGARET FLYNN ..... Silver Spring, MD
MARILYN R. FORBES ..... Winston-Salem
SUZANNE ROWLAND FOREMAN ..... Statesville
W. HAYES FOSTER ..... N. Wilkesboro
HUGH JEROME FRANKLIN ..... Marion
SHIRLEY L. FULTON ..... Durham
ROBIN DALE FUSSELL ..... Charlotte
STEPHAN RAY FUTRELL ..... Rockingham
RICHARD TATUM GAMMON ..... Raleigh
CHARLES DAVID GANTT ..... Sanford
TERRI LYNN GARDNER ..... Mount Airy
JOSEPH RICHARD GAY ..... High Point
MARION BLEN GEE, JR. ..... Chapel Hill
WILLIAM AUBREY GERALD ..... Chapel Hill
GIACOMO GIOVANNI GHISALBERTI ..... Riegelwood
TIMOTHY WAYNE GILBERT ..... Charlotte
SUSANNA KNUTSON GILCHRIST ..... Winston-Salem
KENNETH ROBERT GILLESPIE ..... Winston-Salem
RICHARD BROOKS GLAZIER ..... Winston-Salem
JAMES H. GOLD ..... Carrboro
RUTH HARRIS GOLDSMITH ..... Statesville

ROSLYN DALE GRAND.....Asheville
CY ANTHONY GRANT.....Windsor
FRED MICHAEL GRANUM.....Winston-Salem
ALAN W. GREEN.....Mt. Gilead
THOMAS EDWARD GRIST.....Charlotte
WILBUR PAUL GULLEY.....Durham
WILLIAM BLAIR GWYN, JR.....Winston-Salem
KENNETH EDWARD HAIGLER.....Rockingham
JOHN STACEY HAIR, JR.....Fayetteville
FREDRIC CLAYTON HALL.....Wallace
SCOTT GREGORY HALLQUIST.....Cary
NANCY REBECCA HAMILTON.....Rockingham
AVIS GOODSON HAMMOND.....Greensboro
CHARLES GARY HAMPTON.....Burlington
KIMBERLY TAYLOR HARBINSON.....Cary
HOLMES PLEXICO HARDEN.....Greensboro
CHARLES RAYMOND HARDEE.....Grifton
MARY GWYN HARPER.....Winston-Salem
PATTI OWEN HARPER.....Durham
RICHARD BOYD HARPER.....Fayetteville
WILLIAM PAUL HARPER, JR.....Buies Creek
DAVID H. HARRIS, JR.....Moncure
DEAN MURRAY HARRIS.....Chapel Hill
DOUGLAS STEPHEN HARRIS.....Salisbury
JOHN MACK HARRIS.....Candor
MARSHA LYNETTE HARTSELL.....Durham
HADA DE VARONA HAULSEE.....Greensboro
WILLIAM DUNCAN HAWKINS, III.....Winston-Salem
JOAN G. MCDONOUGH HEALY.....Emmaus, PA
CAROL SHIBLEY HEBERT.....Pfafftown
PHILIP SCOTT HEDRICK.....Charlotte
THOMAS JOSEPH HEFFERON.....Charlotte
NANCY HELMUS HEMPHILL.....Chapel Hill
GAIL RIDER HERIOT.....Asheville
BRUCE HERSCHLAG.....Chapel Hill
CHARLES LESLIE HICKS, JR.....Asheboro
RALPH L. HICKS.....Cashiers
DANIEL CHISHOLM HIGGINS.....Orange, VA
SYDNEY HOUSTON HIGH.....Winston-Salem
JAMES DOUGLAS HILL.....Winston-Salem
JOHN KENNETH HILL.....Whiteville
RICHARD ALLEN HINNANT, JR.....Goldsboro
ROBERT MARTIN HINSON.....Charlotte
MELINDA J. HOLLAND.....Hillsborough
ROSCOE MAURICE HOLLAND, JR.....Roseboro
DAVID E. HOLLOWELL.....Edenton
STEPHEN CHARLES HOLTON.....Lexington
SUZANNE MILLIKAN HORNADAY.....Concord
JILL R. HOWARD.....Jacksonville
BEN BURKE HOWELL.....Oakboro
LOGAN DOUGLAS HOWELL, JR.....Raleigh
CAROLINE HUDSON.....Raleigh

DONALD E. HUDSON, JR. ..... Cary
MICHAEL C. HUDSON ..... Durham
RICHARD L. HUFFMAN, JR. ..... Charlotte
FARRELL WARREN HUGHES ..... Burnsville
JACK HERTFORD HUGHES, JR. ..... Henderson
JOSIAH CARL HULL, JR. ..... Wendell
PAGE HUMPHREY ..... Warsaw, NY
MARSHALL RAY HURLEY ..... Greensboro
RICHARD RYALS HUTAFF ..... Dunn
PATRICIA ANNE HUTCHINS ..... Raleigh
JOHN H. HUTSON, JR. ..... Charlotte
ROBERT A. IDOL ..... Durham
WILLIAM C. INGRAM, JR. ..... Newnan, GA
GARY CHARLES IVEY ..... Jamestown
SHARON LEE JACKSON ..... Wilmington
STEVEN ANDREW JACKSON ..... Malibu, CA
RANDOLPH MICHAEL JAMES ..... Raleigh
MIRIAM K. JERNIGAN ..... Dudley
BENJAMIN ANDERSON JOHNSON ..... Rock Hill, SC
CHARLES EVANS JOHNSON ..... Charlotte
WILLIAM STACY JOHNSON, JR. ..... Southern Pines
KATHERINE FORTINO JOHNSTON ..... Greensboro
SUSAN CUNNINGHAM JONAS ..... Winston-Salem
MARTHA SHEPHERD JONES ..... Charlottesville, VA
ROBERT W. JONES, JR. ..... Chesapeake, VA
KIMBERLY G. JORDAN ..... Whiteville
JOSEPH DOCK JOYNER, JR. ..... Farmville
LORINZO LITTLE JOYNER ..... Durham
GEORGE WILLIAM KANE, III ..... Louisburg
BRUCE LEWIS KAPLAN ..... Charlottesville, VA
INDIA EARLY KEITH ..... Hillsville, VA
BETTIE FRANCES KELLEY ..... Winston-Salem
JOHN LACY KELLY ..... Lillington
REGINALD B. KELLY ..... Lillington
SUSAN GAIL KELLY ..... Greensboro
STEPHEN V. KERN ..... Raleigh
MARK CLAYTON KIRBY ..... Raleigh
RAYMOND ALLEN KNIGHT ..... Winston-Salem
LAURA LEA KRANIFELD ..... Benson
ALFRED WILEY KWABLA KWASIKPUI ..... Greensboro
ROBERT BRUCE LACEY ..... Newland
MICHAEL M. LAKIN ..... Durham
DAVID STEVEN LACKEY ..... Lenoir
ELIZABETH ANNE LACKEY ..... Chapel Hill
MICHAEL CORNELIUS LANDRETH ..... Greensboro
SHERWOOD FOSTER LAPPING ..... Carthage
DAVID B. LEWIS ..... Durham
DAVID O. LEWIS ..... Wilmington
W. ROB LEWIS, II ..... Cincinnati, OH
KATHRYN HILLIARD LIES ..... Goldsboro
THOMAS HUBERT LOCK ..... Selma
VALERIE WATKINS LOFTIN ..... Durham

NICHOLAS LONG, JR. ..... Roanoke Rapids
OSCAR GRAYDON LONON, III ..... W. Jefferson
JOSEPH DAVID LUCAS ..... Fayetteville
LAURA BERNSTEIN LUGER ..... Durham
PETER CLAY MCCREA ..... Los Angeles, CA
JONATHAN BRUCE MCDONALD ..... Charlotte
RICHARD CAVANAGH MCELROY, III ..... Buies Creek
DAVID HOWELL MCGEE ..... Morganton
DOUGLAS CARMICHAEL MCINTYRE, II ..... Lumberton
WILLIAM HOBART MCKEEVER ..... Murphy
J.A. MCKINNEY ..... Durham
HAROLD BRENT MCKNIGHT ..... Chapel Hill
PETER MCLEAN, III ..... Winston-Salem
WALTER PHILIP MCRAE ..... Laurinburg
MALCOLM BAYNE MCSPADDEN ..... Gastonia
RONALD DOUGLAS MCSWAIN ..... Charlotte
ROBERT STEVEN MAHLER ..... Carrboro
GEOFFREY CARLYLE MANGUM ..... Winston-Salem
HENRY BIVENS MANGUM, JR. ..... Monroe
JOHN RANDOLPH MANN ..... Winston-Salem
JULIA M. MANNING ..... Gastonia
LAWRENCE PAUL MARGOLIS ..... New Bern
RICHARD EUGENE MARSH, JR. ..... Chapel Hill
ELSIE JANE MARTINELLI ..... Greensboro
CHARLES STEVEN MASON ..... Winston-Salem
A. RAY MATHIS ..... Charlotte
RANDOLPH BLAIR MEANS ..... Fayetteville
JONATHAN LEE MEGERIAN ..... Carrboro
STEPHEN RAY MELVIN ..... Stedman
ANDERSON CHARLES MESSER ..... Waynesville
WILLIE EUGENE METCALF, JR. ..... Asheville
SCOTT MEZA ..... Carrboro
GAIL FRANCES MILLER ..... Winston-Salem
RONALD DAVID MILLER ..... Columbus, OH
THOMAS RAYMOND MILLER ..... Durham
HUGH CALVIN MILLS ..... Ararat
KATHERINE ELIZABETH MIMS ..... Winston-Salem
ROBERT ANTHONY MINEO ..... Oriental
MARLENE WALDEN MONTAGUE ..... Durham
CHARLES ALLEN MOORE ..... Ahoskie
WILLIAM EVERETT MOORE, JR. ..... Durham
CHARLES LINWOOD MORGAN, JR. ..... Winston-Salem
CLIVE MORGAN ..... Winston-Salem
REX C. MORGAN ..... Charlotte
JOHN FRANCIS MORRIS ..... Durham
WILLIAM OLIVER MOSELEY, JR. ..... Greensboro
JON GALLATIN MUNDORF ..... Charlotte
SHARON MURDOCK-MARCIN ..... Charlotte
JAMES WILTON MUSSELWHITE ..... Lumberton
WILLIAM E. MUSSELWHITE, JR. ..... Lumberton
MICHAEL RANKIN NASH ..... Greensboro
DAVID ALGON NEAL ..... Durham

FRANK CARLYLE NEWTON, JR. ..... Charlotte
THOMAS LAWSON NEWTON ..... Winston-Salem
HENRY DAVID NIBLOCK ..... Winston-Salem
REED NORMAN NOBLE ..... Buies Creek
NANCY DALTON NONEMAN ..... Raleigh
CAROL-NASH NORMAN ..... Winston-Salem
NANCY CHAFFIN NORTHCOTT ..... Davidson
MARK IRVING NUNALEE ..... Chapel Hill
WALTER HUE NUNNALLEE ..... Raleigh
ROBERT O'HALE ..... Fayetteville
JOHN HOWARD PAINTER ..... Monroe
JAMES HILL PARDUE ..... Chapel Hill
SUSAN MILNER PARKER ..... Chapel Hill
JOANNE KLINE PARTIN ..... Chapel Hill
SIMMONS ISLER PATRICK, JR. ..... Kinston
MICHAEL ALVIN PAUL ..... Aurora
BANKS ASHBY PEACOCK ..... Fremont
TIMOTHY PECK ..... Winston-Salem
PHILIP JULIAN PENN ..... Durham
MARTHA JANE PERKINS ..... Hickory
JOHN ROBERT PERKINSON, JR. ..... Winston-Salem
DORIS SUSANNE PHILLIPS ..... Asheville
GAIL MARIE PHILLIPS ..... Rocky Mount
ROBERT A. PHILLIPS ..... Burnsville
ROBIN EUGENE PIPKIN ..... Raleigh
RICHARD STRICKLAND POE ..... Charlotte
JAMES ARTHUR POPE ..... Raleigh
JAMES WILLIAM POPE ..... Charlotte
MICHAEL KERNODLE PRATT ..... Greensboro
DONALD CARPENTER PRENTISS ..... Winston-Salem
RICKY M. PRICE ..... Benson
GWENDA PRIEST ..... Council
ROBIN ANN PUCKETT ..... Durham
RISA TERESA QUINN ..... Magnolia
HARVEY WRIGHT RAYNOR, III ..... Raleigh
JAMES EDWARD REAVES ..... Reidsville
MAYNETTE REGAN ..... St. Pauls
RENEE D. REICHART ..... Winston-Salem
JOHNATHAN LABAN RHYNE, JR. ..... Lincolnton
MARTHA CAMERON RHYNE ..... Dunn
TERRY BERNARD RICHARDSON ..... Durham
ROBERT ERNEST RIGRISH ..... Robbinsville
BARBARA PETERS RILEY ..... Raleigh
PATRICIA MICHELLE RIPPON ..... Cary
THOMAS DANIEL ROBINS ..... Winston-Salem
MAURICE GLYNN ROLLINS, JR. ..... Williamston
JOSEPH ERNEST ROOT, III ..... Winston-Salem
KENNETH PRICE ROTHROCK ..... Winston-Salem
VERNON ALEXIS RUSSELL ..... Concord
PERRY RENFROW SAFRAN ..... Raleigh
THOMAS RANDALL SANDIFER ..... Arkandelphia, Ark
STEVEN MICHAEL SARTORIO ..... Winston-Salem

CHARLES MCBRAYER SASSER ..... Morganton
JONATHAN DREW SASSER ..... Indian Trail
DONALD JOSEPH SCALES ..... Raleigh
SALLY HAMILTON SCHERER ..... Wrightsville Beach
NORMA WEATHERLY SCHWAB ..... Carrboro
PHILIP ELIJAH SEARCY ..... Black Mountain
JIMMY DALE SHARPE ..... Durham
ROBERT STRONG SHEILDS, JR. ..... New Bern
ALLEN BURTON SHUFORD ..... Charlotte
PAM CINDY SILBERMAN ..... Chapel Hill
HAYDEN J. SILVER, III ..... Charlottesville, VA
PAMELA KAYE SILVERMAN ..... Charlotte
HOWARD EARL SINGLETARY, JR. ..... Coats
ANN GRETCHEN SJOERDSMA ..... Chapel Hill
MARY SLOAN THOMPSON SKINNER ..... Durham
BARBARA ANNE SMITH ..... Chapel Hill
HENRY CLAIBORNE SMITH ..... Goldsboro
J. MICHAEL SMITH ..... Raleigh
THEODORE B. SMYTH ..... Winston-Salem
DWIGHT WESLEY SNOW ..... Kernersville
VICTORIA HENSLEY SOTO ..... Chapel Hill
DAVID PAUL SOUSA ..... Winston-Salem
SUSAN L. SOWELL ..... Charlotte
JAMES MONROE SPIRO ..... Buies Creek
WAYNE MICHAEL STANLEY ..... Durham
THOMAS HAYWOOD STARK ..... Durham
JACK W. STEWART JR. ..... Charlotte
JOHN KEVIN STOKES ..... Sanford
JAMES MICHAEL STONE ..... Roxboro
JAMES KEITH STROUD ..... Winston-Salem
KENNETH EPHRIAM STROUP, JR. ..... Cherryville
RICHARD ELVIN STROWD ..... Durham
ELIZABETH RIKER STUCKEY ..... Durham
CECIL CORNELIUS SUMMERS ..... Winston-Salem
MARK T. SUMWALT ..... Columbia, SC
SUSAN NYE SURLES ..... Roseboro
WILLIAM BRANTLEY SUTTON, JR. ..... Faison
THOMAS P. SWAIM ..... Durham
CHRISTOPHER EUGENE SWECKER ..... Winston-Salem
JOSEPH MICHAEL SWOPE ..... Lexington
PAUL BRADFORD TAYLOR ..... Charlotte
SCOTT MACDONALD TAYLOR ..... Wilmington
CHARLES HOMMANN THIBAUT ..... Chapel Hill
SYLVIA HARGETT THIBAUT ..... Chapel Hill
GARY WATSON THOMAS ..... Fuquay-Varina
THAD ALBERT THRONEBURG ..... Hudson
MARGIE ANN TOY ..... Raleigh
PATRICIA ANN TRACEY ..... Winston-Salem
DESTIN SHANN TRACY ..... Chapel Hill
THOMAS GEORGE TRESANSKY, JR. ..... Winston-Salem
ANTHONY R. TRIPLETT ..... Wilkesboro
WILLIAM HARRY TROTTER, JR. ..... Charlotte

LINDA WEINSTEIN TUCKER ..... Durham
GARY MADISON UNDERHILL, JR. ..... Raleigh
JEFFREY REED USHER ..... Winston-Salem
JOSEPH JERRY VICK, JR. ..... Rich Square
CHARLES BRANSON VICKORY, III ..... Mount Olive
NEWTON MADISON WALL, II ..... High Point
OTIS WALL, JR. ..... Raleigh
JAMES QUIMBY WALLACE, III ..... Morehead City
RICHARD DAVID WALLACE ..... Huntersville
JAMES CLIFTON WALSH ..... Buies Creek
WILLIAM FARRIOR WARD, III ..... New Bern
JOSEPH E. WARNER, III ..... Greensboro
ELIZABETH ROSS WARREN ..... Concord
RUBY JOHNETTE WARREN ..... Winston-Salem
LEX ALLEN WATSON, II ..... Fayetteville
JOHN EDWARD WAY, JR. ..... Beaufort
KENNETH R. WAYNE ..... Charlotte
GEORGE EDWARD WEAVER, II ..... Asheville
JAMES ALDEAN WEBSTER, III ..... Winston-Salem
CYNTHIA LEIGH WITTMER WEST ..... Raleigh
JAMES THOMAS WEST ..... Dunn
CORY MALCOLM WESTON ..... Carrboro
JANE RONEY WETTACH ..... Chapel Hill
MICHAEL JAC WHATLEY ..... Asheboro
CRAIG BRADFORD WHEATON ..... Winston-Salem
ANDREW BARTLETT WHITE ..... Raleigh
BARBARA L. WHITE ..... Indianapolis, IN
G. KEITH WHITED ..... Durham
MILTON GORDON WIDENHOUSE, JR. ..... Winston-Salem
ALBERT LEE WILLIAMS, II ..... Richmond, VA
HUGH FRAZIER WILLIAMS, JR. ..... Morganton
LONNIE BOYD WILLIAMS, JR. ..... Wilmington
JOSEPH WALTER WILLIFORD ..... Lillington
ROBERT LEE WILSON, JR. ..... Lewisville
STEELE BRICE WINDLE, III ..... Matthews
ROBERT E. WINFREY ..... Buies Creek
JOHN SHERMAN WINKLER ..... Durham
ROBIN LYNN WINSLOW ..... Liberty
JAMES FREDRICK WOOD, III ..... Charlotte
GLENDA A. WOOLF ..... Charlotte
DENNIS TALMADGE WORLEY ..... Cerro Gordo
CARL ROBER WRIGHT ..... High Point
GREGORY CHARLES YORK ..... Charlotte

Given over my hand and seal of the Board of Law Examiners of the State of North Carolina, this the 29th day of September, 1981.

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

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 individuals were admitted to the practice of law in the State of North Carolina:

On October 16, 1981, the following individuals were admitted:

LEON T. HART ..... Jacksonville, applied from the State of New York, 2nd Department
WILLIAM H. MCBRIDE ..... Raleigh, applied from the State of Virginia
KARL O. HESSE ..... Charlotte, applied from the State of New York, 3rd Department
DAVID BOULDIN CRAIG..... Fayetteville, applied from the State of Texas
EDWARD D. LAPPERRE ..... Pinehurst, applied from the State of Illinois

On October 23, 1981, the following individual was admitted:

LEO PETER AMIRAULT..... Rutherfordton, applied from the State of Ohio

On December 4, 1981, the following individuals were admitted:

ROY CONRAD HABERKERN, JR. ..... Rural Hall, applied from the State of New York
THADDEUS BOYD HODGDON..... Chapel Hill, applied from the District of Columbia
SMITH THOMPSON..... Greensboro, applied from the State of Illinois

Given over my hand and Seal of the Board of Law Examiners this the 7th day of December, 1981.

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

STATE OF NORTH CAROLINA v. MARK AUBREY TEMPLE

No. 96

(Filed 6 January 1981)

1. Criminal Law § 93— order of proof — no prejudice

The trial court did not err in requiring defendant to present his evidence before the State put on its evidence during a hearing on defendant's motion to suppress, and there was no merit to defendant's contention that the inversion of the order of proof resulted in a shift of the burden of proof, since the order of proof is merely a matter of practice without legal effect; there was nothing in the trial court's order denying defendant's motion to suppress to indicate that the trial judge believed otherwise; and defendant was not prejudiced by the order of proof because it resulted in his having to call one of the State's principal witnesses as his own.

2. Criminal Law §§ 75.3, 75.8— indication of wish to remain silent — admissibility of subsequent confession — presenting defendant with evidence of crime — no compulsion

There was no merit to defendant's contention that, by continuing to interrogate him after he indicated that he did not wish to answer any questions, officers violated his constitutional rights, since on each occasion that defendant invoked his right to remain silent the police honored his right by cutting off their interrogation for some period of time; defendant had been informed of his constitutional rights, including his right to remain silent, on six occasions prior to his confession, including one repetition of his rights immediately before he gave his incriminating statement; and defendant understood his rights and affirmatively, voluntarily agreed to waive them. Moreover, there was no merit to defendant's contention that officers coerced his statement by confronting him with evidence recovered from the scene of the crime after he indicated that he did not wish to answer questions, since to present a person in custody with evidence recovered from the scene of the crime is not interrogation; the presentation of evidence in this case did not amount to subtle coercion; officers restated defendant's constitutional rights immediately prior to showing him the evidence; and when defendant refused to make a statement, the officer ceased all questioning or confrontation with evidence, and defendant subsequently invited the officer to resume his questioning.

3. Criminal Law § 68— nontestimonial identification order — constitutional rights not violated

The trial court's denial of defendant's motion to suppress nontestimonial identification evidence was without error where, pursuant to an order of the trial court, fingernail scrapings, samples of defendant's head and pubic hair, saliva samples, blood samples, and photographs of any wounds on defendant's body were taken; the order stated defendant's right to counsel; the State stipulated that nothing defendant said during the procedure would be offered into evidence; defendant was fully advised of his constitutional right to the presence of counsel; and the State was not in violation of any provisions under G.S. Ch. 15A, Art. 14 by not procuring an express waiver from defendant, as the statute does not require

an express waiver of the right to have counsel present at a nontestimonial identification procedure.

4. Criminal Law § 68— bite marks on victim's body — expert testimony that defendant's teeth caused marks

In a prosecution for first degree murder, the trial court did not err in allowing an expert witness to testify that bite marks appearing on the victim's body were made by defendant's teeth, since the expert witness did not rely on untested methods or unproved hypotheses but applied scientifically established techniques of dentistry and photography to determine whether the bite marks were caused by defendant's teeth.

5. Homicide § 20.1— photographs of victim in casket — admission as harmless error

The trial court's error in a first degree murder case in allowing the jury to be shown certain photographs of the victim's body lying in a casket was harmless beyond a reasonable doubt in view of the overwhelming evidence of defendant's guilt.

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

DEFENDANT appeals from judgement of *Brown, J.*, entered at the 14 January 1980 Criminal Session of Superior Court, PASQUOTANK County.

Defendant was tried upon an indictment, proper in form, charging him with first degree murder. The jury found defendant guilty of first degree murder and recommended that a sentence of life imprisonment be imposed. From the trial court's judgment sentencing defendant to imprisonment for the term of his natural life, defendant appeals as a matter of right pursuant to G.S. 7A-27(a).

The State's evidence tended to show that at approximately 11:40 p.m. on 6 July 1979 Annette Ruth Jones, age 16, returned to her residence at 108 Persse Street in Elizabeth City, North Carolina. She announced her return to her grandfather and went upstairs to her bedroom. From about 12:15 to 12:45 a.m. on 7 July 1979 she had a telephone conversation with a girlfriend, Wanda Tadlock. There was an exit from Miss Jones' bedroom to the outside, consisting of a stairway on the back side of the house. No one heard Miss Jones leave the house that night at any time after her return at 11:40 p.m.

At approximately 7:30 a.m. on 7 July 1979 Miss Jones' nude body was discovered beside a building at 203 West Church Street in Elizabeth City. Defendant's uncle then lived in an apartment at

that address, and it was he who discovered the body. Dr. Jerry Pickrel, a pathologist, and Dr. Page Hudson, State Medical Examiner, testified that Miss Jones was killed by a blow to the head with a heavy blunt object. A number of small lacerations and several bite marks were found on various parts of her body. There were cuts and abrasions in and about her vagina, but no evidence of sexual intercourse. A blood test revealed that Miss Jones had been drinking, to the extent that a breathalyzer test would have shown a .12 level of alcohol or a mild intoxication. A cement block with blood on it was found in a clump of bushes 87 feet from the body. Several bloodstained sticks were also found in the bushes.

Police officers observed defendant walking on the downtown streets of Elizabeth City at approximately 12:30 a.m. on 7 July 1979. the officers were located on the roof of a building and were keeping the area under surveillance for an unrelated matter. Defendant was last observed at 12:45 to 12:50 a.m. on Main Street, an area a few blocks from Miss Jones' residence.

Defendant was sought for questioning on 10 July 1979. After being informed by his brother that the police were looking for him, defendant voluntarily went to the Elizabeth City Police Department at 2:00 p.m. on that date. He was met outside the station by several officers, one of whom read him his *Miranda* rights, before he was interrogated in any way. When questioned as to his whereabouts on the evening of 6 July and early morning of 7 July, defendant at that time gave a non-incriminating statement. Officers then questioned defendant's brother, who related that defendant had said he thought he remembered killing the victim with a cement block. At 3:30 p.m. defendant was given his *Miranda* warning again, informed of his brother's statement, and asked if he wished to make any further comments. Defendant refused to make a statement. At 3:45 p.m. he was again read his rights and shown several items of evidence taken from the scene of the crime, including the bloodstained cinderblock. At this time defendant agreed to make a statement and confessed that he remembered hitting the girl with a block three or four times and cutting her with a small object. Defendant was then arrested for the murder.

Pursuant to a nontestimonial identification order, defendant was taken to Albemarle Hospital in Elizabeth City at 8:00 p.m. on 10 July 1979, at which time fingernail scrapings, samples of

defendant's head and pubic hair, saliva samples, blood samples, and photographs of any wounds on defendant's body were taken. Defendant was also given a dental examination pursuant to an order on 11 July 1979, during which impressions were made of his teeth. The State presented medical testimony tending to indicate that the bite marks on the victim's body could be identified as having been made by defendant's teeth.

Defendant presented no evidence at trial.

Additional facts relevant to the decision are set forth in the opinion below.

C. Glenn Austin for defendant.

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

COPELAND, Justice.

Defendant argues six assignments of error on appeal. We have carefully considered each assignment and conclude that the trial court committed no error which would entitle defendant to a new trial.

[1] Defendant first contends that the trial court erred in requiring him to present his evidence before the State put on its evidence during the hearing on his motion to suppress. Among the items of evidence that defendant sought to suppress was the confession taken from him at 3:45 p.m. on 10 July 1979. It is the State's burden to prove the voluntariness of a confession. *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970), *Rev'd on other grounds*, 403 U.S. 948, 91 S.Ct. 2290, 29 L.Ed. 2d 860 (1971). Defendant argues that by requiring him to present his evidence first, the court erroneously shifted the burden of proving the voluntariness of the confession to defendant. We disagree.

Although the party who has the burden of proof is generally the party who first puts on evidence, the order of presentation at trial is a rule of practice, not of law, and it may be departed from whenever the court, in its discretion, considers it necessary to promote justice. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977); *State v. Jones*, 291 N.C. 681, 231 S.E. 2d 252 (1977); *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972); *State v. Thomas*, 244 N.C. 212, 93 S.E. 2d 63 (1956). Since the order of proof in a criminal trial is

largely within the discretion of the trial judge, inversion of the order is not grounds for reversal unless the court abuses its discretion and defendant establishes that he was prejudiced thereby. 75 Am. Jur. 2d *Trials* § 158 (1974). We find that the trial court in this case did not abuse its discretion or commit prejudicial error in requiring defendant to present his evidence first.

Defendant's contention that the inversion of the order of proof results in a shift of the burden of proof is without merit. The order of proof has no effect on the burden of proof or the burden of going forward with the evidence, since the order of proof is merely a matter of practice without legal effect. *State v. Britt, supra; State v. Knight, supra.* Both burdens remained on the State in this case and there is nothing in the trial court's order denying defendant's motion to suppress to indicate that the trial judge believed otherwise. 2 Stansbury's N.C. Evidence § 203 (Brandis Rev. 1973). Defendant's argument that he was prejudiced by the order of proof because it resulted in his having to call the Chief of Police, one of the State's principal witnesses, as his own is also meritless. Defendant complains that this denied him the opportunity to cross-examine the State's witness and placed the State in a position to cross-examine its own witness. We have carefully reviewed the testimony of the Chief of Police at the hearing and find that there is nothing in the record to indicate that the State was allowed to ask any question of this witness that it would not have been in a position to ask if he had been called by the State. Nor is there any indication that defendant was denied permission to ask any question on direct examination that he would have been allowed to ask on cross-examination. The record reveals that defendant was given the opportunity to fully examine the witness and was not prejudiced by calling the witness as his own.

[2] By his second assignment of error, defendant alleges that the trial court erred in denying defendant's motion to suppress the statements he made to police officers while he was being interrogated prior to his arrest. Specifically, defendant argues that his statements in the nature of a confession were obtained in violation of his constitutional rights as set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), in that the confession occurred during questioning by police after he had thrice informed them of his wish to exercise his right to remain silent.

After the hearing on defendant's motion to suppress evidence,

the trial judge made the following findings of fact: Between 1:30 and 1:45 p.m. on 10 July 1979 defendant and his brother went to the Elizabeth City Police Department. As defendant approached the station he was met by Officer Frank Kotzian, who informed defendant that he wished to talk with him and advised defendant of his *Miranda* rights. Defendant stated that he understood his rights and was willing to answer questions without the presence of a lawyer. He was then taken to the office of the Chief of Police where, in the presence of Officer W. G. Williams, Jr., Officer Kotzian again advised defendant of his *Miranda* rights and defendant again responded that he understood his rights and would answer questions without an attorney present. Defendant then gave an exculpatory statement concerning his whereabouts on the night of Miss Jones' murder. This interrogation lasted about fifteen minutes.

While defendant was being questioned by Officers Kotzian and Williams, Officer Mervin Raby was talking to defendant's brother, who stated that defendant had admitted to him that he thought he remembered killing Miss Jones. Defendant's brother repeated this statement to the Chief of Police, W. C. Owens. Defendant was brought into Chief Owens' office at 3:27 p.m. and advised of his brother's statement. Chief Owens also read defendant his constitutional rights, after which defendant stated that he did not want to answer any questions. Defendant and his brother were taken to another room and allowed to talk privately. At 3:45 p.m. they returned to the Chief's office, where defendant was once more advised of his *Miranda* rights and he again declared that he did not wish to answer any questions. Defendant was not interrogated further, but Chief Owens proceeded to show defendant certain items of evidence recovered from the scene of the crime, including the cement block used as the murder weapon. At the Chief's request, Officer Williams recounted his observations of defendant on the streets of Elizabeth City on the night of the murder. Defendant was once more advised of his right to remain silent, and defendant indicated that he intended to remain silent at this time. Officer Kotzian then took defendant and his brother to another room. As Officer Kotzian was closing the door, defendant ordered his brother to leave. The brother left and Officer Kotzian again began to close the door in order to leave defendant alone in the room. Before he completed closing the door, defendant started crying and stated, "Why, why!" The officer opened the door and again repeated defendant's constitutional rights. Defendant answered that he

understood his rights and was now willing to make a statement without the presence of an attorney. He told Officer Kotzian that he remembered hitting the victim with a cement block and cutting her with a small object.

Defendant alleges that by continuing to interrogate him after he indicated that he did not wish to answer any questions, the officers violated his constitutional rights as set forth in *Miranda*. The United States Supreme Court stated in that case:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." 384 U.S. at 473-74, 86 S.Ct. at 1627-28, 16 L.Ed. 2d at 723.

This language was later interpreted in *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed. 2d 313 (1975), where the Court explained that the passage should not be interpreted literally to mean that once a person has invoked his right to remain silent, he can never again be interrogated by any officer at any time or place. The admissibility of statements obtained after a person states that he wishes to remain silent depends upon whether his "right to cut off questioning" was "scrupulously honored." 423 U.S. at 104, 96 S.Ct. at 326, 46 L.Ed. 2d at 321. This Court, relying on *Miranda* and *Mosley*, held in another Pasquotank County case, *State v. Riddick*, 291 N.C. 399, 411, 230 S.E. 2d 506, 514, (1976):

> "... The Miranda rule that in custody interrogation of a defendant must cease when the defendant indicates he wishes to remain silent or wishes to consult counsel, or both, does not bar a subsequent statement by a defendant who, after having been fully advised of his constitutional rights, freely and voluntarily waives his right to remain silent and his right to counsel and invites the officer to

resume talks with him."

See also State v. Hill, 294 N.C. 320, 240 S.E. 2d 794 (1978).

We hold that the evidence before the trial court was sufficient to support its conclusion that defendant's confession was obtained without violation of his constitutional rights. On each occasion that defendant invoked his right to remain silent, the police honored his right by cutting off their interrogation for some period of time, as required by the holding in *Mosley*. Defendant had been informed of his constitutional rights, including his right to remain silent, on six occasions prior to his confession, including one repetition of his rights immediately before he gave his incriminating statement. The evidence supports the trial court's finding that defendant understood his rights and affirmatively, voluntarily agreed to waive them. Since the trial court's finding is supported by substantial evidence, it is binding upon this Court on appeal. *State v. Saults*, 299 N.C. 319, 261 S.E. 2d 839 (1980); *State v. Hill, supra*. Defendant's contention that the officers coerced his statement by confronting him with evidence recovered from the scene of the crime, after he indicated that he did not wish to answer questions, is without merit. This Court has held that to present a person in custody with evidence recovered from the scene of the crime is not "interrogation" within the meaning of the *Miranda* decision. *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978). Nor was the presentation of evidence in this case the type of "subtle coercion" prohibited under the holding in *Miranda*. The mere fact that a confession is made after a defendant is confronted with circumstances normally calling for an explanation is insufficient to render the confession incompetent. *State v. Mitchell*, 265 N.C. 584, 144 S.E. 2d 646 (1965), *cert. denied*, 384 U.S. 1024, 86 S.Ct. 1972, 16 L.Ed. 2d 1029 (1966). The officers restated defendant's constitutional rights immediately prior to showing him the evidence. When defendant refused to make a statement, the officers ceased all questioning or confrontation with evidence and led defendant to another room where he could talk privately with his brother. When defendant said "why, why!" before the officer closed the door to this other room, he invited the officer to resume his questioning. We find that defendant freely and voluntarily waived his right to remain silent and his right to the presence of counsel. Defendant's second assignment of error is overruled.

[3] Defendant next alleges that the trial court erred in denying his

motion for suppression of the evidence obtained as a result of the nontestimonial identification order, because the record fails to show that he waived his right to have counsel present during the nontestimonial identification procedure.

Defendant concedes that Article 14 of Chapter 15A of the General Statutes, which sets forth the procedures to be followed in obtaining nontestimonial identification, does not apply to an accused person such as defendant who has been held in custody. *State v. Reynolds*, 298 N.C. 380, 259 S.E. 2d 843 (1979); *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). Nevertheless, defendant contends that the provisions of that article are applicable in this case because by having a nontestimonial identification order issued, the State elected to proceed under the procedures set forth in that article, and it should be bound by this election. Defendant maintains that these statutory provisions were violated when nontestimonial identification was obtained without the presence of counsel representing the defendant or an express waiver by defendant of his right to have counsel present.

Assuming *arguendo* that Article 14, Chapter 15A is applicable in the case *sub judice*, we hold that the State fully complied with the procedures set forth therein. G.S. 15A-278 provides that a nontestimonial identification order must state: "(5) That the person is entitled to be represented by counsel at the procedure, and to the appointment of counsel if he cannot afford to retain one . . . ." The order in this case did state these rights. G.S. 15A-279(d) further provides:

> "Any such person is entitled to have counsel present and must be advised prior to being subjected to any nontestimonial identification procedures of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel. No statement made during nontestimonial identification procedures by the subject of the procedures shall be admissible in any criminal proceeding against him, unless his counsel was present at the time the statement was made."

The State here stipulated that nothing defendant said during the procedure would be offered into evidence. The record reveals that defendant was fully advised of his constitutional right to the pres-

ence of counsel. In addition to the statement of his rights appearing in the nontestimonial identification order, defendant had been verbally informed of his rights six times prior to being taken to the hospital. Article 14 does not require an express waiver of the right to have counsel present at the nontestimonial identification procedure, therefore the State was not in violation of any provision thereunder by not procuring an express waiver from defendant. The trial court's denial of defendant's motion to suppress nontestimonial identification evidence was without error.

[4] By his fourth assignment of error defendant contends that the trial court erred in allowing expert witnesses to testify that bite marks appearing on the victim's body were made by defendant's teeth. The State called as an expert witness Dr. William P. Webster, a dentist employed by the University of North Carolina School of Dentisty and a consultant to the Chief Medical Examiner in Chapel Hill, North Carolina in matters concerning forensic odontology. Dr. Webster testified that based on his experience of examining the teeth of thousands of individuals for over twenty years, he believed that each individual has an unique and distinctive dentition. After examining defendant's teeth, making impressions of his upper and lower teeth, and preparing plaster casts and overlays from the impressions, Dr. Webster stated that defendant's dentition was unusual and distinctive in that there was a malalignment causing the front teeth, or central incisors, to point backwards toward the back of the head, and causing the lateral incisors to point outward. He further testified that he matched the overlays of defendant's teeth with the bite mark on the left upper chest area of Miss Jones' body and found eight points of identification between the overlays and the bite mark. Based on this evidence, Dr. Webster stated that in his opinion the bite mark on Miss Jones' chest was made from the dentition of defendant. The State also called Dr. Page Hudson, a forensic pathologist and Chief Medical Examiner for the State of North Carolina, as an expert witness. Dr. Hudson testified that he had called in Dr. Webster, an expert in forensic odontology, to perform the comparative examination of defendant's dentition and the bite marks on the victim's skin. After observing Dr. Webster's work, Dr. Hudson stated that in his opinion the bite marks on the victim's skin were caused by defendant's teeth.

Defendant maintains that Dr. Webster's testimony should have been excluded because it was based on the results of a test

which was not scientifically proven for reliability. He argues that Dr. Webster's opinion was formed from unproven hypotheses and mathematical probability. Defendant further alleges that Dr. Hudson should not have been allowed to express an opinion identifying the bite marks as being made by defendant's teeth because he was not qualified as an expert in forensic odontology.

The question of the admissibility of evidence tending to identify an accused by his own bite marks is an issue of first impression in this jurisdiction. Although there is little authority on the subject from other jurisdictions, those courts which have dealt with the question have all permitted such identification testimony. *See Annot.*, 77 A.L.R. 3d 1122 (1977).

The leading case on identification through bite mark analysis is *People v. Marx*, 54 Cal. App. 3d 100, 126 Cal. Rptr. 350 (1975). The victim in *Marx* had been killed by manual strangulation, but had also sustained a bite wound on her nose. The body of the victim was exhumed fifty-one days after death and a cast of the wound on the nose was made. Three dentists were allowed to testify that after comparing impressions taken of defendant's teeth and the cast of the victim's nose, they believed that the bite mark was made by defendant's teeth. It appeared that the State supplemented the expert's testimony by showing models, photographs, x-rays, and slides of the victim's wound and defendant's teeth. In affirming the trial court's decision to admit the expert testimony into evidence, the California court reasoned as follows:

> ". . . [T]he basic data on which the experts based their conclusions were verifiable by the court. Further, in making their painstaking comparisons and reaching their conclusions, the experts did not rely on untested methods, unproved hypotheses, intuition or revelation. Rather, they applied scientifically and professionally established techniques — x-rays, models, microscopy, photography — to the solution of a particular problem which, though novel, was well within the capability of those techniques. In short, in admitting the evidence, the court did not have to sacrifice its independence and common sense in evaluating it." 54 Cal. App. 3d at 111, 126 Cal. Rptr. at 356.

In like manner, we hold that the trial court properly admitted

the testimony of Drs. Webster and Hudson which tended to identify the bite marks on Miss Jones' skin as being made by defendant's teeth. The general rule in North Carolina regarding the admissibility of new methods and types of scientific evidence was stated by the Court in *State v. Powell*, 264 N.C. 73, 74, 140 S.E. 2d 705, 706 (1965), *quoting from Toms v. State*, 95 Okla. Crim. 60, 69, 239 P. 2d 812, 821 (1952):

> "This court is of the opinion, that we should favor the adoption of scientific methods of crime detection, where the demonstrated accuracy and reliability has become established and recognized. Justice is truth in action, and any instrumentality, which aids justice in the ascertainment of truth, should be embraced without delay."

Contrary to defendant's allegations, the expert witnesses in this case did not rely on untested methods or unproved hypotheses. They applied scientifically established techniques of dentistry and photography to the solution of a particular novel problem. The method of bite mark identification employed in this case is simply a matter of comparing items of physical evidence. Although the method of comparison requires the services of skilled experts, the experts used models and measurements procured by standardized procedures. *Niehaus v. State*, 265 Ind. 655, 359 N.E. 2d 513 (1977). Photographs of the wound and models used by the experts in reaching their conclusion were presented at trial as evidence and were verifiable by the court. We reject defendant's argument that the comparison technique in this case is inherently unreliable because it was based in part upon Dr. Webster's studies of the mathematical probability that each person has a unique dentition. Dr. Webster's statement that after examining the teeth of thousands of persons over a twenty year period he believed that each individual had a unique dentition was simply an attempt to explain his scientific method in response to defendant's question whether any other person could possibly have made the same marks on the victim's skin. Dr. Webster expressly stated that he had never undertaken any mathematical studies in this area. *See People v. Slone*, 76 Cal. App. 3d 611, 143 Cal. Rptr. 61 (1978).

We also reject defendant's contention that Dr. Hudson's testimony regarding the bite marks should have been excluded because he was not qualified as an expert in the field of forensic

odontology. Dr. Hudson called in Dr. Webster as an expert in forensic odontology and the two worked together in seeking to determine whether defendant's teeth made the bite mark on the body. Dr. Hudson's testimony was proper as the opinion of the Chief Medical Examiner of the State, arrived at after consulting with an expert whose aid he had requested. In any event, considering the extensive bite mark identification testimony given by Dr. Webster, Dr. Hudson's statement of his opinion was not prejudicial to defendant.

We therefore find that the expert testimony in this case was based upon established scientific methods, and is admissible as an instrumentality which aids justice in the ascertainment of the truth. Any objection to this testimony goes to the credibility to be attributed to the evidence, not to its admissibility. *Patterson v. State*, 509 S.W. 2d 857 (Texas Crim. App. 1974). Defendant's fourth assignment of error is overruled.

[5] Defendant next maintains that the trial court erred in allowing the jury to be shown certain photographs of the exhumed body of Miss Jones. These photographs were presented to the jury by means of color slides projected on a screen and were introduced to illustrate the testimony of Drs. Hudson and Webster. Defendant specifically complains that the photographs of the victim's body lying in her casket were without probative value, serving only to arouse the prejudices of the jury.

Defendant concedes that photographs are admissible in this jurisdiction to illustrate the testimony of a witness, and the fact that the photograph may depict a gory, gruesome scene or tend to arouse prejudice in the jury does not render it incompetent if it is otherwise relevant and material. *State v. Horton*, 299 N.C. 690, 263 S.E. 2d 745 (1980); *State v. Matthews*, 299 N.C. 284, 261 S.E. 2d 872 (1980); *State v. Young*, 291 N.C. 562, 231 S.E. 2d 577 (1977); 1 Stansbury's N.C. Evidence § 34 (Brandis Rev. 1973). However, defendant contends that the State's use of photographs in this case falls within the rule set forth in *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963), and restated as follows in *State v. Mercer*, 275 N.C. 108, 120, 165 S.E. 2d 328, 337 (1969):

> ". . . the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional

photographs add nothing in the way of probative value but tend solely to inflame the jurors."

We find that many of the photographs presented by the State were relevant as illustrations of Dr. Hudson's and Dr. Webster's testimony. However, several of the photographs, particularly those taken of the body lying in the casket, add nothing to the State's case and would have been better left unpresented. Nevertheless, in view of the overwhelming evidence of defendant's guilt, we hold that the photographs were harmless error beyond a reasonable doubt, and therefore defendant's assignment of error is overruled.

Since we have held that the trial judge committed no prejudicial error in this case, we also reject defendant's argument that the trial court erred in denying defendant's motion for a mistrial.

This was a very gruesome murder, for which the State established no motive. The reason for the killing will remain shrouded in mystery, as was the reason for the untimely death of Nell Cropsey in a case from the same county near the turn of the century. *State v. Wilcox*, 132 N.C. 1120, 44 S.E. 625 (1903).

Defendant received a fair trial free from prejudicial error and we find

No error.

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

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, KENAN TRANSPORT COMPANY, AND NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC., AGENT FOR MOTOR COMMON CARRIERS v. BIRD OIL COMPANY, BURKE OIL COMPANY, LAMPLIGHTER OIL COMPANY, WEIL OIL COMPANY, AND NORWOOD OIL COMPANY

No. 50

(Filed 6 January 1981)

1. **Administrative law § 8— appeal from administrative agency — scope of judicial review — burden on parties and reviewing court**

In presenting appeals to the judicial branch from the State administrative agencies, it is essential that the parties present their contentions as to the appli-

cable scope of judicial review. Likewise, the reviewing court should make clear the review standard under which it proceeds.

2. Administrative Law § 8; Utilities Commission § 51— requirements for reversal of order of Utilities Commission

Judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria of G.S. 62-94 which circumscribe judicial review.

3. Carriers § 5.1; Utilities Commission § 51— common carrier rates — petroleum products — criterion for review of Utilities Commission order

The criterion for review of an order of the Utilities Commission relating to the dedicated service provision in the tariff schedule for motor vehicle common carriers of petroleum products was whether the order is affected by errors of law within the meaning of G.S. 62-94(d)(4) where the issues presented for review by appellants were based on the contentions that the Utilities Commission committed "errors of law" in reaching its decision, the holding of the Court of Appeals that the dedicated rate scheme is discriminatory and preferential implicitly indicated a determination that the Utilities Commission committed an error of law, and appellants essentially argue in the Supreme Court that the Commission's order was proper as a matter of law and that the Court of Appeals erred as a matter of law in vacating such order.

4. Carriers § 5; Utilities Commission § 43— differential in public utility rates

The question of law with respect to public utility rate differentials is not whether the differential is merely discriminatory or preferential but is whether the differential is an *unreasonable* or *unjust* discrimination. G.S. 62-140.

5. Carriers § 5; Utilities Commission § 43— differential in public utility rates

There must be substantial differences in service or conditions to justify a differential in public utility rates.

6. Carriers § 5; Utilities Commission § 43— substantial differences in services or conditions — factors considered

Factors which constitute "substantial differences in service or conditions" and, therefore, justify a rate differential include (1) quantity of use, (2) time of use, (3) manner of service, and (4) costs of rendering the two services.

7. Carriers § 5.1— common carrier rates — petroleum products — dedicated service provision — no discriminatory and preferential rates

The Court of Appeals erroneously held as a matter of law that the dedicated service provision in the tariff schedule for motor vehicle common carriers of petroleum products, which provides for a lower rate for petroleum products when the common carrier assigns a single unit of equipment to the exclusive and continuous use in intrastate commerce of one shipper for a minimum of 100 hours per week for 20 consecutive weeks, is discriminatory and preferential in violation of G.S. 62-140 where there was substantial evidence that (1) the cost per shipment for carriers on dedicated traffic was 15.5% lower than cost per shipment on nondedicated traffic; (2) the manner of service is different in that fewer tractor-

trailers and drivers are required to serve dedicated traffic than nondedicated traffic; (3) the quantity of use for dedicated traffic is greater than for nondedicated traffic in light of the 100 hour per week minimum usage requirement; (4) the time of use of dedicated traffic is different in that practically full-time loading and unloading facilities must be available to carriers under the dedicated rate while nondedicated rate users normally make available such facilities only during the normal 40 to 50 hour work week; and (5) a driver of dedicated equipment becomes more familiar with loading and unloading requirements of a customer and this familiarity is beneficial from the standpoint of safety, thus reducing the frequency and costs of accidents.

8. **Carriers § 5.1— common carrier rates — petroleum products — dedicated service provision — no conversion by common carrier into contract carrier**

A common carrier of petroleum products which commits a part of its equipment to dedicated use should not be regarded as a matter of law as a contract carrier since common carriers participating in the dedicated rate arrangement are also rendering service to the public generally and are providing service impartially to all persons requesting such service.

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

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 47 N.C. App. 1, 266 S.E. 2d 838 (1980), one judge dissenting, vacating the order of the Utilities Commission dated 11 April 1979 which approved Supplement No. 8 to Petroleum Tariff No. 5-0, N.C.U.C. No. 110, containing revisions in Item 8005-A (Dedicated Service), applying to petroleum and petroleum products, issued by the North Carolina Motor Carriers Association, Inc., Agent, and filed with the Commission on 5 January 1978.

The issue on this appeal is whether the Court of Appeals properly vacated the order of the Utilities Commission allowing a revision in the "dedicated service" provision of the Petroleum Tariff to permit the commingling of hours generated in interstate and intrastate commerce in determining the minimum of one hundred hours per week required for the dedicated service rate. We find the proceedings before and the order of the Utilities Commission proper and reverse the Court of Appeals.

Allen, Steed and Allen, P.A., by Thomas W. Steed, Jr., and Joseph W. Eason, for plaintiff-appellants Kenan Transport Company and North Carolina Motor Carriers Association, Inc., Agent.

Hatch, Little, Bunn, Jones, Few & Berry, by David H. Permar, for protestant-appellees.

CARLTON, Justice.

On 17 April 1963 the North Carolina Motor Carriers Association, Inc., agent for carriers of petroleum products participating in the Motor Freight Tariff, filed with the North Carolina Utilities Commission a supplement to the then-existing tariff. The supplement established "Dedicated Service" rates which essentially provided for a fifteen percent lower rate for intrastate shipments of gasoline, kerosene, jet fuel, diesel fuel oil No. 1, and fuel oils Nos. 1, 2 and 3, provided that the common carrier assign a single unit of the carrier's equipment to the exclusive and continuous use in intrastate commerce of one shipper for a minimum of one hundred hours per week for twenty consecutive weeks. Pursuant to statutes applicable at that time the Utilities Commission conducted the usual investigation and hearing and issued its order in Docket No. T-825, Sub 68 on 27 September 1963 finding the dedicated service rates just and reasonable and ordering them into effect. 53 N.C. Utilities Comm. Reports 524 (1963). Dedicated service rates have remained in the petroleum tariff of the North Carolina Motor Carriers Association, Inc. [hereinafter "NCMCA"], as amended and re-issued from time to time, since September 1963.

On 5 January 1978 NCMCA, as agent for motor common carriers, filed a proposed amendment to the existing dedicated service rates, Item 8005-A of Supplement 8 to Petroleum Tariff No. 5-0, N.C.U.C. No. 110. The proposed amendment allowed hours generated by the dedicated unit of equipment used in *interstate* commerce, in addition to hours in *intrastate* commerce, to be counted in determining whether the minimum of one hundred hours per week required by the dedicated service rule had been met. This type provision is commonly referred to as a "commingling clause."

On 23 January 1978 the Utilities Commission issued an order of suspension, investigation and notice of hearing, suspending Item 8005-A, Dedicated Service, Paragraph (f) for a period of 270 days and setting the matter for hearing on 10 May 1978.

On 8 February 1978 the Utilities Commission Public Staff filed its Notice of Intervention.

Appellees, fuel oil jobbers, filed a verified protest to Item 8005-A on 17 April 1978 and moved, pursuant to G.S. 62-136, to

expand the scope of the hearing to include an investigation of the *existing* dedicated service rates.

On 2 May 1978 Kenan Transport Company, on behalf of itself and other motor vehicle common carriers participating in the proposed revision in the dedicated service rules, filed a response in opposition to the protest and a motion to expand and continue the hearing.

The Utilities Commission issued an order on 4 May 1978 allowing the protestants to intervene as protestants in opposition to the proposed revision in the dedicated service rules, expanding the scope of the hearing pursuant to G.S. 62-136 to include an investigation of the existing dedicated service rates, ordering the motor common carriers participating in the tariff to file additional information, and continuing the hearing to 2 August 1978.

A hearing was held before the hearing examiner on 2 August 1978. Both Kenan and protestants presented evidence. On 5 January 1979 the hearing examiner issued a recommended order approving the commingling amendment, cancelling the prior order of suspension and investigation and dismissing the proceeding.

On 22 January 1979 the protestants filed their exceptions to the recommended order. Following a hearing on the exceptions, the Utilities Commission issued its final order on 11 April 1979, overruling and denying protestants' exceptions and adopting and affirming the recommended order.

Protestants appealed to the Court of Appeals. That court vacated the order of the Utilities Commission, holding, *inter alia*, that "the *entire* dedicated rate provision is discriminatory and preferential in violation of G.S. 62-140 and other applicable portions of the General Statutes pertaining to Motor Carriers." 47 N.C. App. at 9, 266 S.E. 2d at 843 (emphasis added). Judge Vaughn dissented, noting that the existing rate structure is presumed to be just and reasonable and that the protestants have the burden of proving otherwise. In his opinion, the findings of the Commission were conclusive because they were supported by substantial evidence in view of the entire record.

NCMCA and Kenan appealed to this Court as a matter of right by virtue of Judge Vaughn's dissent. For reasons stated below, we reverse the Court of Appeals and direct that the order of the Utili-

ties Commission be reinstated.

Other facts pertinent to our decision are noted below.

II.

[1] Before addressing the merits, we note that none of the parties to this cause suggested in brief the applicable scope of judicial review on this appeal. Moreover, the Court of Appeals' opinion presents no review standard other than the generalization that its task was to "ascertain whether the orders . . . conform to the mandate of the General Assembly." This is a serious omission. In presenting appeals to the judicial branch from state administrative agencies, it is essential that the parties present their contentions as to the applicable scope of judicial review. Likewise, the reviewing court should make clear the review standard under which it proceeds. The proliferation of appeals from state administrative agencies during recent years requires an orderly appellate process. Such order is totally lacking when one body must guess the scope of review provided by another and when the parties fail to structure their arguments on appeal according to the relevant standard.

We therefore turn to a determination of the appropriate scope of judicial review of the order of the Utilities Commission. While most appeals in this State from the actions of administrative agencies to the judicial branch are governed by our Adminstrative Procedure Act, G.S. Chapter 150A, the Utilities Commission is specifically exempted from the coverage of that chapter. G.S. § 150A-1(a) (1978). When judicial review of administrative actions is provided in the statute under which the administrative action is taken, the right of appeal to the courts is to be first determined by looking at the statute. 2 Am. Jur. 2d *Administrative Law* § 559 (1962). We therefore turn to the public utilities chapter of our General Statutes, Chapter 62, to determine the appropriate scope of judicial review of an order of the Utilities Commission. G.S. 62-94 is controlling. That section provides, *inter alia*, that the reviewing court may (1) affirm, (2) reverse, (3) declare null and void, (4) modify, or (5) remand for further proceedings, decisions of the Commission. The Court's power to affirm or remand is not specifically circumscribed by the statute. However, the power of the court to reverse or modify and, *a fortiori*, to declare null and void, is substantially circumscribed to situations in which the court must

find (a) that appellant's substantial rights, (b) have been prejudiced, (c) by Commission findings, inferences, conclusions or decisions which 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.

G.S. § 62-94(b)(1975); *see Daye*, North Carolina's New Adminstrative Procedure Act: An Interpretive Analysis, 53 N.C.L. Rev. 833, 911-12 (1975). Other provisions of the statute provide that "due account shall be taken of the rule of prejudicial error," G.S. § 62-94(c)(1975), and that orders of the Commission "shall be prima facie just and reasonable," G.S. § 62-94(e)(1975).

[2] Read contextually, therefore, the requirements that "*substantial rights* have been *prejudiced*," that error must be prejudicial and that actions of the Commission are presumed just clearly indicate that judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria which circumscribe judicial review.[1]

[3] In light of the foregoing, it becomes necessary for this Court to determine under which criterion for review the Court of Appeals should have addressed this proceeding. Only then can we decide

[1] For a similar analysis of the judicial review section of the North Carolina Adminstrative Procedure Act, G.S. Chapter 150A, *see Daye, supra*, 53 N.C. L. Rev. at 911-12. We acknowledge that the legislative intent that court reversal of administrative agency action be substantially circumscribed is more clearly stated in G.S. 150A-51 than in G.S. 62-94. In spite of the slight variation in wording of the two statutes, however, we think the intent of our Legislature in providing for judicial review of orders of the Utilities Commission and other state agencies covered by the Administrative Procedure Act to be essentially the same. We also stress again the importance of uniformity in judicial review of administrative decisions. *See Commissioner of Insurance v. Rate Bureau*, 300 N.C. 381, 395, 269 S.E. 2d 547, 559 (1980).

whether the Court of Appeals' decision was proper.

The controlling review statute, G.S. 62-94, also provides that an "appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission." G.S. § 62-94(c). Protestant-appellants in the Court of Appeals, appellees here, were apparently aware of this provision, for in their Exceptions and Notice of Appeal four of the six criteria noted above were referred to in attacking various findings and conclusions of the Commission, *e.g.*, that the Commission's order was in excess of statutory authority, made upon unlawful proceedings, affected by other errors of law and unsupported by competent, material and substantial evidence in view of the entire record. While taking this broadside approach in giving notice of appeal, however, protestants did not bring forward and argue these specific statutory grounds for reversal of the Commission's order in their brief to the Court of Appeals.

The proper scope of review can be determined only from an examination of the issues presented for review by the appealing party. The nature of the contended error dictates the applicable scope of review. In their appeal to the Court of Appeals, protestants presented three issues for review, the gists of which were: (1) whether the lower rate charged users of dedicated service is unlawfully discriminatory and preferential; (2) whether offering of dedicated rate service by a common carrier unlawfully converts a common carrier into a contract carrier; and (3) whether the Recommended Order and Final Order of the Commission are erroneous as a matter of law because they do not contain the findings and conclusions required by law. From these issues it is apparent that the basis for all the proffered issues is protestants' contention that the Commission committed "errors of law" in reaching its decision. Additionally, although the Court of Appeals' opinion does not disclose the standard under which that court considered the issues, its holding that the dedicated rate scheme is discriminatory and preferential implicitly indicates a determination that the Commission committed an error of law and the opinion is written accordingly. Moreover, appellants essentially argue to this Court that the Commission's order was proper as a matter of law and that the Court of Appeals erred as a matter of law in vacating the Commission's order.

From all these factors, plus our review of the record, we think

it obvious that G.S. 62-94(b) (4), whether the order is affected by errors of law, governs our review. Having determined the specific statutory scope of our review, we turn to the merits of the controversy and apply the record and contentions to the stated criterion for review.

III.

In their protest filed with the Commission on 17 April 1978, protestants alleged essentially that the dedicated service rate constitutes "an unreasonable preference or advantage in violation of N.C.G.S. 62-140 and the publication of said dedicated service rates is in violation of the proscription contained in N.C.G.S. 62-140 ...." The Court of Appeals held that "the entire dedicated rate provision is discriminatory and preferential in violation of G.S. 62-140 ...." The primary question before us, therefore, is whether upon a review of the entire record the dedicated rate scheme violates the provisions of G.S. 62-140. That statute provides in pertinent part as follows:

> (a) No public utility shall, as to rates or services, make or grant any *unreasonable preference or advantage* to any person or subject any person *to any unreasonable prejudice or disadvantage.* No public utility shall establish or maintain any *unreasonable difference as to rates or services* either as between localities or as between classes of service.

G.S. § 62-140 (Cum. Supp. 1979) (emphases added).

[4] This statute has led to establishing in this jurisdiction the laudable rule of law that there must be no *unreasonable* discrimination by public utilities between those receiving the same kind and degree of service. *See State ex. rel. Utilities Comm. v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290 (1953). In establishing rates, the statute plainly prohibits (1) *unreasonable* preferences, (2) *unreasonable* advantages, (3) *unreasonable* prejudices, (4) *unreasonable* disadvantages and (5) *unreasonable* differences. G.S. § 62-140. Neither the statute nor the case law, however, prohibits *any* preferences, advantages, prejudices, disadvantages, differences or discrimination in setting rates. The long-established question of law with respect to rate differentials is not whether the differential is merely discriminatory or preferential; the question is whether the differential is an *unreasonable* or *unjust* discrimination. *Id.* This inter-

pretation is not inconsistent with the "[a]dditional declaration of policy for motor carriers" provided in G.S. 62-259[2] and quoted in the Court of Appeals' opinion. The emphasis of that statute is on "unfair" and "undue" preferences, advantages and competitive practices.

This Court has previously interpreted the meaning of "unreasonable," as used in G.S. 62-140, in *State ex rel. Utilities Comm. v. Teer Co.*, 266 N.C. 366, 146 S.E. 2d 511 (1966). In *Teer* the Court upheld a Commission order which concluded that a rate differential on two rail lines of approximately equal distance with the same destination was not unreasonable. The reason for the rate differential was the difference in number and cost of the switching movements required for each line. Justice Lake, writing for the Court, concluded that "a substantial difference between the costs of rendering the two services justifies some difference in the rates, nothing else appearing." *Id.* at 376, 146 S.E. 2d at 518. The *Teer* Court reiterated its approval of statements made by courts in other jurisdictions that, "[t]he charging of different rates for service rendered under varying conditions and circumstances is not unlawful," *Brown v. Pennsylvania Public Utility Comm.*, 152 Pa. Super. 58, 61, 31 A. 2d 435, 437 (1943), and that "[a]ny matter which presents a substantial difference as a ground for distinction between customers, such as quantity used, time of use, or manner of service, is a material . . . factor," *Ford v. Rio Grande Valley Gas Co.*, 141 Tex. 525, 527, 174 S.W. 2d 479, 480 (1943).

---

[2] That statute provides:

> In addition to the declaration of policy set forth in G.S. 62-2 of Article 1 of Chapter 62, it is declared the policy of the State of North Carolina to preserve and continue all motor carrier transportation services now afforded this State; and to provide fair and impartial regulations of motor carriers in the use of the public highways in such a manner as to promote, in the interest of the public, the inherent advantages of highway transportation; to promote and preserve adequate economical and efficient service to all the communities of the State by motor carriers; to encourage and promote harmony among all carriers and *to prevent discrimination, undue preferences or advantages, or unfair or destructive competitive practices between all carriers;* to foster a coordinated statewide motor carrier service; and to conform with the national transportation policy and the federal motor carriers acts insofar as the same may be practical and adequate for application to intrastate commerce.

G.S. § 62-259 (1975) (emphasis added).

Likewise, Justice Higgins, writing for the Court in *State ex rel. Utilities Comm. v. North Carolina Motor Carriers Ass'n*, stated:

> [R]ate-making involves more than mileage .... There are factors involved in rate-making which justify lower per-mile rates from some points than from others .... The law does not contemplate that all rates shall be equal for like distances. Room is left for a rate structure which takes all factors of rate-making into account. [The statute] makes unlawful a rate that creates an *unjust* discrimination or *undue* or *unreasonable* advantage.

253 N.C. 432, 440, 117 S.E.2d 271, 276 (1960) (emphases in original).

[5] From the foregoing and other sources has emerged the principal of law in this jurisdiction that "[t]here must be substantial differences in service or conditions to justify difference in rates." *State ex rel. Utilities Comm. v. Mead Corp.*, 238 N.C. at 462, 78 S.E. 2d at 298; *accord, State ex rel. Utilities Comm. v. Municipal Corps.*, 243 N.C. 193, 203, 90 S.E. 2d 519, 527 (1955).

[6] From the authorities noted above we are able to list several factors previously approved by this Court which constitute "substantial differences in service or conditions" and, therefore, justify a rate differential: (1) quantity of use, (2) time of use, (3) manner of service, and (4) costs of rendering the two services.

[7] Applying the foregoing to the record before us, we find substantial and competent evidence of each of the factors listed above to support a finding of "substantial differences in service or conditions" of transportation services rendered to shippers under the dedicated rate vis-à-vis the services rendered shippers under the general rate. There was substantial evidence that: (1) the cost per shipment for carriers on dedicated traffic was 15.5% lower than cost per shipment on non-dedicated traffic, (2) the manner of service is different in that fewer tractor-trailers and drivers are required to serve dedicated traffic than nondedicated traffic, (3) the quantity of use for dedicated traffic is obviously greater than for nondedicated traffic in light of the 100 hour per week minimum usage requirement, and (4) the time of use of dedicated traffic is different in that practically full-time loading and unloading facilities must be available to carriers under the dedicated rate while nondedicated rate users normally make available such facilities

only during the normal 40 to 50 hour work week.

The record also discloses a "substantial difference in . . . conditions." Testimony established that a driver of dedicated equipment became more familiar with loading and unloading requirements of a customer and this familiarity is beneficial from the standpoint of *safety*, thus reducing the frequency and costs of accidents.

We do not attempt here to itemize every difference between dedicated and nondedicated service. It is unnecessary for us to reach the argument presented with respect to whether competition is a factor which would justify a rate differential. The evidence is more than abundant to justify the finding of a "substantial difference in services and conditions" from the factors discussed above.

Protestants place heavy reliance on two decisions of this Court: *Lumber Company v. Railroad*, 136 N.C. 479, 53 S.E. 823 (1904), and *State ex rel. Utilities Comm. v. Railway*, 256 N.C. 359, 124 S.E. 2d 510 (1962). This reliance is misplaced. Not only are these cases clearly distinguishable from that before us, neither endorses any rule contrary to that reaffirmed here. Both of these cases stand for the proposition that unlawful discrimination exists only when a rate differential or other preference is applied to those operating under substantially similar circumstances and conditions. Such is not the situation disclosed by the record before us.

The burden of proving that the dedicated service rate is discriminatory and preferential lies here with protestants, the complaining parties. G.S. § 62-75 (1975); *accord, State ex rel. Utilities Comm. v. Edmisten*, 291 N.C. 424, 230 S.E. 2d 647 (1976). We are also governed by the statutory provisions that: (1) rates established by the Commission shall be deemed just and reasonable, G.S. § 62-132 (1975); (2) the rates or other actions of the Commission shall, on appeal, be "*prima facie* just and reasonable," G.S. § 62-94(e); and (3) this Court, on appeal, must give due account to the rule of prejudicial error, G.S. § 62-94(c).

Applying the appropriate criterion for judicial review here as discussed in Section II of our opinion, we find that no "substantial rights" of protestants "have been prejudiced," that no prejudicial error was committed in the proceedings before the Commission, and that the Court of Appeals erroneously held as a matter of law that the dedicated rate provision is discriminatory and preferential in violation of G.S. 62-140 and other statutes. We hold that there

were no errors of law in the proceedings before the Commission and its order as contemplated by G.S. 62-94(b)(4).

IV.

[8] Appellees next contend that use of the dedicated rate structure circumvents statutory restrictions by allowing a common carrier to convert itself, in effect, into a contract carrier and then charge a lower rate than common carriers charge.

In presenting this argument, protestants point to the testimony of the Kenan witness who explained the dedicated rate operation. According to his testimony, once a petroleum transport is assigned to dedicated service, it becomes unavailable for use by other shippers during its twenty or more weeks of operation under the dedicated rate plan. For example, if a dedicated service transport is returning empty after making a delivery, it cannot be used for another shipper; neither can it be used for another shipper if sitting idly. This raises the possibility that a dedicated carrier would have to refuse service to a shipper at a time it may actually have equipment available. Protestants argue that this, for all practical purposes, converts a common carrier to a contract carrier.

The crucial question therefore is whether a common carrier which commits a part of its equipment to dedicated use should be regarded as a matter of law as a contract carrier. Our statutes and case law impel a negative answer.

G.S. 62-3(7) defines a common carrier as one "which holds itself out to the general public" to engage in transportation services. G.S. 62-3(8) refers to a contract carrier as one "which, under an individual contract or agreement" engages in transportation services "other than the transportation referred to in subdivision (7) of this section."

From these statutes, it is clear that the crucial test to determine whether one is a common carrier is whether he holds himself out as such. This Court so held in *Jackson v. Stancil*, 253 N.C. 291, 116 S.E. 2d 817 (1960) where it was said, "The crucial test as to 'whether one is a common carrier is whether he holds himself out as such, either expressly or by a course of conduct, that he will carry for hire on a uniform tariff all persons applying . . . so long as he has room.'" *Id.* at 302, 116 S.E. 2d at 825 (citations omitted); *accord, Cantlay & Tangola, Inc. v. Senner*, 92 Ariz. 63, 373 P. 2d 370 (1962).

It is true, as protestants argue, that any service rendered by a common carrier to a shipper under the dedicated rate arrangement is the result of a contract between the carrier and the shipper. There is absolutely nothing in the record before us, however, to indicate that such contracts preclude a common carrier from rendering service to the public generally or interfere with the carrier's holding itself out to serve the public. To the contrary, the record discloses that the common carriers participating in the dedicated rate arrangement are holding themselves out to and do indeed provide transportation services to other petroleum shippers. Additionally, while contract carriers must establish a minimum rate, they are not required to charge all shippers the same rate. Explanation of the North Carolina Truck Act of 1947, N.C. Utilities Comm. General Order No. 4066-A, 8 (June 1, 1948). Common carriers, on the other hand, must charge a uniform tariff for their services. While the dedicated rate is less than the regular rate and results in lower charges for larger shippers, the dedicated rate is equally available, and on the same terms, to all. We find nothing inconsistent between the dedicated rate structure and the duty of common carriers to hold themselves out to the general public and provide service impartially to all persons requesting service. We hold that the Commission did not commit an error of law as contemplated by G.S. 62-94(b)(4) in adhering to the same view.

V.

We note finally that we are not insensitive to the plight of protestants. The resulting inequity to protestants from the dedicated rate structure is, however, as Judge Vaughn correctly notes in his dissent, that the major oil companies in some cases base the freight or shipping allowance given to the oil jobber on the dedicated rate rather than the regular tariff. Any loss suffered by the oil jobbers due to their inability to use the dedicated service results from the petroleum pricing arrangement between them and the major oil companies and not from any unlawful rate structure approved by the Utilities Commission.

For the reasons stated above, the decision of the Court of Appeals is reversed and this cause is remanded to that court with directions to reinstate the order of the Utilities Commission, dated 11 April 1979, in Docket No. T-825, Sub 226, establishing paragraphs (a) through (f) of Item 8005-A in Local Motor Freight Tariff No. 5-0.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. JOHN WESLEY OLIVER AND GEORGE MOORE, JR.

No. 78

(Filed 27 January 1981)

1. Criminal Law § 15.1— pretrial publicity — denial of change of venue

The trial court in a prosecution for first degree murder and armed robbery did not abuse its discretion in denying defendants' motion for change of venue based on pretrial publicity in radio broadcasts and newspaper articles where the articles were of a general nature likely to be found in any jurisdiction to which the trial might be moved; the coverage of defendants' arrest only indicated that defendants had been charged with a crime; the articles were factual, non-inflammatory, and contained for the most part information that could have been offered in evidence at defendants' trial; and no juror objected to by defendants because of pretrial publicity was seated on the jury.

2. Criminal Law § 21.1— denial of post-indictment probable cause hearing

The denial of defendants' post-indictment motions for a probable cause hearing did not violate G.S. 15A-606(a) or deprive defendants of equal protection and due process of law.

3. Jury § 6— denial of individual voir dire — no abuse of discretion

Defendants failed to show that the trial court abused its discretion in the denial of defendants' motion for an individual *voir dire* of each juror and sequestration of the jurors during *voir dire*.

4. Jury § 7.11— opposition to capital punishment — excusal for cause

The trial court in a first degree murder prosecution properly excused for cause prospective jurors who admitted a specific inability to impose the death penalty under any circumstances.

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

There is no merit in defendants' contention that the "death qualification" jury selection process in a first degree murder case deprived them of a jury selected from a representative, fair cross-section of the community on the guilt phase of the case.

6. Jury § 6.4— excusal of jurors for capital punishment views — absence of questioning by defense counsel

When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow defendant to question the juror challenged.

7. Criminal Law § 91— statutory speedy trial — exclusion of time pending motion for change of venue

A motion for change of venue is a "pretrial motion" within the meaning of G.S. 15A-701(b)(1)(d), and the time between the filing of the motion and its disposition is properly excluded in computing the statutory speedy trial period provided the motion is heard within a reasonable time after it is filed and the State does not delay the hearing for the purpose of thwarting the speedy trial statute.

8. Criminal Law § 102.6— use of gun in jury argument

It was not improper for the prosecutor to use in his jury argument a revolver which had been offered in evidence in the trial so long as he did not attempt to draw any inferences from the weapon which were not supported by the evidence or to frighten or intimidate the jury with it.

9. Indictment and Warrant § 7.1— allegation of defendant's residence — surplusage

The trial court properly denied defendant's motion to dismiss murder indictments against him on the ground they described him as being a resident of Robeson County when in fact he resided in Columbus County since defendant's residence was immaterial and the allegations as to his county of residence were at most surplusage.

10. Constitutional Law § 30; Criminal Law § 91.6— discovery of pistol short time before trial — denial of continuance

The trial court in a murder and armed robbery case did not err in the denial of defendant's motion for a continuance of his trial made on the ground that the court had ordered that discovery be completed two weeks before trial and he did not have a full two weeks before his trial commenced on 14 May to view a pistol discovered by the State on 2 May where the State informed defendant's attorney on 3 May of the discovery; defendant's attorney chose not to view the weapon until 9 May after which he received by mail a copy of a permit to purchase the pistol issued to defendant; no ballistics analysis was possible because the bullet which killed one victim could not be found and the bullet which killed the second victim was badly fragmented; and defendant's preparation for trial was thus in no way inhibited by the late discovery of the pistol.

11. Criminal Law §§ 66.10, 66.17— unnecessarily suggestive showup procedure — inherent reliability of identification — admissibility of pretrial and in-court identifications

Although an officer's statement to a seven-year-old witness that he would be

taken to the police station where he "could see that man again" coupled with a showup procedure in which the witness viewed the defendant singly through a two-way mirror constituted an unnecessarily suggestive pretrial identification procedure, the witness's identification of defendant was inherently reliable considering the totality of circumstances and did not create a substantial likelihood of misidentification so that both his out-of-court and in-court identifications of defendant were admissible in evidence where the witness was no casual observer but was a witness to the slaying of his own grandfather; he had ample opportunity to view his grandfather's assailant since the shooting occurred near him, in an open area, outside, and during daylight; he gave an accurate description of defendant prior to the showup; his identification was consistent, unequivocal and made without the slightest hesitancy or uncertainty; he was careful not to implicate a codefendant whom he also viewed singly through the two-way mirror but was quite firm in his consistent identification of defendant; and the length of time between the crime and the confrontation was no more than a few hours.

12. Arrest and Bail § 9— bail in capital case — discretion of court

Whether a defendant charged with a capital offense is entitled to a bail bond is a matter in the discretion of the trial judge. G.S. 15A-533.

13. Jury § 7.8— denial of challenge for cause of juror based on health

The trial court did not abuse its discretion in the denial of defendant's challenge for cause of a 65-year-old juror who stated that she had a history of heart trouble, took medication daily for high blood pressure, utilized nitroglycerin if she experienced pain or became upset, was not sure her health would allow her to sit for more than one day and felt that a trial lasting more than a week would be too strenuous where the trial court fully questioned the juror about her health and observed that the work of a juror was not strenuous, that often veniremen with heart conditions serve on a jury, and that counsel on both sides had agreed that the trial would not last more than a week.

14. Witnesses § 1.2— competency of youthful witness — leading questions on voir dire

The trial court did not abuse its discretion in ruling that a seven-year-old boy was a competent witness in a murder and armed robbery case or in permitting the prosecutor to ask the youthful witness leading questions during the *voir dire* examination to determine his competency.

15. Criminal Law § 33.1— observations of witnesses — relevancy

The trial court in a first degree murder and armed robbery case did not err in the admission of a witness's testimony that he saw two boys walking toward the crime scene shortly before the crimes occurred and that they were "dark people" and another witness's testimony tending to show that clothing he saw one defendant wearing on the day before the crimes matched the description of such defendant's clothing on the day of the crimes; furthermore, such testimony could not have had the purpose of inflaming the jury and would be, at most, harmless error.

16. Criminal Law § 88.1— cross-examination to show bias or prejudice

The district attorney was properly permitted to ask a defense witness on

cross-examination, "Brown, you will do anything to cover up for your old friend, won't you?" and "Were you covering up for your old buddy and cell mate sitting over there at the next table?" since the questions were designed to show bias and prejudice on the part of the witness, and this is a proper function of cross-examination.

17. Criminal Law § 42.2— physical evidence connected with crime — failure to show objects had undergone no material change

In this prosecution for first degree murder and armed robbery, two "football candies," a toboggan, candy wrappers, a red pullover shirt with a hood, and a pistol and bullets were not inadmissible because the State failed to offer positive testimony that the objects had undergone no material change where all of the items were positively identified as being the very items recovered by those investigating the incident in question; there was no evidence that the condition of any of the items had changed between the time of their recovery on the day of the crimes and the day of trial; the very nature of the items themselves would make a change in condition extremely unlikely in the short time between the commission of the crimes and the trial; and the fact that the items had undergone no material change was clearly implied in the testimony of the officer who identified them.

18. Criminal Law § 33.1— relevancy of candies and toboggan

In this prosecution for first degree murder and armed robbery, evidence that candy wrappers discovered in the pocket of a jacket found in a truck used by defendants matched in appearance wrappers on candy found on the counter of the store where the crimes occurred was relevant as a circumstance tending to show that defendants had, at some time, been in the store, and a dark toboggan, also found in the truck, was relevant inasmuch as a witness observed one defendant wearing a dark toboggan shortly after the crimes were committed.

19. Criminal Law §§ 10.3, 11— failure to charge on accessory before or after the fact

The trial court did not err in failing to instruct as to one defendant on the offenses of accessory before and accessory after the fact to the crimes of armed robbery and murder where the evidence showed that both defendants were present at the scene and were acting together in the commission of the armed robbery, and that the murders occurred in furtherance of their common purpose to commit this crime or as a natural consequence thereof.

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

Where defendants were convicted of the capital offense of first degree murder on the theory that the murder was committed during the perpetration of an armed robbery, it was error for the court to submit the underlying felony of armed robbery to the jury in the sentencing phase of the trial as an aggravating circumstance, and defendants who were sentenced to death are entitled to a new sentencing hearing since the jury may well have decided that the remaining aggravating circumstances were not sufficiently substantial to call for imposition of the death penalty had the jury not considered the underlying felony as an aggravating circumstance.

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

The trial court properly submitted to the jury the aggravating circumstance as to whether the first degree murder of a storekeeper was "especially heinous, atrocious or cruel" where the State's evidence showed that the storekeeper, after opening his cash register in response to defendants' demands, begged for his life and that one defendant mercilessly shot him to death. However, the trial court erred in submitting the aggravating circumstance as to whether the death of an innocent bystander was "especially heinous, atrocious or cruel" where the State's evidence showed that one defendant, as he was running from the store, shot and killed the bystander who had pulled up to purchase gas, there was no unusual infliction of pain or suffering on the victim, and the brutality of the killing did not exceed that normally present in a case of first degree murder.

22. Criminal Law § 135.4— first degree murder — sentencing hearing — competency of criminal record

Portions of defendant's criminal record which were read to the jury during the sentencing phase of a first degree murder case were relevant and competent to negate evidence that defendant had no significant history of prior criminal activity which was submitted to the jury on his behalf as a possible mitigating circumstance.

23. Criminal Law § 135.4— murder committed in perpetration of robbery — submission of aggravating circumstance of commission for pecuniary gain

In a prosecution for the first degree murder of a storekeeper during the perpetration of an armed robbery and the first degree murder of an innocent bystander who had pulled up to the store to purchase gas, the trial court properly submitted to the jury during the sentencing phase of the trial the aggravating circumstance as to whether the bystander was murdered for "pecuniary gain" although the evidence showed that the money had already been obtained from the storekeeper at the time the bystander was shot, since the murder of the bystander was apparently committed in an effort to eliminate a witness to the robbery, and the jury could find that both murders were committed for the purpose of permitting the defendants to enjoy pecuniary gain.

24. Criminal Law § 135.4— murder committed in perpetration of robbery — submission of aggravating circumstance of commission for pecuniary gain

There is no error in submitting the aggravating circumstance as to whether a murder was committed "for pecuniary gain" in a felony-murder case in which the underlying felony is robbery notwithstanding the rule that the robbery itself cannot be submitted as such a circumstance, since the circumstance that the capital felony was committed for pecuniary gain does not constitute an element of the offense.

Justice MEYER did not participate in the consideration and decision of this case.

BEFORE *Judge Donald L. Smith* presiding at the 14 May 1979 Session of ROBESON Superior Court, defendants were convicted by a jury of armed robbery and two counts of murder in the first

degree. At the sentencing phase of the trial[1] the jury recommended that defendant Moore be sentenced to life imprisonment for the murder of Dayton Hodge and to death for the murder of Allen Watts. As to defendant Oliver the jury recommended death in both murder cases. From judgments imposing life sentences in the robbery cases and sentences according to the jury's determination in the murder cases, defendants appeal of right to this Court pursuant to G.S. 7A-27.

Rufus L. Edmisten, Attorney General, by Tiare Bowe Smiley, Assistant Attorney General, for the state.

Murchison, Fox & Newton, by Frank B. Gibson, Jr., Attorneys for defendant appellant Oliver.

Robert D. Jacobson, Attorney for defendant appellant Moore.

EXUM, Justice.

Defendants assign a multitude of errors to the guilt and sentence determination phases of the trial. Many are frivolous; because, however, this is a capital case, we touch upon them all.[2] We find no error in the guilt phase warranting a new trial. For error in the sentencing phase we vacate the death sentences and remand those cases in which the death penalty was imposed for new sentencing hearings and determinations.

The state's evidence tends to show as follows:

On the morning of 12 December 1978 Bobby Hodge, a seven-year old boy at the time of trial, rode with his grandfather, Dayton Hodge, to Watts' Convenient Mart in Fairmont. The store was operated by Allen Watts. While Dayton Hodge was putting gas in his truck Bobby saw a man, whom he identified as defendant Oliver, run from Watts' store with a pistol in his hand. This man shot his grandfather at close range with the pistol and then "ran to

[1] North Carolina General Statute 15A-2000 requires a separate proceeding to determine the sentence of a defendant convicted of the capital felony of first degree murder.

[2] Not only are many of the assignments of error frivolous, but the briefs are poorly organized, difficult to follow, and on the whole unpersuasive. We have nevertheless examined the case with care to insure that the convictions and sentences are free from prejudicial error.

the woods." Shortly thereafter, at approximately 9:35 a.m., Mitchell Ivey was driving by Watts' store. He observed a "tall guy running away" wearing a long brown coat with a "silver shiny object in his hand." He then saw another person wearing "something red." "The first guy was running. The big, tall guy was running and the little guy turned around and started running maybe ten feet away . . . ." Bobby Hodge flagged Ivey, and Ivey stopped. Ivey observed Dayton Hodge lying beside his truck with blood on his head and on the pavement. He went inside the store and found Allen Watts lying on his back with "blood all on his side." Ivey telephoned police. Ivey identified defendants Moore and Oliver as the persons he saw running down the shoulder of the road.

Emergency medical technicians with the Robeson County Ambulance Service arrived and transported both Dayton Hodge and Allen Watts to Southeastern General Hospital in Lumberton. When they arrived at the scene neither Dayton Hodge nor Allen Watts displayed any vital signs. Hodge died from a bullet which entered the back of his neck and lacerated his spinal cord. Watts died from a bullet which entered the right side of his forehead and pierced his brain. Both entry wounds were about three-eighths inches in diameter.

Robeson County deputy sheriffs arrived at the scene at approximately 9:50 a.m. They searched a wooded area around the Square Deal Warehouse, near which was parked a white over brown Chevrolet truck approximately two to three tenths of a mile north of Watts' store on Highway 41. They apprehended defendants Oliver and Moore in the wooded area. Oliver jumped up from some thick underbrush with his hands up and was handcuffed. They discovered Moore some 81 feet away lying in a ditch. They found a paper sack containing $225.00 cash in ones, fives, and tens, and fifty-three $1.00 foodstamps in the ditch near where Moore was lying. Moore wore a red sweatshirt with a hood. Thirty minutes after deputies apprehended defendants they returned to the area and found a long, brown coat partially submerged in water in the ditch.

Johnny Lee Lewis, while an inmate in the Robeson County jail on 18 January 1979, overheard defendant Moore talking with other inmates. Moore said he was "in Mr. Watts' store two or three times that week, and on the night before the shooting." Moore said before he left home on 12 December 1978 "he started to take his 12-gauge shotgun and changed his mind at the last minute." He went to

Watts' store and got candy and a drink. When Watts opened the cash register, Moore said, "he pulled out a gun and Mr. Watts said 'Please don't shoot me. Go ahead and take the money.'" Then Moore "just shot Mr. Watts and then laid the gun on the counter."[3]

Other circumstantial evidence strongly implicated both defendants Moore and Oliver as principal perpetrators of the two murders and the robbery. William Lands sold Oliver a .38 caliber pistol and a black holster in August 1978. On 30 April 1979 deputies returned to the wooded area where they had earlier apprehended defendants. They found the pistol sold to Oliver, partially buried, in the area some 600 feet from where defendants were apprehended. Marion Eady sold Oliver a 1972 Chevrolet, white over brown pickup truck on 22 September 1978. This truck was parked near the Square Deal Warehouse on the day of the crimes.

On the evening of 11 December 1978, shortly after 7:00 p.m., defendants came into Watts' store and "just walked around and looked and turned and went down the middle aisle and then came back up the first aisle." Oliver bought vienna sausages. Then the men "moved around in the store continuously." They walked "up and down the aisles for seven to eight minutes." Defendants were seen together at 8:00 a.m. on 12 December 1978 in a "brown pickup truck." Another witness observed two men walking toward Watts' store at approximately 9:00 a.m. on 12 December. One had on "something red. Looked like maybe a red hood. And the other one had on a coat about knee-length." Yet another witness identified both Moore and Oliver in Watts' store on 12 December at approximately 9:15 a.m.

Witnesses who observed defendants at or near the time of the crimes consistently said Oliver was wearing a long, knee-length coat similar to that found in the woods near where he was arrested. They said Moore was wearing a red sweatshirt with a hood on it like that which he was wearing at the time of his arrest. Another witness said Moore was wearing a dark toboggan.

[3] Out of the presence of the jury on *voir dire* Johnny Lee Lewis testified that Moore also said, "Oliver picked the gun up off the counter and he carried the money out of the store." The trial judge assiduously prevented any out-of-court statement made by Moore which tended to implicate defendant Oliver from being placed before the jury so as to avoid violating the rule laid down in *Bruton v. United States*, 391 U.S. 123 (1968).

Oliver's fingerprints were found on the Chevrolet truck parked at the Square Deal Warehouse. Found in the truck was the black holster sold to Oliver by William Lands; a blue coat similar to that which some witnesses said Moore had worn over his red sweatshirt; and a black toboggan. In the right pocket of the blue coat were several pieces of multi-colored Christmas candy wrapping paper which matched the paper on candies found on the counter of Watts' store on the day of the crimes.

Defendants offered evidence as follows:

Oliver's father testified that although Oliver lived with him, he had never seen the long, brown coat allegedly worn by his son, nor had he ever seen his son with a pistol.

According to the testimony of state's witness Johnny Lee Lewis, Robert Earl Brown was one of those inmates to whom Moore made incriminating statements. Brown, testifying for Moore, denied that the conversation ever occurred. He related several exculpatory statements made by Moore.

Defendants filed separate briefs. Assignments of error in the guilt phase made by both defendants will be discussed in Part I of the opinion. Assignments of error in the guilt phase raised only by defendant Oliver will be discussed in Part II; assignments of error in the guilt phase raised only by defendant Moore, in Part III; and errors assigned in the sentencing phase of the trial, in Part IV.

I.

[1] Defendants first assign error in the denial of their motion for a change of venue.[4] Defendants allege that adverse pre-trial publicity precluded their receiving a fair trial in Robeson County. In support of the motion defendants offered newspaper clippings, transcripts

[4] Motions for a change of venue are governed by G.S. 15A-957:

"*Motion for change of venue.*—If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:

(1) Transfer the proceeding to another county in the judicial district or to another county in an adjoining judicial district, or

(2) Order a special venire under the terms of G.S. 15A-958.

The procedure for change of venue is in accordance with the provisions of Article 3 of this Chapter, Venue."

of radio and television news broadcasts and the testimony of five media representatives. Evidence offered or stipulated tended to show: The *Robesonian*, a local newspaper with a circulation of about 14,000, printed five articles discussing the murders and the apprehension of defendants. The *Fairmont Town Messenger*, a newspaper with a circulation of approximately 1,750, printed six such articles. The *Whiteville News Reporter*, a newspaper with a circulation of approximately 40 in Robeson County, published one such article. Broadcasts concerning the pending trial from WTSB radio, reaching an indeterminable number of persons throughout Robeson County, were made on nine different days. In addition, an undetermined number of broadcasts were made by WAGR radio reaching an indeterminable number of persons in Robeson County. The trial court took judicial notice of the fact that Robeson County has a population of approximately 90,000 persons.

A motion for change of venue is addressed to the sound discretion of the trial judge and his ruling will not be overturned on appeal in the absence of an abuse of discretion. *State v. Barfield*, 298 N.C. 306, 320, 259 S.E. 2d 510, 524 (1979), *cert. denied*, ___ U.S. ___, 65 L. Ed. 2d 1137, 100 S.Ct. 3050 (1980). In *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, 429 U.S. 809 (1976), the defendant offered exhibits similar to those relied on here in support of his motion for change of venue. In *Alford* we concluded that with the exception of the coverage of the defendant's arrest, the articles were of a general nature likely to be found in any jurisdiction to which the trial might be moved. Here, as in *Alford*, the coverage of the arrests only indicated that defendants had been charged with a crime. The articles were factual, non-inflammatory, and contained for the most part information that could have been offered in evidence at defendants' trial.

Judge Gavin, who ruled on the motions for change of venue, fully considered defendants' arguments. When the jury was selected at trial, defendants were allowed adequate opportunity for *voir dire* examination of potential jurors. No juror objected to by defendants because of pre-trial publicity was seated on the jury.

The burden of showing "so great a prejudice" by reason of pretrial publicity that a defendant cannot receive a fair trial is on defendant. *State v. Faircloth*, 297 N.C. 100, 105, 253 S.E. 2d 890, 893 (1979). Defendants did not successfully carry this burden. The motion for change of venue was properly denied.

[2] Defendants next challenge the denial of their motions for a probable cause hearing. At defendants' first appearance in this matter a probable cause hearing was scheduled for 20 December 1978. The state's request for a continuance was granted and the hearing rescheduled for 4 January 1979. The grand jury returned indictments against defendants on 2 January 1979. Defendants Oliver and Moore moved, respectively, for a probable cause hearing on 25 January and 22 January 1979. The motions were denied. Defendants contend that not affording them a probable cause hearing conflicts with the controlling North Carolina statute and is a denial of equal protection and due process of law. We do not agree.

The North Carolina statute upon which defendants rely is G.S. 15A-606(a):

> "*Demand or waiver of probable-cause hearing.*—(a) The judge must schedule a probable-cause hearing unless the defendant waives in writing his right to such hearing. A defendant represented by counsel, or who desires to be represented by counsel, may not before the date of the scheduled hearing waive his right to a probable-cause hearing without the written consent of the defendant and his counsel."

Defendants maintain that this section changes our former rule which allowed trial following indictment without a probable cause hearing. *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975), *cert. dismissed*, 423 U.S. 918 (1975). Defendants' argument was fully considered and rejected by this Court in *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978). It would serve no good purpose to repeat the rationale of *Lester;* suffice it to say that we see no need to disturb the conclusion we reached in that case.

Lester also disposes of defendants' claim that failure to provide them a probable cause hearing denied them due process and equal protection under the North Carolina and United States Constitutions. "[N]either [constitution] requires a preliminary hearing as a necessary step in the prosecution of a defendant." *Id.* at 224, 240 S.E. 2d at 396. Since *Lester*, the California Supreme Court has concluded that deprivation of a post-indictment probable cause hearing denies a defendant equal protection of the law as guaranteed by the *California* Constitution. *Hawkins v. Superior Court*, 22 Cal. 3d 584, 586 P. 2d 916, 150 Cal. Rptr. 435 (1978). The rationale of

Hawkins has been rejected expressly by Nevada, *Seim v. State*, 95 Nev. 89, 590 P. 2d 1152 (1979), and Illinois, *People v. Franklin*, 80 Ill. App. 3d 128, 398 N.E. 2d 1071 (1979). Federal courts have uniformly held that a defendant is not constitutionally entitled to a probable cause hearing following a grand jury indictment. *Harris v. Estelle*, 487 F. 2d 1293 (5th Cir. 1974); *United States v. Anderson*, 481 F. 2d 685 (4th Cir. 1973), *aff'd* 417 U.S. 211 (1974); *United States v. LePera*, 443 F. 2d 810 (9th Cir. 1971), *cert. denied*, 404 U.S. 958 (1971); *United States v. Conway*, 415 F. 2d 158 (3d Cir. 1969), *cert. denied*, 397 U.S. 994 (1970). We continue to adhere to our decision in *Lester*. This assignment of error, consequently, is overruled.

[3] Defendants assign as error the trial court's denial of their motion for sequestration of jurors and individual *voir dire* of jurors. The *voir dire* procedure used followed the pattern approved by this Court in *State v. Barfield, supra*. Twelve prospective jurors were seated in the jury box, and the remainder of the jury pool was sequestered outside the courtroom until a replacement was needed for a venireman who had been excused. Defendants contend the record shows that jury selection became more difficult as it wore on because jurors realized that by expressing adamant opposition to the death penalty they would be excused. Defendants allege that this produced a kind of "domino effect" alluded to by defendant in *Barfield*, and resulted therefore in the impaneling of an unrepresentative jury. As we did in *Barfield*, we now conclude this argument to be speculative at best and unpersuasive. The record does not support defendants' contentions. These motions were addressed to the sound discretion of the court whose rulings will not be disturbed except for an abuse of discretion. *State v. Barfield, supra*, 298 N.C. at 323, 259 S.E. 2d at 526; *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978). Defendants have shown no abuse. The assignment of error is overruled.

[4—6] With regard to the jury selection process defendants first allege the trial court committed error in allowing the state to challenge for cause certain jurors who voiced general objections to capital punishment or expressed only conscientious or religious scruples against the death penalty. A close examination of the record belies defendants' contentions on this point. Rather, jurors were excused for cause only where they admitted a specific inability to impose the death penalty under any circumstances. Thus the

challenges met the *Witherspoon*[5] test. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, ___ U.S. ___, 64 L. Ed. 2d 796, 100 S.Ct. 2165 (1980). Defendants next contend that the "death qualification" jury selection process deprived them of a jury selected from a representative, fair cross-section of the community on the guilt phase of the case. This argument was expressly rejected by a majority of the Court in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1979). Finally, defendants also complain of the trial court's refusal to allow defendants to ask additional questions of jurors disqualified because of their opposition to the death penalty. When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged. *See State v. Harris*, 283 N.C. 46, 194 S.E. 2d 796 (1973), *cert. denied*, 414 U.S. 850 (1973). Since defendants have made no showing that additional questioning would likely have produced different answers, their position is without merit.

[7] Defendants moved in the trial court on 11 May 1979 to dismiss the charges because their statutory right[6] to a speedy trial under G.S. 15A-701[7] was violated. The statute requires a defendant's trial to begin "[w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last." G.S. 15A-701(a1)(1) (1980 Interim Supplement). Defendants here were indicted on 2 January 1979; trial began on 14 May 1979, more than 120 days thereafter. But 15A-701(b) goes on to provide:

> "The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

[5] *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *reh. denied*, 393 U.S. 898 (1968).

[6] Defendants raise no claim that their Sixth Amendment speedy trial right was denied.

[7] The statute applies to a defendant "who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1981 . . . ." G.S. 15A-701(a1) (1980 Interim Supplement).

(1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from . . . .

d. Hearings on pretrial motions or the granting or denial of such motions . . . ."

Defendant Moore filed a motion for change of venue[8] on 27 December 1978. Defendant Oliver filed such a motion on 5 January 1979. Both motions for change of venue were heard and denied on 25 January 1979. In denying the motions to dismiss Judge Smith ruled that the filing of a motion for change of venue tolls the running of the 120-day statutory period until the motion is determined.

Defendant Moore contends that since the calendaring of a hearing on a change of venue motion is controlled by the state, the period during which the motion is pending should not be excluded from the statutory speedy trial period. He maintains that his motion could have been heard on 2 January 1979, the date of the indictment. Thus only the days between 27 December and 2 January should be excluded. We reject this argument. While motions should be promptly calendared for hearing, both sides are entitled to a reasonable time within which to prepare. We conclude that a motion for change of venue is included within the statutory reference to "pretrial motions." G.S. 15A-701(b)(1)(d). Provided the motion is heard within a reasonable time after it is filed and the state does not delay the hearing for the purpose of thwarting the speedy trial statute, the time between the filing of the motion and its disposition is properly excluded in computing the time within which a trial must begin. The time here between filing and disposition of the motion, 29 days, we find to be a reasonable time. There is nothing in the record to show any purposeful delay on the part of the state. Therefore this time was properly excluded by Judge Smith; there was no error in his denial of defendant Moore's motion.

Defendant Oliver argues that only those motions whose determination will necessarily delay the date of trial beyond the 120-day period should be considered within the meaning of G.S. 15A-701(b)(1)(d). Since the motion for change of venue *was determined* well

[8] Defendants also filed motions for discovery, a bill of particulars, a pre-trial release order, individual *voir dire* and sequestration of jurors, dismissal, and for a probable cause hearing.

before the expiration of the 120-day period, the state's opportunity to try defendant within the period was not affected and the trial date was not necessarily delayed by the motion. This argument has some merit; but we reject it insofar as it applies to motions for change of venue. The state is in fact stymied in its scheduling of any case for trial until a ruling is made on such a motion. A motion for change of venue so long as it is pending must necessarily delay the setting of a case for trial until it is determined, and this is so whether the determination be soon after the 120-day period begins to run or at some later time within the period. We believe the legislature intended through G.S. 15A-701(b)(1)(d) to exclude from the 120-day speedy trial period all time reasonably required to determine any motion the determination of which must be made before a case can be scheduled for trial. A motion for change of venue, as we have noted, is such a motion. The motion here was determined within a reasonable time. Judge Smith, therefore, properly excluded the time during which this motion was pending. Oliver's assignment of error to Judge Smith's denial of his motion is overruled.

[8] Defendants assign as error the failure of the trial court to award a mistrial because of alleged prosecutorial misconduct during the state's closing argument in the guilt phase. The record shows that the prosecutor on one occasion waved before the jury the .38 caliber revolver which was offered in evidence in the trial. On another occasion he made a reference to the weapon while displaying it to the jury. Defendants' objections were overruled. The rulings were proper. The gun was in evidence. It was not improper for the prosecutor to utilize it in his summation so long as he did not attempt to draw inferences from the weapon which were not supported by the evidence or to frighten or intimidate the jury with it. The prosecutor may argue "the facts in evidence and all reasonable inferences to be drawn therefrom . . . ." *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). The record reveals no improper use of the weapon in the prosecutor's closing argument.

Defendants contend that all charges against them should have been dismissed at the close of the evidence on the ground that the evidence was insufficient to be submitted to the jury. The contention is frivolous. There was substantial evidence of all elements of each offense of which the defendants were convicted. Their assignments of error directed to the denials of their motion to dismiss for

insufficiency of the evidence are overruled.

II.

We turn now to the guilt phase assignments of error brought forward by defendant Oliver.

[9] Defendant Oliver claims error in the trial court's denial of his motion to dismiss the murder indictments on the ground they described him as being a resident of Robeson County when in fact he resided in Columbus County. The indictments recited that "John Wesley Oliver, late of the County of Robeson . . ." committed the offenses charged. Defendant's argument is, of course, frivolous. His residence is immaterial. General Statute 15A-924 requires a criminal pleading to contain "[t]he name or other identification of the defendant . . . ." The indictments contained defendant's name. The allegations as to his county of residence, if this is what was intended by the language in the indictment, is at most surplusage. Consequently any such error is not fatal. The motion to dismiss was properly denied.

[10] Defendant Oliver assigns as error the denial of his motion for a continuance filed 8 May 1979 as a result of the discovery, on 2 May 1979, of the .38 caliber pistol. In the original discovery order entered 24 January 1979, the presiding judge had ordered that all discovery be completed two weeks before the trial. Defendant Oliver contends this order was violated because he was unable to view the pistol a full two weeks before the trial commenced on 14 May 1979. The argument is frivolous. The state could not produce what it had not yet discovered. The day after the discovery of the weapon, 3 May, the state informed defendant Oliver's attorney that the weapon had been discovered. Defendant's attorney, however, chose not to view the weapon until 9 May after which the attorney received by mail a copy of the permit for the purchase of the weapon issued to defendant Oliver. The bullet which killed Hodge could not be located, and the bullet which killed Watts was badly fragmented. No ballistics analysis was possible. Defendant's preparation for trial was in no way inhibited by the late discovery of this pistol. There was no error in denying the motion for continuance.

[11] Defendant Oliver claims error in the denial of his motion to suppress both the out-of-court and in-court identifications of him by the witness Bobby Hodge. A *voir dire* was conducted on the motion. The uncontradicted testimony of Deputy Sheriff Joel Locklear and

the witness Bobby Hodge on *voir dire* tended to show as follows: Shortly after the incident Bobby Hodge described his grandfather's assailant to Deputy Locklear as being a black man about the same height as Locklear with hair "all over his face," wearing a long coat, and wielding a pistol about the same color as the deputy's with a brown handle. Bobby was then taken to the police station where he was told that "I could see that man again." At the police station, before any formal charge was made against defendants, Bobby first viewed defendant Moore through a two-way mirror. Bobby said that he had never seen Moore before. Moore was removed, and defendant Oliver was led into the room for Bobby 's viewing. Bobby upon seeing Oliver immediately and unhesitatingly identified him as the man who had shot his grandfather, "except," Bobby said, "he had on a long coat down to here." At that time Deputy Locklear instructed the other officers to go out and look for a coat, "because that little boy knew what he was talking about." Moore was then led back into the room in order to give Bobby another opportunity to see him. Moore and Oliver were then in the viewing room together. Bobby said that he had never seen Moore before but repeated his identification of Oliver as the man who had shot his grandfather. When asked, "Are you sure, son?" Bobby replied, "I'm sure that's the man . . . ." During *voir dire* Bobby also identified Oliver in the courtroom as being the man who shot his grandfather. Upon this evidence Judge Smith concluded that both the out-of-court identification procedure and Bobby's in-court identification of defendant Oliver were admissible into evidence. Before the jury Bobby Hodge unhesitatingly and without equivocation identified defendant Oliver as the man who shot his grandfather. He also testified regarding his actions at the pre-trial identification procedure.

Defendant Oliver contends that the out-of-court confrontation between the witness Bobby Hodge and Oliver "was so unnecessarily suggestive and conducive to irreparable mistaken identification that he [Oliver] was denied due process of law," *Stovall v. Denno*, 388 U.S. 293, 302 (1967); therefore Hodge's in-court and out-of-court identification of Oliver should have been suppressed. We disagree.

Both the United States Supreme Court and this Court have criticized the "practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup . . . ." *Stovall v.*

Denno, supra, 388 U.S. at 302; *State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128 (1979); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902 (1976). This Court has recognized that such a procedure, sometimes referred to as a "showup," may be "inherently suggestive" because the witness "would likely assume that the police had brought [him] to view persons whom they suspected might be the guilty parties." *State v. Matthews, supra*, 295 N.C. at 385-86, 245 S.E. 2d at 739. We find, consequently, that the investigator's statement to Bobby Hodge to the effect that the boy would be taken to the police station where he "could see that man again" coupled with the showup procedure was unnecessarily suggestive.

This determination, however, does not end our inquiry. In all investigatory identification procedures "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'" *Neil v. Biggers*, 409 U.S. 188, 198 (1972). When the pre-trial investigatory identification procedures have created a likelihood of irreparable misidentification, neither the pre-trial procedures nor an in-court identification is admissible. *Id., United States v. Simmons*, 390 U.S. 377 (1968). Stated another way, in-court identifications are permissible "only if the out-of-court suggestiveness was *not* 'conducive to irreparable mistaken identify.' In this jurisdiction, this often meant that the in-court identification was admissible if the state could show that the in-court identification was of independent origin from the suggestive pre-trial procedures." *State v. McCraw*, 300 N.C. 610, 614, 268 S.E. 2d 173, 176 (1980). If an out-of-state identification procedure is so suggestive that it leads to a substantial likelihood of misidentification, the out-of-court identification is inadmissible. *Neill v. Biggers, supra.*

Suggestive pre-trial identification procedures, even if unnecessary, do not create a substantial likelihood of misidentification so as to preclude an in-court identification nor are the pre-trial proce- 601, 260 S.E. 2d 629 (1979); *State v. Headen*, 295 N.C. 437, 245 S.E. stances surrounding the crime itself "the identification possesses sufficient aspects of reliability." *Manson v. Brathwaite*, 432 U.S. 98, 106 (1977); *State v. McCraw, supra; State v. Nelson*, 298 N.C. 573, 601, 260 S.E. 2d 629 (1979); *State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1978). As the Supreme Court noted in *Manson*, 432 U.S. at 114:

"[R]eliability is the lynchpin in determining the admissi-

> bility of identification testimony. . . . The factors to be considered are set out in Biggers, 409 U.S. at 199-200 . . . . These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself."

This Court has applied *Manson* in at least three recent cases so as to conclude that an in-court identification was admissible despite possible unnecessarily suggestive out-of-court identification procedures. *State v. McCraw, supra; State v. Nelson, supra; State v. Headen, supra. Manson*, itself, dealt with an unnecessarily suggestive pre-trial identification confrontation. The Supreme Court concluded that notwithstanding its suggestiveness it was admissible because after weighing the factors indicating reliability of the identification against the corrupting effect of the suggestiveness itself, the conclusion was inescapable that the identification was reliable and therefore admissible.

So it is here. Considering the totality of circumstances and applying the standards laid down in *Biggers* and *Manson*, we conclude that Bobby Hodge's identification of Oliver was inherently reliable so that both his out-of-court and in-court identifications were properly admitted into evidence. Bobby had ample opportunity to view his grandfather's assailant since the shooting occurred near him, in an open area, outside, during daylight. Bobby was no casual observer but a witness to the slaying of his own grandfather. He gave an accurate description of Oliver prior to the showup. His identification was consistent, unequivocal and made without the slightest hesitancy or uncertainty. Bobby, consequently, was not as subject to suggestion as would have been the case with a witness who was less sure of the appearance of the suspect. Bobby's independence of mind was further demonstrated by the fact that he was quite careful not to implicate defendant Moore but was quite firm in his consistent identification of defendant Oliver. Finally the length of time between the crime and the confrontation was no more than a few hours. Weighing these factors against the corrupting effect of the suggestiveness of the pre-trial identification procedure itself, we conclude that there was not a substantial likelihood of

misidentification. All of Bobby Hodge's identification testimony was, therefore, properly admissible.

III.

[12] Defendant Moore brings forward a number of additional questions. First, he assigns error to the trial court's denial of his motion to set bond. This argument is frivolous. Moore orally moved at arraignment for bond. The district attorney objected. Bond was denied when the court determined that Moore would be tried on a charge of first degree murder and that the state would seek the death penalty. Whether a defendant charged with a capital offense is entitled to a bail bond is a matter in the discretion of the trial judge. G.S. 15A-533. We find no abuse of that discretion here.

[13] Defendant Moore complains that the trial court erred in failing to allow his challenge for cause of alternate juror Locklear. In response to questions by defense counsel, Locklear stated that she was sixty-five years old, had a history of heart trouble, took medication daily for high blood pressure, and if she experienced pain or became upset she utilized nitroglycerin pills. She thought her health would allow her to sit for one day, but beyond that she was not sure, except that she felt a trial lasting more than a week would be too strenuous. In response to inquiries of the court, juror Locklear also stated that if her health did not interfere, she could render a fair and impartial verdict. The court observed that the work of a juror was not strenuous, that often veniremen with heart conditions serve on a jury, and that counsel on both sides had agreed that the trial would not last more than a week. The court then denied defendant Moore's challenge for cause of juror Locklear.

Questions concerning the competency of a juror are within the discretion of the trial judge, whose rulings thereon will not be overturned on appeal absent an abuse of discretion or error of law. *State v. Smith*, 290 N.C. 148, 155, 226 S.E. 2d 10, 15 (1976), *cert. denied*, 429 U.S. 932 (1976). Judge Smith fully questioned the juror about her health and allowed defense counsel the opportunity to do the same. No abuse of discretion has been shown. We also note that juror Locklear was ultimately removed on peremptory challenge by defendant Oliver.

By his next assignment of error, defendant Moore challenges the use of leading questions in the examination by the district

attorney of several of the state's witnesses. Defendant cites six questions asked of four different adult witnesses and two questions asked of Bobby Hodge, and argues that, cumulatively, the use of leading questions over the course of the trial was prejudicial. Objections, however, to five of the questions were sustained. As for the question asked of Bobby Hodge[9] the objection to which was overruled, we find it to be within the rules permitting some leading in the examination of young witnesses. *State v. Cobb*, 295 N.C. 1, 243 S.E. 2d 759 (1978).

Even if the question were improper we are satisfied the answer could not have prejudiced defendant.[10]

[14] Defendant Moore also challenges the determination by the trial court that Bobby Hodge, age seven, was a competent witness.

---

[9] "Q. All right. Did you see anything on the ground or on the pavement there under his [grandfather's] head, or not?

MR. GIBSON: Object.

THE COURT: Overruled.

This constitutes Defendant Oliver's
EXCEPTION NO. 160

THE WITNESS: No, sir.
Q. (By Mr. Britt) Did you see anything, any blood or anything?
MR. JACOBSON: Object to leading, Your Honor.
THE COURT: Overruled.

This constitutes Defendant Moore's
EXCEPTION NO. 161

THE WITNESS: I saw some blood.
Q. (By Mr. Britt) You saw what?
A. I saw blood.

This constitutes Defendant Moore's
EXCEPTION NO. 162.

I don't remember where the blood was."

It is clear that the youthful witness had indeed seen some blood. He did not recall having seen it under the head of his grandfather. Some amount of leading was an acceptable method of eliciting this fact from this witness. The matter, in any event, was of little moment.

[10] Several other witnesses testified without objection to the presence of blood under Dayton Hodge's head.

There is no fixed age below which one is incompetent as a matter of law to testify. *State v. Cooke*, 278 N.C. 288, 179 S.E. 2d 365 (1971). The test of competency of a child as a witness is the capacity of the child to understand and to relate, under the solemn obligation of an oath, facts which will assist the jury in reaching its decision. *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966). The determination of a child's competency to testify rests in the sound discretion of the trial judge. *State v. Cooke*, 280 N.C. 642, 187 S.E. 2d 104 (1972). Judge Smith conducted an extensive *voir dire* of Bobby Hodge to determine his competency. Bobby testified that he knew the importance of telling the truth, knew the difference between truth and falsehood, and intended to tell the truth. The trial court's conclusion that the witness was competent was well within the boundaries of sound discretion.

Defendant Moore raises the additional objection that Bobby's answers on *voir dire* were in response to leading questions of the prosecutor. The rule allowing some leading in examining a child on direct examination applies with equal force to the *voir dire* examination of a child. Absent an abuse of discretion resulting in actual prejudice to a defendant, a decision by the trial judge to allow some leading of a youthful witness is not subject to reversal on appeal. Defendant Moore makes no showing of abuse or prejudice; his assignment of error is without merit.

[15] Defendant Moore next charges the trial court with error in allowing the district attorney to offer into evidence what defendant describes as incompetent and prejudicial matter for the sole purpose of inflaming the jury. Defendant complains of a portion of the testimony of Minnie Waddell, Elbert Ford, and Robert Vereen. Minnie Waddell testified, in part, that she had seen Moore and Oliver together "at different times" prior to 12 December 1978. Elbert Ford testified that on 12 December 1978 at approximately 9:00 a.m. he observed "two boys walking down south toward Watts' store." The following then occurred:

> "Q. All right. Do you know what color these people were?
>
> A. Well, no, I don't, but they were dark people. I don't know what color they were.
>
> Q. All right.
>
> MR. JACOBSON: Move to strike.

THE COURT: Denied.

This constitutes Defendant Moore's
EXCEPTION NO. 141"

Robert Vereen was permitted to testify that he had seen the defendant Moore in Vereen's father's store on 11 December 1978 and to give a description of defendant Moore's clothing at that time.

Regarding Minnie Waddell's testimony defendant's objection to it was sustained, his motion to strike was allowed, and the jury was instructed to disregard it. Elbert Ford's testimony as to what he observed shortly before the incident under investigation was admissible. As to Robert Vereen's testimony, to the extent that his description of defendant Moore's clothing on the day before the shootings matched descriptions given of defendant's clothing on the day of the shooting, his testimony is admissible. Even if we assume, for the purpose of argument, error in the admission of Ford's and Vereen's testimony, we fail to see how such testimony was offered for the purpose of inflaming the jury or how it could have had such an effect. Its admission would be, at most, harmless error. *See* 1 Stansbury's North Carolina Evidence § 77 (Brandis rev. 1973).

[16] Defendant Moore further objects to certain cross-examination by the district attorney of defense witness Robert Brown claiming that it exceeded the boundaries of "appropriate" cross-examination. Brown testified on direct that he had met defendant Moore in jail where they became cell mates for two months. During this time he overheard defendant Moore say that on the day of the murders Moore was trying to fix his truck in the vicinity of Watts' store. He went into the woods to relieve himself and the "next thing he know, 'Boom,' police." Brown testified further that defendant Moore had never told him that he, Moore, had killed Allen Watts. On cross-examination the district attorney was permitted to ask, "Brown, you will do anything to cover up for your old friend, won't you?" Again, the district attorney was permitted to ask, "Were you covering up for your old buddy and cell mate sitting over there at the next table?" These questions were permissible cross-examination. They were designed to show, if they could, bias and prejudice on the part of the witness. This is a proper function of cross-examination.

On another occasion the district attorney was permitted to ask the witness Brown whether he was tried and convicted in Robeson

County for armed robbery. The witness replied that he was "tried and railroaded, yeah, in this courthouse." The district attorney was then permitted to ask the witness, over defendant Moore's objection, if he had testified in the case against him. The witness replied that he had. Whether the witness had testified in his own case was not a proper subject for cross-examination in the case against defendant Moore. The fact that he testified or did not testify in no way bears on his credibility nor does it tend to impeach him as a witness. The inquiry, in short, was irrelevant. Even so, we are satisfied the result of the trial would not have been different had this incident not occurred; therefore defendant was not prejudiced by this aspect of the district attorney's cross-examination.

[17] Defendant Moore challenges the admission of certain evidence offered by the state on the ground the state failed to show that the items in question had undergone no material change in their condition since the incident occurred and on the further ground, as to some of the items, of irrelevancy. The items offered by the state were: two "football candies," a *Robesonian* newspaper, a plastic bag of paper money and food stamps, a blue coat with a fur lined collar, two toboggans, several pieces of multi-colored Christmas wrappings, a red pullover shirt with a hood, and a pistol and bullets. State's witness Lee Sampson, an SBI agent specializing in crime scene investigations, identified the "football candies" and the *Robesonian* newspaper as having been recovered by him from the counter at Watts' store on 12 December 1978. He identified the coat and two toboggans as having been recovered from the truck used by defendants on the day of the crimes. He identified the multi-colored Christmas wrappings matching that on the "football candies" as having come from the right coat pocket of the coat found in the truck. He identified the red pullover shirt with a hood as being the shirt which defendant Moore was wearing when the witness observed him at the Sheriff's Department in Lumberton on the day of the shootings. He identified the pistols and shells as having been recovered by him and other investigators on 30 April 1979 in the area where defendants had been earlier apprehended. He identified the plastic bag of paper money and food stamps as having been given to him by Deputy Ernest Chavis on the day of the shootings. Chavis had earlier testified that he had taken the plastic bag from a ditch near the place where and at the time when defendants were apprehended. He gave the bag, in turn, to Lee Sampson.

The rules governing the admission of this kind of physical evidence, sometimes denoted "real evidence," were well set out by Justice Huskins, writing for the Court in *State v. Harbison*, 293 N.C. 474, 483-84, 238 S.E. 2d 449, 454 (1977):

> "Objects offered as having played an actual direct role in the incident giving rise to the trial are denoted 'real evidence.' McCormick, Evidence § 212 (2d ed. 1972); 1 Stansbury's North Carolina Evidence § 117, n. 1 (Brandis rev. 1973). Such evidence must be identified as the same object involved in the incident in order to be admissible. *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971). It must also be shown that since the incident in which it was involved the object has undergone no material change in its condition. *See* McCormick, *supra*, § 212, p. 527. *See also Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326 (1953). According to Professor Stansbury, when a tangible object is offered it must be first authenticated or identified, 'and this can be done only by calling a witness, presenting the exhibit to him and asking him if he recognizes it and, if so, what it is.' 1 Stansbury's North Carolina Evidence § 26 (Brandis rev. 1973).
>
> "There are no simple standards for determining whether an object sought to be offered in evidence has been sufficiently identified as being the same object involved in the incident giving rise to the trial and shown to have been unchanged in any material respect. 'No specific rules have grown up about the authentication of chattels, chiefly because the variety of circumstances involved are so great that no specific rules would be suitable.' 7 Wigmore, Evidence § 2129, at 569 (3d ed. 1940). Consequently, the trial judge possesses and must exercise a sound discretion in determining the standard of certainty required to show that the object offered is the same as the object involved in the incident giving rise to the trial and that the object is in an unchanged condition. McCormick, *supra* § 212, p. 527, at nn. 25-27. *See, e.g., Walker v. Firestone Tire and Rubber Co.*, 412 F. 2d 60 (2d Cir. 1969)."

In *Harbison* we held that a tire with bullet holes in it was properly excluded from evidence when defendant, who sought to offer it,

offered no evidence of the tire's unchanged condition in the presence of evidence that there were no bullet holes in the tire at the time of the incident under investigation.

In the case at bar there is no evidence that the condition of any of the items in question had changed between the time of their recovery on the day of the shootings and the time of trial. Indeed the very nature of the items themselves would make a change in condition extremely unlikely in the short time between the crimes' commission and the trial. All the items were positively identified as being the very items recovered by those investigating the incident in question. Considering the nature of the items themselves and the absence of any suggestion that they had undergone some relevant change between the time of their recovery and the time of trial, we conclude that the failure of the state to offer positive testimony that the objects had undergone no material change was not fatal to their admission. That they had in fact undergone no material change is clearly implied in the testimony of Sampson. His failure expressly to so state does not so detract from his otherwise positive identification of the items so as to render them inadmissible.

[18] Defendant argues that the "football candies," the "football candy wrappers" and the toboggan [11] were irrelevant inasmuch as there was no showing that they played any part in the incident whatsoever. Although it is not entirely clear from the record, it appears reasonably certain that the football candy wrappers found in the pocket of the jacket which was, in turn, found in the truck defendants used, matched in appearance the wrappers on the football candy found in Watts' store. This evidence was clearly relevant as a circumstance tending to show that defendants had, at sometime, been in the store. The dark toboggan, also found in the truck, was relevant inasmuch as one witness observed Moore wearing a dark toboggan shortly after the crimes were committed. This assignment of error is, consequently, overruled.

[19] Defendant Moore assigns as error the failure of the trial judge to instruct as to him on the offenses of accessory before and accessory after the fact to the crimes of armed robbery and murder. This assignment is frivolous. Suffice it to say there is no evidence that Moore was either an accessory before or an accessory after the fact. The thrust of all the state's evidence is that he was a principal

[11] Only the dark toboggan was actually offered in evidence.

perpetrator of all crimes committed either because he was an aider and abettor or because he and Oliver were acting in concert in the commission of these crimes. Defendant Moore's brief accurately summarizes the state's evidence and, itself, demonstrates that Moore is guilty, if at all, as a principal perpetrator. Moore says the state's evidence tended to show:

> "The two Defendants went into [Watts'] store and purchased several items. Allen Watts was in the store behind the counter. Several other people were in the store who made purchases and then left. Dayton Hodge and his grandson, Bobby Lynn Hodge, pulled up to the gas pumps out in front of the store and Mr. Hodge proceeded to pump gas into his pickup truck. The Defendants shot and killed Allen Watts, removed money and food stamps from the cash register placing it in a brown paper sack, and ran outside where Defendant, J. W. Oliver, shot and killed Dayton Hodge. The Defendants then ran north on Highway 41-Bypass and turned into the woods about 300 feet north of Allen Watts' convenience store. The two Defendants continued through the woods and across North Carolina Highway No. 130 to the brown and white pickup truck which was parked at the Square Deal Warehouse. The truck would not start and the Defendants then ran into the woods behind the Square Deal Oliver shoot his grandfather, Dayton Hodge. The Defendants were apprehended in the woods behind the Square Deal Warehouse at approximately 10:15 a.m. by Deputies Bruce Bullock and B. C. Bass. A brown paper bag containing money and food stamps was found in a ditch near where the Defendant Moore was apprehended."

In addition, the State's evidence also tended to show that both defendants had reconnoitered Watts' store before the crimes. On the morning of the crimes defendants were seen riding together in Oliver's truck. Defendants were seen together inside the store shortly before the killings occurred. Immediately after the shootings both defendants were seen to run into the woods near Watts' store. Both defendants were arrested together.

An accessory before the fact is one who is *absent* from the scene of the crime but who counseled, procured, or commanded its com-

mission. *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (filed 2 December 1980, No. 101, Fall Term 1980); *State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563 (1977), *cert. denied*, 434 U.S. 998 (1977); *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). An accessory after the fact is one who, knowing that a felony has been committed by another, receives, relieves, comforts or assists such felon, or who in any manner aids him to escape arrest or punishment. *State v. Squire, supra; State v. McIntosh*, 260 N.C. 749, 133 S.E. 2d 652 (1963). [12]

There is no evidence here that Moore was an accessory. The evidence shows that both defendants were present at the scene and were acting together in the commission of the armed robbery. The murders occurred in furtherance of their common purpose to commit this crime or as a natural consequence thereof. Where two or more persons "join in a purpose to commit a crime, each of them, *if actually or constructively present*, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof." *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E. 2d 572, 586 (1971), *death sentence vacated*, 408 U.S. 939 (1972) (emphasis supplied); *accord, State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1968). There was, consequently, no error in the trial judge's failing to submit the offenses of accessory before or accessory after the fact in the cases against defendant Moore.

IV.

We turn now to the sentencing phase of the case.

The jury found both defendants guilty of first degree murder of Allen Watts, first degree murder of Dayton Hodge, and armed robbery of Watts. The verdicts were returned on Monday, 22 May 1979.

[12] An additional reason for not submitting accessory after the fact as an alternative verdict is that one may not be convicted of the crime of accessory after the fact upon an indictment charging him as a principal perpetrator. *State v. McIntosh, supra; State v. Jones*, 254 N.C. 450, 119 S.E. 2d 213 (1961). At the time of defendants' trial here, one could have convicted of an accessory before the fact on an indictment charging him as a principal perpetrator. *State v. Holmes*, 296 N.C. 47, 249 S.E. 2d 380 (1978). Effective 1 October 1979, however, newly enacted G.S. 14-5.1 provides that one indicted as a principal perpetrator may not be convicted on that indictment as an accessory before the fact. 1979 Sess. Laws, Chapter 811.

The following day Judge Smith convened the sentencing phase of the proceeding before the same jury which had heard the guilt phase. Correctly taking the position that inasmuch as the state bore the burden of proof in the sentencing phase it should first go forward with its evidence, Judge Smith asked the state to proceed. The state announced that it had no additional evidence on the sentencing phase. Defendant Moore then offered evidence as follows: On 12 December 1978, the date of the crimes charged, he was 19 years, 11 months old. Defendant Oliver offered evidence tending to show that at the time of trial he was 28 years old, had finished the 11th grade in school, had since been working steadily, attends church, and had a good character and reputation in the community where he lived. Defendant Oliver's character witnesses, his sister and a friend of the family, conceded on cross-examination that Oliver had been convicted twice in 1978 for breaking and entering and larceny. His sister further admitted that he had spent some time in a South Carolina prison.

In the absence of the jury there was considerable discussion between the court and counsel as to the propriety of the state's offering into evidence a particular document referred to as an "FBI check" showing that Moore had a prior criminal record. Ultimately Moore and the state stipulated that the state could read from the document only those offenses of which Moore had in fact been finally convicted. Moore waived all objections to the form by which the evidence would be admitted but reserved his objections to the "relevancy and competency" of the evidence. Portions of this document were then read to the jury pursuant to the stipulation. This evidence showed that Moore had been convicted in Columbus County of trespass twice, "felonious breaking and entering and felonious larceny," "damage to real property," and "larceny" twice.

After the jury heard arguments and the court's instructions on the question of sentence, the jury returned verdicts recommending sentences. As to defendant Oliver the jury recommended that he be given the death penalty in both murder cases. As to defendant Moore the jury recommended that he be sentenced to death for the murder of Allen Watts and to life imprisonment for the murder of Dayton Hodge.

Judge Smith submitted aggravating and mitigating circumstances together with the other questions required by G.S. 15A-2000 separately as to each defendant and, again, as to each murder.

Four sets of issues, one in each of the four murder cases, were thus submitted. Identical aggravating and mitigating circumstances, however, were submitted in all four cases, except that as to Moore the jury was permitted to find his age as a mitigating circumstance. The jury answered all issues identically in all four cases except that as to Moore in the Hodge murder case it concluded that this murder was actually committed by defendant Oliver and that Moore was only an accomplice whose "participation was relatively minor." *See* G.S. 15A-2000(f)(4).

Thus in all four murder cases the jury found beyond a reasonable doubt the existence of the following aggravating circumstances: (1) the murders were committed while defendants were "*engaged* in the commission of or a flight after committing the felony of robbery with a dangerous weapon" (emphasis supplied); (2) the murders were committed while defendants were "*aiders and abettors* in the commission of or flight after committing the felony of robbery with a dangerous weapon" (emphasis supplied); (3) the murders were committed "for pecuniary gain"; (4) the murders were "especially heinous, atrocious or cruel." *See* G.S. 15A-2000(e)(5), (6), and (9). In all four cases the jury found beyond a reasonable doubt that the aggravating circumstances were "sufficiently substantial to call for the imposition of the death penalty." *See* G.S. 15A-2000(c)(2). In all four cases the jury failed to find as mitigating circumstances that the defendants had "no significant history of prior criminal activity" and failed to find "any other circumstance arising from the evidence which it deemed to have mitigating value." *See* G.S. 15A-2000(f)(1) and (9). It also failed to find the age of Moore to be a mitigating circumstance. *See* G.S. 15A-2000(f)(7). As to defendant Oliver it failed to find he was only an accomplice in or accessory to the murders such that his participation "was relatively minor." *See* G.S. 15A-2000(f)(4). It likewise failed to find this to be a mitigating circumstance with regard to defendant Moore in the Watts' murder case. In all four cases the jury found beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances.[13] *See* G.S. 15A-2000(c)(3).

[13] Notwithstanding this last finding the jury recommended that defendant Moore be sentenced to life imprisonment for the murder of Dayton Hodge apparently on the basis of its earlier finding that his participation in this murder "was relatively minor."

[20] Both defendants assign as error the submission of that aggravating circumstance defined by G.S. 15A-2000(e)(5), *i.e.*, that the murders were committed while defendants were "engaged, or [were] aider[s] or abettor[s] in the commission of . . . or flight after committing . . . robbery." We agree that it was prejudicial error to submit this aggravating circumstance; therefore defendant Oliver is entitled to a new sentencing hearing in both the Watts and Hodge murder cases and defendant Moore is entitled to a new sentencing hearing in the Watts' case.

When a defendant is convicted of the capital offense of first degree murder on the theory of felony murder, it is error to submit the underlying felony to the jury in the sentencing phase of the trial as an aggravating circumstance. *State v. Cherry, supra*, 298 N.C. 86, 257 S.E. 2d 551. Here both defendants were convicted of both murders solely on a felony murder theory. Thus it was error to submit the first two aggravating circumstances in the three cases in which the death penalty was imposed.

The state concedes the error. It argues, however, that it was not prejudicial. Under circumstances similar to those in this case we concluded in *Cherry* that the error was prejudicial. We said in *Cherry, id.* at 114, 257 S.E. 2d at 568:

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

So it is here. As in *Cherry* both these murders were committed in the course of an armed robbery which constituted the underlying felony giving rise to the convictions of first degree murder in all four cases. The jury found only two other aggravating circumstances, *i.e.*, that the murders were committed for pecuniary gain and were especially heinous, atrocious, or cruel. In *Cherry* the jury likewise found that the murder was committed for pecuniary gain.[14]

[14] The jury in *Cherry* failed, however, to find that the murder was especially heinous, atrocious, or cruel.

An error, other than one of constitutional dimensions, is prejudicial "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 . . . ." G.S. 15A-1443(a). We are unable to say, under the circumstances of this case, that had the first two aggravating circumstances not been submitted there is no reasonable possibility that a different result might have been reached on the sentencing phase of these proceedings. This is so because two out of four aggravating circumstances would have been eliminated. These two circumstances related to the underlying felony of armed robbery. The jury might well have concluded that these were the most serious of all the aggravating circumstances it was permitted to consider. This is particulary true in the Hodge murder cases in which we conclude below that circumstance number four, *i.e.*, the murder was "especially heinous, atrocious, or cruel" should not have been submitted.

[21] Defendants next contend that aggravating circumstance number four, *i.e.*, that the murders were "especially heinous, atrocious, or cruel" should not have been submitted. We conclude that this circumstance was properly submitted in the Watts, but not in the Hodge, murder case.

The meaning of this aggravating circumstance was fully considered in *State v. Goodman*, 298 N.C. 1, 24-26, 257 S.E. 2d 569, 585 (1979), where he said:

> "While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. by using the word 'especially' the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection."

In *Goodman* we adopted the Florida and Nebraska view that for this aggravating circumstance to apply the murder must be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," and we approved the following jury instruction:

> "You are instructed that the words 'especially heinous,

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

We noted in *Goodman* that by so limiting the application of this aggravating circumstance it would not become "a catch all provision which can always be employed in cases where there is no evidence of other aggravating circumstances." *Id.* at 26, 257 S.E. 2d at 585.

Several cases have concluded that certain kinds of murders could be "especially heinous." In *Goodman* the deceased was shot several times, cut repeatedly with a knife, placed in the trunk of a car where he remained alive for several hours and where his struggles to escape could be heard by his assailants who drove him to another county, took him from the car, placed him on the ground and shot him twice through the head. We concluded this murder was "marked by extremely vicious brutality" calling for the application, if the jury so found, of the "heinous, atrocious, or cruel" aggravating circumstance. We held in *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979) that submission of this aggravating circumstance was proper where the defendant tried to strangle his victim to death and, upon rendering her unconscious, sexually molested her when, realizing she was not dead, then stabbed her until she died. A number of decisions from other jurisdictions have had occasion to consider whether particular murders could be "especially heinous, atrocious, or cruel" under capital sentencing statutes similar to ours. At least one court has determined that the murder of one pleading for mercy may fall within the category of an "especially heinous" offense. *Lucas v. State*, 376 So. 2d 1149 (Fla. (1979).[15]

On the other hand in *State v. Cherry, supra*, where the de-

[15]There is a good discussion of all these cases and their holdings in *Vague and Overlapping Guidelines: A Study of North Carolina's Capital Sentencing Statute*, 16 Wake Forest L. Rev. 765, 796-800 (1980).

ceased was shot by defendant during the course of an armed robbery under circumstances indicating that the shooting may not have been intentional, although defendant was threatening the deceased and others with his pistol at the time, the jury failed to find that the killing was especially heinous. This Court consequently had no occasion to consider whether that particular aggravating circumstance should have been submitted.

In the Watts murder cases the state's evidence shows that Watts, after opening his cash register in response to defendants' demands, begged for his life. Watts said, "Please don't shoot me. Go ahead and take the money." With Watts pleading for his life defendant Moore, according to his evidence, mercilessly shot him to death. In our view the jury could find from these circumstances that the murder of Watts was especially heinous, atrocious or cruel. This aggravating circumstance was appropriately submitted in the Watts cases. In the Hodge cases, however, the state's evidence tends to show that defendant Oliver, as he was running from the store, shot and killed Hodge who had pulled up to purchase gas. Although Hodge was an innocent bystander, his murder by defendant Oliver was, according to the evidence, the product of a sudden act, and death apparently was instantaneous. There was no unusual infliction of pain or suffering on the victim. The shooting was undoubtedly the result of Oliver's excitement and haste in his attempt to escape from crimes he had already committed. We can find nothing in the brutality of this killing which exceeds that normally present in a case of first degree murder.

Where it is doubtful whether a particular aggravating circumstance should be submitted, the doubt should be resolved in favor of defendant. When "a person's life is at stake . . . the jury should not be instructed upon one of the [aggravating] statutory circumstances in a doubtful case." *State v. Goodman, supra*, 298 N.C. at 30, 257 S.E. 2d at 588. We conclude, therefore, that the "especially heinous" aggravating circumstance should not have been submitted in the Hodge murder cases.

[22] Defendant Moore assigns as error permitting certain portions of his criminal record to be read to the jury. The assignment is without merit. Defendant Moore stipulated the use of this method in getting the evidence before the jury. He objected only to its "relevancy and competency." The evidence was relevant and competent to negate the fact that defendant had no significant history of prior

criminal activity which was submitted to the jury on his behalf as a possible mitigating circumstance.

[23] Defendant Moore further objects to the submission of the aggravating circumstance in the Hodge murder cases that the murder was committed "for pecuniary gain." Moore argues that since the evidence showed the money had already been obtained from Allen Watts, there is no evidence that Hodge was murdered "for pecuniary gain." While the argument is plausible we reject it. The hope of pecuniary gain provided the impetus for the murder of both Watts and Hodge. This hope and the murders were inextricably intertwined. The murder of Hodge was apparently committed in an effort to eliminate a witness to the robbery; and the murder of Watts, in the hope that defendants could successfully escape, avoid prosecution, and enjoy the fruits of their sordid endeavor. The evidence is such that the jury could find that both murders were committed for the purpose of permitting defendants to enjoy pecuniary gain.

[24] Neither is there any error in submitting this circumstance in a felony murder case in which the underlying felony is robbery notwithstanding the rule that the robbery itself cannot be submitted as such a circumstance. The robbery constitutes an essential element of felony murder. In a capital case tried solely on a felony murder theory a jury, in the absence of this element, could not find defendant guilty of the capital offense.[16] The circumstance that the capital felony was committed for pecuniary gain, however, is not such an essential element. This circumstance examines the motive of the defendant rather than his acts. While his motive does not constitute an element of the offense, it is appropriate for it to be considered on the question of his sentence. In *Cherry* the murder was committed during the course of the robbery of a convenience store. The aggravating circumstance of "pecuniary gain" was submitted and answered by the jury against the defendant. Although we remanded the case for a new sentencing hearing, we did not suggest in *Cherry* that this particular aggravating circumstance should not be submitted at the new hearing. We reject the position taken by the Nebraska Court that this aggravating circumstance does not apply to a murder committed during a robbery. *See State v. Rust*, 197 Neb.

[16] The underlying felony is merged into and forms a part of the capital offense and may not be considered again as a circumstance which aggravates that offense.

528, 250 N.W. 2d 867 (1977). This aggravating circumstance, we hold, was properly submitted to the jury in both murder cases.

Defendant Moore objects to the order in which the issues were submitted in the sentencing hearing.[17] Suffice it to say that the order in which the issues were presented follows the order suggested by G.S. 15A-2000(c). While there is some logic in the order suggested by defendant, see n. 17, we find no error in the order in which the issues were submitted.

Other errors in the sentencing phase suggested by defendants are not likely to arise at the new hearing.

---

[17] The record shows that issues were submitted in all four murder cases as follows:

> "ISSUE ONE: Do you unanimously find from the evidence beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder of [Allen Watts or Dayton Hodge] . . . ?
>
> ISSUE TWO: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances in the murder of [Allen Watts or Dayton Hodge] found by you are sufficiently substantial to call for the imposition of the death penalty as to [George Moore, Jr., or John Oliver] . . . ?
>
> ISSUE THREE: Do you find one or more mitigating circumstances as to [George Moore, Jr., or John Oliver] . . . ?
>
> ISSUE FOUR: Do you unanimously find beyond a reasonable doubt that the mitigating circumstances are insufficient to outweigh the aggravating circumstances?"

Defendant Moore suggests that a preferable order would be:

> "ISSUE ONE: Do you unanimously find from the evidence beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder of [Allen R. Watts or Dayton Hodge] . . . ?
>
> ISSUE TWO: Do you find one or more mitigating circumstances as to George Moore, Jr . . . ?
>
> ISSUE THREE: Do you unanimously find beyond a reasonable doubt that the mitigating circumstances are insufficient to outweigh the aggravating circumstances . . . ?
>
> ISSUE FOUR: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances in the murder of [Allen R. Watts or Dayton Hodge] found by you are sufficiently substantial to call for the imposition of the death penalty as to George Moore, Jr. . . . ?"

CONCLUSION

The result is this: We find no error in the convictions of both defendants for armed robbery and two counts of murder in the first degree. For error, however, in the sentencing phase of both the Hodge and the Watts murder cases as to defendant Oliver and the Watts murder case as to defendant Moore we remand these cases for a new sentencing hearing to be conducted in a manner not inconsistent with this opinion.

NO ERROR in Cases Nos. 78-CRS-25574 and 78-CRS-25579 (the armed robbery cases)

NO ERROR in the convictions in Cases Nos. 78-CRS-25575, 78-CRS-25576, 78-CRS-25577, and 78-CRS-25578 (the murder cases)

REMANDED FOR NEW SENTENCING HEARING in Cases Nos. 78-CRS-25575, 78-CRS-25576, and 78-CRS-25578 (the murder cases in which defendants were sentenced to death)

Justice MEYER did not participate in the consideration and decision of this case.

J. T. HOBBY & SON, INC., A NORTH CAROLINA CORPORATION (SUCCESSOR CORPORATION TO HOBCO BUILDING COMPANY); ROBERT MONTGOMERY PAYNTER AND WIFE, SHIRLEY L. PAYNTER; AND, THOMAS C. BOGLE AND WIFE, SARA M. BOGLE v. FAMILY HOMES OF WAKE COUNTY, INC., A NORTH CAROLINA CORPORATION

No. 72

(Filed 27 January 1981)

1. Deeds § 20.3— residential restrictive covenant — family care home not prohibited

A restrictive covenant limiting the use of subdivision lots to residential purposes was not violated by the use of a lot for a "family care home" in which resident managers would serve as surrogate parents to four mentally retarded adults, since the property in question was not employed in a manner which was significantly different from that of neighboring houses except for the fact that most of those who lived within it were mentally retarded, and the fact that defendant was compensated for the service it rendered did not render its activities at the home commercial in nature.

2. Deeds § 20.3— single family dwelling — restrictive covenant — family care home not prohibited

A provision in a restrictive covenant as to the character of the structure which may be located upon a lot does not by itself constitute a restriction of the premises to a particular use; therefore, a restrictive covenant limiting the use of subdivision lots to detached single family dwellings was not violated by the use of a lot for a "family care home" in which resident managers would serve as surrogate parents to four mentally retarded adults, where nothing in the record indicated that defendant had altered the structure used as a family care home in any manner so that its appearance or its character was anything other than that of a dwelling which would be utilized by anything other than a typical American suburban family.

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

Justice HUSKINS dissenting.

Chief Justice BRANCH joins in the dissenting opinion.

ON discretionary review of the decision of the North Carolina Court of Appeals reported at 46 N.C. App. 741, 266 S.E.2d 32 (1980), affirming the judgment of *Smith, (Donald L.), S.J.*, entered at the 28 May 1979 Regular Civil Session of WAKE Superior Court granting summary judgment in favor of plaintiffs.

The individual plaintiffs each own separate residential lots in the Scarsdale subdivision in the City of Raleigh, North Carolina. Plaintiffs Paynter took title to their property on 9 December 1968, and plaintiffs Bogle took title to their property on 10 September 1970. The corporate plaintiff, J. T. Hobby & Son, Inc., is the successor corporation to Hobco Building Company which developed the subdivision. The corporate defendant, Family Homes of Wake County, Inc., also owns a residential lot in the development.

In the course of developing the subdivision, the corporate plaintiff caused certain restrictive and protective covenants to be recorded in the office of the Wake County Register of Deeds. These covenants applied to all of the residential lots in the Scarsdale subdivision. The present case involves the construction of one of these covenants and its application to the property owned by defendant.

The specific protective covenant which is at issue in the instant case provides that

> No lot shall be used except for residential purposes, but nothing herein shall be construed to mean that a lot may

> not be converted to a street regardless of the type of use made of such street. No building shall be erected, altered, placed, or permitted to remain on any building unit other than one detached single-family dwelling not to exceed 2½ stories in height, a private garage for not more than three cars and outbuildings incidental to residential use . . . .

None of the other covenants which are contained in the pertinent deeds are at issue in the present litigation.

On 22 May 1977, the Raleigh City Council, invoking its powers under the city charter to regulate the density of population, as well as the location and use of buildings, amended its zoning ordinances so as to authorize the placement within the city limits of residential care facilities for persons afflicted with physical disabilities, developmental disabilities, or mental retardation. *See* Raleigh, N.C., Code § 24-2(38)(c) (1959).[1] The amendment went on to define a family care home as being

> . . . a dwelling licensed by the North Carolina Department of Human Resources, Division of Facility Services, as a family care home for two (2) or more, but not more than five (5) unrelated persons, excluding supervisory personnel, who because of a physical disability, developmental disability, or mental retardation need a substitute home: provided that persons with any of the following categories shall not be eligible for admission to a family care home:
>
> a. Persons addicted to or recuperating from the effects of or addiction to drugs or alcohol;
>
> b. Persons adjusting to non-prison life, including but not limited to pre-release, work-release, probationary programs and juvenile detention centers; and

[1] Since the present litigation arose, the Raleigh City Code has been recodified. This particular provision has not been carried over into the new Code. Hereinafter, all citations to Raleigh City Ordinances will be references to the 1980 City Code. Citations to the 1959 Code will be footnoted.

c. Persons requiring professional health care.[2]

Raleigh, N.C., Code § 10-2002 (1980).[3]

The amended ordinance permitted the establishment of family care homes in all residential districts of the city provided that the size of the lot upon which the facility was to be established complied with all of the applicable subdivision requirements, as well as with all of the pertinent zoning regulations. Raleigh, N.C., Code § 10-2073(23)(a) (1980).[4] The City Council further provided that in order to avoid the creation of a *de facto* social service district, as well as to avoid impacting a residential block, no more than one such facility was to be permitted within a three-quarter mile radius. Raleigh, N.C., Code § 10-2073(23)(c) (1980).[5]

The day after the ordinance was enacted, defendant went before the Raleigh Board of Adjustment seeking a special use permit so that a family care home could be established. At a subsequent meeting of the Board, on 13 June 1977, a hearing was held on defendant's application. Ms. Mary Jane Sanderson represented defendant at that hearing. According to Ms. Sanderson, defendant sought a special use permit so as to enable it to operate a family care home for five mentally retarded adults at 300 Millbrook Road in North Raleigh. It is this parcel of property which is at the heart of the present litigation. Defendant envisioned that an adult couple would live at the house with the handicapped residents and that at least one of the adults would be present whenever any of the residents were on the premises. The Millbrook Road location was deemed appropriate by defendant for the reason that it was located near a

[2] The North Carolina Department of Human Resources defines a family care home as being ". . . a small residence which provides sheltered care for two to five adults who, because of age or disability, require some personal services along with room and board to assure their safety and comfort." North Carolina Department of Human Resources, Minimum and Desired Standards for Group Homes for Developmentally Disabled Adults 9 (1978).

[3] Raleigh, N.C. Code § 24-2(48) (1959).

[4] Raleigh, N.C., Code § 24-49(C)(23)(a) (1959). The ordinance regulated the size of the dwelling by providing that any such facility could not have less than 1,400 square feet of heated floor area. In addition, it mandated that 1½ parking spaces be provided for each sleeping room, or in the alternative, 1 parking space for each sleeping room of 70 square feet or less.

[5] Raleigh, N.C., Code § 24-49(C)(23)(a) (1959).

bus stop as well as a shopping center. These factors were considered important because they would enable the residents to move about on their own without requiring the houseparents to provide transportation.

The Chief Zoning Inspector stated that the property in question had a lot size of approximately 12,325 square feet which was in excess of the 10,890 square foot area which was required for housing in the particular zoning district. The dwelling itself had an area of approximately 2,700 square feet. The inspector made the further observation that the distance between the location of the proposed family care home and the nearest similar facility was approximately two miles, clearly in excess of the distance requirement which was imposed by the ordinance. The only respect in which the proposed facility did not comply with the pertinent zoning ordinance was the lack of off-street parking. While there was room in the driveway to park three cars, there were no parking places as such then existing at the site. However, the inspector concluded that there was sufficient space at the house to enable defendant to provide the six required parking spaces.

Thereupon, having heard from its staff, as well as from defendant, the Board received a petition from counsel representing residents of the subdivision. Signed by 101 individuals who lived in the neighborhood, the petition expressed the residents' opposition to the placement of the family care facility in the development. Residents of the subdivision, in their own behalf, as well as by counsel, contended that the development had been established for the purpose of creating a residential area of a single family nature. Particular individuals elaborated upon the character of the development, contending that the placement of a family care home on Millbrook Road would create problems of traffic congestion, as well as security.[6] Other residents voiced the concern that the placement of the family care home in the development would lead to a decrease in property values of the surrounding tracts.[7]

[6] At the hearing, counsel for defendant observed that during the operation of three other group homes in Wake County by defendant, no incidents had occurred involving the residents of these homes, nor had any complaints concerning their behavior been lodged with the appropriate authorities.

[7] At the hearing, Mr. Jim Kyriakis, a mental retardation specialist with the

Basing its decision upon findings of fact drawn from the evidence presented at the hearing, the Board of Adjustment concluded that the proposal of defendant for the operation of a family care home at the Millbrook Road house met the criteria established by the Raleigh City Council in the amended zoning ordinance. Having so concluded, the Board unanimously voted to grant the special use permit which had been sought by defendant.

Plaintiffs filed suit against defendant shortly thereafter, seeking a permanent injunction to restrain defendant from using the Millbrook Road property "as a 'family care home,' to provide institutional care for mentally retarded persons, or any other use not consistent with and specifically permitted by the protective covenants of Scarsdale Subdivision . . . ." The matter came on for hearing on plaintiffs' motion for summary judgment based upon stipulations of fact entered into by the parties which were consistent with the evidence presented to the Board of Adjustment. Defendant responded to the motion by offering the affidavit of its president, John N. Fountain. According to the affidavit, the purpose of the group home was to provide for the mentally retarded residents who lived therein the atmosphere of a single family home. In order to afford the residents this opportunity, the home operated as a single economic unit, with the resident managers serving as surrogate parents who were assisted with cooking, cleaning, shopping, and other household chores by the residents. The affidavit further stated that no structural changes had been made in the dwelling.

Concluding that there was no genuine issue as to any material fact, and that plaintiffs were entitled to summary judgement, Judge Smith entered summary judgment in their favor. He ordered that a permanent injunction be issued against defendant to restrain it from the further operation of the family care home. However, the effect of the injunction was stayed during the pendency of any appeal.

The Court of Appeals, in an opinion written by Judge Hill, concurred in by Judges Martin (Robert M.) and Webb, affirmed,

Wake County Mental Health Center, stated that the National Association of Realtors had made a study concerning the impact that the placement of group homes for the retarded had upon property values within the neighborhood. According to the study, property values have increased and not gone down in such areas.

concluding that the operation of the family care home was an institutional use of the property, not a residential use. Defendant's petition for discretionary review pursuant to G.S. § 7A-31 was allowed by this court on 15 July 1980.

Seay, Rouse, Johnson, Harvey & Bolton, by James L. Seay and Ronald H. Garber, for plaintiff-appellees.

Theodore A. Nodell, Jr., and Smith, Moore, Smith, Schell & Hunter, by McNeill Smith, for defendant-appellant.

Blanchard, Tucker, Twiggs, Denson & Earls, by Charles F. Blanchard and Irvin B. Tucker, Jr., for the Association for Retarded Citizens of North Carolina, Inc., amicus curiae.

Carolina Legal Assistance for Mental Health, by Deborah Greenblatt, for the Governor's Advocacy Council for Persons with Disabilities, amicus curiae.

Merritt & Gaylor, by Cecil P. Merritt, for The Mental Health Association in North Carolina, Inc., amicus curiae.

Van Camp, Gill & Crumpler, P.A., by Douglas R. Gill, for Sandhills Mental Health Center, Inc., amicus curiae.

BRITT, Justice.

In deciding this appeal, we need to address only one issue: Did the Court of Appeals err in concluding that the restrictive covenant was violated by the "institutional" use of the property by defendant? We answer in the affirmative.

Our resolution of this issue turns upon our construction of two phrases contained in the restrictive covenant upon which plaintiffs rely: "residential purpose" and "single-family dwelling."

We begin our analysis of this case with a fundamental premise of the law of real property. While the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, *e.g., Long v. Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967), *see generally* J. Webster, Real Estate Law in North Carolina § 346 (1971), such covenants are not favord by the law, *e.g., Cummings v. Dosam, Inc.*, 273 N.C. 28, 159 S.E.2d 513 (1968), and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land. *Stegall v. Housing Authority of the City of Charlotte*, 278 N.C. 95, 178 S.E.2d 824 (1971); *Long v.*

Branham, supra. The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent. *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925); *see generally* 7 J. Grimes, Thompson on Real Property § 3160 (1962). Even so, we pause to recognize that clearly and narrowly drawn restrictive covenants may be employed in such a way that the legitimate objectives of a development scheme may be achieved. Provided that a restrictive covenant does not offend articulated considerations of public policy or concepts of substantive law, such provisions are legitimate tools which may be utilized by developers and other interested parties to guide the subsequent usage of property.

It is a matter of common understanding that the pertinent terms which guide a legal relationship between parties are not always clearly defined, if they are defined at all. Sound judicial construction of restrictive covenants demands that if the intentions of the parties are to be followed, each part of the covenant must be given effect according to the natural meaning of the words, provided that the meanings of the relevant terms have not been modified by the parties to the undertaking. *Callaham v. Arenson*, 239 N.C. 619, 80 S.E.2d 619 (1954); *Westinghouse Electric Supply Co. v. Burgess*, 223 N.C. 97, 25 S.E.2d 390 (1943).

Having laid the proper foundation for our consideration of the question presented, we now turn our attention to an appropriate analysis of the terms upon which the controversy is founded.

[1] Defendant contends first that the Court of Appeals erred in concluding that the Millbrook Road property is being utilized in an institutional rather than a residential manner. The essence of defendant's argument is that the residential usage requirement is satisfied if the property is used for the habitation of human beings and for those activities such as eating, sleeping, and engaging in recreation which are normally incident thereto. Plaintiffs respond by arguing that a family care home is analogous to a boarding house, such usage having been widely held to violate restrictive covenants requiring that real property be utilized for residential purposes only. *See generally* Annot., 14 A.L.R.2d 1376 (1950). While the analogy which plaintiffs seek to draw between a family care home and a boarding house is intriguing, we find its forcefulness to be unpersuasive. It is our opinion that while a family care home

does not comport in all respects with the traditional understanding of the scope of the term "residential purposes," its essential purpose, when coupled with the manner in which defendant seeks to achieve its stated goals, clearly brings it within the parameters of residential usage as contemplated by the framers of the restrictive covenant which is at issue in this case.

The home at 300 Millbrook Road presently serves as a place of abode for four mentally retarded adults, as well as a married couple who serve as resident managers of the facility. The avowed function of the resident managers is to serve as surrogate parents to the handicapped individuals who live in the house. In this regard, at least one of the surrogate parents is present whenever any of the retarded persons is on the premises. All of the disabled individuals are employed in sheltered workshops in the Raleigh area between the hours of 7:45 a.m. and 5:00 p.m. on weekdays. The home is operated in such a manner that the residents are able to live in an atmosphere much like that found in the homes of traditionally structured American families. In an effort to achieve that goal, all of the retarded residents assist the married couple in the performance of the various duties which are required to maintain the normal operation of the home: cooking, cleaning, shopping, and other similar household chores. In other words, in terms of the day-to-day activities of its inhabitants, the Millbrook Road property is not employed in a manner which is significantly different from that of neighboring houses except for the fact that most of those who dwell within it are mentally retarded.

We are aware that while defendant, Family Homes of Wake County, Inc., is a non-profit corporation which is under contract to and controlled by the Wake County Mental Health Authority, its services at the family care home are not rendered gratuitously. The home operates as a single economic unit whose operating funds are provided by government grants and receipts from the residents themselves. The resident managers are compensated for their services. That the continued operation of the facility on Millbrook Road requires an on-going economic exchange is an insubstantial consideration.

Our resolution of the question of the nature of the usage of the property at issue does not turn upon the economic basis upon which the property is supported. That basis does not detract from the primary objective behind the operation of the facility and the

essence of that operation: Providing a non-institutional setting for normal human habitation and the activities incident thereto for mentally handicapped adults. It is this purpose and method of operation which serves to distinguish defendant's usage of the Millbrook Road property from that normally incident to a boarding house.

While we deem it unnecessary to reach the question of whether the individuals living at the home constitute a family, we are compelled to observe that the surrogate parents and the adults subject to their supervision function as an integrated unit rather than independent persons who share only the place where they sleep and take their meals as would boarders in a boarding house. *See Crowley v. Knapp*, 94 Wis.2d 421, 288 N.W.2d 815 (1980); *but see Seaton v. Clifford*, 24 Cal. App.3d 46, 100 Cal. Rptr. 779 (1972).

That defendant is compensated for the services it renders does not render its activities at the home commercial in nature. While it is obvious that the home would not exist if it were not for monetary support being provided from some source, that support clearly is not the objective behind the operation of this facility. That defendant is paid for its efforts does not detract from the essential character of its program of non-institutional living for the retarded. Clearly, the receipt of money to support the care of more or less permanent residents is incidental to the scope of defendant's efforts. In no way can it be argued that a significant motivation behind the opening of the group home by defendant was its expectation of monetary benefits.

The Court of Appeals observed that in its application for review filed with the Raleigh Board of Adjustment, defendant indicated that its proposed use of the property was of an institutional character rather than choosing to characterize the undertaking as a residential usage. In this regard, we note that 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 some individuals. *See Thompson v. Soles*, 299 N.C. 484, 263 S.E.2d 599 (1980). The uncontroverted facts of the present case belie the institutional characterization on the application before the Board of Adjustment. The manifest purpose of the operation of the home is to provide its residents with a family-like setting unlike that found in traditional institutions for the care of the mentally handicapped. Furthermore, no educational or vocational training

of any kind is provided at the home for the residents. Nor is any medical or nursing care provided at the house. In virtually all respects, other than the mental capacity of those who live on the premises, the house operates much like a typical suburban household.

We conclude that the Millbrook Road property is being used by defendant for residential purposes.

[2] The second part of the restrictive covenant which is at issue in this case provides that

> No building shall be erected, altered, placed or permitted to remain on any building unit other than one detached single-family dwelling not to exceed 2½ stories in height, a private garage for not more than three cars and outbuildings incidental to residential use.

Defendant argues that the restrictive covenant, in effect, places two distinct requirements upon the owners of property in the Scarsdale subdivision: a requirement as to usage of the property and a requirement as to the nature of the structure which may be placed on a parcel in the development. Plaintiffs respond by arguing that a covenant which prescribes the type of building which may be erected necessarily limits the use that may be made of it after it is erected. *See, e.g., Schwarzschild v. Welborne*, 186 Va. 1052, 45 S.E. 2d 152 (1947). We disagree with the position taken by plaintiffs for several reasons.

First, plaintiffs' position is inconsistent with one of the fundamental premises of the law as it relates to restrictive covenants: Such provisions are not favored by the law and they will be construed to the end that all ambiguities will be resolved in favor of the free alienation of land. While it is possible that a restriction as to the type of structure would, in some instances, limit the character of the type of usage to which the building is employed, we conclude that such is not necessarily the case. Indeed, it is not uncommon for buildings that had once served as residences to be acquired by businesses and other concerns for renovation and subsequent utilization in new and varied ways.

Second, each part of a contract which contains a restrictive covenant must be interpreted in such a manner that each portion of the covenant is given effect if that can be done by fair and reason-

able intendment. *See Ingle v. Stubbins*, 240 N.C. 382, 82 S.E.2d 388 (1954); *Callahan v. Arenson, supra*. By its express terms, the restrictive covenant provides a restriction on the character of the usage of the property by requiring that no lot may be used "except for residential purposes." An interpretation of the phrases which relate to a single-family dwelling as being a usage restriction would be to render them mere surplusage because nothing they contain adds anything to the concept of "residential purposes" in a clear and distinct way. All of the components of the particular clause may be interpreted according to their ordinary and accepted meanings as relating to structural matters. By delineating the number of stories which the building may contain, and the number of cars which its garage may accommodate, as well as nature of the outbuildings which may be erected on the lot, it would seem that the framers of the covenant were seeking to impose a *structural* requirement upon owners of the tract. Nothing in the record indicates that defendant has altered the structure which had been erected on the Millbrook Road site in any manner so that its appearance or its character is anything other than that of a dwelling which would be utilized by anything other than a typical American suburban family.

We hold, therefore that a provision in a restrictive covenant as to the character of the structure which may be located upon a lot does not by itself constitute a restriction of the premises to a particular use. *Compare Scott v. Board of Missions*, 252 N.C. 443, 114 S.E. 2d 74 (1960). While a restrictive covenant may be so clearly and unambiguously drafted that it regulates the utilization of property through a structural limitation, such was not done in the present case.

Because of our disposition of the foregoing two issues, we decline to discuss the remaining issues discussed by the Court of Appeals, deeming them unnecessary to our decision. Nothing we have said herein ought to be interpreted to mean that restrictive covenants cannot be drafted so as to regulate the character of the structures erected in a neighborhood or their utilization. We emphasize that despite the salutary policy considerations behind the family homes concept, *see generally* H. Turnbull, The Law and the Mentally Handicapped in North Carolina 16-1 to 16-18 (2d ed. 1979), our decision today rests not upon newly fashioned rules and procedures but upon the established principles of the common law which we have found appropriate to apply to a contemporary con-

cept of care for the handicapped.

The decision of the Court of Appeals is

Reversed.

Justice MEYER did not participate in the consideration or decison of this case.

Justice HUSKINS dissenting.

I respectfully dissent from the majority opinion. The restrictive covenant in question, when properly construed, prohibits nonresidential use of property in the Scarsdale subdivision in the City of Raleigh, North Carolina. The house at 300 Millbrook Road is presently used for institutional purposes — not residential purposes.

To operate the facility, (1) a caretaker staff and house manager are required, (2) the operation is strictly licensed and regulated by government agencies, (3) the operation is financed by a grant from the State plus welfare, social security and employment payments of the occupants, and (4) defendant on occasion has itself characterized the use of 300 Millbrook Road as institutional. In applying for a permit to operate the facility, defendant was required to categorize the property as "Residential, Commercial, Office, Institutional, Day Care, or Industrial." Defendant categorized the property as "Institutional."

In my view, the majority goes beyond the parameters of sound legal reasoning to help these unfortunate wards of the State and society. If this had been a college fraternity, a benevolent social order providing for destitute members or a refuge for former criminals trying to re-enter society, the majority would likely say such use is nonresidential. Yet the reasoning applied today would allow such uses of Scarsdale property. The Court should not, by interpretation, defeat the plain and obvious purpose of restrictive covenants. *Long v. Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967).

The keeping of boarders has been held to be a nonresidential use unless keeping a boarder is incidental to the use of a premises by a family. *See generally* 14 A.L.R.2d 1376, 1406 (1950). If boarding people is a nonresidential use, certainly this use, wherein four retarded persons are housed for a fee provided from funds of the occupants as well as grants from the State, is also nonresidential.

Finally, I note the public policy of this State as expressed in

G.S. 168-9:

> Each handicapped citizen shall have the same right as any other citizen to live and reside in residential communities, homes, and group homes, and no person or group of persons, including governmental bodies or political subdivisions of the State, shall be permitted, or have the authority, to prevent any handicapped citizen, on the basis of his or her handicap, from living and residing in residential communities, homes, and group homes on the same basis and conditions as any other citizen.

This is a policy which I wholeheartedly endorse. However, in the present case, the residents of Scarsdale subdivision must use their property for residential purposes only because the covenant in each deed so requires. Any handicapped person is free to acquire a home in the Scarsdale subdivision and reside there under the same rules and restrictions as other residents. Public policy requires no more. Neither should this Court.

Chief Justice BRANCH joins in this dissent.

EDWARD McKINLEY TERRY, JR. v. CHARLES THURMAN TERRY, INDIVIDUALLY AND AS FORMER EXECUTOR OF THE ESTATE OF EDWARD McKINLEY TERRY, SR.

No. 105

(Filed 27 January 1981)

1. Fraud § 9— allegations required to state claim

In pleading actual fraud the particularity requirement of G.S. 1A-1, Rule 9(b), is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representation; however, a constructive fraud claim requires even less particularity, as it is based on a confidential relationship rather than a specific misrepresentation, and the particularity requirement for alleging constructive fraud may be met by alleging facts and circumstances which created the relation of trust and confidence and which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.

2. Fraud § 9— constructive fraud — sufficiency of complaint to state claim

Plaintiff's complaint was sufficient to state a claim for constructive fraud

where plaintiff alleged a close family relationship existed between defendant and his brother, who was plaintiff's father; plaintiff's father had made defendant the executor of his will and for many years there existed a trusted business relationship in that defendant was given managerial responsibilities, including the keeping of the books in his brother's business; immediately prior to the death of plaintiff's father, defendant was relied on increasingly to manage the day-to-day operation of the business; as defendant's managerial control over the business increased, plaintiff's father became seriously weakened by a continued illness; at the time plaintiff's father signed the document which purported to transfer all his interest in his business to defendant, plaintiff's father was confined to his bed, nearly blind, unable to talk or hear clearly and was suffering from intense pain which required heavy medication; at the time the document was executed, a relation of trust and confidence existed between defendant and his brother; defendant knowingly and willfully, and with the intent to deceive, fraudulently induced his brother and business associate, plaintiff's father, to sell his interest in the business at a grossly inadequate price; and plaintiff, as a devisee under the will of his father, had been damaged by the difference between the price agreed to be paid and the actual value of the business.

3. Fraud § 13— punitive damages — claim incorrectly dismissed

The trial court erred in dismissing plaintiff's claim for punitive damages since plaintiff's fraud claims constituted a sufficient basis to withstand a motion to dismiss on his punitive damage claim.

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

APPEAL by plaintiff from decision of the Court of Appeals, 46 N.C. App. 583, 265 S.E. 2d 463 (1980), affirming dismissal of plaintiff's first, third, fourth and sixth claims by *Britt, J.*, entered 16 August 1979 in WAKE Superior Court.

This is an action for compensatory damages, punitive damages, and rescission based on allegations of fraud, misrepresentation, undue influence, and breach of fiduciary duty on the part of defendant. Plaintiff filed his action on 2 February 1979. His complaint included six counts. Following an extension of time to answer, defendant on 30 March 1979 moved to dismiss all counts under Rule 12 (b)(6). After a hearing on the motion, Judge Samuel E. Britt by order dated 16 August 1979 dismissed plaintiff's first, third, fourth and sixth claims and denied defendant's motion to dismiss the fifth claim. Plaintiff voluntarily dismissed his second claim on 17 August 1979.

The Court of Appeals affirmed the dismissal of plaintiff's claims. It dismissed defendant's appeal of the trial judge's denial of defendant's motion to dismiss plaintiff's fifth claim.

On 18 August 1980 we granted plaintiff's petition for discretionary review pursuant to G.S. 7A-31 from that part of the Court of Appeals' decision which affirmed the trial court's dismissal of four of his claims.

Tharrington, Smith & Hargrove by Steve Evans for plaintiff.

Emanuel & Thompson by W. Hugh Thompson and Yeargan & Mitchiner by Joseph H. Mitchiner for defendant.

BRANCH, Chief Justice.

Plaintiff first assigns as error the dismissal of his first and fourth claims which are grounded on fraud. In pertinent part he alleges in his complaint under these claims:

* * *

3. Plaintiff is the son of the late Edward McKinley Terry, Sr., who died testate in Wake County, North Carolina, on February 25, 1977. Plaintiff is a devisee under his father's Last Will and Testament dated February 5, 1977, which Last Will and Testament has been probated in Wake County.

4. For several years prior to his death, Edward McKinley Terry, Sr. was President and sole stockholder of Terry's Furniture Company, Inc., a retail furniture and appliance dealer in Raleigh, North Carolina.

5. Defendant Charles Thurman Terry, the brother of Edward McKinley Terry, Sr. and uncle of Plaintiff, was an employee of Terry's Furniture Company, Inc. His job was to assist in running the store and to keep the books of the store.

6. Plaintiff is informed and believes and, therefore, alleges upon information and belief that on or about May 31, 1973, Edward McKinley Terry, Sr. transferred by gift 1,087 shares of the stock of Terry's Furniture Company, Inc. to Charles Thurman Terry.

7. Plaintiff, Edward McKinley Terry, Jr., began working at his father's store when he was approximately 14 years of age and continued working there until around April, 1978. He worked closely with his uncle, Charles

Thurman Terry, and relied on his honesty and integrity.

8. On many occasions prior to his death, Edward McKinley Terry, Sr. told plaintiff that he had an ownership interest in the store and that he was "working for himself."

9. In 1976, Edward McKinley Terry, Sr. discovered he had cancer. His health began to decline and surgery to remove cancerous portions of his face was required. In the two months or so prior to his death, Edward McKinley Terry, Sr. was confined to his bed in intense pain; his vision deteriorated to the point of virtual blindness; his hearing and speech ability declined; and his pain was such that his doctor had to prescribe heavy medication.

10. Edward McKinley Terry, Sr. continued to participate in the operation of Terry's Furniture Company, Inc. until at least December, 1976, two months prior to his death; but during the last months of his life because of his illness he relied increasingly on his brother, Charles Thurmond Terry, and plaintiff for the day-to-day operation of the business.

11. On February 4, 1977, 21 days prior to his death, Edward McKinley Terry, Sr. was induced by his brother and business associate, Charles Thurman Terry, to sign a document purporting to transfer all of his interest in Terry's Furniture Company, Inc. to Charles Thurman Terry for $25,000.00. A copy of this document is attached to this Complaint as Exhibit A and incorporated herein by reference.

12. At the time he signed the document attached as Exhibit A, Edward McKinley Terry, Sr. was confined to his bed, nearly blind, unable to talk or hear clearly, suffering intense pain and under heavy medication.

13. Plaintiff witnessed the signing of the purported transfer of his father's interest in the store. Plaintiff was, at that time under severe emotional distress because of his father's physical condition, but was induced to sign the alleged agreement as a witness by Charles Thurman Terry who told Plaintiff that unless he witnessed the

document there would be "a big mess down at the store after his father died." As a result of this stressful situation, his mental and physical condition and the inducement by his uncle, plaintiff witnessed the signing of the alleged agreement without understanding its contents.

14. After his father's death, plaintiff questioned his uncle about the ownership of the store. Around April, 1978, more than one year after Edward McKinley Terry, Sr. died, Charles Thurmond Terry informed plaintiff that he had bought all of Edward McKinley Terry, Sr.'s interest in the store for $25,000.00; that plaintiff had no interest in the store; and that the only thing plaintiff had at the store was a job which he would not have for long.

15. Plaintiff was fired by Charles Thurmond Terry shortly thereafter.

16. Plaintiff has repeatedly requested the opportunity to inspect the books and records of Terry's Furniture Company, Inc. to determine the value of his father's interest in the business. That request has been denied by defendant.

17. Plaintiff is informed and believes and alleges upon information and belief, that the value of his father's interest in Terry's Furniture Company, Inc. on February 4, 1977 was far in excess of the $25,000.00 paid by Charles Thurman Terry.

18. Charles Thurmond Terry knowingly and willfully, and with intent to deceive, fraudulently induced his brother and business associate, Edward McKinley Terry, Sr., to sell his interest in Terry's Furniture Company, Inc., at a grossly inadequate price, and such deceit occurred at a time when Edward McKinley Terry, Sr. was confined to his bed, nearly blind, unable to talk or hear clearly, suffering from intense pain, and under heavy medication.

19. Charles Thurman Terry knowingly and willfully, and with the intent to deceive, misrepresented to plaintiff following the death of plaintiff's father the circumstances surrounding his alleged purchase of plaintiff's

father's interest in Terry's Furniture Company, Inc. and that plaintiff should trust his uncle to protect plaintiff's interest.

20. As a result of Charles Thurman Terry's deceit and influence over Edward McKinley Terry, Sr. and plaintiff, plaintiff, as a devisee under the will of Edward McKinley Terry, Sr., has been damaged by the difference of the price paid by Charles Thurman Terry for Edward McKinley Terry, Sr.'s interest in Terry Furniture Company, Inc. and the true market value of that interest as of February 5, 1977, plus such consequential damages as plaintiff may prove.

As a general rule, the law of frauds contains few absolutes. In this connection, this Court has stated:

> Fraud, actual and constructive, is so multiform as to admit of no rules or definitions. "It is, indeed, a part of equity doctrine not to define it," says *Lord Hardwicke*, "lest the craft of men should find a way of committing fraud which might escape such a rule or definition." Equity, therefore, will not permit "annihilation by definition," but it leaves the way open to punish frauds and to redress wrongs perpetrated by means of them in whatever form they may appear. The presence of fraud, when resorted to by an adroit and crafty person, is at times exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote it. Under such conditions, the inferences legitimately deducible from all the surrounding circumstances furnish, in the absence of direct evidence, and often in the teeth of positive testimony to the contrary, ample ground for concluding that fraud has been resorted to and practiced by one or more of the parties. *Grove v. Spike*, 72 Md., 300.

Standard Oil Company v. Hunt, 187 N.C. 157, 159, 121 S.E. 184, 185 (1924); *Furst v. Merritt*, 190 N.C. 397, 404, 130 S.E. 40 (1925).

Fraud can nevertheless be broken into two categories, actual and constructive. Actual fraud is the more common type, arising from arm's length transactions. It requires an allegation of facts to

support the five elements of fraud. These essential elements of actual fraud are:

> (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.

Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E. 2d 494 (1974); *Dallas v. Wagner*, 204 N.C. 517, 168 S.E. 838 (1933). Constructive fraud, on the other hand, is less common and arises in circumstances where a confidential relationship exists. A claim of constructive fraud does not require the same rigorous adherence to elements as actual fraud. In *Patuxent Development Company v. Bearden*, 227 N.C. 124, 41 S.E. 2d 85 (1947), this Court said that charging actual fraud is "more exacting" than charging constructive fraud. *Id.* at 128, 41 S.E. 2d at 87.

The proper elements for a constructive fraud claim are set out in *Rhodes v. Jones*, 232 N.C. 547, 61 S.E. 2d 725 (1950). Justice Barnhill stated in that case:

> Plaintiff bottoms his cause of action on the assertion that [defendant] . . . first won and then abused his trust and confidence. That is, he relies, in part at least, upon the presumption of fraud which arises upon a breach of a confidential or fiduciary relationship . . . .
>
> * * *
>
> In stating his cause of action under this principle of law, it is not sufficient for plaintiff to allege merely that defendant had won his trust and confidence and occupied a position of dominant influence over him. Nor does it suffice for him to allege that the deed in question was obtained by fraud and undue influence . . . . It is necessary for plaintiff to allege facts and circumstances (1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.

Id. at 548-49, 61 S.E. 2d 725.

The courts have been as reluctant to define a confidential relationship as they have been to define fraud itself. As this Court said in *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896 (1931):

> The courts generally have declined to define the term "fiduciary relation" and thereby exclude from this broad term any relation that may exist betwen two or more persons with respect to the rights of persons or the property of either .... The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.

Id. at 598, 160 S.E. at 906. *In Lee v. Pearce*, 68 N.C. 76 (1872), the Court stated that one type of confidential relationship that would support a constructive fraud claim is where "one is the general agent of another and has entire management, so as to be in effect, as much his guardian as the regularly appointed guardian of an infant." *Id.* at 87.

In this case, plaintiff must rely on constructive fraud rather than actual fraud. The gist of the complaint is not that defendant misrepresented material facts to the detriment of plaintiff's father, but rather that defendant used his confidential relationship with plaintiff's father to take advantage of him by purchasing his interest in the business at a price well below its market value.

Defendant contends that under the rules of civil procedure, this claim of fraud is not stated with sufficient particularity. He cites Rule 9(b) which states, "In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity . . . ." He also notes that, in *Mangum v. Searles*, 281 N.C. 91, 187 S.E. 2d 697 (1972), this Court concluded that "Rule 9(b) codifies the requirement previously existing in our State practice that the facts relied upon to establish fraud, duress or mistake must be alleged." *Id.* at 96, 187 S.E. 2d at 700.

Recognizing and reaffirming our rule that allegations of fraud must be pleaded with greater particularity, we also are aware that Rule 9(b) must be reconciled with our rule 8 which requires a short and concise statement of claims. *See United Insurance Co. v. B. W. Rudy, Inc.*, 42 F.R.D. 398 (E.D. Pa. 1967); 5 Wright and Miller, Federal Practice and Procedure § 1298, at 406 (1969).

Our legislature's recognition of this need for reconciliation of these statutes is reflected in the adoption of the short and concise form suggested for pleading fraud. G.S. 1A, Rule 84(7). We find no decisions in which this Court has examined the rationale of Rule 9(b) to determine the *extent* of particularity required in pleading fraud. Since our Rule 9(b) is a counterpart of the Federal Rule 9(b), we turn to apposite Federal cases for aid in determining this question. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

In *Lincoln National Bank v. Lampe*, 414 F. Supp. 1270 (N.D. Ill. 1976), the court noted that the purpose of Rule 9(b) is to protect a defendant from unjustified injury to his reputation by requiring more particularity than is normally required by notice pleading. The particularity required by the rule generally encompasses the *time, place and contents of the fraudulent representation, the identity of the person making the representation and what was obtained by the fraudulent acts or representations.* The particularity required cannot be satisfied by using conclusory language or asserting fraud through mere quotes from the statute. Other courts have noted that allegations of fraud have been advanced for their nuisance or settlement value. Further it has been recognized that fraud embraces such a wide variety of potential conduct that the defendant needs particularity of allegation in order to meet the charges. *See* 5 Wright and Miller, Federal Practice and Procedure, § 1296 (1969). In Re National Student Marketing Litigation, 413 F. Supp. 1156 (D.D.C. 1976).

[1] Our consideration of the above-stated rules of law leads us to conclude that in pleading actual fraud the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations. A constructive fraud claim requires even less particularity because it is based on a confidential relationship rather than a specific misrepresentation. The very nature of constructive fraud defies specific and concise allegations and the particularity requirement may be met by alleging facts and circumstances "(1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Rhodes v. Jones, supra* at 548-49, 61 S.E. 2d at 725.

[2] In instant case, plaintiff has alleged facts and circumstances tending to show the following: A close family relationship existed between defendant and his brother Edward McKinley Terry, Sr. Edward McKinley Terry, Sr., had made defendant the executor of his will and for many years there existed a trusted business relationship in that defendant was given managerial responsibilities including the keeping of the books in his brother's business. Immediately prior to the death of Edward McKinley Terry, Sr., defendant was relied on "increasingly" to manage the day-to-day operation of the business. As defendant's managerial control over the business increased, brother Edward McKinley Terry, Sr., became seriously weakened by a continued illness. At the time Edward McKinley Terry, Sr. signed the document which purported to transfer all his interest in Terry's Furniture Company, Inc., to defendant, Edward McKinley Terry, Sr., was confined to his bed, nearly blind, unable to talk or hear clearly and was suffering from intense pain which required heavy medication. At the time the document was executed, a relation of trust and confidence existed between defendant and his brother. Charles Thurmond Terry knowingly and willfully, and with the intent to deceive, fraudulently induced his brother and business associate, Edward McKinley Terry, Sr., to sell his interest in Terry's Furniture Company, Inc., at a grossly inadequate price. The plaintiff Edward McKinley Terry, Jr., as a devisee under the will of Edward McKinley Terry, Sr., had been damaged by the difference between the price agreed to be paid and the actual value of Terry's Furniture Company, Inc.

Defendant's reliance on *Mangum v. Searles, supra*, is misplaced. While it is true that in *Mangum* there were a number of allegations in the complaint similar to those made in instant case (especially the allegations of the weakened state of the person taken advantage of and the family relationship), we find *Mangum* distinguishable because no continuing formal business relationship was alleged. The complaint in that case simply alleged advice on many confidential matters. The Court in *Mangum* properly found that the mere family relationship and general allegations of consultations among family members were not particular enough to support the complaint. Here, however, plaintiff's allegations detail an increasing control of the business by defendant coupled with a worsening of plaintiff's father's condition which culminated in the execution of the sale of the business.

We hold that on his first and fourth claims plaintiff has alleged sufficient facts and circumstances to withstand dismissal of his fraud claims for lack of particularity.

Plaintiff's next assignment of error is that the Court of Appeals erred by affirming the dismissal of his third claim. This claim alleges that defendant breached his trust as executor of plaintiff's father's estate and engaged in self-dealing by failing to disapprove his $25,000 purchase of the father's interest in the business. Plaintiff's third claim contains the following allegations, in addition to incorporating those set out above:

> 2. In his Last Will and Testament dated February 5, 1977, Edward McKinley Terry, Sr., nominated his brother Charles Thurman Terry, to serve as Executor of his Last Will and Testament.
>
> 3. On March 4, 1977, Charles Thurman Terry applied for and was granted Letters Testamentary by the Clerk of Superior Court for Wake County.
>
> 4. As Executor of the Estate of Edward McKinley Terry, Sr., Charles Thurman Terry incurred a fiduciary responsibility to settle the estate with as little sacrifice of value as was reasonable under the circumstances and to perform all acts incident to the collection, preservation, and liquidation of the estate assets in a reasonable and prudent manner. As part of this general fiduciary duty, Charles Thurman Terry had the specific duty to refuse to complete any contract entered into by Edward McKinley Terry, Sr. which the Executor, in good faith, determined not to be in the best interest of the estate.
>
> 5. Charles Thurman Terry, as Executor approved and completed the purported agreement by Edward McKinley Terry, Sr. to sell his interest in Terry's Furniture Company, Inc. to Charles Thurman Terry for $25,000.00.
>
> 6. By approving and completing said purported agreement, Charles Thurman Terry engaged in self-dealing, acted in bad faith, and breached his fiduciary duty.

Plaintiff contends that G.S. 28A-13-3(a)(4) requires that defendant as executor consider the impact of adopting the contract to

sell his father's business. The statute empowers the executor

> [t]o complete performance of contracts entered into by the decedent that continue as obligations of his estate, or to refuse to complete such contracts, as the personal representative may determine to be in the best interests of the estate . . . .

The Court of Appeals reasoned that since the contract was signed prior to the father's death, the transfer of property must have taken place at that time as well. Thus, the court concluded that the estate had no contract obligation to discharge and no claim arose under the statute.

We find that we need not further consider plaintiff's third claim for relief. When the decedent signed the contract of sale, his interest passed to defendant, subject to payment of the full purchase price. The executor's duty, if any, under the statute, would have been to refuse receipt of payment and to bring an action to set aside the contract of sale on grounds of fraud or undue influence. Plaintiff's third claim for relief is, therefore, based on his first and fourth claims of fraud and his fifth claim of undue influence. This being so, if the jury does not find in plaintiff's favor on either the claim of fraud or of undue influence, his third claim for relief necessarily fails also. Conversely, if the plaintiff succeeds on either the fraud claim or the undue influence claim, this third claim becomes mere surplusage.

[3] Plaintiff's final assignment of error is that the trial court incorrectly dismissed his claim for punitive damages. Ordinarily punitive damages are not recoverable. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). In the proper case, however, punitive damages are permitted on public policy grounds. *Cotton v. Fisheries Products Co.*, 181 N.C. 151, 106 S.E. 487 (1921). As this court stated in *Newton v. Standard Fire Insurance Company*, 291 N.C. 105, 229 S.E. 2d 297 (1976), "In North Carolina actionable fraud *by its very nature* involves intentional wrongdoing . . . [and] is well within North Carolina's policy underlying its concept of punitive damages." *Id.* at 113, 229 S.E. 2d at 302. [Original emphasis.] We therefore hold that plaintiff's fraud claims constitute a sufficient basis to withstand a 12(b)(6) challenge on the claim for punitive damages.

The decision of the Court of Appeals is reversed. We remand to the Court of Appeals for further remand to the Superior Court of Wake County for further action consistent with this opinion.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. TIMOTHY RAY TANN

No. 141

(Filed 27 January 1981)

1. Constitutional Law § 50— speedy trial — factors considered

Interrelated factors to be considered in determining whether an accused has been denied his constitutional right to a speedy trial are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay.

2. Constitutional Law § 52— speedy trial — requirement that delay be arbitrary and oppressive

Delays in violation of the constitutional right to a speedy trial are those undue delays which are arbitrary and oppressive or the result of deliberate prosecution efforts "to hamper the defense."

3. Constitutional Law § 52— speedy trial — burden of proof

The burden is on an accused who asserts denial of his constitutional right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution.

4. Constitutional Law § 51— eight month delay between arrest and trial — no denial of speedy trial

A defendant charged with first degree burglary was not denied his constitutional right to a speedy trial by the delay of less than eight months from the time of his arrest to commencement of his trial where the record shows that a portion of the delay was due to defendant's motion for a mental examination to determine his competency to proceed; further delay was occasioned when defendant's counsel withdrew due to irreconcilable differences between counsel and defendant; a short delay on another occasion was caused by the inability of an officer to be present; and the case was calendared one or more times for trial but not reached due to the length of the calendar.

5. Criminal Law §§ 66.5, 66.10, 66.15— pretrial showup identification — absence of counsel — no likelihood of irreparable misidentification — in-

court identification — independent origin

The trial court properly admitted a burglary victim's in-court identification of defendant and evidence of the victim's identification of defendant in a one-man showup conducted at the victim's home within an hour after the crime and at a time when defendant was without counsel and had not waived counsel where the evidence on *voir dire* tended to show that when the victim awoke on the night in question a man was standing over her with his hand on her thigh; the man left through a window and the victim watched him crawl on his knees to the corner of her house where he stood up and then left; the victim was able to see the man's face when he stood up because there was a street light located in the back yard; the victim recognized the man as a person known to her as "Rayboy"; the victim told officers the man was wearing a light colored shirt and light colored pants and had an Afro hairdo; officers knew that defendant was known as "Rayboy"; officers then went to defendant's home and found him lying on a couch wearing a light colored shirt and light colored pants which were wet below the knees and had grass stains on the knees; defendant agreed voluntarily to accompany the officers to the victim's residence where he was identified by the victim; and defendant had not been arrested and was not in custody at the time he was identified at the victim's home, since (1) defendant was not entitled to counsel at the one-man showup because he was not in custody, (2) there is no reasonable possibility that the one-man showup could have led to a mistaken identification or contributed to defendant's conviction, and (3) the in-court identification of defendant by the victim was independent in origin and was not influenced by the showup.

6. Criminal Law § 75.9— volunteered in-custody statements

In-custody statements volunteered by defendant after he had waived his constitutional rights and while he was being taken by automobile from the magistrate's office to the police station, "Man, you can't do this to me. That lady don't know what time I broke into her house," were properly admitted in defendant's trial for first degree burglary.

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

DEFENDANT appeals from judgment of *Bruce, J.*, 7 April 1980 Criminal Session, EDGECOMBE Superior Court.

Defendant was tried and convicted upon a bill of indictment charging him with first degree burglary on the night of 2 September 1979, when he allegedly broke into and entered the occupied dwelling of Annie Brooks located at 1508 Springbrook Drive in Rocky Mount, N.C., with intent to commit rape.

The State offered evidence tending to show that on the night in question Annie Brooks was awakened at approximately 2 a.m. by a man standing over her bed with his hand on her thigh. She yelled "Who are you!" and the man "turned around fast and went out the bedroom window." The window had been left open that night due to hot weather, but the screen was intact when Mrs. Brooks went to

bed. It was later discovered that the screen had been torn or cut. Mrs. Brooks rushed to the window and saw the intruder fall on the wet grass. He crawled about twenty feet to the corner of the house and stood up. In the words of Mrs. Brooks:

> I saw his face. I could see the type of clothes he was wearing. I know who he was. I knew him to be Rayboy. I had seen him before. He lives down the street from me not far from my house. I have been down to the house where he lives. All I knew about him was his name was Rayboy. When he got to the corner of my house, he straightened up and ran around the house. He had to run because he knew I saw him.

Police officers were called immediately. When they arrived, Mrs. Brooks told them the intruder was a man she knew as "Rayboy." She said she had no doubt that it was Rayboy; that he lived in the community and she had seen him on other occasions; that his hair was bushed, and that he was wearing "real light" clothing. Mrs. Brooks had never heard the name "Timothy Ray Tann," but the officers knew that Timothy Ray Tann was known as "Rayboy." Within less than an hour, they brought the defendant Timothy Ray Tann to the Brooks residence and Mrs. Brooks identified him as the individual who had been in her bedroom.

Officer Parks testified that he and Officer Moss immediately went to the home of defendant's mother and were admitted. They found defendant lying on the couch fully clothed except for his shoes. Defendant willingly accompanied the officers to the Brooks residence at 1508 Springbrook Drive. The officers wanted Mrs. Brooks to see defendant to make sure that "we were talking about one and the same person." Defendant was dressed in a light colored shirt and off-white pants. The pants were wet below the knees with grass stains on the knees.

The State's evidence further tends to show that defendant had been living about a year at the home of Catherine Davis, a friend of Mrs. Brooks, the third or fourth house from the Brooks residence on Springbrook Drive. Mrs. Brooks had seen defendant at least twice at the Davis home.

Defendant testified he was twenty-five years old and had been living in a rented room in the home of Catherine Davis on Spring-

brook Drive for about a year. He said he and Mrs. Brooks were friends; that he had seen her at the Catherine Davis house about every weekend; that she asked for liquor and beer on many occasions but he would not give her any; that she used to go with a man named Hiawatha who also lived at the Davis house.

Defendant gave a detailed account of his whereabouts on 1 September until 11:15 p.m. when he went to his mother's home, kicked off his shoes and lay down on the couch. He remained there until the officers came sometime during the early morning hours and took him away. He denied that he had been to the home of Mrs. Brooks that night until the officers took him there. His testimony was corroborated by the testimony of his mother that she had asthma and sat up all night in the same room where defendant was lying on the couch. She testified defendant did not leave her home from 11:15 p.m. on the night in question until the officers came and took him away.

Defendant admitted he had been convicted of manslaughter, felonious breaking and entering twice, and larceny.

Defendant was convicted of burglary in the first degree and sentenced to life imprisonment. He appeals to this Court assigning errors discussed in the opinion.

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

William A Pully, Attorney for defendant appellant.

HUSKINS, Justice.

Defendant moved to dismiss the charges against him on the ground that his constitutional right to a speedy trial had been denied. Denial of the motion constitutes his first assignment of error.

Defendant filed no affidavits or other evidentiary matter to support the conclusory assertions contained in his motion to dismiss. An examination of the record reveals the following chronology of events:

1. The crime was committed and defendant was arrested on 2 September 1979.

2. A probable cause hearing was set for 20 September 1979,

but on that date defendant, through counsel, moved for a mental examination to determine his competency to proceed. In consequence thereof, the probable cause hearing was not held, and defendant was sent to Dorothea Dix Hospital for a mental examination.

3. The mental examination was completed on 5 October 1979. Defendant was found competent to proceed, and the psychiatric report to that effect was filed with the court on 10 October 1979.

4. On 18 October 1979, Quentin T. Sumner, defendant's original counsel, was allowed to withdraw due to irreconcilable differences between him and defendant. Attorney William A. Pully was thereupon appointed to represent defendant.

5. On 13 December 1979, a probable cause hearing calendared for that date was continued on motion of the State to 17 December 1979 due to the absence of an officer. Defendant's motion to dismiss at the close of the hearing was denied.

6. On 17 December 1979, a probable cause hearing was conducted, and defendant was bound over to superior court for trial.

7. On 7 January 1980, defendant's counsel, William A. Pully, moved for the appointment of an additional lawyer to assist him. The motion was allowed on 11 January 1980, and H. Vinson Bridgers was appointed as additional counsel.

8. On 11 January 1980, defendant moved to dismiss on the ground that his constitutional right to a speedy trial had been denied.

9. On 14 January 1980, the Grand Jury returned a true bill of indictment against defendant.

10. On 15 January 1980, defendant appeared for arraignment and entered a plea of not guilty. His motion to dismiss for want of a speedy trial was denied and the case was calendared for trial on 19 February 1980 but not reached at the February session of superior court.

11. On 7 April 1980, defendant was tried, convicted and sentenced.

12. On 9 April 1980, defendant filed his second motion to dismiss for failure to grant a speedy trial. He asserts in that motion,

with no evidence to support it, that his probable cause hearing was calendared no less than four times in district court and continued three times by the State; that the case against him had been calendared three times in superior court before it was finally brought to trial on 7 April 1980. The record shows none of these things, but we shall assume *arguendo* that they are true.

13. On 16 April 1980, defendant's motion to dismiss because he was denied a speedy trial was denied by the court, and defendant excepted.

On the basis of the record before us, we think defendant's motion to dismiss on speedy trial grounds was properly denied.

[1] Interrelated factors to be considered in determining whether an accused has been denied his constitutional right to a speedy trial are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed.2d 101, 92 S.Ct. 2182 (1972); *State v. Hill*, 287 N.C. 207, 214 S.E.2d 67 (1975); *State v. Gordon*, 287 N.C. 118, 213 S.E.2d 708 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed.2d 1207, 96 S.Ct. 3206 (1976); *State v. Johnson*, 275 N.C. 264, 167 S.E.2d 274 (1969).

[2] Whether an accused has been denied a speedy trial must be answered in light of the facts in each particular case. The instant case involves a delay of less than eight months from time of defendant's arrest to commencement of his trial. The length of the delay is not *per se* determinative, and there is no showing that the delay was purposeful or oppressive or by reasonable effort could have been avoided by the State. Inherent in every criminal prosecution is the probability of some delay, *State v. Johnson, supra*, and for that reason the right to a speedy trial is necessarily relative. *State v. Neas*, 278 N.C. 506, 180 S.E.2d 12 (1971). Delays in violation of the constitutional right to a speedy trial are those undue delays which are arbitrary and oppressive or the result of deliberate prosecution efforts "to hamper the defense." *Barker v. Wingo, supra; State v. Spencer*, 281 N.C. 121, 187 S.E.2d 779 (1972).

[3,4] The burden is on an accused who asserts denial of his constitutional right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. *State v. Hill, supra; State v. Gordon, supra; State v. Johnson, supra.* In the case before us, de-

fendant has failed to carry the burden. To the contrary, the record indicates that a portion of the delay in the prosecution of this case was due to defendant's motion for a mental examination to determine his competency to proceed. Further delay was occasioned when his counsel withdrew due to irreconcilable differences between counsel and defendant. A short delay on another occasion was caused by the inability of an officer to be present. Finally, the case was calendared one or more times for trial but not reached, apparently due to the length of the calendar. All such reasons have been recognized consistently as valid justification for delay. *See Barker v. Wingo, supra; State v. Hill, supra; State v. Gordon, supra.* We therefore conclude that the length of the delay was not unreasonable. He has shown no prejudice resulting from the delay of which he now complains. Defendant's first assignment of error is overruled.

[5] Defendant moved to suppress his in-court identification by Mrs. Brooks because (1) it was based on an illegal pretrial one-man lineup and (2) the one-man lineup was conducted at a time when defendant was without counsel and had not knowingly and intelligently waived his right to counsel. Defendant argues he was thus identified at the home of Mrs. Brooks in the absence of counsel and under suggestive circumstances amounting to a denial of due process which renders the evidence incompetent. The motion to suppress was denied and this constitutes his next assignment of error.

An in-custody confrontation for identification purposes requires that: (1) the accused be warned of his constitutional right to the presence of counsel during the confrontation; (2) when counsel is not knowingly waived and is not present, the testimony of witnesses that they identified the accused at the confrontation must be excluded, and (3) the in-court identification of the accused by a witness who participated in the pretrial out-of-court confrontation must likewise be excluded unless it is first determined on *voir dire* that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. Failure to observe these requirements is a denial of due process. *United States v. Wade*, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967); *Gilbert v. California*, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967); *State v. Smith*, 278 N.C. 476, 180 S.E.2d 7 (1971); *State v. Rogers*, 275 N.C. 411, 168 S.E.2d 345 (1969), *cert. den.*, 396 U.S. 1024, 24 L. Ed. 2d 518, 90 S.Ct. 599 (1970).

Furthermore, it is established law that lineup and confrontation procedures so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification violate due process and are constitutionally unacceptable. *State v. McPherson*, 276 N.C. 482, 172 S.E.2d 50 (1970); *State v. Austin*, 276 N.C. 391, 172 S.E.2d 507, *cert. denied*, 400 U.S. 842, 27 L.Ed.2d 78, 91 S.Ct. 85 (1970).

The trial judge conducted a *voir dire* on defendant's motion to suppress. The State examined Mrs. Brooks and Officer Jack Parks. Mrs. Brooks testified in pertinent part that when she awoke on the night in question the man was standing over her with his cold hand on her naked thigh; that she could not see his face at that time; that he whirled around and left through the window; that she watched him crawl on his knees to the corner of her house where he stood up and then ran; that she was able to see his face when he stood up because there was a street light located in the back yard; that the person who stood up at the corner of her house was Rayboy; that she had no doubt about her identification of the man as Rayboy; that she recognized him and told Officer Parks later that night it was Rayboy; that when the officers later brought defendant back to her home that night it was the same person she knew and recognized as Rayboy; that he was wearing real light clothing and had a bush or Afro hairdo; that when the officers brought defendant to her house within less than an hour after the burglary, defendant was dressed the same way and was the same individual she had seen standing at the corner of her house earlier.

Officer Jack Parks testified *voir dire* that he arrived at the Brooks home at approximately 2:52 a.m. on the night of 2 September 1979; that Mrs. Brooks advised him a black man had entered her bedroom window and when she awakened he was standing over her with her nightgown around her waist and one of his hands on her thigh; that the black man was dressed in light colored clothing, limped, and was called Rayboy; that she stated she knew it was Rayboy because she had seen him in the neighborhood; that he knew defendant Timothy Tann was known as Rayboy; that he thereupon went to the home of defendant's mother who admitted him; that defendant was lying on the couch fully clothed except for his shoes and agreed voluntarily to accompany the officers to the Brooks residence after they told him they were investigating a burglary; that Mrs. Brooks was in her bedroom when they brought defendant

into the house and took him into the bedroom; that after she looked at Timothy Tann, they took him into the living room and at that point Mrs. Brooks indicated that he was Rayboy. Officer Parks further testified that defendant was dressed in a light colored shirt and off-white pants and that the pants were wet below the knees with grass stains on the knees. Officer Parks said defendant had not been arrested and was not in custody at the time and consequently had not been warned of his constitutional rights.

Defendant offered no evidence on *voir dire*.

The trial court made findings of fact substantially in accord with the testimony of the State's witnesses. They include the following pertinent findings:

> 5. The area of the yard of said dwelling house is lit by a street light located behind the house and a street light located in front of the house.
>
> 6. Annie Pearl Brooks observed the person standing by the corner of her house to have been wearing a pea green light colored shirt, light colored pants and an Afro hairdo and that the person was a person known to her as "Rayboy."
>
> 7. The Rocky Mount police . . . within one hour . . . picked up Timothy Ray Tann and brought him to the home of the witness Annie Pearl Brooks.
>
> 8. Upon leaving Mrs. Brooks' house after getting the description Officer Parks went to the home of a person he knew as "Rayboy," also known as Timothy Ray Tann, and found the defendant lying upon a couch with light colored pants wet below the knees, and with grass stains on the knees, a light colored shirt and no shoes.
>
> . . .
>
> 10. Timothy Ray Tann agreed to accompany the police and was not formally placed under arrest.
>
> . . .
>
> 12. Timothy Ray Tann was thereupon taken into the residence and into the bedroom of the witness Brooks and the witness Brooks was given an opportunity to observe

Timothy Ray Tann with the light off.

13. The witness, Annie Pearl Brooks identified Timothy Ray Tann as being the person in her house earlier.

14. Subsequent to the said identification Timothy Ray Tann was placed under arrest.

Based on the findings of fact, the trial judge concluded as a matter of law: (1) that Timothy Ray Tann was not under arrest or in any way detained by the police against his will when he was taken to the Brooks residence; (2) that defendant voluntarily accompanied Officer Parks to the Brooks residence; (3) that the officers were conducting an on-the-scene investigation at the time Timothy Ray Tann was taken to the Brooks residence to determine whether the "Rayboy" described by Mrs. Brooks was in fact Timothy Ray Tann, a person known by Officer Parks to be called "Rayboy"; (4) that the one-man show-up was conducted by Officer Parks during his investigation and was not so unnecessarily suggestive as to be conducive to an irreparable mistaken identification of defendant or in a manner which violated defendant's constitutional rights; (5) that defendant's right to counsel had not yet attached because defendant had not been placed under arrest; (6) that defendant's in-court identification by Mrs. Brooks is based upon her observation of him at the time or shortly after the alleged offense when the person she knew as "Rayboy" crawled to and stood up at the corner of her house; and (7) the in-court identification of defendant and evidence of his identification at the show-up are admissible into evidence.

There is plenary competent evidence in the record to support the findings of the trial judge. Such findings are conclusive when supported by competent evidence and no reviewing court "may properly set aside or modify those findings if so supported by competent evidence in the record." *State v. Gray*, 268 N.C. 69, 79, 150 S.E.2d 1, 8 (1966), *cert. den.*, 386 U.S. 911, 17 L.Ed.2d 784, 87 S.Ct. 860 (1967).

Since defendant was not in custody, the rules gleaned from *United States v. Wade*, *supra*, and *Gilbert v. California*, *supra*, governing in-custody confrontations for identification purposes do not apply in this case. Nevertheless, if it is conceded *arguendo* that defendant was in custody, no denial of due process has been shown and the evidence defendant moved to suppress was properly admitted.

It is quite evident that the in-court identification of defendant by Mrs. Brooks was independent in origin, stemming from her recognition of him when he stood up at the corner of her home immediately after the burglary, and was not influenced by the show-up. Mrs. Brooks knew the intruder as "Rayboy." The officers merely supplied Timothy Ray Tann while Mrs. Brooks independently identified the man bearing that name as the man she knew as "Rayboy." There is ample evidence to support the finding that the in-court identification was independent in origin. She knew the man long before the officers produced him. In all events, admission of evidence concerning the one-man show-up was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *Gilbert v. California, supra; State v. Taylor*, 280 N.C. 273, 185 S.E.2d 677 (1972). Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless. *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229 (1963). We see no reasonable possibility that the one-man show-up here could have led to a mistaken identification or contributed to defendant's conviction. After all, the victim had recognized defendant and told the officers that Rayboy was the culprit. This assignment of error has no merit and is overruled.

[6] After Mrs. Brooks had informed the officers that defendant was the burglar in her bedroom on the night in question, Officer Parks took defendant to the police station and advised him of his *Miranda* rights. Following the reading of defendant's constitutional rights, defendant said he understood them and stated he would sign a waiver, which he did. Defendant was then interrogated for about five minutes at the police station and, in response to questions, stated that on the night in question he had been to a cousin's house located on Goldleaf Street and thereafter had gone to a place known as "Brown's." Questioning by the officers then ceased and defendant was taken by automobile to a magistrate's office located some distance from the police station and was not further questioned by the officers. After a warrant was issued by the magistrate and served on defendant, he was taken by car back to the police station. No questions were put to him in the automobile during the trip from the magistrate's office to the police station. During the course of the trip, however, defendant volunteered the following statement: "Man, you can't do this to me. That lady don't know what time I broke into her house."

During the course of the trial defendant moved to suppress the officer's testimony regarding the quoted statement by defendant. The jury was excused and the trial judge conducted a *voir dire* during which Officer Parks testified as a witness for the prosecution. Defendant offered no evidence on *voir dire*. At its conclusion, the trial judge made findings of fact substantially in accord with the foregoing narration. The court concluded that defendant's statement was volunteered after he had been warned of his constitutional rights, including the right to counsel, and had freely and understandingly waived the same. The incriminating statement was thereupon admitted into evidence over defendant's objection. This constitutes his next assignment of error.

It is settled law that where, as here, the findings of the trial judge are supported by competent evidence, they are binding and conclusive on appellate courts in this jurisdiction. *State v. Morris*, 279 N.C. 477, 183 S.E.2d 634 (1971); *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971); *State v. Gray*, *supra*. The challenged evidence was competent and therefore properly admitted. Seemingly, it has very little probative value but its weight is for the jury and does not affect its admissibility.

Evidence of defendant's guilt is strong. Various circumstances, including grass stains on the knees of his pants and his positive identification by Mrs. Brooks who knew him before the crime was committed, plus the fact that he was apprehended within thirty minutes, point unerringly to defendant as the burglar. In any event, the jury believed the State's evidence. Defendant has failed to show prejudicial error in his trial. The verdict and judgment must therefore be upheld.

No error.

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

STATE OF NORTH CAROLINA v. JAMES LEWIS JACKSON

No. 98

(Filed 27 January 1981)

1. Criminal Law § 29— capacity to stand trial — sufficiency of court's findings

There was no merit to defendant's argument that because the court did not adopt the report by the State on defendant's capacity to stand trial, any finding that defendant suffered some sort of mental disease was unsupported by the evidence, nor was there merit to his argument that the trial court was required to adopt the psychiatric report of either the State or the defense but could not arrive at an independent conclusion, and the finding of the trial judge that defendant was competent to stand trial was clearly supported by the evidence where evidence offered by the State indicated defendant was fully capable of standing trial; testimony for the defense was to the effect that in stressful situations the defendant manifested some symptoms of mental illness; but defendant's expert witness also stated that in his opinion defendant understood the nature of the proceedings against him.

2. Arrest and Bail § 3.1— warrantless detention — reasonableness

There was no merit to defendant's contention that he was unlawfully detained prior to his arrest because he was stopped by a policeman who did not have probable cause to detain him but who responded to a request from the officer with whom the rape victim was riding that defendant be detained, since the detention was reasonable as to time, occurring in the middle of the day after defendant was spotted walking along a road, and it was also reasonable as to manner because the officer who stopped defendant simply asked him to wait until the investigating officer arrived, a period of a few minutes, and this defendant willingly did.

3. Searches and Seizures § 5— knife in plain view — warrantless seizure proper

In a first degree rape case where the victim contended that her assailant executed the crime at knife point, the trial court did not err in denying defendant's motion to suppress a knife found among his belongings on the ground that it was found during an illegal search, since a police officer and friend of defendant's family went to defendant's home to secure a change of clothing for defendant; the officer told defendant's mother of the arrest and the reason for the visit; the mother invited the officer into the kitchen where defendant's clothing was in two bags; defendant's mother opened one of the bags and a knife fell out; and the officer had the right to take the knife under the "plain view" doctrine.

4. Criminal Law § 87.3— notes carried by officer to witness stand — denial of access to defendant

The trial court did not err in refusing to afford defendant access to notes carried to the witness stand by the investigating officer, since the officer never referred to the notes during his testimony and in fact never read the notes at all, and where a witness on the stand does not use or attempt to use the writings sought to be produced, even though the writings are under his control, opposing counsel cannot compel their production.

5. Criminal Law § 61.2— shoeprints at crime scene — admissibility

Defendant's contention that only an expert could properly testify as to identification of shoeprints is not the law in this State, nor was there merit to defendant's argument that lay testimony concerning the identification of shoeprints is not admissible unless it satisfies the three-prong test of *State v. Palmer*, 230 N.C. 205, since the principles stated in that case are to be applied where the sufficiency of circumstantial evidence to withstand the motion for nonsuit is the question before the court, rather than the admissibility of shoeprint evidence which was the question in this case.

6. Criminal Law § 63— psychiatrist's testimony — admissibility

There was no merit to defendant's contention that testimony by a State psychiatrist concerning the result of a psychiatric test given defendant was impermissible hearsay because the psychiatrist did not personally administer the test, since the evidence did not establish conclusively that the psychiatrist did not participate in administering the test, and even if the test was administered by an assistant, the doctor's evaluation of the test results was admissible, since a diagnostic opinion is not incompetent even if based on information obtained from others.

7. Criminal Law § 131— undisclosed SBI lab report — mistrial not required

The trial court did not err in denying defendant's motion for mistrial based on the discovery by defendant, on the fourth day of trial, of a previously undisclosed lab report which revealed that an SBI expert had found insufficient characteristics present in the photographs of shoeprints at the crime scene to enable the examiner to render an opinion as to whether defendant's shoes could have made the heel impressions shown in the photographs, since the existence of that report in no way affected the competency of the investigating officer's testimony concerning his personal observation of the shoeprints; defendant did not take advantage of the trial court's offer to assist in locating the SBI expert if defendant thought his testimony would be helpful; although defendant obtained possession of the report before the State rested its case, he made no effort to introduce the report into evidence; and inasmuch as the report was prepared by the SBI in connection with the investigation of the case, the report was not statutorily discoverable except by voluntary disclosure.

8. Criminal Law § 138.7— sentencing hearing — testimony considered

In a first degree rape case there was no merit to defendant's contention that the trial court erred in admitting testimony at his sentencing hearing by a woman who recognized defendant as the man who raped her several days before the rape in question, though this testimony would not have been admissible at the guilt phase of the trial, since formal rules of evidence do not apply at a sentencing hearing, and there was no showing of abuse of discretion, as the sentence of life imprisonment for the rape conviction was mandated by statute.

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

APPEAL by defendant from judgments of *Brewer, J.*, entered at the 18 March 1980 Session of ORANGE Superior Court.

Defendant was convicted of first degree rape of Kathleen Buck and second degree burglary of Buck's residence on the night of 11 December 1979. He was sentenced to life imprisonment for the rape and fifteen to twenty years in prison for the burglary, to run consecutively.

At trial, evidence for the State tended to show that on 11 December 1979 the prosecutrix was confronted in her home by a black man armed with a knife. The knife appeared to be one owned by the victim. At knifepoint the intruder forced the prosecutrix to have sexual intercourse against her will. A short time later the assailant left the house on foot.

On 12 December 1979, the day following the incident, the prosecutrix was riding in a police car when she spotted defendant walking beside the road. She immediately identified him as her assailant. The police officer in the car radioed for the assistance of another officer to detain defendant while he drove the prosecuting witness home. The investigating officer then returned and arrested defendant.

Where relevant, other facts will be discussed in the body of the opinon.

Rufus L. Edmisten, Attorney General, by Barry S. McNeill, Associate Attorney, for the State.

Barry T. Winston, attorney for defendant appellant.

HUSKINS, Justice:

[1] Defendant first assigns error to the finding by the trial court that defendant had sufficient capacity to stand trial. The amended record shows that a psychiatrist offered by the State, Dr. James F. Groce, found no evidence of psychosis. Defendant's psychiatrist, Dr. Milton F. Gipstein, testified at a hearing on defendant's motion prior to trial that he found defendant clearly psychotic.

Defendant had been ordered evaluated at Dorothea Dix Hospital by Judge Paschal on 13 December 1979. The staff of that hospital reported him competent to stand trial on 19 December 1979. On hearing the evidence of both the State and defendant, Judge Brewer entered an order on 13 February 1980 finding defendant competent to stand trial. That same day, Judge Brewer also ordered defendant reevaluated apparently in light of Dr. Gip-

stein's testimony that defendant did have mental problems. The staff of Dorothea Dix again found defendant competent on 7 March 1980.

In his order of 13 February 1980 finding defendant competent, Judge Brewer adopted *in toto* neither the report of the State's psychiatrist that defendant was fully competent nor the finding of defendant's psychiatrist that defendant was psychotic. Rather, Judge Brewer found defendant manifested some symptoms of mental illness but nonetheless had sufficient capacity to proceed to the trial.

Defendant argues that because the court did not adopt the report by the State, any finding that defendant suffered some sort of mental disease was unsupported by the evidence. In effect, defendant argues that the trial court in this instance was required to adopt the psychiatric report of either the State or the defense but could not arrive at an independent conclusion. Such is not the law.

The test for capacity to stand trial is whether a defendant has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed. *State v. Bundridge*, 294 N.C. 45, 239 S.E.2d 811 (1978). The issue may be resolved by the trial court with or without the aid of a jury. *State v. Willard*, 292 N.C. 567, 234 S.E. 2d 587 (1977). When the trial judge conducts the inquiry without a jury, the court's findings of fact, if supported by competent evidence, are conclusive on appeal. *State v. Cooper*, 286 N.C. 549, 213 S.E.2d 305 (1975).

Here, the evidence offered by the State indicated defendant was fully capable of standing trial. Testimony for the defense by Dr. Gipstein was to the effect that in stressful situations the defendant manifested some symptoms of mental illness. But Dr. Gipstein also stated that in his opinion Jackson understood the nature of the proceedings against him. Based on the psychiatric evidence before the court, the finding of the trial judge that defendant was competent was clearly supported by competent evidence and is binding on appeal. *State v. Cooper, supra.*

As a second assignment, defendant asserts error in the trial court's denial of his motions to suppress various items of evidence. We will consider the two challenged rulings separately.

[2] Prior to trial, defendant filed a motion to suppress various items of evidence seized from his person following his arrest. Defendant contends he was unlawfully detained prior to his arrest, and, therefore, items seized incident to his arrest should have been suppressed.

The factual basis for defendant's allegation that he was unlawfully detained is found, according to defendant, in his being stopped by a Carrboro policeman who did not have probable cause to detain him. Rather, that officer responded to a request from the officer with whom the prosecutrix was riding that the defendant be detained.

Detention on "investigative custody" without probable cause to make a warrantless arrest is restricted by the Fourth Amendment prohibition of unreasonable search and seizure. *Davis v. Mississippi*, 394 U.S. 721, 22 L. Ed.2d 676, 89 S.Ct. 1394 (1969). Nevertheless, decisions both state and federal have recognized the need and the right of a police officer in the performance of his duties, and in limited circumstances, to detain a person who is not subject to lawful arrest. *See, e.g., Adams v. Williams*, 407 U.S. 143, 32 L.Ed. 2d 612, 92 S.Ct. 1921 (1972); *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968); *State v. McZorn*, 288 N.C. 417, 219 S.E.2d 201 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed.2d 1210, 96 S.Ct. 3210 (1976). The constitutional question here, simply put, is whether the detention of this defendant was reasonable. We hold that it was.

First, we note that the detention was reasonable as to time. It occurred in the middle of the day after defendant was spotted walking along the road. It was also reasonable as to manner. The officer who stopped the defendant simply asked him to wait until the investigating officer arrived, a period of a few minutes. This the defendant willingly did. As the Supreme Court stated in *Adams v. Williams*, *supra*, 407 U.S. at 145, 32 L.Ed.2d at 616-17, 92 S.Ct. at 1923:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response.

This assignment is overruled.

[3] Defendant also filed a motion to suppress a knife found among his belongings, on the grounds that it was found during an illegal search. Apparently, after the arrest, a police officer and friend of defendant's family went to defendant's home to secure a change of clothing for defendant. The officer told defendant's mother of the arrest and the reason for the visit. The mother invited the officer into the kitchen, where defendant's clothing was in two bags. Defendant's mother opened one of the bags and a knife fell out. Upon request, the mother gave the knife to the officer.

Defendant's primary argument is that his mother, by going through defendant's things, was an agent of the State and engaged in a warrantless search. *See* 68 Am. Jur. 2d, Searches and Seizures § 14. But the factual record shows defendant's mother was not asked to search her son's clothes, nor did the police officer intend to conduct a warrantless search. The sole purpose of the officer's visit was to secure a change of clothing for defendant. The officer was invited into the room where the bags were by the person in control of the house, the mother. There, when the knife fell into view, the officer had the right to take it under the "plain view" doctrine. *Harris v. United States*, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968); *State v. Hunter*, 299 N.C. 29, 261 S.E.2d 189 (1980).

Defendant next asks this Court to abandon its adherence to test of insanity established by the M'Naghten rule in favor of the American Law Institute's Model Penal Code standard. *See* American Law Institute, Model Penal Code, Proposed Official Draft, § 4.01 (1962). Suffice it to say that we have adhered to the "right and wrong" M'Naghten test for many years and are not disposed to depart from it now. *See State v. Conley*, 295 N.C. 327, 245 S.E.2d 663 (1978), *vacated on other grounds*, 441 U.S. 929, 60 L.Ed.2d 657, 99 S.Ct. 2046 (1979), and cases cited therein.

[4] As his fourth assignment, defendant alleges error by the trial court in its refusal to afford him access to notes carried to the witness stand by the investigating officer. The notes which defendant sought were written by a gynecology resident as he interviewed the prosecutrix during her examination immediately after the rape. The trial court stipulated that the notes were included in the "packet of notes" which the officer took to the stand. The record also shows the officer never referred to the notes during his testimony,

and in fact never read the notes at all. Where a witness on the stand does not use or attempt to use the writings sought to be produced, even though the writings are under his control, opposing counsel cannot compel their production. *Manufacturing Co. v. Railroad*, 222 N.C. 330, 23 S.E.2d 32 (1942); 3 Wigmore, Evidence § 762 (Chadbourn rev. 1970). If the witness had referred to the notes for the purpose of refreshing his recollection, defense counsel would have been entitled to examine them. *State v. Carter*, 268 N.C. 648, 151 S.E.2d 602 (1966). This assignment is overruled.

[5] Defendant next assigns as error the admission of non-expert opinon testimony as to the similarity between the design on the sole of shoes taken from the defendant and shoeprints found at the scene of the crime. Defendant challenges, first, the competency of a lay witness to testify on this point and, second, that any comparison at all is inadmissible unless a foundation satisfying the three-pronged test of *State v. Palmer*, 230 N.C. 205, 52 S.E.2d 908 (1949), is laid before the testimony is heard.

Defendant's contention that only an expert can properly testify as to identification of tracks is not the law in this State. *State v. Atkinson*, 298 N.C. 673, 259 S.E.2d 858 (1979).

Defendant's second argument that lay testimony concerning the identification of shoeprints is not admissible unless it satisfies the three-pronged standard of *State v. Palmer*, *supra*, is also erroneous.

In *Palmer*, this Court considered only the question whether the trial court should have granted defendants' motion for judgment of nonsuit. The State's evidence clearly demonstrated that the deceased died by a criminal act. However, proof that the criminal act was committed by defendants was *solely circumstantial*. The evidence tending to identify defendants as perpetrators of the murder was shoeprints and automobile tracks found near the victim's body and evidence of a possible motive to kill the victim. In dealing with the evidence of shoeprints, Justice Ervin wrote:

> In the nature of things, evidence of shoeprints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) That the shoeprints were found at or near the place of the crime; (2)

> that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime. Similar criteria apply to evidence of automobile tracks offered to identify the owner of a motor vehicle as the perpetrator of an offense.
>
> Moreover, the bare opinon of a witness that a particular shoeprint is the track of a specified person is without probative force on the question of identification.

Id. at 213-14, 52 S.E. 2d at 913 (citations omitted). The State's evidence in *Palmer* provided no connection between the shoeprints or tiretracks and the crime itself or those accused of the crime. The evidence was held too tenuous and speculative to justify submitting the case to the jury.

The three circumstances enumerated in *Palmer* thus test the weight to be given such evidence and not its admissibility. We have given this interpretation to *Palmer* in the past. "*Palmer* dealt with the weight to be assigned the evidence of the shoe print in determining a motion for nonsuit, not its admissibility." *State v. Long*, 293 N.C. 286, 295, 237 S.E.2d 728, 734 (1977); *see also State v. Banks*, 295 N.C. 399, 245 S.E.2d 743 (1978); *State v. Willis*, 281 N.C. 558, 563, 189 S.E.2d 190, 193 (1972); *State v. Pinyatello*, 272 N.C. 312, 158 S.E.2d 596 (1968); *State v. Bass*, 253 N.C. 318, 116 S.E.2d 772 (1960); *State v. Tew*, 234 N.C. 612, 68 S.E.2d 291 (1951).

A body of case law also exists which cites *Palmer* for the proposition that the three factors stated therein are three prerequisites to admissibility of shoeprint evidence. *State v. Atkinson*, 298 N.C. 673, 259 S.E.2d 858 (1979); *State v. Lewis*, 281 N.C. 564, 569-70, 189 S.E.2d 216, 220, *cert. den.*, 409 U.S. 1046, 34 L.Ed.2d 498, 93 S.Ct. 547 (1972); *McAbee v. Love*, 238 N.C. 560, 78 S.E.2d 405 (1953); *State v. Walker*, 6 N.C. App. 447, 170 S.E.2d 627 (1969).

The use of the triple inference stated in *Palmer* as a test for admissibility of shoeprints is improper. The cited cases are no longer authoritative on this point. The principles stated in *Palmer* are to be applied where the *sufficiency* of circumstantial evidence to withstand a motion for nonsuit is the question before the Court rather than the *admissibility* of shoeprint evidence. Evidence of shoeprints at the scene of the crime corresponding to those of the accused may always be admitted as tending more or less strongly to

connect the accused with the crime. *State v. Long, supra; State v. Pinyatello, supra; State v. Warren*, 228 N.C. 22, 44 S.E.2d 207 (1947); 1 Stansbury, North Carolina Evidence § 85 (Brandis rev. 1973).

In the present case, evidence of shoeprints found in the driveway the day following the attack which corresponded with those of the accused was properly admitted as tending to connect defendant with the crime. The admissibility of such evidence is consistent with the rule of relevance which permits the introduction of any evidence which "has any logical tendency however slight to prove the fact at issue in the case." 1 Stansbury, North Carolina Evidence § 77 (Brandis rev. 1973). Here, defendant's plea of not guilty placed upon the State the burden of proving every element of the crime charged, including identity. The shoeprint evidence was, therefore, admissible to corroborate the prosecuting witness's identification of defendant as her assailant. The weight to be given it was a matter for the jury since it was not the sole evidence connecting defendant with the crime. If the shoeprints were the only evidence connecting defendant to the crime, then a question of *sufficiency of the evidence* would arise and the three-pronged standard of *Palmer* would be applicable. However, the question raised in this assignment is admissibility of the evidence and in that respect there is no error.

Nor did the trial court err in admitting into evidence for illustrative purposes photographs of shoeprint impressions found in the victim's driveway. The photographs were properly admitted for the purpose of illustrating the witness's testimony. *State v. Casper*, 256 N.C. 99, 122 S.E.2d 805 (1961), *cert. den.*, 376 U.S. 927, 11 L.Ed.2d 622, 84 S.Ct. 691 (1964). Defendant's companion assignment, that it was error to allow the jury to examine the photographs and the shoes seized from defendant, is also without merit. *State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241 (1969), *death sentence vacated*, 403 U.S. 948, 29 L.Ed.2d 859, 91 S.Ct. 2283 (1971); *State v. Speller*, 230 N.C. 345, 53 S.E.2d 294 (1949); 1 Stansbury, North Carolina Evidence § 118 (Brandis rev. 1973).

Defendant's argument that the State failed to lay a proper foundation for the introduction of blood test results performed on the prosecutrix and the defendant is rebutted by the factual record. It is therefore overruled.

[6] Defendant next alleges that testimony by a State psychiatrist

concerning the result of a psychiatric test given the defendant was impermissible hearsay. The witness testified that defendant was given the test "under my direction" and that the test showed "no evidence of any organic brain damage." Defendant argues that because the doctor did not personally administer the test this testimony was hearsay.

We find this argument unpersuasive. The cited testimony does not establish conclusively that Dr. Groce did not participate. But, even if the test was administered by an assistant, the doctor's evaluation of the test results is admissible. A diagnostic opinion is not incompetent even if based on information obtained from others. *State v. DeGregory*, 285 N.C. 122, 203 S.E.2d 794 (1974).

[7] By his next assignment, defendant charges error to the denial of his motion for a mistrial. That motion was based on the discovery by defendant, on the fourth day of trial, of a previously undisclosed SBI lab report. The report revealed that an SBI expert had found insufficient characteristics present in the photographs of the shoeprints to enable the examiner to render an opinion as to whether the shoes "could or could not have made the heel impressions" shown in the photographs.

To begin with, the existence of that report in no way affects the competency of Officer Tripp's testimony concerning his *personal* observation of the shoeprints. Secondly, the defendant did not take advantage of the trial court's offer to assist in locating the SBI expert if the defendant thought his testimony would be helpful. Although defendant obtained possession of the report before the State rested its case, he made no effort to introduce the report into evidence. Finally, inasmuch as the report was prepared by the SBI in connection with the investigation of the case, the report was not statutorily discoverable except by voluntary disclosure. G.S. 15A-904(a).

In considering defendant's motions for dismissal, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from it. *State v. Lee*, 294 N.C. 299, 240 S.E.2d 449 (1978). Applying that rule of law to the case *sub judice*, we find no error in the trial court's denial of defendant's motions for dismissal.

[8] As a final assignment of error, defendant challenges the admissibility of testimony at the sentencing hearing by a woman who

recognized the defendant as the man who raped her on 24 November 1979. Apparently this witness had been unable to identify her assailant from a group of photographs, but recognized him when she came to observe this trial. Prior to her identification of defendant, this witness had been informed that his fingerprints had been found in her house, and that he was on trial for rape.

To begin with, under G.S. 15A-1334(b), formal rules of evidence do not apply at a sentencing hearing. Thus the fact that this testimony would not be admissible at the guilt phase of the trial does not bar its reception at the sentencing phase.

"A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E. 2d 126, 133 (1962). We find no reason to disturb the judgment here. The sentence of life imprisonment for the rape conviction was mandated by statute. G.S. 14-21 (repealed effective January 1, 1980). The sentence imposed on the conviction of second degree burglary was much less than the maximum the statute allows. G.S. 14-52(a). This assignment is overruled.

Our examination of defendant's arguments and our own review of the record convince us that the defendant received a fair trial, free from prejudicial error. Accordingly, the judgments of the trial court must be upheld.

No error.

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

STATE OF NORTH CAROLINA v. GLENN MILLER SQUIRE

No. 115

(Filed 27 January 1981)

1. Searches and Seizures § 34— impoundment of vehicle — article in plain view — search pursuant to warrant

Defendant cannot complain that officers chose to afford defendant the protection of impounding his vehicle and keeping it locked and under custody until a search warrant could be obtained rather than seizing a knife which was in plain view on the dashboard of the car at the time the car was impounded.

2. Criminal Law § 87.1— leading questions

The trial judge did not abuse his discretion in permitting the district attorney to ask leading questions directed to the State's 15-year-old witness where the judge stated that he was allowing the leading questions because, in his opinion, the witness exhibited a lack of intelligence, appeared not to understand many of the words used by the district attorney and defense counsel, and had difficulty reading and comprehending a written statement he had given to police officers.

3. Criminal Law § 89.2— testimony admissible for corroboration

Testimony by kidnapping and rape victim that a co-perpetrator of the offenses told her that defendant was putting a gun together, that he was crazy, and that he was going to kill the victim was properly admitted to corroborate prior testimony of another witness, although the co-perpetrator who allegedly made these statements never testified.

4. Criminal Law § 87.3— use of notes to refresh recollection

An officer was properly allowed to use notes he took during his interview with a kidnapping and rape victim in order to refresh his recollection as to what she reported to him at that time, although the court had previously ruled that the notes could not be introduced into evidence or read to the jury.

5. Criminal Law § 87— State's calling of witness subpoenaed by defendant

It was within the discretion of the trial judge to permit the State to call and question a witness subpoenaed by defendant.

6. Criminal Law § 90— State's impeachment of own witness

The trial court did not abuse its discretion in permitting the State to impeach its own witness where it appears that the district attorney was surprised by the witness's testimony at the trial.

7. Criminal Law § 89.2— testimony corroborating personal observations

In this prosecution for kidnapping and rape, an officer's testimony that a State's witness told him that he was riding with defendant in his car on the night of the alleged offenses when defendant stopped his car on the highway, offered a white girl a ride, and drove off when she refused was properly admitted to

corroborate testimony by the State's witness concerning his personal observations and was not offered to impeach contrary testimony by another State's witness who was also riding in defendant's car on the night in question.

8. Criminal Law § 113.9— instructions — misstatment of date of offenses — absence of objection

In a prosecution for kidnapping and rape, defendant waived objection to the court's misstatement of the date of the offenses as 20 October 1979 rather than the correct date of 21 October 1979 by failing to bring the misstatement to the court's attention in time to afford an opportunity for correction. Furthermore, defendant was not prejudiced by the misstatement considering the amount of testimony referring to the date of the offenses as 21 October 1979 and the trial judge's instruction that the jury should be guided by its own recollection of the evidence.

9. Kidnapping § 1— failure to instruct on kidnapping in second degree

The existence of two ranges of sentences under G.S. 14-39(b) did not create two separate degrees of the offense of kidnapping, and the trial court did not err in failing to instruct the jury on kidnapping in the second degree where G.S. 14-39 provided for only one offense of kidnapping at the time defendant was tried for and convicted of kidnapping.

10. Kidnapping § 2— life sentence for kidnapping

Defendant's evidence was insufficient to meet his burden of proving the mitigating circumstances set forth in G.S. 14-39(b) by a preponderance of the evidence, and the trial judge acted properly within his discretion in sentencing defendant to life imprisonment for kidnapping, where the State presented substantial evidence tending to show that the victim was kidnapped, repeatedly raped by defendant and three other males and released near her home, and defendant's evidence to the contrary consisted of his own testimony denying participation in the offenses charged and the testimony of several witnesses which tended to show an alibi for defendant at the time the crimes were committed.

11. Constitutional Law §§ 79, 83; Criminal Law §§ 138.1, 138.2— concurrent sentences of life imprisonment — no cruel and unusual punishment — no denial of equal protection

The imposition on defendant of two concurrent terms of life imprisonment for kidnapping and first degree rape did not constitute cruel and unusual punishment since the sentences were authorized by G.S. 14-39 and G.S. 14-21. Furthermore, the sentences did not violate defendant's equal protection rights because other persons involved in the same offenses received lesser punishments.

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

DEFENDANT appeals from judgment of *Tillery, J.*, entered at the 25 February 1980 Criminal Session of Superior Court, HALIFAX County.

Defendant was tried upon indictments, proper in form, charg-

ing him with first degree rape and kidnapping. The jury found defendant guilty on both charges. From the trial court's judgment sentencing him to two terms of life imprisonment, to be served concurrently, defendant appeals as a matter of right pursuant to G.S. 7A-27(a).

The State's evidence tended to show that Kathy Renee Freeman, a sixteen-year-old female, was kidnapped and raped in the early morning hours of 21 October 1979. Ms. Freeman testified that on the night in question she was walking along Highway 158 towards her home in Roanoke Rapids, North Carolina, when several black males and females in a white, four-door automobile stopped beside her and offered to give her a ride. She refused and the car drove away. Five to ten minutes later she saw a black male jogging on the other side of the road. The man crossed the road, grabbed her by the arm, and threatened her with a knife. He forced her across the road and into a clump of bushes, where another black male was waiting. A white, four-door automobile occupied by two other black males then approached them and Ms. Freeman was pushed into the car with the four males. She was taken to a wooded area nearby and raped repeatedly by each male. Ms. Freeman stated that the four males continued to brandish the knife and threaten her throughout the entire incident. At approximately 5:00 a.m. she was left near the fire station in Roanoke Rapids. She then walked home, reported the incident to her mother, took a bath, and washed the clothes she had been wearing. She testified that she did not notify law enforcement officers until approximately 7:00 p.m. on 21 October 1979 because the four males had threatened to harm her if she reported the incident. A doctor examined Ms. Freeman that evening and reported the presence of spermatozoa in her vagina, one of which could have been deposited during the previous forty-eight hours. Ms. Freeman identified defendant at trial as the man who had run up to her, grabbed her, pushed her into the car, and raped her several times.

James Short testified under a plea bargaining agreement with the State that he was one of the four males who kidnapped and raped Ms. Freeman on 21 October 1979. His testimony was identical to Ms. Freeman's on all major points.

Defendant was arrested on 24 October 1979. A white, four-door, 1966 Chevrolet Malibu automobile registered in his name was impounded at that time. A search of the car pursuant to a warrant

on 26 October 1979 disclosed a knife, several shotgun shells, a white rubber cord, and seventy latent fingerprints. Ms. Freeman identified the knife at trial as the one defendant had used to threaten her.

Defendant testified in his own behalf, denying any knowledge of or participation in the kidnapping and rape of Ms. Freeman on 21 October 1979. He presented several witnesses whose testimony tended to establish an alibi for defendant at the time the offenses were committed.

Other facts pertinent to the decision will be set forth in the opinion below.

Charlie D. Clark, Jr. (deceased) and A. S. Godwin, Jr. for defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Henry T. Rosser for the State.

COPELAND, Justice.

Defendant argues numerous assignments of error on appeal. We have carefully considered each assignment and conclude that the trial court committed no error which would entitle defendant to a new trial.

[1] By his first assignment of error, defendant contends that the trial court erred in denying defendant's motion to suppress the evidence seized from defendant's automobile during a search pursuant to a warrant. Detective C.E. Ward of the Halifax County Sheriff's Department testified for the State that defendant was arrested at his place of work, and that the keys to his car were seized during a search of his person incident to the arrest. The car was parked outside defendant's place of work. After defendant was arrested, the car was driven by a law enforcement officer to the Halifax County jail, where it ws impounded, locked, and stored behind the jail until a search warrant was obtained. The car was searched pursuant to a warrant on 26 October 1979, two days after it was impounded. Defendant does not contend that the search warrant was invalid or that the search was conducted contrary to law. He argues that since the knife seized during the search was in plain view on the dashboard of the car, the officers should have seized it at the time the car was impounded, under the "plain view" exception to the warrant requirement. It is well established in this

jurisdiction that law enforcement officers may seize evidence in plain sight without a warrant. *State v. Williams*, 299 N.C. 529, 263 S.E. 2d 571 (1980); *State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980). A warrantless search of a vehicle capable of movement, such as the car involved in this case, may also be made when officers have probable cause to search it and exigent circumstances make it impracticable to secure a search warrant. *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978); *State v. Cobb*, 295 N.C. 1, 243 S.E. 2d 759 (1978). However, the laws of this State provide for searches made pursuant to a warrant and do not require a warrantless search under any circumstances. G.S. 15A-241 *et. seq.* Defendant cannot complain that the officers in the case *sub judice* chose to afford defendant the protection of impounding his vehicle and keeping it locked and under custody until a search warrant could be obtained. Defendant's assignment of error is without merit and overruled.

[2] Under his second assignment of error, defendant argues that the trial court erred in permitting the district attorney to ask leading questions directed to State's witness James Short. A trial judge, in his discretion, may permit any party to ask leading questions, and there is no reversible error absent abuse of this discretion. *State v. Clark*, 300 N.C. 116, 265 S.E. 2d 204 (1980); *State v. Berry*, 295 N.C. 534, 246 S.E. 2d 758 (1978); *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). If the witness is having difficulty understanding or answering questions because of immaturity, age, infirmity, or ignorance, it is permissible for the trial judge to allow the witness to be interrogated by leading questions. *State v. Hopkins*, 296 N.C. 673, 252 S.E. 2d 755 (1979); *State v. Berry, supra; State v. Greene, supra;* 1 Stansbury's North Carolina Evidence § 31 (Brandis Rev. 1973). In this case, the trial judge stated that he was allowing the district attorney to question fifteen-year-old James Short by leading questions because, in his opinion, the witness exhibited a lack of intelligence, appeared not to understand many of the words used by the district attorney and defense counsel, and had difficulty reading and comprehending a written statement he had given to police officers. Hence, we hold that the trial judge did not abuse his discretion and find defendant's assignment of error without merit.

[3] Defendant alleges under assignment of error number seven that the trial court erred in allowing the prosecuting witness, Kathy Freeman, to testify as to a conversation between herself and

one of the co-perpetrators of the offenses, which took place out of the presence of defendant. After the trial judge instructed the jury that any statements by Ms. Freeman concerning her conversation with this person were to be considered for corroborative purposes only, she was permitted to relate the co-perpetrator's statements to the effect that defendant was putting a gun together, that he was crazy, and that he was going to kill Ms. Freeman. Defendant claims that this testimony could not have been offered for corroborative purposes because the co-perpetrator who allegedly made these statements never testified. We disagree. Ms. Freeman's statements were admitted for the purpose of corroborating the testimony of James Short, not of any other participant in the offense. James Short had previously testified that defendant produced a gun from the trunk of his car and stated that he intended to kill Ms. Freeman. Ms. Freeman's testimony was therefore admissible as evidence tending to corroborate the prior testimony of another witness. *State v. Rogers*, 299 N.C. 597, 264 S.E. 2d 89 (1980); 1 Stansbury's North Carolina Evidence § 52 (Brandis Rev. 1973).

[4] By his fourteenth assignment of error, defendant contends that the trial court erred in allowing the district attorney to continue to question Detective Charles E. Ward concerning the notes he had taken during his interview with prosecuting witness Kathy Freeman, since the trial judge had previously ruled that the notes could not be introduced into evidence or read to the jury. It is well established in this jurisdiction that a witness may use notes previously prepared by him in order to refresh his memory during his testimony at trial, so long as he does not read them to the jury. The witness' testimony must actually be from memory; the notes are merely a tool to aid his recall. *State v. Adams*, 299 N.C. 699, 264 S.E. 2d 46 (1980); *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). In the present case, Detective Ward was allowed to use the notes he took during his interview with Ms. Freeman in order to aid his recall in testifying as to what she reported to him at that time. The trial court acted properly in instructing the witness not to read from his notes, and defendant has presented no evidence to indicate that the witness misused his notes in any manner. We find defendant's assignment of error without merit.

[5,6] Under his assignment of error number nineteen, defendant argues that it was error for the trial court to allow the State to

impeach its own witness. It appears from the record that although Jackie Handsome had been subpoenaed by defendant, she was called by the State as a rebuttal witness. It is within the discretion of the trial judge to permit the State to call and question a witness subpoenaed by defendant, and we find no abuse of that discretion in this case. *State v. Herndon*, 292 N.C. 424, 233 S.E. 2d 557 (1977); *State v. Lancaster*, 202 N.C. 204, 162 S.E. 367 (1932). Jackie Handsome was interviewed by Detective Ward on 25 October 1979, at which time she stated that she was riding with defendant in his automobile during the early morning hours of 21 October 1979. She reported that they stopped beside a girl walking along Highway 158, whereupon defendant asked if she would like a ride, and drove on when the girl refused his offer. Ms. Handsome said she exited the car at a beer joint a few minutes later and did not see defendant again that night. The evidence presented by the State tended to show that at approximately 5:00 p.m. on the day before she was called as a rebuttal witness by the State, Ms. Handsome was again interviewed by Detective Ward and the district attorney, at which time she repeated her previous statement without material change. During her testimony in court the following day, however, she stated that she did not see defendant stop his automobile and offer a ride to a girl walking beside the road. The district attorney claimed surprise at Ms. Handsome's testimony and obtained the trial court's permission to impeach the witness. It is a general rule in this jurisdiction that a party may not impeach his own witness. *State v. Austin*, 299 N.C. 537, 263 S.E. 2d 574 (1980); *State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973). However, when the party calling the witness has been led to believe that the witness will testify in a certain manner, and that party is surprised when the witness fails to testify as expected, the trial judge, in his discretion, may allow the party to impeach its witness. *State v. Austin, supra*, *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975). It appears that in the case *sub judice*, the State was surprised by Jackie Handsome's testimony at trial. Consequently, the trial judge did not abuse his discretion in permitting the State to impeach the witness, and defendant's assignment of error is overruled.

[7] We likewise find no merit in defendant's twentieth assignment of error. Under that assignment, defendant claims that the testimony of State's witness Ricky Handsome was offered for the purpose of impeaching the testimony of Jackie Handsome, again in violation of the general rule that a party may not impeach its own

witness. The exception defendant refers to under this assignment relates not to Ricky Handsome's testimony, but to Detective Ward's testimony concerning his interview with Ricky Handsome. Detective Ward reported Mr. Handsome's statement that on the night of the alleged offenses, he was riding with defendant in his car when defendant stopped on Highway 158, offered a white girl a ride, and drove on when she refused. This evidence was not offered for impeachment purposes, but as evidence tending to corroborate Mr. Handsome's testimony concerning his personal observations.

> "The anti-impeachment rule does *not* prevent a party from showing that the facts are otherwise than as testified to by his witness (including a clearly friendly witness), though this has the effect of indirectly impeaching him. This showing may be made 'not only by the testimony of other witnesses, but from other statements of the same witness, and at times from the facts and circumstances of the occurrence itself, the *res gestae*.'" 1 Stansbury's North Carolina Evidence § 40, 116-17 (Brandis Rev. 1973). *See also State v. Pope, supra.*

Mr. Handsome's testimony indicates that he was not present during Detective Ward's interview with Jackie Handsome, and that he was not aware of what she had reported to the detective at that time. His testimony at trial and statements to Detective Ward were thus properly admitted as evidence of his own personal observations.

[8] By his twenty-third assignment of error, defendant contends that the trial court erred in instructing the jury that the alleged offenses occurred on 20 October 1979, although the warrants for defendant's arrest, the bills of indictment, and all the evidence presented by defendant and the State indicated that the alleged offenses were committed on 21 October 1979. Any objection to an error by the trial judge in summarizing the evidence presented and the contentions of the parties must be brought to the court's attention in time to afford an opportunity for correction; otherwise, they are deemed to have been waived and will not be considered on appeal. *State v. Hough*, 299 N.C. 245, 262 S.E. 2d 268 (1980); *State v. White*, 298 N.C. 430, 259 S.E. 2d 281 (1979); *State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977). There is no indication in the record that defendant brought the trial judge's error in stating the date of the alleged offenses to the attention of the court, therefore we find

that defendant waived his objection. Furthermore, considering the amount of testimony referring to the date of the offense as 21 October 1979, and the trial judge's statement to the jury "that if in my recollection of the evidence I remember any differently from the way you do, then you be guided by what you remember," the jury could not have been misled by the trial court's inadvertence and defendant was not prejudiced thereby. Incidently, the prosecuting witness' testimony included events which took place on 20 October 1979. Defendant's assignment of error is overruled.

[9,10] Under his assignment of error number twenty-five, defendant argues that the trial court committed error in failing to instruct the jury on kidnapping in the second degree. At the time defendant was tried for and convicted of kidnapping, G.S. 14-39 provided for only one offense of kidnapping. The existence of two different ranges of sentences under G.S. 14-39(b) did not create two separate degrees of the offense of kidnapping, therefore the trial judge did not err in failing to charge the jury on an offense which did not exist. *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978). G.S. 14-39(b) provided that if defendant satisfied the trial judge by a preponderance of the evidence that he released the kidnapping victim in a safe place and that the victim was neither sexually assaulted nor seriously injured, then the trial judge could not impose a sentence upon defendant's conviction of kidnapping of more than twenty-five years. Whether defendant proved these mitigating factors by a preponderance of the evidence was a determination to be made by the trial judge, not the jury. *State v. Williams, supra. See also State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971), *cert. denied* 404 U.S. 1023, 92 S.Ct. 699, 30 L. Ed. 2d 673 (1974). In the instant case, the State presented substantial evidence tending to show that the victim, Kathy Freeman, was kidnapped, repeatedly raped by defendant and three other males, and released near her home. Defendant's evidence to the contrary consisted of his own testimony denying participation in the offenses charged and the testimony of several witnesses which tended to show an alibi for defendant at the time the alleged crimes were committed. We find defendant's evidence insufficient to meet his burden to prove the mitigating circumstances set forth in G.S. 14-39(b) by a preponderance of the evidence, hence we hold that the trial judge acted properly within his discretion in sentencing defendant to life imprisonment for kidnapping.

[11] Under his twenty-seventh assignment of error, defendant claims that by sentencing him to two terms of life imprisonment, to be served concurrently, the trial court imposed upon him a cruel and unusual punishment and infringed upon his right to equal protection, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Specifically, defendant argues that his constitutional rights were violated because he received a substantially more severe punishment than the other three persons involved in the offenses. A sentence is not cruel or unusual punishment in the constitutional sense so long as it falls within the maximum authorized by statute and the punishment provisions of the statute itself are constitutional. *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979); *State v. Pearce*, 296 N.C. 281, 250 S.E. 2d 640 (1979); *State v. Williams*, *supra*. We held above that the trial court's sentence of life imprisonment for kidnapping in this case was authorized by the provisions of G.S. 14-39. Likewise, G.S. 14-21, in effect at the time defendant was sentenced, authorizes a sentence of life imprisonment upon a conviction of first degree rape. Both statutes have been found constitutional by this Court. *State v. Wilson*, 296 N.C. 298, 250 S.E. 2d 621 (1979); *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). A sentence within the maximum limits set by statute does not violate the equal protection clause of the Fourteenth Amendment simply because another person involved in the same offense received a lesser punishment. *State v. Atkinson*, *supra*; *State v. Williams*, *supra*. The sentence defendant received was within the maximum limits set by statute and did not violate his equal protection rights, and defendant's allegations to the contrary are without merit.

We have carefully considered defendant's remaining assignments of error, numbered 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 21, 22, 24, and 26, and find them without merit. Defendant received a fair trial free from prejudicial error and we find

No error.

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

STATE OF NORTH CAROLINA v. CARLIE DANNY WRIGHT

No. 121

(Filed 27 January 1981)

1. Criminal Law §§ 71, 73.4, 169.3— arson case — witness's statement as to cause of fire

The trial court in an arson case did not err in allowing the State's witness to testify that, upon discovering the fire, she immediately exclaimed to the driver of the car in which she was riding that, "That boy [defendant] just set that girl's house on fire," since the statement accusing defendant of arson was an exclamation in response to the surprising discovery of the fire, made without time for reflection or fabrication, and was admissible as a spontaneous declaration; the statement was uttered so close in time to the events surrounding the burning that it could be admitted under the *res gestae* exception to the hearsay rule; and defendant waived his objection to the testimony when he failed to object to similar statements made by another State's witness.

2. Arson § 4.1— arson of girlfriend's apartment — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in an arson case where it tended to show that defendant had a motive to harm the person whose apartment was burned, and that he was angry over her decision to terminate their relationship; defendant had an opportunity to commit the crime since he knew that his girlfriend was not at home on the evening of the crime; testimony from several witnesses indicated that defendant was in the immediate vicinity of the apartment building just moments prior to the discovery of the fire; defendant was seen driving away from the area at a high rate of speed; the fire was started by igniting rags which had been piled on the living room sofa and on the bed; two officers stopped defendant a few hours after the fire driving a car matching the description given by several witnesses as the automobile in the area of the crime just prior to the fire; and upon approaching the car, the officers observed a bale of rags and a propane torch on the floor board.

3. Arson § 6; Constitutional Law § 33— punishment for arson — no ex post facto law

There was no merit to defendant's contention that the trial court imposed an *ex post facto* punishment upon him because, pursuant to the statute in effect at the time of the burning, he would have been eligible for parole under a sentence of life imprisonment after serving ten years, but he was instead sentenced under statutes which changed the time period required before he could be considered eligible for parole from ten to twenty years, since the period of imprisonment required before defendant could be considered for parole was twenty years under the statutes in effect both at the time of the offense and at the time he was sentenced. G.S. 148-58; G.S. 15A-1371.

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

DEFENDANT appeals from judgment of *Brannon, J.*, entered at the 12 May 1980 Criminal Session of Superior Court, WAKE County.

Defendant was tried upon an indictment, proper in form, charging him with arson. The jury found defendant guilty of arson, and from the trial court's judgment sentencing him to imprisonment for the term of his natural life, defendant appeals.

The State's evidence tended to show that at approximately 7:00 p.m. on 15 September 1976, Ms. Peggy Mayo's apartment at 1400 Creech Road in Garner, North Carolina, was gutted by a deliberately set fire. Ms. Mayo testified for the State that she left her apartment between 5:15 and 5:30 p.m. on that date and drove to her grandmother's home to pick up her daughter. While she was at her grandmother's, defendant arrived and asked to speak to her. At trial Ms. Mayo described her relationship with defendant as "girlfriend and boyfriend for approximately six years." On the date of the fire the two were in the process of severing their relationship. When defendant appeared at her grandmother's between 6:00 and 6:15 p.m. on 15 September 1976, Ms. Mayo paid him some money she owed him and informed him that she did not wish to speak with him again. By the time Ms. Mayo returned to her apartment, the fire had been extinguished.

State's witness Olivia Herd, who lived in the apartment next to Ms. Mayo's, testified that she was riding in a car near her apartment building at approximately 6:30 p.m. on the day of the fire when she observed defendant driving from behind the apartment complex and away from the building at a high rate of speed. She described the car defendant was driving as a small, gold Ford automobile which she had noticed parked behind her apartment building on several occasions. She had seen defendant a number of times during his visits to Ms. Mayo's apartment and recognized him as the person driving the gold Ford. A few minutes after she observed defendant, Ms. Herd noticed that the curtains at the front window of Ms. Mayo's apartment were on fire. She stated that she then turned to the driver of the car in which she was riding and said, "That boy [defendant] just set that girl's house on fire."

Hiram Byrd, the driver of the car in which Ms. Herd was riding, testified that just as he was beginning to turn into the driveway of the apartment complex at issue, he nearly collided with a gold Ford Falcon automobile which had just come from behind the apartment building and was proceeding down the driveway. Mr. Byrd backed his car out of the driveway to allow the gold car to pass. He stated that he recognized the car as one he had often seen

parked behind the apartment building. Shortly after parking his car at the building, Mr. Byrd stated that Ms. Herd exclaimed to him, "Lord, Peggy's house is on fire. I bet that boy [defendant] set her house on fire." Mr. Byrd then ran to the burning apartment, kicked in the front door, and entered. Inside he met James Walker, another occupant of the building, who had kicked in and entered the back door. Mr. Byrd observed three separate fires, one in the living room, one in the bedroom, and one in the bathroom. He stated that the living room fire had apparently been started by setting fire to some rags which he saw draped across a sofa. After the fire was extinguished, Mr. Byrd surveyed the apartment and noted that almost everything in it had been destroyed.

James Walker testified that when Hiram Byrd informed him that Ms. Mayo's apartment was on fire, he ran to the back door and kicked it in. Upon entering the apartment he noticed two separate fires, one in the living room and one in the bedroom. He went to the bedroom and observed a pile of rags burning on the bed.

State's witness Chris Rochelle, who lived in the house next door to the apartment building at issue in this case, stated that on the evening of 15 September 1976 he observed a gold car turn into the apartment complex driveway and proceed to the rear of the building. He recognized the car as one he had seen parked in front of Ms. Mayo's apartment on a number of occasions. He could describe the driver only as a black male. Chris Rochelle stated that he saw the same gold automobile five to ten minutes later, traveling from behind the apartment building and out of the driveway at a high rate of speed. Shortly thereafter he noticed smoke and fire coming from Ms. Mayo's apartment.

A Wake County Deputy Sheriff and a State Bureau of Investigation Officer testified that after surveying the damage done by the 15 September 1976 fire and interviewing those present at the scene, they went in search of defendant and found him in the White Oak Road area near Garner, driving a gold Ford Falcon automobile. Upon approaching defendant's vehicle, the law enforcement officers observed rags on the front floor board of the car and rags and a propane torch on the rear floor board behind the driver's seat. The officers questioned defendant but did not arrest him at this time. Defendant was arrested 3 January 1980.

Defendant presented no evidence in his behalf. From the

jury's verdict finding him guilty of arson and the trial court's judgment sentencing him to life imprisonment, defendant appeals as a matter of right pursuant to G.S. 7A-27(a).

T. Yates Dobson, Jr. for defendant.

Attorney General Rufus L. Edmisten by Assistant Attorneys General John C. Daniel, Jr. and Thomas B. Wood for the State.

COPELAND, Justice.

Defendant raises eight assignments of error on appeal. We have carefully examined each of defendant's assignments and find no error which would entitle defendant to a new trial. For the reasons stated below, we affirm the trial court's judgment sentencing defendant to life imprisonment.

[1] By his first and second assignments of error, defendant contends that the trial court erred in allowing State's witness Olivia Herd to testify that upon discovering the fire in Ms. Mayo's apartment, she immediately exclaimed to Hiram Byrd, the driver of the car in which she was riding, as follows: "That boy [defendant] just set that girl's house on fire." Defendant argues that this testimony was inadmissible as hearsay and as a statement of conclusion prejudicial to defendant.

We find Ms. Herd's testimony admissible under three well established legal theories. Since the statement accusing defendant of the arson was an exclamation in response to the surprising discovery of the fire, made without time for reflection or fabrication, it is admissible as a spontaneous declaration, despite its hearsay nature. *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978); 1 Stansbury's North Carolina Evidence § 164 (Brandis rev. 1973). The statement was also uttered so close in time to the events surrounding the burning that it can be admitted under the *res gestae* exception to the hearsay rule. *State v. Chapman, supra; State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Hunt*, 289 N.C. 403, 222 S.E. 2d 234 (1976). In addition, defendant waived his objection to Ms. Herd's testimony when he failed to object to similar statements made by State's witness Hiram Byrd. Mr. Byrd was allowed to testify, without objection, that immediately after Ms. Herd saw the fire, she exclaimed, "Lord, Peggy's house is on fire. I bet that boy [defendant] set her house on fire." Whenever evidence is admitted over objection and the same or similar evidence is

theretofore or thereafter admitted without objection, the objection is deemed waived. *State v. Henley*, 296 N.C. 547, 251 S.E. 2d 463 (1979); *State v. Chapman, supra; State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). Mr. Byrd's testimony was certainly of the same import as Ms. Herd's, therefore defendant's objection was waived. Furthermore, we find that any possible prejudice to defendant from Ms. Herd's conclusory statement about matters not within her personal knowledge was cured by her testimony on cross-examination to the effect that she did not actually observe defendant on the premises of Ms. Mayo's apartment on the day of the fire and that she knew nothing of how the fire was started or who started it. Defendant's assignments of error are without merit and overruled.

[2] Under assignments of error numbered 3,4,6 and 7, defendant argues that the trial court erred in denying his motions to dismiss made at the end of the State's evidence and at the end of all the evidence, and in denying his motions to set aside the verdict and to grant a new trial. It is defendant's contention that the circumstantial evidence presented by the State was insufficient to sustain a verdict finding defendant guilty of arson.

The State concedes that the evidence presented which tended to establish defendant's guilt was all circumstantial. However, the rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both. *State v. McKnight*, 279 N.C 148, 181 S.E. 2d 415 (1971); *State v. Ewing*, 227 N.C. 535, 42 S.E. 2d 676 (1947); 2 Stansbury's North Carolina Evidence § 210 (Brandis rev. 1973). The evidence is sufficient to sustain a guilty verdict if substantial evidence was presented on every element of the offense charged. "Substantial evidence" is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). In ruling upon defendant's motions challenging the sufficiency of the evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences therefrom in the State's favor. *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980); *State v. Powell, supra.*

Considered in the light most favorable to the State, the evidence in this case shows that defendant had a motive to harm Ms. Mayo, in that he was angry over her decision to terminate their

relationship, and that he had an opportunity to commit the crime since he knew that Ms. Mayo was not at home on the evening of 15 September 1976. Testimony from several witnesses indicates that defendant was in the immediate vicinity of the apartment building just moments prior to the discovery of the fire, and that he was driving away from the area at a high rate of speed. Further evidence showed that the fire was started by igniting rags which had been piled on the living room sofa and on the bed. Two law enforcement officers testified that they stopped defendant a few hours after the fire, driving a car matching the description given by several witnesses as the automobile in the apartment area just prior to the fire. Upon approaching the car, the officers observed a bale of rags and a propane torch on the floor board. After considering this evidence as a whole, we find that there was substantial evidence presented of defendant's guilt on each essential element of arson, i.e., the malicious and willful burning of the dwelling house of another person. *State v. White*, 291 N.C. 118, 229 S.E.2d 152 (1976); *State v. Arnold*, 285 N.C. 751, 208 S.E.2d 646 (1974). The determination of defendant's guilt or innocence was therefore a question to be answered by the jury, and the trial court acted properly in refusing to grant defendant's motions. Assignments of error 3,4,6 and 7 are overruled.

By his fifth assignment of error, defendant alleges that the trial judge erred in his instructions to the jury by failing to properly explain the law pertinent to the case and by expressing an opinion as to defendant's guilt, in violation of G.S. 15A-1232. Specifically, defendant quotes the following passage from the instructions as constituting an expression of opinion: ". . . that Carlie Wright intended to commit arson, that is, that he intended to set fire to and to burn up the dwelling of Peggy Mayo, and that he did set fire to rags that in turn proximately caused some physical damage by fire . . . ." It is well settled in this jurisdiction that in determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments. *State v. Rogers*, 299 N.C. 597, 264 S.E. 2d 89 (1980); *State v. Matthews*, 299 N.C. 284, 261 S.E. 2d 872 (1980); *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). Defendant in this case has extracted a phrase from the instructions and urges us to consider it without reference to the context in which it was spoken. His request is contrary to the principles of law governing our permissible scope of review and therefore cannot be granted. The passage quoted by

defendant was preceded by the following introductory statement: "So I charge if you find from the evidence and beyond a reasonable doubt that on or about September 15, 1976, that Carlie Wright intended to commit arson . . . ." The trial judge then ended the passage with the instruction that if, and only if, the jury found all the preceding things to be true beyond a reasonable doubt, then it would be their duty to return a verdict of guilty of attempted arson. This paragraph, considered as a whole, was a proper statement of the law regarding attempted arson, not an expression of opinion by the trial judge. We have carefully considered the entire charge to the jury and find no misstatement of the law or expression of opinion prejudicial to defendant. Defendant's assignment of error is overruled.

[3] By his eighth assignment of error, defendant argues that by sentencing him to life imprisonment on 15 May 1980, the trial court imposed an *ex post facto* punishment upon him in violation of his rights guaranteed under the United States and North Carolina Constitutions. Article I, §10 of the United States Constitution and Article I, §16 of the North Carolina Constitution forbid this State to pass an *ex post facto* law. Any legislation which increases the punishment for a crime between the time the offense was committed and the time a defendant is punished therefor is considered an invalid *ex post facto* law as applied to that defendant. *State v. Detter*, 298 N.C. 637, 260 S.E. 2d 567 (1979); *State v. Pardon*, 272 N.C. 72, 157 S.E. 2d 698 (1967). Defendant claims that pursuant to the statutes in effect at the time of the burning on 15 September 1976, he would have been eligible for parole under a sentence of life imprisonment after serving ten years. Instead, he argues, he was sentenced under statutes embodying a 1977 amendment which changed the time period required before he could be considered eligible for parole from ten to twenty years. It is defendant's contention that this extension of the period he must serve before being considered for parole is an increase in his punishment which occurred after the offense was committed, and therefore the statutes under which he was sentenced are *ex post facto* as applied to him. Defendant's allegations would be correct if the statutes at issue actually read as defendant claims that they do. However, we find that the period of imprisonment required before defendant could be considered for parole was twenty years under the statutes in effect both at the time of the offense and at the time he was sentenced on 15 May 1980. G.S. 148-58 was amended in 1973, which

amendment became effective 1 July 1974, to provide that the period a prisoner sentenced to life imprisonment must serve before being eligible for parole would be changed from ten to twenty years. This twenty year provision was in effect at the time of the burning in 1976. G.S. 148-58 was repealed by the 1977 Session Laws, effective 1 July 1978, and replaced by G.S. 15A-1371. G.S. 15A-1371, which was still in effect at the time defendant was sentenced, also provides that one sentenced to life imprisonment must serve twenty years before being considered for parole. Therefore, the terms of defendant's punishment were identical under the statutes in effect at the time of the offense and the statutes in effect at the time he was sentenced, and defendant's allegation that the trial court imposed an *ex post facto* punishment upon him is without merit.

After careful examination of the entire record before this Court on appeal, we hold that defendant received a fair trial free from prejudicial error.

No error.

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

GERALDINE MAYBANK, PLAINTIFF, v. S. S. KRESGE COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF v. G.T.E. SYLVANIA, INC., THIRD-PARTY DEFENDANT

No. 109

(Filed 27 January 1981)

1. Uniform Commercial Code § 25— action for breach of warranty — notice to seller — condition precedent

The notice "within a reasonable time" required by G.S. 25-2-607(3)(a) in an action for breach of warranty against the immediate seller is a condition precedent to recovery which must be pled and proved by plaintiff rather than an affirmative defense which must be raised by defendant seller.

2. Uniform Commercial Code § 25— explosion of flashcube — action for breach of warranty — seasonable notice to seller

When the plaintiff in an action for breach of warranty is a lay consumer and notification is given to the defendant seller by the filing of an action within the period of the statute of limitations, and when the applicable policies behind the requirement of notice to the seller have been fulfilled, the plaintiff is entitled to go

to the jury on the issue of seasonable notice to the seller. Therefore, in an action to recover on the theory of breach of warranty of merchantability for injuries resulting from the explosion of a flashcube sold to plaintiff by defendant, plaintiff's evidence was sufficient to go to the jury on the issue of whether plaintiff gave defendant notice "within a reasonable time" where it tended to show that the filing of this suit and accompanying service upon defendant some three years after the explosion was defendant's first notice that the flashcube was defective and had caused injury, that plaintiff was a lay consumer, and that the flashcube which exploded and the carton in which it was purchased were available as evidence at the trial.

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

ON defendant's petition for discretionary review, pursuant to G.S. 7A-31, of a decision of the Court of Appeals, 46 N.C. App. 687, 266 S.E. 2d 409 (1980), reversing directed verdict in favor of defendant entered at the 5 June 1979 Session of Superior Court, GUILFORD County.

By this appeal we consider whether the notice required by G.S. 25-2-607(3)(a) in an action for breach of warranty is a condition precedent to recovery which must be pled and proved by plaintiff or whether it is an affirmative defense which must be raised by defendant-seller. On all other points raised by this appeal, we adopt the Court of Appeals' opinion.

Barefoot & White, by J.C. Barefoot, Jr., for plaintiff-appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., and Suzanne Reynolds, for defendant-appellant.

CARLTON, Justice.

I.

Plaintiff brought this action to recover for personal injuries she received when a Blue Dot flashcube exploded in her face while she was taking a picture. Defendant and third-party plaintiff S.S. Kresge Company, trading under the name of K-Mart, sold the flashcube to plaintiff; third-party defendant G.T.E. Sylvania, Inc., manufactured the flashcube. Plaintiff pled causes of action for negligence, strict liability and breach of express and implied warranties. Defendant's third-party claim against the manufacturer was severed for trial at a later date. This appeal involves only plaintiff's claims; the third-party claim is not before us.

At trial, evidence for plaintiff tended to show the following:

Plaintiff, a Greensboro resident, flew to New York in July 1972 to visit her son. On her trip she took an Argus camera, borrowed from her daughter, and a package containing three Blue Dot flashcubes. The flashcubes were purchased for $.88 from defendant approximately two days prior to her departure for New York. The package was sealed with tape. Plaintiff carried the package of flashcubes to New York in her purse.

Approximately one week after her arrival in New York, on 21 July 1972, plaintiff used the camera and flashcubes to take pictures of her grandson at her son's apartment. When the package was opened, none of the cubes appeared to be damaged or broken and "they all looked the same." Plaintiff placed one cube, containing four flashbulbs, on the Argus camera and took four pictures of her grandson without incident. She then removed the second flashcube and placed it on the camera. When she pressed the shutter button, the flashcube exploded. The force of the explosion knocked plaintiff's glasses off and the corner of her left eye was badly cut, causing temporary blindness. Only plaintiff's two-year-old grandson was with her when the accident occurred, and it was not until her son returned home from work approximately one hour later that she was taken to the hospital.

Plaintiff's injuries required that she be hospitalized for one week. After her release from the hospital plaintiff continued to see doctors concerning her eye. She was absent from work for three weeks due to the injury. The injury has continued to affect her use of the eye for reading and it is easily fatigued.

The carton in which the flashcubes were packaged contained the following warning: "CAUTION. Although each bulb is safely coated and flashcube provides shield a damaged cube may shatter ...." The carton also contained the following warranty: "If any time a flashbulb contained in a Sylvania tube (sic) fails to flash, return the cube to the address below for a replacement." Plaintiff testified that she had not complained to the manufacturer about the allegedly defective flashcube because her complaint was not that the flashcube failed to flash, but rather that it exploded, and the carton contained no instructions for notification in the event of explosion.

At the close of plaintiff's evidence defendant moved for a directed verdict pursuant to Rule 50, N.C. Rules of Civil Procedure.

Judge Collier granted defendant's motion and plaintiff's action was dismissed with prejudice.

On appeal, the Court of Appeals unanimously reversed the action of the trial court and held that plaintiff's evidence made out a *prima facie* case of breach of an implied warranty of merchantability. However, that court found her evidence insufficient to establish her other claims, and the dismissal of those causes of action was affirmed. Defendant petitioned for discretionary review of the Court of Appeals' decision. We allowed the petition on 15 August 1980.

II.

Defendant-appellant's main contention in this appeal is that the Court of Appeals erred in holding that plaintiff's evidence was sufficient to establish two essential elements of a breach of an implied warranty of merchantability, namely that the alleged defect existed at the time of the sale of the flashcubes and that the alleged defect was the proximate cause of plaintiff's injuries. We have carefully examined the Court of Appeals' opinion and the briefs and authorities on these points. We find that the result reached by the Court of Appeals, its reasoning and the legal principles enunciated by it to be altogether correct and adopt as our own that portion of the Court of Appeals' opinion dealing with the sufficiency of the evidence to establish a breach of an implied warranty of merchantability. While not presented on this appeal, we also agree with the Court of Appeals that plaintiff's evidence was insufficient to take the case to the jury on the claims of breach of an express warranty, negligence and strict liability. However, we find it necessary to modify that portion of the Court of Appeals' decision concerning the buyer's duty to notify the seller of the breach of warranty.

III.

[1] The Uniform Commercial Code, codified as Chapter 25 of our General Statutes, provides that a buyer who has accepted goods must notify the seller of any breach within a reasonable time: "Where a tender has been accepted (a) the buyer *must* within a reasonable time after he discovers or should have discovered any breach notify the seller of breach *or be barred from any remedy* . . . ." G.S. § 25-2-607(3)(1965)(emphases added). Although neither party challenged the timeliness of notification on appeal, the Court of

Appeals considered this requirement. It held that failure to give adequate notice is an affirmative defense which defendant here was deemed to have waived because it had not raised the issue. In so holding, that court relied on its decision in *Reid v. Eckerd Drugs, Inc.*, 40 N.C. App. 476, 485, 253 S.E. 2d 344, 350, *cert. denied*, 297 N.C. 612, 257 S.E. 2d 219 (1979). In this portion of its decision, the Court of Appeals erred.

Plaintiff at no time prior to the institution of this suit informed defendant that the flashcube was defective and had caused injury. The filing of the suit and accompanying service upon defendant was its first notice of the breach. We disagree with the Court of Appeals that lack of notification is an affirmative defense and hold that the plaintiff-buyer has the burden of proving compliance with G.S. 25-2-607(3)(a) in an action against the immediate seller.

We think it obvious from the language of the statute that seasonable notification is a *condition precedent* to the plaintiff-buyer's recovery. G.S. § 25-2-607(3); *accord, e.g., Standard Alliance Industries, Inc. v. Black Clawson Co.*, 25 U.C.C. Rep. 65, 587 F. 2d 813 (6th Cir. 1978); *Steel & Wire Corp. v. Thyssen Inc.*, 20 U.C.C. Rep. 892 (E.D. Mich. 1976). Thus, the burden of pleading and proving that seasonable notification has been given is on the buyer. *Standard Alliance Industries, Inc. v. Black Clawson Co.*, 25 U.C.C. Rep. 65, 587 F. 2d 813; *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 19 U.C.C. Rep. 353, 532 F. 2d 957 (5th Cir. 1976); *Steel & Wire Corp. v. Thyssen Inc.*, 20 U.C.C. Rep. 892; *L.A. Green Seed Co. v. Williams*, 6 U.C.C. Rep. 105, 246 Ark. 463, 438 S.W. 2d 717 (1969); *General Matters, Inc. v. Paramount Canning Co.*, 28 U.C.C. Rep. 1031, 382 So. 2d 1262 (Fla. Dist. Ct. App. 1980); *Branden v. Gerbie*, 24 U.C.C. Rep. 152, 62 Ill. App. 3d 138, 379 N.E. 2d 7 (1978). *Contra, Fischer v. Mead Johnson Laboratories*, 12 U.C.C. Rep. 68, 41 App. Div. 2d 737, 341 N.Y.S. 2d 257 (1973) (per curiam) (notice requirement not applicable to retail consumer when claim is for personal injury). Without such proof, any action in warranty against the seller must fail.

[2] Plaintiff's action was dismissed on a directed verdict motion. We must, therefore, consider whether her evidence, taken in the most favorable light, *e.g., Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971), is sufficient to go to the jury on the issue of

seasonable notice.[1] More specifically, the question is whether plaintiff has made a *prima facie* showing that the notice given here —three years after discovery of the defect by the filing of a suit for breach of warranty — constitutes notification within a reasonable time.

Whether a *prima facie* showing that the notice was given "within a reasonable time" has been made can be determined only by examining the particular facts and circumstances of each case and the policies behind the notice requirement. If plaintiff's evidence shows that the policies behind the requirement have not been frustrated and, instead, have been fulfilled, the evidence is sufficient to withstand a directed verdict motion. *See* J. White & R. Summers, Uniform Commercial Code § 11-10 (2d ed. 1980).

Perhaps the most important policy behind the notice requirement is enabling the seller to make efforts to cure the breach by making adjustments or replacements in order to minimize the buyer's damages and the seller's liability. White & Summers, *supra*, § 11-10; *see L.A. Green Seed Co. v. Williams*, 6 U.C.C. Rep. 105, 246 Ark. 463, 438 S.W. 2d 717. This policy obviously has its greatest application in commercial settings where there is an opportunity to minimize losses. However, in cases where the defective goods have caused personal injury, this policy has no application because the damage has already occurred and is irreversible.

Another policy behind the notice requirement is to afford the seller a reasonable opportunity to learn the facts so that he may adequately prepare for negotiation and defend himself in a suit. White & Summers, *supra*, § 11-10; *see, e.g., Dold v. Sherow*, 220 Kan. 350, 552 P. 2d 945 (1976); *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E. 2d 550 (1974). If a delay operates to deprive the seller of a reasonable opportunity to discover facts which might provide a defense or which might lessen his liability, thus defeating the policy behind the notice requirement, the notice might be said not to have been given within a reasonable time.

[1] Whether the notice given was seasonable is a question of fact and normally must be determined by the trier of fact. *E.g., L.A. Green Seed Co. v. Williams*, 6 U.C.C. Rep. 105, 246 Ark. 463, 438 S.W. 2d 717. The issue becomes a question of law only when the facts are undisputed and only one inference can be drawn as to the reasonableness of the notice. *E.g., Steel & Wire Corp. v. Thyssen Inc.*, 20 U.C.C. Rep. 892.

The least compelling policy behind the requirement is the same as the policy underlying statutes of limitation: to provide a seller with a terminal point in time for liability. *L.A. Green Seed Co. v. Williams*, 6 U.C.C. Rep. 105, 246 Ark. 463, 438 S.W. 2d 717; White & Summers, *supra*, § 11-10. This policy seems the least compelling because a "reasonable time" is not a point which can accurately be predicted and because the statute of limitations reflects the legislature's judgment as to how long the seller should be subject to suit. This third policy will rarely provide a reason for holding that notice has not been seasonably given.

Equally as germane as the above policies is the proposition that "'[a] reasonable time' for notification *from a retail consumer* is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat *commercial bad faith*, not to deprive a good faith consumer of his remedy." G.S. § 25-2-607, Official Comment 4 (1965) (emphases added). Thus, in determining whether the notice in the case *sub judice* was, *prima facie*, seasonable, we must balance the countervailing policies of providing the seller an opportunity to prepare himself for suit against providing an injured good faith consumer a remedy in the courts.

Although a delay of three years is, undoubtedly, a long time, we are unable to conclude that it is unreasonable as a matter of law under the facts of this case. An injured lay consumer has no reason to know, until he consults a lawyer, that under the terms of the Uniform Commercial Code he is required to give the seller notice that the item sold was not satisfactory. Dean Prosser has aptly stated the dilemma facing the courts in applying this rule:

> Both the Sales Act and the Commercial Code contain provisions which prevent the buyer from recovering on a warranty unless he gives notice to the seller within a reasonable time after he knows or should know of the breach. As between the immediate parties of the sale, this is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary. The injured consumer is seldom "steeped in the business practice which justifies the rule," and at least until he has legal advice it will not occur to him to give notice to one with

whom he has had no dealings.

W. Prosser, Law of Torts §97 at 655 (4th ed. 1971). Fairness to the consumer dictates that he be given a reasonable time to learn of and to comply with this requirement. While three years might conceivably be a *per se* unreasonable delay in a commerical context, differing considerations applicable in retail situations may mean that a delay of three years by a consumer in giving notice to a retail seller is within the bounds of a reasonable time.

The record before us discloses that plaintiff is a lay consumer. Additionally, the flashcube which exploded and the carton in which it was purchased were available as evidence at trial. Taking these facts in the light most favorable to plaintiff, we conclude that plaintiff has made a *prima facie* showing that she gave notice within a reasonable time and that her evidence is sufficient to withstand defendant's directed verdict motion. When the plaintiff is a lay consumer and notification is given to the defendant by the filing of an action within the period of the statute of limitations, and when the applicable policies behind the notice requirement have been fulfilled, we hold that the plaintiff is entitled to go to the jury on the issue of seasonable notice. Defendant may, of course, bring out facts at trial that tend to show plaintiff's "bad faith" or other factors that would support a finding that notice was not seasonably given.

We note that plaintiff's complaint nowhere alleges that adequate notice has been given. However, this is not fatal to this appeal because the provisions of Rule 15, N.C. Rules of Civil Procedure, which provide for amendment of pleadings, will be available to plaintiff on retrial.

Accordingly, we modify and affirm the decision of the Court of Appeals and remand to that court with instructions to remand to the Superior Court, Guilford County, for further proceedings consistent with this opinion.

Modified and affirmed.

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

State v. Milby and State v. Boyd

STATE OF NORTH CAROLINA v. ZEBEDEE MILBY, STATE OF NORTH CAROLINA v. CHARLES LINWOOD BOYD

No. 134

(Filed 27 January 1981)

Criminal Law § 42.4; Robbery § 3.2— armed robbery — guns taken from defendants five weeks later — connection with crime

In a prosecution for armed robbery, the Court of Appeals erred in determining that the admission of handguns taken from defendants five weeks after the crime with which they were charged was prejudicial error, since the Court of Appeals held that there was no evidence to connect guns to the robbery for which defendants were being tried, but (1) on the basis of the record before the Court, it was unable to conclude that the admission of the exhibits by the trial court was in fact error, as the exhibits in question were not placed before the Court for its examination, nor was there any stipulation placed in the record which would serve to describe the exhibits; and (2) even if the exhibits were erroneously admitted, defendants were not prejudiced by their admission into evidence, as several witnesses positively identified defendants as the persons who perpetrated the robbery.

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

ON discretionary review of the decision of the North Carolina Court of Appeals reported at 47 N.C. App. 669, 267 S.E.2d 594 (1980), reversing the judgment of *Tillery, J.*, entered at the 8 October 1979 Criminal Session of VANCE Superior Court.

Upon pleas of not guilty defendants were tried on bills of indictment proper in form which charged them with the crime of armed robbery.

At trial, the evidence for the state tended to show that:

On 21 April 1979, the A & P Food Store on North Garnett Street in Henderson, North Carolina, was robbed by two men. At approximately 9:35 p.m. on that day, Ms. Juanita Fuller, an employee of the store, was working in the store's office. The office was located at the front of the store on the left-hand side. From her position in the office, Ms. Fuller had a view of the various checkout lanes at the front of the store. At the time in question, registers two and three were in operation. As Ms. Fuller opened the office safe to deposit some of the day's receipts, she heard the office door slam. She turned around and saw defendant Charles Boyd entering the office. Defendant Boyd was carrying a yellow bucket in his right hand and a pistol in his left hand. At the time she first saw him,

Boyd was approximately four feet away from her. After he entered the office, Boyd went to the opened safe and began filling the bucket with money.

As Boyd went about the task of emptying the safe, defendant Zebedee Milby was standing near the second cash register and was pointing a gun at Mark Lassiter, co-manager of the store, and Dick Twisdale, an employee of the store who was operating the particular register. Milby had ordered Lassiter and Twisdale to lie upon the floor.

After a short period of time, Boyd completed filling the bucket with money. He then ordered Ms. Fuller to bring him a brown paper grocery bag. She complied with the order, and Boyd continued to empty the safe. After depleting the safe, Boyd picked up the bucket and the bag and proceeded to leave the office. As he did, however, the brown bag began to tear apart, and two smaller bags inside fell out onto the floor. Boyd called out to his companion for help. Milby moved to the office where Ms. Fuller handed him the two bags which had fallen out as he pointed a pistol at her. The two defendants then made their get away, carrying with them approximately $5,000.

Defendants presented evidence, including their own testimony, which tended to establish alibis to the effect that at the time of the robbery of the grocery store in Henderson, both of them were in Richmond, Virginia. In particular, defendant Boyd was at his home in Richmond with his wife until approximately 9:45 on the evening of 21 April 1979. Until approximately 9:30 that evening, Boyd and his wife had been entertaining guests in their home. Two of these guests, John Boyd, defendants's brother, and Garland Legrand, a friend of defendant's, testified that they had been at defendant's house with their wives drinking alcoholic beverages and playing cards. After the guests left, defendant Boyd drove to Henderson to visit a friend he had met four weeks earlier in Richmond, arriving in North Carolina at approximately 11:30 p.m. Unable to find his friend, defendant Boyd drove to a nightclub in Warren County. He left the establishment between 1:30 and 2:00 on the morning of 22 April 1979 and drove back to Richmond.

Defendant Milby testified in his own behalf. A resident of Richmond, Milby had previously been employed with Boyd at a construction company. According to his testimony, Milby spent the

date of 21 April 1979 in Richmond with his stepfather, mother and a sister.

Both defendants were found guilty as charged. Each defendant received a sentence of twenty to twenty-five years imprisonment.

The Court of Appeals granted defendants a new trial, concluding that the trial court had erroneously admitted into evidence two handguns which had been seized from defendants at the time of their arrest. The state's petition for discretionary review pursuant to G.S. § 7A-31 was allowed by this court on 16 September 1980.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Lucien Capone III, for the State.

George T. Blackburn II for defendant Charles Linwood Boyd.

Linwood T. Peoples for defendant Zebedee Milby.

BRITT, Justice.

Because of defendants' failure to preserve for our review the other assignments of error which they presented to the Court of Appeals by bringing them forward in their new briefs, *see* N.C. R. App. P. 16, only one question is properly before this court for our consideration: Did the Court of Appeals commit error in awarding defendants new trials because of the introduction into evidence by the state of two handguns which had been seized at the time of their arrest? We conclude that the Court of Appeals was in error, and, accordingly, we reverse its decision.

The handguns in question were seized from defendants on the evening of 26 May 1979 when they were arrested. On that date, the Henderson Police Department received a communication from the Richmond Police Department through the Police Information Network (PIN) to the effect that defendant Boyd and a companion had left Richmond in a Ford Pinto bearing Virginia license plate number JGD 732. The message indicated that both individuals were armed. The dispatch also advised that the license plate was invalid because the vehicle to which it had been issued had been given a new license plate, suggesting that the particular license plate had been stolen or lost.

When the message was received in Henderson, elements of the

State Highway Patrol, the Henderson Police Department, and the Vance County Sheriff's Department were posted along Interstate Highway 85 for the purpose of intercepting the vehicle.

Late in the evening of 26 May, Officer C. G. Todd of the State Highway Patrol stopped a car meeting the description contained in the PIN dispatch on Norlina Road across from an A.B.C. store. Defendant Boyd was driving the Pinto, and defendant Milby was seated in the passenger seat. After repeated requests, defendants removed themselves from the automobile. When defendant Milby got out of the car, Officer J. W. Prather of the Vance County Sheriff's Department, who had arrived on the scene in the interim, observed a .22 caliber pistol lying on the seat upon which defendant Milby had been riding. This pistol was later offered by the state as exhibit number 2. At approximately the same time, defendant Boyd was searched, and a .32 caliber pistol was seized which was later offered by the state as exhibit number 1.

During her direct examination, Ms. Fuller testified at length concerning the conduct of defendants during the course of the robbery. In the course of describing the exit of defendant Boyd from the store's office after he had emptied the safe, Ms. Fuller testified that

> I didn't try to stop him because of company policy. He started out the door. I looked at his face. I closely observed it. I could see where the gun was at that time. He never took the gun off of me the whole time. I can describe that gun. It was a long, narrow gun. It was sort of a brass look. As he left, the brown bag tore and two bags inside fell out. He went out to Zeb on the floor and told him to come back for the two bags of money.
>
> Zeb came to the office. He stood about five feet from me and pointed a gun at me. The gun was the same kind as the other one. He told me to hand him the money bags. I handed him the bags.

It will be observed that not only did Ms. Fuller describe the pistol used by defendant Boyd while he was in the store's office but also that she tied its description in with that of defendant Milby's gun. It was the alleged disparity between Ms. Fuller's testimony and the state's offer of proof in the introduction of state's exhibits one and two which constituted the basis for the award of a new trial by the

Court of Appeals.

At no time did the state connect the pistols which were seized from defendants at the time of their arrest and subsequently introduced as exhibits one and two with the pistols which had been utilized in the robbery of the grocery store. Nor was there any testimony to the effect that the exhibits were similar to those actually employed by defendants. The Court of Appeals concluded that the admission into evidence of these handguns was prejudicial error because there was no evidence that either gun matched the description given by Ms. Fuller. *State v. Milby & Boyd*, 47 N.C. App. at 671, 267 S.E.2d at 595. We hold that the Court of Appeals was in error for two reasons.

First, on the basis of the record which is before us, we are unable to conclude that the admission of the exhibits by the trial court was in fact error. The exhibits in question have not been placed before this court for its examination. Nor has there been any stipulation placed in the record which would serve to describe the exhibits for us. In other words, we are unable to determine that there was indeed a discrepancy between the weapons which were used in the commission of the armed robbery and the exhibits about which defendants now complain.

A ruling of the trial court on an evidentiary point is presumptively correct, and counsel asserting prejudicial error must demonstrate that the particular ruling was in fact incorrect. *See generally* 1 Stansbury's North Carolina Evidence § 27 (Brandis Rev. 1973). Where the matter complained of does not appear of record, appellant has failed to make the irregularity manifest and it will not be considered as a basis for prejudicial error. *E.g.*, *State v. Hilton*, 271 N.C. 456, 156 S.E.2d 833 (1967); *State v. Duncan*, 270 N.C. 241, 154 S.E.2d 53 (1967). It is the duty of an appellant to see that the record on appeal is properly made up and transmitted to the appellate court. *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969). While it is true that defendants asserted in their brief before the Court of Appeals that the exhibits are short, dark-barreled pistols, no description of the exhibits is part of the record, nor are the exhibits filed with our clerk. It is our conclusion that the admission of an exhibit cannot be held to be prejudicial error when the exhibit complained of or a description of same, does not appear of record in some fashion. *Compare Consolidated Vending Co. v. Turner*, 267 N.C. 576, 148 S.E.2d 531 (1966); *Cudworth v. Reserve Life Insurance*

Co., 243 N.C. 584, 91 S.E.2d 580 (1956); *see also State v. Samuel*, 27 N.C. App. 562, 219 S.E.2d 526 (1975).

Second, even assuming *arguendo* that the exhibits were admitted erroneously, we are unable to conclude that defendants were prejudiced by their admission into evidence. Ms. Fuller and Mr. Twisdale positively identified defendant Boyd as being the robber who was in the store's office emptying the safe. Defendant Milby was identified by all three of the state's witnesses as being the robber who was positioned at the second checkout stand at the front of the store. There was no hesitancy or equivocation on the part of the state's witnesses in making these identifications.

It is well-established that the burden is on the appellant not only to show error but also to show that he suffered prejudice as a result of the error. *E.g., State v. Chapman*, 294 N.C. 407, 241 S.E.2d 667 (1978). The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction, G.S. § 15A-1443 (1978), not whether the appellate court is able to conclude beyond a reasonable doubt that the evidence was harmless to the rights of a defendant. The latter standard is appropriately invoked only in matters of constitutional dimension. *State v. Heard & Jones*, 285 N.C. 167, 203 S.E.2d 826 (1974). In view of the overwhelming evidence which was presented by the state, as well as the quality of the evidence, we conclude that there is no reasonable possibility that the verdicts returned by the jury were affected by the introduction of the handguns in question.

The decision of the Court of Appeals is

Reversed.

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

STATE OF NORTH CAROLINA v. NOEL SHANE HARREN

No. 120

(Filed 27 January 1981)

1. Criminal Law § 91— speedy trial act — calculation of time excluded for mental examination

In calculating the time to be excluded for a mental examination of defendant in computing the time within which the trial of defendant must begin under the speedy trial statutes, the first day of the applicable period should be excluded and the last day of the period should be included.

2. **Criminal Law § 91— speedy trial act — excludable delay for mental examination of defendant**

In calculating the time within which a criminal trial must begin under the speedy trial act, the excludable delay permitted by G.S. 15A-701(b)(1)(a) for a mental examination of defendant runs from the date of entry of the order of commitment to the date the report of the mental examination becomes available to both defendant and the State.

3. **Criminal Law § 66.4— tentative lineup identification — admissibility**

A rape victim's testimony concerning her pretrial lineup identification of defendant and the testimony of a police officer who corroborated that testimony was not rendered inadmissible because the victim's identification of defendant at the lineup was tentative, since the tentative nature of the lineup identification went only to the weight that the jury might place upon it and not to its admissibility.

4. **Burglary and Unlawful Breakings § 5.1; Rape § 5— identification testimony — fingerprints — sufficiency of evidence of burglary and rape**

An 11 year old rape victim's tentative identification of defendant as her assailant and expert testimony that fingerprints lifted from the inside frame of the bedroom window where the victim's assailant entered matched defendant's fingerprints were sufficient to be submitted to the jury on issues of defendant's guilt of first degree burglary and first degree rape.

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

APPEAL by defendant from *Gaines, J.*, 31 March 1980 Criminal Session of MECKLENBURG County Superior Court.

Defendant was charged in separate bills of indictment with first-degree burglary and with the first-degree rape of a child under twelve years old. The trial court consolidated the charges for trial, and defendant entered a plea of not guilty to each charge.

The State's evidence tended to show that on the night of 18 July 1979, Peyton Elam, 11, was awakened by a man in her bedroom. Miss Elam testified that she first saw the man beside her bed pulling his pants down. The man put a pillow over her face, preventing her from either seeing him well or screaming, got on top of her and had intercourse with her.

The prosecuting witness testified that her assailant was a white man with short hair. His body was medium and his stomach was "kind of big." She had never seen the man before. She stated

that there was enough light from a street lamp for her to see the things she had described about the man. The man left the bedroom through a window. After he left, the child went to her mother's room to tell her what had happened. Her mother called the police. The prosecuting witness testified that she had never had intercourse before that night. Other State witnesses corroborated her testimony by testifying to statements previously made by her.

The trial court allowed defendant's motion to suppress an in-court identification by Miss Elam. However, over defendant's objection and, after a *voir dire* hearing, the trial court permitted the victim to testify concerning an out-of-court lineup identification of defendant. A police officer corroborated Miss Elam's account of the lineup. A fingerprint expert also testified that two fingerprints on the inside frame of the bedroom window where the entry occurred matched defendant's fingerprints.

The defendant did not present any evidence.

The jury returned a verdict of guilty to each of the charges. The judge consolidated the cases for judgment and sentenced defendant to life imprisonment. Defendant appealed to this Court as a matter of right pursuant to G.S. 7A-27(a).

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

Peter H. Gerns for defendant-appellant.

BRANCH, Chief Justice.

Defendant first assigns as error the failure of the trial court to grant his motion to dismiss because of violation of his statutory right to a speedy trial. The applicable section of the speedy trial act, G.S. 15A-701(b)(1)(a) provides:

> (b) The following periods shall be excluded in computing the time within which the trial of the criminal offense must begin:
>
> (1) Any period of delay resulting from . . . proceedings concerning the defendant including . . .
>
> (a) A . . . mental examination of the defendant . . .

The following dates are important in deciding whether exclud-

able defense delays reduce the total passage of time from indictment to date of trial to less than 120 days:

27 August 1979 — Indictment handed down.

25 September 1979 — Order for mental examination of defendant.

5 October 1979 — Defendant taken to hospital for examination.
19 October 1979 — Defendant returned to jail from hospital.

26 October 1979 — Defense continuance granted until 2 November 1979.

1 November 1979 — Clerk notified District Attorney that mental examination report was in clerk's office.

25 January 1980 — Defense continuance granted until 4 February 1980.

At the hearing held on 7 February 1980, Judge Gaines found that after deducting the net excludable delay only 119 days had elapsed between the return of the indictment and the commencement of the trial.

The key to the question presented by this assignment of error lies in the determination of the correct time to be excluded for the mental examination. It was stipulated that 165 days had elapsed between the bringing of the indictment and the date that the case was called for trial. Both defendant and the State in their computation of time elapsed used nine days as the net excludable delay for continuances granted to defendant.

[1] Defendant argues that we should adopt the time rule which excludes the first day of any legal period and includes the last day in calculating the time period. We agree. This rule is consistent with our civil rule. G.S. 1A-1, Rule 6(a). We see no reason why this well-recognized rule should not be employed in criminal cases.

[2] Defendant argues that the time to be excluded for the mental examination should run from 25 September 1975 (date of the order authorizing the mental examination) to 19 October 1979 (date of defendant's return from hospital custody to jail custody). Using this approach, there would have been 24 days excludable by reason of the mental examination and 9 days net excludable delay because of continuances granted defendant. When computed in accordance

with the rules set forth above, 132 days would have elapsed between the return of the indictment and the date defendant was brought to trial. Defendant therefore contends that his case should have been dismissed pursuant to the provisions of G.S. 15A-703.

The record does not disclose the method of computation used by the trial judge. However, the result reached by him indicates that he determined the time continued to run until the date that both defendant and the State had access to the report of the mental examination. Thus, Judge Gaines' computation included nine days net excludable delay by reason of continuances for defendant and 37 days excludable delay due to the mental examination. The difference between the sum of the excludable delays found by Judge Gaines and the time stipulated to have elapsed (165 days) was 119 days and within the statutory limitation.

In our opinion, the broad language of G.S. 15A-701(b)(1)(a) does not restrict the excludable period to the period of time a person is actually in custody of the hospital. Indeed, defendant does not contend that such a restrictive meaning was intended by the Legislature. This is evidenced by inclusion in his calculation of the time period which elapsed after the order was entered but before he was delivered to the custody of the hospital. However, he arbitrarily used the date he was released from hospital custody and placed in jail custody as the cutoff period for the period of excludable delay because of his mental examination. We are of the opinion that the same rationale which supports excluding the period between the order and the transportation of defendant to the hospital also supports the exclusion of the time period between the return of defendant to jail and the date the mental examination report is available to the parties. The rationale for exclusion of the time between the order and transportation of defendant to the hospital is that the State cannot bring the defendant to trial during this time period because to do so would deprive him of the benefit of the mental examination. This rationale applies equally to the time between defendant's return from the hospital and the date of the availability of the mental examination. The State could not properly bring defendant to trial during this time period, for to do so would similarly deprive him of the benefit of the mental examination. We therefore hold that the excludable delay due to a mental examination of a defendant runs from the date of entry of the order of committment to the date the report becomes available to both de-

fendant and the State.

We note that in oral argument before this Court, defendant's counsel contended that the report was available to both defendant and the State much earlier than the notice from the Clerk of the Superior Court indicates. We are unable to find substantiation for this argument in the record. Our examination of the record discloses that the only evidence concerning the availability of the report is the notice from the Clerk's office. We do not decide that this is the only type of evidence which can be introduced to show the availability of the report. We only conclude that, since the Clerk's report was the only evidence of the availability of the report, this evidence is determinative.

We therefore hold that the trial judge properly denied defendant's motion to dismiss.

[3] Defendant consolidates his second and third assignments of error for argument. He challenges the admissibility of the testimony of the prosecuting witness concerning her pretrial lineup identification of defendant and the testimony of a police officer who corroborated that testimony.

Before trial defendant moved to suppress the in-court identification of defendant by the prosecuting witness. At a hearing on this motion, the court heard testimony concerning the circumstances surrounding the prosecuting witness's observation of defendant at the time of the burglary and rape. The testimony offered was consistent with that set forth in our statement of facts.

After finding facts, the court concluded that the identification was not independent of the pretrial identification and allowed defendant's motion to suppress the in-court identification. We note that the findings of fact that supported the ruling were unchallenged.

At trial, when it appeared that the State was about to offer evidence of the pretrial lineup procedures, defense counsel objected and the court excused the jury and conducted a *voir dire* hearing concerning the admissibility of that evidence. The testimony offered on *voir dire* tended to show that on 26 August 1979, police held a lineup at the Mecklenburg County Law Enforcement Center. Defendant was represented by counsel at the lineup. Members of the public defender's office and defendant himself chose the six

men who participated in the lineup. Defendant's former attorney, who represented him at the lineup, testified that he could not recall anything suggestive about the lineup procedure. According to contemporary notes he made at the lineup, the former defense lawyer reconstructed the following colloquy which occurred between the assistant district attorney directing the lineup and Miss Elam at the lineup:

> ASSISTANT DISTRICT ATTORNEY: Can you identify anyone as the person who was in your home or broke into your home?
>
> MISS ELAM: I am not sure but I think it's No. 2.
>
> ASSISTANT DISTRICT ATTORNEY: Are you sure or not?
>
> MISS ELAM: Kind of in-between.

The defendant was in position number two in the lineup.

After finding facts, including a finding that there was nothing impermissibly suggestive about the pretrial procedure, Judge Gaines overruled defendant's objection. Over defendant's objection, the State then offered evidence before the jury concerning the pretrial lineup procedure.

At trial and before this Court, defendant has argued that the tentative nature of the prosecuting witness's identification at the lineup required the suppression of this testimony under the "totality of the circumstances" test in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972). The test set forth in that case is whether under the "totality of the circumstances" the in-court identification was reliable even though the confrontation procedure was impermissibly suggestive.

Defendant's reliance on *Neil v. Biggers, supra*, is misplaced. In *Manson v. Braithwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed. 2d 140 (1977), the United States Supreme Court recognized that a challenge to the admissibility of identification testimony requires (1) an impermissibly suggestive procedure and, if one is found, then (2) consideration of the *Neil v. Biggers* factors to determine whether

the taint is purged.[1] *See also State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1978).

Here defendant has not demonstrated the existence of the first requirement as set forth in *Manson v. Braithwaite, supra*, because nothing in the record supports a finding that the pretrial procedure was impermissibly suggestive. Neither does the suppression of the in-court identification affect the pretrial procedure. The only vice in the challenged identification is that it was tentative. The identification, however, was relevant and its tentative nature went to the *weight* that the jury might place upon it and not to its admissibility. The trial judge correctly admitted the testimony of the prosecuting witness concerning the pretrial lineup procedure and properly admitted the testimony offered in corroboration.

[4] Defendant next assigns as error the trial judge's denial of his motion for nonsuit. Relying on *State v. Clyburn*, 273 N.C. 284, 159 S.E. 2d 868 (1968), he argues that the equivocal identification testimony was not sufficient to carry the case to the jury. *Clyburn* is distinguishable from the case before us. In *Clyburn* the *only* evidence linking the defendant to the crime was the testimony of an eyewitness. That witness testified that he could not "honestly say . . ." that defendant was one of the men who consulted him. In the case *sub judice*, Miss Elam's tentative identification of defendant is *not the only* evidence linking defendant to the crime. Here, a fingerprint expert testified that fingerprints lifted from the inside frame of the bedroom window where the victim's assailant entered matched defendant's fingerprints. According to the officer who found the prints, they could have been no older than ten to fourteen hours. We hold that when considered in the light most favorable to the State, as we must, the combination of the identification testimony and the fingerprint evidence was sufficient to repel defendant's motion for judgment of nonsuit.

Finally, defendant assigns as error the admission into evidence of the testimony of Officer C. H. Van Hoy concerning his prearrest investigation.

[1] The factors cited in *Neil v. Biggers, supra*, are (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

This assignment of error does not conform to the requirements of Rule 10(c) in that it is not confined to a single issue of law. *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970). However, we have carefully examined every argument properly supported by exception and find that even if the questioned evidence were inadmissible, defendant has failed to carry the burden of showing that had the challenged evidence been excluded a different result would have been reached. G.S. 15A-1443(a). *State v. Hudson*, 295 N.C. 427, 245 S.E. 2d 686 (1978). This assignment of error is overruled.

We have carefully examined this entire record and find that defendant has been accorded a fair trial free of prejudicial error.

No error.

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

BETTY D. LOVELL, PLAINTIFF V. ROWAN MUTUAL FIRE INSURANCE COMPANY AND GRAHAM M. CARLTON, SUBSTITUTED TRUSTEE, DEFENDANTS AND ROWAN MUTUAL FIRE INSURANCE COMPANY, THIRD-PARTY PLAINTIFF V. ROBERT J. LOVELL, THIRD-PARTY DEFENDANT

No. 35

(Filed 27 January 1981)

Husband and Wife § 15; Insurance §§ 121, 134— entirety property — intentional burning by husband — right of innocent wife to recover fire insurance proceeds

An innocent wife can recover under an insurance policy issued to her husband, which insures property owned by them as tenants by the entirety, when the loss by fire resulted from intentional burning of property by the husband.

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

APPEAL of right by plaintiff from decision of the Court of Appeals (*Morris, C.J., Parker, J.*, concurring, *Hill, J.*, dissenting) reported at 46 N.C. App. 150, 264 S.E.2d 743 (1980), affirming the entry of summary judgment for defendant insurance company by *Hairston, J.*, entered 6 March 1979 in ROWAN Superior Court.

In this proceeding, plaintiff seeks to recover from defendant insurance company the value of her interest in realty she held with

her husband as tenants by the entirety.

By her complaint, plaintiff alleges that she and her husband owned certain real estate in Rowan County as tenants by the entirety. The house located on the property was insured by Rowan Mutual Fire Insurance Company for $27,000. The contents of the house were insured by the same policy for $3,000. On 24 September 1978, the husband intentionally set fire to the house, destroying it and its contents.

At the time of the fire, plaintiff and her husband were indebted to Citizens Savings and Loan Association, on a note secured by a deed of trust on the property, in the amount of $15,103.75. Plaintiff and husband were likewise indebted to North Carolina National Bank in the amount of $4,331.20. That debt was also evidenced by a note secured by a deed of trust. The insurance policy contained a loss payable clause in favor of both Citizens Savings and Loan Association and North Carolina National Bank. Shortly after the fire, the defendant insurance company paid the balance due on both notes, receiving an assignment of each note and deed of trust.

Graham M. Carlton was substituted as trustee for the *cestui* in the Citizens Savings and Loan deed of trust and, on 8 December 1978, began foreclosure proceedings on the property. Disbursement of any proceeds of foreclosure was enjoined by Judge Hairston on 2 February 1979, pending a determination as to the proper party to receive the proceeds.

Plaintiff's husband pleaded guilty to felonious burning of a dwelling house, a violation of G.S. 14-65. By judgment entered 13 February 1979, he was placed on probation for five years and ordered to pay to the clerk of court $9,000 as restitution.

Plaintiff says that because the property was owned by the entirety and her husband was solely responsible for its burning, she is entitled to recover $10,565 from the defendants. That figure represents the extent of the policy's coverage, minus the sums paid by the insurance company to extinguish the two notes held by the banks, as discussed above. Plaintiff also seeks payment to her of all proceeds from the foreclosure sale, and punitive damages.

Other relevant facts will be discussed in the opinion.

Coughenour, Linn and Short by W. C. Coughenour for plaintiff

appellant.

Carlton, Rhodes and Wallace by Graham M. Carlton for defendant appellees.

HUSKINS, Justice:

As the Court of Appeals recognized, this case presents a question of first impression in this State. Simply stated, the issue here is whether the innocent wife can recover under an insurance policy issued to her husband, which insures property owned by them as tenants by the entirety, when the loss by fire resulted from intentional burning of the property by the husband. Relying mainly on the special incidents of a tenancy by the entirety, the Court of Appeals held the wife's recovery barred by the actions of her husband. We reverse. Proper application of the more relevant rules of insurance and contract law leads us to the opposite result. Accordingly, we hold that the wife is entitled to recover from defendant insurance company.

In reaching that result, we have carefully reviewed the applicable case law from other jurisdictions. *See* Annot. 24 A.L.R.3d 450 (1969).

The leading case allowing recovery to the wife[1] is *Howell v. Ohio Casualty Insurance Company*, 124 N.J. Super. 414, 307 A.2d 142 (1973), *aff'd* 130 N.J. Super. 350, 327 A.2d 240 (App. Div. 1974).[2] In *Howell*, the defendant insurance company similarly sought to avoid the claim of an innocent wife arising out of her husband's intentional burning of the entirety property. The trial court considered the traditional concept of "oneness" of husband and wife when holding property by the entirety, but held that even if the realty was owned jointly, contract rights arising under the fire insurance policy entered into by husband and wife could not be said

[1] The innocent spouse was also allowed to recover in *Hosey v. Seibels Bruce Group South Carolina Insurance Co.*, 363 So.2d 751 (Ala. 1978); *Auto-Owners Insurance Co. v. Eddinger*, 366 So.2d 123 (Fla. App. 1979); *Economy Fire and Casualty Co. v. Warren*, 28 Ill. Dec. 194, 390 N.E.2d 361 (Ill. App. 1979); *Hildebrand v. Holyoke Mutual Fire Insurance Co.*, 386 A.2d 329 (Me. 1978); and *Winter v. Aetna Casualty and Surety Co.*, 409 N.Y.S.2d 85 (S.Ct. 1978).

[2] The lower court in *Howell* allowed recovery to the wife because it viewed the contract policy as several, not joint. On appeal the judgment was affirmed on that and an additional ground equally applicable here: that the fraud, *i.e.*, the arson, was also several and could not be imputed to the wife.

to fall automatically in the same category. Rather, adopting the reasoning of the New York Court of Appeals in *Hawthorne v. Hawthorne*, 242 N.Y.S.2d 50, 192 N.E.2d 20 (Ct. App. 1963), the *Howell* court viewed those contract rights as several, not joint, personal property, able to be possessed separately and individually by each spouse. 124 N.J. Super. at 419, 307 A.2d at 145. It follows therefore that the interest of one spouse could not be subject to divestment or forfeiture by the unilateral actions of the other.

Appellees would have us discount the rationale of the lower court in *Howell* for the reason that in the instant case, only the husband is named as insured and beneficiary under the policy. This argument is unpersuasive for two reasons. First, the case law in North Carolina clearly establishes that the wife is also an insured party, if the property is held by the entirety, even though only the husband's name appears on the policy. *Carter v. Insurance Co.*, 242 N.C. 578, 89 S.E.2d 122 (1955). Second, by enacting G.S. 58-180.1, the legislature apparently intended to resolve the related question of whether a policy insuring entirety property was void if issued solely in the name of either husband or wife. That statute, coupled with the clear rule of law established by case precedent, was sufficient notice to defendants that by insuring the interest of the husband it also insured the interest of plaintiff wife. Defendants therefore suffer no prejudice by our holding that the wife was an insured party, entitled to recover under the policy.

Relying in large part on *Howell v. Ohio Casualty Insurance Company, supra*, the Delaware Supreme Court allowed recovery by an innocent wife in *Steigler v. Insurance Co. of North America*, 384 A.2d 398 (Del. Supr. 1978). The husband in that case, as in the case before us, was convicted on criminal charges for the burning of the entirety property. In *Steigler* the entirety property was insured under a policy which contained a standard fraud provision rendering the policy void "in case of any fraud . . . by the insured relating thereto." The critical question, said the court, is the meaning of the word "insured."

The defendant insurance company urged the court to determine "insured" to mean the one entirety interest jointly held by husband and wife. Arson of one would, under that theory, bar recovery by the other. The court found the legal fiction of "oneness" of husband and wife inapposite to a contract dispute between an

insurance company and a policyholder. Resolution of the relative rights of the parties was deemed governed by contract law rather than the law governing land titles. Thus, because the wife was an insured party under the fire insurance contract, the court held she could recover one-half of the damages to the property within the limits of the contract. 384 A.2d at 402.

Additionally, the *Steigler* court recognized the fundamental injustice of barring recovery by the wife where the fraud of the insured husband involved a *criminal* act. Allowing such a result, said the court, would mean that the wife was in effect held responsible for the crime of her husband. *Id.* Such a result would clearly be repugnant to the general rule of law that a wife is not vicariously liable for the criminal acts of her husband merely because of the existence of the marital relationship.

In reaching a similar result in the instant case, we recognize that there is authority supporting the result of the Court of Appeals. For the most part, though, those cases dwell, as did the Court of Appeals, on the special nature of the entirety relationship. Generally, the rule in these jurisdictions[3] is that, since under real property law the interest of husband and wife are non-separable, one spouse cannot recover for damages to the entirety property intentionally occasioned by the act of the other.

Representative of this line of cases is *Rockingham Mutual Insurance Co. v. Hummel*, 219 Va. 803, 250 S.E.2d 774 (1979). There the plaintiff insurance company sued to recover funds it had paid on a fire insurance policy, issued to defendants husband and wife, after it became apparent that defendant husband had intentionally burned the entirety property. As in the instant case, the insurance policy there provided:

> This entire policy shall be void, . . . in case of any fraud or false swearing by the insured relating thereto.

* * * *

[3] Among cases holding recovery by the innocent spouse barred *see Kosior v. Continental Ins. Co.*, 299 Mass. 601, 13 N.E.2d 423 (1938) (husband and wife were tenants in common); *Morgan v. Cincinnati Ins. Co.*, 282 N.W.2d 829 (Mich. App. 1979); *Mele v. All-Star Insurance Corp.*, 453 F. Supp. 1338 (D.C. Pa. 1978) (applying "vintage" Pennsylvania law); *Cooperative Fire Ins. Assn. of Vermont v. Domina*, 399 A.2d 502 (Vt. 1979); and *Klemens v. Badger Mutual Ins. Co. of Milwaukee*, 99 N.W.2d 865 (Wis. 1959).

> This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: . . . neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, ...

The *Hummel* court first noted that whether an innocent insured may recover after the fraudulent act of a co-insured depends upon whether the interests of the co-insured are joint or severable. *Id.* at 805, 250 S.E.2d at 776. In the case before it, the court held the legal interest in the subject matter of the policy to be joint, because the property was owned in tenancy by the entirety.[4] Since both husband and wife were named as the "insured," each spouse, said the court, had the *joint* obligation to use all reasonable means to save and preserve the property. Likewise, each spouse had a joint duty to refrain from defrauding the insurer. Therefore, if either spouse violated any one of these duties, the breach was chargeable to the other. *Id.* at 806, 250 S.E.2d at 776. We see nothing in the analysis of the *Hummel* court which persuades us to adopt the result reached in that case. The mere fact that property is held by the entirety should not, standing alone, bar the innocent spouse's recovery. "The unity of person of husband and wife [expressed through the tenancy by the entirety] gives no clue to the relationship that ought properly to obtain between the owners of the proceeds of insurance. . . ." *Hawthorne v. Hawthorne*, *supra*, 242 N.Y.S.2d at 51, 192 N.E.2d at 21. The insurance policy on the entirety property is a personal contract, appertaining to the parties to the contract and not to the thing which is subject to the risk insured against. 43 Am. Jur. 2d, Insurance, § 194.

Analogous support for our holding that the unilateral act of the husband does not bar recovery by the wife is in fact found elsewhere in the law of tenancies by the entirety. In *Air Conditioning Co. v. Douglass*, 241 N.C. 170, 84 S.E.2d 828 (1954), this Court held that a husband's dealings with a creditor did not automatically bind the wife, and thus did not allow the creditor to attach a lien to the entirety property. Plaintiff in that case urged the Court to adopt the same *ipso facto* conclusion urged on the Court in the instant case: that the unilateral act of the husband should bind the wife

[4] In Virginia, as in North Carolina, once such an estate is established neither spouse can sever it by his or her sole act. *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); *Vasilion v. Vasilion*, 192 Va. 735, 740, 66 S.E.2d 599, 602 (1951).

simply by virtue of the tenancy by the entirety. We find that argument no more persuasive now than did our brethren before us.

Moreover, it has long been the rule that an estate by the entirety in personal property is not recognized in North Carolina. *Bowling v. Bowling*, 243 N.C. 515, 91 S.E.2d 176 (1956). Hence, when property held as tenants by the entirety is sold, the cash proceeds are not held as tenants by the entirety, but rather, most often, as tenants in common. *Wilson v. Ervin*, 227 N.C. 396, 42 S.E. 2d 468 (1947). Cash proceeds arising out of the husband's intentional burning of insured entirety property are equally incapable of entirety ownership. Rather, such proceeds must be considered divisible personal property unless the parties by contract have provided what disposition should be made of the funds. *Wilson v. Ervin, supra.*

Here, Rowan Mutual Fire Insurance Company paid Citizens Savings and Loan Association the sum of $15,103.75 and paid North Carolina National Bank the sum of $4,331.20 to discharge the indebtedness of Betty D. Lovell and her husband to those institutions, receiving an assignment of each note and deed of trust. Our holding in this case contemplates that from the $30,000 insurance the sum of $19,434.95 will be deducted to reimburse defendant insurance company for the sums it paid to Citizens Savings and Loan Association and North Carolina National Bank, leaving a balance of $10,565.05. One half of that balance with interest as provided by law shall be paid to plaintiff Betty D. Lovell by Rowan Mutual Fire Insurance Company. The remaining one half, which, nothing else appearing, would belong to the husband Robert J. Lovell, has been forfeited by his intentional act of setting fire to the insured property.

The deeds of trust have been foreclosed by Graham M. Carlton, substitute trustee, and disbursement of the proceeds of foreclosure have been enjoined by Judge Hairston pending final determination as to the proper party to receive the proceeds. We make no adjudication as to the proper recipient of the proceeds of the foreclosure because that issue is not before us.

For the reasons stated the decision of the Court of Appeals is reversed and the case remanded to the Court of Appeals for further remand to Rowan Superior Court for disposition in accord with this opinion.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. HOWARD ELAM

No. 86

(Filed 27 January 1981)

1. **Criminal Law § 146.4— review of constitutional questions not raised below — unconstitutionality of statute**

The General Assembly was without authority to enact the statute permitting appellate review of a contention that defendant was convicted under a statute that violates the U. S. Constitution or the N. C. Constitution even though no objection, exception or motion on such ground was made in the trial division, G.S. 15A-1446 (d)(6), since the statute violates the provisions of Article IV, § 13(2) of the N. C. Constitution giving the Supreme Court the exclusive authority to make rules of practice and procedure for the appellate division.

2. **Criminal Law § 146.4— constitutional questions not raised below — consideration under supervisory powers**

While the Supreme Court will generally refrain from deciding constitutional questions which are not raised or passed upon in the trial court or properly presented in the Court of Appeals, the Court may pass upon constitutional questions not properly raised below in the exercise of its supervisory jurisdiction. Rule 2 of the Rules of Appellate Procedure.

3. **Crime Against Nature § 1— taking indecent liberties with children — statute not unconstitutionally vague**

The statute prohibiting the taking of indecent liberties with children, G.S. 14-202.1, is not unconstitutionally void for vagueness since the statute clearly prohibits sexual conduct with a minor child and describes with reasonable specificity the proscribed conduct.

4. **Crime Against Nature § 1— taking indecent liberties with children — equal protection**

The statute prohibiting the taking of indecent liberties with children, G.S. 14-202.1, does not violate equal protection because it requires a five-year difference between the age of the defendant, who cannot himself be under 16, and the age of the victim, who must be under age 16, since the age classifications within the statute are reasonably related to the purpose of the statute, *i.e.*, the protection of children from the sexual advances of adults.

5. **Crime Against Nature § 1— taking indecent liberties with children — standing to attack statute on First Amendment grounds**

Defendant had no standing to attack the statute prohibiting the taking of

indecent liberties with children, G.S. 14-202.1, on the ground that it is unconstitutionally overbroad in that it proscribes innocent displays of affection in violation of the First Amendment since the statute has never been so interpreted and was not so applied against defendant, and defendant had no First Amendment right to express himself through unlawful actions.

6. Crime Against Nature § 1— crime against nature with child — trial under indecent liberties statute

There was no merit to defendant's contention that the trial court lacked jurisdiction to try him under the indecent liberties with children statute, G.S. 14-202.1, because the criminal act he committed was a crime against nature prohibited by G.S. 14-177, since the crime against nature statute and the indecent liberties with children statute are complementary but not mutually exclusive.

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

DEFENDANT appeals from an unpublished decision of the Court of Appeals, 44 N.C. App. 731, 264 S.E.2d 411 (1980), upholding judgment of *Graham, S.J.*, entered at the 24 January 1979 Criminal Session of BRUNSWICK Superior Court.

Defendant was tried on indictments charging him with two counts of taking indecent liberties with children in violation of G.S. 14-202.1.

The evidence for the State tended to show the following. Defendant is a married, thirty-four year old pastor of two Methodist churches in Brunswick County. On 15 September 1978, he took a group of young boys on a camping trip to Boiling Springs Lake in an effort to get a church club organized for the coming year. Defendant shared a three-man tent with Dale Leonard Hubble, age fourteen, and Lester Charles Self, age twelve. Each boy testified that he awoke during the night and found defendant performing an act of fellatio on him and observed defendant perform the same act on the other boy in the tent. The boys neither cried out nor resisted. They did not tell the other boys what happened nor did they discuss it with each other. The boys did inform their parents the next day of what had taken place. The parents confronted defendant with the statements of their children. Dale Hubble's parents and Lester Self's parents, sister and brother-in-law testified defendant confessed to these acts on two separate occasions.

Defendant denied molesting the boys and denied confessing to the families when confronted with the accusations. He elected to sleep in the same tent with the two boys because he had been told they had lice and he did not want others exposed to the lice. Defend-

ant is a family man and minister. He has been very active with youth groups. He presented a number of witnesses from the community, and from communities he had previously served as pastor, who testified to his good reputation and character.

Defendant was found guilty as charged in each case. The cases were consolidated for judgment and defendant was sentenced to five years in prison.

Defendant appealed to the Court of Appeals alleging the unconstitutionality of G.S. 14-202.1 under which he was convicted and assigning as error the charge to the jury. The Court of Appeals found no error and this Court allowed defendant's petition for discretionary review.

Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General, for the State.

Singleton, Murray, Harlow & Little by James D. Little, attorneys for defendant appellant.

HUSKINS, Justice.

Defendant, for the first time in the Court of Appeals, argued that G.S. 14-202.1 is unconstitutional. The constitutionality of the statute was not raised in the trial court, and the Court of Appeals therefore declined to discuss the merits of the constitutional arguments, citing *State v. Cumber*, 280 N.C. 127, 185 S.E.2d 141 (1971), and *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971). In both those cases, this Court refused to decide constitutional questions which had not been raised or considered in the court below. This is a well established rule. *State v. Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972), *cert. den.*, 414 U.S. 1160, 39 L.Ed.2d 112, 94 S.Ct. 920 (1974); *Wilcox v. Highway Commission*, 279 N.C. 185, 181 S.E.2d 435 (1971); *State v. Mitchell*, 276 N.C. 404, 172 S.E.2d 527 (1970); *State v. Parrish*, 275 N.C. 69, 165 S.E.2d 230 (1969); *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968), *cert. den.*, 393 U.S. 1087, 21 L.Ed.2d 780, 89 S.Ct. 876 (1969); *State v. Dorsett*, 272 N.C. 227, 158 S.E.2d 15 (1967); *State v. Grundler*, 251 N.C. 177, 111 S.E.2d 1 (1959), *cert. den.*, 362 U.S. 917, 4 L.Ed.2d 738, 80 S.Ct. 670 (1960). The rule is in accord with decisions of the United States Supreme Court. *See, e.g., Estelle v. Williams*, 425 U.S. 501, 48 L.Ed.2d 126, 96 S.Ct. 1691 (1976); *Irvine v. California*, 347 U.S. 128, 98 L.Ed. 561, 74 S.Ct. 381 (1954); *Edelman v. Califor-*

nia, 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953). This requirement is expressly provided for in Rule 14 (b) (2) of the Rules of Appellate Procedure:

> In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall contain the elements specified in Rule 14 (b) (1) and in addition shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

The Court of Appeals acted properly in overruling the assignment of error.

[1,2] Defendant contends it was error for the Court of Appeals to overrule his constitutional attack, citing and relying on G.S. 15A-1446 (d) (6) which provides:

> Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.
>
> (6) The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.

Subsection (6) of G.S. 15A-1446 (d) is in direct conflict with Rules 10 and 14 (b) (2) of the Rules of Appellate Procedure and our case law on the point. The Constitution of North Carolina provides that "[t]he Supreme Court shall have exclusive authority to make rules of practice and procedure for the Appellate Division." N.C. Const. Art. IV § 13 (2). The General Assembly was without authority to enact G.S. 15A-1446 (d) (6). It violates our Constitution. Our Rule 14 (b) (2) and our case law are authoritative on this point. The Court of Appeals did not err. This Court will refrain from deciding constitutional questions which are not raised or passed upon in the

trial court or properly presented in the Court of Appeals.

This Court may, however, pass upon constitutional questions not properly raised below in the exercise of its supervisory jurisdiction. Rule 2 of the Rules of Appellate Procedure; *Rice v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963). Within our discretion, and in the exercise of our supervisory powers, we have decided to address the merits of defendant's constitutional claims.

Defendant contends G.S. 14-202.1 is unconstitutional in that (a) it is a denial of due process because of vagueness, (b) it is a denial of equal protection because of age classification in the statute and (c) it is an overbroad restriction on protected activity. These arguments are without merit.

Defendant was charged with taking indecent liberties with children in violation of G.S. 14-202.1 which reads:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.
>
> (b) Taking indecent liberties with children is a felony punishable by a fine, imprisonment for not more than 10 years, or both.

[3] Defendant's contention that the statute is unconstitutionally vague is without merit. This issue was correctly decided by the Court of Appeals in *State v. Vehaun*, 34 N.C. App. 700, 239 S.E.2d 705 (1977), *cert. den.*, 294 N.C. 445, 241 S.E.2d 846 (1978), in an opinion by Judge (now Justice) Britt. The test applied was whether the statute gives a "person of ordinary intelligence a reasonable

opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L.Ed.2d 222, 227, 92 S.Ct. 2294, 2298-99 (1972); *see also State v. Lowry*, 263 N.C. 536, 139 S.E.2d 870, *appeal dismissed*, 382 U.S. 22, 15 L.Ed.2d 16, 86 S.Ct. 227 (1965). The language of G.S. 14-202.1 provides a defendant with sufficient notice of what is criminal conduct. The statute clearly prohibits sexual conduct with a minor child and describes with reasonable specificity the proscribed conduct. Any person of ordinary understanding upon reading the statute would know the statute would be violated if a thirty-four year old man fondled two boys, aged twelve and fourteen, and placed his mouth on the penises of the boys. As the Court of Appeals noted in *Vehaun*, similar language in a District of Columbia Statute, D.C. Code § 22-3501, has withstood this same constitutional attack. *Moore v. United States*, 306 A.2d 278 (D.C. 1973).

[4] Defendant contends the statute denies him equal protection under the laws because it has two age requirements. The statute requires the defendant be over sixteen years of age and that there be a five-year difference between the age of the accused and the age of the victim, who must be less than sixteen. Defendant contends we should apply a rule of strict scrutiny to test the constitutionality of the statute. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969). We disagree. The proper test is whether the statute has a rational basis for the classification scheme. Age classifications are not so suspect as to require an application of the strict scrutiny test. In re *Walker*, 282 N.C. 28, 191 S.E.2d 702 (1972). The age classifications within the statute are reasonably related to the purpose of the statute, *i.e.*, the protection of children from the sexual advances of adults. The five-year age difference of the defendant, who cannot himself be under sixteen, and that of the victims, who must be under age sixteen, is a reasonable classification. If it were otherwise, a child could be punished for molesting another child, or an adult could be punished for molesting another adult. This was not the purpose behind G.S. 14-202.1. The age classifications are reasonable means of avoiding this. The statute does not deny defendant his right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution or Article I, section XIX of the North Carolina Constitution.

[5] Defendant's final argument on the constitutionality of G.S. 14-202.1 is that it is unconstitutionally overbroad in that it pro-

scribes innocent displays of affection in violation of the First Amendment. The statute has never been so interpreted and it was certainly not so applied in this case. Defendant has no standing to attack the statute on these grounds. He has no First Amendment right to express himself through unlawful actions. This is not activity which the State is forbidden by the Constitution to regulate. *See State v. Banks*, 295 N.C. 399, 245 S.E.2d 743 (1978).

[6] Defendant's second assignment of error, which is raised for the first time in this Court, is that the trial court lacked jurisdiction to try him under G.S. 14-202.1 because the criminal act he committed was a crime against nature prohibited by G.S. 14-177. Defendant relies on dicta in *State v. Lance*, 244 N.C. 455, 459, 94 S.E.2d 335, 339 (1956), which is also quoted in *State v. Harward*, 264 N.C. 746, 748, 142 S.E.2d 691, 693 (1965), to the following effect:

> The two acts are complementary rather than repugnant or inconsistent. GS 14-177 condemns crimes against nature whether committed against adults or children. GS 14-202.1 condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of GS 14-177.

In spite of this language, no case has held that an adult who places his mouth on the penis of a child cannot be tried under G.S. 14-202.1. On the facts of this case, it is the more encompassing statute. Defendant did more to the children than commit a crime against nature. Dale Hubble testified, "I told my mother that he rubbed my back and legs. . . ." Lester Self's mother testified without objection that her son told her defendant "had placed his hands on his penis and other privates." Defendant was properly tried under G.S. 14-202.1. The crime against nature statute, G.S. 14-177, and the indecent liberties with children statute, G.S. 14-202.1, are complementary but not mutually exclusive.

Defendant's final assignment of error is to the jury charge of the trial court. The assignment is supported by an exception which appears at the end of the charge which covers five printed pages of the record. The charge contains no identification of the portion or portions to which exception was taken. The Court of Appeals correctly noted this to be a "broadside" exception to the charge in

violation of Rule 10(b)(2), Rules of Appellate Procedure. The Court of Appeals also correctly noted that defendant had attempted to argue three separate points of law under one assignment of error based on one exception in violation of Rule 10(c), Rules of Appellate Procedure. The Court of Appeals did not err in overruling the assignment of error on these grounds. We have, however, reviewed the charge and find it, when considered as a whole, an accurate statement and application of the law to the case.

The Court of Appeals did not err in upholding the conviction.

Affirmed.

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

IN THE MATTER OF THE ESTATE OF JOHN C. KIRKMAN, SR., DECEASED

No. 131

(Filed 27 January 1981)

Wills § 61; Attorneys § 7.5— proceeding to determine spouse's right to dissent — attorney's fees properly taxed as costs against estate

Where a surviving spouse is forced to engage in litigation to determine whether a right of dissent from the will of the deceased spouse exists, the discretionary power given the trial judge under G.S. 6-21(2) includes the power to award attorney's fees for the surviving spouse when, in the opinion of the trial court, the proceeding was one of substantial merit.

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

APPEAL by Minnie H. Kirkman, surviving spouse of John C. Kirkman, Sr., from a decision of the Court of Appeals reported in 47 N.C. App. 479, 267 S.E. 2d 518 (1980), reversing an order by *Kivett, Judge*, entered at the 13 June 1979 Session of Superior Court, DURHAM County.

By this appeal we consider whether a trial court has the authority pursuant to G.S. 6-21(2) to award attorneys' fees to attorneys for a surviving spouse who incurs such legal fees in establishing the right to dissent from the deceased spouse's will and to tax such fees as costs to the estate of the testator. We hold that the trial court is so authorized and such costs may, in the discretion of the

trial judge, be so taxed. Accordingly, we reverse the Court of Appeals.

E. C. Harris and Randall, Yaeger, Woodson, Jervis & Stout, by John C. Randall, for appellant.

Nancy Fields Fadum on brief for executor-appellee. No appearance on behalf of appellee at oral argument.

CARLTON, Justice.

I.

The facts involved in this controversy are simple: Counsel for the widow in proceedings establishing her right to dissent from her husband's will filed petitions requesting that their fees resulting from the litigation be taxed as costs to the estate of the testator. The clerk allowed the requests and was affirmed by the trial court which concluded, "as a matter of law that a proceeding to determine the right of dissent from a will by a surviving spouse is a proceeding within the meaning of North Carolina General Statutes 6-21(2), such matter being a proceeding which fixes the rights and duties of the parties under a will." The executor appealed to the Court of Appeals. That court reversed, holding that a proceeding under Chapter 30 is "beyond the purview of G.S. 6-21(2)." We allowed discretionary review on 16 September 1980.

II.

The question dispositive of this appeal is whether G.S. 6-21(2) empowers a trial court, in its discretion, to award attorneys' fees to attorneys for a spouse who has sought to establish a right to dissent from the deceased spouse's will, as allowed by Chapter 30 of the North Carolina General Statutes. G.S. 6-21 vests in a trial court the discretion to tax costs against either party in certain specified instances. In relevant part, G.S. 6-21 provides that costs may be taxed when the proceedings are:

> (2) Caveats to wills and *any action or proceeding which may require the construction of any will or trust agreement*, or fix the rights and duties of parties thereunder; provided, however, that in any caveat proceeding under this subdivision, if the court finds that the proceeding is without substantial merit, the court may disallow attorneys' fees for the attorneys for the cave-

ators.

G.S. § 6-21 (Cum Supp. 1979) (emphasis added). "Costs" that may be assessed include "reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow . . . ," G.S. § 6-21(11) (Cum. Supp. 1979), giving the trial court broad discretion to fix reasonable attorneys' fees and tax and apportion court costs among the parties. *Id.; accord, Godwin v. Trust Co.*, 259 N.C. 520, 131 S.E. 2d 456 (1963). Such costs may be assessed against any party, including the executor of a testator's estate. *McWhirter v. Downs*, 8 N.C. App. 50, 173 S.E. 2d 587 (1970). Thus, in the case *sub judice*, the order taxing the dissenting spouse's atorneys' fees against the executor of her deceased husband's estate was proper only if an action to establish the right to dissent is "[an] action or proceeding which may require the construction of [a] will . . ., or fix the rights and duties thereunder," G.S. § 6-21(2).

The right to dissent, which Mrs. Kirkman has now established by companion litigation, is statutory. To establish the right to dissent, a spouse must make a timely filing pursuant to G.S. 30-2, and must show an entitlement to that right under G.S. 30-1. The right to dissent is a matter of mathematical determination. In *re Estate of Connor*, 5 N.C. App. 228, 168 S.E. 2d 245 (1969). A surviving spouse has a right to dissent only when the total value of property received under and outside the will is less than what he or she would have received had the deceased spouse died intestate. *Phillips v. Phillips*, 296 N.C. 590, 252 S.E. 2d 761 (1979). Any determination and establishment of value made as provided in G.S. 30-1 is binding only for the purposes of determining whether there is a right of dissent. G.S. § 30-1(c)(1976).

Although Chapter 30 does provide a straightforward formula for determining the right to dissent, it is clear that evaluating the relative rights of the surviving spouse will not always be an easy task. In *Phillips* this Court recognized the complexities of estimating the amount and value of property passing to the dissenting spouse within and without the will. Chief Justice Sharp, writing for the Court, noted that "no judicially imposed solution can adequately redress the problems of valuation raised by our dissent statutes." *Phillips v. Phillips*, 296 N.C. at 604, 252 S.E. 2d at 770. What we must determine is whether, recognizing the potential complexity of litigation to determine a right to dissent, the Legislature intended

that attorneys' fees should be awarded to attorneys for the dissenting spouse in the discretion of the trial court.

In construing the scope of G.S. 6-21(2), we must, as is always the case in statutory interpretation, ascertain and adhere to the intent of the Legislature. In *re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978). In attempting to ascertain the legislative intent, courts resort first to the words of the statute. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). Legislative intent may also be ascertained from the nature and purpose of the statute and the consequences which would follow from a construction one way or another. *Campbell v. Church*, 298 N.C. 476, 259 S.E. 2d 558 (1979). "A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). The words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the underlying reason and purpose of the statute. In *re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978).

In *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1973), this Court considered whether G.S. 6-21.1 empowered a trial judge to award attorneys' fees where an action was settled before proceeding to trial. G.S. 6-21.1 provided:

> In any personal injury or property damage suit * * * instituted in a court of record, where the judgment for recovery of damages is two thousand dollars ($2,000.00) or less, the *presiding judge* may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as part of the court costs.[1] (Emphasis added.)

The obvious purpose of the statute is to provide relief for persons whose damage claims would be so small as to perhaps be economically unfeasible if they had to pay an attorney out of their recovery. Consequently, in *Hicks* we held that, despite the possible implication raised by the term "*presiding* judge," the Legislature intended that attorneys' fees be awarded, subject to the discretion of

[1] In 1979, G.S. 6-21.1 was amended by substituting "five thousand dollars ($5,000)" for "two thousand dollars ($2,000)."

the trial judge, even when a case was settled prior to trial. Moreover, we further stated that G.S. 6-21.1 was a remedial statute, and thus "should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope." 284 N.C. at 239, 200 S.E. 2d at 42. Such a rule of construction applies with equal force in determining the scope of G.S. 6-21(2).

Considering the language of 6-21(2), we note especially that attorneys' fees may be awarded in "any action or proceeding which may require the construction of any will." The Court of Appeals held that a proceeding to determine the right to dissent merely involves a *valuation* of the property transferred under the will and "does not require a construction of the provisions of the will itself," because the dissent proceeding does not "determine what, if any, property is passed by [the will]."

While the valuation of the property passing under the will to the surviving spouse is binding only for the purposes of the dissent action and does not, of itself, establish what property will ultimately pass under the will, we do not find this to be determinative. The valuation process is not independent of "construction" of a will. Reference to the will is obviously an integral part of the process. Indeed, the very purpose of a dissent proceeding is to determine whether the surviving spouse's share *under the will* is more or less than under the laws of intestate succession. Valuation of the spouse's interest under the will requires a construction of the will itself; it is irrelevant that the construction reached in a dissent proceeding will not control the distribution of property under the will. It is the necessity of construction that is important, not the resulting distribution.

This conclusion seems consistent with the legislative intent underlying G.S. 6-21(2). The statutory right of dissent, "which was intended to provide a relatively simple process of determining the right to dissent, will in many cases prove to be complex, time-consuming, and expensive. An unintended effect of these drawbacks may be to discourage a deserving spouse from exercising the right to dissent." *Phillips v. Phillips*, 296 N.C. at 604-05, 252 S.E. 2d at 770. A spouse who wishes to establish that he or she is entitled to dissent from a will should not be discouraged from doing so by the potential expense involved. G.S. 6-21(2) was enacted to ensure that

parties having meritorious challenges to a will or trust agreement would not be discouraged from pressing these claims by the spectre of incurring legal fees.

Interpreting G.S. 6-21(2) as allowing a trial judge the discretion to award attorneys' fees to a spouse who seeks to establish a right to dissent seems to us also consistent with the general legislative intent of that section: that proceedings which necessarily require the construction of the terms of a will should not, if meritorious, be discouraged. Where a surviving spouse is forced to engage in litigation to determine whether a right of dissent exists, we hold that the discretionary power given the trial judge under G.S. 6-21(2) includes the power to award attorneys' fees for the surviving spouse when, in the opinion of the trial court, the proceeding was one with substantial merit. Accordingly, the decision of the Court of Appeals is reversed. This cause is remanded to the Court of Appeals with the direction that the order of the trial court be reinstated.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. ARTHUR EDMONDSON

No. 57

(Filed 27 January 1981)

1. **Rape § 6.1— indictment for rape — incidents preceding intercourse — no consideration of lesser included offenses**

When a defendant charged with rape admits that he had sexual intercourse with the prosecutrix, neither the State nor the defendant is entitled to have the jury consider a lesser included offense on the basis of incidents which might have preceded the sexual intercourse because the bill of indictment charging only rape does not encompass such earlier incidents but is directed only to the sexual intercourse itself. If the State contends defendant committed some other crime, such as assault, prior to the rape itself, it should file a separate indictment or add a count to the rape indictment charging this other crime.

2. **Rape § 6.1— rape prosecution — admission of intercourse — submission of lesser offenses not required**

Where the only dispute in a rape prosecution is whether an admitted act of sexual intercourse was accomplished by consent or by force, the lesser included

offenses of assault with intent to commit rape and assault upon a female should not be submitted to the jury.

DEFENDANT appeals from *Judge Herbert Small* presiding at the 31 March 1980 Criminal Session of NASH Superior Court. Upon pleas of not guilty defendant was tried and convicted of first degree rape, crime against nature, and kidnapping. He was sentenced to life imprisonment on the rape conviction, ten years on the crime against nature conviction, and not less than thirty nor more than fifty years on the kidnapping conviction. Defendant appeals from the rape conviction pursuant to G.S. 7A-27(a). Although defendant has abandoned all assignments of error as to his crime against nature and kidnapping convictions these cases are before this Court pursuant to his motion to bypass the Court of Appeals.[1]

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the state.

Ralph G. Willey III Attorney for defendant appellant.

EXUM, Justice.

The sole question presented by defendant's appeal is whether the trial court, in submitting to the jury the offense of rape, erred by not also submitting the lesser included offenses of assault with intent to commit rape and assault upon a female. Defendant contends that failure to submit the lesser included offenses was prejudicial error. We do not agree, and find no error.

The state's evidence consists essentially of the testimony of prosecuting witness Brenda Wilkins. She testified that on 3 October 1979 she was working as night auditor at the Imperial 400 Motel in Enfield. Shortly after 2:00 a.m. defendant, whom she had never seen before, came in and asked to register. Thereafter he came behind the counter, grabbed Ms. Wilkins around the neck and, after brandishing a straight razor, forced her to walk from the lobby to room 125 wherein they engaged in sexual intercourse. Although she did not see the razor after entering the room, Ms. Wilkins testified that she was "scared" and that she engaged in sexual intercourse because she feared defendant would harm her if

[1] Motion to bypass allowed 10 July 1980. Defendant has presented only one question in his brief and it relates to his rape conviction. Thus under App. R. 28(a) all other assignments of error "are deemed abandoned."

she refused. She gave defendant her telephone number at his request because she "hoped that he would leave me alone and hoped he would forget it." Defendant informed Ms. Wilkins that he would contact her by telephone and arrange a subsequent date. Upon being released Ms. Wilkins, crying and in hysterics, ran to the lobby, locked the door and called the County Sheriff's Department. After talking with the police she went to the hospital and then to her home. Defendant called her the following afternoon to arrange a date. Ms. Wilkins, after conferring with the police, made the date. When defendant kept it he was immediately arrested.

Defendant, testifying in his own behalf, conceded the sexual encounters but claimed that they were with the consent of Ms. Wilkins. Defendant testified that he had known the prosecuting witness since July 1979, and that he went to the motel at her request. He further testified that Ms. Wilkins was angry at his refusal to pay her $35.00 after their sexual relations and at his contemplated reconciliation with his wife. An argument ensued and defendant left the motel. Ms. Wilkins called the next day to apologize and arrange a date. He kept the date and was arrested.

Defendant contends that the trial court erred by not submitting to the jury the lesser included offenses of assault with intent to commit rape and assault upon a female. This Court held in *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111 (1972), *cert. denied*, 409 U.S. 995 (1972), that where all the evidence reveals a completed act of sexual intercourse and the only dispute is whether the act was accomplished by consent or by force, the lesser included offenses of assault with intent to commit rape and assault upon a female need not be submitted to the jury. This is because lesser included offenses must be submitted only where there is evidence to support them. *State v. Watson*, 283 N.C. 383, 196 S.E. 2d 212 (1973); *State v. Bryant, supra.* Where the only dispute is whether an admitted act of sexual intercourse was accomplished by consent or by force there is no evidence of assault with intent to commit rape or assault upon a female; hence it is firmly established that these lesser included offenses need not be submitted to the jury.[2] *State v. Armstrong*, 287

[2] To convict one of assault with intent to commit rape the state must prove (1) an assault by a male upon a female (2) with the intent to have sexual intercourse with her "at all events against her will and notwithstanding any resistance she may make." *State v. Overcash*, 226 N.C. 632, 634, 39 S.E. 2d 810, 811 (1946). To convict one of assault upon a female the state must prove (1) an assault (2) upon a female person

N.C. 60, 212 S.E. 2d 894 (1975), *death sentence vacated*, 428 U.S. 902 (1976); *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975), *cert. dismissed*, 423 U.S. 918 (1975); *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Bynum* 282 N.C. 552, 193 S.E. 2d 725 (1973), *cert. denied*, 414 U.S. 869 (1973).

[1] Defendant concedes the applicability of *State v. Bryant, supra*, and its progeny, but urges this Court to reconsider these decisions before deciding the present case. Specifically, he asks this Court to adopt former Chief Justice Bobbitt's dissenting opinion in *State v. Bryant, supra*. It was Chief Justice Bobbitt's view that the consent of the prosecuting witness to the sexual act "would not preclude a finding that, *earlier in their relationship*, the defendant had assaulted the prosecutrix with the intent to gratify his passion on her notwithstanding any resistance she might make." *State v. Bryant, supra*, 280 N.C. at 560, 187 S.E. 2d at 116. (Emphasis supplied.) In other words, a defendant may assault a prosecuting witness with intent to commit rape only to find a willing participant or one who after initial resistance freely consents. Chief Justice Bobbitt, therefore, would have required submission of the lesser included offense of assault with intent to commit rape on the basis of incidents which might have preceded the sexual intercourse.[3] When a defendant charged with rape admits that he had sexual intercourse, we believe the better view to be that neither the state nor the defendant is entitled to have the jury consider a lesser included offense on the basis of incidents which might have preceded the sexual intercourse because the bill of indictment charging only rape does not encompass such earlier incidents. It is directed only to the sexual intercourse itself. On the *rape* indictment, the question of whether defendant is guilty of some crime which might have preceded the sexual intercourse simply does not arise. If the state contends defendant committed some other crime, such as assault, prior to the

by a male person. *State v. Craig*, 35 N.C. App. 547, 241 S.E. 2d 704 (1978). Where a defendant admits to engaging in sexual intercourse but contends that it was with the consent of the prosecuting witness there is, nothing else appearing, evidence neither of an assault upon a female nor of an assault with intent to commit rape. Accordingly, in such cases submission of these offenses is not required since there is no evidence to support them.

[3] We note in this regard that Justice Sharp (later Chief Justice), after joining Chief Justice Bobbitt's dissent in both *State v. Bryant, supra*, and *State v. Arnold, supra*, later abandoned this position and joined the majority opinion in *State v. Armstrong, supra*.

rape itself, it should file a separate indictment or add a count to the rape indictment charging this other crime.

[2] Consequently we affirm our earlier decisions and hold that where the only dispute is whether an admitted act of sexual intercourse was accomplished by consent or by force the lesser included offenses of assault with intent to commit rape and assault upon a female should not be submitted to the jury.

No error.

STATE OF NORTH CAROLINA v. JOE ANDREW FELMET

No. 129

(Filed 27 January 1981)

1. Criminal Law § 18— failure of record to show jurisdiction in superior court — motion to amend record

The Court of Appeals did not abuse its discretion in denying defendant's motion to amend the record to show derivative jurisdiction of a misdemeanor in the superior court through appeal of a district court conviction and in then dismissing defendant's appeal for failure of the record to show jurisdiction. However, the Supreme Court elects to allow the amendment to reflect subject matter jurisdiction so that it may pass upon the substantive issue of the appeal.

2. Constitutional Law § 18— soliciting signatures on petition at private mall — no protected exercise of free speech

Defendant's accosting of customers in a private parking lot at a privately owned and operated mall to sign a petition, which was a type of solicitation prohibited by the owners of the mall, was not an exercise of free speech protected by the First Amendment to the U. S. Constitution or by Article I, § 14 of the N. C. Constitution.

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

APPEAL by defendant from decision of the Court of Appeals, 47 N.C. App. 201, 266 S.E.2d 721 (1980), dismissing defendant's appeal from a 7 September 1979 judgment of *Rousseau, J.*, in FORSYTH Superior Court.

Defendant was charged with trespass in violation of G.S. 14-134 for failure to leave private property of Hanes Mall in Winston-Salem after being ordered to do so. He moved to dismiss contending the conduct which gave rise to the trespass charge was protected by

the freedom of speech provisions of the United States and North Carolina Constitutions. The motion was denied. Defendant was convicted in superior court and sentenced to thirty days imprisonment, suspended for one year on condition he not engage in solicitation activities at Hanes Mall. Defendant appealed to the Court of Appeals assigning error to the failure of the lower court to dismiss the charge on constitutional grounds.

At oral argument before the Court of Appeals, counsel for defendant was advised by that court that the appeal was subject to dismissal because the record did not reflect how the superior court obtained jurisdiction over the charge.

Following oral argument, defendant filed a motion to amend the record on appeal by adding a certified copy of the judgment of the district court which reflected defendant's appeal therefrom to the superior court. The motion to amend was denied on 29 May 1980. On 3 June 1980, the Court of Appeals dismissed the appeal for failure of the record to show jurisdiction in the superior court. Defendant petitioned for writ of certiorari to review the procedural dismissal by the Court of Appeals. This Court granted certiorari in the case.

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

Pfefferkorn & Cooley, P.A., by Robert M. Elliot, attorneys for defendant appellant.

HUSKINS, Justice:

[1] The procedural issue raised on this appeal is whether the Court of Appeals erred in denying defendant's motion to amend the record to reflect proper jurisdiction in the trial court and then dismissing defendant's appeal for failure of the record to show jurisdiction. While we find no legal error or abuse of discretion in the denial of the motion and the dismissal, we have allowed the amendment in order to reach and decide the substantive issue of the case.

Defendant was charged with trespass in violation of G.S. 14-134, a misdemeanor offense. Exclusive original jurisdiction of all misdemeanors is in the district courts of North Carolina. G.S. 7A-272. The jurisdiction of the superior court for the trial of a misde-

meanor, unless a circumstance enumerated in G.S. 7A-271(a) arises, is derivative and arises only upon appeal from a conviction of the misdemeanor in district court. *State v. Guffey*, 283 N.C. 94, 194 S.E. 2d 827 (1973); *see also* G.S. 7A-271(b). The superior court has no jurisdiction to try a defendant on a warrant for a misdemeanor charge unless he is first tried, convicted and sentenced in district court and then appeals that judgment for a trial *de novo* in superior court. *State v. Hall*, 240 N.C. 109, 81 S.E.2d 189 (1954).

The printed record in this case indicates defendant was tried in the Superior Court of Forsyth County upon a warrant issued by a deputy clerk of court charging defendant with misdemeanor trespass. The record does not show defendant was ever tried in district court on this charge. The record reveals only that defendant was convicted by a jury in superior court and a suspended sentence imposed. The record fails to disclose derivative jurisdiction in the superior court through appeal of a district court conviction.

Rule 9(b)(3) of the North Carolina Rules of Appellate Procedure contains a list of documents and information which must be included in a record on appeal in a criminal case. This rule requires "a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered . . . ." N.C. Rules of Appellate Procedure 9(b)(3)(ii). The Commentary accompanying this rule in part states:

> The office of this item is simply to permit routine confirmation by the appellate court of the subject matter jurisdiction or "competence" of the particular trial judge and tribunal . . . . The elements enumerated are sufficient for this purpose when rounded out by the court's range of judicial notice.

Table III in the Appendix of Tables and Forms which accompanies the Rules of Appellate Procedure contains a *suggested* order or arrangement for a record on appeal in a criminal case. The list is based on successive trials in both district and superior courts but is stated to be adaptable to trial only in superior court by exclusion of items indicated by an asterisk. Those items which are marked by asterisks are items five and six which read:

5. Judgment in district court.*

6. Entries showing appeal to superior court.*

These items should have been included in the record on appeal in this case but were not. Defendant had the duty to see the record on appeal was properly compiled. *State v. Stubbs*, 265 N.C. 420, 144 S.E.2d 262 (1965). The problem in this case is what significance or penalty to place on this omission from the record.

When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority. *State v. Hardy*, 298 N.C. 191, 257 S.E.2d 426 (1979); *State v. Guffey, supra; State v. Evans*, 262 N.C. 492, 137 S.E.2d 811 (1964); *State v. Johnson*, 251 N.C. 339, 111 S.E.2d 297 (1959). When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed. *State v. Hunter*, 245 N.C. 607, 96 S.E.2d 840 (1957); *State v. Banks*, 241 N.C. 572, 86 S.E.2d 76 (1955); *State v. Patterson*, 222 N.C. 179, 22 S.E.2d 267 (1942). In the case before us, the record is silent and the Court of Appeals *ex mero motu* noted it was unable to determine that the superior court had jurisdiction.

When confronted with the record's deficiency on oral argument, defendant's counsel did not argue the superior court was without jurisdiction. Instead, he moved to amend the record to include the judgment of the district court and appeal entries therefrom. This motion, unopposed by the State, reflects proper jurisdiction in the superior court. The Court of Appeals, for reasons not readily apparent, denied the motion to amend. We cannot say the court abused its discretion because Rule 9(b)(6) of the Rules of Appellate Procedure specifies:

> On motion of any party or on its own initiative the appellate court *may* order additional portions of a trial court record sent up and added to the record on appeal. On motion of any party the appellate court *may* order any portion of the record on appeal amended to correct error shown as to form or content.

(Emphasis added.) Even so, we have decided to allow the amendment to reflect subject matter jurisdiction and then pass upon the substantive issue of the appeal. This is the path we elect to follow. It is the better reasoned approach and avoids undue emphasis on procedural niceties.

[2] The substantive issue presented is whether defendant's conduct which formed the basis of the charge of trespass was protected by the First Amendment to the United States Constitution and Article I, section 14 of the North Carolina Constitution. We conclude defendant's conduct was not protected free speech under either the Federal or State Constitution. His motion to dismiss the charge was properly denied.

The circumstances under which defendant was arrested can be summarized as follows. Hanes Mall is a large regional shopping center which contains fashion shops, several banking establishments and department stores. No government agencies are located in the facility. It is privately owned and operated. On 4 June 1979, Hanes Mall had a policy prohibiting any solicitation on the premises without obtaining prior permission from the management. Signs at the three entrances to the facility read:

> Notice to the people. The property comprising Hanes Mall is private property. Solicitations or distribution of handbills is absolutely prohibited on this property. Written permission must be obtained from the Manager's Office to use this property in any activity other than shopping.

Activities other than shopping were permitted, such as observance of National Law Enforcement Week and solicitations by the Salvation Army during the Christmas season but only after written permission was obtained from the management. Any person seen soliciting without permission was requested to cease the activity and, if he refused, advised that the police would be called to remove him from the property. If he still refused, the police removed the person from the property.

On 4 June 1979, two shoppers at the mall approached the Mall's Security Director, Fred Thomas, and informed him that a man was soliciting signatures in the parking lot. Thomas walked to the parking lot and saw defendant waving a clipboard and calling out to people in a loud voice to come over to him. Thomas approached defendant who asked him to sign a petition against the draft movement. Thomas was aware defendant did not have the management's permission to solicit on the property. He told defendant solicitation was not permitted and requested that defendant stop. Defendant refused, asserting he had a constitutional right to do so.

Thomas eventually called the police who, after some discussion with defendant, took him to the police station where he was arrested for trespass.

Defendant's conduct was not protected under the First Amendment to the United States Constitution. In *Lloyd Corporation v. Tanner*, 407 U.S. 551, 33 L.Ed.2d 131, 92 S.Ct. 2219 (1972), a case factually similar to the case at hand, the Court weighed the First Amendment rights of Vietnam War and draft protestors to distribute handbills in the interior area of a large, privately owned shopping mall against the Fifth and Fourteenth Amendment property rights of the mall owners who had a strict policy against handbilling and who had asked the protestors to leave. The Court held "there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights." 407 U.S. at 570, 33 L.Ed.2d at 143, 92 S.Ct. at 2229. The accosting of customers in the private parking lot of Hanes Mall to sign a petition, which was a type of solicitation prohibited by the owners of the property, was not a protected exercise of free speech under the Federal Constitution.

Nor were defendant's actions protected under Article I, section 14 of the North Carolina Constitution which reads:

> Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, *but every person should be held responsible for their abuse.*

(Emphasis added.) This Court could, under the Supremacy Clause, interpret our State Constitution to protect conduct similar to that of defendant without infringing on any federally protected property right of the owners of private shopping centers. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 64 L. Ed.2d 741, 100 S.Ct. 2035 (1980). However, we are not so disposed. Defendant's conviction for trespass is free from prejudicial error. The judgment must therefore be upheld.

No error.

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

STATE OF NORTH CAROLINA v. RANDY ANSON CULPEPPER AND TREVOR DALE GURGANUS

No. 111

(Filed 27 January 1981)

Arson § 3; Criminal Law § 50.1 — origin of fire — opinion testimony improperly excluded

In a prosecution of defendants for conspiring to burn a building and personal property therein, the trial court erred in excluding a witness's testimony as to his opinion that the char pattern on the floor of the second story of the building did not indicate the use of an accelerant and that there was only one origin to the fire, since defendant should have been allowed to offer expert testimony to counter that introduced and relied upon by the State; one defendant's testimony that the condition of the building remained unchanged from the time of the fire until the time the expert witness observed it laid an adequate foundation for the expert testimony; and there was a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial, as the impact of another expert witness's testimony was severely diminished when he admitted that he was not an arson expert and had not had training in the investigation of arson and arson detection.

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

ON discretionary review pursuant to G.S. 7A-31(a) to review the decision of the Court of Appeals, reported in 47 N.C. App. 633, 267 S.E. 2d 591, finding no error in judgments entered by *Brown, J.*, at the 29 May 1979 Session of PASQUOTANK Superior Court.

Defendants were charged in separate indictments, proper in form, with conspiring with each other to burn a building and with conspiring to burn personal property located within the building. Each defendant was also indicted on counts of burning a building and burning personal property.

The undisputed evidence at trial tended to show that defendants operated a nightclub located in Elizabeth City, North Carolina. The two-story, rented building which housed the nightclub consisted essentially of one large room on the first floor, used as the nightclub, and another large room on the second level, used principally for storage. The first floor had been adapted for nightclub use by the addition of a bar, a dance floor, and bathrooms. The true ceiling of the first floor was twelve to fourteen feet high. The ceilings in the bathrooms were about eight feet high, resulting in a false ceiling and an area above the ceiling in which defendants had

stored paints, paint thinner, brushes, rollers, and other painting apparatus.

About 3:00 a.m. on 6 October 1978, defendants closed the nightclub for the evening and left. Shortly thereafter, the building caught fire and burned, resulting in substantial fire damage.

Defendants were arrested on 1 December 1978. The trial began 29 May 1979. Following verdicts of guilty on all charges, each defendant was sentenced to fifteen years imprisonment for the charge of burning a building, and five years on the charge of burning personal property. The Court of Appeals, in an opinion by Judge Hedrick, Judges Martin (Robert M.) and Martin (Harry C.) concurring, found no error. We granted defendants' petition for discretionary review pursuant to G.S. 7A-31(a) on 15 August 1980.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, and Acie L. Ward, Assistant Attorney General, for the State.

Twiford, Trimpi, Thompson and Derrick, by C. Everett Thompson, for defendants.

BRANCH, Chief Justice.

The sole question presented for review is whether the trial court erred in refusing to admit the testimony of defendants' expert witness.

The State contended throughout the trial, and its evidence tended to show, that the fire had three points of origin: the area behind the bar; the men's restroom; and an area on the second floor above the men's restroom. The State's expert witness, Mr. Floyd Douglas Allen, testified that, in his opinion, the fire on the second floor was caused by the ignition of vapors from a flammable liquid which was poured on the floor, "and that this flash fire, in return, ignited the flammable liquids, which in turn ignited the floor."

Defendants contended that the fire originated when a live cigarette was thrown into a large trash can behind the bar. As the fire spread, it ignited cans of paint thinner stored above the false ceiling in the men's restroom and caused them to explode. As a result, the false ceiling burned away, and cans of paint thinner fell to the floor of the restroom. In essence, defendants maintained that the fire began accidentally and had only one point of origin.

In support of their contention, defendants offered the testimony of Mr. Harley June, an expert in the causes of fires. Mr. June was qualified as an expert and, after testifying concerning his inspection of the burned premises, was asked the following question about the second-floor fire:

> Mr. June, do you have an opinion, satisfactory to yourself, based upon your experience and training, as to whether or not and based on your observations of the hole, as to whether or not the charring around that hole you testified about, was caused by the use of an accelerant poured on the floor?

The court sustained the State's objection and permitted defendants to enter into the record what the witness would have responded had he been allowed to testify. Out of the hearing of the jury, Mr. June responded:

> Based on my experience and observations, there was no evidence to indicate an accelerant was used.

Mr. June also would have testified that the fire had only one point of origin.

It is well settled that "an expert in a particular field may give his opinion, based on personal observation or in answer to a properly framed hypothetical question, that a particular event or situation could or could not have produced the result in question." *Teague v. Power Co.*, 258 N.C. 759, 763, 129 S.E. 2d 507, 510 (1963). We hold that it was error not to permit defendant to offer expert testimony to counter that introduced and relied upon by the State. *See State v. Moore*, 262 N.C. 431, 137 S.E. 2d 812 (1964) (reversible error to exclude expert evidence offered to refute State's theory of the origin of the fire).

The Court of Appeals held that there was no error in excluding the challenged testimony since no foundation had been laid. The court noted that Mr. June did not visit the premises until ninety-seven days after the fire. The court then stated that defendants had failed to offer evidence that "the condition of the building as he observed it, and upon which he based his opinion, was substantially the same as it was immediately after the fire." 47 N.C. App. at 635, 267 S.E. 2d at 593. We disagree. Prior to offering the testimony of Mr. June, defendant Gurganus testified as follows:

> I had an occasion to go in the building in January of 1979. I went in there with Mr. Harley June. When I went in there with Mr. June, *it had not changed in any way since the fire.* Other than a small amount of cleanup that we had done, that was very minor. The upstairs on the second floor had not altered or changed in any way. (Emphasis added.)

We think that the testimony of defendant Gurganus suffices to lay an adequate foundation for Mr. June's expert testimony.

Even so, the State submits, and the Court of Appeals agreed, that any error in excluding the testimony amounted to harmless error since another expert witness, Mr. Donald Oglesbe, testified substantially in accordance with what Mr. June would have said, had he been permitted to give his opinion. However, on cross-examination, the impact of Mr. Oglesbe's expert testimony was severely diminished when he admitted that he was not an arson expert and had not "had the training in the investigation of arson and arson detection." He further admitted that he had never investigated the premises involved here. Under these cirumstances, we cannot say that there is no "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." G.S. 15A-1443(a).

The decision of the Court of Appeals finding no error in defendants' trial is reversed and the cause is remanded to that court for further remand to the Pasquotank Superior Court for a new trial.

New trial.

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

JAMES CLIFTON PEELER v. STATE HIGHWAY COMMISSION, SELF-INSURED

No. 126

(Filed 27 January 1981)

Master and Servant § 75— workers' compensation — future medical expenses — statute not applied retroactively

The 1973 amendment to G.S. 97-25 which eliminated the ten-week limitation for the recovery of medical expenses for an employee's treatments which are necessary "to effect a cure or give relief" will not be applied retroactively to a case in which the claim arose out of an accident occurring prior to the effective date of the amendment.

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

APPEAL by plaintiff from decision of the North Carolina Court of Appeals reported at 48 N.C. App. 1, 269 S.E.2d 153 (1980), affirming the award of the North Carolina Industrial Commission which affirmed in part and vacated in part the order entered 24 April 1978 by *Deputy Commissioner C. A. Dandelake.*

This case arises from a claim filed under the Workers' Compensation Act by plaintiff, an employee of the State Highway Commission, seeking compensation and medical expenses for injuries resulting from an accident arising out of and in the course of his employment as an engineer's aide when he was run over by a motor grader on 22 October 1969. Defendant employer admitted liability for the accident and entered into an agreement with plaintiff which provided that he be compensated for his temporary total disability for the period 30 October 1969 to 22 March 1973.

On 22 March 1978, the cause came on for hearing before Deputy Commissioner Dandelake. All of the evidence which was received at the hearing was by way of stipulations of counsel for both parties. Upon this evidence, the deputy commissioner found as a fact that as a result of an accident arising out of and in the course of his employment, plaintiff had sustained an injury which had resulted in a 20% permanent partial disability of his back, a 28% permanent partial disability of his right leg, and a 5% permanent disability of his left leg; that plaintiff had sustained permanent injuries to "important external and internal" organs of the body which resulted in his total and permanent impotence; and plaintiff has lost complete use of his bladder and his secondary sexual organs

such as his prostate gland and seminal vesicles. The deputy commissioner also made the following findings of fact, to which defendant employer took exception:

> He will require the continued use of an external drainage apparatus because of the necessity to create a urinary diversion above the bladder. That the plaintiff will also have to have continued treatment two times a year for an ileo-loop stomo in the right lower quadrant of the abdomen which will require permanent use of a collection appliance. These are synthetic material which will require repeated replacement and, therefore, will require a necessary replacement periodically to tend to lessen his disability.
>
> * * *
>
> The plaintiff's doctors are also of the opinion that plaintiff will have to be seen regularly at least two times a year as the plaintiff will continue to have disability related to his urinary tract because of the ileo-loop urinary tract infections or may even develop a chrinic [sic] urinary tract infection which may predispose to calculus or stone formation and may develop certain electrolite imbalances or even progress to renal sufficiency with associated azotemia and anemia and possible acidosis. In order to avoid this type of complication he will need periodic evaluation to consist of complete blood counts with serum, Bun and Creatinine and Electrolyte determinations. He will also require periodic urinalysis directly from the ileo-loop along with quantitive urine cultures and drug sensitivities if indicated. He should also have periodic x-ray evaluation of the ileo-loop and of the kidneys to determine both anatomic and functional status. That the x-ray procedure be done at yearly intervals and that the urinalysis and cultures and blood studies be done at three to six month intervals. He may need surgical removal of the retained bladder if he continues to have difficulty with fluid accumulations with possible secondary infections in the bladder. That the plaintiff will also continuously wear a long leg waist height support. (That all of the above will be required to keep plaintiff's condition from worsening.)

Thereupon, plaintiff was awarded compensation for permanent partial disability in the amount of 126 weeks at $46.80 per week for a total of $5,896.80; compensation for plaintiff's impotence in the amount of $5,000; and compensation for plaintiff's loss of his bladder and prostrate gland in the amount of $1,861.60.

None of the foregoing award has ever been challenged by defendant employer. However, on appeal to the full Industrial Commission by defendant, the conclusion of the deputy commissioner that "[P]laintiff will need additional medical expenses from time to time in the future to lessen his permanent partial disability . . ." was ordered stricken. The corresponding portion of the deputy commissioner's order which directed defendant employer to ". . . pay future medical expenses for treatment as recommended by plaintiff's doctor so long as it will tend to lessen his period of disability" was also ordered stricken.

On appeal by plaintiff, the Court of Appeals, in an opinion by Judge Parker, concurred in by Chief Judge Morris, affirmed the decision of the full commission. Judge Robert M. Martin dissented, and plaintiff appealed pursuant to G.S. § 7A-30(2).

Attorney General Rufus L. Edmisten, by Assitant Attorney General Ralf F. Haskell, for the State.

Williams, Willeford, Boger, Grady & Davis, by Thomas M. Grady, for plaintiff-appellant.

PER CURIAM.

In a clear and well-written opinion, Judge Parker, speaking for the Court of Appeals, held that:

(1) The action of the full Industrial Commission in striking the conclusion of the deputy commissioner that "[p]laintiff will need additional medical expenses from time to time in the future to lessen his permanent partial disability", as well as the portion of the award which required defendant employer to pay plaintiff's future medical expenses "so long as it will tend to lessen (plaintiff's) period of disability", was, in effect, a conclusion of law reviewable by the appellate courts.

(2) G.S. § 97-29 authorizes a claimant to recover compensation for medical care only when the disability is found to be *total* and permanent. That statute cannot be relied upon to support the action

of the deputy commissioner because there had been an express finding that plaintiff had suffered a permanent *partial* disability.

(3) G.S. § 97-25 authorized, at the time of plaintiff's injury, an award of expenses for medical treatment only when: (a) It was reasonably required to effect a cure or give relief within ten weeks of the injury. (b) After the ten-week period, when, in the judgment of the Industrial Commission, the treatment was reasonably required to lessen the period of disability. The conclusion of law by the deputy commissioner was to the effect that these medical expenses will be necessary only to lessen plaintiff's permanent partial disability, not that they would tend to lessen the period of his disability. While this conclusion of law flows logically from the findings of fact, it does not provide a basis upon which medical expenses could be properly awarded, and the full commission acted correctly in ordering that it be stricken. At most, the findings indicate that the treatment is necessary to prevent plaintiff's condition from deteriorating, not that it will tend to lessen the period of disability.

We are in full agreement with the majority opinion of the Court of Appeals. The only issue that remains for our consideration is that posed by the dissent of Judge Robert M. Martin: Whether this court, in the recent case of *Schofield v. Great Atlantic & Pacific Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980), retroactively applied a 1973 amendment to G.S. § 97-25 in such a manner as to enable plaintiff to recover future medical expenses.

At the time of plaintiff's injury, G.S. § 97-25 provided that

> Medical, surgical, hospital, nursing services, medicines, sick travel, and other treatment including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from date of injury 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, . . . shall be provided by the employer.

G.S. § 97-25 (1965).

The 1973 Session of the General Assembly amended the statute to provide that

> 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, . . . shall be provided by the employer.

It was the position of the dissent that the 1973 amendment was retroactively applied by this court in *Schofield*; and that the statute as amended requires employers to provide medical care which is reasonably required (1) to effect a cure, (2) give relief, or (3) if additional time is required, to lessen the period of disability. Judge Martin concluded that it was clear upon the present record that the continuing medical treatment which plaintiff will require for the rest of his life as a result of his permanent injuries will never effect a cure or lessen the period of his disability. However, he concluded that there was ample evidence in the record to support a finding that such treatment is reasonably required to give relief. Judge Martin observed that the manifest intention of the legislature in enacting the amendment was to eliminate the previous ten-week limitation on treatments which are necessary to effect a cure or give relief.

The position taken by the dissent that this court retroactively applied the 1973 amendment in *Schofield* is erroneous for two principal reasons.

First, while it is the general rule that the Workers' Compensation Act should be liberally construed so that the benefits arising under the Act will not be denied by narrow or technical construction, *e.g.*, *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E.2d 281 (1972), that rule is subject to the principle that a statute will not be construed to have retroactive effect unless that intent is clearly expressed in the legislation or arises by necessary implication from its terms. In re Will of Mitchell, 285 N.C. 77, 203 S.E.2d 48 (1974); *see generally* 1A D. Sands, Statutes and Statutory Construction § 22.36 (1972); *compare Arrington v. Stone & Webster Engineering Corp.*, 264 N.C. 38, 140 S.E. 2d 759 (1965); *Hartsell v. Thermoid Co.*, 249 N.C. 527, 107 S.E.2d 115 (1959); *Oaks v. Cone Mills Corp.*, 249 N.C. 285, 106 S.E.2d 202 (1958). By its very terms, the amending legislation provides that it is to be effective "from and after July 1, 1973." Such language provides no room for a judicial construction otherwise.

Second, close analysis of the *Schofield* opinion indicates that the statutory provision at issue in the present case had no bearing whatsoever on the issues then presented to the court for its review. It will be noted that *Schofield* held that G.S. § 97-25 authorizes an employee to seek treatment in an emergency by a physician other than that selected by an employer where the employer's failure to provide medical services amounts merely to an inability to provide such care. The provision of the statute which is at issue in the present case was in no way involved in *Schofield* other than being set out in the opinion in a block quotation with the entire statutory section which happens to also include the pertinent provisions for emergency treatment, an issue upon which the decision ultimately turned. The question of retroactivity of the 1973 amendment was not even addressed by the court because the amendment in no way altered the provisions of the statute which dealt with emergency care.

It follows, therefore, that since we intimated and intended no retroactive application of the 1973 amendment in *Schofield*, and affirmatively disclaim such concept herein, it is irrelevant that the Industrial Commission failed to make any findings of fact as to whether the medical treatment involved was reasonably required to give relief.

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

Affirmed.

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

MICHAEL ROLAND LYNCH v. JEAN T. LYNCH

No. 90

(Filed 2 February 1981)

1. **Divorce and Alimony § 1.1— divorce from bed and board — residency requirement**

The trial court properly granted defendant's motion to dismiss plaintiff's action for divorce from bed and board on the ground that plaintiff failed to meet the six month N. C. residency requirement set forth in G.S. 50-8 before filing a complaint for divorce.

2. **Divorce and Alimony §§ 23.1, 23.5— divorce action dismissed for lack of jurisdiction — child within State — jurisdiction of custody action**

The portion of plaintiff's complaint seeking custody of his minor son constituted a separate action severable from his divorce proceeding so that dismissal of the divorce action for lack of subject matter jurisdiction did not result in a dismissal of the custody action, and the trial court was authorized to assert subject matter jurisdiction over the custody portion of the case where the child was physically within the State.

3. **Divorce and Alimony § 23.4; Rules of Civil Procedure § 4— nonresident defendant — service by registered mail — inadequate affidavit**

The trial court did not have personal jurisdiction over the nonresident defendant in a child custody proceeding, and a custody order entered on 1 June 1978 was not binding on defendant, where plaintiff attempted to serve defendant with process in Illinois by registered mail, return receipt requested, but the affidavit required by Rule 4(j)(9)(b) was not filed until 19 January 1979, and the affidavit did not state that a copy of the summons and complaint was deposited in the post office by registered mail, return receipt requested.

4. **Appearance § 1.1; Infants § 5.1— child custody proceeding — full faith and credit motion — general appearance**

Defendant made a general appearance in a child custody proceeding and submitted herself to the jurisdiction of the court by making a motion invoking the adjudicatory power of the court to determine whether full faith and credit should be given to a custody decree entered in Illinois.

5. **Constitutional Law § 26.5; Infants § 5.1— foreign child custody order — full faith and credit**

The trial court and the Court of Appeals erred in refusing to give full faith and credit to an Illinois divorce decree awarding child custody to defendant mother since the custody order in question was clearly an award of permanent custody, as there was no indication in the entire judgment that the court intended this award of custody to be temporary; the Illinois court had previously entered an order awarding temporary custody to defendant so that an additional order awarding temporary custody would have served no purpose; the fact that the court retained jurisdiction to determine whether plaintiff would be allowed

visitation rights did not change the permanent nature of the custody order; and the Illinois court by the same judgment granted defendant's petition for a final divorce, indicating that it considered the entire judgment to be final except as to matters which it specifically retained the right to adjudicate at a later time. Since plaintiff originated the Illinois action by his complaint and since at the time he filed his complaint the minor child and both parties were domiciled in Illinois, the Illinois court clearly had jurisdiction to adjudicate the matter and enter the permanent child custody order.

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

ON defendant's petition for discretionary review of a decision of the Court of Appeals, 45 N.C. App. 391, 264 S.E. 2d 114 (1980) (opinion by *Erwin, J.*, with *Clark, J.* and *Arnold, J.* concurring), affirming in part and vacating in part the judgments of *Hamrick, D.J.*, entered at 19 January 1979 Civil Session of District Court, CLEVELAND County.

This case involves a series of divorce and custody proceedings, the ultimate issue being which, if any, of the divorce and custody orders entered by the courts of North Carolina and Illinois are binding upon the parties. Plaintiff husband and defendant wife were married on 30 April 1976 in Cook County, Illinois, where they lived together until their separation in October, 1977. One child was born of the marriage on 3 December 1976. Plaintiff filed a petition for divorce, requesting custody of the child, on 30 December 1977 in Illinois. Defendant filed a response to this Illinois action on 13 February 1978, pleading that plaintiff's petition for divorce and custody be denied.

On or about 20 March 1978 plaintiff left Illinois with the child and moved to Shelby, North Carolina. He testified before the North Carolina District Court in Cleveland County that he took the child without the knowledge or consent of the mother. Plaintiff filed a complaint in North Carolina on 6 April 1978, seeking a divorce from bed and board and custody of the minor child. On that same day the North Carolina court awarded temporary custody to plaintiff and entered an order demanding that defendant appear in the North Carolina court on 21 April 1978. The record contains a certified mail receipt, purportedly signed by defendant, showing that something was delivered to her on 11 April 1978.

Defendant filed a counter petition in plaintiff's Illinois action on 21 April 1978, seeking divorce, temporary custody, and child support. Plaintiff's complaint filed in Illinois on 30 December 1977

was dismissed for lack of prosecution on 16 May 1978. This order was vacated on 31 May 1978, apparently for the purpose of allowing defendant's counter petition to be heard, and a hearing was scheduled for 15 June 1978.

The North Carolina district court filed an order on 1 June 1978 awarding permanent custody of the child to plaintiff. At the 15 June 1978 hearing on plaintiff's Illinois action, the Illinois court entered an order of default against plaintiff for his failure to answer defendant's counter petition. Plaintiff did not appear at the hearing and his attorney was permitted to withdraw as counsel on that date. On 11 July 1978 the Illinois court ordered plaintiff's petition for dissolution of marriage dismissed for want of prosecution, retroactive to 15 June 1978. By a judgment entered 17 July 1978 the Illinois court granted defendant's counter petition for divorce, ordered plaintiff to return the child to Illinois, and awarded custody of the minor child to defendant.

Defendant filed motions in plaintiff's North Carolina action on 30 November 1978, requesting that the court dismiss plaintiff's North Carolina actions for divorce from bed and board and custody of the minor child or set aside the portion of the court's order granting custody to plaintiff, and asking that the 17 July 1978 Illinois judgment ordering plaintiff to return the minor child and awarding custody to defendant be given full faith and credit.

On 19 January 1979 the North Carolina court held a hearing on defendant's 30 November 1978 motions. Defendant presented a certified copy of the record in the Illinois action and eight affidavits from persons residing in Illinois, attesting to the good character of defendant and bad character of plaintiff. Plaintiff testified in his own behalf, denying the allegations made in the eight affidavits submitted by defendant and accusing defendant of several actions of immoral conduct which, he argued, rendered her unfit for custody of the minor child. Plaintiff claimed that he had not corresponded with his Illinois counsel since early in March 1978 and that until November 1978 he was unaware of any action that had taken place in the Illinois proceeding after the withdrawal of his attorney on 15 June 1978. Plaintiff's mother testified as a character witness for him.

By an order filed 5 February 1979 the district court of Cleveland County granted defendant's motion to dismiss plaintiff's

action for divorce from bed and board, on the ground that it lacked jurisdiction to adjudicate that portion of the action since plaintiff had not met the six month residency requirement set forth in G.S. 50-8 before filing his complaint. Defendant's motions to dismiss the custody action, to vacate the orders granting custody to plaintiff, and to give full faith and credit to the Illinois judgment of 17 July 1978 were denied. After reviewing the evidence presented at the 19 January 1979 hearing, the court again awarded permanent custody to plaintiff.

The Court of Appeals affirmed in part and reversed in part, holding that the 6 April 1978 and 1 June 1978 orders of the North Carolina court awarding custody to plaintiff were not binding on defendant due to defects in the service of process, and that the 17 July 1978 Illinois judgment was not entitled to full faith and credit. That court further found that by filing a motion requesting that the Illinois judgment be given full faith and credit, defendant made a general appearance in the action and thereby submitted to the jurisdiction of the court as of 30 November 1978. After defendant's motions were denied at the 19 January 1979 hearing, the Court of Appeals held that she should have been permitted to file an answer, therefore the portion of the 5 February 1979 order granting custody to plaintiff was vacated and the case remanded to allow defendant to file an answer, after which the case would be scheduled for a *de novo* hearing on the merits.

We allowed defendant's petition for discretionary review pursuant to G.S. 7A-31 on 3 June 1980.

Hicks, Harris & Sterrett by Richard F. Harris III, for defendant appellant.

No counsel for plaintiff appellee.

COPELAND, Justice.

By this appeal defendant asks us to determine which, if any, of the orders filed by the North Carolina and Illinois Courts are binding upon the parties. We agree with the Court of Appeals that the judgments of the North Carolina district court on 6 April 1978 and 1 June 1978, awarding custody to plaintiff, are not binding upon defendant. However, we reverse that portion of the Court of Appeals' decision which holds that the Illinois judgment of 17 July 1978 is not entitled to full faith and credit. We find that the Illinois

judgment was a permanent, final determination of custody by a court with proper jurisdiction, and therefore the trial court erred in failing to give full faith and credit to that judgment.

[1] The trial court properly granted defendant's motion to dismiss plaintiff's action for divorce from bed and board on the ground that plaintiff failed to meet the six month North Carolina residency requirement set forth in G.S. 50-8 before filing a complaint for divorce. Plaintiff himself testified before the district court that he moved to North Carolina on 20 March 1978. He filed his complaint seeking divorce from bed and board on 6 April 1978, only a few weeks after establishing residency in North Carolina. Hence, the district court lacked subject matter jurisdiction over the divorce action. *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975); *Israel v. Israel*, 255 N.C. 391, 121 S.E. 2d 713 (1961). G.S. 1A-1, Rule 12(h)(3) provides that subject matter jurisdiction may be challenged at any point in a proceeding, therefore defendant's 30 November 1978 motion to dismiss the divorce action was timely made and correctly granted.

[2] The portion of plaintiff's complaint seeking custody of his minor son constitutes a separate action, severable from the divorce proceeding. Consequently, the dismissal of the divorce action for lack of subject matter jurisdiction does not result in a dismissal of the custody action. *Brondum v. Cox*, 292 N.C. 192, 232 S.E. 2d 687 (1977); *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974); *Bunn v. Bunn*, 258 N.C. 445, 128 S.E. 2d 792 (1963). *See* G.S. 50-13.5 (c)(1976) (prior to amendment effective 1 July 1979, 1979 N.C. Sess. Laws, c. 110, s. 12). We agree with the Court of Appeals' finding that the district court was authorized to assert subject matter jurisdiction over the custody portion of the case. At the time plaintiff's complaint was filed, G.S. 50-13.5(c)(2) provided:

> "(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child when: a. The minor child resides, has his domicile, or is physically present in this State . . ."

It is a generally accepted principle that the courts of the state in which a minor child is physically present have jurisdiction consistent with due process to adjudicate a custody dispute involving that child. The authority to assert jurisdiction stems from the state's responsibility as *parens patriae* to provide for the general welfare

of any child within its borders. *Murphy v. Murphy*, 404 N.E. 2d 69 (Mass. 1980); *Trampert v. Trampert*, 55 App. Div. 2d 838, 390 N.Y.S. 2d 325 (1976); *Spence v. Durham*, 283 N.C. 671, 198 S.E. 2d 537 (1973), *cert. denied* 415 U.S. 918, 94 S.Ct. 1417, 39 L. Ed. 2d 473 (1974); *Holmes v. Sanders*, 246 N.C. 200, 97 S.E. 2d 683 (1957); *Adams v. Bowens*, 230 S.E. 2d 481 (W. Va. 1976). G.S. 50-13.5(c)(2) was amended by the 1979 Session Laws, effective 1 July 1979, to read that the courts of this state shall have jurisdiction to adjudicate a custody proceeding under the provisions of G.S. 50A-3. G.S. 50A-3, also effective 1 July 1979, states that a North Carolina court has jurisdiction to determine matters of child custody based upon the physical presence of the child within the state only if the child has been abandoned, if no other state would have jurisdiction, or if it is necessary in an emergency situation to protect the health of the child. Since this statute was not made retroactive, it has no bearing upon this case, and defendant's claim that the court erred in asserting jurisdiction over the custody determination is without merit. *See* 1979 N.C. Sess. Laws, c. 110, s. 1, effective 1 July 1979.

[3] However, we do find merit in defendant's contention that the district court lacked personal jurisdiction over her at the time it entered its orders of 6 April 1978 and 1 June 1978, and hold in accord with the decision of the Court of Appeals that these orders are not binding upon her. Plaintiff alleged that defendant was properly served with summons on 11 April 1978 by means of certified mail, return receipt requested, and therefore the district court had personal jurisdiction over her. G.S. 50-13.5(d), in effect at the time plaintiff filed his complaint and until 1 July 1979, stated that:

> (1) Service of process in civil actions or habeas corpus proceedings for the custody of minor children shall be as in other civil actions or habeas corpus proceedings. Motions for custody or support of a minor child in a pending action may be made on five days' notice to the other parties and compliance with G.S. 50-13.5(e).
>
> (2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided."

Service of process in other civil proceedings is governed by the

provisions of G.S. 1A-1, Rule 4, which provides in section (j)(9) that any person who is not an inhabitant of the state or found within the state may be served with process by:

> "... b. Registered or certified mail. - Any party subject to service of process under this subsection (9) may be served by mailing a copy of the sumons and complaint, registered or certified mail, return receipt requested, addressed to the party to be served. Service shall be complete on the day the summons and complaint are delivered to the address .... Before judgment by default may be had on such service, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by registered or certified mail averring (i) that a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested, (ii) that it was in fact received as evidenced by the attached registered or certified receipt or other evidence satisfactory to the court of delivery to the addressee and (iii) that the genuine receipt or other evidence of delivery is attached. This affidavit shall be *prima facie* evidence that service was made on the date disclosed therein in accordance with the requirements of this paragraph, and shall also constitute the method of proof of service of process when the party appears in the action and challenges such service upon him. This affidavit together with the return receipt signed by the person who received the mail raises a rebuttable presumption that the person who received the mail and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the defendant's dwelling house or usual place of abode."

The record shows that at the time of the 1 June 1978 order awarding permanent custody to plaintiff, the only document before the court which tended to prove service of process on defendant was a return receipt for certified mail, allegedly signed by defendant, dated 11 April 1978 and addressed to her residence at 8435 South Merrimack Street, Burbank, Chicago, Illinois. This receipt shows that something was delivered to defendant on that date, but does not

indicate what was delivered. The affidavit stating the circumstances warranting the use of service by certified mail, required under Rule 4(j)(9)b, was not filed until 19 January 1979. Plaintiff never filed an affidavit stating that copies of the summons, complaint, and order were deposited in the post office for delivery by registered or certified mail, also a requirement under Rule 4(j)(9)b. If a statute specifies that certain requirements must be complied with in the process of serving summons, failure to follow these requirements results in a failure of service. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E. 2d 146 (1977). Since plaintiff failed to file the affidavits required by Rule 4(j)(9)b, the return receipt of certified mail was insufficient to prove service of process, and plaintiff was never properly served in this action. Unless waived by the party to be served, service of summons in compliance with Rule 4 is required before a court may assert personal jurisdiction over that party or enter a default judgment against him. *Guthrie v. Ray, supra; North State Finance Co. v. Leonard*, 263 N.C. 167, 139 S.E. 2d 356 (1964); *Kleinfeldt v. Shoney's of Charlotte, Inc.*, 257 N.C. 791, 127 S.E. 2d 573 (1962). Since defendant was never properly served with process under Rule 4 and had not waived the right to be served at that time, the 1 June 1978 order awarding permanent custody to plaintiff was a nullity as to her. Under G.S. 50-13.5(d)(2), in effect at the time of the present custody action, a temporary custody order was binding only if service of process was carried out in accordance with Rule 4. Such service of process was never rendered, therefore the temporary custody order of 6 April 1978 was also not binding on defendant.

[4] Although service of process was defective in this case, we agree with the Court of Appeals' holding that by her motions filed 30 November 1978, defendant made a general appearance in the custody proceeding, and thereby waived her right to challenge the North Carolina court's personal jurisdiction over her from that date forward. G.S. 1-75.7 states as follows:

> "--A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:
>
> (1) Who makes a general appearance in an action; provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance . . ."

Consequently, any act which constitutes a general appearance obviates the necessity of service of summons and waives the right to challenge the court's exercise of personal jurisdiction over the party making the general appearance. *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E. 2d 769 (1974); *Youngblood v. Bright*, 243 N.C. 599, 91 S.E. 2d 559 (1956). In re Blalock, 233 N.C. 493, 504, 64 S.E. 2d 848, 856 (1951), Justice Winborne (later Chief Justice), speaking for the Court, explained that "... a general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person." In one of her motions filed 30 November 1978, defendant requested that the district court give full faith and credit to the Illinois judgment awarding custody to her, filed 17 July 1978. Defendant thereby invoked the adjudicatory power of the court to determine whether the Illinois judgment should be accorded full faith and credit by our courts, and requested that the court assert jurisdiction to award her affirmative relief. Consequently, defendant's motion constituted a general appearance in the action and waived her right to challenge personal jurisdiction.

In determining whether a general appearance was made in any proceeding, G.S. 1-75.7 must be construed with G.S. 1A-1, Rule 12, since these statutes are part of the same enactment. *Simms v. Mason's Stores, Inc., supra.* After construing the two statutes together, our conclusion that defendant entered a general appearance on 30 November 1978 remains unchanged. Rule 12(b) states that before filing a responsive pleading in an action, a party may make a motion to dismiss the case on one or more grounds specified in that section, including lack of jurisdiction over the person. Rule 12(b) also provides that "[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." Sections (g) and (h) of Rule 12 further state that a challenge to jurisdiction over the person shall be waived if a party files another motion permitted under Rule 12 and fails to join with it a motion to contest personal jurisdiction, or if a party files a responsive pleading in the case before filing a motion contesting personal jurisdiction. This Court has held that when the above provisions of Rule 12 are construed with G.S. 1-75.7, it is clear that a general appearance will waive the right to challenge personal jurisdiction only when it is made prior to the proper filing of a Rule 12(b)(2) motion contesting jurisdiction over the person. If a general

appearance is made in conjunction with or after a Rule 12(b)(2) motion is properly filed, the right to challenge personal jurisdiction is preserved. *Simms v. Mason's Stores, Inc., supra.*

In the present case, defendant's motion to have the Illinois judgment accorded full faith and credit, which constituted a general appearance, was filed in conjunction with four other motions, three of which contested the court's jurisdiction in the proceeding. Before filing her 30 November 1978 motions defendant had not waived her right to enter any Rule 12(b) motions, since she had never been served with summons, the orders of 6 April 1978 and 1 June 1978 were not binding upon her, and this was the first response she had entered in the action. However, we find that none of the 30 November 1978 motions were motions contesting personal jurisdiction on the ground of insufficiency of process, therefore defendant's general appearance on that date before challenging personal jurisdiction waived her right to make such a challenge thereafter. The district court acted properly in asserting jurisdiction over defendant after that date and during the 19 January 1979 hearing on her motions.

[5] Although the district court acted correctly in asserting jurisdiction over defendant after 30 November 1978, we hold that it erred in denying defendant's motion to give full faith and credit to the 17 July 1978 Illinois judgment awarding custody to defendant, and the Court of Appeals erred in affirming the district court's denial of this motion. It is well established that under the full faith and credit clause in Art. IV, § 1 of the United States Constitution, the courts of one state must give the same effect to a final judgment of the courts of another state that the judgment would have in the jurisdiction in which it was rendered. *Ford v. Ford*, 371 U.S. 187, 83 S.Ct. 273, 9 L. Ed. 2d 240 (1962); *Spence v. Durham, supra.*

The validity and effect of the judgment of another state must be determined by the laws of that state. *Spence v. Durham, supra; Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E. 2d 397 (1966). Since the 17 July 1978 judgment awarding custody to defendant was issued in Illinois, it is the law of that state which governs us in determining what effect the judgment must be given. The courts of Illinois have repeatedly held that a permanent custody order is a "final judgment" as to circumstances existing at the time it was rendered. *Hofmann v. Poston*, 77 Ill. App. 3d 689, 396

N.E. 2d 576 (1979); *Herron v. Herron*, 74 Ill. App. 3d 748, 393 N.E. 2d 1153 (1979); *Rippon v. Rippon*, 64 Ill. App. 3d 465, 381 N.E. 2d 70 (1978); *Dunning v. Dunning*, 14 Ill. App. 2d 242, 144 N.E. 2d 535 (1957); *Nye v. Nye*, 411 Ill. 408, 105 N.E. 2d 300 (1952). Whether a custody order is temporary or permanent and final must be determined according to the substance, not the form, of the order. *Herron v. Herron, supra; Carroll v. Carroll*, 64 Ill. App. 3d 925, 382 N.E. 2d 7 (1978). The Court of Appeals found that the 17 July 1978 Illinois judgment at issue in this case was an award of temporary custody to defendant and was therefore not entitled to full faith and credit. After carefully reviewing the 17 July 1978 order, we find that it was clearly an award of permanent custody and should have been accorded full faith and credit by the courts of this state. The order states that "the care, custody, control and education of the minor child of the parties is awarded to the Counter Petitioner, Jean Lynch." There is no indication in the entire judgment that the court intended this award of custody to be temporary. The Illinois court had previously entered an order on 21 April 1978 awarding temporary custody to defendant, thus an additional order awarding temporary custody would have served no purpose. The fact that the court retained jurisdiction to determine whether plaintiff would be allowed visitation rights does not change the permanent nature of the custody order. *See Hofmann v. Poston, supra; Herron v. Herron, supra.* In addition, the Illinois court by the same judgment granted defendant's petition for a final divorce, indicating that it considered the entire judgment to be final except as to matters which it specifically retained the right to adjudicate at a later time. *See, e.g.*, In re Marriage of Junge, 73 Ill. App. 3d 767, 392 N.E. 2d 313 (1979). We find no reason to regard the 17 July 1978 Illinois judgment as anything other than a final custody determination. Since plaintiff originated the Illinois action by his complaint filed on 30 December 1977, and since at the time he filed his complaint the minor child and both parties were domiciled in Illinois, the Illinois court clearly had jurisdiction to adjudicate the matter and enter the 17 July 1978 judgment.[1] Ill. Ann. Stat. ch. 40, § 601 (Smith-Hurd). *See also* Ill.

[1] Although the Illinois court entered an order on 16 May 1978 dismissing plaintiff's complaint for lack of prosecution, the court did not lose jurisdiction over the case by that order. The order was vacated on 31 May 1978. Ill. Ann. Stat. ch. 110, § 50(5) (Smith-Hurd) provides that:

> "The court may in its discretion, before final order, judgment or decree, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order, judgment or decree upon any terms

Ann. Stat. ch. 40, § 2104(a)(1) (Smith-Hurd). Hence, the trial court and the Court of Appeals erred in failing to grant defendant's motion to give the Illinois judgment full faith and credit.

Even if the hearing before the district court on 19 January 1979 could be considered as a proceeding to determine whether the provisions of the Illinois custody decree should be modified due to changed circumstances, we find that the district court was without authority to modify the decree. The United States Supreme Court has specifically held that a state court may modify a custody decree rendered by a court of another state on the basis of a change in circumstances *only* when the court which issued the decree would be empowered to alter it upon the same grounds. *Ford v. Ford, supra; Kovacs v. Brewer*, 356 U.S. 604, 78 S.Ct. 963, 2 L. Ed. 2d 1008 (1958). *See also Spence v. Durham, supra.* Ill. Ann. Stat. ch. 40, § 610(a), in effect at the time of the North Carolina district court's order filed 5 February 1979, provided as follows:

> "No motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health."

The 19 January 1979 hearing before the district court was held only six months after the Illinois court filed its 17 July 1978 judgment

---

and conditions that shall be reasonable."

Thus, a court which properly asserted jurisdiction over an action from its inception does not lose jurisdiction during the 30 days following entry of an order dismissing the complaint for lack of prosecution. *People v. Stokes*, 49 Ill. App. 3d 296, 364 N.E. 2d 300 (1977); *Stark v. Ralph F. Roussey & Associates, Inc.* 131 Ill. App. 2d 379, 266 N.E. 2d 439 (1970). The Illinois courts have held that a motion to set aside an order of dismissal for lack of prosecution is addressed to the sound discretion of the trial judge, and will not be disturbed on appeal absent an abuse of that discretion. *Weilmuenster v. Illinois Ben Hur Construction Co.*, 72 Ill. App. 3d 101, 390 N.E. 2d 579 (1979); *Czyzewski v. Gleeson*, 49 Ill. App. 3d 655, 364 N.E. 2d 557 (1977).

In the present action the Illinois trial judge, on defendant's motion, vacated the 16 May 1978 order dismissing plaintiff's complaint on 31 May 1978, well within the statutory period. The order was apparently vacated for the purpose of allowing defendant's counter petition to be heard. Neither party was prejudiced thereby, hence we find that the trial judge did not abuse his discretion in setting aside his order dismissing plaintiff's complaint, and the Illinois court properly maintained jurisdiction over the action.

awarding custody to defendant, well short of the two years required by the Illinois statute. There is also no evidence that plaintiff filed any affidavits in accordance with the statute to show that the child's health would be endangered if he was in the custody of defendant. Consequently, the district court had no power to alter the Illinois judgment at that time, and its order of 5 February 1979 awarding custody to plaintiff is thereby vacated.

For the foregoing reasons, we reverse that portion of the Court of Appeals' decision which affirms the trial court's denial of defendant's motion requesting that full faith and credit be given to the 17 July 1978 Illinois judgment. The case is remanded to the Court of Appeals for remand to the District Court, Cleveland County, for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

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

WALTER ARNELL WEST v. G. D. REDDICK, INC.

No. 125

(Filed 2 February 1981)

1. **Appeal and Error § 5.1— judicial notice of opinion of Court of Appeals**

The Supreme Court could take judicial notice of facts not appearing in the record in this case but which appeared in a published opinion by the Court of Appeals.

2. **Limitation of Actions § 12.1; Rules of Civil Procedure § 41.1— voluntary dismissal — appeal — time from which statute of limitations begins to run**

Where plaintiff takes a voluntary dismissal under G.S. 1A-1, Rule 41(a)(2) and defendant appeals from that dismissal, plaintiff's one year period to reinstitute his claim does not run from the taking of the dismissal in the trial court, but instead runs from the date of final appellate action.

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

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from decision of the North Carolina Court of Appeals affirming judgment on the pleadings in favor of defendant entered by *Kilby, J.*, on 19 October 1979 in District Court, WILKES County.

On 20 July 1976 plaintiff instituted an action for damages for personal injuries which he alleged were suffered by him on 25 July 1974 and which were allegedly proximately caused by the negligence of defendant. On 15 September 1977 Judge Kivett signed an order pursuant to G.S. 41(a)(2) dismissing plaintiff's action without prejudice. On 28 November 1978 plaintiff commenced this action based on the 25 July 1974 accident. Defendant answered on 15 December 1978 and, *inter alia*, pled the three-year statute of limitations and the failure of plaintiff to reinstitute his action against defendant within one year from the 15 September 1977 order. On 5 March 1979 defendant filed a motion for judgment on the pleadings which was granted by Judge Kilby on 19 October 1979. Plaintiff appealed and the Court of Appeals in an opinion by Judge Martin (Harry C.), Judge Martin (Robert M.) concurring, affirmed Judge Kilby's judgment. Judge Hedrick dissented and this case is before us as a matter of right pursuant to G.S. 7A-30(2).

Vannoy, Moore and Colvard by J. Gary Vannoy and Michael E. Helms, for plaintiff.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and Keith W. Vaughan, for defendant.

BRANCH, Chief Justice.

[1] The threshold question presented by this appeal is whether we may judicially notice facts not appearing in the record in this case but which appear in a published opinion of the Court of Appeals. We note initially that the record does not disclose any statement concerning an appeal from the order dismissing the original action. Nevertheless, both parties argued, as the sole issue in their briefs in the Court of Appeals, the issue of whether the one-year period of limitation granted by Rule 41(a)(2) for reinstitution of the dismissed action began to run at the time of the order of dismissal or at the time of final appellate action. The Court of Appeals held that it could not consider the effect of defendant's appeal in the prior action or the appellate disposition of that appeal because there is nothing in the record of this action showing that any prior appeal was, in fact, taken.

This Court has long recognized that a court may take judicial notice of its own records in another interrelated proceeding where the parties are the same, the issues are the same and the interrelated case is referred to in the case under consideration. *State v.*

Patton, 260 N.C. 359, 132 S.E. 2d 891 (1963); *Bizzell v. Ins. Co.*, 248 N.C. 294, 103 S.E. 2d 348 (1958); *State v. McMilliam*, 243 N.C. 775, 92 S.E. 2d 205 (1956). Here however, we are not being asked to take judicial notice of *our* records. Nevertheless, generally a judge or a court may take judicial notice of a fact which is either so notoriously true as not to be the subject of reasonable dispute or *is capable of demonstration by readily accessible sources of indisputable accuracy. Kennedy v. Parrott*, 243 N.C. 355, 90 S.E. 2d 754 (1956) (emphasis added); *Hopkins v. Comer*, 240 N.C. 143, 81 S.E. 2d 368 (1954); *see also* 29 Am. Jur. 2d, "Evidence," § 25 (1967). "The device of judicial notice is available to an appellate court, and is employed not only in the course of a trial but also on any occasion where the existence of a particular fact is important, as in determining the sufficiency of a pleading . . . ." 1 Stansbury's North Carolina Evidence § 11 (Brandis rev. 1973).

In fact, this Court has, on at least one occasion, examined facts appearing in a published opinion of a federal court. In *State v. Cooke*, 248 N.C. 485, 103 S.E. 2d 846 (1958), defendants asked the trial court to take judicial notice of a civil action in the United States District Court involving the same matter. The trial court declined. This Court affirmed, noting without elaboration that its knowledge of the facts in the civil case was "limited to what appears in the published opinion." *Id.* at 493, 103 S.E. 2d at 852. Although the Court examined the published opinion it apparently rested its holding on the fact that its examination of the published opinion did not disclose sufficient facts to support the defense which defendants sought to interpose.

The facts that plaintiff would have us judicially notice are contained in a published report of the North Carolina Court of Appeals. That court and our Court constitute the appellate division of the General Court of Justice. At oral argument before us, counsel for defendant admitted that the case reported in 38 N.C. App. 370 was the same case which was dismissed without prejudice on 15 September 1977.

We conclude that the matter which we are asked to judicially note, the published opinion of the North Carolina Court of Appeals at 38 N.C. App. 370, is a "readily accessible source of indisputable accuracy." We, therefore, take judicial notice of that opinion. Our examination of that opinion reveals that defendant appealed from

the 15 September 1977 order and that the opinion of the Court of Appeals was filed on 17 October 1978.

We are cognizant of the holding in *Whitford v. Whitford*, 261 N.C. 353, 134 S.E. 2d 635 (1964). In that case, defendant was found guilty of willful contempt because of his failure to comply with the court's order for child support. The court rejected defendant's argument that the North Carolina court should take judicial notice of an unauthenticated divorce decree of a Florida court. There was nothing before the North Carolina court to show that the Florida court had jurisdiction to decree a divorce, award custody, or fix support payments. Neither was there any showing that the Florida court was informed that the North Carolina court had already awarded child custody and fixed the support payments to be paid by defendant. The facts in *Whitford* are easily distinguishable from the facts before us. In *Whitford* the Court was asked to judicially note a record or decree of a trial court of a foreign jurisdiction.

[2] Having decided that we are not restricted to the record in this case, we move to the merits of the appeal. We must now decide whether the one-year period to reinstitute a claim dismissed under Rule 41(a)(2) runs from the date of the taking of the dismissal in the trial court or from the date of the appellate court's mandate.

Rule 41(a)(2) provides, *inter alia*:

> If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.

Defendant contends that the time for refiling began to run upon entry of Judge Kivett's order dismissing the original action, and therefore the present action is barred by the applicable three-year statute of limitations and by the one-year limitation set out in Rule 41(a)(2). On the other hand, plaintiff contends that defendant's action in taking an appeal from the dismissal order tolled the running of the one-year limitation until final appellate action was taken, and therefore this action was not barred by the passage of time.

Plaintiff relies heavily on our decision in *Rowland v. Beau-*

champ, 253 N.C. 231, 116 S.E. 2d 720 (1960), in which we considered G.S. 1-25 (repealed by 1967 N.C. Sess. Laws c. 954, s. 4, effective 1 January 1970). That statute provided as follows:

> If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited . . . the plaintiff . . . may commence a new action within one year after such nonsuit . . . .

The Court in *Rowland* considered whether the one-year period to refile ran from the date of a General County Court nonsuit of plaintiffs' action or from the date of dismissal of plaintiffs' appeal in the Superior Court. We held that the date of dismissal in the Superior Court was the correct date from which time would begin to run. We said, "When a judgment of nonsuit has been appealed from, the nonsuit does not become final, in the sense that it ends the lawsuit, until the appeal . . . has been disposed of . . . ." *Id.* at 237, 116 S.E. 2d at 724, *quoting Adams v. St. Louis-San Francisco Railway*, 326 Mo. 1006, 33 S.W. 2d 944 (1930). Plaintiff argues that since Rule 41(a)(2) is similar to former G.S. 1-25 the Court should interpret the one-year period in Rule 41(a)(2) consistent with its interpretation of G.S. 1-25 in *Rowland*.

Defendant, on the other hand, contends that the language of the rule is clear and that by its express terms plaintiff's action is barred. We disagree. It is generally recognized that, "the opinion of the writers at the time of the adoption of Rule 41 [was] that the provisions of that rule follow G.S. 1-25, and the wording of the rule would so indicate." *Whitehurst v. Virginia Dare Transportation Co.*, 19 N.C. App. 352, 355-56, 198 S.E. 2d 741, 743 (1973). *See* McIntosh, N. C. Practice and Procedure § 1647 (Phillips Supp. 1970); Sizemore, *General Scope and Philosphy of the New Rules*, 5 Wake Forest Intra. L. Rev. 1, 30 (1969); Smith, *Trial Under the New Rules*, 5 Wake Forest Intra. L. Rev. 138, 146 (1969). Under *Rowland v. Beauchamp*, *supra*, final dismissal, when a voluntary dismissal is appealed, does not take place until after appellate action. Therefore, we hold consistently with *Rowland* that the use of "dismissal" in Rule 41(a)(2) refers to the ultimate dismissal which occurs only after final appellate action.

Defendant relies primarily on the case of *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 36 N.C. App. 778, 245 S.E. 2d 234 (1978), in which the court stated, "the statute of

limitations was not tolled by the appeal undertaken by defendant . . . ." *Id.* at 781, 245 S.E. 2d at 236. An examination of the facts of that case, however, shows that it is inapposite to the one before us. In *Ready Mix*, the plaintiff filed an action but failed properly to serve defendant with process. The plaintiff obtained a default judgment when defendant did not answer. Defendant later moved to set aside the judgment on grounds of improper service of process. The trial court found against defendant, but the Court of Appeals reversed the trial court and found service improper. At some time between plaintiff's acquisition of the default judgment and the Court of Appeals' decision overturning the judgment, the three-year statute of limitations had run on the claim. Thereafter, plaintiff obtained proper service on defendant and argued that the claim survived because the defendant's first appeal tolled the statute of limitations. The case again reached the Court of Appeals. It held that the first appeal did not toll the statute of limitations because there was no proper service in the original lawsuit. In instant case, however, plaintiff does not seek to revive a claim already barred by the statute of limitations.

Defendant contends that a decision to start the one-year period from the date of final appellate action will fail in practice because no specific date can be fixed to mark the beginning of the one-year period. Under Rule 32 of the Rules of Appellate Procedure, the mandate of the appellate court "consists of certified copies of its judgment and of its opinion . . . ." Unless a court otherwise directs, the mandate must be issued twenty days after the written opinion is filed with the clerk. App. R. 32(b).

In the case before us, the Court of Appeals filed its opinion on 17 October 1978. Thus, pursuant to Rule 32, the mandate of the Court of Appeals would have had to issue on 6 November 1978. Plaintiff reinstituted his action on 28 November 1978, well within the one-year period set forth in Rule 41(a)(2).

The decision of the Court of Appeals is reversed, and the cause is remanded to that court with direction that it be remanded to the District Court, Wilkes County, for proceedings in accordance with this opinion.

Reversed and remanded.

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

RALPH N. BRENNER, JR. v. THE LITTLE RED SCHOOL HOUSE, LIMITED

No. 46

(Filed 2 February 1981)

1. Contracts § 20.1— nonrefundable tuition — failure of child to attend school — doctrine of impossibility of performance

A contract which required plaintiff to pay a nonrefundable tuition for the entire school year in advance of the first day of school in order for defendant to hold a place in the school for plaintiff's child and to teach the child during the school year was not subject to rescission under the doctrine of impossibility of performance because plaintiff's former wife refused to send the child to the school year was not subject to rescission under the doctrine of impossibility of matter of the contract was not destroyed.

2. Contracts § 20.1— nonrefundable tuition — failure of child to attend school — doctrine of frustration inapplicable

A contract requiring plaintiff to pay a nonrefundable tuition for the entire school year in advance of the first day of school in return for defendant's promise to hold a place in the school for plaintiff's child, to make all preparations necessary to educate the child for the school year, and to teach the child during that period was not subject to rescission under the doctrine of frustration of purpose because plaintiff's former wife would not allow the child to attend the school, since defendant's performance under the contract was sufficient consideration for plaintiff's tuition payment so as to avoid the application of the doctrine of frustration of purpose. Furthermore, a provision of the contract stating that tuition is "payable in advance of the first day of school, no portion refundable" allocates to plaintiff the risk that the child will not attend the school and prevents the application of the doctrine of frustration of purpose.

3. Contracts § 6— nonrefundable tuition — contract not unconscionable

A contract requiring plaintiff to pay tuition in advance with no refund in order for defendant to prepare and hold a place in the school for plaintiff's child was not unconscionable since there was no inequality of bargaining power between the parties; plaintiff was not forced to accept defendant's terms, for there were other private and public schools available to educate the child; the clause providing that tuition payments would be nonrefundable was reasonable when considered in light of the expense to defendant in preparing to educate the child and reserving a space for him; and the bargain was one that a reasonable person of sound judgment might accept.

4. Damages § 7— nonrefundable tuition — no penalty or liquidated damages

A contract clause prohibiting the refund of any portion of the tuition paid by plaintiff to defendant in order for defendant to prepare and hold a place in its school for plaintiff's child was neither a penalty nor a provision for liquidated damages where plaintiff's former wife would not permit the child to attend the school; both parties fully performed their obligations under the contract to the extent possible without the presence of the child in the school; and there was no

breach of contract by either party.

5. **Rules of Civil Procedure §§ 12, 15— amendment of answer without permission — responsive pleading after motion to strike denied**

Although G.S. 1A-1, Rule 15(a) mandates that defendant could only amend his answer after obtaining the court's permission or plaintiff's written consent, G.S. 1A-1, Rule 12(a)(1)a expressly authorized defendant to file without permission those portions of his amended answer which were a responsive pleading to the paragraphs of the complaint subject to defendant's motion to strike, and the court erred in granting plaintiff's motion to strike those portions of the amended answer which were responsive pleadings to the paragraphs of the complaint subject to defendant's motion to strike.

6. **Contracts § 18.1— nonrefundable tuition — promise of refund — modification of contract — consideration**

In an action to recover tuition paid by plaintiff for the enrollment and teaching of plaintiff's child in defendant's school, an enforceable modification of the provision of the contract prohibiting a tuition refund was created if defendant's headmistress promised to refund to plaintiff the full tuition payment when plaintiff informed her that his former wife would not permit his child to attend the school, since the promise to refund was supported by consideration in that defendant received a benefit in being relieved of the responsibility to teach the child for the school year.

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

APPEAL as a matter of right by defendant from the decision of the Court of Appeals, reported in 47 N.C. App. 19, 266 S.E. 2d 728 (1980) (opinion by *Webb, J.*, with *Wells, J.*, concurring and *Martin (Harry C.), J.*, dissenting). The Court of Appeals reversed summary judgment in favor of plaintiff entered by *Hatfield, J.*, at the 5 October 1979 Session of District Court, GUILFORD County, and remanded for entry of judgment in favor of defendant.

By his complaint filed 17 July 1979, plaintiff sought a refund of the $100.00 confirmation fee and $972.00 advanced tuition which he had paid to defendant pursuant to a contract by which defendant agreed to enroll plaintiff's son in the fourth grade class of defendant school and to teach him for the 1978-1979 school session. The contract provided in pertinent part as follows:

> "We understand that the tuition is $1,080.00 per year, payable in advance on the first day of school, no portion refundable. We also understand that upon your approval we may elect to pay tuition in $100.00 per month installments with interest according to published schedule, but that such election does not in any wise modify the stipula-

tion that tuition is payable in advance.

> Enclosed is our $100.00 confirmation fee which will reserve our student a place for the coming year. This confirmation fee is to be applied to the yearly tuition only after all other installments, interest and other charges are paid."

Plaintiff was divorced on 21 January 1973 by an order which also awarded custody of the couple's minor son to his former wife. Plaintiff continued to make payments for the support of the child, including the tuition required to enable the child to attend defendant school for several years. Prior to the beginning of the 1978-79 school term, plaintiff paid defendant $1,072.00 pursuant to the contract. Subsequently, plaintiff's former wife refused to allow the child to attend the school at any time during the 1978-79 term.

Plaintiff's complaint stated that the contract at issue was void and unenforceable for lack of consideration or failure of consideration, and therefore all payments made thereunder should be refunded to avoid unjustly enriching defendant. Plaintiff further alleged that defendant's failure to return all payments under the contract constituted an unfair trade practice under G.S. 75-1.1, thus entitling him to the recovery of treble damages.

On 3 August 1979 defendant filed a motion to dismiss under G.S. 1A-1, Rule 12(b)(6), a motion for summary judgment, a motion to strike paragraphs five and six of plaintiff's complaint, and an answer to those portions of plaintiff's complaint which were not subject to defendant's motion to strike. Both plaintiff and defendant moved for summary judgment on 31 August 1979. On 19 September 1979 the district court judge entered an order denying defendant's motions for summary judgment, motion for dismissal pursuant to Rule 12(b)(6), and motion to strike paragraph five of the complaint. A minor amendment was made to paragraph six of the complaint. Defendant filed an amended answer on 25 September 1979, denying for the first time the allegations of paragraphs five and six in the complaint. On 27 September 1979 plaintiff moved to strike defendant's amended answer pursuant to G.S. 1A-1, Rule 12(f).

Summary judgment in favor of plaintiff was granted 5 October 1979, allowing him to recover the $1,072.00 paid to defendant.

On 16 October 1979, plaintiff's motion to strike defendant's amended answer was allowed and defendant's motion to set aside summary judgment entered 5 October was denied.

The Court of Appeals reversed the trial court's decision granting plaintiff's motion for summary judgment and remanded for entry of judgment in favor of defendant. Plaintiff appeals to this Court as a matter of right pursuant to G.S. 7A-30(2).

Wyatt, Early, Harris, Wheeler & Hauser by A. Doyle Early, Jr. for plaintiff-appellant.

Max D. Ballinger for defendant-appellee.

COPELAND, Justice.

Plaintiff sets forth several arguments in support of his allegation that the Court of Appeals erred in reversing the trial court's order entering summary judgment in his favor. We have carefully reviewed each of plaintiff's contentions and find that summary judgment could not properly be granted in favor of either party. For the reasons stated below, we reverse that portion of the Court of Appeals' decision which remanded the case for entry of summary judgment in favor of defendant.

[1] Plaintiff-appellant first contends that the doctrine of impossibility of performance and frustration of purpose should apply in this case to bring about a recission of the contract. Impossibility of performance is recognized in this jurisdiction as excusing a party from performing under an executory contract if the subject matter of the contract is destroyed without fault of the party seeking to be excused from performance. *Sechrest v. Forest Furniture Co.*, 264 N.C. 216, 141 S.E. 2d 292 (1965). Plaintiff's former wife's refusal to send the child to defendant school did not destroy the subject matter of the contract; it was still possible for the child to attend the school. The doctrine of impossibility of performance clearly has no bearing on this case.

[2] In support of the applicability of the doctrine of frustration of purpose, plaintiff argues that his former wife's refusal to allow the child to attend defendant school was a fundamental change in conditions which destroyed the object of the contract and resulted in a failure of consideration. Judge Harry C. Martin agreed with plaintiff and dissented on this basis, discussing the doctrine of

frustration of purpose at length. While we agree with Judge Martin's general discussion of the law concerning frustration of purpose, we hold that the doctrine does not apply to bring about a recission under the facts of this case.

The doctrine of frustration of purpose is discussed in 17 Am. Jur. 2d *Contracts* § 401 (1964) as follows:

> "Changed conditions supervening during the term of a contract sometimes operate as a defense excusing further performance on the ground that there was an implied condition in the contract that such a subsequent development should excuse performance or be a defense, and this kind of defense had prevailed in some instances even though the subsequent condition that developed was not one rendering performance impossible . . . . In such instances, . . . the defense doctrine applied has been variously designated as that of 'frustration' of the purpose or object of the contract or 'commercial frustration.'
>
> Although the doctrines of frustration and impossibility are akin, frustration is not a form of impossibility of performance. It more properly relates to the consideration for performance. Under it performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance. The doctrine of commercial frustration is based upon the fundamental premise of giving relief in a situation where the parties could not reasonably have protected themselves by the terms of the contract against contingencies which later arose."

If the frustrating event was reasonably foreseeable, the doctrine of frustration is not a defense. In addition, if the parties have contracted in reference to the allocation of the risk involved in the frustrating event, they may not invoke the doctrine of frustration to escape their obligations. 17A C.J.S. *Contracts* § 463(2) (1963). *See also Perry v. Champlain Oil Co.*, 101 N.H. 97, 134 A. 2d 65 (1957); *Blount-Midyette & Co. v. Aeroglide Corp.*, 254 N.C. 484, 119 S.E. 2d 225 (1961); Annot. 84 A.L.R. 2d 12 (1962).

In the present case, plaintiff contracted to pay the tuition for

the entire school year in advance of the first day of school. In consideration therefor, defendant promised to hold a place in the school for plaintiff's child, to make all preparations necessary to educate the child for the school year, and to actually teach the child during that period. Both parties received valuable consideration under the terms of the contract. After receiving plaintiff's tuition payment, defendant reserved a space for plaintiff's child, made preparations to teach the child, and at all times during the school year kept a place open for the child. This performance by defendant was sufficient consideration for plaintiff's tuition payment. A school such as defendant must make arrangements for the education of its pupils on a yearly basis, prior to the commencement of the school year. Many of these arrangements are based upon the number of pupils enrolled, for example, the teaching materials to be ordered, the number of teachers to be hired, and the desks and other equipment which will be used by the children. In addition, private schools are often limited in the number of pupils that can be accommodated, so that the reservation of a space for one child may prevent another's enrollment in the school. Had it been advised before the first day of school that plaintiff's child would not be in attendance, defendant might have been able to fill the vacant position. After the start of the school year, the probability of filling the position decreased substantially, thus to allow plaintiff to recover the tuition paid might deprive defendant of income it would have received had the contract not been entered into. Therefore, although plaintiff did not receive the full consideration contemplated by the contract, he received consideration sufficient to avoid the application of the doctrine of frustration of purpose. There was no substantial destruction of the value of the contract.

Furthermore, we find the doctrine of frustration of purpose inapplicable on an additional basis. Although the parties could not have been expected to forsee the exact actions of plaintiff's former wife in refusing to send the child to defendant school, the possibility that the child might not attend was foreseeable and appears expressly provided for in the contract. The contract states that tuition is "payable in advance of the first day of school, no portion refundable." This provision allocates to plaintiff the risk that the child will not attend, and prevents the application of the doctrine of frustration of purpose.

Since the doctrine of frustration of purpose does not apply and

the terms of the contract are clear and unambiguous, the courts are bound to enforce it as written. *Crockett v. First Federal Savings and Loan Association of Charlotte*, 289 N.C. 620, 224 S.E. 2d 580 (1976); *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962). This holding is consistent with prior cases in this jurisdiction which state that a contract providing for the nonrefundable payment of tuition is enforceable as written, regardless of the nonattendance of the pupil, where the failure to attend is not caused by some fault on the part of the school. *Horner School v. Wescott*, 124 N.C. 518, 32 S.E. 2d 885 (1899); *Bingham v. Richardson*, 60 N.C. 215 (1864). Our decision is also in accord with the majority of jurisdictions in this country. *J.J. & L. Investment Co. v. Minaga*, 487 P. 2d 561 (Colo. App. 1971); *Missouri Military Academy v. McCollum*, 344 S.W. 2d 636 (Mo. Ct. App. 1961); Annot., 69 A.L.R. 714 (1930).

[3] Defendant argues that even if the contract is not rescinded, this Court should find it unconscionable and refuse to enforce it. We disagree. A court will generally refuse to enforce a contract on the ground of unconscionability only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. *Hume v. United States*, 132 U.S. 406, 10 S.Ct. 134, 33 L.Ed. 393 (1889); *Christian v. Christian*, 42 N.Y. 2d 63, 365 N.E. 2d 849, 396 N.Y.S. 2d 817 (1977). In determining whether a contract is unconscionable, a court must consider all the facts and circumstances of a particular case. If the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable. In re Friedman, 64 A.D. 2d 70, 407 N.Y.S. 2d 999 (1978); *Collins v. Uniroyal Inc.*, 126 N.J. Super. 401, 315 A. 2d 30 (1973), *aff'd* 64 N.J. 260, 315 A. 2d 16 (1974). *See, e.g.*, G.S. 25A-43(c).

After considering all the facts before the trial court, we hold that the contract at issue cannot be declared unenforceable on the grounds of unconscionability. There was no inequality of bargaining power between the parties. Plaintiff was not forced to accept defendant's terms, for there were other private and public schools available to educate the child. The clause providing the tuition payments would be non-refundable is reasonable when considered in light of the expense to defendant in preparing to educate the

child and in reserving a space for him. The bargain was one that a reasonable person of sound judgment might accept. "Ordinarily, when parties are on equal footing, competent to contract, enter into an agreement on a lawful subject, and do so fairly and honorably, the law does not permit inquiry as to whether the contract was good or bad, whether it was wise or foolish." *Roberson v. Williams*, 240 N.C. 696, 700-01, 83 S.E.2d 811, 814 (1954). The contract is enforceable as written.

[4] Plaintiff next contends that the clause prohibiting the refund of any portion of the tuition paid is in the nature of a penalty rather than a provision for liquidated damages, and therefore cannot be enforced. It is well established that a sum specified in the contract as the measure of recovery in the event of a breach will be enforced if the court determines it to be a provision for liquidated damages, but not enforced if it is determined to be a penalty. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d (1968). However, plaintiff's argument ignores the fact that there has been no breach of contract in this case. Both parties fully performed their obligations under the contract to the extent possible without the presence of the child in the school. Neither party promised that the child would attend. The non-refundable tuition provision was simply one term of the contract, not a measure of recovery in the event of a breach, thus the law of damages has no bearing upon this case.

[5] In paragraph five of his amended complaint, plaintiff alleged that after his former wife informed him that she did not intend to send the child to defendant school, plaintiff contacted Patsy Ballinger, headmistress of the school, who promised to refund to plaintiff the full tuition payment of $1,072.00. Before answering the other portions of plaintiff's complaint, defendant moved to strike the allegations of paragraph five. This motion was denied 19 September 1979 by an order which did not specify a time within which defendant was to reply to the allegations in that paragraph. On 25 September 1979 defendant filed an amended answer, for the first time denying the allegations of paragraph five. Plaintiff filed a motion to strike the amended answer on 27 September 1979, on the grounds that defendant failed to obtain permission of the court before filing the amended answer, in violation of G.S. 1A-1, Rule 15. Plaintiff's motion was allowed 16 October 1979. Plaintiff therefore contends that since the allegations of paragraph five were never denied, they are deemed admitted under G.S. 1A-1, Rule 8(d). We

hold that the trial court erred in granting plaintiff's motion to strike defendant's amended answer, and therefore find plaintiff's argument without merit.

Defendant's motion to strike paragraph five of the complaint was made under the authority of G.S. 1A-1, Rule 12(f). G.S. 1A-1, Rule 12(a)(1)a provides that when the court denies a motion permitted under Rule 12, a responsive pleading may be served within 20 days after notice of the court's action. Defendant's amended answer, which was the first responsive pleading to paragraph five of the complaint, was filed well within the 20 day limit. Thus, although Rule 15(a) mandates that defendant could only amend his answer after obtaining the court's permission or plaintiff's written consent, Rule 12(a)(1)a expressly authorized defendant to file without permission those portions of his amended answer which were a responsive pleading to the paragraphs of the complaint subject to defendant's motion to strike. Consequently, the court's 16 October 1979 order granting plaintiff's motion to strike the amended answer was in error to the extent that it struck those portions which were responsive pleadings to the paragraphs of the complaint subject to defendant's motion to strike. The allegations in paragraph five of the complaint were properly denied by defendant's amended answer, and plaintiff's arguments to the contrary are without merit.

[6] However, we find that by his allegation that Ms. Ballinger agreed to refund the tuition paid, plaintiff raised an issue of fact sufficient to avoid the entry of summary judgment against him. If Ms. Ballinger did agree to refund plaintiff's payment, her agreement would constitute an enforceable modification of the provision of the contract prohibiting a refund. Where, as in this case, a contract has been partially performed, an agreement to alter its terms is treated as any other contract and must be supported by consideration. *Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E. 2d 763 (1980); *Lenoir Memorial Hospital, Inc. v. Stancil*, 263 N.C. 630, 139 S.E. 2d 901 (1965). In return for defendant's promise to refund the tuition paid, plaintiff would relinquish his right to have his child educated in defendant school. Defendant received a benefit in being relieved of the responsibility to teach the child for the school year. It is well established that any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee, is sufficient consideration to support a contract.

Carolina Helicopter Corp. v. Cutler Realty Co., 263 N.C. 139, 139 S.E. 2d 362 (1964); 17 C.J.S. *Contracts* § 74 (1963). We believe that there was consideration sufficient to support an agreement by Ms. Ballinger to refund plaintiff's payment, if such an agreement was made. Whether such an agreement was reached is a material fact to be determined by the jury. Summary judgment is properly granted only if all the evidence before the court indicates that there is no genuine issue as to any material fact and that one party is entitled to judgment as a matter of law. The burden of establishing the absence of any triable issue of fact is on the party moving for summary judgment. *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E. 2d 54 (1980); *Middleton v. Myers*, 299 N.C. 42, 261 S.E.2d (1980); 108 G.S. 1A-1, Rule 56(c). Plaintiff failed to meet his burden to prove, as a matter of law, that an enforceable agreement to refund his payments existed. Hence, the trial court erred in granting plaintiff's motion for summary judgment. Likewise, defendant did not prove, as a matter of law, that no agreement to refund plaintiff's payment was made, and that portion of the Court of Appeal's opinion which remanded to the trial court for entry of summary judgment in favor of defendant was also in error.

For the reasons stated, we reverse the decision of the Court of Appeals and remand to that court with instructions to remand to the District Court, Guilford County, for a

New trial.

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

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

BANK v. SHARPE

No. 180PC

Case below: 49 N.C. App.693

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 March 1981. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 4 March 1981.

BROOKS, COMR. OF LABOR v. GRADING CO.

No. 186PC
No. 119 (Spring Term)

Case below: 49 N.C. App. 352

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 4 March 1981.

BURTON v. ZONING BOARD OF ADJUSTMENT

No. 163PC

Case below: 49 N.C. App. 439

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 4 March 1981.

CARR v. CARBON CORP.

No. 177PC

Case below: 49 N.C. App.631

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 March 1981.

CROMER v. CROMER

No. 153PC
No. 114 (Spring Term)

Case below: 49 N.C. App. 403

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 March 1981. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question denied 4 March 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

DEPT. OF TRANSPORTATION v. PELHAM

No. 4PC
No. 120 (Spring Term)

Case below: 50 N.C. App.212

Petition by Dept. of Transportation for discretionary review under G.S. 7A-31 allowed 4 March 1981.

EASTER v. HOSPITAL

No. 159PC
No. 116 (Spring Term)

Case below: 49 N.C. App. 398

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 March 1981.

GREENFIELD v. GREENFIELD

No. 157PC

Case below: 49 N.C. App. 545

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 March 1981.

GUILFORD CO. v. BOYAN

No. 156PC
No. 115 (Spring Term)

Case below: 49 N.C. App. 430

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 March 1981.

HOWELL v. FISHER

No. 171PC

Case below: 49 N.C. App. 488

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 March 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

INGRAM, COMR. OF INSURANCE v. INSURANCE CO.

No. 69PC
No. 113 (Spring Term)

Case below: 48 N.C. App. 643

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 4 March 1981. Motion of Insurance Guaranty Assoc. to dismiss appeal for lack of substantial constitutional question denied 4 March 1981.

IN RE STROUTH

No. 166PC

Case below: 49 N.C. App.698

Petitions by Dept. of Social Services and Alpha Mae Strouth for discretionary review under G.S. 7A-31 denied 4 March 1981.

LANE v. SURETY CO.

No. 100PC

Case below: 48 N.C. App. 634

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 March 1981.

MACON v. EDINGER

No. 162PC
No. 117 (Spring Term)

Case below: 49 N.C. App.624

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 March 1981.

MOORMAN v. LITTLE

No. 11PC

Case below: 48 N.C. App. 742

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 March 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

POWER & LIGHT CO. v. MERRITT

No. 9PC

Case below: 50 N.C. App. 269

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 March 1981.

RAMSEY v. RUDD

No. 183PC

Case below: 49 N.C. App. 670

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 March 1981.

STATE v. DUERS

No. 131PC

Case below: 49 N.C. App. 282

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 March 1981.

STATE v. GOODMAN

No. 1PC

Case below: 50 N.C. App. 212

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 March 1981.

STATE v. KING

No. 170PC

Case below: 49 N.C. App. 499

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 March 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. RAKINA and STATE v. ZOFIRA

No. 175PC

Case below: 49 N.C. App. 537

Petition by Kimmelman, Surety, for discretionary review under G.S. 7A-31 denied 4 March 1981.

STATE v. ROBINSON

No. 178PC

Case below: 50 N.C. App.213

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 March 1981.

STATE v. SAUNDERS

No. 191PC

Case below: 50 N.C. App.213

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 March 1981.

STEPHENS v. MANN

No. 190PC

Case below: 50 N.C. App.133

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 March 1981.

WALSTON v. BURLINGTON INDUSTRIES

No. 176PC
No. 118 (Spring Term)

Case below: 49 N.C. App. 301

Petition by defendants for writ of certiorari to North Carolina Court of Appeals allowed 4 March 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

WOLFE v. EAKER

No. 184PC

Case below: 50 N.C. App.144

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 4 March 1981.

STATE OF NORTH CAROLINA v. STEPHEN KARL SILHAN

No. 93

(Filed 4 March 1981)

1. **Indictment and Warrent § 13; Homicide § 12.1— felony murder or premeditation and deliberation — motion for bill of particulars**

The trial court did not err in the denial of defendant's motion for a bill of particulars requiring the State to declare prior to trial whether it would prosecute a first degree murder indictment on a theory of premeditation and deliberation or felony murder since the murder indictment and the separate indictment charging the accompanying felony set out sufficient factual information to enable defendant to understand the basis of the State's cases against him, and since the State is not generally required to elect between legal theories in a murder prosecution prior to trial.

2. **Indictment and Warrant § 8.4; Homicide § 12.1— felony murder or premeditation and deliberation — motion to require election by State**

The trial court did not err in the denial of defendant's motion that the State elect at the close of the evidence which theory of first degree murder would be submitted to the jury where the evidence was sufficient to establish a *prima facie* case as to both felony murder and murder with premeditation and deliberation, since it became the responsibility of the jury to weigh the evidence to see if it warranted a finding that defendant was guilty of murder in the first degree upon either or both theories.

3. **Searches and Seizures § 23— sufficiency of affidavit for search warrant**

An affidavit for a search warrant, including allegations that the print of the right rear wheel of a vehicle was found in mud at the crime scene, that a blue van was observed at the crime scene, and that defendant was operating a blue 1976 Chevrolet van at the time of his arrest, was sufficient to enable the magistrate to find probable cause for the issuance of a warrant to search defendant's van and seize the right rear tire thereof.

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

Defendant was not denied a fair trial before a representative cross-section of the community in violation of the Sixth Amendment by the denial of his motion that the district attorney be prohibited from inquiring into potential jurors' attitudes toward capital punishment and from excusing prior to the sentencing phase any jurors who said unequivocally that they could not impose the death penalty; nor was defendant denied due process on the ground that death-qualified juries are prosecution prone.

5. **Jury § 7.7— challenge for cause — renewal of challenge after exhausting peremptory challenges**

Even if it was error for the trial judge to deny the defendant's challenges for cause to two prospective jurors, defendant may not complain on appeal where he

failed to renew his challenge for cause of either juror after having exhausted his peremptory challenges as required by G.S. 15A-1214(h) and (i).

6. Constitutional Law § 30; Criminal Law § 80.2— exculpatory evidence not disclosed to defendant — motion to examine prosecutor's file — disclosure order — offer of recess

When it came to light at trial that an FBI report showing that none of the fingerprints taken at the crime scene could be identified as those of defendant had not been disclosed to defendant pursuant to discovery, the trial court acted properly in offering to give defendant as much of a recess as he needed to deal adequately with the report, ordering the district attorney to reveal to defendant any exculpatory evidence of which he had knowledge, and denying defendant's motion to examine the files of the district attorney for additional exculpatory evidence. G.S. 15A-910(2).

7. Criminal Law § 99.3— recall of witness after bench conference — no expression of opinion

In a rape and felonious assault case in which the victim's father testified about written notes given to him by the victim describing the crimes and the assailant, the recall of the victim's father after a bench conference to permit him to testify as to the unavailability of the notes in order to comply with the best evidence rule did not amount to an expression of opinion by the presiding judge in violation of G.S. 15A-1222.

8. Criminal Law § 61.3— evidence of tire tracks — sufficiency of foundation

A sufficient foundation was presented for the admission of testimony concerning tire tracks where the State introduced evidence tending to show that a plaster cast of a tire track had been made on a roadside near the crime scene; a blue Chevrolet van had been seen on the side of the road at or near the time of the crimes; defendant owned a van similar to the one seen; the cast was compared with a tire taken from the right rear wheel of defendant's van; and the tire track was such that defendant's van could have made it.

9. Criminal Law § 50.1, 61.3— tire track identification — inability to make positive identification

A witness's testimony that a tire print *could* have been made by defendant's vehicle was not rendered incompetent by the inability of the witness to state conclusively that defendant's tire made the print, since the inability of the witness to make a positive identification went only to the weight of his testimony.

10. Criminal Law § 66— van identification procedure not unduly suggestive

A van identification procedure was not unduly suggestive, and a witness was properly permitted to testify as to her identification of defendant's van, where the witness observed a light blue van parked along the side of the road near the crime scene on the afternoon of the crimes; the witness saw the van in broad daylight without any obstruction to her view; the witness was driven by a deputy sheriff to a law enforcement center parking lot where she observed several vans; she spontaneously identified one of the vans as being the one which she had seen near the crime scene; other witnesses established that the van selected by the witness

was the defendant's van; nothing suggested that defendant's van was displayed or portrayed in any manner which could reasonably be said to single it out for the witness's special attention; and neither the deputy sheriff with whom the witness rode nor any other law enforcement officer in any way directed her attention to defendant's van by conduct or speech.

11. Criminal Law §§ 45, 66— van identification procedure not experiment

A procedure in which a witness for the State identified defendant's van as being the vehicle which she had seen near the crime scene did not constitute an experiment; therefore, testimony concerning the van identification was not rendered inadmissible because of the State's failure to comply with established procedures governing the admission into evidence of experiments or because the prosecutor failed to inform defense counsel of the results of the identification procedure pursuant to G.S. 15A-903(e).

12. Criminal Law § 43.1— photograph of defendant taken before crimes — competency

In this prosecution for first degree murder, first degree rape, and felonious assault, a photograph of defendant taken one month before the crimes and testimony as to the circumstances surrounding the photograph were competent to show that within a month of the attack defendant wore a cap and glasses similar to that which one victim testified were worn by the man who attacked her.

13. Bills of Discovery § 6— State's failure to produce photograph — exclusion not required

A photograph of defendant was not required to be excluded from evidence because the State failed to produce it prior to trial pursuant to defendant's request for voluntary production where defendant failed to show that the photograph was in the State's possession, custody or control before the trial, and where defendant never requested that the photograph be excluded on the ground of the State's failure to comport with our discovery rules and did not ask for any other sanction permitted by the discovery statute. G.S. 15A-903(d).

14. Criminal Law § 169.3— erroneous admission of evidence — admission of similar evidence without objection

The admission of testimony or other evidence over objection is harmless when testimony or other evidence of the same import has previously been admitted without objection.

15. Criminal Law § 89.3; Constitutional Law § 65— victim's prior written statements — rehabilitation of credibility — right of confrontation

Prior written statements of a rape and assault victim who testified for the State were not hearsay and were properly admitted to rehabilitate the victim's credibility before the jury. Furthermore, defendant's right of confrontation was not denied because the written statements had not been disclosed to defense counsel prior to trial where the trial judge directed the district attorney to turn over to defendant any such statements, offered to grant a recess for such time as was necessary for defense counsel to study the statements, and offered to permit defense counsel to recall the victim or any of the State's witnesses for cross-

examination about the statements.

16. Criminal Law § 42.3— admissibility of boots — showing of chain of custody not necessary

An officer's testimony that boots offered in evidence were those he observed taken from defendant after defendant's arrest and that shoelaces contained in the boots when they were offered into evidence were those which he had noticed earlier constituted sufficient identification of the boots to permit them to be offered without showing a chain of custody.

17. Criminal Law § 42— introducing exhibits not previously admitted

The trial court did not err in permitting the prosecutor to introduce into evidence all exhibits not previously admitted rather than requiring that each exhibit be individually introduced where the record shows that defendant had an opportunity to interpose objections to every item of physical or documentary evidence shown to the jury during the trial, and that defendant was given the opportunity to object specifically to any item at the time the remaining exhibits were introduced into evidence.

18. Constitutional Law § 30; Criminal Law § 80.2— allowance of motion to compel discovery — refusal to have material sealed for appellate review

The trial court did not err in the denial of defendant's motion to have prior written statements of a rape and assault victim placed in an envelope and sealed for purposes of appellate review where the court allowed defendant's motion to compel discovery by directing the district attorney at trial to give the statements to defendant, the court offered to grant a recess so that defendant would have an opportunity to consider the statements, and the court offered to allow defendant to recall any witness whom he wished to examine concerning the statements.

19. Criminal Law § 119— request for instructions — instructions given in substance

The trial court did not err in failing to give defendant's requested instructions concerning the identification of defendant as the perpetrator of the crime and factors which the jury should consider in weighing the credibility of a witness's identification of defendant where the court in substance gave the requested instructions.

20. Criminal Law § 113.1— instructions — summary of evidence — evidence brought out on cross-examination

The trial court did not err in denying defendant's request that evidence brought out on cross-examination of State's witnesses be included in the court's summary of the evidence.

21. Criminal Law § 118— charge on contentions of the parties

It is not error for the trial judge to state the contentions of the parties provided the contentions of each litigant are stated fairly and accurately.

22. Criminal Law § 114.2— instruction on elements of rape — insertion of additional evidence — harmless error

If the trial judge erred in stating evidence that a rape victim's vagina had been injured and that semen was present while he was instructing on the elements of the various degrees of rape, such error was not prejudicial to defendant where it was not disputed that the victim had in fact been raped, and defendant relied on the defense that he was not the perpetrator.

23. Rape § 6— age of defendant — instructions on factors to be considered

The trial court in a rape case did not err in instructing the jury that, in determining whether defendant was sixteen years of age or older, the jury could consider the defendant's appearance and evidence as to whether he was operating a vehicle and was married.

24. Criminal Law § 112.4— lapsus linguae in instruction on circumstantial evidence

The trial court's *lapsus linguae* in stating during its instructions on circumstantial evidence that the jury should determine whether these circumstances "include" rather than "exclude" every reasonable conclusion except that of guilt did not constitute prejudicial error since it is apparant from a contextual reading of the charge that the jury could not have been misled thereby.

25. Criminal Law § 114.3— additional instructions — no expression of opinion

The trial judge's statement that he thought he had covered the matter earlier but would give additional instructions out of an abundance of caution did not constitute an expression of opinion.

26. Criminal Law § 26; Homicide § 31— conviction of first degree murder — failure of jury to specify theory — underlying felony merged into murder conviction

When a jury in a first degree murder trial is properly instructed upon both theories of premeditation and deliberation and felony murder and returns a first degree murder verdict without specifying whether it relied on either or both theories, the case is treated as if the jury relied upon the felony murder theory; therefore, the underlying felony merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested.

27. Criminal Law § 135.4— first degree murder conviction — failure of jury to specify theory — underlying felony not aggravating circumstance

Where a first degree murder case was submitted to the jury upon both theories of premeditation and deliberation and felony murder and the jury did not specify the theory or theories upon which it relied in returning a guilty verdict, the underlying felony may not be considered as an aggravating circumstance in the penalty phase because it has merged with and become a part of the murder conviction as an essential element thereof.

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

The trial court should have submitted to the jury during the sentencing phase of a first degree murder trial the aggravating circumstance as to whether the crime was "especially heinous, atrocious or cruel" where the evidence tended to show that the victim was stripped from the waist down before she was mur-

dered; her hands were tied behind her back and her brassiere was tied around her neck; she was marched at knife point by her assailant into nearby woods where she was forced to lie on the ground; and she was beaten before she was murdered.

29. Criminal Law § 135.4— capital case — aggravating circumstance supported by evidence — no power by State to withdraw from jury's consideration

The prosecution in a capital case has no power to withdraw from the jury's consideration any aggravating circumstance which is in fact supported by evidence adduced at the guilt or sentencing phase of the trial; furthermore, the State is without power to agree to a life sentence or to recommend such a sentence to the jury during the sentencing phase when the State has evidence from which a jury could find at least one aggravating circumstance beyond a reasonable doubt.

30. Criminal Law § 26.9— new trial after appeal — double jeopardy

If a criminal conviction is reversed on appeal for insufficiency of the evidence, double jeopardy precludes remanding the case for a new trial even if the State has evidence which it could offer at a new trial but did not offer at the trial from which the appeal was taken. However, there is no such impediment in ordering a new trial when the first trial was tainted by mere "trial error."

31. Criminal Law §§ 26.9, 135.4— life sentence in capital case — appeal by State — new sentencing hearing — double jeopardy

If a life sentence is imposed following conviction for a capital crime, double jeopardy considerations prohibit an appeal by the State or the ordering of a new sentencing hearing on defendant's appeal of his conviction even if the life sentence was the result of trial error favorable to defendant.

32. Criminal Law §§ 26.9, 135.4— appeal of death sentence — remand for new sentencing hearing — aggravating circumstances which may be considered

If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy prohibitions would not preclude the State from relying on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed and which was either not then submitted to the jury or, if submitted, the jury then found it to exist.

33. Criminal Law § 135.4— vacation of death sentence — remand for new sentencing hearing

If upon defendant's appeal the Supreme Court vacates a death sentence for trial error, it will remand for a new sentencing hearing only if there are aggravating circumstances which would not be constitutionally or legally proscribed at the new hearing. An aggravating circumstance would not be so proscribed at the new hearing if (1) there was evidence to support it at the hearing appealed from; (2) it was not submitted to the jury or, if submitted, the jury found it to have existed; and (3) there is no other legal impediment (such as the felony murder merger rule) to its use.

34. Criminal Law § 135.4— death sentence vacated — remand for new sentencing hearing

Upon vacating defendant's death sentence on a first degree murder conviction because the trial court erroneously submitted the underlying felony of rape as an aggravating circumstance, the Supreme Court will remand the case for a new sentencing hearing where there was evidence of the "prior felony" and "especially heinous" aggravating circumstances at the hearing appealed from and neither aggravating circumstance was submitted to the jury at the hearing. G.S. 15A-2000(e)(3) and (9).

35. Criminal Law § 135.4— capital crime — proof of prior felony aggravating circumstance

The most appropriate way to show the "prior felony" aggravating circumstance would be to offer duly authenticated court records, and the testimony of the victims themselves should not ordinarily be offered unless such testimony is necessary to show that the crime for which defendant was convicted involved the use or threat of violence to the person. However, if defendant denies that he was the defendant shown on the conviction record, the occurrence of the conviction, or that the crime involved the use or threat of violence to the person, then the State should be permitted to offer such evidence as it has to overcome defendant's denials.

36. Criminal Law § 135.4— capital case — aggravating circumstance — defendant's bad character

Although the State could not in its case in chief offer evidence of defendant's bad character as an aggravating circumstance in a capital case, the State could offer evidence of defendant's bad character to rebut evidence of his good character presented by defendant as a mitigating circumstance.

Justice MEYER did not participate in the consideration and decision of this case.

APPEAL by defendant from *Judge Fountain*, 8 March 1979 Criminal Session of COLUMBUS Superior Court.

Upon pleas of not guilty, defendant was tried upon two bills of indictment proper in form the first of which charged him with first degree murder and first degree rape (79-CRS-1943), and the second with felonious assault (79-CRS-1942). Defendant was found guilty as charged. For his conviction of first degree murder, defendant was sentenced to death. Defendant was also sentenced to life imprisonment for the crime of first degree rape. A sentence of twenty years was imposed on the felonious assault conviction. On 18 December 1979, we allowed defendant's motion to bypass the Court of Appeals on his appeal from the assault conviction. This case was docketed and argued as No. 3, Spring Term 1980.

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

Mary Ann Tally and Fred J. Williams, Attorneys for defend-

ant appellant.

EXUM, Justice.

Defendant brings forward numerous assignments of error relating to both phases of his trial.[1] After a careful consideration of these assignments, as well as the record which is before us, we find no error in the guilt determination phase of defendant's trial. However, for error in the sentence determination phase, we vacate defendant's death sentence on the first degree murder conviction and remand for a new sentencing hearing. We also arrest judgment on defendant's first degree rape conviction. We find no error in the felonious assault conviction and judgment.

I.

At trial, the state introduced evidence which tended to show: On 13 September 1977, between the hours of 5:00 p.m. and 6:00 p.m., passersby saw Barbara Lynne Davenport, age 17, stagger from a wooded area and collapse on Manchester Road in the city of Spring Lake, North Carolina. Her throat had been cut severely, and a wound of between four and five inches in length was visible. Ms. Davenport had also been stabbed in the back. Her hands were tied behind her with a shoestring, and her brassiere had been tied around her mouth and throat.

Unable to talk because of her throat injury, Ms. Davenport could nonetheless communicate through gestures and written messages. She indicated to her attendants that "my friend is in the woods." An ensuing search of an adjacent wooded area revealed the dead body of Mary Jo Nancy Coates, age 14, lying face down on the ground approximately twenty yards from the road. Ms. Coates was nude from the waist down; her hands were tied behind her back with a black bootlace; and her brassiere had been tied around her neck. Ms. Coates had received two knife wounds: one to the back and one to the chest. In the immediate area of the body, searchers found a pair of cut-off blue jeans and a pair of panties hanging in a tree. The items belonged to Ms. Coates. Searchers also found a pair of

[1] G.S. § 15A-2000(a)(1) provides that upon conviction or adjudication of guilt of a defendant of a capital felony, the trial court is obligated to conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment. A capital case is thus conducted in two phases—a guilt determination phase and a sentence determination phase.

tortoise shell glasses which belonged to Ms. Davenport and several smaller items near the body. A search of the area between the wooded area where the body was found and a nearby cornfield uncovered a laceless tennis shoe, an open bag of Doritos, several cigars and a pack of cigarettes. Another laceless tennis shoe was found in the cornfield itself. All of these items, as well as jewelry and clothing taken from the body of Ms. Coates, were taken into custody and preserved for trial.

The decedent and Ms. Davenport were close friends who lived in separate homes in a trailer park in Spring Lake. On the afternoon of 13 September 1977, the pair left Ms. Davenport's home to go to a convenience store located approximately a quarter mile from the trailer park. The girls shopped often at the convenience store and habitually took a path between the cornfield and the wooded area in making the trip to and from the establishment. The journey normally took between five and ten minutes each way. On this particular day, the girls purchased six packs of cigars for Ms. Davenport's father, as well as two packs of cigarettes for themselves and a bag of Doritos.

On their return trip from the store Ms. Coates and Ms. Davenport stopped in a clearing to smoke cigarettes. As they sat in the clearing with their backs to the convenience store, Ms. Coates pointed to a cluster of vines and brambles in the direction of the trailer park saying that someone was spying on them. Ms. Davenport looked to where her friend was pointing and saw a man wearing a fatigue cap and sunglasses standing about sixty feet away. Ms. Davenport got up from where she was seated and walked towards where the man was standing. He started walking away from the two girls down the path in the direction of the trailer park. Ms. Davenport went back to the clearing whereupon she and Ms. Coates proceeded to gather their belongings. The two women headed for home.

After Ms. Davenport and Ms. Coates had traveled some distance, they saw a man, apparently the same individual they had seen earlier, coming towards them on the path. He passed by the pair at an arm's length distance. As he passed by her Ms. Davenport was able to notice that he was wearing a fatigue cap, a camouflage jungle shirt, and sunglasses. The man had dark hair which was cut in a military fashion. As he passed by the girls he spoke to them. At the time of this encounter, Ms. Davenport was several feet ahead of

Ms. Coates as they walked together on the path.

A few moments later, Ms. Davenport heard a noise which caused her to stop walking. She turned to find Ms. Coates kneeling on the ground. The man they had passed on the path was kneeling behind Ms. Coates holding a knife to her throat. As Ms. Davenport looked on, the man told her to do what he said or he would kill Ms. Coates.

The assailant took off one of Ms. Coates' tennis shoes. Before he threw the shoe into the cornfield nearby, he removed the shoelace and used it to tie Ms. Davenport's hands behind her. At the time she was tied up Ms. Davenport was lying face down on the ground. The man then apparently, though not in Ms. Davenport's view, tied Ms. Coates' hands in similar fashion. Having bound the girls the assailant forced them into the woods.

Once they were in the wooded area away from the nearby highway, the man forced both Ms. Coates and Ms. Davenport to lie upon the ground. Ms. Davenport could not see what happened next, but she did hear her companion repeatedly say "no, no, no." Ms. Coates' protests continued for about half a minute. The assailant thereupon went over to Ms. Davenport. After sexually assaulting her, the man produced a knife which had a blade about a foot long with a dull finish. He used the knife to cut the straps of her brassiere and then used the garment to gag her mouth. The man then pulled both girls to their feet and forced them to walk about sixty feet to an area where the vegetation was particularly thick. Again, they were forced to the ground. Ms. Davenport could not see what happened next, but she heard the sound of a zipper, some jingling, and the screams of her friend. Ms. Davenport was able to get the gag out of her mouth, but the assailant came over to her and bound her again before he returned to Ms. Coates. Ms. Davenport then heard the man beating Ms. Coates. After a short while, he came back over to Ms. Davenport and began beating her about her back. The man then pulled Ms. Davenport's head up from the ground as the rest of her body still lay flat. With his knife in his right hand, the man pulled the knife across her neck several times. Despite her struggling, the man stabbed Ms. Davenport in the back twice. At that point, though she was still conscious, Ms. Davenport stopped struggling and pretended to be dead.

After several minutes, Ms. Davenport was able to get to her

feet and spit the gag out of her mouth. As she got up to leave the area, Ms. Davenport noticed that Ms. Coates was nude from the waist down with her hands tied behind her. She was still. Ms. Davenport went down the path in the direction of Manchester Road where she collapsed.

As passersby attended to her, Ms. Davenport was able to provide them with a rough description of her assailant. Over the course of the next several days, while she was hospitalized, Ms. Davenport assisted law enforcement officers in developing a composite drawing of the man who had attacked her and her friend. On 20 September 1977 several police officers visited Ms. Davenport in the hospital and showed her a number of photographs. At that time, she identified a photograph of defendant as being that of her assailant. At trial, Ms. Davenport again positively identified defendant as her assailant.

Defendant was a sergeant in the United States Army. From 10 September 1977 until 13 September 1977, defendant's unit was on field training manuevers at Camp Hill, Virginia. Members of his unit observed defendant having in his possession an old bayonet which was approximately twelve to fourteen inches long. Defendant was also seen wearing sunglasses during the encampment. At approximately 4:30 a.m. on 13 September, defendant left Camp Hill to return to Fort Bragg, North Carolina via the morning chow truck. When he left he was wearing a fatigue cap and camouflage shirt. Defendant arrived at Fort Bragg at approximately 3:50 p.m. that same day and went immediately to the motor pool where he picked up his light blue Chevrolet van. Defendant was seen at Fort Bragg around 5:00 p.m. leaving his barracks. A light blue Chevrolet van was independently observed by two persons shortly after 5:00 p.m. on 13 September in the area where the two girls were attacked. The van was seen on Manchester Road, parked on the same side of the road as the wooded area where the women were assaulted. After the photographic lineup was conducted on 20 September 1977, defendant was arrested at a shopping center in Spring Lake. At the time of his arrest defendant was driving his light blue Chevrolet van.

Defendant offered no evidence during the guilt determination phase of trial.

Upon receiving from the jury verdicts finding defendant guilty

of first degree murder, first degree rape, and assault with a deadly weapon, the court convened the sentence determination phase of trial before the same jury pursuant to the provisions of G.S. §§ 15A-2000, *et seq.* in connection with the first degree murder conviction. The state at first offered no evidence during this phase, choosing to rely instead upon the evidence introduced at the guilt determination phase. Defendant offered evidence of his family background, his conduct as a husband and father, and his satisfactory behavior while in prison. In rebuttal, the state offered evidence which tended to show that defendant had been found guilty of several offenses in Chatham County and that defendant had a bad reputation.

The jury found beyond a reasonable doubt the presence of the aggravating circumstance that the capital felony of first degree murder was committed while the defendant was engaged in the commission of or the attempt to commit the crime of rape. The jury also determined that such mitigating circumstances as it found to exist[2] were insufficient to outweigh the aggravating circumstance and that the aggravating circumstance was sufficiently substantial to call for imposition of the death penalty. It recommended that the death penalty be imposed; the court's judgment imposing the death sentence was accordingly entered.

II.

[1, 2] Defendant initially contends the trial court erred in denying his motion for a bill of particulars by which he sought to have the state declare upon which theory it intended to rely in making out a case of first degree murder: felony murder or premeditation and deliberation. Defendant again raised the issue at the close of all the evidence in the guilt phase of trial by moving that the state be required to elect which of the two theories would be submitted to the jury. Judge Fountain likewise denied this motion. There was no error in these rulings.

A motion for a bill of particulars is addressed to the sound discretion of the trial court. *E.g., State v. McLaughlin*, 286 N.C. 597,

[2] The jury found two mitigating circumstances: (1) defendant had no significant history of prior criminal activity and (2) another unnamed circumstance which the jury deemed to have mitigating value. The jury did not find defendant's age at the time of the commission of the crimes to be a mitigating circumstance.

213 S.E. 2d 238 (1975), *death sentence vacated*, 428 U.S. 903 (1976); *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Spence*, 271 N.C. 23, 155 S.E. 2d 802 (1967), *death sentence vacated*, 392 U.S. 649, *on remand*, 274 N.C. 536, 164 S.E. 2d 593 (1968). In *McLaughlin*, we found no error in the trial court's denial of a bill of particulars which, as here, sought to require the state to declare prior to trial whether it would prosecute a first degree murder indictment drawn under G.S. 15-144 on a theory of premeditation and deliberation or felony murder. We there concluded that the murder indictment and a separate indictment charging the accompanying felony, joined for trial, set out sufficient factual information to enable defendant to understand the basis of the state's cases against him. So it is here. Furthermore it is well settled that the state is not generally required to elect between legal theories in a murder prosecution prior to trial. *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976). Where the factual basis for the prosecution is sufficiently pleaded, defendant must be prepared to defend against any and all legal theories which these facts may support. *State v. Boyd*, 287 N.C. 131, 214 S.E. 2d 14 (1975). A bill of particulars is normally designed to require the state to reveal "items of *factual* information desired by the defendant which pertain to the charge and which are not recited in the pleading, and must allege that the defendant cannot adequately prepare or conduct his defense without such information." G.S. § 15A-925(b). (Emphasis supplied.) Nor was it error to deny defendant's motion that the state elect at the close of the evidence which theory of first degree murder would be submitted to the jury when the evidence was sufficient to establish a *prima facie* case as to both theories, felony murder, as well as murder with premeditation and deliberation. *State v. Boyd, supra. See also State v. Swift, supra.* Here the state's evidence was sufficient to establish a *prima facie* case as to felony murder, *see e.g., State v. Crawford*, 260 N.C. 548, 133 S.E. 2d 232 (1963), as well as to murder upon premeditation and deliberation. *See e.g., State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296, *death sentence vacated*, 429 U.S. 809 (1976). Since the state established a *prima facie* case as to each theory, it became the responsibility of the jury to weigh the evidence to see if it warranted a finding that defendant was guilty of murder in the first degree upon either or both theories.

[3] Defendant further contends the trial court erred in denying his motion to suppress evidence obtained from his van pursuant to a search warrant. Defendant claims the affidavit offered in support

of the application for the warrant failed sufficiently to allege the underlying facts and circumstances upon which a finding of probable cause could be based. This claim is untenable. The affidavit in question reads as follows:

> "On 13 September 1977, Mary Jo Nancy Coats [sic], W/F, 14, and Barbara Davenport, W/F, 16, were ambushed in some woods near their home and Victim [sic] Coats [sic] was raped and stabbed to death, and Victim Davenport was stabbed and cut severely. A light blue van was seen parked at the crime scene. It was observed that a tire print, believed to be from the right rear wheel of the vehicle, was in the mud at the crime scene. A cast and photographs was [sic] made of this print. On 20 September 1977, Stephen Karl Silhan was arrested with a warrant charging him with the crime. At the time of his arrest, the defendant was operating a 1976 Chevrolet Van, blue in color. The affiant prays that a search warrant be issued so that the right rear tire of the van can be seized and compared by experts with the cast and photograph made at the crime scene."

The affidavit was sufficient. Probable cause prerequisite to the issuance of a search warrant exists when there is reasonable ground to believe that the proposed search will reveal the presence of objects which will aid in the apprehension or conviction of an offender. *State v. Edwards*, 286 N.C. 162, 209 S.E. 2d 758 (1974); *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972); *see generally* M. Crowell, Search Warrants in North Carolina (1976). Probable cause cannot be established by affidavits which are purely conclusory in nature. *State v. Campbell, supra.* The affidavit must set forth enough of the underlying facts and circumstances so that the magistrate can perform his detached judicial function as a check upon intrusions by law enforcement officials into the privacy of individuals. *E.g., Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S.Ct. 1509 (1964); *State v. Campbell, supra; see generally* J. Cook, Constitutional Rights of the Accused: Pretrial Rights § 36 (1972).

Relying on *State v. Campbell, supra*, defendant argues that the search of the blue Chevrolet van was based solely upon his arrest and that the state is attempting to bootstrap a finding of probable cause to search the van upon the probable cause which existed for his arrest. We disagree. *Campbell* is distinguishable. In *Campbell*

an affidavit offered in support of an application for a search warrant stated merely that the affiant had in his possession arrest warrants for several individuals and that all of these individuals had sold narcotics to a named agent of the State Bureau of Investigation as well as numerous college students. The affiant sought to procure a search warrant for a particular house. In no way did the affidavit tie the house in question to the possession or sale of controlled substances. By failing to implicate the house in the illegal activity under investigation the affidavit was insufficient to permit the magistrate to exercise his independent judgment in determining whether probable cause existed. It is necessary that an affidavit for a search warrant implicate the premises to be searched. *See* 1 W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 3.7(d)(1978). In the present case the affidavit states not only that defendant was operating a blue 1976 Chevrolet van at the time of his arrest but also that a van of the same color was observed at the crime scene. Thus the van was linked not only to defendant, who according to the affidavit had been arrested presumably on probable cause, but also to criminal activity which was then under investigation. These facts taken together are sufficient to enable the magistrate to make a determination that probable cause prerequisite to the issuance of the search warrant existed.

III.

Defendant brings forward several assignments of error which challenge the jury which was impaneled and the manner in which it was selected. These assignments are without merit.

[4] On 17 November 1978 defendant moved that the district attorney be prohibited from inquiring about potential jurors' attitudes toward capital punishment and from excusing prior to the sentencing phase any jurors who said unequivocally that they could not impose the death penalty. Defendant argues that denial of this motion denied him a fair trial before a representative cross-section of the community in violation of the Sixth Amendment. Defendant, relying on several empirical studies,[3] also argues that death-

[3] H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment, Center for Studies in Criminal Justice, University of Chicago Law School (1968); Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An*

qualified juries are "prosecution-prone" in that they are more likely to ignore the presumption of innocence and accept without close scrutiny the version of the facts put forward by the state. Thus he also claims a Fourteenth Amendment Due Process violation in the jury selection process. This argument was considered and rejected by a majority of this Court in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980).

[5] Defendant assigns as error the trial court's denial of his challenges for cause of potential jurors Enzor and Livingston. After Judge Fountain denied these challenges defendant peremptorily challenged both prospective jurors and they were excused. Thereafter defendant sought to challenge peremptorily prospective juror Arp. At this time defendant had already exhausted the fourteen peremptory challenges allowed to him by G.S. § 15A-1217, and Judge Fountain properly denied the fifteenth challenge directed to juror Arp. Defendant argues that his challenges for cause of jurors Enzor and Livingston were improperly denied and Judge Fountain ought to have cured the error by allowing him an additional peremptory challenge.

Assuming *arguendo* that it was error for Judge Fountain to deny defendant's challenges for cause to jurors Enzor and Livingston, defendant may not complain on appeal because of his failure to comply with G.S. § 15A-1214(h) and (i). This section provides that:

> "(h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, *he must have*:
>
> (1) Exhausted the peremptory challenges available to him;
> (2) *Renewed his challenge as provided in subsection (i) of this section; and*
> (3) *Had his renewal motion denied as to the juror in*

Empirical Study of Colorado Veniremen, 42 Colo. L. Rev. 1 (1970); Goldberg, *Towards Expansion of WITHERSPOON: Scruples, Jury Bias and the Use of Psychological Data to Raise Presumptions in the Law*, 5 Harv. Civ. Lib. L. Rev. 53 (1970); Jurow, *New Data on the Effect of a Death-Qualified Jury on the Guilt Determination Process*, 84 Harv. L. Rev. 529 (1971); Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on the Issue of Guilt?* 39 Tex. L. Rev. 545 (1961); Rokeach and McLellan, *Dogmatism and the Death Penalty: A Reinterpretation of the Duquesne Data*, 8 Duq. L. Rev. 125 (1969); White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 Cornell L. Rev. 1176 (1973).

question.

(i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:

(1) Had peremptorily challenged the juror; or

(2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

The judge may reconsider his denial of the challenge for cause, reconsidering facts and arguments previously adduced or taking cognizance of additional facts and arguments presented. If upon reconsideration the judge determines that the juror should have been excused for cause, he must allow the party an additional peremptory challenge." (Emphasis supplied.)

The record shows that defendant did not renew his challenge for cause of either juror Enzor or Livingston after having exhausted his peremptory challenges. Defendant urges that by exhausting his peremptory challenges and thereafter asserting a right to challenge peremptorily an additional juror, his exception was preserved for review under *State v. Boyd, supra*, 287 N.C. 131, 214 S.E. 2d 14 (1975). General Statute § 15A-1214, however, was enacted and took effect after our decision in *Boyd*. To the extent that a constitutionally valid statute overrules or supplements the dictates of one of our cases the statute is, of course, controlling. Defendant's argument must, therefore, be rejected.[1]

Defendant next argues that certain jurors were excused in violation of the principle announced in *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and that Judge Fountain erred in instructing the panel of prospective jurors prior to the jury selection as follows:

"Ladies and Gentlemen, the State in this case is seeking the death penalty of the charge of murder in the first degree. I say that to you so that I can make a brief explanation of how that is done. The Jury in the case will have to decide only the question of guilt or innocence.

[1] Our analysis of this assignment of error ought not to be taken to mean that our traditional close scrutiny on capital cases is no longer viable. *See, e.g., State v. Knight*, 248 N.C. 384, 103 S.E.2d 452 (1958). In the present case, the mandate of the statute has foreclosed our review of this assignment.

> That is all. Of course if the defendant is found not guilty that is the end of it. If he is found guilty of murder in the first degree, then a Jury, and in all probability the same Jury, would hear such additional evidence as the State or Defendant wishes to offer on the question of punishment. At that time I would instruct the Jury what to consider in determining whether the death penalty should or should not be imposed. I make that explanation to you so that you will know that in the trial it is on the merits on a question of guilt or innocence. *You don't have to concern yourselves — or rather you don't have to make the ultimate decision of whether the Defendant should be executed or should not be executed.*" (Emphasis supplied.)

Defendant complains of the italicized portion of the instruction. He argues that the death sentence cannot be validly imposed by jurors so selected or instructed. Since we are vacating the death sentence and remanding for a new sentencing hearing before a new jury, we need not address these arguments.

IV.

[6] Defendant contends that the trial court erred in denying his motion to examine the files of the district attorney for exculpatory evidence after it came to light at trial that the results of tests which were exculpatory had not been disclosed to defendant.

The district attorney complied with a request from defense counsel for voluntary discovery. During the cross-examination of Ms. Debbie Becher, a crime scene technician with the City-County Bureau of Identification in Fayetteville, defendant became aware apparently for the first time of a report from the Federal Bureau of Investigation which summarized the results of an analysis of fingerprints taken from the scene of the assaults. None of the prints could be identified as being those of defendant. After Ms. Becher was excused, defendant moved to inspect for additional exculpatory evidence all files in the district attorney's possession which relate to the charges being tried, or in lieu thereof, to have these files surrendered to the court "for appellate purposes." Although Judge Fountain denied these motions he ordered the district attorney to reveal to defendant any exculpatory evidence of which he had knowledge. Judge Fountain also offered to give defendant as much of a recess as he needed to deal adequately with the report. Defendant declined

the offer. Judge Fountain noted that defendant had gotten the benefit of the report during his cross-examination of Ms. Becher. The district attorney disavowed any prior knowledge of the report.

We conclude Judge Fountain's rulings were altogether correct. His offer to grant defendant a recess comports specifically with the provisions of G.S. § 15A-910(2), and his order that the district attorney produce any known exculpatory evidence reinforced the district attorney's already existing duty under *Brady v. Maryland*, 323 U.S. 83, 10 L. Ed. 2d 215, 83 S.Ct. 1194 (1963). The actions of Judge Fountain afforded defendant a full opportunity to overcome any prejudice which may have been caused by the earlier nondisclosure. Defendant was not entitled to an order permitting a *carte blanche* inspection of the district attorney's files. *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976); *State v. Davis* 282 N.C. 107, 191 S.E. 2d 664 (1972). Finally defendant seems, in fact, not to have been prejudiced by the earlier nondisclosure.

[7] Defendant argues that the trial court abused its discretion by instructing the district attorney to recall Mr. Davenport, father of Barbara Davenport, after he had been excused without having been cross-examined. On direct examination Mr. Davenport testified to prior identifications and descriptions by his daughter of her assailant. He stated that she was unable to talk for days immediately following the assaults but that she communicated with him by writing on a pad. After her surgery, Mr. Davenport asked her to write a complete description of what had happened. Ms. Davenport's response included a description of her attacker. Mr. Davenport stated that he did not have the written responses with him at that time. There being no cross-examination, the witness was excused. Judge Fountain called the district attorney to the bench. After the bench conference, the state over objection recalled Mr. Davenport, who then testified that the notes prepared by his daughter had been collected and turned over to the authorities. He did not then know where they were. Defendant argues that the recall of the witness after a bench conference amounted to a prejudicial expression of opinion by the presiding judge in violation of G.S. § 15A-1222.

There is no merit to this argument. Whatever transpired at the bench conference does not appear in the record. Certainly the jury did not hear it. Presumably Judge Fountain was trying to ascertain the whereabouts of Barbara Davenport's written notes, which would have been the best evidence of what she had told her

father. The notes conceivably could have benefitted defendant. Had they been available to the witness, some question could have been raised concerning the admissibility of his testimony about what his daughter had told him under the rule that "*a writing is the best evidence of its own contents*, and which in general requires a party to produce the writing itself, unless its non-production is excused . . . ." 2 Stansbury's North Carolina Evidence § 190 (Brandis rev. 1973). (Emphasis supplied.) In this inquiry Judge Fountain again acted quite properly. A trial judge is more than an umpire. He has a duty to see that the trial is conducted fairly for both sides and to eliminate error if he can including that engendered by the inadvertence of counsel for the state or the defendant. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974); *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied*, 393 U.S. 1087 (1969).

Defendant next contends the trial court erred in allowing Mr. Layton, an expert witness for the state, to testify to an opinion which was inconclusive and speculative in nature. Mr. Layton was a special agent with the State Bureau of Investigation. A plaster cast had been made on a roadside near the crime scene. This cast was compared with a tire taken from the right rear wheel of defendant's van. Defendant moved *in limine* to prohibit the state from soliciting Mr. Layton's opinion as to whether the tire taken from defendant's van could have made the impression preserved by the cast. On *voir dire*, Mr. Layton testified that he could not state conclusively that defendant's tire made the impression, but that he would say that defendant's tire *could* have made the impression. Over objection he testified to the jury that defendant's tire in his opinion could have made the impression preserved by the cast. Defendant argues that no proper foundation for this testimony was laid and, further, that since Mr. Layton's opinion was not conclusive, it was inadmissible. He relies first on *Perfecting Service Co. v. Product Development and Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9 (1963).

Defendant's reliance on this case is misplaced. If the opinion of an expert is based upon obviously inadequate data, the trial judge may properly refuse to allow it to go to the jury for its consideration. *Id.* at 411, 131 S.E. 2d at 18; *see also Bryant v. Russell*, 266 N.C. 629, 146 S.E. 2d 813 (1966); *Schafer v. Southern Ry. Co.*, 266 N.C. 285, 145 S.E. 2d 887 (1966); *see generally* 1 Stansbury's North Carolina Evidence § 136 (Brandis rev. 1973). In *Perfecting Service Co.* the relevant issue was the tensile strength of metal in a mechanical

device after the design had been modified. Expert testimony as to the insufficiency of the metal's tensile strength was properly excluded because the record failed to disclose whether the tests which formed the basis of the expert testimony had been performed before or after the design had been modified. Here the issue is not the manner or timing of tests upon which the expert opinion is based. Instead, the issue is whether the opinion of Mr. Layton is incompetent because of the absence of a proper foundation or his inability to be conclusive.

[8] Evidence of tire tracks is without probative force unless from the evidentiary circumstances the jury can reasonably infer: (1) the tracks were found at or near the scene of the crime, (2) they were made at the time of the commission of the crime, and (3) they correspond to tires on a motor vehicle owned or operated by defendant. *See, e.g., State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979); *State v. Pinyatello*, 272 N.C. 312, 158 S.E. 2d 596 (1968); *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960); *see generally* Annot. 23 A.L.R. 2d 112 (1952). Upon proper foundation being laid, evidence of tire tracks is generally admissible. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. Willis*, 281 N.C. 558, 189 S.E. 2d 190 (1972). Through the testimony of Mr. Layton and that of other witnesses, the state introduced evidence which tended to show: The plaster cast in question had been made along the side of the road near the place of the assaults by a technician employed by the City-County Bureau of Investigation on 14 September 1977; a blue Chevrolet van had been seen on the side of the road at or near the time of the assaults; defendant owned a van similar to the one seen. The tire tracks were such that defendant's van could have made them. This was an adequate foundation.

[9] That Mr. Layton could not positively conclude that the tire print had been made by defendant's vehicle does not make his opinion incompetent. Tire track identification is a proper subject for expert testimony. *See generally* 1 Stansbury's North Carolina Evidence § 134 (Brandis rev. 1973). The witness' inability to make a positive identification goes to the weight of his testimony; it does not render it incompetent. *State v. Patterson*, 284 N.C. 190, 200 S.E. 2d 16 (1973); *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973); *see generally* 1 Stansbury's North Carolina Evidence § 129 (Brandis rev. 1973); 3 C. Torcia, Wharton's Criminal Evidence § 610 (13th ed. 1973). There was no error in its admission.

Defendant next contends the trial court erred by allowing Ms. Frazier, sister of Barbara Davenport, to be recalled to the witness stand to testify as to her identification of defendant's van.

This contention is without merit. When she was first called to the stand, Ms. Frazier testified that on the afternoon of the crimes she had been in the Manchester Road neighborhood adjoining Pope Air Force Base. Ten minutes after her sister and Nancy Coates went to a nearby convenience store she too left the house and began walking to the store. As she traveled along the highway she observed a light blue Chevrolet van parked along the side of the road. Ms. Frazier was subsequently recalled by the state. On recall, she testified that shortly before defendant's trial began, she went to the Cumberland County Law Enforcement Center in Fayetteville pursuant to a request from the Cumberland County Sheriff's Department. She was driven by a deputy sheriff to a parking lot where she observed several vans. There she spontaneously identified one of the vans as being the one which she had seen parked along Manchester Road on 13 September 1977. Other witnesses established that the van selected by Ms. Frazier was the defendant's van. Defendant argues the trial court erred in receiving this evidence.

In raising on appeal the propriety of Ms. Frazier's testimony, defendant makes three independent arguments: (1) the identification procedure was unduly suggestive; (2) the procedure failed to comply with established procedures governing the admission into evidence of "experiments"; and (3) the testimony ought to have been excluded because the district attorney failed to inform defense counsel of the "experiment" and its results as required by G.S. § 15A-903(e).

[10] As to the first argument, we conclude the procedure employed was not unduly suggestive. Ms. Frazier testified she had seen the van in broad daylight without any obstruction to her view. Nothing suggests that defendant's van was displayed or portrayed in any manner which could reasonably be said to single it out for her special attention. In fact, the evidence shows without contradiction that defendant's van was parked in a lot with several other vans, one of which was also blue, albeit a shade darker than defendant's van. Neither the deputy sheriff with whom she rode nor any other law enforcement officer in any way directed Ms. Frazier's attention to defendant's van by conduct or speech.

[11] We answer defendant's remaining two arguments by concluding that the van identification procedure was not an "experiment." An experiment for purposes of the law of evidence is generally a procedure "in which contested facts are artificially reproduced and the results observed." 1 Stansbury's North Carolina Evidence § 94 at 304 (Brandis rev. 1973); *compare Stone v. City of Florence*, 203 S.C. 527, 28 S.E. 2d 409 (1943). Here no contested fact was artificially reproduced. Events at the scene of the crime were not reenacted. Nor were specialized tests designed and performed. All that occurred was that a witness for the state engaged in a procedure by which she identified defendant's van as being the vehicle which she had seen on the afternoon of 13 September 1977. This was no more an "experiment" than pre-trial lineup identification procedures, or pre-trial photographic identification procedures are "experiments." This was simply a pre-trial van identification procedure. None of these kinds of identification procedures are "experiments" as that term is used in the law of evidence nor are they "tests, measurements, or experiments" as these terms are used in the discovery statute, G.S. § 15A-903(e).

[12] Defendant next contends the trial court erred by receiving into evidence a photograph of defendant which had been taken one month before the two women were assaulted. This error, defendant argues, was compounded by the trial judge when he allowed a witness to testify as to the circumstances surrounding the photograph. During her direct examination, Ms. Davenport testified that her assailant wore a "jungle fatigue cap" and eyeglasses with black frames and dark lenses. Thereafter Mr. Carpenter, a squad leader in defendant's Army platoon at Fort Bragg, North Carolina, testified that he had observed defendant on a trip the unit had taken down the Cape Fear River in August, 1977. Defendant was wearing a patrol cap and sunglasses. Mr. Carpenter had photographed the unit including defendant. The photograph was admitted into evidence to illustrate Mr. Carpenter's testimony regarding the type of cap and sunglasses defendant was wearing on that occasion. There was no error in so admitting the photograph.

Defendant argues the photograph was irrelevant. Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue. *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978). The photograph and the accompanying testimony of Mr. Carpenter met this standard. The testimony tended to show that within at least

a month of the attack defendant wore a cap and eyeglasses similar to that which Ms. Davenport contends were worn by the man who attacked her. This testimony was relevant in that it was one circumstance among others tending to identify defendant as her assailant. The photograph was properly admitted as tending to illustrate Mr. Carpenter's testimony.

[13] Defendant argues further that the photograph should not have been admitted because the state failed to produce it prior to trial pursuant to his request for voluntary production. If this photograph was in the state's "possession, custody, or control" before trial, "material to the preparation of the defense," and "intended for use by the State as evidence," the district attorney should have produced it prior to trial upon defendant's request. G.S. § 15A-903(d). Defendant has not shown that the photograph was in the state's "possession, custody, or control" before trial. Even if it was, exlusion of it at trial is not the only appropriate sanction for the state's failure to produce it. G.S. § 15A-910. Defendant never requested that the photograph not be admitted on the grounds of the state's failure to comport with our discovery rules nor did he ask for any other sanction permitted by the statute. The admission of the photograph, consequently, was not error. *See State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978); *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978); *State v. Thomas*, 291 N.C. 687, 231 S.E. 2d 585 (1977).

[14] Defendant next asserts the trial court erred in allowing Sergeant Hartman to testify that while their unit was on maneuvers at Camp A. P. Hill, Virginia, on 11 September 1977, he saw defendant in possession of a bayonet with a blade approximately one foot long and one inch wide. Sergeant Hartman was then allowed over objection to identify State's Exhibit Fifty-eight as being a knife similar in blade length and width to the weapon which he had seen in defendant's possession. Defendant argues that the exhibit was not connected to commission of the crimes for which he was tried.

There was no prejudicial error. Shortly before Sergeant Hartman testified, Sergeant Oscott, defendant's platoon sergeant on 11 September 1977, testified that during these maneuvers he had seen defendant with an old bayonet whose blade was approximately twelve to fourteen inches long and one inch wide. The witness further testified that State's Exhibit Fifty-eight was similar to the weapon which he had seen in defendant's possession in Virginia.

Defendant lodged no objection to Sergeant Oscott's testimony. It is well-established that the admission of testimony or other evidence over objection is harmless when testimony or other evidence of the same import has previously been admitted without objection. *E.g., State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978); *see generally* 1 Stansbury's North Carolina Evidence § 30 (Brandis Rev. 1973).

[15] Defendant next argues the trial judge erred in permitting the state to introduce written statements of Ms. Davenport which had not been identified by her during her direct examination and which had not been disclosed to defense counsel. Detective Byrd testified for the state. At trial Detective Byrd was employed by the Fayetteville Police Department; but at the time of the assault he was a homicide investigator with the Cumberland County Sheriff's Department. Detective Byrd testified that on 13 September 1977 he talked with Ms. Davenport about the assaults. Though she was unable to talk, she was able to communicate through handwritten notes. On 20 September 1977 Detective Byrd presented Ms. Davenport with a series of written questions which she answered in her own handwriting on a separate sheet of paper. These answers constituted State's Exhibits Number Fifty-nine and Sixty which were admitted into evidence and read to the jury over objection. Defendant argues the evidence was inadmissible hearsay and that its admission violates his Sixth Amendment right of confrontation. We disagree.

At trial, Ms. Davenport gave a detailed account of the events of 13 September 1977 as well as a description of her assailant. She further testified to her written communications with her father and law enforcement officers concerning the attacks and her description of her assailant. The written statements embodied in the answers which she gave to the officer's written questions were not hearsay. When evidence of a prior consistent statement of a testifying witness is received, it is not hearsay because it is received to prove only that the statement was made, not to prove its truth. *See, e.g., State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374 (1978); *State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977); *see generally* 1 Stansbury's North Carolina Evidence § 141 (Brandis Rev. 1973). On cross-examination Ms. Davenport's credibility was subjected to a severe attack by defendant who sought to establish that she had made *prior inconsistent statements* concerning the incidents of 13 September 1977. The state was well justified in attempting to rehabili-

tate Ms. Davenport's credibility before the jury. *E.g., State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975), *death sentence vacated*, 428 U.S. 902 (1976).

Nor did this procedure deny to defendant his Sixth Amendment right of confrontation. Defendant's contention apparently is that his rights were prejudiced by the introduction of these statements because he was unable to cross-examine Ms. Davenport about them. The face of the record belies this argument. After the state rested its case, Judge Fountain conferred with the district attorney and defense counsel concerning the prior written statements of Ms. Davenport. After Judge Fountain directed the district attorney to turn over to defendant any such statements, he inquired as to whether there were additional points which defendant would like to raise. At that time, the following discussion ensued:

"MRS. TALLY: Mr. Conerly has also previously testified that Barbara made notes on September 15, 1977; that Barbara wrote answers to questions on September 17, 1977, and questions and answers which, I assume, are the ones—

COURT: Aren't they the ones Mr. Byrd testified about?

MRS. TALLY: Yes, sir.

COURT: Well, you were given copies of those, were you not?

MRS. TALLY: No sir; not for cross-examination.

COURT: Well, you have cross-examined him about it.

MRS. TALLY: No, sir.

COURT: I will give you a copy —

MRS. TALLY: Your Honor, we would just ask that these statements and notes be placed in an envelope and sealed for appellate review.

COURT: I will let you have them. You can use them for whatever you can use them for—if you want to use them to cross-examine the witness, you may have them.

MRS. TALLY: That time has passed.

COURT: I will let you call the witness back and I will give you ample time to study those documents — until tomorrow, if you want — I will give you whatever time you need.

MRS. TALLY: We would simply ask that those state-

ments and notes be placed in an envelope and sealed for appellate review.

COURT: I am not going to do that. I will give them to you, if you want.

MRS. TALLY: Your Honor, I can't see any good that I can get out of them now.

COURT: Well, Mrs. Tally, so that there will be no misunderstanding, any document that you want I will direct the solicitor to give them to you. If you need additional time to study those documents, I will give you additional time. Now, if you want to talk to Mr. Williams, I will stop. *I will give you all the time that you need to study them, recall any witness the State has offered to examine them about those documents, if you wish. Just say so.* (Emphasis supplied.)

MRS. TALLY: Your Honor, I do not wish to have them.

COURT: All right. Give her copies of them. Are there any others than the ones you have already mentioned?

MRS. TALLY: I have no idea. Mr. Grannis had agreed and the Court had ordered that those things be turned over. I have no idea what he has.

COURT: Well, you are going to get them. Are they all in the handwriting of Barbara Davenport as far as you know?

MR. GRANNIS: There's Barbara Davenport's handwriting on all of them but on one of them, I believe, there is also the handwriting of her father. We have no objection to her having that either.

COURT: Okay. Now, Mrs. Tally, the questions and answers that Mr. Byrd read to the Jury, did you not have a copy of those?

MRS. TALLY: No, sir.

COURT: *Give her a copy of those and you may recall Mr. Byrd, if you wish, or any other witness you wish.* (Emphasis supplied.)

All right. If you need time for those, I will give you until tomorrow, if you need to. Would you like time to consider those documents?

MR. WILLIAMS: Your Honor, at this time we would ask to continue whatever proceedings until tomorrow. At

this time I don't think we are going to call these witnesses back but we would like some time.

COURT: I will give you time to do that."

When court convened the next morning and before the jur entered the courtroom, Judge Fountain again asked defendant if h would like to recall *any* of the state's witnesses. The offer was declined. Defendant then had the opportunity to cross-examine Ms. Davenport or any other witness concerning these statements but declined to do so. Judge Fountain's rulings not only did not deny defendant's right of confrontation, they scrupulously protected it.

[16] Defendant next argues the state failed to show chain of custody as to a pair of boots which had been taken from him after his arrest. Defendant does not argue that the boots are not his. Nor does he argue that they have been altered in any way. He contends, instead, that the state has failed to establish where the boots were kept and in whose custody they reposed during the period between their seizure and their introduction into evidence.

We conclude there was no need to show a chain of custody as a prerequisite to admitting the boots. Detective Byrd testified that the boots offered in evidence were those he observed taken from defendant at the Law Enforcement Center after defendant's arrest. He then noticed that the boots had a new pair of shoelaces in them. The shoelaces contained in the boots when they were offered into evidence were those which he had noticed earlier. This was sufficient identification of the boots to permit them to be offered without showing a chain of custody. *State v. Boyd*, 287 N.C. at 143, 214 S.E. 2d at 20-21.

[17] At the close of the state's case, the following occurred:

"MR. GRANNIS: Your Honor, at this time if we have not offered all the exhibits into evidence, we would at this time offer all that had not heretofore been admitted into evidence.

MRS. TALLY: We would OBJECT.

COURT: Which ones do you specifically object to?

MR. WILLIAMS: If he says he is going to introduce all of them, we are going to OBJECT to all of them.

COURT: Then I'm going to OVERRULE your objection. Let them be admitted."

Defendant now asserts that he was entitled at that stage of the trial to have each exhibit individually introduced so that he could interpose objections to inadmissible items. He now says the procedure deprived him of due process of law.

We disagree. There is no showing in the record that the state was attempting to or did surreptitiously slip into evidence some new item to which defendant had not had an opportunity to object. So far as the record reveals defendant did, in fact, have opportunity to interpose objections to every item of physical or documentary evidence shown to the jury during the trial. It is obvious that the district attorney was seeking to insure that all such items and only such items were formally introduced into evidence. Defendant was given opportunity to object specifically to any item. He declined to do so. We find no error in this procedure.

[18] Defendant next argues the trial court erred by not allowing him to "make a record" as to prior written statements of Ms. Davenport that identified him as her assailant and described his characteristics. These statements are embodied in handwritten notes taken during a questioning session between Ms. Davenport and law enforcement officers on 14 September 1977 and answers which she gave to Detective Byrd on 20 September 1977. At the close of the state's evidence defendant moved to have this material placed in an envelope and sealed for purposes of appellate review. Judge Fountain denied this motion. Defendant asserts this action violated his right to due process of law and constitutes reversible error. We disagree.

When a defendant seeks to compel disclosure by the state of evidence material to his defense and embodied in the statement of a witness for the prosecution, the requirements of due process are satisfied by the order of the trial judge directing that an *in camera* hearing be held on the attempt to compel disclosure. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). At the close of the hearing, the trial judge is obligated to make findings of fact and conclusions of law. If the trial judge *denies* a defendant's motion in this regard, it is incumbent upon him to order that the sealed statement be placed in the record for appellate review. *State v. Hardy, supra*, 293 N.C. at 128, 235 S.E. 2d at 842.

Judge Fountain did not *deny* defendant's motion to compel discovery; he *allowed* it. He directed the district attorney at trial to

give defendant the statements in question; offered to allow defendant to recall any witness whom he wished to examine concerning the documents; and offered to grant a recess so that defendant would have opportunity to consider the materials. There was no error in his rulings regarding these statements. They were quite favorable to defendant.

At the close of the state's evidence, defendant moved for judgment of dismissal. Defendant concedes the evidence adduced by the state was sufficient to enable the state to go to the jury on the issue of defendant's guilt. Nevertheless he asks this Court to review the sufficiency of the state's evidence in light of the seriousness of the offenses with which he is charged and the penalty pronounced upon him. This we have done. Our examination impels our conclusion that the evidence introduced by the state fully warranted submission of the question of defendant's guilt to the jury for its consideration.

V.

[19] Defendant brings forward a number of assignments of error challenging the accuracy and sufficiency of Judge Fountain's jury instructions. We conclude there was no error in these instructions.

Defendant argues that Judge Fountain erred by not giving defendant's requested jury instruction concerning the identification of defendant as the perpetrator of the crime. The essence of the requested instruction is that the jury must be satisfied beyond a reasonable doubt that defendant was the perpetrator of the crime and that in testing the credibility of a witness' identification the jury ought to weigh several factors in the balance: the capacity of the witness to make an observation through the senses, the opportunity of the witness to make such an observation, and such details as the lighting at the scene of the crime, the mental and physical condition of the witness, the length of time of the observation, the degree of attention being paid by the witness, as well as any other factors which might have aided or hindered the witness in making the observation. Judge Fountain responded to the request by saying that he would, in substance, give the requested instruction. *See, e.g., State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). He stated:

> "I instruct you that it is your duty to consider the testimony of each of the witnesses. Determine the means and

> opportunity of each of the witnesses to know the things about which they testify or lack of means and opportunity to know the things about which they testify. You shall give to the testimony of each of the witnesses sufficient weight and credibility as you find it deserves in order to ascertain the truth."

He also instructed the jury on defendant's contentions as follows:

> "He contends that you should not accept the identification of him by Barbara Davenport. He contends that the evidence offered by the State shows that she had only a scant opportunity to observe whoever it was present and that her description of her assailant was not the description of the Defendant. He contends, that is, the Defendant contends, that she, Barbara Davenport, has on different occasions made statements inconsistent with her testimony in a material way and that you should reject her testimony concerning any kind of identification."

These instructions taken together adequately convey the substance of defendant's request. There was no error in failing to give defendant's request in its exact form. *State v. Monk, supra.*

[20] Nor did Judge Fountain err by denying defendant's request that evidence brought out on cross-examination of state's witnesses be included in the court's summary of the evidence. In response to this request, Judge Fountain stated:

> "Well, Mrs. Tally, I do not charge my juries that way. I do not take the witnesses and tell the jury what the witness has said, either on direct or cross. I will briefly summarize the evidence only sufficiently to charge the jury on the law. It is not my intention to attempt to quote what any witness said about anything."

This response was altogether a correct statement of a trial judge's duty regarding his summary of the evidence. "In instructing the jury, the judge must declare and explain the law arising on the evidence. *He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence.* He must not express an opinion whether a fact has been proved." G.S. § 15A-1232. (Emphasis supplied.) His instructions comported with this response. Judge Fountain briefly arrayed the evidence for

the state, and gave the state's contentions. He then gave a full statement of defendant's contentions concerning this evidence, its failure to prove his guilt beyond a reasonable doubt, its contradictions, its weaknesses, and the portions of it which were favorable to his defense.

Prejudicial error is committed when a trial judge gives an exhaustive and detailed array of the state's contentions and evidence but deals with the contentions and evidence of the defendant in only a brief and summary fashion. *State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962); *State v. Kluckhohn*, 243 N.C. 306, 90 S.E. 2d 768 (1956). But a trial judge is not required to consume an equal amount of time in stating the contentions and evidence of each party to a case. *See State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971), *death sentence vacated*, 408 U.S. 939 (1972). Judge Fountain's instructions were carefully balanced both for the state and defendant. There was no error in this aspect of the instructions.

[21] Defendant next contends that the trial court erred in stating his contentions to the jury. The essence of defendant's argument is that it is a "dangerous practice" to state the contentions of the parties and that the trial court ought to leave discussion of the parties' contentions to their respective oral arguments. Defendant offers no authority in support of this position. The rule with us is that it is not error for the trial judge to state the contentions of the parties provided that the contentions of each litigant are stated fairly and accurately. *See State v. Thomas*, 284 N.C. 212, 200 S.E. 2d 3 (1973). There was no error in this aspect of the instructions.

Defendant further argues that Judge Fountain misstated one of his contentions when he said:

> "[Defendant] further contends that the evidence favorable to him tends to show that his statement that he had been in Virginia at the military camp was consistent with the truth; that it was just a way of saying that he had nothing to do with and was not present at the time of the alleged crime."

Defendant argues that Judge Fountain by this statement gave a contention of defendant that he was in Virginia at the time of the crimes whereas defendant did not so contend. We do not read the statement this way. It is rather a statement of defendant's conten-

tion that he was not the perpetrator because he was somewhere else at the time of the crime. In addition Judge Fountain offers a plausible explanation favorable to defendant for his pre-trial statement that he was in Virginia when the crimes were committed—a statement which some of the state's evidence tended to refute—in the event the jury might believe that such a statement was made. Furthermore misstatements of a party's contentions ordinarily must be called to the trial court's attention in order to give opportunity for correction before they can be considered on appeal. *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978).

Defendant next argues that Judge Fountain inadequately defined the crimes of first degree rape and first degree murder. Suffice it to say that we have carefully examined these portions of the jury instructions and find them to be complete and accurate statements of the law. Nothing would be served by our setting out the instructions and demonstrating their accuracy.

[22] After Judge Fountain had completed his summary of the evidence, and during his instruction on the elements of the various degrees of rape, he stated:

> "Of course, the fact that a person has sexual intercourse — if in fact such an act was committed by or upon Nancy Coates — in and of itself does not mean that that person has been a victim of rape. However, the state has offered evidence which I failed to mention. I do so now simply because I overlooked it in the summation I made earlier; that the vagina of Nancy Coates was in some way injured. I don't recall the exact testimony in that regard — or it was damaged in some way — and that semen was present, which I think I did mention."

Defendant argues that this insertion of additional evidence at this point, albeit evidence which had been presented, constitutes error because it gave undue emphasis to that evidence. By so doing, defendant says that Judge Fountain expressed an opinion prejudicial to defendant in violation of G.S. §15A-1232.

We cannot agree. Even if placement of this bit of evidence unduly emphasized it, we are satisfied no prejudice to defendant resulted. That Nancy Coates was raped is a fact beyond dispute in

this case. She was assaulted with a knife and her hands bound behind her. She was heard by her companion to protest the action of her assailant. She was found nude from the waist down. An autopsy revealed two prominent stab wounds in her chest and back; scratches over her thighs and legs; lacerations to and live, mobile sperm in her vagina. The defense did not rest on consent. The defense was that defendant was not the perpetrator. Had the battleground in this case been whether Ms. Coates was raped or consented to intercourse this instruction would have to be more closely scrutinized. As the case stands the instruction, even if error, could not have been prejudicial.

[23] There was no error in Judge Fountain's instructions to the jury concerning the age of defendant. Judge Fountain stated:

> "As far as I recall, there is no evidence of the defendant's age in this case. However, it is proper for the jury to look at the defendant, consider whether he appears to be more than sixteen years of age or not; consider the evidence as to whether he was or was not operating a vehicle; as to whether he was or was not married; any other evidence in the case that you consider relevant in determining whether he is more than sixteen years of age."

An essential element of the crime of first degree rape is that defendant must be sixteen years of age or older. G.S. §14-21; *State v. Goss, supra; State v. Perry, supra.* A jury may look upon a defendant to determine his age, *State v. Evans*, 298 N.C. 263, 258 S.E. 2d 354 (1979), and may consider other circumstances, such as those mentioned by Judge Fountain, which bear upon a person's age in determining this issue.

[24] Defendant next complains of this instruction on circumstantial evidence:

> "The facts, relations, connections and combinations should be natural, clear, reasonable and satisfactory. When such evidence is relied upon to convict, it should be clear, convincing and conclusive in all its combinations and should exclude all reasonable doubt as to guilt.
>
> . . . .

> After considering the evidence in this way and determining the circumstances, if any, which are established beyond a reasonable doubt, the next thing for the jury to determine is do these circumstances include every reasonable conclusion except that of guilt. If so, the evidence is sufficient to convict. If not, it is not."

Judge Fountain inadvertently used the word "include" rather than "exclude" in the second paragraph. In all other respects, it is correct. *Compare State v. Sledge*, 297 N.C. 277, 254 S.E. 2d 579 (1979); *State v. Hood*, 294 N.C. 30, 239 S.E. 2d 802 (1978). Viewing the instruction as a whole, *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970), we are satisfied the jury was not misled or confused by this *lapsus linguae*. A mere slip of the tongue which is not called to the attention of the court at the time it is made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled thereby. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968).

[25] At the close of Judge Fountain's instructions, defendant renewed his motion that the jury be charged on the evidence tending to identify him as the perpetrator. Judge Fountain then stated to the jury:

> "Members of the Jury, inasmuch as you have not begun your deliberations, the Defendant's counsel has requested that I instruct you further about certain matters, each of which I thought I had covered but, in an abundance of precaution, I will comment about it further.
>
> As I said to you, and I say again so that it will not be misunderstood, in order for the Jury to find beyond a reasonable doubt that the Defendant is guilty of any degree of any of the offenses charged or of anything whatever, obviously, the State must satisfy the Jury from the evidence and beyond a reasonable doubt that the Defendant was present at the place referred to in this testimony on the afternoon and early evening of September 13, 1977. If he was not present or if you have a reasonable doubt as to his presence, you would acquit him of all charges because in order to find him guilty, the State must prove that he was present and

> that he participated in and committed the crimes charged."

We have already considered and rejected defendant's contention that Judge Fountain's earlier instructions on identification testimony were inadequate. Defendant argues here that Judge Fountain in these closing instructions prejudicially expressed an opinion adverse to defendant. The argument is feckless. Judge Fountain's statement that he had thought he had covered the matter earlier but would give additional instructions out of an abundance of caution does not constitute an expression of opinion. There was no error.

When the jury returned verdicts finding defendant guilty as charged, defendant moved to set aside the verdict as contrary to law and evidence and for a new trial for error committed. Both motions were denied. The first is addressed to the sound discretion of the trial court and is not reviewable on appeal absent a showing of an abuse of discretion. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated*, 429 U.S. 912 (1976). No such abuse of discretion has been shown. We find no error in the guilt phase; therefore the second motion was properly denied.

VI.

After the jury found defendant guilty of first degree murder, it was excused by Judge Fountain until the following day. In the jury's absence defendant renewed his motion that the state disclose whatever evidence relevant to sentencing it intended to rely on. Judge Fountain requested that the state give defendant "a statement of what aggravating circumstances" it intended to rely upon and "any written statements from any witnesses concerning" those aggravating circumstances. The following colloquy then occurred between the court and the prosecutor:

> "MR. GRANNIS: That will take some time.
>
> COURT: Do you have any written statements concerning the punishment aspect of it that has not already been given?
>
> MR. GRANNIS: Yes, sir.
>
> COURT: You do?
>
> MR. GRANNIS: Yes, sir.
>
> COURT: Let her have those and let her know what aggravating circumstances you expect to offer.

MR. GRANNIS: Those aggravating circumstances based on all the evidence.

COURT: Right, assuming you do not intend to proceed on all of them.

MR. GRANNIS: Correct.

COURT: So whichever one or more you expect to proceed on, just give her a statement to that effect.

This constitutes DEFENDANT'S EXCEPTION NO. 126.

MR. GRANNIS: Your Honor, we would intend tomorrow to proceed with regard to evidence concerning an incident where this Defendant was involved in Chatham County. I have not determined what written statements were taken from the victims that are present here in court but I do have a transcript and I can Xerox all that.

COURT: Do you need it tonight?

MRS. TALLY: I do.

MR. GRANNIS: I will go to the Clerk's Office and give her a copy. That will take a little time but I think I can have it done this afternoon.

COURT: All right."

The following day court was convened for the sentencing hearing. The state offered no evidence in chief, intending apparently to rely upon evidence presented during the guilt determination phase. Defendant offered the testimony of Jerry Wooten, a paralegal in the Public Defender's Office; Joe Pratt, a correctional sergeant with the North Carolina Department of Correction assigned to Central Prison; defendant's neighbors; and members of defendant's family. This evidence tended to show that defendant was married and the father of two children. He was a good husband and father and, according to his parents, had been a good, dutiful son. He was the third of eight children and had a normal childhood. He participated in the Boy Scouts and Little League Baseball and held a number of part-time jobs. After participating in Junior R.O.T.C. in high school, he left high school in his senior year to join the Army. Thereafter he obtained his high school equivalency certificate and attained the rank of sergeant.

The state offered rebuttal evidence from various military personnel who had known defendant in the Army. These witnesses

testified that defendant's "general character and reputation" in the Army was "bad." Judge Fountain instructed the jury that they should not consider this character testimony as "substantive evidence." He said, "It is evidence offered only for the purpose of impeaching the testimony of witnesses offered by the defendant to the effect that he was a person of good character, or a good person... "

On the state's cross-examination of Jerry Wooten, the Public Defender's paralegal, Wooten testified that he was aware that defendant had been tried and convicted in Chatham County of "a sexual offense," an "assault," and "crime against nature." Wooten further testified that he was not aware "until this morning" that the victims of these crimes were named Johnson. The state then offered the testimony of Mr. and Mrs. Johnny Johnson which tended to show that in September 1976 in Chatham County defendant assaulted them with a pistol, tied them, and after threatening them with death if they did not cooperate, forcibly committed a "crime against nature" against Mrs. Johnson.

Before trial defendant had moved to suppress all reference to the Johnson incidents on the ground that the case had been tried in October 1977 and was then on appeal to the North Carolina Supreme Court.[5] Judge Fountain reserved ruling on the motion. During the sentencing phase, over defendant's objection,[6] he permitted the evidence to be offered.

[5]This Court later found no error in defendant's Chatham County convictions for (1) the kidnapping of Mr. and Mrs. Johnson, (2) crime against nature performed upon Mrs. Johnson, and (3) assault with intent to rape Mrs. Johnson. *State v. Silhan*, 297 N.C. 660, 256 S.E. 2d 702 (1979).

[6]Defendant's brief makes it clear that his objections to this testimony were based on two grounds: (1) the Chatham County convictions were on direct appeal at the time of this trial, and (2) the Chatham County convictions were not obtained until after the incidents in the present case occurred. As we have already noted, no error was found by this Court in the Chatham County convictions. *See* n. 5, *supra*. Further, since the date of this trial, we have held that the state may utilize the aggravating circumstance defined by G.S. §15A-2000(e)(3), *i.e.*, "The defendant had been previously convicted of a felony involving the use or threat of violence to the person," if the state establishes that: "(1) defendant had been convicted of a felony, that (2) the felony for which he was convicted involved the 'use or threat of violence to the person,' and that (3) the *conduct* upon which this conviction was based was *conduct which occurred prior to the events out of which the capital felony charge arose.*" *State v. Goodman*, 298 N.C. 1, 22, 257 S.E. 2d 569, 583 (1979). (Emphasis supplied.) This point is discussed more fully later in the text.

Judge Fountain submitted one aggravating circumstance, that defined by G.S. § 15A-2000(e)(5), to the jury for its consideration: The capital felony, first degree murder, "was committed while the defendant was engaged . . . in the commission of, or the attempt to commit . . . rape . . . ." The jury found beyond a reasonable doubt the presence of this circumstance. *See* G.S. § 15A-2000(c)(1). Judge Fountain charged the jury as to these mitigating circumstances: Defendant's lack of a history of prior criminal activity; defendant's age at the time of the crime; and any other circumstance arising from the evidence which the jury deemed to have mitigating value. *See* G.S. §§ 15A-2000(f)(1), (7) and (9). The jury found that defendant had no significant history of prior criminal activity and that there were unspecified circumstances which it deemed to have mitigating value. The jury found the age of defendant was not a mitigating factor. The jury further found beyond a reasonable doubt: (1) the aggravating circumstance was sufficiently substantial to call for the imposition of the death penalty, and (2) the mitigating circumstances were insufficient to outweigh the aggravating circumstance. *See* G.S. §§ 15A-2000(c)(2) and (3). The jury therefore recommended that defendant be sentenced to death.

Pursuant to the jury's mandate, Judge Fountain sentenced defendant to death in the murder case. Judge Fountain also sentenced defendant to life imprisonment in the first degree rape case and to a consecutive term of twenty years imprisonment in the assault case. Both terms of imprisonment were to be served upon the expiration of the sentences which had been imposed upon defendant for his criminal conduct in Chatham County. Defendant's motion to arrest judgment in the rape conviction was denied.

Defendant contends that it was error to deny his motion to arrest judgment in the rape conviction and that it was also error to permit the jury to consider this rape as an aggravating circumstance in the murder case. He asks for a new sentencing hearing because of the latter error. We agree with both contentions and order that judgment be arrested in the rape case and that a new sentencing hearing be conducted in the murder case. The reason is that the jury was permitted to return a first degree murder verdict on the theory of felony murder in which the rape constituted the underlying felony.

[26] When a defendant is convicted of first degree murder pursuant to the felony murder rule, and a verdict of guilty is also returned

on the underlying felony, this latter conviction provides no basis for an additional sentence. It merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested. *State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563 (1977); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). When, however, a defendant has been convicted of first degree murder on a theory of premeditation and deliberation and in the process commits some other felony, the other felony is not an element of the murder conviction although the other felony may be part of the same continuous transaction. Defendant may in such cases be sentenced upon both the murder conviction and the other felony conviction. *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). But when a jury is properly instructed upon both theories of premeditation and deliberation and felony murder, and returns a first degree murder verdict without specifying whether it relied on either or both theories, the case is treated as if the jury relied upon the felony murder theory for purposes of applying the merger rule. Judgment imposed on a conviction for the underlying felony must be arrested. *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975), *death sentence vacated*, 428 U.S.903 (1976).

Here evidence in the murder case supported submission of both theories of first degree murder: premeditation and deliberation and felony murder committed during a rape. The jury did not specify that it relied on either or both theories. Therefore judgment on the rape conviction must be arrested.

[27] When a criminal defendant is convicted of first degree murder upon a theory of felony murder, it is error to submit the underlying felony to the jury at the punishment phase of trial as one of the aggravating circumstances defined by G.S. § 15A-2000(e)(5). *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979). However, when the murder is committed during the commission of a felony enumerated by G.S. § 15A-2000(e)(5) and defendant is convicted of first degree murder on a theory of premeditation and deliberation, the other felony may properly be considered as an aggravating circumstance. *See State v. Cherry, supra*. Similarly, when a jury specifies that it finds a defendant guilty upon both theories and *both* are supported by the evidence, the underlying felony may properly be submitted as an aggravating circumstance. *State v. Goodman*, 298

N.C. 1, 257 S.E. 2d 569 (1979).[7]

Here, as in *McLaughlin*, both theories of first degree murder were properly submitted to the jury, but the jury did not specify the theory or theories upon which it relied. As in *McLaughlin* judgment on the underlying felony, *i.e.*, the rape, must be arrested. Likewise this underlying felony may not be considered as an aggravating circumstance in the penalty phase, because it has merged with and become a part of the murder conviction as an essential element thereof. *State v. Cherry, supra.*

The state's reliance upon *State v. Johnson, supra*, 298 N.C. 47, 257 S.E. 2d 597, is misplaced. In *Johnson* defendant pleaded guilty to first degree murder. At the sentencing hearing, the state introduced evidence that the murder was committed during the commission of or attempt to commit the crime of rape. The evidence which was adduced to provide a factual basis for defendant's guilty plea would have supported a conviction of first degree murder on a theory of premeditation and deliberation, felony murder, or both. We held that the question of the correctness of submitting the rape as an aggravating circumstance simply did not arise. We nevertheless vacated Johnson's death sentence on other grounds.

Johnson, as noted, involved a guilty plea, not a jury verdict. A defendant, nothing else appearing, pleads guilty to a charge contained in a bill of indictment not to a particular legal theory by which that charge may be proved. His plea waives his right to put the state to its proof. It obviates the necessity for the state's invocation of some particular legal theory upon which to convict defendant. The question of which theory, if there is more than one available, upon which defendant might be guilty does not arise. His plea of guilty means, nothing else appearing, that he is guilty upon any and all theories available to the state. The effect, then, of a guilty plea to first degree murder, the factual basis for which demonstrates that there is more than one theory to support it, is the same as a jury verdict of guilt which specifies that it is on all theories available — the situation which existed in *State v. Goodman, supra*,

[7] Whenever a first degree murder case is submitted on both theories and the state intends to rely on the underlying felony as the basis for a separate conviction and sentence or as an aggravating circumstance at the sentencing hearing, the trial judge should require the jury to specify which theory or theories it used in arriving at its verdict.

298 N.C. 1, 257 S.E. 2d 569. *Johnson*, then, stands with *Goodman* vis-a-vis the propriety of relying on the underlying felony in the sentencing phase.

[28] The trial judge submitted to the jury only one aggravating circumstance; as we have noted, it should not have been submitted. There was, however, evidence of that aggravating circumstance defined by G.S. § 15A-2000(e)(9): "The capital felony was especially heinous, atrocious, or cruel." We considered the meaning of this aggravating circumstance in *State v. Goodman, supra*, 298 N.C. 1, 24-25, 257 S.E. 2d 569, 585 (1979). We said:

> "While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word 'especially' the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection."

Adopting the Florida and Nebraska view, we concluded in *Goodman* that in order for this aggravating circumstance to apply the murder must be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Id.* at 25, 257 S.E. 2d at 585. We approved in *Goodman* the following jury instruction:

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

We limited the application of this aggravating circumstance in *Goodman* so that it would not become "a catch all provision which can always be employed in cases where there is no evidence of other

aggravating circumstances." *Id.* at 25, 257 S.E. 2d at 585.[8]

Noting these principles and the cases in which the aggravating circumstance has been applied, we are satisfied that it could and should have been submitted in this case. The evidence tends to show that before she was murdered, Mary Jo Nancy Coates was stripped from the waist down. Her hands were tied behind her back, and her brassiere was tied around her neck. She was marched at knife point by her assailant into nearby woods where she was forced to lie on the ground. She was beaten before she was murdered. Clearly this murder constituted a "conscienceless" and "pitiless" crime which was "unnecessarily torturous to the victim." *See State v. Goodman, supra.* The jury could have found, had it been given the opportunity to do so, that the murder of Mary Jo Nancy Coates was especially heinous, atrocious, or cruel.

[29] It is not clear from the record why the "especially heinous" aggravating circumstance was not submitted to the jury. The state in its brief takes the position that the prosecution at trial "did not rely" upon this aggravating circumstance.[9] Suffice it to say that the prosecution in a capital case has no power to withdraw from the jury's consideration any aggravating circumstance which is in fact supported by evidence adduced at the guilt or the sentencing phase. G.S. § 15A-2000(b) provides:

> "(b) *Sentence Recommendation by the Jury.*— Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to

[8] In both *Goodman* and *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979) we concluded that the submission of this aggravating circumstance was proper. In *State v. Oliver & Moore*, 302 N.C. 28, 274 S.E. 2d 183 (1981), however, we concluded that this aggravating circumstance should not have been submitted in one of the murders there involved.

[9] The state takes this position in answer to defendant's contention that the prosecution at trial never properly disclosed those aggravating circumstances upon which it intended to rely. The state in its brief says with reference to the "especially heinous" circumstance:

> "The only other aggravating circumstance the prosecution could have used was that of 'especially heinous,' GS 15A-2000(e)(9). Evidence of this would have been developed earlier in the case; however, *in view of the fact the prosecution did not rely upon this* and the jury did not find it in their sentencing verdict, failure to disclose it was non-prejudicial beyond a reasonable doubt." (Emphasis supplied.)

> the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsection (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances."

Furthermore, the state is without power to agree to a life sentence or to recommend such a sentence to the jury during the sentencing phase "when the state has evidence from which a jury could find at least one aggravating circumstance beyond a reasonable doubt." *State v. Johnson, supra*, 298 N.C. 47, 79, 257 S.E. 2d 597, 619 (1979).[10]

It would also seem that at the new sentencing hearing the state would have evidence of that aggravating circumstance defined by G.S. § 15A-2000(e)(3), *i.e.*, that the "defendant had been previously convicted of a felony involving the use or threat of violence to the person." To take advantage of this aggravating circumstance the state must prove: "(1) defendant had been convicted of a felony . . . (2) the felony for which he was convicted involved the 'use or threat of violence to the person,' and . . . (3) the *conduct* upon which this conviction was based was *conduct which occurred prior to the events out of which the capital felony charge arose.*" *State v. Goodman, supra*, 298 N.C. at 22, 257 S.E. 2d at 583 (emphasis supplied); *see* n. 6, *supra*.

In suggesting the submission of these additional aggravating circumstances at the new sentencing hearing we are not insensitive to the dictates of the Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment,

---

[10] Where, however, "the state has no evidence of an aggravating circumstance we see nothing in the statute which would prohibit the state from so announcing to the court and jury at the sentencing hearing. Such an announcement must be based on a *genuine lack of evidence* to support the submission to the jury of any of the aggravating circumstances listed in G.S. § 15A-2000(e). Upon such an announcement being made and upon failure of the state to offer evidence of any aggravating circumstance the judge may proceed to pronounce a sentence of life imprisonment without the intervention of the jury." *State v. Johnson, supra*, 298 N.C. at 79-80, 257 S.E. 2d at 620. (Emphasis supplied.)

Benton v. Maryland, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S.Ct. 2056 (1969), and the corresponding provision of our own constitution. N.C. Const., Art. I, § 19; *State v. Crocker*, 239 N.C. 446, 80 S.E. 2d 243 (1954).[11]

[30] With regard to criminal *convictions*, if the conviction is reversed on appeal for insufficiency of evidence, the Double Jeopardy Clause precludes remanding the case for a new trial even if the state has evidence which it could offer at a new trial but did not offer at the trial from which the appeal is taken. *Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S.Ct. 2141 (1978). There is no such impediment in ordering a new trial when the first trial was tainted by mere "trial error." *Id.* Trial error occurs for purposes of applying the Double Jeopardy Clause when a conviction appealed from was based on a single erroneous legal theory when the state's *evidence* at the first trial would have supported another valid legal theory. *Compare Burks v. United States, supra*, with *Forman v. United States*, 361 U.S. 416, 4 L. Ed. 2d 412, 80 S.Ct. 481 (1960); *see State v. Williams*, 224 N.C. 183, 29 S.E. 2d 744 (1944), *aff'd sub nom. Williams v. North Carolina*, 325 U.S. 226, 89 L. Ed. 1577, 65 S.Ct. 1092 (1945).

In *United States v. DiFrancesco*, ___ U.S. ___, 66 L. Ed. 2d 328, 101 S.Ct. 426 (1980) the Supreme Court had occasion to consider the application of the Double Jeopardy Clause to a federal statute permitting the government to appeal a criminal sentence. A majority of the Court concluded that a provision of the Organized Crime Control Act of 1970 authorizing such an appeal of a convicted dangerous special offender's sentence on the ground that the sentence was insufficient did not violate the prohibition against double jeopardy. In reaching this conclusion, the Court discussed at length various principles which had emerged from the Court's earlier double jeopardy decisions. Quoting from *Green v. United States*, 355 U.S. 184, 187-188 (1957), the Court noted:

> "the constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.... The underlying

[11] We acknowledge that double jeopardy questions are not now before us, but we discuss them for the guidance of the trial court since they are likely to arise at the new sentencing hearing.

> idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The Court observed that while the primary purpose of the clause was "to preserve the finality of judgments . . . 'central to the objective of the prohibition against successive trials' is the barrier to 'affording the prosecution another opportunity to supply evidence *which it failed to muster in the first proceeding.*'" ___ U.S. at ___, 66 L. Ed. 2d at 340, 101 S.Ct. at 432. (Emphasis supplied.) The Court said that the prohibition against double jeopardy consisted "of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Id.* at ___, 66 L. Ed. 2d at 340, 101 S.Ct. at 433, *quoting from North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-665, 89 S.Ct. 2072 (1969). The Court emphasized, *id.* at ___, 66 L. Ed. 2d at 340-341, 101 S.Ct. at 433:

> "An acquittal is accorded special weight. 'The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal,' for the 'public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation."'"

We held in *State v. Jones*, 299 N.C. 298, 307-09, 261 S.E. 2d 860, 867 (1980) that "[d]ouble jeopardy considerations precluded a retrial" when a defendant is duly convicted of a capital offense but erroneously sentenced to life imprisonment by the trial judge who failed to conduct a sentencing hearing in the presence of evidence which would have supported at least one aggravating circumstance.

DiFrancesco, of course, addresses a problem different from the one with which we deal here. In *DiFrancesco* the Court was

concerned with whether on the government's appeal the likelihood of an increased sentence after a new sentencing hearing contravened double jeopardy prohibitions when both the original sentence was, and the new sentence would be, imposed in the discretion of the trial judge. Here we deal with a defendant's appeal. We are not concerned with the likelihood of an increased sentence nor with the relatively unbridled sentencing discretion of a trial judge in a non-capital case. We are concerned, rather, with a jury's sentencing decision in a capital case. Although the jury's sentencing discretion is not totally eliminated, it is not unbridled. It must be exercised under the guidance of "a carefully defined set of statutory criteria that allow[s] [the jury] to take into account the nature of the crime and the character of the accused." *State v. Johnson, supra,* 298 N.C. at 63, 257 S.E. 2d at 610; *see also State v. Barfield,* 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied,* ___ U.S. ___ (1980). Prerequisite to any jury decision imposing the death penalty the state must prove and the jury must find beyond a reasonable doubt at least one of the enumerated aggravating circumstances listed in G.S. § 15A-2000(e). *State v. Johnson, supra.* The jury must also find beyond a reasonable doubt: (1) the aggravating circumstance(s) is (are) "sufficiently substantial to call for the imposition of the death penalty"; and (2) the mitigating circumstance(s) is (are) "insufficient to outweigh the aggravating" circumstance(s). G.S. § 15A-2000(c); *State v. Johnson, supra,* 298 N.C. at 75, 257 S.E. 2d at 617. That the jury must find three specific things and must find them beyond a reasonable doubt before it can impose the death penalty puts upon the jury in a capital case much the same kind of duty it has in determining a defendant's guilt. The three requirements, in terms of the jury's function, are like the elements of a given criminal offense all of which the jury must find to exist beyond a reasonable doubt before it can return a guilty verdict. This makes our capital sentencing process more like a determination of guilt than like an ordinary discretionary sentencing decision of a trial judge such as that dealt with in *DiFrancesco.* We look, therefore, more to the double jeopardy principles dealing with criminal convictions, many of which were alluded to in *DiFrancesco,* than to the holding of *DiFrancesco* itself. In other words we believe the Double Jeopardy Clause places some limitations on the state in a new capital sentencing hearing ordered because of legal error committed in the hearing from which a defendant successfully appeals.

[31, 32] Applying the Double Jeopardy Clause jurisprudence just

discussed, we derive the following principles applicable to our capital sentencing procedure: The Double Jeopardy Clause is a limitation on the state's, not the defendant's, power to proceed. If a life sentence is imposed following conviction for a capital crime, the state may not appeal nor may a new sentencing hearing be ordered on defendant's appeal of his conviction even if the life sentence was the result of trial error favorable to defendant.[12] This would be tantamount to defendant's having been acquitted of the death penalty. If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy prohibitions would not preclude the state from relying on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed from and which was either not then submitted to the jury or, if submitted, the jury then found it to exist. The dictates of double jeopardy would preclude the state from relying on any aggravating circumstance of which it offered insufficient evidence at the hearing appealed from. This would be tantamount to the state's having offered insufficient evidence of an essential element of a criminal offense in which case the state, because of double jeopardy considerations, could not retry the defendant even if it had sufficient evidence which could be offered at a new trial. Similarly the prohibition against double jeopardy would preclude the state from relying, at a new sentencing hearing, on any aggravating circumstance the existence of which the jury at the hearing appealed from, upon considering it, failed to find. The jury's failure to find the existence of the aggravating circumstance, after it had considered it, would be tantamount to defendant's having been acquitted of this circumstance.

[33] In view of the foregoing, if upon defendant's appeal this Court vacates a death sentence for trial error, it will remand for a new sentencing hearing only if there are aggravating circumstances which would not be constitutionally or legally proscribed at the new hearing. An aggravating circumstance would not be so proscribed at the new hearing if (1) there was evidence to support it at the hearing appealed from; and (2) it was not submitted to the jury or, if submitted, the jury found it to have existed; and (3) there is no other

[12] This, of course, does not mean that the state and the trial judge may, with impunity, wilfully ignore the clear mandates of our capital sentencing statute. For flagrant, wilful refusals to comply with the statute, remedies other than an appeal, *e.g.*, *mandamus*, may be available.

legal impediment (such as the felony murder merger rule) to its use. If all aggravating circumstances would be constitutionally or legally proscribed at the new hearing, this Court will not remand for a new sentencing hearing but will order that a sentence of life imprisonment be imposed. An aggravating circumstance would be so proscribed at the new hearing if either (1) there was no sufficient evidence to support it at the hearing appealed from; or (2) the jury at the hearing appealed from, after considering it, failed to find that it existed; or (3) there would be some other legal impediment (such as the felony murder merger rule) to its use.

[34] Applying these principles to the case at hand, we have no hesitancy in remanding it for a new sentencing hearing. The prohibition against double jeopardy will not preclude the state from offering evidence of and relying on both the "prior felony" and "especially heinous" aggravating circumstances defined, respectively, by G.S. § 15A-2000(e)(3) and (9). There was evidence of both of these aggravating circumstances at the hearing appealed from. Neither was submitted to the jury.[13]

Defendant may argue at the new sentencing hearing that the "prior felony" circumstance should not be submitted because the jury has somehow resolved this issue against the state when it concluded at the hearing appealed from that defendant had no significant history of prior criminal activity. It is clear from the record that whether defendant had a significant criminal history was the issue to which evidence of the Chatham County convictions was directed.[14]

[13] The "prior felony" circumstance may not have been submitted because at the time of the hearing appealed from the convictions were on direct appeal to this Court. The appeal was, however, resolved against defendant and presumably these convictions are now final. *See* n. 5, *supra*. We express no opinion on whether the trial court properly failed to submit this circumstance on the ground suggested. Since the appeal has been resolved the question of whether a prior conviction presently on direct appeal may be utilized by the state in a capital sentencing hearing will not arise at the new hearing.

[14] The record supports the conclusion that evidence of the Chatham County convictions was offered not for establishing the "prior felony" aggravating circumstance, but solely for the purpose of disproving the mitigating circumstance that "defendant had no significant history of prior criminal activity." Indeed defendant now argues that it was prejudicial error for the trial judge to have submitted this mitigating circumstance inasmuch as defendant did not ask that it be submitted and never contended that he had no history of prior criminal activity. Defendant argues

The argument must fail. The fact is that the jury was not permitted to consider whether the "prior felony" aggravating circumstance existed. Judge Fountain, for whatever reason, did not submit it. Evidence of the Chatham County convictions was not, furthermore, geared to show that defendant had been formally convicted of the crimes as much as it was offered to show simply that he had been involved in prior criminal activity. The state, for example, never sought to offer the Chatham County court records which would have been the best evidence of defendant's prior convictions. It barely tied evidence of the Chatham County incidents to the "convictions" referred to in Jerry Wooten's testimony on cross-examination. The only connection was Wooten's testimony that he did not know the name of the victims to be "Johnson" until the very morning of his testimony. Thus the jury has not resolved the issue of the "prior felony" circumstance against the state.

[35] We note in this regard that the most appropriate way to show the "prior felony" aggravating circumstance would be to offer duly authenticated court records. Testimony of the victims themselves should not ordinarily be offered unless such testimony is necessary to show that the crime for which defendant was convicted involved the use or threat of violence to the person. There should be no "mini-Trial" at the sentencing hearing on the questions of whether the prior felony occurred, the circumstances and details surrounding it, and who was the perpetrator. Whether a defendant has, in fact, been convicted of a prior felony involving the use or threat of violence to a person would seem to be a fact which ordinarily is beyond dispute. It should be a matter of public record. If, of course, defendant denies that he was the defendant shown on the conviction record, the occurrence of the conviction, or that the crime involved the use or threat of violence to the person, then the state should be permitted to offer such evidence as it has to overcome defendant's denials.

---

that the sole reason for submitting this mitigating circumstance was to permit the state to offer evidence of the Chatham County convictions which, defendant contends, would not otherwise have been admissible. Whatever motive the state might have had in offering this evidence, the fact is that it was offered. Therefore the principle that the state may not at a new sentencing hearing offer evidence of an aggravating circumstance of which there was no sufficient evidence offered at the hearing successfully appealed from does not preclude the state from offering evidence of and relying on this circumstance at the new sentencing hearing.

[36] Finally, defendant argues that to admit testimony, in rebuttal, of his bad character, was prejudicial error. After defendant had offered evidence that he had been a good child, a good husband and father, and a good neighbor, the state in rebuttal offered evidence that defendant's general character and reputation in the military was bad. There was no error in admitting this character evidence.

Our capital sentencing statute not only permits but requires juries to determine the sentence guided "by a carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." *State v. Johnson, supra*, 298 N.C. at 63, 257 S.E. 2d at 610. This statute, however, limits the state in its case in chief to proving only those aggravating circumstances listed in section (e).[15] Bad reputation or bad character is not listed as an aggravating circumstance. Therefore the state may not in its case in chief offer evidence of defendant's bad character. A defendant, however, may offer evidence of whatever circumstances may reasonably be deemed to have mitigating value, whether or not they are listed in section (f) of the statute. *State v. Johnson, supra*, 298 N.C. at 72-74, 257 S.E. 2d at 616-617. Often this may be evidence of his good character. *Id.* The state should be able to, and we hold it may, offer evidence tending to rebut the truth of any mitigating circumstance upon which defendant relies and which is supported by the evidence, including defendant's good character. Here, despite defendant's contentions to the contrary, he did offer evidence of his good character. It is true that the evidence was not cast in terms of defendant's reputation in his community. Nevertheless it was evidence tending to show defendant to be, generally, a good person by those most intimately acquainted with him. In face of this evidence, the state was entitled to show *in rebuttal* that defendant's reputation among others familiar with it was not good. Both the state and defendant are entitled to a fair sentencing hearing, and the jury is entitled to have as full a picture of a defendant's character as our capital sentencing statute and constitutional limitations will permit.

Other errors assigned by defendant to the sentencing phase are not likely to arise at the new sentencing hearing; therefore we do not discuss them.

---

[15] Section (e) provides "aggravating circumstances which may be considered *shall be limited* to the following:" (Emphasis supplied.)

CONCLUSION

The murder case is remanded for a new sentencing hearing to be conducted in a manner not inconsistent with this opinion. Judgment is arrested in the rape case. There is no error in the felonious assault case, nor in defendant's conviction of first degree murder.

DEATH SENTENCE VACATED AND REMANDED FOR A NEW SENTENCING HEARING in Case No. 79-CRS-1943; JUDGMENT ARRESTED in the rape count in Case No. 79-CRS-1943;
NO ERROR in Case No. 79-CRS-1942;
NO ERROR in the guilt phase in Case No. 79-CRS-1943.

Justice MEYER did not participate in the consideration and decision of this case.

STATE OF NORTH CAROLINA, EX REL. HIS EXCELLENCY, JAMES B. HUNT, JR., GOVERNOR OF THE STATE OF NORTH CAROLINA; STATE OF NORTH CAROLINA, EX REL. THE HONORABLE JOHN R. INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA; AND STATE OF NORTH CAROLINA, EX REL. THE HONORABLE RUFUS L. EDMISTEN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA v. NORTH CAROLINA REINSURANCE FACILITY, NORTH CAROLINA RATE BUREAU, ALLIANZ INSURANCE COMPANY, ALLSTATE INDEMNITY COMPANY, ALLSTATE INSURANCE COMPANY, AMERICAN AGRICULTURAL INSURANCE CO., AMERICAN AUTOMOBILE INS. CO., AMERICAN BANKERS INS. CO. OF FLA., AMERICAN CASUALTY CO. OF READING, AMERICAN DRUGGISTS' INS. CO., THE AETNA CASUALTY AND SURETY CO., THE AETNA FIRE UNDERWRITERS INS. CO., AETNA INS. CO., AFFILIATED F M INS. CO., AGRICULTURAL INSURANCE COMPANY, AIU INSURANCE COMPANY, ALLIANCE ASSURANCE CO., LIMITED, AMERICAN ECONOMY INSURANCE CO., AMERICAN EMPLOYERS' INS. CO., AMERICAN FIDELITY FIRE INS. CO., AMERICAN FIRE & CASUALTY CO., AMERICAN & FOREIGN INS. CO., AMERICAN GUARANTEE & LIABILITY INS. CO., AMERICAN HARDWARE MUTUAL INS. CO., AMERICAN HOME ASSURANCE COMPANY, AMERICAN INDEMNITY COMPANY, AMERICAN INS. CO., AMERICAN MFGR'S MUTUAL INS. CO. ILL., AMERICAN MOTORISTS INSURANCE CO., AMERICAN MUTUAL FIRE INSURANCE CO., AMERICAN MUTUAL INS. CO. OF BOSTON, AMERICAN MUTUAL LIABILITY INS. CO., AMERICAN NATIONAL FIRE INS. CO., AMERICAN PROTECTION INSURANCE CO., AMERICAN RE-INSURANCE CO. OF DEL., AMERICAN SECURITY INS. CO., AMERICAN STATES INSURANCE COMPANY, AMERICAN UNIVERSAL INS. CO., AMICA MUTUAL INSURANCE COMPANY, ARGONAUT INS. CO., ASSOCIATED GENERAL INSURANCE CO.,

ASSOCIATED INDEMNITY CORP., ASSURANCE COMPANY OF AMERICA, ATLANTIC INS. CO., ATLANTIC MUTUAL INS. CO., ATLAS ASSURANCE COMPANY OF AMERICA, AUTOMOBILE CLUB INSURANCE COMPANY, AUTOMOBILE INS. CO. OF HARTFORD, BALBOA INSURANCE COMPANY, BANKERS AND SHIPPERS INS. CO. OF NEW YORK, BANKERS STANDARD INSURANCE CO., BELLEFONTE UNDERWRITERS INS. CO., BEACON INSURANCE COMPANY, BIRMINGHAM FIRE INS. CO. OF PA., BITUMINOUS CASUALTY CORP., BITUMINOUS FIRE & MARINE INS. CO., BOSTON-OLD COLONY INS. CO., CALVERT FIRE INSURANCE COMPANY, CANAL INS. CO., CAROLINA CASUALTY INS. CO., CARRIERS INS. CO., CAVALIER INS. CORP., CENTENNIAL INS. CO., CENTRAL MUTUAL INS. CO., CENTRAL NAT'L INS. CO. OF OMAHA, CENTURY INDEMNITY CO., CHARTER OAK FIRE INS. CO., CHICAGO INSURANCE COMPANY, CHURCH MUTUAL INSURANCE COMPANY, CIMARRON INS. CO., INC., CINCINNATI INSURANCE COMPANY, COLONIAL PENN FRANKLIN INS. CO., COLONIAL PENN INSURANCE COMPANY, COMMERCE & INDUSTRY INS. CO., COMMERCIAL INS. CO. OF NEWARK, N.J., COMMERCIAL UNION INSURANCE CO., THE CONNECTICUT INDEMNITY CO., CONSOLIDATED AMERICAN INS. CO., CONTINENTAL CASUALTY CO., CONTINENTAL INS. CO., CONTINENTAL REINSURANCE CORP., COTTON STATES MUTUAL INS. CO., COVINGTON MUTUAL INSURANCE COMPANY, CRITERION INSURANCE COMPANY, CUMIS INSURANCE SOCIETY, INC., DRAKE INSURANCE COMPANY OF N.Y., ELECTRIC INSURANCE COMPANY, ELECTRIC MUTUAL LIABILITY INS. CO., EMCASCO INSURANCE COMPANY, EMMCO INSURANCE COMPANY, EMPIRE FIRE & MARINE INS. CO., EMPLOYERS CASUALTY COMPANY, EMPLOYERS FIRE INS. CO., EMPLOYERS MUTUAL CASUALTY CO., EMPLOYERS MUTUAL LIABILITY INS. CO. OF WIS., EMPLOYERS REINSURANCE CORP., EQUITABLE FIRE INSURANCE CO., EQUITABLE GENERAL INSURANCE CO., EXCALIBUR INSURANCE COMPANY, FARMERS INS. EXCHANGE, FEDERAL INSURANCE COMPANY, FEDERAL KEMPER INSURANCE COMPANY, FEDERATED MUTUAL INSURANCE CO., FIDELITY & CASUALTY CO. OF NEW YORK, FIDELITY AND GUARANTY INS. CO., FIDELITY & GUARANTY INS. UNDERWRITERS, INC., FIREMAN'S FUND INSURANCE COMPANY, FIREMEN'S INS. CO. OF NEWARK, N.J., FIRST GENERAL INSURANCE COMPANY, FIRST OF GEORGIA INSURANCE CO., FIRST NAT'L INS. CO. OF AMERICA, FOREMOST INS. CO. GRAND RAPIDS, MICH., FORUM INSURANCE COMPANY, GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORP., LTD., GENERAL INS. CO. OF AMERICA, GENERAL REINSURANCE CORPORATION, THE GLENS FALLS INSURANCE CO., GLOBE INDEMNITY CO., GOVERNMENT EMPLOYEES INS. CO., GRAIN DEALERS MUTUAL INS. CO., GRANITE STATE INS. CO., GREAT AMERICAN INSURANCE COMPANY, GREATER NEW YORK MUTUAL INS. CO., GREAT WEST CASUALTY COMPANY, GULF INSURANCE COMPANY, HANOVER INSURANCE COMPANY, N.H., HANSECO INSURANCE COMPANY, HARBOR INSURANCE COMPANY, HARCO NATIONAL INSURANCE COMPANY, HARFORD MUTUAL INS. CO., HARLEYSVILLE MUTUAL INS. CO., HART-

FORD ACCIDENT & INDEMNITY CO., HARTFORD CASUALTY INSURANCE CO., HIGHLANDS INS. CO., HOLYOKE MUTUAL INS. CO. IN SALEM, HOME INDEMNITY COMPANY, HOME INS. CO., INS. CO. OF NORTH AMERICA, THE INSURANCE CO. OF THE STATE OF PENNSYLVANIA, INTEGON GENERAL INSURANCE CORP., INTEGON INDEMNITY CORPORATION, INTEGRITY INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, IOWA MUTUAL INS. CO., IOWA NAT'L MUTUAL INS. CO., HORACE MANN INSURANCE COMPANY, IDEAL MUTUAL INS. CO., INA REINSURANCE COMPANY, INA UNDERWRITERS INSURANCE CO., INDEMNITY INS. CO. OF NORTH AMERICA, INDIANA LUMBERMENS MUTUAL INS. CO., INDUSTRIAL INDEMNITY CO., JEFFERSON INSURANCE COMPANY OF N.Y., JEFFERSON PILOT FIRE & CAS. CO., JOHN DEERE INSURANCE COMPANY, KANSAS CITY FIRE & MARINE INS. CO., KEMPER SECURITY INSURANCE CO., LIBERTY MUTUAL FIRE INS. CO., LIBERTY MUTUAL INS. CO., LONDON GUARANTEE & ACC. CO. N.Y., LUMBERMENS UNDERWRITING ALLIANCE, LUMBERMENS MUTUAL CASUALTY CO., LUMBERMENS MUTUAL INS. CO., MARYLAND CASUALTY CO., MASSACHUSETTS BAY INS. CO., MERCHANTS MUTUAL INS. CO., METROPOLITAN PROPERTY AND LIABILITY INS. CO., MICHIGAN MILLERS MUTUAL INS. CO., MICHIGAN MUTUAL INSURANCE COMPANY, MIDDLESEX INSURANCE COMPANY, MIDLAND INSURANCE COMPANY, MEAD REINSURANCE CORPORATION, MIDWEST MUTUAL INS. CO., MILLERS NATIONAL INS. CO., MINNEHOMA INSURANCE COMPANY, MISSION INSURANCE COMPANY, MONARCH INS. CO., OF OHIO, MONTGOMERY MUTUAL INSURANCE CO., MOTOR CLUB OF AMERICA INS. CO., MOTORS INS. CORP., NATIONAL AM. INSURANCE CO. OF N.Y., NAT'L BEN FRANKLIN INS. CO. OF ILL., NATIONAL FIRE INS. CO. OF HARTFORD, NATIONAL GENERAL INSURANCE COMPANY, NAT'L INDEMNITY CO., NATIONAL INSURANCE UNDERWRITERS, NATIONAL SURETY CORPORATION, NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA., NATIONWIDE MUTUAL FIRE INS. CO., NATIONWIDE MUTUAL INSURANCE CO., NEWARK INS. CO., NEW HAMPSHIRE INS. CO., NEW SOUTH INS. CO., NEW YORK UNDERWRITERS INS. CO., NIAGARA FIRE INS. CO., NORTHBROOK PROPERTY AND CASUALTY INSURANCE CO., N.C. FARM BUREAU MUTUAL INS. CO., NORTH RIVER INSURANCE COMPANY, NORTHERN ASSURANCE CO. OF AMERICA, NORTHERN INS. CO. OF NEW YORK, NORTHWESTERN NAT'L CASUALTY CO., NORTHWESTERN NATIONAL INS. CO., OCCIDENTAL FIRE & CAS. CO. OF N.C., OHIO CASUALTY INS. CO., OHIO FARMERS INSURANCE COMPANY, OLD GENERAL INSURANCE COMPANY, OLD REPUBLIC INS. CO., OMAHA INDEMNITY COMPANY, PACIFIC EMPLOYERS INS. CO., PACIFIC INDEMNITY COMPANY, PEERLESS INS. CO., PENINSULAR FIRE INSURANCE COMPANY, PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, PENNSYLVANIA MILLERS MUT. INS. CO., PENNSYLVANIA NAT'L MUT. CASUALTY INS. CO., PETROLEUM CASUALTY COMPANY, PHOENIX ASSURANCE CO. OF NEW YORK, PHOENIX INSURANCE CO., PLANET INS. CO., POTOMAC INS. CO.,

PREFERRED INSURANCE COMPANY, PREMIER INSURANCE COMPANY, PROGRESSIVE CASUALTY INSURANCE COMPANY, PROPRIETORS' INSURANCE COMPANY, PROTECTIVE INS. CO., PROVIDENCE WASHINGTON INS. CO., PRUDENTIAL PROPERTY AND CASUALTY INSURANCE COMPANY, PUBLIC SERVICE MUTUAL INS. CO., PURITAN INSURANCE COMPANY, RELIANCE INS. CO., ROYAL GLOBE INSURANCE COMPANY, ROYAL INDEMNITY CO., SAFECO INS. CO. OF AMERICA, SAFEGUARD INS. CO., ST. PAUL FIRE & MARINE INS. CO., ST. PAUL GUARDIAN INSURANCE CO., ST. PAUL MERCURY INS. CO., THE SEA INSURANCE COMPANY, LTD, SECURITY INS. CO. OF HARTFORD, SECURITY MUTUAL CASUALTY COMPANY, SELECT INSURANCE COMPANY, SENTRY INDEMNITY COMPANY, SENTRY INSURANCE A MUTUAL CO., SHELBY MUTUAL INSURANCE OF SHELBY, OHIO, SHIELD INSURANCE COMPANY, SOUTH CAROLINA INS. CO., SOUTHERN FIRE & CASUALTY CO., TENN., SOUTHERN HOME INS. CO., STANDARD FIRE INS. CO., STANDARD GUARANTY INSURANCE CO., STATE AUTOMOBILE MUTUAL INS. CO., STATE CAPITAL INS. CO., STATE FARM FIRE & CASUALTY CO., STATE FARM MUTUAL AUTOMOBILE INS. CO., SUN INSURANCE OFFICE, LTD., SUPERIOR INSURANCE COMPANY, SUBSCRIBERS AT CASUALTY RECIPROCAL EXCHANGE, TEACHERS INSURANCE COMPANY, TOKIO MARINE AND FIRE INS. CO., LTD., TRANSAMERICA INSURANCE COMPANY, TRANSCONTINENTAL INS. CO., TRANSIT CASUALTY COMPANY, TRANSPORT INDEMNITY CO., TRANSPORT INS. CO., TRANSPORTATION INSURANCE COMPANY, TRAVELERS INDEMNITY CO., TRAVELERS INDEMNITY CO. OF AM., TRAVELERS INDEMNITY CO. OF R.I., TRAVELERS INSURANCE CO., TWIN CITY FIRE INS. CO., TRUCK INS. EXCHANGE, UNIGARD INDEMINITY COMPANY, UNIGARD INSURANCE COMPANY, UNIGARD MUTUAL INSURANCE CO., UNITED PACIFIC INSURANCE COMPANY, UNITED STATES FIDELITY & GUARANTY, UNITED STATES FIRE INS. CO., UNITED STATES LIABILITY INS. CO., UNIVERSAL UNDERWRITERS INS. CO., USAA CASUALTY INSURANCE COMPANY, UNITED SERVICES AUTOMOBILE ASSN., UTICA MUTUAL INS. CO., VALIANT INSURANCE COMPANY, VALLEY FORGE INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, VIRGINIA MUTUAL INS. CO., VIRGINIA SURETY COMPANY, INC., WAUSAU UNDERWRITERS INS. CO., WEST AMERICAN INSURANCE COMPANY, WESTCHESTER FIRE INS. CO., THE WESTERN CASUALTY & SURETY CO., THE WESTERN FIRE INSURANCE CO., WESTFIELD INS. CO., YOSEMITE INSURANCE COMPANY, ZURICH INSURANCE COMPANY

No. 5

(Filed 4 March 1981)

Insurance § 79.1 — automobile liability insurance — recoupment surcharges — rates — no necessity for filing

Surcharges on automobile liability insurance coverages ceded to the N. C. Reinsurance Facility to recoup past facility losses and on all automobile liability

coverages to recoup anticipated losses on ceded "clean risks" did not constitute rates and no filing with or approval by the Commissioner of Insurance was required by law with respect to the surcharges in question.

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from and on discretionary review pursuant to G.S. 7A-31 of the decision of the Court of Appeals, 49 N.C. App. 206, 271 S.E. 2d 302 (1980), one judge dissenting, modifying in part and remanding the order of *Judge Braswell* entered 26 February 1980 in Superior Court, WAKE County.

The primary issue on this appeal is whether "recoupment surcharges" imposed on certain insureds by the North Carolina Reinsurance Facility are "rates" within the meaning of our insurance laws and therefore subject to the statutory requirement that rates must be filed with the Commissioner of Insurance.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., and Hunter, Wharton & Howell, by V. Lane Wharton, Jr., for plaintiffs.

Allen, Steed & Allen, P.A., by Arch T. Allen III and Charles D. Case, for Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, New York Underwriters Insurance Company and Twin City Fire Insurance Company.

Bailey, Dixon, Wooten, McDonald & Fountain, by J. Ruffin Bailey and Gary Parsons, for American Automobile Insurance Company, American Insurance Company, Associated Indemnity Corporation, Fireman's Fund Insurance Company, and National Surety Corporation.

Broughton, Wilkins & Crampton, by J. Melville Broughton, Jr., and Charles P. Wilkins, for Nationwide Mutual Fire Insurance Company, Nationwide Mutual Insurance Company, and N.C. Farm Bureau Mutual Insurance Company.

Johnson, Patterson, Dilthey & Clay, by Grady S. Patterson, Jr., and D. James Jones, Jr., for American Fire and Casualty Company, Ohio Casualty Company, Utica Mutual Insurance Company, Virginia Mutual Insurance Company, Carolina Casualty Insurance Company, West American Insurance Company, and American Indemnity Company.

Jordan Law Offices, by John R. Jordan, Jr., and Robert R.

Price, for American Manufacturers Mutual Insurance Company, American Motorists Insurance Company, American Protection Insurance, Federal Kemper Insurance Company, Kemper Security Insurance Company, and Lumbermens Mutual Casualty Company.

Manning, Fulton & Skinner, by Howard E. Manning and John B. McMillan, for Allstate Indemnity Company, Allstate Insurance Company, Northbrook Fire and Casualty Company, State Farm Fire and Casualty Company, and State Farm Mutual Automobile Insurance Company.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Henry A. Mitchell, Jr., and R. Marks Arnold, for Aetna Casualty and Surety Company, Automobile Insurance Company of Hartford, Bankers Standard Insurance Company, The Connecticut Indemnity Company, Horace Mann Insurance Company, Insurance Company of North America, INA Reinsurance Company, INA Underwriters Insurance Company, Indemnity Insurance Company of North America, Pacific Employers Insurance Company, Security Insurance Company of Hartford, Standard Fire Insurance Company and Teachers Insurance Company.

Young, Moore, Henderson & Alvis, by Charles H. Young, Jr., for North Carolina Reinsurance Facility, North Carolina Rate Bureau, Allianz Insurance Company, and all other answering defendant insurance companies.

CARLTON, Justice.

We are once again presented with a serious conflict between the insurance industry and the North Carolina Commissioner of Insurance concerning the interpretation of certain insurance laws. In this action, the Commissioner is joined by the Governor and the Attorney General as plaintiffs. In light of our recent extensive treatment of this area, we find it unnecessary to present a historical background of North Carolina's insurance laws except as stated briefly and in limited context below. References will be made to the four cases decided by this Court on 15 July 1980 and they will be hereinafter referred to collectively as the 1980 Insurance Cases, and individually as follows: *State ex rel. Commissioner of Ins. v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980), as 1980 Insurance Case I; *State ex rel. Commissioner of Ins. v. Rate Bureau*, 300 N.C. 460, 269 S.E. 2d 538 (1980), as 1980 Insurance Case II; *State ex*

rel. Commissioner of Ins. v. Rate Bureau, 300 N.C. 474, 269 S.E. 2d 595 (1980), as 1980 Insurance Case III; *State ex rel. Commissioner of Ins. v. Rate Bureau*, 300 N.C. 485, 269 S.E. 2d 602 (1980), as 1980 Insurance Case IV.

I.

SUMMARY OF FACTS AND HOLDINGS OF THE LOWER COURTS

On 24 September 1979 plaintiffs, the Governor, the Commissioner of Insurance and the Attorney General, filed a complaint for declaratory relief and motion for preliminary injunction against the North Carolina Reinsurance Facility (Facility), the North Carolina Rate Bureau (Rate Bureau), and approximately 300 of their member companies. Plaintiffs challenged the legality of specific "recoupment surcharges" imposed by the industry on certain motor vehicle insurance policyholders in addition to regular insurance premiums. Plaintiffs alleged that the surcharges are unlawful on numerous grounds, primarily that they are "rates" which may not be lawfully charged until filed with and reviewed by the Commissioner of Insurance. Pending a final resolution of the case on its merits, plaintiffs sought to enjoin collection of the surcharges.[1]

The motion for preliminary injunction was heard by Judge Braswell at the 18 February 1980 Session of Superior Court, Wake County. In an order filed 26 February 1980 Judge Braswell denied plaintiffs' motion for preliminary injunction on the grounds (1) that the surcharges were lawful and proper and in compliance with G.S. 58-248.34(e), G.S. 58-248.33(*l*), G.S. 58-248.34(f) and other applicable provisions of the Facility's Plan of Operation, (2) that no filing with or approval by the Commissioner of Insurance is required by law with respect to the surcharges in question, (3) that plaintiffs failed to demonstrate probable cause to believe that they would be successful upon the ultimate determination of the case, (4) that neither the plaintiffs nor the using and consuming public would be irreparably damaged by collection of the recoupment surcharges during the pendency of the litigation, and (5) that there was a substantial likelihood that the Facility would in the near future be

unable to meet its obligations as they become due should collection of the recoupment surcharges be enjoined *pendente lite* and, instead, that the Facility and its member companies would suffer irreparable harm if a preliminary injunction was issued.

Plaintiffs appealed the trial court order to the North Carolina Court of Appeals. On 21 October 1980, the Court of Appeals, Judge Wells writing, modified and remanded. That court held that the trial court properly denied plaintiffs' motion to enjoin collection of the disputed surcharges *pendente lite*, but that the denial of plaintiffs' motion that defendants be required to file the disputed surcharges with the Commissioner of Insurance was erroneous. The Court of Appeals agreed with plaintiffs that defendants were required to file the surcharges so that they could be reviewed by the Commissioner, and, if appropriate, by the courts as required by G.S. 58-248.33(*l*) and G.S. 58-248.34(d). The court reasoned that if the surcharges were not so filed and reviewed, persons paying the surcharges would be "denied the protection of the laws, may not be able to recover any excessive charges paid by them and would therefore suffer irreparable loss should plaintiffs prevail on the merits."

Judge Hedrick dissented. In his opinion, the appeal should be dismissed since it was from the denial of a preliminary injunction and no substantial right of plaintiffs would be lost if the appeal was not determined before a final hearing on the merits.

Defendants gave notice of appeal to this Court. Since Judge Hedrick's dissent did not directly address the filing issue, defendants also simultaneously petitioned this Court for discretionary review which we allowed on 2 December 1980. Oral arguments were heard on 10 February 1981. We disagree with the holding of the Court of Appeals and reverse.

Other facts important to an understanding of our decision are noted below.

II.

JURISDICTION AND EXTENT OF REVIEW

We elect to address a single issue on this appeal: Whether surcharges are "rates" within the meaning of our insurance laws. Other issues were addressed by the Court of Appeals and others

have been presented to us by the briefs of the parties. We elect not to address any of them. We have accelerated our efforts to file this opinion in order that it might be promptly available to our legislators who, we understand, are presently considering legislation in this controversial area of our law. To address the peripheral issues would serve no positive purpose and would, as will later be demonstrated, produce no different result. Unquestionably, the above issue is at the core of the controversy and the other issues raised pale in comparison. It would serve little purpose for us to extensively discuss whether the Governor had standing to sue. Moreover, whether the appeal should be dismissed as interlocutory since it is from the denial of a preliminary injunction, as discussed in the Court of Appeals' dissent, is irrelevant in light of our election to answer the substantive question involved. We also will not address the Court of Appeals' treatment of our preliminary injunction laws. With respect to these, and all other issues noted by the Court of Appeals and the parties in brief, we express no opinion. Suffice it to say that pursuant to our supervisory and discretionary power we find the procedural context of the matter before us to be such that we can adequately deal with the substantive issue presented in a controversy which is obviously demanding of prompt resolution. It is an issue crucial to the people of North Carolina.

III.

SURCHARGES VIS-À-VIS RATES

A.

In the *1980 Insurance Case I*, Section III, we held that evidence, in view of the entire record, was insufficient to support the Commissioner's findings and conclusions that the 10% rate differential between insureds ceded to the Facility and those remaining in the voluntary market was unfairly discriminatory. There, we also reviewed the statutes creating the Facility and discussed in detail what we understood to be the intent of our Legislature in creating this form of automobile insurance administration. We noted then the problems relating to recoupment surcharges and that the 1979 Legislature had enacted legislation requiring that "clean risks" in the Facility be charged no higher rate than those outside. We also noted that confusion would continue to surround this phase of automobile insurance regulation in North Carolina until such time as our General Assembly acted to clarify the law.

The present action, of course, was initiated prior to our decision in *1980 Insurance Case I* and we are, as anticipated, confronted with an issue resulting from further confusion over the interpretation to be given certain provisions within the same area of our insurance laws. In light of our extensive discussion of the Facility legislation contained in *1980 Insurance Case I*, discussed here are only those portions of the insurance statutes relevant to this controversy. We will also attempt to place those portions of our insurance law in appropriate historical perspective.

In 1973, the General Assembly created the Facility to replace the outmoded and largely unworkable Assigned Risk Plan. Essentially, the Facility is a pool of insurers which insures drivers who the insurers determine they do not want to individually insure. The Facility is a creation of North Carolina's Compulsory Automobile Liability Insurance Law. The pertinent provisions are codified in Article 25A, Chapter 58, of the General Statutes. G.S. § 58-248.26 to .40 (1975 Cum. Supp. 1979) [hereinafter referred to as "Facility Act"]. Under the Facility Act, all insurance companies which write motor vehicle insurance in North Carolina are required to be members of the Facility. They are required to issue motor vehicle insurance to any "eligible risk" as defined in G.S. 58-248.26(4) who applies for that coverage, if the coverage can be ceded to the Facility. G.S. 58-248.32(a) provides in part that no licensed agent of an insurer may refuse to accept any application from an eligible risk for such insurance and that the agent must immediately bind the coverage applied for if cession of the particular coverge and limits are permitted in the Facility. After writing such coverage, the company has the option of either retaining it as a part of its voluntary business or ceding it to the Facility. If the policy is ceded, the writing company pays to the Facility the net premium, less certain ceding and claims expense allowances, and the Facility is then liable on the particular policy. Should there be a loss under the policy, the ceding company settles the claim and is reimbursed by the Facility.

The Facility is structured by law to operate on a no profit-no loss basis, and the rates charged drivers ceded to the Facility must reflect this:

> All rates shall be on an actuarially sound basis and shall be calculated, insofar as is possible, to produce neither a profit nor a loss .... Rates shall not include any factor for

> underwriting profit on Facility business, but shall provide an allowance for contingencies. There shall be a strong presumption that the rates and premiums for the business of the Facility are neither unreasonable nor excessive.

G.S. § 58-248.33(*l*) (Cum. Supp. 1979).

The 1977 General Assembly enacted significant amendments to the original 1973 legislation. The most significant was the establishment of the procedures designed to make the Facility self-sustaining. Under the 1977 statute, losses sustained by the Facility can be recouped pursuant to statutory procedures. G.S. 58-248.34 was amended to provide in part that:

> (e) . . . .
>
> The plan of operation [of the Facility] shall provide for, among other matters, . . . *the recoupment of losses sustained by the Facility, which losses may be recouped either through surcharging persons reinsured by the Facility or by equitable pro rata assessment of member companies* . . . .

G.S. § 58-248.34(e) (Cum. Supp. 1979) (emphasis added). The member companies, in turn, recoup any such loss by surcharging policyholders:

> The plan of operation shall provide that every member shall, following payment of any *pro rata* assessment, *commence recoupment of that assessment by way of an identifiable surcharge on motor vehicle insurance policies issued by the member or through the Facility until the assessment has been recouped.* Such surcharge may be at a percentage of premium or dollar amount per policy adopted by the Board of Governors of the Facility. With the exception of the recoupment provided for in G.S. 58-248.33(*l*) and with the exception of the surcharge against persons reinsured by the Facility as provided for in G.S. 58-248.34(e), recoupment, if necessary, shall not be made based on loss or expense experience prior to July 1, 1979. If the amount collected during the period of surcharge exceeds assessments paid by the member to the Facility, the member shall pay over the excess to the Facility at a date specified by the Board of Governors. If

> the amount collected during the period of surcharge is less than the assessment paid by the member to the Facility, the Facility shall pay the difference to the member. *The amount of recoupment shall not be considered or treated as premium for any purpose.*

G.S. § 58-248.34(f) (emphases added).

The Facility amended its plan of operation in 1977 to comply with the statutory provisions noted above. The amended plan of operation essentially tracked the statutory language. The amended plan of operation was submitted to the Commissioner of Insurance on 20 October 1977 and approved by him on 18 November 1977.

The 1979 Legislature also enacted significant amendments to the Facility Act which are pertinent to this controversy. G.S. 58-248.31 was amended by the addition of two subsections. One of these amendments provides that each company will provide the same type of service to ceded business that it provides for its voluntary market. G.S. § 58-248.31(b) (Cum. Supp. 1979). The records provided to agents and brokers must indicate that the business is ceded. *Id.* When an insurer cedes a policy to the Facility and the premium for policy is higher than the insurer would normally charge for the policy if retained by the insurer, the policyholder must be informed (1) that his policy is ceded, (2) that the coverages are written at the Facility rate, and the rate differential must be specified, (3) the reason or reasons for cession to the Facility, (4) that the specific reason or reasons for his cession to the Facility will be provided upon the written request of the policyholder to the insurer, and (5) that the policyholder may seek insurance through other insurers who may choose not to cede his policy. *Id.* Upon the written request of a person notified that his policy has been ceded to the Facility, the insurer ceding the policy must provide in writing to the insured the specific reason for the decision to cede. G.S. 58-248.31(c) (Cum. Supp. 1979).

The 1979 Legislature also significantly amended G.S. 58-248.33. As amended, the statute defined a clean risk as the owner

> of a motor vehicle classified as a private passenger non-fleet motor vehicle . . . if the owner and the principal operator and each licensed operator in the owner's household have two years' driving experience and if

> neither the owner nor any member of his household nor the principal operator had had any chargeable accident or any conviction for a moving traffic violation . . . during the three-year period immediately preceding the date of application for motor vehicle insurance . . . .

G.S. § 58-248.33(*l*) (Cum. Supp. 1979). That subsection was also significantly amended to provide, "*However, the rates made by or on behalf of the Facility with respect to 'clean risks' . . . shall not exceed the rates charged 'clean risks' who are not reinsured in the Facility.*" *Id.* (emphasis added). Moreover, the amended subsection also provided that "[*t*]*he difference between the actual rate charged and the actuarially sound and self-supporting rates for 'clean risks' reinsured in the Facility may be recouped in similar manner as assessments pursuant to G.S. 58-248.34(f).*" *Id.* (emphasis added).

The Facility suffered tremendous financial losses pursuant to the statutory scheme summarized above. During the first four years of the Facility's operation, rates for ceded business were identical to those for voluntary business. There was, at that time, no provision in the statutes permitting separate rates for those insured by the Facility. Undoubtedly because insureds ceded to the Facility generally presented a greater risk than those not ceded, rates charged the ceded risks were insufficient to cover the claims on those policies and great losses were incurred. The losses for the fiscal years ending 30 September 1974, 30 September 1975 and 30 September 1976 were $14,300,000; $22,000,000 and $25,800,000, respectively. Hence, from its inception through 30 September 1976 the net cumulative operating loss of the Facility exceeded $62,000,000.

This trend of substantial losses was not reversed by the enactment of the 1977 amendments noted above. During the fiscal year ending 30 September 1978 the Facility sustained a net operating loss of $31.4 million, bringing its five-year losses from inception to over $109 million.[2] Therefore, in accordance with G.S. 58-248.34(e) and the plan of operation which had been approved by the Commissioner, the Facility Board of Governors voted, on 25 July 1979, to recoup the $31.4 million loss incurred in fiscal 1978 through an 18.6% recoupment surcharge *on motor vehicle insurance policies written and ceded to the Facility* during the period 1 December 1979

[2] Losses for fiscal year ending 30 September 1977 were $15,600,000.

through 30 November 1980.

At the same meeting, the Board of Governors also voted to implement a separate recoupment pursuant to the 1979 change in G.S. 58-248.33(*l*), discussed above. That amendment provided essentially that rates charged "clean risks" in the Facility cannot exceed rates charged those in the voluntary market and further provided that the resulting loss to the Facility could be recouped in a similar manner as assessments pursuant to G.S. 248.34(f). Prior to this amendment, there was no requirement that rates charged "clean risks" in the Facility be the same as rates charged in the voluntary market. Since the new "clean risk" subclassification within the Facility went into effect on 1 October 1979, a serious reduction in the amount of premium income collected by the Facility resulted. The Board of Governors therefore voted to recoup the reduction in income through a 1.1% surcharge on private passenger non-fleet policies, *both those ceded to the Facility and those issued in the voluntary market.*

Following the action of the Board of Governors on 25 July 1979, plaintiffs initiated this action in the Superior Court, Wake County, on 24 September 1979 and the case is before us in the procedural context discussed above.

B.

The primary issue presented by this appeal is whether the Court of Appeals erred in holding that recoupment surcharges are "rates" which must be filed with the Commissioner of Insurance.

G.S. 58-248.33(*l*), in pertinent part, provides: "The . . . *rates* . . . used on motor vehicle insurance policies reinsured by the Facility may be made by the Facility or by any licensed or statutory rating organization or bureau on its behalf and *shall be filed with the Commissioner.*" (Emphases added.) Plaintiffs vigorously contend that, while no specific statute so provides, the spirit of North Carolina's insurance laws requires that recoupment surcharges be included within the meaning of "rates" for the purpose of the above-stated filing requirement. We disagree for the reasons stated below.

Plaintiffs are unable to cite any specific statutory or other authority squarely in support of their position. Since our research has also failed to produce any such authority, the issue here pre-

sented is purely one of construing the intent of our Legislature. As always, our primary task in statutory construction is to ensure that the purpose of the Legislature in enacting the law, the legislative intent, is accomplished. *In re Dillingham*, 257 N.C. 684, 127 S.E. 2d 584 (1962). The best indicia of that legislative purpose are "the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972). In addition, a court may consider "circumstances surrounding [the statute's] adoption which throw light upon the evils sought to be remedied." *State ex rel. North Carolina Milk Comm. v. National Food Stores, Inc.*, 270 N.C. 323, 332, 154 S.E. 2d 548, 555 (1967). Moreover, we must be guided by the rules of construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other. *Redevelopment Comm. v. Security Nat'l Bank*, 252 N.C. 595, 114 S.E. 2d 688 (1960). Such statutes should be reconciled with each other when possible and any irreconcilable ambiguity should be resolved in a manner which most fully effectuates the true legislative intent. *Duncan v. Carpenter & Phillips*, 233 N.C. 422, 64 S.E. 2d 410 (1951), *overruled on other grounds, Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980).

Applying the foregoing rules of statutory construction, we first note the critical statutes authorizing the recoupment surcharges here in question. G.S. 58-248.34(e) requires the recoupment of losses sustained by the Facility "either through surcharging persons reinsured by the Facility or by equitable *pro rata* assessment of member companies." G.S. § 58-248.34(e) (Cum. Supp. 1979). If losses are recouped by surcharging the member companies, those insurers "shall . . . commence *recoupment of that assessment by way of an identifiable surcharge on motor vehicle insurance policies issued by the member or through the Facility until the assessment has been recouped . . . . The amount of recoupment shall not be considered or treated as premium for any purpose.*" G.S. § 58.248.34(f) (Cum. Supp. 1979) (emphasis added).

The foregoing statutes provide the specific authority for the imposition of the 18.6% surcharge here in question. With respect to the 1.1% surcharge, G.S. 58-248.33(*l*) provides that *rates* charged "clean risks" in the Facility cannot exceed *rates* charged "clean risks" in the voluntary market, but that "[t]he difference between the actual rate charged and the actuarially sound and self-

supporting rate for 'clean risks' reinsured in the Facility may be recouped in similar manner as assessments pursuant to G.S. 58-248.34(f)." G.S. § 58-248.33(*l*). Thus, the method of recoupment of this difference in rates is the same as that for the Facility's losses and is set out above.

Viewing these statutes and others noted below as components of a single and harmonious scheme, we think it obvious that the Legislature intended the "rates" to have a single and consistent meaning throughout and that "rates" does not encompass within its definition, for any purpose, including filing and review, the types of surcharges challenged here. In holding to the contrary, the Court of Appeals erred. We reach this conclusion for the following additional reasons:

(1) In reviewing the language of the 1977 amendments to our automobile insurance laws, all of which were enacted as House Bill 658, it is patently clear that our Legislature had no intention of equating recoupment surcharges with rates. To the contrary, it specifically provided that "[t]he amount of recoupment shall not be considered or treated as premium *for any purpose.*" G.S. § 58-248.34(f) (emphasis added). Throughout those portions of Chapter 58 which were enacted or amended by the same legislation, the terms "rate" and "premium" are used interchangeably. For example, G.S. 58-124.22 provides in essence that when a "rate" has been disapproved by the Commissioner the "rate" may be used pending judicial review if the purported improper portion of the "premium" collected is placed in escrow. Law of June 30, 1977, 1977 N.C. Sess. Laws 1119, Ch. 828, s. 6 (enacted as G.S. § 58-130). G.S. 58-131.42(b) (Cum. Supp. 1979) also provides for "file and use" of a disputed rate for miscellaneous lines of insurance. G.S. 58-131.37 (Cum Supp. 1979) provides in essence that "rates" are not unfairly discriminatory because different "premiums" result for policyholders who have like exposures but different expense factors or who have like expense factors but different loss exposures.

The statutory interchangeable use of "rates" and "premiums" was carried forward into the 1979 Session. G.S. 58-248.31(b)(Cum. Supp. 1979) provides that if an insured pays a higher "premium" by virtue of having his policy ceded to the Facility, he must be notified that his coverage has been written at the Facility "rate" and must be further notified as to the amount of the "rate" differential.

G.S. 58-124.19, also enacted as part of House Bill 658[3] which effected the 1977 amendments referred to above, enumerates factors to be considered in establishing "rates." Those factors include, *inter alia*, actual loss and expense experience within the state for the most recent three-year period; prospective loss and expense experience; the hazards of conflagration and catastrophe; a reasonable margin for underwriting profit and for contingencies; past and prospective expenses specially applicable to this state; other relevant factors within the state; and countrywide experience only where credible North Carolina experience is not available. Clearly, these factors enumerated by our Legislature for consideration in ratemaking do not apply and are irrelevant to the calculation of surcharges such as those here in question. The Court of Appeals appears to have ignored the interchangeable usage of the words "rates" and "premium" and has failed to heed the express provision in G.S. 58-248.34(f) that recoupment shall not be considered or treated as premium for any purpose. The interchangeable usage of the words "rate" and "premium" becomes especially important when it is considered that the words "surcharge," "assessment" and "recoupment" are nowhere used in the filing and review provisions of our insurance law, G.S. 58-124.20, .21(b), .22(b) (Cum. Supp. 1979).

We find no basis from our review of the applicable insurance statutes to support plaintiffs' position that our Legislature intended to encompass recoupment surcharges within the meaning of "rates" and therefore conclude that there exists no legally defensible basis for the Court of Appeals' conclusion that recoupment surcharges, as rates, are subject to the filing and review portions of our insurance laws. To the contrary, our review of the applicable statutes compels the conclusion that the Legislature, in omitting surcharges from the file and review portions of our statutes, evidenced the clear intent *to exclude* surcharges from the filing and review requirements. "Where a statute sets forth one method for accomplishing a certain objective, or sets forth the instances of its application or coverage, other methods or coverage are necessarily excluded under the maxim *expressio unius est exclusio alterius.*" 12 Strong's N.C. Index 3d, Statutes § 5.10 (1978); *accord In re Bluebird Taxi Co.*, 237 N.C. 373, 376, 75 S.E. 2d 156, 159 (1953).

[3] Law of June 30, 1977, 1977 N.C. Sess. Laws 1119, Ch. 828.

(2) Review of past decisions of this Court and other authorities leads us to conclude that the Court of Appeals misunderstood the well-established definitions of "rates," "premiums," and "surcharges." "Rates" and "premiums" are usually defined similarly and in no instance do we find any hint which indicates that either "rates" or "premiums" encompasses "surcharges" within its definition:

> The *rate* is the price per unit of exposure that is charged a particular insured for a particular contract of insurance . . . . For the great majority of insureds, the product of the rate times the number of units of exposure equals the *premium* — the total price paid for the insurance.

C. Kulp & J. Hall, *Casualty Insurance* 765 (4th ed. 1968) (emphases in original). "Rate" has also been defined as "the amount of *premium* per unit of insurance or exposure." *Webster's Third New International Dictionary* 1884 (1971) (emphasis added).

This Court has stated: "For ratemaking purposes, the components of a casualty insurance premium are the 'pure premium' and 'expense loading.' The 'pure premium' is the amount allocated for the settlement of casualty losses, including loss adjustment expenses. 'Expense loading' is the amount allocated for operating expenses and for underwriting profit and contingencies." *In re Filing by Automobile Rate Administrative Office*, 278 N.C. 302, 312, 180 S.E. 2d 155, 162-63 (1971), quoting *Virginia State AFL-CIO v. Commonwealth*, 209 Va. 776, 777 167 S.E. 2d 322, 323 (1969).

This Court has noted on numerous occasions that ratemaking is a prospective process while surcharge assessments involve recoupment for losses already incurred. As Justice Exum aptly stated in *State ex rel. Commissioner of Ins. v. Automobile Rate Office*, 294 N.C. 60, 241 S.E. 2d 324 (1978), "rates are made prospectively, not retroactively . . . . '[T]he entire procedure [of ratemaking] contemplates a looking to the future.'" *Id.* at 71, 241 S.E. 2d at 331, quoting *In re Filing of Fire Ins. Rating Bureau*, 275 N.C. 15, 32, 165 S.E. 2d 207, 219 (1969). In *State ex rel. Commissioner of Ins. v. Automobile Rate Admin. Office*, 287 N.C. 192, 205, 214 S.E. 2d 98, 106 (1975), we described ratemaking as "an attempt to predict the future." We have said on numerous occasions that the purpose of the ratemaking process is to ensure that premiums are adequate to cover *anticipated* losses and *anticipated* expenses and to allow a

reasonable profit. *In re Filing by Fire Insurance Rating Bureau*, 275 N.C. at 39, 40, 165 S.E. 2d at 224.

Inclusions of recoupment surcharges within the meaning of "rates" simply does not comport with the established understanding of the meaning of that term. The surcharges imposed pursuant to the Facility Act are, generally speaking, retroactive: they are designed to recoup actual losses, those which have already been incurred. The 18.6% surcharge involves recovery of losses known and verified by audit conducted by independent auditors, as required by G.S. 58-248.34(h). While the 1.1% surcharge does involve recovery, to some extent, of a loss which has not been incurred, and which, because of its very nature, requires a prediction of future events, it, too, can be determined by simple mathematical computation. Moreover, in the case of the 1.1% surcharge, the statute specifically provides for recoupment of losses sustained by the Facility as a result of the legislation prohibiting increased rates for "clean risks" within the Facility over those in the voluntary market and specifically provides that "[t]he difference between the actual rate charged and the actuarially sound and self-supporting rates for 'clean risks' reinsured in the Facility may be recouped *in similar manner* as assessments pursuant to G.S. 58-248.34(f)." G.S. § 58-248.33(*l*) (emphasis added). In other words, the calculation of recoupment surcharges is essentially mathematical in nature. It looks into the past rather than the future. It is concerned with losses and expenses already incurred rather than those anticipated. Moreover, there is undisputed evidence in the record that the word "rate," as used in the industry, does not include the retroactive recovery of past losses involved in the statutory surcharging process. While the 1.1% surcharge does, to some extent, involve an estimation as to *future* losses, such recoupment is expressly authorized by the statute and in a manner which indicates that the recoupment is not to be considered as a "rate."

(3) Our conclusion that a recoupment surcharge is not a rate is further buttressed by reference to other portions of the statutory scheme. As stated above in section III B, if, as plaintiffs contend, the contested surcharges are rates for purposes of the filing and review requirements, then they must also be rates for all other purposes of our automobile insurance laws, for statutes *in pari materia* must be construed harmoniously. When the definition of rates is expanded to include surcharges and that definition is applied to other statu-

tory provisions dealing with rates, it becomes obvious that "rates" does not include surcharges.

For example, G.S. 58-124.19 enumerates factors which may properly be considered in establishing "rates." All factors listed indicate that, while past loss experience may be considered, it is relevant only to the extent of predicting future events. *See State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau*, 292 N.C. 471, 234 S.E. 2d 720 (1977). There is nothing in this statute which indicates that past losses themselves constitute a component of the rate, nor can such a conclusion be logically inferred. Such a crucial omission from the factors which may be considered in establishing rates is, we think, persuasive.

Another statute which demonstrates that the Legislature did not intend rates to include surcharges is G.S. 58-124.26. That statute places a 6% cap on annual insurance rate increases and was enacted[4] at a time when automobile insurance premiums were increasing rapidly. In the same bill, the Legislature indicated that the Facility was to operate on a no profit-no loss basis.[5] To this end, the Facility was to be permitted to recoup its losses. That a tremendous increase in revenues was necessary for the Facility to break even is obvious from the record. In its first filing after the 1977 amendments, the Facility demonstrated that a rate increase of 63.4% was required. We cannot believe that the Legislature would have expressed its intention that the Facility operate on a break-even basis and provided an apparent means for the Facility to do so and, in the same breath, made such a result impossible to achieve with the 6% cap. Instead, we find it infinitely more logical to presume that the Legislature acted in accordance with reason and common sense and did not act to produce an unjust and absurd result, *King v. Baldwin*, 276 N.C. 316, 172 S.E. 2d 12 (1970).

(4) We also note that the General Assembly is not unaware of the proper procedure for requiring that recoupment surcharges be filed with the Commissioner. Article 18B, Chapter 58, N.C. General Statutes, provides for recoupment surcharges for urban property

[4] Law of June 30, 1977, 1977 N.C. Sess. Laws 1119, Ch. 828, s. 6 (enacted as G.S. § 58-131.4).

[5] *Id.*

reinsurance. G.S. 58-173.28 specifically requires that such surcharges be approved by the Commissioner. That statute was enacted prior to the 1977 legislation here in question. Failure of the Legislature to incorporate provisions similar to those in Article 18B into the Reinsurance Act further compels the conclusion that the Legislature did not intend surcharges to be rates which must be filed with the Commissioner.

(5) We noted in our *1980 Insurance Case I* that one of the primary purposes of the 1977 legislation was to ensure that the Facility would be self-sustaining. Clearly, therefore, the Legislature contemplated that recoupment surcharges would be an indispensible means of funding the operation of the Facility. This is so because our Legislature also specifically provided that Facility *rates* would be established on a no profit-no loss basis insofar as possible. G.S. § 58-248.33(*l*). However, Facility rates are subject to the statutory cap on rates and cannot be increased by more than 6% annually. The record clearly discloses that collection of premiums pursuant to established rates does not support the Facility. At the time of the hearing before the trial court the Facility had approximately $13.6 million available for payment of claims and was experiencing a net cash outflow of approximately $3 million per month. Without recoupment surcharges, the Facility would have exhausted its assets and been unable to pay claims beginning in May 1980. In light of this serious inadequacy of Facility rates, any "rate" increases would clearly not cover the burgeoning Facility losses. Hence, we think our Legislature reasoned, other losses must be recovered through collection of recoupment surcharges. As stated above, however, we find nothing in the statutes which indicates that the Legislature intended to equate the recoupment surcharges with rates. To the contrary, the Legislature's concern that the Facility operate on a no profit-no loss basis, together with the statutory cap on rates impels us to conclude that the Legislature intended the recoupment surcharges to be separate and apart from rates.

(6) Finally, we respond to the Court of Appeals' reasoning that if recoupment surcharges are not considered rates, then the persons paying such surcharges "would be denied the protection of the laws." Again, construing the applicable statutes, we find no support for such reasoning. The Legislature clearly structured the statutory scheme to provide for public protection against surcharges of an amount greater than actual losses by requiring that the Facility

be operated on a no profit basis. As we understand the statutory scheme, any excess of surcharges over losses would be reflected in the operating results of the Facility for the period during which the surcharge was collected. This would reduce the Facility's operating loss for the period of collection and therefore reduce the loss which the Facility may recoup by the surcharges. Put another way, the only result of excessive surcharges in one period would be a corresponding offset in the surcharge for the following period. We see no way, under the statutory scheme, for the Facility or its member companies to profit by excessive surcharges. Moreover, we note that, with respect to this portion of our insurance laws, the Commissioner received statutory sanction for independent audits of the Facility's annual statements — a device he vigorously contended he needed with respect to other portions of the insurance statutes in the *1980 Insurance Cases*. Such audits, we think, provide public protection against excessive surcharges by independent verification of the recoupment surcharges imposed.

(7) We find especially pertinent, in considering the intent of our Legislature, this statement to the 1979 General Assembly commenting on the 1977 insurance law amendments:

> Under the old law the participating companies could not transfer more than 50% of their risks to the Facility, had to share Facility losses, and could not charge higher rates for automobile liability policies ceded to the Facility. House Bill 658[, 1977 revision of insurance law,] changed all of that by eliminating the 50% limitation on cessions, by permitting higher rates or surcharges to recover losses of the Facility, and by providing for distribution of Facility gains to policy-holders reinsured by the Facility. *The apparent intent behind the new provisions is to make the Facility self-sustaining*, whereas under the old system the insurance industry in effect subsidized the Facility by absorbing its losses.

North Carolina Legislative Research Commission, *Report to the 1979 General Assembly of North Carolina, Insurance Laws*, at 12-13 (1979) (emphasis added).

Again, we find no hint of any intention that surcharges be used for anything other than recoupment of past losses nor that they be treated as rates for the purpose of the statutes requiring filing and

review of rates.

In summary, our review of the statutory scheme enacted by our Legislature reveals no legislative intent that recoupment surcharges be considered rates and be subject to the filing and review requirements before the Commissioner of Insurance. Plaintiffs have cited us to no specific authority in support of their contention in this respect nor has our research disclosed any. Likewise, the decision of the Court of Appeals is without citation of authority and our review of the record discloses that its reasoning is unsupportable. We must, therefore, reverse the Court of Appeals and reinstate the order of the trial court.

IV.

SUMMARY AND CONCLUSION

In an insurance case before this Court in 1977, Justice Lake, writing for the Court, stated:

> We observe that both the Commissioner and the Bureau are enmeshed in a statutory plan for rate-making so ambiguous and unclear that legislative revision appears to offer more likelihood of future harmony between the Commissioner and the Bureau, in their efforts to bring about a realization of the dual legislative purpose of insurance at a reasonable cost in financially responsible companies, than does piecemeal construction of the statutes through what is not rapidly assuming the proportions of an interminable series of judicial reviews of orders by the Commissioner.

State ex rel. Commissioner of Insurance v. Rating Bureau, 292 N.C. at 490, 234 S.E. 2d at 730.

Unfortunately, this piecemeal construction of our insurance statutes has continued. Indeed, during the past eight years, the appellate division has issued over thirty opinions resulting from actions before the Commissioner of Insurance. Although resolving such disputes is, of course, the proper function of the appellate courts, we do not think it unreasonable to observe that these disputes are far too numerous and that the legislative intent behind our insurance statutes should not be so difficult to discern that almost quarterly decisions from the judicial branch of government

are required. We think the Legislature should hasten to rewrite the insurance laws in question in clear and unmistakable language.

This unfortunate trend to administer the insurance laws of our state before the courts has resulted in part, we think, as a result of the polarization of views. It serves little purpose for public officials to take the attitude that all insurance companies are constantly attempting to steal from the public. Insurance companies are not charitable institutions and are forced, under the laws of our state, to insure drivers with the worst possible driving records. It is equally useless for the insurance industry to take the view that public officials act for no legitimate purpose and seek only to harass the industry. It has long been established that the insurance business is charged with a public interest, and that its regulation is constitutional. *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 34 S. Ct. 612, 58 L. Ed. 1011 (1914). Indeed, the public demands the effective regulation of the insurance industry.

Our Legislature, therefore, is presented with no enviable task. It must, as our statutory architect, evolve a plan which will best protect the public interest and ensure the liquidity and solvency of participating insurance companies in our state who must also be assured of a reasonable profit. This balancing of equities between the consuming public and the commercial sector can be done only by the legislative branch and the plan can be effectively administered only with the full cooperation of the executive branch of government. Most importantly, the Legislature, in formulating a regulatory scheme, should employ words that clearly and accurately reflect its intent so that the courts of this state will have some much needed guidance in interpreting those laws.

We hasten to add that we are not inadvertent to the concerns of plaintiffs in this action. There are seemingly apparent inequities in our insurance laws. For example, while this lawsuit was not so posited, we think the underlying concern with respect to recoupment surcharges is that those with safe driving records, defined by statute as "clean risks," and other insureds outside the Facility are now called upon to support the Facility and to subsidize the costs of insuring drivers with such poor driving records that insurance companies, absent the heavy hand of the law, would refuse to insure. This may well be a legitimate and worthy grievance; however, it is a political one which cannot properly be considered by an appellate court in ascertaining legislative intent. Such a grievance

is best remedied by bringing it to the attention of the legislative branch. Whether the cost of providing insurance to persons with poor driving records should be borne by that class alone or by the general driving public is a policy decision that only our General Assembly can make. When that decision has been made, we hope that our legislators will express it in clear and unmistakable language that the Commissioner of Insurance, the Governor, the Attorney General, insurance companies and courts can understand.

There are other concerns which have been brought before us in previous appeals to which the Legislature should give its attention. For example: (1) if the Legislature feels that the Commissioner should be vested with the authority to require that company data in insurance ratemaking hearings be audited, it should so provide, (2) if the General Assembly believes that income on invested capital should be considered in insurance ratemaking cases, it should so provide, (3) if the Legislature feels that the present method for calculating underwriting profit margins is inappropriate, it should clearly spell out the appropriate calculating methodology, (4) if the Legislature feels that the burden of proof in a ratemaking hearing should be placed on the Commissioner of Insurance, it should so provide. *See* 1980 Insurance Case I. Additionally, raised on oral argument was the issue of the propriety of having the Facility run by a board of governors, the membership of which consists entirely of representatives of member insurance companies. This is a question which we cannot address on this appeal. The Legislature in its wisdom clearly set out the composition of the Board of Governors; it is up to the Legislature, if it wishes, to change that composition.

These concerns and others of a similar nature have been the subject of extensive litigation before the courts, and the policy-making body of the state should resolve them once and for all. The court system in this state remains forever open to resolve legitimate justiciable controversies which will undoubtedly continue to occur in an area of the law as complex and important as this. However, no area of the law should be controlled by statutes which are so confusing and unwieldy that constant recourse to the judicial branch is inevitable. We hope that our Legislature, now in session, will resolve the issues before it in this area of the law expeditiously and express its intent in language which is crystal clear.

For the reasons stated above, we reverse the decision of the Court of Appeals. This matter is remanded to that court with

instructions that it remand to the Superior Court, Wake County, for reinstatement of the trial court order of 26 February 1980.

Reversed and remanded.

IN RE: INQUIRY CONCERNING A JUDGE NO. 64, BILL J. MARTIN

No. 26

(Filed 4 March 1981)

1. Judges § 7— preliminary investigation by Judicial Standards Commission — right of respondent to present evidence

There was no merit to the contention of a district court judge that the Judicial Standards Commission did not afford him a reasonable opportunity to present such relevant matters as he might choose during a preliminary investigation, since both notices advising respondent of the preliminary investigation specifically stated that he had the right to present any relevant matters he might choose; respondent's letter to the Commission did not embody a request to present relevant matters during the investigation; even if respondent's letter did amount to such a request, any failure by the Commission to allow respondent to present relevant matters would not render the entire proceeding a nullity; and respondent failed to show what, if any, prejudice resulted from the alleged failure to afford him the opportunity to present relevant matters.

2. Judges § 7— proceedings before Judicial Standards Commission — State Bar attorney appointed as special counsel

The Judicial Standards Commission was authorized to appoint an attorney who was a full time employee of the North Carolina State Bar as special counsel in a proceeding to investigate alleged misconduct by a district court judge.

3. Judges § 7— misconduct in office — censure — sufficiency of evidence

Evidence was sufficient to support the conclusion of the Judicial Standards Commission that respondent's conduct constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute and the evidence was sufficient to support its recommendation of censure where it tended to show that respondent was charged with failure to stop at a stop sign; he was to appear in district court at a session over which he was scheduled to preside; he knew that it would be improper to preside over that session; he said nothing when his case was called; he did not offer to recuse himself; and the assistant district attorney, upon learning that respondent was the defendant, took a voluntary dismissal in the case.

4. Judges § 7— misconduct in office — judge's behavior toward female criminal defendants

Evidence was sufficient to support findings by the Judicial Standards

Commission concerning respondent's behavior toward and with two female criminal defendants who had appeared before him where the evidence tended to show that respondent followed one defendant in his automobile, indicated that he wanted defendant to get into his car, discussed the pending criminal cases against her, and indicated his willingness to appoint an attorney for her in exchange for sexual favors; respondent subsequently met this same defendant in a parking lot to discuss her situation, and during the course of the conversation made improper advances; respondent went uninvited to the home of the second defendant and there attempted to force himself upon the defendant; and the times, places, and bare bones of the meetings with the criminal defendants were supported by the testimony of respondent who contended that the Supreme Court should believe his version of the events and discount the version related by the female defendants and found as true by the Commission.

5. Judges § 7— wilful misconduct in office

There was no merit to respondent's contention that his conduct did not amount to wilful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute because there was no evidence that he intentionally used the *power of his office* to accomplish the acts of which he stood accused, since (1) the inquiry was not whether the conduct in question could fairly be characterized as "private" or "public," but the proper focus was on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office, and respondent's attempt on several occasions to obtain by innuendoes or directly sexual favors from two female defendants constituted wilful misconduct in office warranting removal; (2) the record was not silent on the question of whether respondent actually offered or extended judicial leniency in return for sexual favors; (3) in light of the Supreme Court's previous censure of respondent, and his persistence in following a course of conduct detrimental to the judicial office as evidenced in the present case, respondent abused the privilege of his office, was guilty of wilful misconduct in office, and should be officially removed from office.

6. Judges § 7— proceedings before Judicial Standards Commission — conduct during previous term considered

There was no merit to respondent's contention that the Judicial Standards Commission erred in considering evidence concerning his conduct with a female criminal defendant who appeared before him because that conduct occurred in a previous term of office.

THIS proceeding is before the Court upon the recommendation of the Judicial Standards Commission (hereinafter referred to as the "Commission") that Respondent Bill J. Martin be removed from office and censured as provided in G.S. 7A-376 (1979 Cum. Supp.).

On 18 December 1979 and 12 February 1980, the Judicial Standards Commission, in accordance with its Rule 7, notified Respondent that it had ordered on its own motion a preliminary

investigation to determine whether formal proceedings should be instituted against him under the Commission's Rule 8. The December notice informed Respondent that the "subject matter of the preliminary investigation will be your actions in *State v. Bill Joe Martin*, Catawby County file number 79CR15048." The February notice stated that the subject matter of the preliminary investigation would include:

> a) your relationship and conduct in connection with female criminal defendants, witnesses, and other persons having an interest in matters pending or heard before you;
>
> b) your entry of an order following a hearing in a domestic relations matter allegedly without notice to the opposing party or counsel for the opposing party;[1] and
>
> c) your refusal to proceed with the trial of juvenile matters on grounds that the State was not represented when in fact the State was represented and prepared to proceed.[2]

Both notices included the following:

> You have the right to present for the Commission's consideration any relevant matters you choose. An investigator for the Commission, Mr. Cale K. Burgess, may contact you in the future.

On 1 May 1980, Judge Martin was served with a formal complaint and notice which informed him, *inter alia*, that the Commission had "concluded that formal proceedings should be instituted" against him; that Harold D. Coley, Jr., would be Special Counsel for the formal proceedings; and that the charges against him were wilful misconduct in office and conduct prejudicial to the adminis-

[1] The conduct charged in (b) was, in fact, the subject matter of another investigation instituted by the Commission, culminating in our censure of him in *In re Martin*, 295 N.C. 291, 245 S.E. 2d 766 (1978). The complaint filed in the instant proceeding contained no allegation relating to this conduct.

[2] At the hearing, counsel for the Commission indicated that it would present no evidence in support of allegation (c) which was embodied in Count 5 of the complaint. Judge Clark allowed Respondent's motion at the close of the Commission's evidence for a directed verdict on this count.

tration of justice that brings the judicial office into disrepute.

Respondent answered, denying the material allegations and explaining his own recollection of the events.

A formal hearing was scheduled to begin on 29 July 1980. On that date, Respondent moved that he be allowed, pursuant to Rule 7 of the Judicial Standards Commission, a reasonable opportunity to present such relevant matters as he should choose. By order dated 1 August 1980, Respondent's motion was allowed. The hearing was rescheduled to begin on 16 September 1980 in the Federal Courthouse in Statesville, North Carolina.

Evidence in support of the allegations in the complaint was presented at the hearing by Mr. Harold D. Coley, Jr., Special Counsel for the Commission. Respondent was present and offered evidence. He was represented at the hearing by Mr. John A. Hall and Mr. William C. Warden, Jr.

After hearing the evidence, the Commission made findings of fact and conclusions of law and recommendations regarding the conduct of Respondent. The findings of fact upon which it based its final conclusions and recommendations are as follows:

> (a) That from 30 October 1979 to and including 14 January 1980 there were pending against then twenty-one-year-old Debbie W. Lail the four (4) worthless check cases of *State of North Carolina v. Debbie W. Lail*, Catawba County file numbers 79Cr12854, 79Cr12855, 79Cr15200, and 79Cr15748; that the respondent presided over the 30 October 1979 Criminal Session of Catawba County District Court at Hickory, North Carolina, and directed that the four pending cases be added to the printed calendar for that session; that the respondent had previously authorized the defendant's release on her own recognizance from Catawba County jail on 28 October 1979 on condition that she appear in his courtroom; that the defendant did appear in court on 30 October 1979 and asked that an attorney be assigned to represent her, but no appointment was made at that time; that during the lunch recess of court, the respondent in his car followed the car operated by Ms. Lail and initiated a discussion with her concerning assignment of counsel after she had parked her car in a church parking lot at his signal and

gotten into respondent's car at his request; that the respondent stated he would consider appointing an attorney to represent her; that when Ms. Lail told the respondent she would appreciate appointed counsel, he grinned and asked, "How much do you appreciate it?"; that Ms. Lail repeated her statement that she would appreciate it, left the respondent's car, and drove away; that respondent ordered the assignment of counsel for defendant late in the day and then followed the defendant to the vicinity of her home after court adjourned; that the respondent also presided over the 19 November 1979 and 28 December 1979 Criminal Sessions of Catawba County District Court at Hickory at which the defendant's cases were calendared; that following the defendant's 5 January 1980 arrest for failure to appear in court on 28 December 1979, the respondent directed that the $1,000 bond amount set by Judge L. Oliver Noble on 7 January 1980 and required for her release be reduced to $500 and solicited the assistance of a bail bondsman to effect her release from Catawba County jail on 10 January 1980; that on 14 January 1980 the respondent met the defendant at his suggestion in the "Big Rebel" parking lot in Hickory, North Carolina, at night to discuss defendant's cases, and after Ms. Lail had gotten into the respondent's car at his request, the respondent attempted to force himself on the defendant during this meeting by attempting to embrace and kiss her but she resisted; that the respondent then suggested that they go to his office in the courthouse at Hickory but she refused, and before Ms. Lail left the respondent's car, the respondent asked for and obtained the defendant's phone number and said he would call her.

(b) That the respondent presided over the 22 February 1977 Criminal Session of Burke County District Court during which Carol Lynn Birchfield, the then twenty-one-year-old defendant in *State of North Carolina v. Carol Turpin Birchfield*, Burke County file number 77CR195, was convicted upon a plea of guilty to driving under the influence of intoxicating liquor and was granted limited driving privileges by the respondent; that the respondent presided over the 14 March 1977

Domestic Relations Session of Burke County District Court at which contempt proceedings by Carol Lynn Birchfield against her ex-husband for failure to pay child support were to be heard and signed a consent judgment in the case after the parties had agreed to a $1,500 settlement prior to trial; that soon after 14 March 1977 the respondent had lunch with Douglas F. Powell, attorney for Carol Lynn Birchfield in the aforementioned matters, at Holly Farms Restaurant in Morganton, North Carolina, where Ms. Birchfield was working at the time, and the respondent stated to Ms. Birchfield that he wanted to see her and said that he could favorably change her limited driving privileges, but she refused to make a date with him; that on the same afternoon the respondent went to the home of Ms. Birchfield uninvited, and while there the respondent made sexual advances toward her by attempting to fondle her breasts and attempting to kiss her and pushed her down on a bed; that Ms. Birchfield resisted these advances, and as he was leaving, the respondent told Ms. Birchfield that he would return the next day and would not take "No" for an answer.

(c) That on or about 16 October 1979 the respondent was charged with failure to stop at a duly erected stop sign in the case of *State of North Carolina v. Bill Joe Martin*, Catawba County file number 79Cr15048, and was cited to appear in Catawba County District Court at Hickory, North Carolina, on 19 November 1979; that the respondent knew it would be improper for him to hear his own case; that the respondent knew prior to 19 November 1979 that he was scheduled to preside over the session of court at which his case was calendared; that the respondent retained Phillip R. Matthews, an attorney, to represent him in the matter; that at no time prior to 19 November 1979 did the respondent or his attorney request a continuance of the matter or move for a change in venue; that the respondent presided over the 19 November 1979 Criminal Session of Catawba County District Court at Hickory, North Carolina, with knowledge that his case was on the calendar; that when the respondent's case was called at the calendar call by Thomas Neil Hannah, the assistant district attorney prosecuting the docket on that

date, the respondent did not offer to recuse himself or indicate that his recusal would be required nor did respondent's counsel request a continuance to a later date; that respondent's counsel answered for the respondent at the call of the calendar and requested that the case be held open; that Hannah had no knowledge that the defendant in *State of North Carolina v. Bill Joe Martin* was in fact the respondent until he questioned Matthews about this during a recess; that Hannah was embarrassed when he learned the identity of the defendant in the *Martin* case and decided to take a voluntary dismissal in the case for several reasons, including the minor nature of the offense, the probability that a change of venue would be necessary, and the awkward position in which the prosecution would be placed by trial before the respondent or another judge of that judicial district; that when court reconvened, the respondent continued to preside, and Hannah called the case and in open court announced the entry of a voluntary dismissal in the *Martin* case before the respondent.

11. That in response to a question by the Commission concerning the THIRD DEFENSE of his Answer the respondent stated that he felt the allegations of the Complaint were the result of a personal vendetta against him by persons in the 25th judicial district; however, the respondent failed to present any evidence at the hearing in support of his allegations.

12. That the findings hereinbefore stated and the conclusions of law and recommendation which follow were concurred in by five (5) or more members of the Judicial Standards Commission.

The Commission then concluded as a matter of law that Respondent's conduct in failing to recuse himself in a case in which he was the defendant constituted "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The Commission consequently recommended that respondent be censured by this Court. The Commission further concluded that Respondent's sexual advances toward two female defendants constituted a "willful abuse of the power and prestige of his judicial office" and "willful misconduct in office and conduct prejudicial to

the administration of justice that brings the judicial office into disrepute . . . ." For this conduct, the Commission recommended that Respondent be removed from judicial office. On 12 December 1980 Respondent petitioned this Court for a hearing on the Commission's findings and conclusions and recommendations.

McElwee, Hall, McElwee & Cannon, by John E. Hall and William C. Warden, Jr., for Respondent.

H. D. Coley, Jr., and Andrew A. Vanore, Jr., for Judicial Standards Commission.

BRANCH, Chief Justice.

[1] Respondent first contends that the Commission erred in failing to observe the clear mandate of the Commission's Rule 7(b) which provides in pertinent part that during a preliminary investigation an accused judge "shall be . . . afforded a reasonable opportunity to present such relevant matters as he may choose." Respondent argues here that although he received notice of the preliminary investigation, he was never afforded opportunity to present relevant matters to the Commission or its investigator. He therefore concludes that all proceedings subsequent to the preliminary investigation are void due to the Commission's failure to follow its own mandate. We disagree.

We note initially that both notices advising Respondent of the preliminary investigation specifically stated that he had "the right to present for the Commission's consideration any relevant matters [he might] choose." Respondent contends that by letter dated 25 February 1980, he requested that he be allowed the opportunity to present relevant matters during the preliminary investigation. That letter reads as follows:

LETTER - FEBRUARY 25, 1980

Judicial Standards Commission
P. O. Box 1122
Raleigh, North Carolina 27602

To the Chairman and the Members of the Judicial Standards Commission of the State of North Carolina:

This is to acknowledge receipt of your letter of February 12, 1980, received by the Honorable Bill J. Martin

and to advise the Commission that the undersigned represents Judge Martin with regard to this matter.

Pursuant to your invitation, we would appreciate your sending to us a copy of the Rules of the Judicial Standards Commission.

Judge Martin has asked that I advise the Judicial Standards Commission that he has not engaged in any type of conduct as a judge of the General Court of Justice of the State of North Carolina which has been either illegal, improper or contrary to decency. Please advise the investigator, Mr. Cale K. Burgess, to whom you refer in your letter that Judge Martin and I will be happy to discuss with him or any other person delegated by the Commission any subject matter which the Commission directs the investigator to discuss with Judge Martin and me.

Judge Martin has further requested that I advise the Commission that the subject matter of the preliminary investigation as referred to in your Paragraph Number 3 of your letter appears to be very vague and we would request that at some early time, if possible, that the Commission be more particular with what the names, dates and places and title of cases with regard to the investigation in order that Judge Martin and I might be prepared to discuss the matters with the investigator more intelligently and with as much dispatch as possible. Suffice it to say that Judge Martin has further directed that I advise the Commission that he welcomes your investigation and that we will cooperate with the Commission with regard thereto.

Sincerely yours,

McELWEE, HALL, McELWEE & CANNON
s/ John E. Hall lc
John E. Hall

Our careful examination of the letter leads us to conclude that it does not embody a request to present relevant matters during the preliminary investigation. Furthermore, even if we could fairly construe the letter as such a request, we are of the opinion that the

Commission's failure to abide by the dictates of Rule 7 would not render the entire proceeding a nullity. In *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 116 Cal. Rptr. 260, 526 P. 2d 268 (1974), the Supreme Court of California faced a challenge that the petitioner was denied due process by the Commission's failure to accord proper notice of a preliminary investigation. The challenge was based on Rule 904(b) of the California Rules of Court which provided that an accused judge be allowed a "reasonable opportunity in the course of the preliminary investigation to present such matters as he may choose." In denying the petitioner's challenge to the procedural irregularity, the court noted that the notice requirement "clearly affords to the judge more procedural protection than is constitutionally required . . . . [N]otice to the judge under investigation as to the nature of the complaints against him is not compelled as a matter of due process . . . [and] relief from the deleterious effect, if any, of the Commission's failure to follow rule 904(b) may be secured by petitioner only upon a showing of actual prejudice." *Id.* at 519, 116 Cal. Rptr. at 265, 526 P. 2d at 273.

In the instant case, we note that Respondent has failed to show what, if any, prejudice resulted from the alleged failure here to afford him the opportunity to present relevant matters. In fact, the record clearly discloses that upon his specific request at the scheduled 29 July 1980 hearing, the Commision continued the hearing and ordered that he "be allowed to present relevant information to the Judicial Standards Commission or its investigator prior to the formal hearing in this cause." We therefore hold that, even if Respondent's February 25 letter amounted to a request to present matters pursuant to Rule 7 and the Commission's failure to honor that request constituted a procedural irregularity, that procedural flaw standing alone does not negate the entire proceeding. Respondent's assignment of error relating to this issue is overruled.

[2] Respondent next contends that the Commission erred in appointing as Special Counsel Mr. Harold D. Coley, Jr., and in utilizing as investigators Mr. H. J. Harmon and Mr. James Beane. In support of this contention, Respondent relies upon the following statute:

> The Commission is authorized to employ an executive secretary to assist it in carrying out its duties. *For specific cases, the Commission may also employ special counsel or call upon the Attorney General to furnish counsel.*

> *For specific cases the Commission may also employ an investigator or call upon the Director of the State Bureau of Investigation to furnish an investigator.* While performing duties for the Commission such executive secretary, special counsel, or investigator shall have authority throughout the State to serve subpoenas or other process issued by the Commission in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice. [Emphasis added.]

Respondent maintains that the Commission violated this statute since Mr. Coley and Mr. Harmon were full-time employees of the North Carolina State Bar, and Mr. Beane was employed by the State of North Carolina District Attorney's Office, 25th Judicial District. Respondent thus argues that neither Special Counsel nor the investigators were "employed" by the Commission. He further submits that counsel was not supplied by the Attorney General and that the investigators were not furnished by the State Bureau of Investigation. Respondent argues strenuously that it is against public policy to permit the State Bar and the District Attorney's office for the 25th District to be the "watchdogs" of the judiciary.

Prior to the hearing before the Commission, Respondent moved to suppress all evidence relating to any counts in which the investigators were Harmon or Beane, or in which Special Counsel was Mr. Coley. Judge Clark as Chairman of the Judicial Standards Commission denied Respondent's motion and specifically ruled that Mr. Cale Burgess was the sole investigator and "that the Commission has not had anyone else conduct any investigation for it or asked anyone to do so." Respondent offered no evidence to refute this ruling. We therefore do not deem it necessary to address Respondent's allegation as it relates to Mr. Harmon and Mr. Beane.

We turn then to Respondent's contention that the Commission violated G.S. 7A-377(b) in appointing Mr. Coley as Special Counsel. He argues that the Commission did not "employ" Mr. Coley, but rather "borrowed" him from the State Bar. Respondent's argument presumes that the Legislature intended the word "employ" to mean "hire" in its narrowest sense. The Commission on the other hand argues that the word "employ" means to make use of or to use and thus it had the authority to utilize Mr. Coley as Special Counsel.

The Judicial Standards Commission is a creature of the Legis-

lature and derives its powers solely from that source. G.S. 7A-377(a) specifically authorizes the Commission to "issue process to compel the attendance of witnesses and the production of evidence, to administer oaths, to punish for contempt, and to prescribe its own rules of procedure." Subsection (b) of that section further authorizes the Commission to "employ special counsel." In our opinion the Legislature intended to confer upon the Commission the powers necessary to effectively carry out its responsibilities under the statute. With this in mind we construe the word "employ" in its common, everyday sense to mean "use" or "make use of." *Webster's New World Dictionary* 459 (2d Coll. Ed. 1972). We therefore hold that the Commission was authorized to appoint Mr. Coley as Special Counsel for the proceeding. In any event, we cannot perceive how Respondent could have been prejudiced by the *manner* in which Special Counsel's services were obtained.

Respondent next challenges the sufficiency of the evidence to support the Commission's Findings Nos. 10(a), 10(b) and 10(c). He asks us to substitute our independent evaluation of the evidence and to disregard the findings and conclusions of the Commission. He further submits that the evidence as to each charge does not meet the required quantum of proof.

It is well settled that the recommendations of the Judicial Standards Commission "are not binding upon the Supreme Court, and this Court must consider all the evidence and exercise its independent judgment as to whether it should censure, remove, or decline to do either." *In re Martin*, 295 N.C. 291, 245 S.E. 2d 766 (1978). The quantum of proof necessary to sustain censure or removal under the statutes is "proof by clear and convincing evidence - a burden greater than that of proof by a preponderance of the evidence and less than that of proof beyond a reasonable doubt." *In re Nowell*, 293 N.C. 235, 247, 237 S.E. 2d 246, 254 (1977).

With these rules in mind, we now turn to a consideration of the evidence adduced in support of each of the Commission's findings.

[3] Finding of Fact 10(c), which supports the conclusion and recommendation of censure, is supported by clear and convincing evidence in the record. The evidence is undisputed that Respondent was charged with failure to stop at a stop sign; that he was to appear at Catawba District Court at a session over which he was scheduled to preside; that he knew it would be improper to preside over that

session; that he said nothing when his case was called; that he did not offer to recuse himself; that the assistant district attorney, Mr. Tom Hannah, upon learning that Respondent was the defendant, took a voluntary dismissal in the case. Upon this finding, the Commission concluded that Respondent's conduct constituted "conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . ." Without reaching the question of whether Respondent's conduct, in light of his previous censure by this Court, *In re Martin, supra*, amounts to wilful misconduct in office, we adopt the Commission's finding as our own and hold only that the conduct warrants that Respondent be censured.

[4] Finding of Fact 10(a) and 10(b) deal with Respondent's behavior toward and with two female criminal defendants who had appeared before him. These findings are amply supported by the testimony of the female defendants. The times, places, and bare bones of the facts are further supported by the testimony of Respondent himself; he disagrees for the most part only with the allegations of what transpired between each female defendant and him. He contends that this Court should believe his version of the events, and discount the version related by the female defendants and found as true by the Commission. An independent review of the evidence, however, leads us to agree with the findings and conclusions of the Commission.

The evidence is undisputed that on or about 28 October 1979, Respondent authorized defendant Debbie Lail's release on her own recognizance from Catawba County jail on condition that she appear in court on 30 October 1979. She appeared as required and indicated that she desired to have an attorney represent her. According to Ms. Lail's testimony, during noon recess and while she was on her way home, she noticed a car behind her. The driver was tapping the horn and motioning for her to pull over. Both vehicles then pulled into a church parking lot. Ms. Lail recognized the driver of the other car as Respondent. Respondent discussed her situation with her and then indicated his willingness to appoint an attorney for her. Ms. Lail testified that she told him she appreciated it and that he grinned and said "Well, how much?"

Respondent testified that Ms. Lail initiated the meeting, and that they only discussed briefly her situation. He denied any conduct or statements which could fairly be construed as suggestive.

Again undisputed is the evidence of Ms. Lail's subsequent incarceration for failure to appear in court on 28 December 1979 and Respondent's later reduction of her bond to $500. On 14 January 1980, shortly after Ms. Lail's release from jail, she met with her appointed attorney, Mr. Theodore Cummings, and they arranged for her to call Respondent from Mr. Cummings' office. The phone conversation between Ms. Lail and Respondent was tape recorded. In it Respondent suggested that he and Ms. Lail meet at about 8:30 that night at the Big Rebel parking lot. The contents of the tape were offered and received into evidence at the hearing before the Commission.

When asked at the hearing before the Commission why he had taped the phone conversation, Mr. Cummings replied as follows:

> It was my feeling at the time that there was the possibility of an action such as this coming to pass due to the information that my client had given me. I was concerned not having had any experience with Miss Lail and not actually knowing anything about her, having been appointed by the Court [to] represent her and knowing her personally, that everything she was telling me might not be exactly as it happened. For my own protection, Miss Lail's protection, for Judge Martin's protection I felt it incumbent upon me to as best I could determine that what she was telling me had some basis in fact. I saw no other way to do that other than to verify some of the things that she had told me at a conversation between herself and Judge Martin.

Mr. Cummings and his secretary, Ms. Cynthia Dickson, both testified that, following the telephone call to Respondent, they drove together to the Big Rebel parking lot. Mr. Cummings borrowed a white van from an acquaintance and he and Ms. Dickson positioned themselves so that they could view the cars of Ms. Lail and Respondent. Mr. Cummings testified as follows:

> We could see out the side windows of the van and directly into the 2 front seats of the 2 automobiles parked there.... According to my watch, at 8:24 p.m. she left her automobile and got into his car on the passenger side of the front seat .... They appeared to be carrying on a conversation for some 5 minutes. During that period of

> time from 8:24 to 8:29 Judge Martin kept inching closer to the seat in which my client was seated .... I saw the Judge make an overt effort to get closer to Ms. Lail .... His face was close to hers and increasingly closer to hers; and at 8:29 his face became very close to her .... [H]e grabbed her face, put his left arm around her, and appeared to attempt to kiss her.... She was struggling to push him away and just flailing at him.

Ms. Dickson's testimony tended to corroborate Mr. Cummings' account of the events and of what appeared to transpire in Respondent's car. Ms. Lail testified to essentially the same transactions and further stated that Respondent tried to kiss her.

Respondent admitted meeting Ms. Lail at the parking lot to discuss her situation but denied making any improper advances. He explained that he "like[s] to look at someone if I am talking to them .... She kept her head down looking outside the car .... I placed one hand on top of her head, one under her chin. I turned her towards me. I said, 'Miss Lail, if you want to talk to me please look at me.' "

While numerous witnesses testified regarding the good character of Respondent, many of those same witnesses attested to the impeccable character of Mr. Cummings. In light of the eyewitness accounts of what appears clearly to be improper advances toward Ms. Lail, we cannot say that the evidence to support finding 10(a) is anything but clear and convincing.

Even if we were to ignore the findings of the Commission and find the facts to be consistent with Respondent's testimony, we are still confronted with the glaring fact that his conduct in conferring alone with Ms. Lail concerning her pending cases violated Canons 2 and 3 of the Code of Judicial Conduct, 283 N.C. 771 (1973). Canon 2 provides that "[a] judge should avoid impropriety and the appearance of impropriety in all his activities;" Canon 3 states that "[a] judge should perform the duties of his office impartially and diligently." The standards set forth in elaboration of Canon 3 state that a judge should "neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." We agree with the Commission's conclusion that Respondent has violated the professional standards prescribed for the judiciary of this State.

Finding of Fact 10(b) relating to Carol Lynn Birchfield is likewise amply supported by the testimony of Ms. Birchfield. Respondent admitted having seen Ms. Birchfield at the Holly Farms Restaurant but denies that he went uninvited to her home later that day. He testified that she announced to him at the restaurant that she had a Doberman dog for sale, and that she gave him her address so that he could "come by to look at it." According to his version, they discussed the possible sale of the dog, and he did go inside the house to see "the room that [had] burned." Douglas F. Powell, an attorney from Morganton who was with Respondent at the Holly Farms Restaurant, testified that he recalled Ms. Birchfield mentioning a dog and "telling Judge Martin where she lived." He further testified that he couldn't recall all that was discussed "because it's been over 3 years ago . . . ."

Ms. Audrey Jenkins, a friend of Ms. Birchfield, testified that Ms. Birchfield called her immediately following the encounter with Respondent and was upset and crying. Ms. Jenkins stated:

> I can't recall the exact words. It's been several years, but she said that Judge Martin had just been there and that he had pushed her down and told her that he would be back and he wouldn't take no for an answer.

Respondent again asks us to ignore the Commission's findings and, in the exercise of our independent judgment, give credibility to his version of the events which transpired at Ms. Birchfield's home. *See In re Martin*, *supra*, at 308, 245 S.E. 2d at 776. It is true that here we have the testimony of a member of the judiciary pitted against the statements of a former criminal defendant. It is equally true, however, that, in light of the course of conduct witnessed by Mr. Cummings and Ms. Dickson in the Big Rebel parking lot, Ms. Birchfield's version assumes an added layer of credibility. Furthermore, Respondent is the subject of the instant proceeding; his own uncorroborated testiony regarding the visit to Ms. Birchfield's house must, therefore, be regarded to some degree as selfserving. We note in this regard that Mr. Powell's testimony concerning the conversation at Holly Farms does not lend any real weight one way or the other to the events which took place at Ms. Birchfield's house. Although he vaguely recalled a discussion about a dog, and that Ms. Birchfield gave her address to Respondent, such evidence is of little value in determining whether Respondent attempted to force himself upon Ms. Birchfield later in the day. We further take judicial

notice of the fact that Mr. Powell represented the plaintiff in the case of *Stroupe v. Stroupe*, 301 N.C. 656, 273 S.E. 2d 434 (1980), in which Respondent sitting out of term entered a judgment favorable to the plaintiff and without proper notice to the defendant or his attorney.

Finally, as bearing upon the credibility of Ms. Birchfield's testimony, and despite the Commission's failure to make a finding regarding this witness, we note the testimony of Ms. Marie Mikeal. Ms. Mikeal testified concerning two sexual encounters with Respondent evidencing a course of conduct on his part similar to that followed with Ms. Lail and Ms. Birchfield.

In light of the evidence elicited showing Respondent's course of conduct with Ms. Lail, we hold that Finding of Fact 10(b) is supported by clear and convincing evidence in the record.

We therefore accept and adopt as our own the Commission's Findings 10(a) and 10(b).

[5] Even so, Respondent contends that, even if the allegations are true, his conduct did not amount to wilful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. He relies on the following language from *In re Nowell, supra*, at 248, 237 S.E. 2d at 255 (1977):

> Wilful misconduct in office is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith . . . . A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith.

Respondent argues that there is no evidence that he intentionally used the *power of his office* to accomplish the acts of which he stands accused. He maintains that nothing in the record and no finding support a conclusion that he ever offered judicial leniency in exchange for sexual favors. He seemingly argues that the conduct here complained of was a matter of his "private" as opposed to his "public" life. We disagree on several grounds.

First, we have consistently and repeatedly held that each of

these cases is to be decided solely on its own facts. The terms "wilful misconduct in office" and "conduct prejudicial to the administration of justice" are "'so multiform as to admit of no precise rules or definition.'" *In re Peoples*, 296 N.C. 109, 157, 250 S.E. 2d 890, 918 (1978). We have defined "wilful misconduct in office" as involving "more than an error of judgment or a mere lack of diligence." *In re Nowell, supra* at 248, 237 S.E. 2d at 255. We have also stated that "[w]hile the term would encompass conduct involving moral turpitude, dishonesty, or corruption, these elements need not necessarily be present." *In re Edens*, 290 N.C. 299, 305, 226 S.E. 2d 5, 9 (1976). As we observed in *In re Martin, supra*, "if a judge *knowingly and wilfully persists in indiscretions and misconduct* which this Court has declared to be, or *which under the circumstances he should know to be*, acts which constitute wilful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, he should be removed from office." *Id.* at 305-306, 245 S.E. 2d at 775. [Emphasis added.] We do not agree, nor have we ever held, that "wilful misconduct in office" is limited to the hours of the day when a judge is actually presiding over court. A judicial official's duty to conduct himself in a manner befitting his professional office does not end at the courthouse door. *See In re Haggerty*, 257 La. 1, 241 So. 2d 469 (1970). Whether the conduct in question can fairly be characterized as "private" or "public" is not the inquiry; the proper focus is on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office.

In the instant case, the evidence tends to show, and we have so found, that Respondent pursued a course of conduct which reflects at least a reckless disregard for the standards of his office. The Commission found, and we have adopted those findings, that Respondent attempted on several occasions by innuendoes or directly, to obtain sexual favors from two female defendants. Such conduct, in our view, constitutes "wilful misconduct in office" warranting removal. *See In re Peoples, supra.*

Second, we do not agree that the record is silent on the question of whether Respondent actually offered or extended judicial leniency in return for sexual favors. Ms. Birchfield testified specifi-

cally that, at Holly Farms Restaurant, Respondent mentioned something about changing her restricted driver's license. This evidence was embodied in the Commission's Finding 10(b). Furthermore, whether or not Ms. Lail ever testified specifically regarding an actual tender of favorable treatment by Respondent, the evidence of the events which transpired between Ms. Lail and Respondent is replete with inferences that he intended some form of exchange of favors. Finally, common sense requires a conclusion that Respondent's conduct constituted an abuse of the powers of his office, regardless of whether he actually extended an offer of judicial favoritism. The women who testified regarding Respondent's unseemly behavior and sexual advances were either criminal defendants, or were otherwise involved in matters pending before him. As such, they were all in particularly vulnerable and susceptible "bargaining" positions, at least from Respondent's point of view. Indeed, without passing on the correctness of the Commission's failure to find facts regarding the incidents, we note that a third female, likewise involved in cases heard or being heard before Respondent, testified concerning encounters she had had with Respondent which were strikingly similar to those of Ms. Lail and Ms. Birchfield. Marie Mikeal testified that on one occasion, Respondent extended to her a "lunch invitation," which ultimately turned out to be an invitation to engage in sexual relations. When asked at the hearing why she had accepted the invitation, Ms. Mikeal gave this poignant and revealing reply:

> Well, there is 2 reasons really that cross my mind of why that I would say, "Yes." One because he was such an important person I felt, and I was just an individual, a common person, and he was such an important person I felt it was an honor, you know, him asking me to lunch; and the second reason, I am kind of scared of anybody that is in the law. I felt like if I said, no, maybe that I'd be crossing him in some way, and he'd be mad at me.

Third, and finally, we disagree with Respondent's contention that his behavior does not constitute "wilful misconduct in office" for yet another reason. Counsel for both parties stipulated for the record the existence of a former case in which this Court censured Respondent. *In re Martin, supra.* We declined to remove Respondent at that time but held nevertheless that his conduct in disposing of several cases *ex parte* constituted "wilful misconduct in office and

conduct prejudicial to the administration of justice that brings the judicial office into disrepute." *Id.* In light of our previous censure of Respondent, and his persistence in following a course of conduct detrimental to the judicial office as evidenced in the instant case, we are left with no conclusion but that Respondent has abused the privilege of his office, is guilty of wilful misconduct in office, and should be officially removed from office. *In re Peoples, supra.*

Respondent next contends that Article 30, Chapter 7A of the General Statutes, establishing a Judicial Standards Commission and providing for removal or censure of a judge, is an unconstitutional denial of due process and equal protection. We do not deem it necessary to discuss the constitutional questions since we have answered them adversely to Respondent in prior cases. *In re Martin, supra*; *In re Nowell, supra.*

Respondent maintains in his brief that it was error to permit the members of the Commission to read certain statements of witnesses while evidence was being presented at the hearing. The record, however, is totally devoid of any indication that this conduct occurred. There is no objection, no exception, and no assignment of error which could fairly be construed as alluding to this practice. We, therefore, have no grounds upon which to rule, and consequently find this contention wholly without merit.

[6] Respondent's final assignment of error is that the Commission erred in considering evidence concerning his conduct with Ms. Birchfield since those acts occurred in previous term. He cites no authority for his contention. The Commission cites two lines of authority, either of which might arguably stand for defendant's proposition, but both of which are distinguishable from the case *sub judice.* Both lines of authority reason that misconduct which occurred during previous terms of office is forgiven by the voice of the electorate in reelecting the official. *E.g., Matter of Carrillo,* 542 S.W. 2d 105 (Texas 1976); *State ex rel. Turner v. Earle,* 295 So. 2d 609 (Fla. 1974). However, the basis for this rationale is further conditioned upon the existence of at least one other factor, depending on the line of authority.

The court in *State ex rel. Turner v. Earle, supra,* held that misconduct occurring during previous terms of office could not form the basis for removal or suspension during a current term when the electorate had, in effect, pardoned the misconduct through

reelection. The court reasoned that the nature of a democracy required that the will of the people prevail. However, the court's holding is based on the failure of the constitution or statute to give "the suspension or removal the effect of disqualifying the suspended or removed person from holding the same or any other office in the future . . . ." *Id.* at 615 [quoting *In re Advisory Opinion to the Governor*, 31 Fla. 1, 12 So. 114 (1893)]. The rationale appears to be that, if the official is free to seek reelection following a removal for misconduct, a reelection which occurs after the misconduct effectively wipes his slate clean and indeed indicates that the electorate still reposes confidence in the official. However, where the constitution or statutes speak otherwise, the people cannot by popular referendum overrule what is undoubtedly the ultimate will of the people as expressed in those enactments. Thus, as the Commission correctly points out, the rationale represented by this line of authority offers no support where, as in this State, the Legislature has made it manifest that "[a] judge removed for other than mental or physical incapacity . . . is disqualified from holding further judicial office." G.S. 7A-376.

The second line of authority, even assuming that we would adopt the rationale that a reelection acts to pardon prior misconduct, is equally inapplicable. *In Matter of Carrillo*, *supra*, the court held that a reelection of a judicial official may pardon prior acts of misconduct, provided those acts were public knowledge at the time of the reelection. In the case at bar, no evidence is present to indicate that the incident involving Ms. Birchfield was a matter of public knowledge at the time of Respondent's reelection. We therefore hold that the Commission properly considered evidence of events which transpired during Respondent's previous term of office.

Respondent in his brief argues finally that the Commission erred in considering the evidence of Debbie Lail. In support of this assertion, he cites no authority; neither is there an exception or assignment of error relating to his contention. He argues only that the actions of Ms. Lail's attorney, Mr. Cummings, in taping the telephone conversation between Ms. Lail and Respondent constituted trickery and were part of some overall plot or scheme to "get" Respondent. Respondent's contention here is not supported by the record.

As mentioned previously, Mr. Cummings testified that he arranged to tape the phone conversation because he did not know

Ms. Lail well and because he felt that such a permanent recording would best protect all of the persons involved, including Respondent. It was encumbent upon Mr. Cummings, as a member of the legal profession, to refrain from knowingly making false accusations against a judge. DR8-102(B), 283 N.C. 783, 845 (1973). Under the circumstances of this case, we are of the opinion that Mr. Cummings conducted himself professionally and in a manner calculated to preserve the integrity of the judicial system.

Furthermore, the record in this case is devoid of any evidence tending to show a conspiracy or scheme designed to "get" Respondent. The Commission made a specific finding that "the respondent failed to present any evidence at the hearing in support of his allegations [of the existence of a personal vendetta against him]." We agree. When asked the basis of his allegations, Respondent replied, "I feel personally someone has a personal vendetta against me and is out to remove me from office. I do not know why." Respondent also confessed that he did not know who. We therefore find Respondent's final argument to be without merit.

For the reasons stated and in the exercise of our independent judgment of the record, it is ordered by the Supreme Court in conference that Respondent Judge William J. Martin be and he is hereby censured for the conduct specified in the Commission's Finding 10(c).

Be it further ordered by the Supreme Court in conference that Respondent Judge William J. Martin be and he is hereby officially removed from office as a judge in the General Court of Justice, District Court Division, Twenty-Fifth Judicial District, for the wilful misconduct in office specified in the Commission's Findings 10(a) and 10(b).

CHATEAU X, INC., A SOUTH CAROLINA CORPORATION; ATLA THEATERS, INC., A SOUTH CAROLINA CORPORATION; JAMES RUSS, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF BOTH CHATEAU X, INC., AND ATLA THEATERS, INC.; ALBERT PELOQUIN, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF BOTH CHATEAU X, INC. AND ATLA THEATERS, INC.; HECTOR RIQUELME, JR.; FREDERICK OLLIE BYROM; SUSAN RUPE; VICTOR STROOP; JIMMIE TUCKER HILL; DENISE TERRY LAMB; GEORGE JOHNSON; JOE HORNSBY; ROBERT JEROME SMITH; AND A PLACE OF BUSINESS KNOWN AS CHATEAU X THEATER AND BOOKSTORE, HIGHWAY 17 SOUTH, JACKSONVILLE, NORTH CAROLINA v. STATE OF NORTH CAROLINA, EX REL. WILLIAM H. ANDREWS, DISTRICT ATTORNEY FOR THE FOURTH DISTRICT OF NORTH CAROLINA

No. 83

(Filed 4 March 1981)

Obscenity § 3; Nuisance § 10— moral nuisance statutes — constitutionality

Since neither a fine nor imprisonment can be imposed upon a defendant in moral nuisance proceedings under G.S. Ch. 19 unless and until it has been judicially determined that he has sold or exhibited obscene matter, the "prior restraint" imposed by the moral nuisance statutes, if any, is neither more onerous nor more objectionable than a criminal sanction meted out after the fact of sale or exhibition and, therefore, is constitutionally permissible.

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

Justice EXUM dissenting.

ON remand from the United States Supreme Court for consideration of this Court's prior decision, State ex rel. *Andrews v. Chateau X, Inc.*, 296 N.C. 251, 250 S.E. 2d 603 (1979), in light of *Vance v. Universal Amusement Co.*, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980) (per curiam).

This case was argued as No. 23, Fall Term 1980.

Attorney General Rufus L. Edmisten, by Senior Deputy Attorney General Andrew A. Vanore, Jr., Assistant Attorney General Marvin Schiller and I. Beverly Lake, Jr., for the State.

Bailey, Raynor & Erwin, by Frank W. Erwin, and Arthur M. Schwartz, P.C., for defendants.

CARLTON, Justice.

I.

This action was instituted on 12 December 1977 by the State,

through William H. Andrews, District Attorney for the Fourth District, to declare the Chateau X Theater and Bookstore a nuisance under Chapter 19 of the North Carolina General Statutes and to permanently enjoin defendants, South Carolina corporations doing business in Jacksonville, North Carolina, and its officers and employees from "maintaining, using, continuing, owning or leasing said place known as Chateau X Theater and Bookstore . . . as a nuisance" and "any place in the State of North Carolina as a nuisance." The complaint alleged that defendants maintained the Theater for the purpose of illegal exhibitions and sales to the public of obscene and lewd films and publications as a regular and predominant course of business.

The trial was conducted on 4 January 1978 before Judge Small, who, by stipulation of the parties, sat without a jury. Although nineteen exhibits of films and magazines possessed for sale or shown by Chateau X were introduced into evidence, the trial judge viewed only two of them, State's Exhibit Number 15, a film entitled "Airline Cockpit," and State's Exhibit Number 3, a magazine called "Spread Your Legs." The parties mutually stipulated that all films and magazines listed in State's Exhibit Number 20, an inventory of materials found at Chateau X on 12 December 1977, "contain substantially similar material" as was contained in State's Exhibits Numbers 15 and 3. Defendants presented no evidence. It was stipulated, however, that had defendants testified, "the evidence would indicate that the motion pictures exhibited and the books distributed and sold were done (sic) to consenting adults . . . ."

The trial judge found that State's Exhibits Numbers 15 and 3 were obscene and, pursuant to the parties' stipulation, that the remainder of the nineteen films and magazines and all materials listed on the inventory were obscene. He found all the films and magazines to be nuisances and declared Chateau X to be a nuisance under Chapter 19 of our General Statutes and ordered that all materials listed on the inventory be confiscated and destroyed.[1] Defendants were enjoined from exhibiting or selling any item listed on the inventory, from possession for exhibition to the public any

[1]This portion of the trial court's judgment requiring confiscation and destruction of the obscene material was stayed pending appeal, and the defendants, their officers, agents and employees were enjoined from removing or destroying the material by order of Judge Small dated 13 January 1978.

other film in the future which appeals to the prurient interest in sex without serious literary, artistic, educational, political or scientific values and depicts:

(1) Persons engaging in sodomy, per os, or per anum,
(2) Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or
(3) Persons engaging in masturbation,

and from possessing for sale and selling lewd matter which constitutes a principal or substantial part of the stock in trade at a place of business consisting of magazines, books, and papers which appeal to the prurient interest in sex without the same values and which depict any of the three specific acts of sexual conduct listed above.

Both defendants and the State appealed from the trial court's judgment. On 8 May 1978 this Court granted the request of all parties, pursuant to G.S. 7A-31(b), to hear the case prior to its determination by the Court of Appeals. We affirmed the judgment of the trial court concluding, *inter alia*, that Chapter 19 of the General Statutes places the burden of proving obscenity on the State and that the portion of the trial judge's order enjoining the sale or exhibition of obscene matter which has not been judicially determined to be obscene, if it is a prior restraint, is a constitutionally permissible one because it is, in reality, nothing more than a personalized criminal statute.

Defendants sought further review of this case and on 25 April 1980 the United States Supreme Court granted their petition for a writ of certiorari, vacated our prior decision and remanded the cause to this Court "for further consideration in light of *Vance*." *Chateau X, Inc. v. Andrews*, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980).

II.

Our consideration of this cause on remand is limited to determining (1) whether the holdings of *Vance v. Universal Amusement Co.* are applicable to the case *sub judice*, and (2) if so, whether the principles enunciated in *Vance* require reversal or modification of our previous decision. We hold that *Vance* is inapplicable to the present case and, accordingly, reaffirm our previous decision by incorporating herein by reference the original opinion of this Court, reported at 296 N.C. 251, 250 S.E. 2d 603.

In *Vance*, the United States Supreme Court was confronted with the question of the constitutionality of a Texas public nuisance statute[2] which, *inter alia*, authorizes state judges, on the basis of a showing that obscene films have been exhibited in the past, to prohibit the future exhibition of motion pictures that have not yet been judicially determined to be obscene. The Supreme Court affirmed the United States Court of Appeals for the Fifth Circuit and held that the Texas statute in question was unconstitutional. The Court of Appeals read the statute as authorizing a prior restraint of indefinite duration on the exhibition of motion pictures without a final judicial determination of obscenity and without any guarantee of prompt review of a preliminary finding of probable obscenity. *Universal Amusement Co. v. Vance*, 587 F. 2d 159 (5th Cir. 1978). In holding the Texas statute unconstitutional the Supreme Court emphasized:

> that the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance, and . . . that the burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying

[2]The Texas statute provides:

> Art. 4667. 4685-93 Injunctions to abate public nuisances
>
> (a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:
>
> (1) For gambling, gambling promotion, or communicating gambling information prohibited by law;
>
> (2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;
>
> (3) *For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;*
>
> (4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;
>
> (5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law.

Tex. Rev. Civ. Stat. Ann. art. 4667 (Vernon Supp. 1980) (emphasis added).

the imposition of a criminal sanction for a past communication.

445 U.S. at 315-16, 100 S. Ct. at 1160-61, 63 L. Ed. 2d at 420.

In *Vance*, appellee, an operator of an adult motion picture theater, brought a suit in federal district court for declaratory relief and an injunction seeking, in part,[3] to declare the Texas nuisance statute,[4] unconstitutional and to enjoin any action by the County Attorney under that statute. The district court concluded that the statute, when coupled with the Texas Rules of Civil Procedure governing injunctions, operated as an invalid prior restraint on the exercise of first amendment rights and held the statute to be unconstitutional.

The State of Texas appealed to the United States Court of Appeals for the Fifth Circuit, and a divided panel of that court reversed, concluding that "[b]ecause the injunction follows rather than precedes a judicial determination that obscene material has been shown or distributed or manufactured on the premises and because [the injunction's] prohibitions can apply only to *further* dealings with *obscene and unprotected* material," the injunction did not constitute a prior restraint. *Universal Amusement Co. v. Vance*, 559 F. 2d 1286, 1292 (5th Cir. 1977) (panel decision). The panel also concluded that the injunction procedure satisfied the procedural safeguards set forth in *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965),[5] because any temporary restraint entered pending final adjudication on the merits would be imposed

[3]The suit also challenged the constitutionality of another Texas nuisance statute, Tex. Rev. Civ. Stat. Ann. art. 4666 (Vernon 1952). The district court found that statute to be unconstitutional as applied to obscenity, but the Court of Appeals for the Fifth Circuit reversed that holding and found that this statute was inapplicable. *Universal Amusement Co. v. Vance*, 587 F. 2d 159, 166-67 (5th Cir. 1978). Appellees did not appeal from that portion of the court's decision, and the constitutionality of Art. 4666 was not before the United States Supreme Court. 445 U.S. at 310 n. 1, 100 S.Ct at 1158 n. 1, 63 L. Ed. 2d at 416 n.1.

[4]Tex. Rev. Civ. Stat. Ann. art. 4667, *supra* note 2.

[5]The procedural safeguards enunciated by *Freedman* applicable to regulation of communicative activity are:

(1) The burden of proving that the material is beyond the purview of first amendment protection must rest on the censor or the party who is seeking to have the material banned.

by a judge instead of an administrative censor. *Universal Amusement Co. v. Vance*, 559 F. 2d at 1292-93. The judgment of the district court was reversed.

The Court of Appeals granted rehearing *en banc*, reversed the decision of the panel and held that Art. 4667(a) is unconstitutional. *Universal Amusement Co. v. Vance*, 587 F. 2d 159. The eight-member majority found the statute constitutionally objectionable in several respects: First, the Texas statute authorizes injunctions against the future exhibition of unnamed films and, thus, amounts to an impermissible prior restraint on materials not yet declared obscene. Second, under Texas procedure an obscenity case is treated no differently from any other civil case and there is no provision for a prompt review on the merits. The six-member dissent concluded that, as a practical matter, the injunction authorized by the Texas statute imposed no greater a prior restraint than a criminal obscenity statute and, thus, the statute must be constitutional.

On appeal, the Supreme Court limited its review to two questions: (1) whether an "obscenity injunction" under the Texas statute imposes no greater a prior restraint than any criminal statute, and (2) whether the fifth circuit erroneously held that no prior restraint of possible first amendment materials is constitutionally permissible.

With respect to the first issue, the Supreme Court concluded that the Texas statute did impose a greater, more onerous and more objectionable prior restraint than does a criminal statute because:

> [p]resumably, an exhibitor would be required to obey [the injunction] pending a review of its merits and would be subject to contempt proceedings even if the film is ultimately found to be nonobscene. Such prior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any crimi-

(2) There must be a judicial determination as to whether the material constitutes protected expression.

(3) There must be a procedural guarantee of a prompt final judicial decision.

380 U.S. at 58-59, 85 S. Ct. at 738-39, 13 L. Ed. 2d at 654-55.

nal proceeding.

445 U.S. at 316, 100 S. Ct. at 1161, 63 L. Ed. 2d at 421. Justices White and Rehnquist, in dissent, disagreed with the majority's conclusion, arguing that because any injunction granted under the Texas statute would be phrased in terms of the *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973),[6] definition of obscenity, an exhibitor could never be found in contempt for showing a nonobscene film. In response, the majority seemed to imply that, while this point is true with regard to *unnamed* obscene films, the Texas statute also allowed the entry of a temporary injunction prohibiting the exhibition of *specific named* films on the basis of a showing of probable success on the merits. Apparently, it was with regard to the *named* films that the majority found the Texas statute constitutionally infirm: "Even if it were ultimately determined that the [specifically named] film is not obscene, the exhibitor could be punished for contempt of court for showing the film before the obscenity issue was finally resolved." 445 U.S. at 312 n. 4, 100 S. Ct. at 1159 n. 4, 63 L. Ed. 2d at 418 n. 4.[7]

With regard to the second issue, the Supreme Court disagreed with appellant's contention that the Court of Appeals had held that there can never be a valid prior restraint on communicative activity. Instead, that Court viewed the lower court's opinion as holding only that the Texas statute, in combination with the state's procedural rules, was procedurally deficient and that it authorized prior restraints that are more onerous than is constitutionally permissible. Consequently, the Supreme Court did not reach the issue of

[6]In *Miller*, the Supreme Court formulated a new legal standard for obscenity, holding that the basic guidelines for the trier of fact are:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24, 93 S. Ct. at 2615, 37 L. Ed. 2d at 431 (citations omitted).

[7]The brief treatment of this issue in the per curiam opinion renders our task of determining the precise holding quite difficult. We proceed on what we believe is the most logical basis for the Supreme Court's conclusion that the Texas statute authorizes prior restraints more onerous and more objectionable than the threat of criminal sanctions, that stated above in the text.

whether there can ever exist a constitutionally permissible prior restraint of possible first amendment materials.

III.

We now turn to a consideration of the North Carolina moral nuisance statutes in light of the *Vance* decision. As we read the pertinent portion of the *Vance* opinion, the Supreme Court held that the Texas statute, which admittedly authorized prior restraints of indefinite duration on the exhibition of materials that had not been finally adjudicated to be obscene, was unconstitutional because it authorized prior restraints more onerous and more objectionable than corresponding criminal sanctions. The vice of the Texas statute lay in the possibility that an exhibitor could be held in contempt for violating a temporary injunction by showing a film prior to a final judicial determination of obscenity even if the film were ultimately found to be non-obscene. As stated above, the United States Supreme Court has interpreted the Texas statute to allow a preliminary injunction against *unnamed* materials only if those materials come within the legal definition of obscenity and also to allow the injunction to issue against *named* materials. As to the former, presumably, obscenity would be an essential element required to be proved *before* the seller or exhibitor could be held in contempt; thus, as to the unnamed materials, nonobscenity would be a defense in a contempt proceeding and the injunction procedure is no more onerous than and, in practical terms, resembles a criminal sanction imposed after the fact of sale or exhibition. As to the *named* materials, however, the United States Supreme Court concluded that contempt could be premised merely upon the showing of these materials in violation of the express terms of the injunction, without regard to the character or content of the materials; thus, as to the named materials, mere exhibition or sale would constitute the violation without regard to the obscenity or nonobscenity of the subject matter. Nonobscenity would not be a defense to a contempt charge for showing or selling a material specifically named in the injunction. In this respect, the Supreme Court concluded, the Texas injunction procedure is more onerous than a criminal sanction and constitutes a constitutionally impermissible prior restraint.

In contrast to the statute construed in *Vance*, the moral nuisance proceedings authorized by Chapter 19 of our General Statutes permit no such vice. As we made clear in our prior decision in

this case, nonobscenity is *always* a defense to a contempt proceeding and in such an action the State has the burden of proving obscenity beyond a reasonable doubt:

> There is no significant difference procedurally in a criminal action for selling obscenity and in a contempt action for violation of an injunction. In both proceedings the defendant can always defend on the ground that the material is not legally obscene. The burden is on the State to prove obscenity beyond a reasonable doubt.

State ex rel. Andrews v. Chateau X, Inc., 296 N.C. at 264, 250 S.E. 2d at 611 (citations omitted).

The constitutional challenge made on the initial appeal by the original defendants to the Chapter 19 proceeding was directed toward the constitutionality of a permanent injunction, one entered after a final judicial determination of obscenity. Although the above-quoted language was directed toward the permanent injunction, which can enjoin *specifically named* materials only after they have been found to be obscene, *see id.* at 255-56, 250 S.E. 2d at 606, and the issue presented in *Vance* concerning a temporary injunction was not under consideration, we deem this rule to be equally applicable in contempt actions brought for violation of a temporary injunction. Under our laws, therefore, no penalty, whether it be a fine or imprisonment,[8] can be imposed upon a defendant unless and until it has been judicially determined that he has sold or exhibited obscene matter. Because of this special procedural safeguard, the "prior restraint" imposed by our statutes, if any, is neither more onerous nor more objectionable than a criminal sanction meted out after the fact of sale or exhibition and, therefore, is constitutionally permissible.

Under our law, sellers and exhibitors of erotic material can be punished only for dealing in materials which are legally obscene and unprotected by the first amendment guarantee of freedom of speech. Since nonobscenity is *always* a complete defense to contempt actions, there is no possibility that anyone could be punished for dealing in constitutionally protected materials. Hence, our laws

[8] Violation of any injunction granted under the provisions of Chapter 19 constitutes contempt and is punishable by imposition of a fine of not less than $200 or more than $1,000, or by imprisonment in the county jail for not less than three or more than six months, or by both fine and imprisonment. G.S. § 19-4 (1978).

do not share the constitutional infirmities of Texas law, and the principles enunciated in *Vance* do not control the disposition of the case *sub judice*. We find nothing in *Vance* which requires us to depart in any way from our prior decision. Therefore, the prior decision of this Court, reported at 296 N.C. 251, 250 S.E. 2d 603, is hereby reaffirmed and incorporated by reference as part of the opinion of this Court on remand.

IV.

Because we readopt the prior decision of this Court, the action of the trial court in all respects is, again,

Affirmed.

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

Justice EXUM dissenting:

I dissent for the reasons given in my dissent to the Court's first opinion, 296 N.C. 251, 268, 250 S.E. 2d 603, 613 (1978), a position which I believe has been bolstered by *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), and *Spokane Arcades, Inc. v. Brockett*, ___ F. 2d ___, No. 78-2369, slip op. (9th Cir. 1980). Both *Vance* and *Spokane Arcades* struck down state statutes which permitted injunctions against future "obscene" expressions. As construed by the majority in this Court's first opinion, a construction with which I then disagreed, our statute under attack permits precisely this kind of injunction.

The argument of the majority initially and in its second opinion is the same: An injunction against future "obscene" expressions has no greater chilling effect on protected expressions than criminal sanctions against "obscene" expressions which have been approved by the United States Supreme Court. As I noted in my original dissent, I thought that Court answered such an argument in *Near v. Minnesota*, 283 U.S. 697 (1931). If not, it clearly answered it in *Vance* when it said, 445 U.S. 315-16, "the burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication."

The majority relies on finely spun distinctions between the injunction dealt with in *Vance* and the one here being considered.

Perhaps these distinctions are sufficient to make a difference. I do not think so, because I read *Vance* more broadly than the majority chooses to.

Vance says that injunctions against future expressions are intrinsically different from criminal sanctions against past expressions. *One* reason given in *Vance* is that non-obscenity might not be a defense against a contempt proceeding for violation of a civil injunction. In other words, a defendant may engage in expression that violates the terms of the injunction but which is not in fact obscene. The dissenters in *Vance* noted, "[t]his conclusion is plainly wrong." 445 U.S. at 322. The majority here says that non-obscenity is always a defense against a contempt proceeding under our civil injunction statute because the injunction can apply only to materials which, by definition, are obscene.

Even if the dissenters in *Vance* and the majority here are correct on this point, this is not the *only* reason why injunctions against future expression are more onerous in light of the First Amendment than criminal sanctions against past expressions. First, as I noted in my original dissent, a criminal defendant is entitled to various procedural protections, *e.g.*, a jury trial, not available to an alleged civil contemner. Second, the state in a criminal obscenity prosecution is constitutionally required to prove not only that the particular material in question is obscene but that defendant knew of its obscenity at the time he dealt with it. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Smith v. California*, 361 U.S. 147 (1959). "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." *Mishkin v. New York*, 383 U.S. 502, 511 (1966). No such proof of scienter, or *mens rea*, would be required in a civil contempt proceeding. The state as plaintiff would be required to prove only that defendant wilfully engaged in expressions prohibited by the injunction.

WILLIE M. GRAVES AND WIFE, BELVA W. GRAVES AND TERRY GRAVES HEATH v. WILLIAM L. WALSTON AND WIFE, PATTY L. WALSTON, GEORGE H. WALSTON AND WIFE, JEAN H. WALSTON

No. 95

(Filed 4 March 1981)

1. Rules of Civil Procedure § 50.4— failure to move for directed verdict — judgment n.o.v. improper

Plaintiffs had no standing after the verdict to move for judgment n.o.v. where they did not move for directed verdict at the close of their evidence or at the close of all the evidence. G.S. 1A-1, Rule 50(b)(1).

2. Rules of Civil Procedure § 50— motion for judgment n.o.v. and new trial — failure to rule on new trial motion

When a motion for judgment n.o.v. is joined with a motion for a new trial, it is the duty of the trial court to rule on both motions.

Justices CARLTON and MEYER did not participate in the consideration or decision of this case.

APPEAL by defendants from an unpublished decision of the Court of Appeals, 46 N.C. App. 606, 275 S.E. 2d 570 (1980), upholding judgment for plaintiffs entered by *Smith (David I.), S.J.*, at the 31 May 1979 Session of GREENE Superior Court. This case was docketed and argued as No. 110 at the Fall Term 1980.

At a pretrial conference, certain facts, drawn mostly from the averments of the complaint and answer, were stipulated and presented to the jury at trial. Those facts may be summarized as follows:

Harry L. Walston died intestate on 30 June 1950, leaving a farm in Greene County which, under the laws of intestacy, passed to his children, Belva Walston Graves, William Walston and George Walston, as tenants in common, each inheriting a one-third undivided interest in the farm subject to the dower interest of Esther T. Walston, wife of the deceased.

Willie Graves rented the farm and tended it for more than ten years for his wife, her brothers and her mother. The farm contained a feeder pig operation which was the subject of a recorded contract between Willie Graves and Bunting Swine Farms. In 1974, Willie and Belva Graves mortgaged Belva's one-third undivided interest to Branch Banking and Trust Company as a portion of the security

for an $85,000 loan by the bank. Willie and Belva Graves defaulted on the loan and the bank instituted foreclosure proceedings. A foreclosure sale was set for 15 November 1976. William and George Walston became concerned that part of the farm might be acquired by someone outside the family. The parties entered into an agreement whereby the interest of Belva Graves would not pass out of the family. According to a stipulated fact drawn from defendants' answer:

> [P]rior to the foreclosure sale the plaintiff, Belva W. Graves and her husband, Willie M. Graves, and the defendants agreed that if the Bunting brothers would put up the money necessary to bid in the one-third undivided interest in said lands at the foreclosure sale, then, and in that event, William L. Walston would make high bid for said lands at the foreclosure sale and, upon payment of said purchase price to the Trustee and after acquisition of title of said lands, deed said one-third undivided interest to Terry Graves Heath.

Willie Graves, defendants William and George Walston, and the Bunting brothers met at the courthouse on the morning of the sale and discussed the agreement. At the sale, the bank bid $9,000; William Walston then bid $10,000, and the sale was closed. The Bunting brothers gave a check for $1,000 to the trustee as a ten percent deposit. The check was never cashed. Neither the Buntings nor plaintiffs were called upon to provide the bid money. Defendants and Esther T. Walston, the widow with the dower interest, obtained a $10,000 loan from First Citizens Bank which was used to pay the amount of the bid to the trustee who conducted the foreclosure sale. The sale to William Walston was confirmed, and on 6 December 1976, the one-third undivided interest of Belva Graves was deeded to William L. and George Harper Walston.

William Walston then advised his sister that she and the other plaintiffs had no interest in the property and that he and George Walston owned the entire property subject to their mother's dower right. Defendants further advised plaintiffs and Bunting Swine Farms by registered mail that the farm belonged to defendants and that the feeder pig operation on the farm must be terminated unless Bunting Swine Farms and plaintiffs paid $2,000 rent by 15 February 1977 and recognized the ownership of the farm by defendants.

In addition to the above stipulated facts, there is evidence tending to show:

The Buntings agreed to put up the money for William Walston to bid in the farm. The principal concern of the Buntings was to see that the hog feeder operation upon which they relied in their business continued to function. Willie Graves was employed by them in their pig farm operations. It was felt that others might not bid on the farm if they knew family members were trying to buy it back. William Walston testified: "I was there for the sole purpose of bidding the farm in and having it in my name and when they paid off the rest of the money it was going to Terry Graves. I was not interested in where the money was coming from so long as the money came and it was put in Terry's name."

William Walston bid in the property and C. B. Bunting gave the trustee a deposit check for $1,000. After the sale, the Buntings discussed the $10,000 loan with their attorneys. The Buntings intended the hogs Willie Graves raised for them to be security for the loan. The Bunting attorneys suggested other alternatives including having title to the interest in the name of Bunting Farms with a "legal paper" acknowledging the loan and agreeing to convey the property to Terry Graves Heath on payment of the loan. The Buntings informed Willie Graves of their attorneys' advice. Douglas Bunting testified, "[w]e would consider putting title in the name of Terry Graves Heath if it had to go that way." Willie Graves told his brother-in-law William Walston of the Buntings' proposal that the property be in their name until the $10,000 purchase price was paid them. William Walston objected to this but did indicate a deed of trust to the Buntings by Terry Graves Heath would be acceptable.

The Walston brothers felt the Bunting brothers had reneged on the agreement. It was their intent to keep the farm in the family. It was impossible for their sister to hold the property because of her other judgment creditors who would seek execution on the land. The Walston brothers wanted their niece, Terry Graves Heath, to have her mother's interest. Terry Graves Heath testified that her uncle told her of the plan to put her mother's interest in her name and that she was not to worry about the cost as the rents would more than cover it. William Walston testified that "I would bid it in for Terry if the Bunting brothers would pay the money. I did bid it in for Terry upon the condition of the Bunting brothers putting up the money."

The Bunting brothers testified that from the date of the foreclosure sale until the day of the trial, they were ready, willing and able to provide the $10,000 purchase price.

The Walston family farm contains seventy-six acres of land. Forty-four acres are cleared fields which bring an annual rent of $8,000. Eight to ten of these cleared acres are prime tobacco land. The tobacco poundage is about 20,000 pounds a year. The remaining acreage consists of woodlands and pasture which is used in the feeder pig operation which Willie and Belva Graves developed at a cost of $50,000 to $60,000. The farm has 1800 feet of paved road frontage. The fair market value of the farm was placed at between $150,000 and $200,000. William Walston testified the one-third interest of his sister for which he paid $10,000 was worth $25,000 to $30,000.

The case was submitted to the jury on five issues which were answered as follows:

1. Did the defendant, William L. Walston, agree at or before the sale on November 15, 1976 to take title in trust for Terry Graves Heath on the condition that the Bunting Brothers supply the purchase price?

ANSWER: YES.

2. Did the plaintiffs rely on this agreement and allow the land to be bid in by the defendant, William L. Walston?

ANSWER: YES.

3. If so, did the defendant William L. Walston bid in the property at a grossly inadequate price?

ANSWER: YES.

4. Were the plaintiffs at all times ready, willing, and able to comply with the agreement?

ANSWER: NO.

5. Did the defendant, William L. Walston, wrongfully put title to the land in the name of himself and his brother, George Walston?

ANSWER: NO.

Plaintiffs moved to set aside the answers to the fourth and fifth issues as contrary to the weight of the evidence and the law. Plaintiffs argued that the answers to the first three issues entitled them to this as a matter of law. They also moved for judgment notwithstanding the verdict and for a new trial. The trial judge then stated:

> Well, the Court is of the opinion that a directed verdict should have been entered for the plaintiffs before they returned a verdict back. The motion to set aside the verdict as to issues four and five, motions are denied and the Court concludes, however, that notwithstanding the answers to these issues, judgment is to be entered for the plaintiffs and orders the defendants to convey all of their right, title and interest to the property to Terry Graves Heath upon tender by the plaintiff of the purchase price of $10,000.00 either in U.S. currency or certified check.

A judgment to this effect was entered and defendants appealed to the Court of Appeals which affirmed the trial court's "equitable judgment" notwithstanding the verdict. This Court allowed defendants' petition for discretionary review pursuant to G.S. 7A-31.

Braswell & Taylor by Roland C. Braswell, attorneys for plaintiff appellees.

James H. Toms attorney for defendant appellants.

HUSKINS, Justice.

Did the trial court err by entering a judgment notwithstanding the verdict for plaintiffs when plaintiffs had not moved for a directed verdict at the close of all the evidence? The answer is yes.

The record on appeal as amended reveals that the following transpired after the jury verdict came in:

> COURT: All right, any motions.
>
> MR. BRASWELL: Your honor, I would like for the record to show, that the plaintiffs move that the answer to Issue number four be set aside for that the answer is contrary to the evidence, contrary to the law and that it should be set aside in the interest of justice. I make the same motion with reference to the fifth one and I would move the court that judgment be entered notwithstand-

ing the verdict for that the answers to the first three issues would entitle us to judgment notwithstanding the answer to the issues number four and number five and finally if the court does not so grant, then we move for a new trial.

COURT: Well, the Court is of the opinion that a Directed Verdict should have been entered for the plaintiffs before they returned a verdict back. The motion to set aside the verdict as to issues four and five, motions are denied and the Court concludes however that notwithstanding the answers to these issues, judgment is to be entered for the plaintiffs and orders the defendants to convey all of their right, title and interest to the property to Terry Graves Heath upon tender by the plaintiff of the purchase price of $10,000.00 either in U.S. currency or certified check.

As shown by the amended record, plaintiffs' counsel made three post verdict motions: (1) to set aside the answers to issues four and five, (2) for judgment notwithstanding the verdict and (3) for a new trial. The first motion was expressly denied. The second was granted. The third was never ruled on by the trial court.

A motion for judgment notwithstanding the verdict is governed by Rule 50(b)(1) of the North Carolina Rules of Civil Procedure which provides:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In either case the motion shall be granted if it appears that the motion for directed verdict could properly have been granted. A motion for a new

> trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the judge may allow the judgment to stand or may set aside the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the judge may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. Not later than ten (10) days after entry of judgment or the discharge of the jury if a verdict was not returned, the judge on his own motion may, with or without further notice and hearing, grant, deny, or redeny a motion for directed verdict made at the close of all the evidence that was denied or for any reason was not granted.

The plain meaning of the quoted rule is that a motion for judgment notwithstanding the verdict must be preceded by a motion for directed verdict at the close of all the evidence. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E.2d 316 (1976). The reason for that requirement has been explained by Professor Moore as follows:

> This is to avoid making a trap of the latter motion. At the time that a motion for directed verdict is permitted, it remains possible for the party against whom the motion is directed to cure the defects in proof that might otherwise preclude him from taking the case to the jury. A motion for judgment n.o.v., without prior notice of alleged deficiencies of proof, comes too late for the possibility of cure except by way of a complete new trial. The requirement of the motion for directed verdict is thus in keeping with the spirit of the rules to avoid tactical victories at the expense of substantive interests.

5A Moore's Federal Practice § 50.08 (1980); *see also* 9 Wright and Miller, Federal Practice and Procedure § 2537 (1971).

[1] In the present case, plaintiffs did not move for directed verdict at the close of plaintiffs' evidence or at the close of all the evidence. Plaintiffs thus had no standing after the verdict to move for judgment notwithstanding the verdict and for that reason the trial court was without authority to enter judgment notwithstanding the verdict for plaintiffs. The Court of Appeals erred when it affirmed. The judgment notwithstanding the verdict for plaintiffs must there-

fore be vacated.

[2] The trial court did not rule on plaintiffs' third post verdict motion for a new trial. This was error. When a motion for judgment notwithstanding the verdict is joined with a motion for a new trial, it is the duty of the trial court to rule on both motions. Rule 50 (c) (1) provides:

> If the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate division has otherwise ordered. In case the motion for new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate division.

See also Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940). The ruling on the alternative motion for a new trial becomes important where, as here, the judgment notwithstanding the verdict is overturned on appeal. Had the trial court conditionally denied the alternative motion, plaintiffs, as provided in Rule 50 (c) (1), could have excepted and appealed conditionally therefrom. Incident to such conditional appeal, plaintiffs, as appellees, could have included their exceptions in the record on appeal and could have set out cross assignments of error allegedly entitling them to a new trial in the event the judgment notwithstanding the verdict was reversed on appeal. *Hoots v. Calaway*, 282 N.C. 477, 193 S.E.2d 709 (1973). Had the trial court conditionally granted the alternative motion, the case could have proceeded to new trial upon remand following our reversal of the judgment notwithstanding the verdict, unless this Court on appeal also reversed the grant of a new trial. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974).

We note judicially that the special superior court judge who tried this case is no longer on the bench. It would be inappropriate for another superior court judge who did not try the case to now pass upon plaintiffs' alternative motion for a new trial. *Hoots v. Calaway, supra.*

We have reviewed the record and find error of law prejudicial to plaintiffs. Five issues were submitted to the jury and answered by it as follows:

> 1. Did the defendant, William L. Walston, agree at or before the sale on November 15, 1976 to take title in trust for Terry Graves Heath on the condition that the Bunting Brothers supply the purchase price?
>
> ANSWER: YES.
>
> 2. Did the plaintiffs rely on this agreement and allow the land to be bid in by the defendant, William L. Walston?
>
> ANSWER: YES.
>
> 3. If so, did the defendant William L. Walston bid in the property at a grossly inadequate price?
>
> ANSWER: YES.
>
> 4. Were the plaintiffs at all times ready, willing, and able to comply with the agreement?
>
> ANSWER: NO.
>
> 5. Did the defendant, William L. Walston, wrongfully put title to the land in the name of himself and his brother, George Walston?
>
> ANSWER: NO.

The answers to the first two issues, nothing else appearing, would entitle plaintiffs to judgment as a matter of law on the theory of a parol trust. In *Bryant v. Kelly*, 279 N.C. 123, 181 S.E.2d 438 (1971), we discussed at length the requirements for a parol trust. In *Bryant*, we said:

> North Carolina is one of a minority of states that has never adopted the Seventh Section of the English Stat-

> ute of Frauds which requires all trusts in land to be manifested in writing. Even so, this Court has consistently enforced safeguards that considerably limit the application of the parol trust doctrine. Despite such limitations, this Court has always upheld parol trusts in land in the "A to B to hold in trust for C" situation. The rule is stated in *Paul v. Neece* [244 N.C. 565, 94 S.E.2d 596 (1956)] in these words: "[I]t is uniformly held to be the law in this State that where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land, and equity will enforce such an agreement." Moreover, a parol trust "does not require a consideration to support it. If the declaration is made at or before the legal estate passes, it will be valid even if in favor of a mere volunteer." Evidence of the establishment of a parol trust is required to be clear, cogent, and convincing; a mere preponderance of the evidence is not sufficient.

279 N.C. at 129-30, 181 S.E.2d at 441-42 (citations omitted). The third issue, while not a prerequisite to establishment of a parol trust, demonstrates overwhelmingly that equity is on the side of the plaintiffs. If on remand another jury trial is required, the presiding judge shall formulate and submit appropriate issues based upon the pleadings and the evidence offered at that time.

In the present case, the parties stipulated and the jury found that William Walston agreed, at or before the foreclosure sale, to take title in trust for Terry Graves Heath on condition that the Bunting brothers supply the purchase price on behalf of plaintiffs. William Walston himself so testified. Terry Graves Heath and the other plaintiffs relied on that agreement, and William Walston was permitted to bid in the land for $10,000. This establishes a parol trust in favor of Terry Graves Heath. Although plaintiffs alleged in their pleadings a constructive or resulting trust, the pleadings, pursuant to Rule 15(b) of the Rules of Civil Procedure, are in effect deemed amended to conform to the proof. Even so, filing a formal written amendment to the complaint by leave of the trial court is envisioned by the rule.

A parol trust must be established by evidence clear, cogent

and convincing; a mere preponderance of the evidence is not sufficient. *Bryant v. Kelly, supra.* We note from the charge in this case that the judge merely required plaintiffs to prove their case by the greater weight of the evidence.

For the reasons stated, the decision of the Court of Appeals is reversed and the judgment for plaintiffs notwithstanding the verdict is vacated. The case is remanded to the trial court for a new trial in accord with this opinion.

Reversed and remanded.

Justices CARLTON and MEYER did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JERRY ROSS LUCAS, JR.

No. 67

(Filed 4 March 1981)

1. Rape §§ 2, 5— second degree sexual offense — meaning of "any object"

In defining a "sexual act" in G.S. 14-27.1(4) as "the penetration, however slight, by any object into the genital or anal opening of another person's body," the legislature intended the words "any object" to embrace parts of the human body as well as inanimate or foreign objects. Therefore, the State's evidence was sufficient for the jury in a prosecution for second degree sexual offense where it tended to show that defendant penetrated the genital opening of the prosecutrix's body with his fingers.

2. Criminal Law §§ 66, 89.3— victim's prior identification of defendant — admissibility for corroboration

In a prosecution for second degree sexual offense, the victim's testimony as to her previous identification of defendant at the probable cause hearing was competent to corroborate her in-court identification of defendant.

3. Criminal Law §§ 50, 71— testimony that slivers "appeared to be" glass — competency

Testimony by a police officer that defendant had what appeared to be slivers of glass in his hair, in his pants and imbedded into his leather jacket at the time of his arrest did not violate the opinion rule of evidence since the slivers of glass could hardly be described otherwise, and the witness was in a better position than the jury to draw the conclusion as to whether the slivers were glass.

4. Arrest and Bail § 3.5; Searches and Seizures § 7— probable cause for arrest

— seizure of clothing incident to lawful arrest

An officer had probable cause to arrest defendant for burglary and second degree sexual offense where the officer questioned defendant near the crime scene shortly after receiving a radio dispatch concerning the crimes but did not arrest him at that time; the officer then went to the victim's residence where he received a description of the burglar and his clothing; and realizing the description fit the appearance of defendant, the officer went looking for defendant, removed him from a passing vehicle, and took him to the police station. Therefore, defendant's clothing was properly seized at the police station as an incident of his lawful arrest and was properly admitted into evidence at his trial.

DEFENDANT appeals from judgments of *Reid, J.*, entered at the 30 April 1980 Session, WASHINGTON Superior Court.

Defendant was tried upon separate bills of indictment, proper in form, charging him with (1) first degree burglary in violation of G.S. 14-51, (2) second degree sexual offense upon Helen Peele in violation of G.S. 14-27.5 and (3) common law robbery of Helen Peele. All three offenses allegedly occurred on 8 January 1980.

The State offered evidence tending to show that Helen Peele was seventy-one years old and lived alone. On 8 January 1980, she was in bed watching television. Shortly before 1 a.m., she heard "something like glass falling" and got up to investigate. When she got into the dining room she saw a man "backing in the window." The entire window had been broken out, and the man backed through the window into the room. She screamed and ran to her bedroom and closed the door, but the man pushed it open. They struggled, and the intruder asked, "Where is your damn money?" She pointed to her coat nearby, but the man said he didn't want money but wanted sex. The struggle continued, and the man started choking her and beating her in the face saying, "I'll kill you." They fell on the floor and her assailant penetrated her vagina with his fingers. The man then left the house through the same window by which he had entered. Mrs. Peele ran to a neighbor's house and a passing motorist alerted the police. She gave the officers a description of her assailant, including his clothing, and stated that he had the odor of alcohol about him. Mrs. Peele returned to her home and discovered two pocketbooks missing with thirty-seven dollars in currency in them.

Over objection, Mrs. Peele identified defendant in court as the intruder who had assaulted her and stated that she had seen him at the probable cause hearing and identified him there.

Officer Curtis Johnson of the Plymouth Police Department received a call at 12:52 a.m. on 8 January 1980 while he was on patrol duty. Within three minutes he encountered defendant Lucas and interrogated him for four or five minutes. Officer Johnson then went to Mrs. Peele's residence, where he received a description of the person involved. He then went looking for defendant, removed him from a passing vehicle and took him to the police station. Defendant had slivers of glass in his hair and pants and some were embedded in his leather jacket. He had welts on his chest and a cut between his fingers. He had in his possession two ten-dollar bills, two five-dollar bills and a key to Room No. 35 at the Pinetree Motel. Officer Johnson further testified that he was in court on 16 January 1980 at a preliminary hearing for defendant and that Mrs. Peele identified defendant as her assailant at that time. There were seventy-three people in the courtroom.

Willie Hart was driving the car from which defendant was removed when arrested. Hart testified defendant came to his door, asked for a ride to Sand Hill and gave him two one-dollar bills with which to buy gas. As they were riding on the Sand Hill road, the car was stopped and defendant was arrested. Hart further stated that defendant was wearing a coat but he did not see any glass slivers or other glittering material on it.

Police Chief Floyd Woodley testified he found two purses at 207 Monroe Street about a block and three-quarters from Mrs. Peele's house.

SBI Agent Steve Jones, an expert in the examination and comparison of known inked impressions with latent fingerprints, testified he compared a latent palm print lifted from the windowsill of Mrs. Peele's house with a known inked impression of defendant's palm print, found twenty-two points of identification, and in his opinion the person who made the inked palm print impression also made the latent palm print impression on the windowsill of Mrs. Peele's house.

Defendant offered no evidence.

The jury convicted defendant on all three charges. He received a life sentence for the first degree burglary which he appealed to this Court. We allowed motion to bypass the Court of Appeals on the sexual assault and robbery convictions for which he received sentences of sixteen years and four years, respectively, to the end that

initial appellate review in all cases be had in the Supreme Court.

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

Maynard A. Harrell, Jr., attorney for defendant appellant.

HUSKINS, Justice.

[1] Defendant's motion at the close of the State's evidence to dismiss the charge of second degree sexual assault was denied. This ruling is the basis for his first assignment of error.

G.S. 14-27.5 provides in pertinent part as follows:

> (a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:
>
> (1) By force and against the will of the other person;
>
> . . . .
>
> (b) Any person who commits the offense defined in this section is guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for a term of not more than 40 years.

G.S. 14-27.1(4) defines "the penetration, however slight, by any object into the genital or anal opening of another person's body . . ." as a "sexual act."

The evidence in this case tends to show that defendant penetrated the genital opening of Helen Peele's body with his fingers. Defendant contends this is not a "sexual act" under the statute because the Legislature only intended the words "any object" in G.S. 14-27.1(4) to mean any object foreign to the human body. Defendant cites no authority in support of his position.

In the interpretation and construction of statutes, the task of the judiciary is to seek the legislative intent. *Housing Authority v. Farabee*, 284 N.C. 242, 200 S.E.2d 12 (1973). This rule applies not only to civil statutes but to criminal statutes as well. *State v. Brown*, 221 N.C. 301, 20 S.E.2d 286 (1942); *State v. Humphries*, 210 N.C. 406, 186 S.E. 473 (1936). Criminal statutes must be strictly, but not stintingly or narrowly, construed. *State v. Spencer*, 276 N.C. 535,

173 S.E.2d 765 (1970). The words and phrases of a statute must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit. Where the Legislature defines a word used in a statute, that definition is controlling even though the meaning may be contrary to its ordinary and accepted definition. *Vogel v. Supply Co.*, 277 N.C. 119, 177 S.E.2d 273 (1970).

When the foregoing rules of statutory construction are applied to G.S. 14-27.1(4), we are of the opinion, and so hold, that the Legislature did not intend to limit the meaning of the words "any object" to objects foreign to the human body. The complete definition of "sexual act" contained in the statute reads as follows:

> "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: Provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

It is noted that all sexual acts specifically enumerated in the statute relate to sexual activity involving parts of the human body. The only sexual act excluded from the statutory definition relates to vaginal intercourse, a necessary omission because vaginal intercourse is an element of the crimes of first and second degree rape which are defined in G.S. 14-27.2 and G.S. 14-27.3. The words "sexual act" do not appear in these rape statutes. The words do appear in G.S. 14-27.4 and G.S. 14-27.5 which define the crimes of first and second degree "sexual offense." The Legislature must have intended "sexual act" as defined in G.S. 14-27.1(4) to encompass every penetration other than vaginal intercourse. We therefore conclude that the Legislature used the words "any object" to embrace parts of the human body as well as inanimate or foreign objects. If the lawmaking body had a different intent, it could have easily expressed it. Defendant's first assignment of error is overruled.

[2] At trial, Mrs. Peele identified defendant from the witness stand without objection as the man who broke into her home and assaulted her. She was then permitted to testify over objection that she had previously picked defendant out of the crowd in the courtroom at the probable cause hearing and identified him as her

assailant at that time. Admission of her testimony as to the previous identification constitutes defendant's second assignment of error.

There is nothing in the record to suggest that Mrs. Peele's previous identification of defendant at the probable cause hearing was tainted by impermissibly suggestive procedures. Defendant does not challenge admission of the evidence on that ground. Rather, he contends that Mrs. Peele's credibility had not been impeached and therefore her testimony as to her previous identification of defendant at the probable cause hearing could not be used to bolster and strengthen the credibility of her in-court identification testimony. For reasons which follow, we think defendant's position is unsound.

It seems that most jurisdictions will not receive evidence to support the credibility of a witness unless that witness has been directly impeached. *See* 4 Wigmore, Evidence, § 1124 (Chadbourn rev. 1972). The necessity for some kind of impeachment or attack on the credibility of the witness is recognized in some of our earlier cases. *See State v. Cope*, 240 N.C. 244, 81 S.E.2d 773 (1954); *Gibson v. Whitton*, 239 N.C. 11, 79 S.E.2d 196 (1953); *State v. Melvin*, 194 N.C. 394, 139 S.E. 762 (1927); *Bowman v. Blankenship*, 165 N.C. 519, 81 S.E. 746 (1914); *State v. Parish*, 79 N.C. 610 (1878). As these and other cases reveal, however, we have recognized that impeachment may arise from proof of bad character, contradictory statements, vigorous cross-examination, contradiction by other witnesses, or the varied position of the witness in reference to the cause and its parties. As a result, "the necessity of impeachment as a prerequisite to corroboration would seem to be more theoretical than real. Indeed, the more recent cases tend to ignore the requirement of impeachment altogether." 1 Stansbury's North Carolina Evidence § 50, p. 144 (Brandis rev. 1973). *See State v. Carter*, 293 N.C. 532, 238 S.E.2d 493 (1977); *State v. Cook*, 280 N.C. 642, 187 S.E.2d 104 (1972); *State v. Best*, 280 N.C. 413, 186 S.E.2d 1 (1972); *State v. Fox*, 277 N.C. 1, 175 S.E.2d 561 (1970); *State v. Primes*, 275 N.C. 61, 165 S.E.2d 225 (1969); *State v. Paige*, 272 N.C. 417, 158 S.E.2d 522 (1968); *State v. Rose*, 270 N.C. 406, 154 S.E.2d 492 (1967); *State v. Case*, 253 N.C. 130, 116 S.E.2d 429 (1960), *cert. den.*, 365 U.S. 830, 5 L.Ed.2d 707, 81 S.Ct. 717 (1961); *State v. Rose*, 251 N.C. 281, 111 S.E.2d 311 (1959). In fact, the admissibility of prior consistent statements of a witness to strengthen his credibility has been reaffirmed by this Court in scores of cases where the credibility of the

witness has been impugned in any way. *See, e.g., State v. Brodie*, 190 N.C. 554, 130 S.E.2d 205 (1925). If the previous statement of the witness was substantially consistent with the testimony of the witness at trial, it has been held to be admissible for corroborative purposes. If the prior statement is substantially inconsistent with the testimony of the witness at trial, it is admissible for impeachment purposes. Such is the rule with us. It is grounded upon the obvious principle that the consistent statements sustain and strengthen, while conflicting statements impair the credibility of the witness before the jury.

For the reasons stated, we hold that the challenged evidence was competent and properly admitted. Defendant's second assignment of error is overruled.

[3] Officer Curtis Johnson was permitted to testify over objection that when he removed defendant from the vehicle driven by Willie Hart and took him to the police station, defendant had what appeared to be slivers of glass in his hair and in his pants as well as embedded into his leather jacket. Admission of this testimony constitutes defendant's third assignment of error.

Defendant argues the testimony challenged by this assignment violates the opinion rule of evidence and is therefore inadmissible; that the witness could have described the substance to the jury and allowed it to form its own opinion as to whether it was glass or some other material; that the court's ruling permitted the witness to testify in an area requiring the testimony of experts. This prompts a brief examination of the opinion rule.

Opinion evidence is inadmissible if the witness can relate the facts "so that the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts." 1 Stansbury's North Carolina Evidence § 124, p. 388 (Brandis rev. 1973); *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E.2d 36 (1966). The evidence is admissible if either of these conditions is absent. Moreover, when the facts cannot be so described that the jury will understand them sufficiently to be able to draw its own inferences, the admissibility of opinion evidence is thoroughly established and is often characterized as a shorthand statement of fact, or the instantaneous conclusions of the mind, or natural and instinctive inferences, or the evidence of common observers testifying to the results of their observation. *See* 1 Stans-

bury's North Carolina Evidence § 125 (Brandis rev. 1973), and cases cited therein.

In the case before us, regardless of the characterization given to the statement of Officer Johnson concerning "what appeared to be" glass slivers, we hold the statement was competent and properly admitted because slivers of glass could hardly be described otherwise. To require the witness to describe the location, position, coloration and other minute characteristics so that the jury, who had not seen the slivers, could draw its own conclusions as to whether they were glass places form over substance and is contrary to common sense. The witness was in a better position than the jury to draw the conclusions. Defendant's third assignment is overruled.

[4] Finally, defendant challenges the seizure of his clothing and admission of the clothing into evidence. This constitutes his fourth and fifth assignments of error.

The record reveals that Officer Johnson questioned defendant shortly after receiving a radio dispatch concerning the burglary but did not arrest him at that time. The officer then went to Mrs. Peele's residence where he received a description of her assailant. Realizing the description fit the appearance of defendant Lucas, Officer Johnson continued his search and stopped a vehicle in which defendant was a passenger, removed him and took him to the police station. There, Officer Johnson advised defendant of his *Miranda* rights. Officer Inscoe, after conferring with Officer Johnson, placed defendant under arrest and requested Sergeant Mizell to obtain other clothing for defendant so defendant's clothing could be removed and retained for further examination. When Sergeant Mizell returned with other clothing, defendant's clothing was removed and retained. Evidence establishing all these facts was admitted without objection. In fact, the record shows that the clothing itself was also admitted without objection. Failure to object to the introduction of evidence is a waiver of the right to do so, "and its admission, even if incompetent, is not a proper basis for appeal." *State v. Hunter*, 297 N.C. 272, 278-79, 254 S.E.2d 521, 525 (1979); *see also State v. Nelson*, 298 N.C. 573, 260 S.E.2d 629 (1979).

In any event, the clothing was not seized as an incident to an illegal arrest. Defendant was not illegally arrested. He was arrested without a warrant upon probable cause. "An arrest without a warrant is based upon probable cause if the facts and circumstances

known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon." *State v. Alexander*, 279 N.C. 527, 532, 184 S.E.2d 274, 278 (1971). Here, Officer Johnson had observed defendant and his clothing, had received a description of the burglar's attire from Mrs. Peele and discovered defendant when he stopped the car of one Willie Hart. The arrest which followed thereafter was based upon probable cause. The officer had visited the crime scene and had reasonable grounds to believe that defendant committed the offense in question. *State v. Small*, 293 N.C. 646, 239 S.E.2d 429 (1977); *State v. Dickens*, 278 N.C. 537, 180 S.E.2d 844 (1971).

Defendant's clothing was lawfully seized and properly allowed into evidence. The authorities hold that handwriting samples, blood samples, fingerprints, *clothing*, hair, voice demonstrations, even the body itself, are identifying physical characteristics and outside the protection of the Fifth Amendment privilege against self-incrimination. *Schmerber v. California*, 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966); *State v. Wright*, 274 N.C. 84, 161 S.E.2d 581 (1968), *cert. den.*, 396 U.S. 934, 24 L.Ed.2d 232, 90 S.Ct. 275 (1969); *State v. Gaskill*, 256 N.C. 652, 124 S.E.2d 873 (1962). "It is well settled in North Carolina that clothing worn by a person while in custody under a valid arrest may be taken from him for examination, and, when otherwise competent, such clothing may be introduced into evidence at his trial." *State v. Dickens*, 278 N.C. 537, 543, 180 S.E.2d 844, 848 (1971). Moreover, there is nothing in this record to indicate that the taking of defendant's clothing was other than with his voluntary cooperation.

We conclude that defendant had a fair trial free from prejudicial error. The verdicts and judgments based thereon must therefore be upheld.

No error.

CALVIN E. PEEBLES v. HAROLD MOORE

No. 13

(Filed 4 March 1981)

Rules of Civil Procedure § 55— entry of default — effect of untimely answer

Defaults may not be entered after answer has been filed, even though the answer is late. G.S. 1A-1, Rule 55(a)

ON discretionary review to review the decision of the Court of Appeals, reported in 48 N.C. App. 497, 269 S.E. 2d 694 (1980), which reversed a judgment of default against defendant entered by *Canaday, J.*, 13 September 1979 at WAKE County Superior Court.

On the motion for default judgment, Judge Canaday had before him the following facts: On 24 January 1979, plaintiff filed a complaint seeking damages for injuries allegedly proximately caused by defendant's negligent operation of his motorcycle. The summons and complaint were served on defendant 28 January 1979. Defendant's answer denying negligence and alleging contributory negligence on the part of plaintiff was not filed until 6 March 1979, which date was beyond the thirty-day time limit for responsive pleadings as set out in Rule 12(a)(1). On 9 April 1979 upon oral request from plaintiff, the Clerk of Wake County Superior Court made an entry of default against defendant. On the same day, plaintiff filed a reply to defendant's answer denying that plaintiff was contributorily negligent.

On 24 April 1979, defendant moved to have the Clerk's entry of default set aside. In support of this motion, defendant filed the affidavit of John F. Hester, Claims Attorney for Nationwide Mutual Insurance Company, defendant's insurer. In the affidavit, Mr. Hester explained the course of events leading to the late filing of the answer as follows: Nationwide received notice of the lawsuit on 9 February 1979, and Mr. Hester notified the company's counsel, George R. Ragsdale, through Mr. Ragsdale's secretary, that he would send along the file on the case in about seven days. Three days later the file was removed from Mr. Hester's desk before its entry on the company's automatic diary which keeps track of the procedural posture of the company's cases. The misplacement of the case file did not come to the attention of Mr. Hester until 5 March 1979 when he received a call from plaintiff's attorney. Thereupon, Mr. Hester called Mr. Ragsdale, and defendant's answer was filed on 6

March 1979.

On 13 September 1979, Judge Canaday heard defendant's motion to set aside the Clerk's entry of default and plaintiff's motion for default judgment based on the entry. Judge Canaday denied defendant's motion to set aside the entry and granted plaintiff a default judgment on the issue of liability. The judge found that "defendant has not shown good cause for setting aside the entry of default . . . ."

The Court of Appeals reversed the trial judge and, in an opinion by Chief Judge Morris, held that the Clerk of Superior Court properly made the initial entry of default despite the presence of defendant's answer. The Court of Appeals, however, concluded that Judge Canaday had abused his discretion in failing to set aside the entry of default pursuant to defendant's motion. We granted plaintiff's petition for discretionary review on 4 November 1980.

Sanford, Adams, McCullough & Beard, by J. Allen Adams, Peter J. Sarda and William G. Pappas for plaintiff.

Ragsdale & Liggett, by George R. Ragsdale and Jane Flowers Finch for defendant.

BRANCH, Chief Justice.

Plaintiff first takes the position that under Chapter 1A-1 of the General Statutes a clerk of the superior court has authority to enter a default even though an answer is on file prior to the request for entry of default. Defendant on the other hand argues that the established practice in North Carolina does not permit a clerk to enter a default when an answer is on file, and that the adoption of Chapter 1A-1 does not affect the established rule. He relies on a line of cases represented by *Bailey v. Davis*, 231 N.C. 86, 55 S.E. 2d 919 (1949). In *Bailey* the clerk of the court entered a default judgment for plaintiff even though defendant had previously filed a tardy answer. Affirming the trial judge's order setting aside the default, this Court stated:

> [W]hile the clerk is authorized by statute, G.S. 1-209, to enter all judgments by default final as are authorized in G.S. 1-211, and others, the situation of the record, at the time he came to act on plaintiffs' motion for such judg-

> ment, failed to present a case where the defendant had not answered. Hence, so long as the answer remained filed of record, the clerk was without authority to enter a judgment by default final. This being so, the judgment entered may, on motion in the cause, be set aside.
>
> * * *
>
> Furthermore, this Court has held that where the plaintiff is entitled to judgment by default before the clerk for failure of defendant to answer within the statutory time, he waives this right by waiting until after the clerk has permitted an answer to be filed and the matter has been transferred to the civil docket for trial. *Cahoon v. Everton*, 187 N.C. 369, 121 S.E. 612.

Id. at 89-90, 55 S.E. 2d at 921.

We note parenthetically that G.S. 1-273 still provides that when issues are joined the case shall be transferred to the superior court for trial.

The holding in *Bailey* was clearly reenunciated in *White v. Southard*, 236 N.C. 367, 72 S.E. 2d 756 (1952). There we find the following language:

> A clerk of the Superior Court may, in proper cases, when no answer has been filed, enter a judgment by default final or default and inquiry as authorized by G.S. 1-211, 1-212 and 1-213. G.S. 1-214. However, when an answer has been filed, whether before or after the time for answering had expired, so long as it remains filed of record, the clerk is without authority to enter a judgment by default. *Bailey v. Davis*, 231 N.C. 86, 55 S.E. 2d 919; *Cahoon v. Everton*, 187 N.C. 369, 121 S.E. 612; *Investment Co. v. Kelly*, 123 N.C. 388, 31 S.E. 671.

Id. at 368, 72 S.E. 2d at 757. *See also Steed v. Cranford*, 7 N.C. App. 378, 172 S.E. 2d 209 (1970).

We recognize all of these cases were handed down prior to the adoption of Chapter 1A-1, Rules of Civil Procedure. Under the old practice the recognition of defendant's default by the clerk was by entry of default judgment in some circumstances or by entry of default judgment and inquiry in others. Under the modern rules

the clerk recognizes a defendant's default by an entry of default. Entry of judgment by default under the former practice and entry of default under the modern rules are similar in that they both indicate a recognition by the clerk that defendant has not timely filed an answer. Nevertheless, we must still decide whether the enactment of Chapter 1A-1 of the General Statutes modified the previously existing law so as to permit an entry of default when answer has been filed, though it be late.

The Court of Appeals adopted plaintiff's position and, in an opinion by Judge Morris, concurred in by Judges Erwin and Clark, the court concluded that "decisions under the modern Rules of Civil Procedure appear to have modified this procedure." The authorities upon which the Court of Appeals relied are *Crotts v. Pawn Shop, Inc.*, 16 N.C. App. 392, 192 S.E. 2d 55, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 835 (1972), and *Bell v. Martin*, 299 N.C. 715, 264 S.E. 2d 101 (1980). The Court of Appeals' reliance on these cases is misplaced.

Bell v. Martin, supra, is clearly distinguishable from the case before us for decision. In *Bell* the Court considered a motion for summary judgment pursuant to G.S. 1A-1, Rule 56. The statement in *Bell* upon which the Court of Appeals relied is as follows:

> [W]e 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.

Id. at 720, 264 S.E. 2d at 105.

The above-quoted language is clearly *dicta*. Further, this *dicta* statement was addressed to a factual situation in which no answer had been filed. The crucial question before us in instant case is whether a plaintiff is entitled to entry of default *when an answer is on file.*

In *Crotts* plaintiff instituted an action on 15 September 1971. Defendant filed answer on 27 October 1971, twelve days beyond the time allowed by Rule 12(a)(1). On 24 January 1972 an entry of

default signed by the clerk was filed. Judge McConnell entered an order setting aside the entry of default. Plaintiff appealed, and the Court of Appeals affirmed, finding that the trial judge properly acted within his discretion upon finding that good cause existed to set aside the entry of default. The Court of Appeals, without citation of authority, proceeded to state:

> Before depositing its answer with the clerk defendant did not move under Rule 6(b) for enlargement of time to file answer, therefore, its tardily deposited answer did not constitute a bar to the entry of default. Under the circumstances, the answer was merely proffered for filing. Defendant has not yet made a motion under Rule 6(b) for enlargement of time to file answer, and, therefore, no answer has been filed. The portion of the judgment which states "so that the case may be decided on its merits" constitutes surplusage and is disregarded.

16 N.C. App. at 394, 192 S.E. 2d at 56. No authority was cited for the ruling that the tardily filed answer was not filed but was only *proffered* for filing. For many years the rule in this jurisdiction has been that a paper writing is deemed to be filed when it is delivered for that purpose to the proper officer and received by him. *Power Co. v. Power Co.*, 175 N.C. 668, 96 S.E. 99 (1918); *Bailey v. Davis, supra.*

In the case before us, it is obvious that the answer was delivered to the proper person and received by him for filing. Although we find nothing in *Crotts* to explain its departure from the established North Carolina rule, Chief Judge Morris in the case *sub judice* stated that *Crotts* represents "the better reasoned view and is in keeping with the spirit of the time limits of the Rules of Civil Procedure." *Peebles v. Moore, supra*, at 501, 269 S.E. 2d at 697. We find this reasoning unpersuasive. The Court of Appeals seemed to base its conclusion upon G.S. 1A-1, Rule 6(b) and G.S. 1A-1, Rule 12(a)(1). Comparison of Rule 6(b) with the former statutes G.S. 1-125, G.S. 1-152 and G.S. 1-220 discloses that the new rule is more detailed than the former rules, but there is "no basic change of procedure." *Comment*, G.S. 1A-1, Rule 6(b), Section (b). Neither do we discern any basic difference in the provisions of G.S. 1A-1, Rule 12(a)(1), and the corresponding provisions contained in G.S. 1-125. Each statute merely sets forth a timetable for the filing of responsive pleadings. We further note that neither of the two new rules

imposes any sanction for filing a late answer. We therefore conclude that the enactment of these new rules is not determinative of the question before us. If the enactment of G.S. 1A-1 changed the then existing practice concerning defaults, such change must be found in the language of G.S. 1A-1, Rule 55(a). That rule provides:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for plaintiff, or otherwise, the clerk shall enter his default.

The portion of G.S. 1A-1, Rule 55, applicable to the facts of the case before us, requires a clerk to make an entry of default "when a party . . . has failed to plead . . . ." When a party has answered, it cannot be said that he "has failed to plead . . . ." We are unable to perceive anything in this language or in the language of the entire rule, G.S. 1A-1, Rule 55, which alters the established law that defaults may not be entered after answer has been filed, even though the answer be late.

We believe that the better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise. McIntosh, North Carolina Practice and Procedure (1970, Phillips Supp.) § 1670; 3 Barron and Holtzoff, Federal Practice and Procedure (Wright ed., 1961) § 1216.

Here plaintiff does not contend that his right to fairly litigate his action has been impaired because defendant tardily filed his answer. The record shows that defendant was a few days late in filing his answer, and plaintiff delayed until answer was filed and issues joined before seeking entry of default and before filing a reply. Without considering the questions of just cause, excusable neglect or waiver, we conclude that justice will be served by vacating the entry of default and permitting the parties to litigate the joined issues.

For reasons stated, we hold that the Clerk of Superior Court of Wake County was without authority to enter the default when the answer was on file. In light of this holding, we do not deem it necessary to address the question of whether the trial judge abused

his discretion in refusing to set aside the entry of default.

This cause is remanded to the Court of Appeals with direction that it be remanded to Wake County Superior Court for proceedings consistent with this opinion.

Modified and affirmed.

PAUL STAM, JR. v. THE STATE OF NORTH CAROLINA; JAMES B. HUNT, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA; RUFUS EDMISTEN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; SARA MORROW, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF NORTH CAROLINA; NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES; ROBERT WARD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF SOCIAL SERVICES OF THE DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF NORTH CAROLINA; SOCIAL SERVICES COMMISSION; JAMES WIGHT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE WAKE COUNTY DEPARTMENT OF SOCIAL SERVICES; WAKE COUNTY, A BODY POLITIC

No. 79

(Filed 4 March 1981)

1. Abortion § 4; Constitutional Law § 17; Taxation § 7— human fetus not "person" — no constitutional bar to State funding of abortions

Decision of the Court of Appeals that a human fetus is not a "person" within the protection guaranteed by Art. I, §§ 1 and 19 of the N.C. Constitution and that State funding of elective abortions does not violate Art. V, § 5 of the N. C. Constitution requiring every act which levies a tax to "state the special object to which it is to be applied" is affirmed by the Supreme Court.

2. Counties § 6.1— authority of county to levy taxes

Counties must derive the power of taxation from the legislature, and any attempt to exercise the taxing power which is found not to be within the powers granted to the county is *ultra vires* and void.

3. Counties § 6.1— power to levy taxes — strict construction

A grant to a county of the power to levy taxes must be strictly construed.

4. Abortion § 4; Counties § 6.1; Taxation § 5.2— medically unnecessary abortions — county's levy of taxes — no statutory authority

G.S. 153A-255 did not give counties the underlying authority to levy taxes pursuant to G.S. 153A-149(c)(30) to fund medically unnecessary abortions, since the authority conferred upon counties to provide social services pursuant to G.S.

153A-255 is limited to providing the poor with the basic necessities of life and a medically unnecessary abortion is not a basic necessity of life. Therefore, Wake County exceeded its statutorily conferred power in levying a tax to fund medically unneccessary abortions and the tax levy was *ultra vires* and void.

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

ON appeal from the decision of the Court of Appeals, reported in 47 N.C. App. 209, 267 S.E. 2d 335, affirming the granting of summary judgment for defendants by *Braswell, J.*, at the 29 March 1979 Session of WAKE Superior Court. This case was argued as No. 59, Fall Term, 1980.

Plaintiff instituted this action as a citizen, resident and taxpayer of the State of North Carolina and of Wake County seeking a declaratory judgment that the action of defendants in paying for medically unnecessary abortions is illegal. Plaintiff alleged, *inter alia*, that:

> 5. Defendants jointly and severally have been, and continue to pay and cause to be paid out of tax monies of the State of North Carolina and of Wake County, monies for the performance of abortion of live human fetuses, which abortions are medically unnecessary.
>
> 6. Defendants purport to act under administrative rules, codified as 10 NCAC 42W0001 *et seq* which rules purport to establish a State Abortion Fund and purport to be authorized by G.S. 143B-153 and/or G.S. 14-45.1 and to have been effective February 1, 1978.

Plaintiff challenged the payment of monies for abortions as "*ultra vires* any power given to Wake County by any statute lawfully enacted by the General Assembly of North Carolina." He also challenged the payment of money on constitutional grounds, alleging that a fetus is a person within the "Law of the Land" clause of the North Carolina Constitution, Article 1, Section 19 and entitled to due process before being deprived of life, liberty or property. Finally, plaintiff alleged that the payment of funds "[c]onstitutes an application of tax monies to purposes not stated in the Acts levying the tax in violation of Article V, Section 5 of the North Carolina Constitution."

Defendants answered, denying the material allegations of the complaint, and moved for summary judgment. Judge Braswell

granted summary judgment for defendants and found that a fetus is not a legal "person" within the meaning of the North Carolina Constitution, that the funding of monies for medically unnecessary abortions was not *ultra vires* and violated neither statutory nor constitutional law.

The Court of Appeals, in an opinion by Judge Parker, Chief Judge Morris and Judge Martin (Robert M.) concurring, affirmed. Plaintiff appealed to this Court pursuant to G.S. 7A-30(1) on grounds that the appeal involves a substantial question arising under the North Carolina Constitution.

Paul Stam, Jr., for plaintiff appellant.

Rufus L. Edmisten, Attorney General, by Steven M. Shaber, Associate Attorney, for the State, appellee.

Michael R. Ferrell for the County of Wake, appellee.

BRANCH, Chief Justice.

[1] By his first assignment of error, plaintiff contends that the trial court erred in concluding that a human fetus is not a "person" within the protection guaranteed by Article I, Sections 1 and 19 of the North Carolina Constitution. Plaintiff's second assignment of error is to the trial court's conclusion that the state funding of these abortions does not violate Article V, Section 5 of our Constitution requiring every act which levies a tax to "state the special object to which it is to be applied."

We have carefully examined the unanimous decision of the Court of Appeals as it relates to plaintiff's Assignments of Error Numbers 1 and 2. We conclude that the authorities cited, the principles of law enunciated, and the reasoning of the panel of that court are correct and fully support the result reached on the questions of law presented by these assignments of error. We therefore approve and adopt the decision insofar as it affirms the granting of summary judgment on these first two issues.

We turn to plaintiff's final assignment of error which challenges the authority of the county to levy taxes and appropriate monies for the purpose of funding medically unnecessary abortions.

[2] It is well settled that counties are mere "instrumentalities and agencies of the State government and are subject to its legislative

control; they possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them." *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 654, 142 S.E. 2d 697, 701 (1965). It is equally well settled that a sovereign state possesses the inherent power of taxation, but counties must derive that power as well as all others from the legislature. *In re Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974); *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E. 2d 481 (1971); 71 Am. Jur. 2d "State and Local Taxation" § 86 (1973). Furthermore, "[a]ny attempt to exercise the taxing power . . . which is found not to be within the powers granted to the municipality, is *ultra vires* and void." 71 Am. Jur. 2d, *supra*.

[3] A grant to a county of the power to levy taxes must be strictly construed. 4 Antieau's Local Government Law § 41.00 (1966); 71 Am. Jur. 2d *supra* § 87. "It is likewise an established rule that the authority of municipalities to levy a tax must be made clearly to appear, and that doubts, if any, as to the power sought to be exercised, must be resolved against the municipality." 71 Am. Jur. 2d *supra*; 4 Antieau's Local Government Law, *supra*.

The power of a county to levy taxes is conferred by G.S. 153A-149. Subsection (b) of that statute provides, *inter alia*:

> (b) Each county may levy property taxes without restriction as to rate or amount for the following purposes:
>
> * * *
>
> (8) Social Services. — To provide for public assistance required by Chapters 108 and 111 of the General Statutes.

We agree with the Court of Appeals, and do not think there is any real dispute that this section is inapplicable to the instant case. Chapter 108 is entitled "Social Services" and includes authorization for certain medical assistance. G.S. 108-59. However, the medical services are limited to those "essential to the health and welfare" of the recipients. By no stretch of the imagination can we consider medically unnecessary abortions as "essential to the health and welfare" of the recipients. Chapter 111 deals exclusively with aid to the blind. Thus, the power to levy taxes to fund medically unnecessary abortions must be found elsewhere.

[4] Defendants contend, and the Court of Appeals agreed, that the necessary authority is found in G.S. 153A-149(c)(30) which confers

upon a county the power to levy property taxes, with a rate restriction, for various services, including:

> (30) Social Services. — To provide for the public welfare through the maintenance and administration of public assistance programs not required by Chapters 108 and 111 of the General Statutes, and by establishing and maintaining a county home.

We agree that, on its face, this section confers the power to levy taxes to fund certain social service programs. However, G.S. 153A-149(g) provides as follows:

> This section *does not authorize any county to undertake any program, function, joint undertaking, or service not otherwise authorized by law.* It is intended only to authorize the levy of property taxes within the limitations set out herein to finance programs, functions, or services authorized by other portions of the General Statutes or by local acts. [Emphasis added.]

It is clear, then, that the power to tax conferred by section (c)(30) depends in turn upon the existence of authority to implement a given program in the first instance. Defendants maintain, and again the Court of Appeals agreed, that the underlying power to implement a county program of funding for medically unnecessary abortions is to be found in G.S. 153A-255 which provides:

> *Authority to provide social service programs.* — Each county shall provide social service programs pursuant to Chapter 108 and Chapter 111 and *may otherwise undertake, sponsor, organize, engage in, and support other social service programs intended to further the health, welfare, education, safety, comfort, and convenience of its citizens.* [Emphasis added.]

We disagree.

In *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E. 2d 898 (1979), this Court had occasion to construe this statute in determining whether the underscored language authorized a county to establish a school for dyslexic students. In holding that the statute conferred no such authority, we noted that the emphasized portion of the statute authorizes a county to implement only programs "of the type

created in Chapters 108 and 111 of the General Statutes." *Id.* at 92, 253 S.E. 2d at 902. We there stated:

> A review of the various aid programs established by Chapters 108 and 111 of the General Statutes indicates that the education of dyslexic children is not the type of "social service program" or "public assistance program" contemplated by [G.S. 153A-149(c)(30) and G.S. 153A-255]. The programs in Chapters 108 and 111 are responsive to the needs of impoverished citizens *who are unable to provide for the basic necessities of life.*

Id. at 93, 253 S.E. 2d at 902. [Emphasis added.]

While the decision in *Hughey* turned on the fact that the school was not limited to a class of impoverished students, it is undisputed here that the funding of medically unnecessary abortions is available only to indigent women. Nevertheless, *Hughey* limits the broad language of G.S. 153A-255 to programs similar in nature to those provided for in Chapters 108 and 111. *Hughey* held that one common thread running through those chapters was that all the programs were intended to aid the indigent. Our further review of those statutes reveals that they all provide the class of poor with basic necessities which they themselves are unable to provide, including, for example, nursing care, employment opportunities, and food stamps. We therefore conclude that the authority conferred upon counties to provide social services pursuant to G.S. 153A-255 is limited to providing the poor with the basic necessities of life. We find it inconceivable that the legislature would have intended medically unnecessary abortions to be basic necessities of life.

Further evidence of the legislature's intent in passing G.S. 153A-255 may be found in that statute's predecessor. Prior to the enactment of the current statute, the legislature authorized counties:

> (21) To provide for the *maintenance* of the poor. To provide by tax for the maintenance, comfort and well-ordering of the poor; to employ, biennially, by public letting or otherwise, some competent person as overseer of the poor; to institute proceedings by the warrant of the chairman against any person coming into the county who is likely to become chargeable thereto, and cause the

> removal of such poor person to the county where he was last legally settled; and to recover by action in the superior court from the said county, all the charges and expenses whatever, incurred for the maintenance or removal of such poor person . . . .

N. C. Code, Ch. 17, Sec. 707(21) (1883).

The language of this act remained virtually unaltered until the statute under consideration was enacted by the General Assembly in 1973. It is apparent to us that the intent and purpose of the former act was to *maintain* the poor. In light of the types of programs outlined in Chapters 108 and 111, and in the absence of clear authorization otherwise, we are of the opinion that the legislature did not intend by the broad language of G.S. 153A-255 to authorize counties to levy taxes to fund medically unnecessary abortions.

Finally, we are not inadvertent to the fact that the morality and legality of abortions have been and remain topics of widespread emotional and intellectual debate. Neither do we think that legislators are insensitive to the ongoing debate concerning this highly volatile subject. It is our opinion, therefore, that had the legislature intended to authorize counties to fund medically unnecessary abortions, it would have made its intent clear by express authorization. This the legislature has not done. We therefore hold that defendant Wake County exceeded its statutorily conferred power in levying the tax involved in the funding of medically unnecessary abortions. Such a levy without express authorization from the General Assembly was *ultra vires* and void.

The decision of the Court of Appeals affirming the judgment of Braswell, J., is reversed in part and affirmed in part, and the case is remanded to that court for further remand to the Wake County Superior Court for entry of judgment in accordance with this opinion.

Affirmed in part.

Reversed in part.

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

STATE OF NORTH CAROLINA v. GEORGE LEE HAWKINS

No. 39

(Filed 4 March 1981)

1. Criminal Law § 34.7— defendant's commission of another crime — admissibility to show motive

In a prosecution for murder of a person whom defendant met at a county fair, testimony that defendant sneaked into the fair without paying because he had no money was competent to show that defendant's motive for killing the victim was pecuniary gain where other evidence showed that later the night of the killing defendant had $60 to $80 in his possession.

2. Criminal Law § 34— evidence of defendant's commission of another crime — inapplicability of rule

The rule prohibiting evidence that the accused has committed another distinct, independent or separate offense was not violated by a witness's testimony that he had been convicted of breaking and entering a warehouse and larceny of property therefrom and that defendant went to the warehouse with him on the night in question to drink wine, since there was no evidence that defendant participated in any criminal offense.

3. Criminal Law § 114.2— instructions — no expression of opinion on evidence

The trial court in a murder prosecution did not express an opinion on the evidence in instructing the jury on a stick as a dangerous weapon where a witness had testified that defendant told him he killed a man and that "he beat him with a stick."

4. Criminal Law § 130— motion to set aside verdict — jurors leaving jury room during deliberations

The trial court did not err in the denial of defendant's motion to set aside the verdict on the ground that five or six members of the jury left the jury room at various intervals during their deliberations and that the jurors remaining in the room continued to talk while others were absent where the evidence at a hearing on the motion showed that five or six jurors left the jury room at different intervals for the purpose of using a restroom but that no person was allowed to speak to a juror during the time the juror was out of the room and no juror was away from the room for more than two minutes, and where there was no evidence as to what was said by the remaining jurors while a juror was out of the jury room.

APPEAL by defendant from *Britt, J.*, 18 February 1980 Session of VANCE Superior Court.

Upon a plea of not guilty, defendant was tried on a bill of indictment charging him with the first degree murder of Owen Ira Ayscue on 6 October 1978. Evidence presented by the state is summarized in pertinent part as follows:

On the afternoon of 17 October 1978 a hunter in a wooded area of Vance County near the fairgrounds found the body of Owen Ira Ayscue. The body was in an advanced state of decomposition. A medical examiner testified that the body bore indications of extensive injuries, including lacerations about the head, a broken jaw, and several cracked ribs.

State's witness Donnell Hayes testified that he and defendant attended the Vance County Fair together on 6 October 1978; that they sneaked into the fair because they had no money; that they met a man known as "BoJo", and defendant left with the man to get some wine. Upon his return a short while later, defendant had blood on his clothes and told Hayes that he had killed the man.

Another witness for the state, Melvin Lewis, testified that defendant told him that he had killed a man at the fair and that he had beat him with a stick. Other witnesses testified that defendant was seen at the fair with decedent; that thereafter defendant had blood on his clothing; and that he had approximately $60.00 to $80.00 in one of his hands.

Defendant offered no evidence.

Other evidence relating to the assignments of error will be summarized in the opinion.

The jury returned a verdict finding defendant guilty of first-degree murder by virtue of the felony-murder rule.

The court then conducted a sentencing hearing as mandated by G.S. §15A-2000 (1978). Pursuant to written issues submitted, the jury found that the murder was committed for pecuniary gain but that the murder was not especially heinous, atrocious or cruel. They then found that the aggravating circumstance found by them was not sufficiently substantial to call for the imposition of the death penalty and that the age of defendant at the time of the murder was a mitigating circumstance. The jury unanimously recommended that defendant be sentenced to life imprisonment.

From judgment imposing a life sentence, defendant appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General T. Buie Costen, for the state.

J. Henry Banks for defendant appellant.

BRITT, Justice.

I.

By his first assignment of error, defendant contends the trial court committed prejudicial error by allowing witnesses "to testify to misconduct of the defendant when the defendant had not testified in his own behalf". This assignment has no merit.

[1] Under this assignment defendant refers to his exceptions number 1, 2 and 3. Exception number 1 relates to the testimony of Donnell Hayes. On direct examination Hayes testified that on the night in question he and defendant were friends and that they "snuck" into the fair. The witness was then asked, "why did you sneak in the fair?" After the witness answered "George Lee didn't have no money", defense counsel objected. The objection was overruled and the witness testified again that he and defendant "snuck in the fair" because defendant did not have any money.

Exceptions 2 and 3 relate to the redirect examination of Hayes. On cross-examination he had been asked about his prior criminal record and, particularly, his conviction for breaking and entering Rose's Warehouse and larceny of property therefrom. On redirect examination, Hayes was asked who was with him on the night he went to the Rose's Warehouse. Over objection he testified that four other persons, including defendant, went with him. He further testified that the five of them went there to drink wine.

Defendant argues that by admitting the challenged testimony the trial court violated the general rule laid down in *State v. McLain*, 240 N.C. 171, 81 S.E.2d 364 (1954), "that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense". While defendant has accurately set forth the *general* rule restated in *McClain*, that decision also sets forth eight exceptions to the rule. The testimony challenged by exception number 1 comes within at least one of the exceptions to the rule. The testimony challenged by exceptions 2 and 3 does not come within the rule at all.

Admittedly, the evidence that defendant sneaked into the fair without paying tends to show that defendant committed a misdemeanor. However, it also tends to show that defendant had no money when he entered the fair. Other evidence showed that some-

time thereafter he met with decedent and that later that night he (defendant) had $60.00 or $80.00. One of the exceptions set forth in *McLain* to the general rule is:

> 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.) 240 N.C. at 176, 81 S.E.2d at 367.

We hold that the testimony challenged by exception number 1 was admissible because it tended to show that defendant's motive for committing the crime of murder was pecuniary gain.

[2] With respect to the testimony challenged by exceptions 2 and 3, we do not think that testimony tended to show the commission of a separate criminal offense by defendant. While the evidence showed that Hayes was convicted of breaking and entering Rose's Warehouse, there was no evidence that defendant was convicted of, or even participated in, the offense. The evidence tended to show only that sometime that night defendant and three others went with Hayes to Rose's Warehouse and that the only thing they did there was drink wine. This did not show the commission of a crime or degrading conduct by defendant.

Conceding, *arguendo*, that the trial court erred in admitting any of the testimony which is the subject of defendant's first assignment of error, considering the overwhelming evidence of defendant's guilt, we perceive no prejudicial error. Defendant has the burden not only to show error but also to show that the error complained of affected the result adversely to him. *E.g., State v. Paige*, 272 N.C. 417, 158 S.E.2d 522 (1968); *State v. Jarrett*, 271 N.C. 576, 157 S.E.2d 4, *cert. denied sub. nom., Manning v. North Carolina*, 389 U.S. 865 (1967).

Defendant's assignment of error number 1 is overruled.

II.

Defendant has abandoned his second assignment of error which relates to the denial of his motion for non-suit.

III.

[3] By his third assignment of error defendant contends the trial

court erred "in restating factual matters in the charge to the jury." Specifically, defendant contends that the court expressed an opinion on the evidence in violation of G.S. §15A-1222 (1978). We find no merit in this assignment.

The portion of the charge challenged by this assignment was given when the court was instructing the jury as to what the state must prove beyond a reasonable doubt in order for the jury to find defendant guilty of first-degree murder. Defendant excepts to this portion of the charge:

> ... That the defendant had in his possession a dangerous weapon. That is a weapon dangerous to the life of Owen Ira Ayscue. In determining whether a stick was dangerous to the life of Owen Ira Ayscue you would consider the nature of the stick, the manner in which the defendant used it or threatened to use it and the size and strength of the defendant as compared to Owen Ira Ayscue.

Defendant argues that a stick "was never mentioned in the indictment, testimony or even by circumstantial evidence". We reject this argument. Melvin Lewis, a witness for the state, testified, among other things, that he and defendant were friends, that he spent the night of 6 October 1978 with defendant, that defendant told him that night that he killed a man at the fairgrounds, and that "he beat him with a stick". (R.p. 28)

Assignment of error number 3 is overruled.

IV.

[4] By his fourth assignment of error defendant contends the trial court erred in denying his motion to set the verdict aside and for a new trial. There is no merit in this assignment.

After the jury had returned their verdict of first-degree murder, but before the court conducted the sentencing phase of the trial, defendant moved to set the verdict aside on the ground of improper conduct on the part of the jury. Defendant contended then, as he does now, that five or six members of the jury left the jury room at various intervals during their deliberations and that the jurors remaining in the room continued to talk while others were absent. He argues that this conduct violated the principle stated in *State v. Bindyke*, 288 N.C. 608, 623, 220 S.E.2d 521, 531

(1975), that

> ...[T]here can be no doubt that the jury contemplated by our Constitution is a body of twelve persons who reach their decision in the privacy and confidentiality of the jury room.

The trial judge conducted a hearing on defendant's motion in the absence of the jury at which time the bailiff and deputy sheriff who had waited on the jury during the course of the trial testified. Following the hearing, His Honor made findings of fact summarized in pertinent part as follows:

At all times during their deliberations on the guilt or innocence of defendant, the jury was entrusted to the care of bailiff T. E. Cook who was assisted by Deputy Sheriff R. F. Wade, Jr. Neither Mr. Cook nor Mr. Wade entered the jury room when any deliberations were taking place. The jury used the grand jury room and it did not have toilet facilities. Messrs. Cook and Wade maintained positions in a hallway near a door leading to the jury room for purpose of protecting the jury and answering reasonable requests for drinks and cigarettes.

During the jury's deliberation, no person other than the jury entered the jury room. On the morning that the verdict was returned, five or six jurors came out of the jury room at different intervals for the purpose of using a restroom. On those occasions each juror was escorted down the hallway (some 30 feet away) by either Mr. Cook or Mr. Wade. No person was allowed to speak to a juror during the time the juror was out of the room and no juror was away from the room for more than 2 minutes. The officer determined that no one else was in the restroom when a juror was using it.

The trial court found and concluded that there was no misconduct on the part of the jurors and denied the motion for mistrial. The court did not err. As to defendant's argument that while one or more of the jurors went to the restroom the jurors remaining in the jury room continued to talk, there was no evidence as to what was being said. The only evidence was that "I could just hear a mumble in there at times, you couldn't hear a word that they said, you'd just hear them talking and that's all".

Defendant has failed to show error and the presumption is in

favor of the regularity of the trial. *State v. Sanders*, 280 N.C. 67, 185 S.E.2d 137 (1971); *State v. Partlow*, 272 N.C. 60, 157 S.E.2d 688 (1967).

For the reasons stated, in defendant's trial and the judgment entered we find

No error.

STATE OF NORTH CAROLINA v. THOMAS EUGENE DAVIS

No. 100

(Filed 4 March 1981)

Receiving Stolen Goods § 2— receiving stolen property — possessing stolen property — no lesser offense

Possessing stolen property in violation of G.S. 14-71.1 is not a lesser included offense of receiving stolen property in violation of G.S. 14-71.

Justice MEYER did not participate in the consideration and decision of this case.

BEFORE *Judge Barefoot* presiding at the 1 October 1979 Session of GATES Superior Court defendant was convicted of possession of stolen property. Defendant was sentenced to imprisonment for a term of not less than four nor more than five years. A majority of the Court of Appeals affirmed in an opinion by *Chief Judge Morris* with *Judge Wells* concurring. *Judge Vaughn* dissented. Defendant appeals of right to this Court pursuant to G.S. 7A-30(2). This case was docketed and argued as No. 137, Fall Term 1980.

Rufus L. Edmisten, Attorney General, by Jo Anne Sanford, Assistant Attorney General, for the state.

Hopkins & Allen, by Grover Prevatte Hopkins and Janice Watson Davidson, Attorneys for defendant appellant.

EXUM, Justice.

The dispositive question presented by this appeal is whether possessing stolen property in violation of G.S. 14-71.1 is a lesser included offense of receiving stolen property in violation of G.S. 14-71. We hold that it is not. Consequently, since defendant was indicted upon a charge of feloniously receiving stolen property, but

convicted of feloniously possessing stolen property, we arrest judgment in this case.

The state's evidence tends to show the following: On 10 March 1979 at approximately 9:30 p.m. Gatesville Police Chief Eugene McLawhorn observed defendant Davis sitting in a parked car near a laundromat. He watched as defendant left the car, relieved himself upon a nearby tree, and returned to the car "in a staggering motion." Chief McLawhorn then observed co-defendants Norman Wayne Green and Larry Jesse Duff remove tires from the back door of the laundromat and place them in the car in which defendant Davis was sitting. Defendant, sitting in the middle of the front seat, "would on occasion lean over and on occasion sit up straight." Co-defendants Green and Duff, after placing nine tires in the car, got in the car and Duff drove it away. Shortly thereafter the car was stopped by Chief McLawhorn; Duff and defendant were arrested. Green fled but was later apprehended. Chief McLawhorn further testified as to a written statement made by defendant Davis which tended to implicate him in the crime. In Chief McLawhorn's opinion defendant was "highly intoxicated" but not drunk when he made the statement. Henry Wrenn, manager of the Gatesville Rubber Company, testified that his company stored tires in a warehouse located in the back portion of the laundromat. He stated that on 10 March 1979 the warehouse was broken into and numerous tires were missing.

Defendant, testifying on his own behalf, stated that he had been drinking heavily on 10 March 1979, that he dozed off occasionally during the evening, that he was unable to remember much of what happened that night including his statement to Chief McLawhorn, and that he had nothing to do with the theft of the tires.

On 2 April 1979 defendant was indicted for felonious breaking and entering, larceny, and receiving stolen goods. After co-defendants Green and Duff withdrew their pleas of not guilty and entered guilty pleas, the state announced that as to defendant Davis it would "proceed upon the theory of the third count of the bill of indictment, that being the theory of receiving stolen goods knowing them to be stolen."

Receiving stolen goods knowing or having reasonable grounds to believe the property to have been stolen is a violation of G.S.

14-71.[1] The trial court, however, instructed the jury that defendant was charged with "possessing property which the defendant knew or had reasonable ground to believe had been stolen as a result of breaking and entering." Possession of stolen property knowing or having reasonable grounds to believe the property to have been stolen is a violation not of G.S. 14-71, but of G.S. 14-71.1.[2] Defendant was convicted of felonious possession of stolen property.[3]

Defendant contends his conviction for felonious possession of stolen property, an offense with which he was not charged, constitutes error requiring arrest of judgment. A majority of the Court of Appeals disagreed, holding that all the elements of possession are present in the charge of receiving. Thus, since G.S. 15-170 provides that upon the trial of any indictment a defendant may be convicted of the crime charged in the indictment or of "a less degree of the same crime," defendant Davis' conviction was upheld. Judge Vaughn, being of the view that G.S. 14-71.1 is not a crime of lower degree than G.S. 14-71, dissented. We agree with Judge Vaughn.

It is well-established that when a defendant is indicted for a criminal offense he may be lawfully convicted of the offense charged therein or of any lesser offense if all the elements of the lesser offense are included within the offense charged in the indictment, and if all the elements of the lesser offense could be proved by proof of the facts alleged in the indictment. He may not, upon trial under that indictment, be lawfully convicted of any other criminal offense

[1] "§14-71. *Receiving stolen goods.*—If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense . . . ."

[2] "§14-71.1. *Possessing stolen goods.*—If any person shall possess any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense . . . ."

[3] The larceny of property, the receiving of stolen goods knowing them to be stolen and the possessing of stolen goods knowing them to be stolen constitutes a felony if the property involved has a value of more than $400.00. *See* G.S. 14-72(a). The value of the tires stolen in the present case was approximately $526.00.

whatever the evidence introduced against him may be. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967); *State v. Rorie*, 252 N.C. 579, 114 S.E. 2d 233 (1960). Similarly, "[i]f the greater of two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some element not so included in the greater offense, the lesser is not necessarily included in the greater." *Id.* at 581, 114 S.E. 2d at 235-36. It is necessary, then, to examine the elements of receiving stolen goods under G.S. 14-71 and possessing stolen goods under G.S. 14-71.1 to determine if all the elements of the latter are present in the former. If so, G.S. 14-71.1 is a lesser included offense under G.S. 14-71.

These statutory provisions are identical in language except that the words "receive" and "receiver" in G.S. 14-71 are substituted for the words "possess" and "possessor" in G.S. 14-71.1.[4] The essential elements of feloniously receiving stolen property are (1) receiving or aiding in the concealment of personal property, (2) valued at more than $400.00, (3) which has been stolen, (4) by someone else, (5) the receiver knowing or having reasonable grounds to believe the property to have been stolen, and (6) the receiver acting with a dishonest purpose. See G.S. §§ 14-71, 14-72; *State v. Haywood*, 297 N.C. 686, 256 S.E. 2d 715 (1979); *State v. Tilley*, 272 N.C. 408, 158 S.E. 2d 573 (1968); *see also* N.C.P.I.—Crim. § 216.40. The essential elements of feloniously possessing stolen property are (1) possession of personal property, (2) valued at more than $400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose. *See* G.S. §§ 14-71.1, 14-72; *see also* N.C.P.I.— Crim. § 216.47.

An examination of the elements of both offenses reveals the presence of an element in each offense that is not present in the other. The element of possession is different from, and not included in, the element of receiving, and vice versa. To convict a defendant under G.S. 14-71.1 the state must prove among other things that the defendant possessed, rather than received, stolen goods. To convict under G.S. 14-71 the state must prove that defendant received, rather than possessed, stolen goods and that the goods were stolen by someone other than the receiver. *See State v. Kelly*, 39 N.C. App.

[4] *See* notes 1 and 2, *supra*.

246, 249 S.E. 2d 832 (1978); *see also* N.C.P.I.—Crim. §§ 216.40, 216.47.

Although at first glance possession may seem to be a component of receiving, it is really a separate and distinct act. In analagous cases dealing with the contraband of non-taxpaid whiskey and controlled substances (rather than with the contraband of stolen property) this Court has consistently held that the crime of *possession* of such items is not a lesser included offense of the crime of *selling* or *transporting* them. *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973) and cases therein cited.[5] The Court said in *Cameron*, *id.* at 202, 195 S.E. 2d at 488:

> "By setting out both the possession and sale as separate offenses in the statute and by prescribing the same punishment for possession and for sale, it is apparent that the General Assembly intended possession and sale to be treated as distinct crimes of equal degree, to be separately punished rather than providing that one should be a lesser included offense in the other.
>
> "The unlawful sale of a narcotic drug is a specific act and a given sale occurs only at one specific time. Unlawful possession, however, is a continuing violation of the law. It begins as soon as an individual first unlawfully obtains possession of the drug, whatever the purpose of that possession might be, and does not end until he divests himself of it."

Similarly the unlawful receipt of stolen property is a single, specific act occurring at a specific time; possession, however, is a continuing offense beginning at the time of receipt and continuing until divestment. Under G.S. 14-71 the state seeks to punish the act of *receiving* stolen goods *from another*; under G.S. 14-71.1 the state seeks to punish the act of *possessing* stolen goods without regard to who might have stolen them. The punishment for both offenses is the same. We believe the legislature intended *possession* and *receiving* to be distinct, separate crimes of equal degree rather than the former to be a lesser included offense of the latter.

[5] The opinion in *Cameron* noted that the Court of Appeals had erred in *State v. Thornton*, 17 N.C. App. 225, 193 S.E. 2d 373 (1972), relied on by defendant Cameron, in concluding that possession of a controlled substance was a lesser included offense of the sale of the substance.

We conclude, therefore, that defendant Davis has been found guilty of an offense with which he was not charged. Judgment must be arrested. *See State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977).

Due to the conclusion we have reached it is unnecessary to discuss other assignments of error.

The verdict below is set aside and judgment is arrested.

Judgment arrested.

Justice MEYER did not participate in the consideration and decision of this case.

IN THE MATTER OF: THE WILL OF MATTIE T. RIDGE, DECEASED

No. 49

(Filed 4 March 1981)

Attorneys at Law § 7.5— caveat proceeding — fees awarded caveators' counsel

There is no statutory or case law requirement that a specific finding be made in a caveat proceeding that the case has substantial merit before attorneys' fees may be awarded to caveator's counsel; furthermore, there was no merit to propounders' contention that the caveat had no merit at all and that the court abused its discretion in allowing counsel fees and costs for caveators to be paid from the estate, since evidence of the highly dependent condition of testatrix combined with the fiduciary relationship between her and her niece, one of the propounders, the niece's part in preparing and presiding over the execution of three codicils, and the niece's ever increasing share of the estate as each codicil was signed raised at least a strong suspicion of the exercise of undue influence, it appeared in the best interest of the estate that this cloud be removed and that the will be probated in solemn form, and there was therefore ample evidence to support the trial judge's finding of fact that the action of the caveators in initiating the proceeding was apt and proper and their claim was reasonable, made in good faith, and *prima facie* in the interest of the estate.

ON petition for discretionary review pursuant to G.S. 7A-31 filed by caveators of the will of Mattie T. Ridge, deceased, from a decision of the Court of Appeals reported in 47 N.C. App. 183, 266 S.E. 2d 766 (1980), vacating an order of *Graham, Judge*, entered at the 27 June 1979 Session of Superior Court, GUILFORD County, allowing attorneys' fees for caveators' counsel and costs from the estate and remanding the cause to the Superior Court of GUILFORD County for further hearing. Caveators' petition for discretionary

review was allowed on 16 September 1980. This case was docketed in the Fall Term 1980 as Case No. 130 but argued in the Spring Term 1981 as Case No. 49.

Edwards, Greeson, Weeks & Turner, by Elton Edwards, for caveators-appellants.

Wyatt, Early, Harris, Wheeler & Hauser, by William E. Wheeler, for propounders-appellees.

MEYER, Justice.

Mrs. Mattie T. Ridge died testate in High Point, Guilford County, North Carolina, on 28 November 1978 at the age of 85. On 7 December 1978, Virginia T. Jackson, a niece of Mrs. Ridge, presented decedent's will and three attached codicils to the Clerk of Superior Court of Guilford County for probate. The original will, dated 28 May 1970, and three codicils, dated 13 May 1974 (hereinafter referred to as first codicil), 22 November 1974 (hereinafter referred to as second codicil), and 16 October 1975 (hereinafter referred to as third codicil), were admitted to probate in common form as together constituting decedent's last will and testament.

The original will, executed when the testatrix was 76 years old, in general provided for conventional disposition of testatrix's property: specific bequests to her husband, a niece, a church, and a brother, with the residue to be divided one-fifth to her husband, one-fifth to each of her two living brothers, and one-fifth to children of each of her two deceased brothers and named a brother as executor. The first and second codicils were executed when testatrix was 81 years old and the third codicil when she was 82 years old. These codicils substantially changed the distribution of her estate. The first codicil, among other things, included a specific bequest to Virginia Jackson of $5,000. The second codicil, among other things, designated the share of a deceased brother, Alson Thayer (the caveators' father, who had died since the execution of the will), to nieces and nephews other than Alson Thayer's children, thereby increasing the share of the estate bequeathed to Virginia Jackson. Virginia Jackson was also named as executrix. The third codicil increased the bequests to several people including Virginia Jackson.

After the will was probated in common form, Virginia Jackson qualified and undertook the administration of decedent's estate.

On 19 January 1979, Lucy Thayer Koontz, Faye Thayer Kilgore and Marie Thayer McFarlan, the three children of Alson M. Thayer, the brother of decedent who was named in the original will but whose name had been stricken from the will by the second codicil, filed a caveat to the will as probated. The original will was not questioned. The caveat alleged the invalidity of the three codicils attached to the will and asserted that at the time testatrix executed each of the codicils, she lacked testamentary capacity to do so; that undue influence was exerted upon testatrix at the time each codicil was executed; and that decedent was mistaken as to the nature, contents or identity of each of the three codicils.

On 14 May 1979, caveators withdrew their allegation as to the invalidity of the three codicils on the ground of lack of testamentary capacity.

The matter came on for trial at the 25 June 1979 Special Session of the General Court of Justice, Superior Court Division, High Point, North Carolina, before Judge William T. Graham. At the trial of the case, caveators (having previously waived their allegation of lack of testamentary capacity) waived their allegation as to the invalidity of the three codicils on the ground of mistake, leaving only the allegation of undue influence.

At the close of caveators' evidence, the propounders moved for a peremptory instruction on all issues. Caveators stipulated that the third codicil was properly executed and did not resist a peremptory instruction on that issue. The court allowed propounders' motion for peremptory instruction and submitted to the jury only the issue of *devisavit vel non*. The jury returned a verdict in favor of the propounders, and thereafter judgment was entered by Judge Graham admitting the four instruments to probate in solemn form as decedent's last will and testament.

Caveators gave notice of appeal and asked to be heard with respect to counsel fees. Counsel for propounders asked to be heard on the propriety of any award whatsoever of counsel fees for caveators. The court heard argument for propounders and caveators and, finding that the action was brought in good faith, held that caveators as well as propounders were entitled to have their legal fees paid out of the estate. The court then instructed counsel to have time sheets and appropriate orders prepared in accordance with G.S. 6-21(2), leaving the amount blank. On the following day, caveators

presented time records and other information supporting legal services rendered on their behalf in affidavit form together with proposed orders for attorneys' fees and costs as requested by the court. The court, after hearing evidence of both propounders and caveators as to the fees and costs, awarded propounders $13,000 in attorneys' fees and certain costs and awarded caveators $7,500 in attorneys' fees, all to be paid from the estate. The following day, the court signed a separate order for caveators' costs and for refunding the $200 cash bond which had been filed when the action was instituted. Propounders appealed from the order contending that the trial court erred in awarding attorneys' fees and costs to caveators both as a matter of law and as an abuse of discretion. Caveators subsequently, on 20 August 1979, filed a stipulation of dismissal of their appeal and by proper order it was dismissed. Propounders appealed from the order of Judge Graham awarding caveators' counsel fees and costs from the estate. The Court of Appeals, in an opinion filed 3 June 1980, vacated Judge Graham's order and remanded the case to the Superior Court of Guilford County for another hearing to determine the propriety of awarding caveators' attorneys' fees and, if found proper, the amount of such fees.

All parties agree that resolution of this cause is governed by G.S. 6-21:

> *Costs allowed either party or apportioned in discretion of court.*—Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> . . . .
>
> (2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, however, that in any caveat proceeding under this subdivision, if the court finds that the proceeding is without substantial merit, the court may disallow attorneys' fees for the attorneys for the caveators.
>
> . . . .
>
> The word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys'

> fees in such amounts as the court shall in its discretion determine and allow: . . . .
>
> In the decision of the Court of Appeals, we find the following:
>
> > In its order for counsel fees the trial court made no finding or conclusion with respect to whether the proceeding was without substantial merit. Under the evidence in this case, without such a finding we cannot determine whether the trial court properly exercised its discretion in awarding the counsel fees.
> >
> > For this reason, the order allowing attorneys' fees for caveators' counsel and costs must be vacated and the cause remanded to the Superior Court of Guilford County for another hearing to determine the propriety of awarding attorneys' fees to counsel for caveators and, if found proper, the amount of such fees.

The clear implication of this portion of the decision is that the trial judge is required to make a specific finding with respect to whether the proceeding was "without 'substantial merit.'" In their briefs and in oral argument before this Court, appellees conceded that the Court of Appeals erred in remanding the case to the Superior Court for findings with regard to the propriety of awarding counsel fees and costs to caveators and the amount thereof. We agree. We fail to find any statutory *requirement* that a specific finding as to whether or not the case was without substantial merit be made, nor do we find that our case law establishes such a requirement. By the plain language of the statute the words "if the court finds" renders the proviso with respect to a finding that the case is without merit subjunctive, and the word "may" renders it permissive even in a case where this proviso applies. The phrase "if the court finds" clearly contemplates a contingency, the contingency being that the court might in some cases make a finding that a case was without substantial merit. Only in the event of that contingency does the proviso apply, and then the word "may" renders it permissive even in that event. Appellees strenuously contend, however, that the caveat had no merit at all and that the court abused its discretion in allowing counsel fees and costs for caveators to be paid from the estate. Therefore, argue appellees, Judge Graham's order awarding costs and attorneys' fees to caveators should be set aside.

Ordinarily, attorneys' fees are taxable as costs only when expressly authorized by statute. *Horner v. Chamber of Commerce*, 236 N.C. 96, 72 S.E. 2d 21 (1952). G.S. 6-21 specifically authorizes the trial court in its discretion to allow attorneys' fees to counsel for unsuccessful caveators to a will. *In re Coffield's Will*, 216 N.C. 285, 4 S.E. 2d 870 (1939); *In re Will of Slade*, 214 N.C. 361, 199 S.E. 2d 290 (1938) (both cases construing the predecessor to G.S. 6-21). The statute does not *require* the court to award attorneys' fees in such cases but clearly *authorizes* the court to do so. It is a matter in the discretion of the court, both as to whether to allow fees and the amount of such fees. *Godwin v. Trust Company*, 259 N.C. 520, 131 S.E. 2d 456 (1963). The findings of the trial judge are conclusive on appeal if there is competent evidence in the record to support them. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968), *see* Strongs, 1 N.C. Index 3rd, Appeal and Error § 57.2. This is true even though there may be evidence in the record which could sustain findings to the contrary. *Id.* We must therefore determine whether the trial judge's award of caveators' attorneys' fees and costs from the estate constituted an abuse of discretion. In order to make that determination we must first consider whether there is competent evidence in the record before us to support the findings and conclusion of the trial judge.

The Court of Appeals found that the evidence in the case in the trial court strongly supported the propounders' argument that the caveat had no merit at all: that caveators, before trial, abandoned their claims of lack of testamentary capacity and mistake on the part of the testatrix, and that on the remaining issue of undue influence, the record is absolutely void of any evidence to substantiate such claim.

In his order of 27 June 1979 allowing caveators' attorneys' fees and directing that they be taxed against the estate, Judge Graham made the following findings of fact and conclusion:

> 1. The action of Caveators in initiating this proceeding was apt and proper, and their claim was reasonable, made in good faith and *prima facie* in the interest of the estate.
>
> 2. Upon an affidavit submitted by counsel for the Caveators, which is attached hereto, and statements of such counsel, and upon consideration of the rec-

> ord in this action and of the nature and complexity of the action, the Court finds that the sum of $7500.00 is a fair and reasonable attorney's fee for counsel of the Caveators;
>
> Upon such findings, the Court, in the exercise of its discretion, concludes that the Caveators should be awarded their costs, including a reasonable attorney's fee ; . . . .

"Apt" and "proper" both mean that which is fit, suitable and appropriate. Black's Law Dictionary, 94, 1094 (5th Ed. 1979). "Good faith" means honesty of intention, and freedom from knowlege of circumstances which ought to put the holder upon inquiry. *Id.* at 623-24. "*Prima facie*" means at first sight, on the first appearance, on the face of it, so far as can be adjudged from the first disclosure. *Id.* at 1071. Therefore, "*prima facie* in the best interest of the estate" means on first appearance in the best interest of the estate.

As to the amount of the fees awarded, Judge Graham properly considered the affidavit and statements of counsel for caveators, the record in the proceeding, and the nature and complexity of the caveat proceeding. While the record does not contain a copy of the caveators' counsel's affidavits, we note in the briefs submitted to this Court by the propounders that the caveators' counsel's affidavit showed the number of hours expended by caveators' counsel, the length of time the attorney had practiced law, his usual charges for litigation, and his opinion of the customary charges for litigation in Guilford County.

We note in the record of the exchange between counsel and Judge Graham concerning whether or not counsel fees and costs should be awarded the caveators, which followed immediately the taking of the verdict, that Judge Graham stated, "Well, I think it is in good faith. It is . . . not obviously the strongest case, but I think it was brought in good faith . . . I think that the caveators are entitled to have their legal fees paid out of the estate as are the propounders." On the following day, in a hearing on proposed attorneys' fees for both parties, the judge, after allowing certain costs and disallowing others, stated:

> As to the case in general, I don't know when I have tried a case that counsel have been as well prepared for as they were in this case. Counsel for propounders was especially well prepared in this matter and was prepared for just

> about any eventuality that could have occurred in this case. Caveators' counsel were also prepared . . . .
>
> On the caveator's side, the caveator was fully prepared for the case and the case appeared to the Court to have merit. As it went along it obviously did not have as much merit as it could have had.

We note that the propounders' counsel were awarded the amount of $13,000. We find ample competent evidence in the record before us to support the trial judge's finding that the sum of $7,500 was a fair and reasonable fee for counsel of the caveators.

In 1 Wiggins, Wills and Administration of Estates in North Carolina § 55, a number of different circumstances are said to be indicia of undue influence: (1) that the testator was of advanced age and subject to physical and mental weakness; (2) that the testator was in the home of the beneficiary, subject to his constant supervision, and others had little or no opportunity to see him; (3) that there is a variance of testamentary dispositions with the testator's intentions as expressed in a prior will; (4) that the provisions of the will were unnatural; i.e., the testator disinherited the natural objects of his bounty; and (5) that the chief beneficiaries of the will were active in procuring the execution of the will. Dr. Wiggins further notes that the leniency in allowing a wide range of testimony on the issue of undue influence is due to the fact that undue influence has to be shown by circumstantial evidence. *Id.* § 56.

Evidence in the record before us with regard to the foregoing circumstances cited by Wiggins includes the following:

1. The testatrix was 76 years old when she executed her original will but was 81 years old when the first two codicils were executed and 82 years old when the last codicil was executed. She could no longer sign her name and she was crippled from severe rheumatoid arthritis, blind, and steroid dependent. She had been on medication since 1956 and was chair-ridden and had to be fed by others.

2. The testatrix was dependent upon a housekeeper to attend to her physical needs until she went to a nursing home, and upon a niece, Virginia Jackson, to handle her financial affairs, particularly after giving Virginia Jackson a power of attorney.

3 and 4. Testatrix's original will provided for a natural distribution of her estate by making provisions for two living brothers and the children of two deceased brothers. The second codicil, which was written after the testatrix's brother, Alson Thayer (caveators' father) died, did not make provision for Alson's three children as the testatrix had done for her other two deceased brothers' children; instead, the share of the estate Alson Thayer would have taken was designated for the children of testatrix's two other deceased brothers. Evidence from at least two witnesses at the trial indicated that the testatrix showed equal affection for all nieces and nephews as well as other members of her family. Each codicil resulted in her niece, Virginia Jackson, receiving a larger portion of the estate.

5. While the original will was prepared by an attorney and maintained by him in a lockbox, the three codicils were prepared by the niece, Virginia Jackson, who was present at the execution of each codicil. The testatrix's attorney testified that he knew only about the first codicil. The first time the third codicil came to light was when Virginia Jackson produced it from her briefcase in the testatrix's attorney's office the day after the funeral, gave it to him and said, "I know you said no more codicils." There was also evidence that Virginia Jackson, following the funeral, told a number of members of the family that she could not permit the testatrix to give $10,000 to Christ United Methodist Church and continue to give money to various other recipients.

In *In re Will of Amelia Everett*, 153 N.C. 83, 68 S.E. 924 (1910), this Court said:

> [W]hen a will is executed through the intervention of a person occupying a confidential relation towards the testatrix, whereby such person is the executor and a large beneficiary under the will, such circumstances create a strong suspicion that an undue or fraudulent influence has been exerted, and then the law casts upon him the burden of removing the suspicion by offering proof that the will was the free and voluntary act of the testator.

Id. at 85, 68 S.E. at 925; *see also McNeill v. McNeill*, 223 N.C. 178, 25 S.E. 2d 615 (1943).

The caveators contend that the highly dependent condition of

the testatrix combined with the fiduciary relationship between her and Virginia Jackson, the latter's part in preparing and presiding over the execution of the codicils, and her ever-increasing share of the estate as each codicil was signed, raised at least a strong suspicion of the exercise of undue influence. We agree. Further, with this strong suspicion present, it appeared at least *prima facie* in the best interest of the estate that this cloud be removed and that the will be probated in solemn form. We therefore hold that there was ample evidence to support Judge Graham's finding of fact that the action of the caveators in initiating the proceeding was apt and proper and that their claim was reasonable, made in good faith and *prima facie* in the interest of the estate.

Having found ample competent evidence in the record before us to support the findings and conclusion of the trial judge, we conclude that there was no abuse of discretion on his part in the allowance of caveators' attorneys' fees and costs to be paid from the estate or the amounts thereof.

We do not deem *In re Moore*, 292 N.C. 58, 231 S.E. 2d 849 (1977), relied upon by the propounders, apposite here. In that case, this Court held that G.S. 6-21(2) does not authorize the awarding of costs and attorneys' fees to an individual in pressing his claim for appointment as executor under a will when such individual is disqualified as a matter of law from serving as executor. We note, however, that even there, attorneys' fees were allowed for other activities of the same individual.

We have carefully considered all other assignments of error brought forward by the propounders and find them to be without merit.

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 Guilford County for reinstatement of Judge Graham's orders of 27 June 1979 and 28 June 1979 awarding attorneys' fees and costs to caveators to be paid from the estate.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DARRELL LEE YOUNG

No. 54

(Filed 4 March 1981)

1. **Criminal Law § 92.4— consolidation of charges against same defendant**

The trial court did not err in consolidating for trial a charge against defendant for felonious escape and charges against defendant for rape, kidnapping and larceny because evidence that defendant was serving a prison sentence for a prior conviction was allowed to be presented to the jury, since the events giving rise to the four charges against defendant all took place within a thirty minute time period and were so closely connected in time and place that they constituted separate segments of a continuing program of action by defendant, and since even if the escape charge had not been consolidated with the other charges, evidence that defendant had just escaped from a road crew consisting of prison inmates would have been relevant and admissible in defendant's trial on the other charges.

2. **Criminal Law § 91— delay between arrest and trial — Speedy Trial Act**

Defendant's rights under the Speedy Trial Act were not violated by the lapse of more than 120 days between his arrest and trial where defendant was brought to trial only 77 days after he was indicted.

3. **Criminal Law § 34— nonresponsive testimony disclosing prior crime — instruction by court — harmless error**

In a prosecution for rape, kidnapping and larceny, the trial court did not err in the denial of defendant's motion for a mistrial made because a witness's unresponsive answer to a question by defense counsel disclosed that defendant had committed a prior murder where the trial judge immediately instructed the jury not to consider the witness's statement, and where the evidence of defendant's guilt was overwhelming and uncontradicted.

DEFENDANT appeals from judgment of *Rousseau, J.*, entered at 28 April 1980 Criminal Session of Superior Court, ALEXANDER County.

Defendant was tried upon indictments, proper in form, with kidnapping, felonious larceny, second degree rape, and felonious escape. The jury found defendant guilty on each charge. From the trial court's judgment sentencing him to life imprisonment for second degree rape, ten years imprisonment for felonious larceny, one year imprisonment for felonious escape, and not less than fifty years nor more than life imprisonment for kidnapping, defendant appeals as a matter of right pursuant to G.S. 7A-27(a). We allowed defendant's motion to bypass the Court of Appeals on the offenses of kidnapping, felonious larceny, and felonious escape on 5 November

1980.

The State's evidence tended to show that on 24 October 1979 defendant was an inmate at the Davidson County Prison Unit near Lexington, North Carolina, serving a prison sentence for felonious breaking and entering and second degree murder. At approximately 9:00 a.m. on that day defendant was working as a member of a road crew whose task was to repair road pavement. Defendant requested and obtained permission from his foreman to enter the woods nearby in order to relieve himself.

Prosecuting witness Mrs. Stella Ivey testified that her door bell rang a few minutes after 9:00 a.m. on 24 October 1979, and that upon opening the door she observed a man whom she identified at trial as defendant. Mrs. Ivey stated that defendant jerked the screen door open and forced his way into the house, saying that he wished to use the telephone. He then put one hand over her mouth and the other around her throat, dragged her to a couch and raped her. Subsequently, defendant bound Mrs. Ivey's wrists, gagged her, and took her billfold and car keys. He attempted to pull Mrs. Ivey out of the door and towards her Oldsmobile automobile, but she escaped and ran down the road toward the group of men working on the pavement. She reported the incident to the foreman of the work crew, and law enforcement officers were summoned. A medical examination was conducted and spermatoza was found in Mrs. Ivey's vagina.

The foreman of the work crew and another State Department of Transportation employee testified that approximately twenty minutes after defendant was given permission to relieve himself on the morning of 24 October 1979, they heard Mrs. Ivey scream for help and observed her running from her house toward the work crew. They saw an Oldsmobile automobile backing out of Mrs. Ivey's driveway and recognized defendant as the driver. Both witnesses stated that Mrs. Ivey's lip was bleeding and that her arms appeared to have friction burns on them.

Mrs. Ivey's husband testified that on 24 October 1979 he owned a 1978 Oldsmobile Cutlass automobile, with an approximate fair market value of $5,000.00, which was taken on that date without his permission or consent.

Defendant presented no evidence in his behalf.

Charles H. Harp II for defendant-appellant.

Attorney General Rufus L. Edmisten by Associate Attorney Lisa Shepherd for the State.

COPELAND, Justice.

Defendant argues four assignments of error on appeal. We have carefully considered each assignment and conclude that the trial court committed no error which would entitle defendant to a new trial.

[1] Defendant first contends that the trial court erred in granting the State's motion to consolidate the charges against him for trial. G.S. 15A-926(a) provides that:

> "Two or more offenses may be joined . . . for trial when the offenses . . . are based on . . . a series of acts or transactions connected together or constituting parts of a single scheme or plan."

It is well established that the decision to consolidate charges is within the discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978), *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). In determining whether an accused has been prejudiced by joinder, "[t]he question is whether the offenses are so *separate in time and place* and *so distinct in circumstances* as to render a consolidation unjust and prejudicial to defendant." *State v. Powell*, 297 N.C. 419, 428, 255 S.E. 2d 154, 160 (1979). *See also State v. Greene, supra*; *State v. Johnson*, 280 N.C. 700, 187 S.E. 2d 98 (1972). Defendant does not contend that the events giving rise to the charges against him were so separate in time, place, and circumstances that he was prejudiced by having to defend the charges in one action. Instead, he argues that by consolidating the charge of felonious escape with the other charges against him, the trial judge allowed evidence of the fact that defendant was serving a prison sentence for a prior conviction to be presented to the jury, which prejudiced the jurors against him and prevented him from obtaining a fair trial. We find defendant's contention without merit. The events giving rise to the four charges against defendant all took place within a thirty minute time period and were so closely connected in time and place that they constituted separate segments of a continuing program of action by defendant. Even had the escape

charge not been consolidated with the other charges, evidence that defendant had just escaped from a road crew consisting of prison inmates would have been relevant and admissible in defendant's trial on the other charges. *See State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972). We find that the trial judge's decision to consolidate charges was consistent with the guidelines set forth in G.S. 15A-926(a) and did not constitute an abuse of discretion. Defendant's assignment of error is overruled.

[2] By his second assignment of error, defendant complains that the lapse of time between his arrest on 24 October 1979 and the commencement of trial on 28 April 1980 resulted in a denial of his right to speedy trial. The time limitations pertaining to defendant's trial are set forth in G.S. 15A-701 (a1)(1), which mandates that defendant be brought to trial "[w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last." Defendant was indicted on 11 February 1980 and brought to trial on 28 April 1980, 77 days later and clearly well within the statutory time limit. Defendant's argument that the lapse of more than 120 days between his arrest and the date of trial violated the "spirit" of the statute is without merit.

[3] Defendant next alleges that the trial court erred in denying his motion for a new trial. Specifically, defendant argues that an unresponsive answer given by State's witness Stella Ivey was so prejudicial to his defense that instructions by the trial judge to ignore the answer were insufficient to negate the adverse effects of the statement, therefore a new trial is required. The unresponsive answer objected to by defendant was given during recross examination by the attorney for defendant as follows:

> "Q. Did he try to choke you?
>
> A. No, except when he choked me getting me to the couch.
>
> Q. Didn't say anything to you about he was going to kill you or beat you up?
>
> A. Just kept telling me to be quiet and do what he told me to do.
>
> Q. To be quiet and do what he told you to do?

A. At that time I didn't know he had done killed another person.

Objection by Mr. Harp.

COURT: Disregard anything she thought he might have done before; disregard that last remark from your deliberation."

It is true that where a defendant does not testify as a witness and does not offer evidence of his good character, the State may not present evidence of his bad character, including the fact that he was convicted of an unrelated criminal offense. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), *death penalty vacated* 428 U.S. 903, 96 S. Ct. 3205, 49 L.Ed. 2d 1206 (1976). However, where evidence of defendant's prior conviction comes before the jury in the form of an unresponsive answer to a question propounded by defendant, and the trial judge immediately instructs the jury not to consider the statement, a new trial is not automatically required. *State v. Jarrette, supra.* In this case, the evidence of defendant's guilt was overwhelming and uncontradicted.

> "Where there is abundant evidence to support the main contentions of the state, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result." *State v. Williams*, 275 N.C. 77, 89, 165 S.E. 2d 481, 489 (1969).

Defendant presented no evidence that would raise a reasonable possibility that the jury would have reached a different result had the unresponsive answer not been given. Under the circumstances of this case, we find that any prejudicial effect of Mrs. Ivey's answer was cured by the trial judge's instructions to the jury to disregard the statement. The trial judge did not abuse his discretion in failing to grant defendant's motion for a new trial.

Defendant concedes that his fourth assignment of error is without merit, therefore we consider this exception abandoned in accordance with Rule 28(b)(3) of the North Carolina Rules of Appellate Procedure.

Defendant received a fair trial free from prejudicial error and we find

No error.

J. PEYTON FULLER v. PHYLLIS M. FULLER

No. 60

(Filed 4 March 1981)

ON discretionary review to review the decision of the Court of Appeals, reported without opinion and filed 15 July 1980, affirming the granting of summary judgment in favor of defendant by *Paschal, J.*, at the 13 November 1979 Session of ORANGE Superior Court.

Plaintiff instituted this action for a divorce based upon a one-year separation. As a second cause of action, plaintiff alleged the existence of a deed of separation which he further alleged contained terms which are unreasonable, unfair, and unduly burdensome upon him. He prayed that the deed of separation be reformed or rescinded on grounds of undue influence, duress, mistake, lack of intent, lack of consideration, and changed circumstances. Defendant moved for summary judgment. At the hearing on that motion, evidence tended to show that plaintiff is Assistant Vice-President and Corporate Controller of Duke University in Durham, North Carolina. The trial court considered the affidavits and depositions of the parties and granted defendant's motion for summary judgment on plaintiff's second cause of action. Upon plaintiff's appeal, the Court of Appeals in an opinion by Judge Webb, Judges Parker and Clark concurring, affirmed the granting of summary judgment. We allowed plaintiff's petition for discretionary review pursuant to G.S. 7A-31 on 7 October 1980.

Joseph D. Eifort, attorney for plaintiff.

Bryant, Bryant, Drew & Crill, P.A., by Victor S. Bryant, Jr., for defendant.

PER CURIAM.

Upon review of the record, the briefs and oral arguments of counsel and the authorities there cited, we conclude that the peti-

tion for discretionary review was improvidently granted.

The order granting discretionary review is vacated; the summary judgment for defendant remains undisturbed.

STATE OF NORTH CAROLINA)
)
)
v.) ORDER
)
)
LARRY CLINTON LIPFIRD)

No. 108PC

(Filed 4 March 1981)

THIS cause is before us upon defendant's petition for a writ of certiorari to review the decision of the Court of Appeals reported in 48 N.C. App. 649, 269 S.E. 2d 723 (1980).

The petition for a writ of certiorari is allowed for the limited purpose of entering this order in the cause:

Our review of the record and the Court of Appeals opinion reveals that that court found no error in the following instruction given to the jury after it had begun its deliberations and had returned to the courtroom indicating that it was unable to reach a verdict:

> All right, now, Members of the Jury, anything further? *I presume that you members of the jury realize what a disagreement means. It means, of course, that it will be more time of the Court that will have to be consumed in the trial of this action again.* I don't want to force you or coerce you in any way to reach a verdict, but it is your duty to try to reconcile your differences and reach a verdict if it can be done without the surrender of one's conscientious convictions.
>
> You've heard the evidence in the case. *A mistrial, of course, will mean that more time and another jury will have to be selected to hear the cases and this evidence again.*

> I realize the fact that there are sometimes reasons why jurors cannot agree. I want to emphasize the fact to you that it is your duty to do whatever you can to reason the matter over together as reasonable men and women and to reconcile your differences if such is possible without surrendering your conscientious convictions and to reach a verdict. I'm going to let you resume your deliberations and see if you can. (Emphasis supplied.)

This Court held in *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980) that it was error, in violation of G.S. § 15A-1235 (which prescribes the instructions a judge may give when a jury deadlocks), to instruct a deadlocked jury that its inability to agree will result in the inconvenience of having to retry the case. Our decision in *Easterling* that an instruction in violation of G.S. § 15A-1235 did not mandate a new trial in that case was due to the fact that while the instruction was given after the jury had begun its deliberations, it was given before the jury had returned announcing any deadlock.

In *Easterling*, this Court said:

> "We caution the trial bench, however, that our holding today is not to be taken as disapproval of the contrary result reached in *State v. Lamb, supra*, [44 N.C. App. 251 (1980)] a case in which initial jury disagreement preceded the offending instruction. Clear violations of the procedural safeguards contained in G.S. 15A-1235 cannot be lightly tolerated by the appellate division. Indeed, it should be the rule rather than the exception that a disregard of the guidelines established in that statute will require a finding on appeal of prejudicial error." *Id.* at 609, 268 S.E.2d at 809-10.

We note that this case was tried in August 1979 and that the decision of the Court of Appeals was filed on 16 September 1980. The Advance Sheets containing the Easterling opinion were published on 10 October 1980.

The decision of the Court of Appeals being contrary to *State v. Easterling, supra*, said decision is reversed and the Court of Appeals is ordered to remand this cause to the Superior Court, Catawba County, for a new trial.

This order will be printed in the official reports of decisions of this Court.

Done by the Court in Conference, this 4 March 1981.

MEYER, J.
For the Court

STATE OF NORTH CAROLINA; STATE OF NORTH CAROLINA EX REL. ROLAND GOFF, JR., ANTHONY CURTIS GIVENS, BARRY JOE HAWKINS, BENJAMIN HENDREN, PHILLIP WHARTON AND JAMES DAVID CHILTON, INFANTS	)	
v.	)	WRIT OF MANDAMUS
THE HONORABLE C. W. WILKINSON, JR., DISTRICT COURT JUDGE OF THE NINTH JUDICIAL DISTRICT, IN HIS OFFICIAL CAPACITY	)	

No. 32PC

(Filed 4 March 1981)

THIS cause was considered by the Supreme Court in conference on the petition by State of North Carolina, *ex rel.* Roland Goff, Jr., *et al.*, that this Court issue its writ of mandamus to the Honorable C. W. Wilkinson, Jr., District Court Judge, Ninth Judicial District, in his official capacity, requiring him to hold voluntary admission hearings, pursuant to Article 4 of Chapter 122 of the General Statutes of North Carolina, for certain mentally ill juveniles who reside in the North Carolina Special Care Facility for Re-Education of Adolescent Children, a State facility designated for the treatment of mental illness located on the grounds of John Umstead Hospital at Butner, North Carolina.

The petitioners have previously addressed their petition to the North Carolina Court of Appeals, and their petition was denied by order of that court dated 17 February 1981.

This matter was originally heard at a hearing held on 11 December 1980 before C. W. Wilkinson, Jr., District Court Judge, Ninth Judicial District, at John Umstead Hospital, Butner, North Carolina. The sole issue addressed at the hearing was the legal necessity for Chapter 122 hearings governing the voluntary admission of juveniles to mental health treatment facilities. Upon the consideration of the arguments and evidence submitted, Judge Wilkinson held that the court could not conduct hearings on admission of the minors. The trial court's order appears to be based upon two grounds: First, the court concluded that the special care facility is not a "treatment facility providing psychiatric care as envisioned by Article 4" of Chapter 122. Second, the court concluded that the Department of Human Resources was without legislative authority to confine children at the special care facility.

Having reviewed the full record of the proceedings together with the documents which were before Judge Wilkinson at the hearing, this Court concludes that Judge Wilkinson's order is in error for the reason that the North Carolina Special Care Facility for Re-Education of Adolescent Children has been properly designated by the Department of Human Resources a "treatment facility" within the meaning of Article 4, Chapter 122 of the General Statutes, and that postadmission judicial hearings upon the voluntary admission of minors to that facility is mandated by statute.

IT IS, THEREFORE, ORDERED that Judge C. W. Wilkinson, Jr., District Court Judge, Ninth Judicial District, be, and he is hereby, in his official capacity, ordered to hold voluntary postadmission hearings pursuant to Article 4 of Chapter 122 of the General Statutes for petitioners herein, Roland Goff, Jr., Anthony Curtis Given, Barry Joe Hawkins, Benjamin Hendren, Phillip Wharton and James David Chilton.

It is further ordered that the Clerk of this Court is designated as marshal of this Court to forthwith serve upon Judge Wilkinson a certified copy of this writ and make his return hereon.

By order of the Court in conference this 4th day of March 1981.

MEYER, J.
For the Court

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

BANK v. ROBERTSON

No. 38PC

Case below: 50 NC App 212

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 7 April 1981.

BD. OF EDUCATION v. CONSTRUCTION CORP.

No. 24PC

No. 8 (Fall Term)

Case below: 50 NC App 238

Petition by plaintiff and by defendant for discretionary review under G.S. 7A-31 allowed 7 April 1981.

BROWN v. SCISM

No. 49PC

Case below: 50 NC App 619

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 24 March 1981.

COOK v. TOBACCO CO.

No. 2PC

Case below: 50 NC App 89

Petition by Tobacco Company for discretionary review under G.S. 7A-31 denied 7 April 1981.

GROVES & SONS v. STATE

No. 5PC

Case below: 50 NC App 1

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 April 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

HAMILTON v. HAMILTON

No. 15PC

Case below: 50 NC App 417

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1981.

HARRIS v. HARRIS

No. 34PC

Case below: 50 NC App 305

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1981. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 7 April 1981.

HILL v. MEMORIAL PARK

No. 33PC

No. 10 (Fall Term)

Case below: 50 NC App 231

Petition by plaintiffs for writ of certiorari to North Carolina Court of Appeals allowed 7 April 1981.

IN RE LAND AND MINERAL CO.

No. 173PC

Case below: 49 NC App 529

Petition by Land and Mineral Company for discretionary review under G.S. 7A-31 denied 7 April 1981.

IN RE LAND AND MINERAL CO.

No. 8PC

Case below: 49 NC App 608

Petition by Avery County for discretionary review under G.S. 7A-31 denied 7 April 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

IN RE SMITH

No. 28PC

Case below: 50 NC App 417

Petition by Nationwide Mutual Fire Insurance Company for discretionary review under G.S. 7A-31 denied 7 April 1981.

KENT v. HUMPHRIES

No. 125

Case below: 50 NC App 580

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 April 1981.

LUMBER CO. v. BROOKS, COMR. OF LABOR

No. 22PC

Case below: 50 NC App 294

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1981. Motion of Comr. of Labor to dismiss appeal for lack of substantial constitutional question allowed 7 April 1981.

MABRY v. FULLER-SHUWAYER CO.

Case No. 19PC

Case below: 50 NC App 245

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1981.

PARKER v. WINDBORNE

Case No. 18PC

Case below: 50 NC App 410

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 April 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

PATTERSON v. EDDIETRON

Case No. 21PC

Case below: 50 NC App 417

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1981.

SAMUEL v. SIMMONS

Case No. 35PC

Case below: 50 NC App 406

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1981.

STATE v. ALLEN

Case No. 73PC

Case below: 50 NC App 173

Motion of Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 April 1981.

STATE v. DUVALL

Case No. 72PC

Case below: 50 NC App 684

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 April 1981.

STATE v. HOOTS

Case No. 102

Case below: 50 NC App 418

Motion of Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 April 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. JONES

No. 16PC

Case below: 50 NC App 263

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1981.

STATE v. KELLER

No. 23PC

Case below: 50 NC App 364

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 April 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 April 1981.

STATE v. LONG

No. 112PC

Case below: 51 NC App 248

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1981.

STATE v. PEARCY

No. 53PC

Case below: 50 NC App 210

Application by defendant for further review denied 7 April 1981.

STATE v. RAMSEY

No. 41PC

Case below: 50 NC App 746

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 April 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. SALEM

No. 45PC

Case below: 50 NC App 419

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1981.

STATE v. SHAW

No. 119PC

Case below: 51 NC App 248

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1981.

STATE v. SHAW

No. 120PC

Case below: 51 NC App 248

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1981.

STATE v. SNIPES

No. 55PC

Case below: 49 NC App 699

Application by defendant for further review denied 7 April 1981.

STATE v. SPICER

No. 6PC

Case below: 50 NC App 214

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 April 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

TAN v. TAN

No. 174PC

Case below: 49 NC App 516

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1981.

WATERS v. PHOSPATE CORP.

No. 17PC

Case below: 50 NC App 252

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1981.

ZARN, INC. v. RAILWAY CO.

No. 25PC

No. 9 (Fall Term)

Case below: 50 NC App 372

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 7 April 1981.

PETITIONS TO REHEAR

LYNCH v. LYNCH

No. 90

Reported: 302 NC 189

Petition by defendant to rehear allowed 7 April 1981 for the limited purpose of considering the points raised in such petition.

JAMES R. SHEFFIELD, AND E. J. PARKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED v. CONSOLIDATED FOODS CORPORATION, PURCESS, GRAHAM & CO., INC., AND HANES CORPORATION

No. 91

(Filed 7 April 1981)

Corporations § 16.1— Tender Offer Disclosure Act — inapplicability to open market purchases of securities

The North Carolina Tender Offer Disclosure Act, G.S. Ch. 78B, does not apply to open market acquisitions of securities aimed at gaining corporate control where the seller experiences no more than the normal market pressures to sell. Therefore, the Act did not apply to open market purchases of a corporation's stock where (1) there was no active and widespread solicitation of shareholders; (2) there was no premium offered over market price; (3) the purchaser's "offer" of terms was subject to the working of the normal market place; (4) there was no offer contingent on tender of a fixed number of shares; (5) there was no offer open for a limited period of time; (6) the shareholders were not subjected to pressure to sell their stock; and (7) there were no public announcements of a purchasing program preceding or accompanying the rapid accumulation of the corporation's stock.

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

ON plaintiffs' petition for discretionary review, pursuant to G.S. 7A-31, prior to determination by the Court of Appeals, of entry of summary judgment in favor of defendants by *McConnell, Judge,* at the 7 February 1980 Session of Superior Court, GUILFORD County.

The issue on this appeal is whether the North Carolina Tender Offer Disclosure Act [hereinafter "Act"] is applicable to purchases of securities on the open market. Our opinion presents the first appellate court construction of the Act, enacted as Chapter 78B of our General Statutes by the 1977 Legislature.

This case was argued as No. 71 at the Fall Term 1980.

Smith, Moore, Smith, Schell & Hunter, by McNeill Smith, Doris R. Bray and Thomas C. Watkins, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey and Leonard, by Hubert Humphrey and Jerry W. Amos, for defendant-appellees.

CARLTON, Justice.

Plaintiffs filed a complaint alleging violation of the North Carolina Tender Offer Disclosure Act, Chapter 78B of the General

Statutes, by defendant Consolidated Foods Corporation, a Maryland corporation, in connection with its takeover of Hanes Corporation, formerly a North Carolina corporation.[1] The trial court allowed summary judgment for defendants. We hold that the Tender Offer Disclosure Act does not apply to purchases of stock on the open market and affirm.

I.

A merger of Hansco, Inc., a wholly owned North Carolina subsidiary of Consolidated Foods Corporation, and Hanes Corporation was consummated on 1 July 1979. Hanes thereby became a wholly owned subsidiary of Consolidated and it, Hanes, ceased to exist as a separate entity. The tactics employed by Consolidated in purchasing the stock of Hanes gave rise to this lawsuit.

The pertinent facts are undisputed. For many years Hanes was a prominent, publicly held North Carolina corporation with several thousand shareholders. Its shares were listed on the New York Stock Exchange. From 2 June 1978 through 5 September 1978, Consolidated purchased, on the open market, an aggregate of 905,900 Hanes shares. The shares were purchased during this period at prices ranging from a high of about $50 to a low of about $35 per share, for a total of $41,478,033, including brokerge commissions. These purchases resulted in aggregate holdings by Consolidated of more than 20% of the Hanes stock then outstanding. Plaintiffs alleged that Consolidated's purchasing program was purposely carried out in a covert manner so as to enable Consolidated to keep its identity secret and its accumulation of Hanes shares unknown. Plaintiffs' complaint alleged that Consolidated actively concealed its purchases by using "blind" or "numbered accounts" with different brokerage firms. In answers to interrogatories, Consolidated stated that in purchasing Hanes shares it dealt with Morgan Stanley Company, a New York brokerage firm, but that "[i]t is understood that Morgan Stanley dealt with other brokerage firm or firms in executing such purchases . . . ." On or before 25 August 1978, Consolidated had acquired in aggregate more than 5% of all outstanding Hanes common stock.

[1] The parties have stipulated that this action was moot as to defendant Hanes Corporation by the time of the trial court ruling on summary judgment and that the action against defendant Purcell, Graham & Co. was dismissed without prejudice. This appeal therefore involves only defendant Consolidated Foods Corporation.

On 1 September 1978, Hanes instituted a separate action in the United States District Court for the Middle District of North Carolina. Hanes alleged, *inter alia*, that the purchases constituted illegal market manipulation in violation of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78 a-kk, and violated the North Carolina Tender Offer Disclosure Act because no disclosure statement had been filed. The named defendants were Purcell, Graham & Co., a New York brokerage firm which had made a large purchase of Hanes stock, and Doe Corporation. At that time, Consolidated's identity was still unknown.

On 5 September 1978, the New York Stock Exchange suspended trading of Hanes stock and the suspension was continued the following day.

On 7 September 1978, an action was filed pursuant to the Act against Consolidated in Superior Court, Wake County, by the Attorney General of North Carolina on behalf of the Secretary of State of North Carolina, the administrator of the Act. Consolidated's identity had become known by this time by virtue of its filing, on 5 September 1978, of a disclosure document pursuant to a provision of the Securities Exchange Act of 1934 which requires such disclosure within ten days *after* an offeror has accumulated 5% of a target corporation's stock. 15 U.S.C. § 78m(d)(1)(Supp. 1979). Judge Bailey issued a temporary restraining order enjoining Consolidated from purchasing additional shares of Hanes. The order was continued by Judge Godwin for an additional ten days on 12 September 1978.

On 8 September 1978, officers of Hanes and Consolidated met and began negotiations which, on the evening of 13 September 1978, resulted in an agreement in principle for the merger. This agreement was publicly announced on 14 September 1978.

On 15 September 1978, the board of directors of Hanes approved the merger agreement in principle and an agreement was reached by Consolidated, the Secretary of State and the Attorney General relating to the State's pending action. The settlement agreement provided the action would be dismissed provided details of the merger were to the satisfaction of the officers and directors of Hanes and that Consolidated file the disclosure statement required by the North Carolina Act. The statement was filed on 22 September 1978, the temporary restraining order was dissolved, and

the Secretary of State dismissed his action against Consolidated.

The merger agreement was executed on 22 September 1978. It provided that all remaining Hanes shareholders at the time of the merger would receive $61.00 per share for the Hanes stock then outstanding.

On 11 October 1978 Hanes took a dismissal with prejudice of its action against Consolidated in the federal court and Consolidated took a dismissal of a counterclaim.

The merger agreement led to stock purchase agreements between Consolidated and members of the Hanes family who owned a major portion of Hanes stock. The agreements provided for the purchase by Consolidated of 1,019,734 Hanes shares, some 23.7% of the Hanes shares then outstanding, at $61.00 per share. Then, on 15 November 1978, Consolidated announced its willingness to purchase any and all Hanes shares at $61.00 per share. A total of 1,320,670 Hanes shares, some 30.7% of the Hanes stock then outstanding, were purchased by Consolidated pursuant to this offer.

A meeting of Hanes shareholders was called to consider the merger on 29 January 1979. By this time, Consolidated owned approximately 75.4% of the Hanes stock. The merger was consummated.

Plaintiffs purport to bring this action on behalf of all persons who sold Hanes shares during the period of time Consolidated was allegedly in violation of the North Carolina Act.[2] Plaintiffs initially

[2] Plaintiff Sheffield alleged that in August of 1978 he was the owner of 6,000 shares of Hanes common stock; that in August of 1978 neither he nor his attorney in fact had knowledge of any negotiations between Hanes and Consolidated; that he had no knowledge of the purchases by Consolidated and its brokers of Hanes stock or Consolidated's plan to acquire control of Hanes; that had Consolidated complied with the North Carolina Act, the Secretary of State would have been notified and certain information with respect to the tender offer would have been filed with the Secretary and Hanes; that this filing would have been made at least by 26 July 1978 (30 days prior to 25 August 1978, the date that Consolidated acquired in excess of 5% of the outstanding common stock of Hanes) and Consolidated and its brokers would have made no further purchases for the 30-day period following the filing during which time he and other Hanes shareholders would have had a chance to decide whether to sell on the basis of the disclosed information; that instead, however, defendants did not obey the statute and the 6,000 shares owned by plaintiff Sheffield were sold without the benefit of its protection; that the shares were sold in three 2,000 share transactions on August 25, August 30 and August 31 at prices of $41.25, $49.00 and

sought to exercise a statutory right to rescind the sales of Hanes shares and to recover the shares under G.S. 78B-6.[3]

A temporary restraining order preserving their right to do so was entered by Judge Walker simultaneously with the filing of plaintiff's complaint. This order was dissolved on 28 January 1979 based on a finding by Judge Walker that Consolidated was able to respond to any damage award in favor of plaintiffs. Since the merger was

---

$50.00 per share, respectively, for each of the three 2,000 share sales.

Plaintiff Parks alleged that in August of 1978 he was the owner of 986 shares of Hanes common stock; that he had no knowledge of any negotiations between Consolidated and its brokers concerning Hanes stock or Consolidated's plans to acquire control of Hanes; that he sold his 986 shares without the benefit of protection afforded by the Act and that due to violations of the Act as set forth in the complaint, Parks sold 86 of his shares at a price of $49.50 per share and his remaining 900 shares at a price of $49.5/8 per share on 31 August 1978.

We express no opinion on whether this suit is properly denominated a class action.

[3] That statute provides:

(a) An offeror who

(1) Makes a tender offer that does not comply in all material respects with the provisions of G.S. 78B-3, or

(2) Makes a tender offer without complying in all material respects with the provisions of G.S. 78B-4, or

(3) Makes a tender offer by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading (the offeree not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and did not act in reckless disregard, of such untruth or omission,

shall be liable to any offeree whose equity securities are sold to the offeror pursuant to the tender offer and such offeree in a civil action shall be entitled (i) to recover such equity securities, together with all dividends, interest or other payments received thereon upon the tender of the consideration received for such securities from the offeror, or (ii) if the offeror has transferred such equity securities to a third party, to recover such damages as the offeree shall have sustained as the proximate result of the conduct of the offeror which is in violation of this section.

(b) No civil action may be maintained under this section unless commenced before the expiration of two years after the act or transaction constituting the violation.

(c) The rights and remedies of this Chapter are in addition to any other rights or remedies that may exist at law or in equity.

G.S. § 78B-6 (Cum. Supp. 1979)

consummated and all Hanes shares were cancelled by operation of law, plaintiffs' present claim is for money damages, not rescission. The amount of damages sought is the difference between the price per share received by plaintiffs for their sale of Hanes shares and the $61.00 per share received by the Hanes family and others. G.S. § 78B-6(a)(3)(ii)(Cum. Supp. 1979).

We now consider the propriety of the entry of summary judgment in favor of defendants. The specific issue with which we are confronted on this appeal is whether the North Carolina Tender Offer Disclosure Act applies to open market acquisitions aimed at gaining control in which the seller experiences no more than the normal market pressures to sell.

II.

The North Carolina Act was passed in an attempt to supplement the federal regulation of tender offers and to remedy the perceived inadequacies in that legislation. In order to divine the intent of our Legislature in adopting the Act, it is necessary to examine the history behind the federal legislation, the Williams Act, Securities Exchange Act of 1934 §§ 13(d)-13(f), 14(d)-14(f), 15 U.S.C. §§ 78m(d)-78m(f), 78n(d)-78n(f) (1976 & Supp. 1979), and to examine the operation of the Williams Act itself.

The use of tender offers as a means to gain control of a corporation was virtually unregulated until passage of the Williams Act in 1968. Note, Cash Tender Offers, 83 Harv. L. Rev. 377, 377, 379 (1969). Regulation was absent because it was not until the 1960s that the tender offer came into vogue as a takeover weapon. *See* Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317 (1967).

Focus by the legal and business communities, and eventually the government, on tender offers as a means to acquire control of large corporations resulted from what has been called the "conglomerate merger mania of the early and mid 1960s." E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* 64 (1973). Although tender offers have traditionally been employed by corporations wishing to repurchase their own securities, Zilber, *Corporate Tender Offers for Their Own Stock: Some Legal and Financial Considerations*, 33 U. Cin. L. Rev. 315, 315 (1964); Note, The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934, 86 Harv. L. Rev. 1250, 1253 (1973), it was not until this

period that tender offers came into widespread use as a method for corporate takeover; *see* Fleischer & Mundheim, *supra*, 115 U. Pa. L. Rev. 317. Prior to this time takeovers resulted almost exclusively from the traditional devices of mergers, consolidations and asset acquisitions. *See generally* Darrell, *The Use of Reorganization Techniques in Corporate Acquisitions*, 70 Harv. L. Rev. 1183 (1957). Because tender offers, unlike the more conventional means for gaining control, were unregulated, the tender offer became the fastest method of acquiring control of corporations and was found to be an attractive alternative to the more regulated processes of statutory merger and proxy contests. Note, *supra*, 83 Harv. L. Rev. at 378-79. The cash tender offer technique became the cheapest, simplest and quickest method of gaining corporate control. Aranow & Einhorn, *supra* at 64-66. It also offered to the offeror the benefits of secrecy and surprise. Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 Bus. Law. 149, 150 (1966); Note, *supra*, 86 Harv. L. Rev. at 1253-54. The tender offer's obvious great advantage to a raiding corporation was its ability to bypass strong and often hostile incumbent management by taking the offer directly to shareholders. *See* Fleischer & Mundheim, *supra*, 115 U. Pa. L. Rev. at 321. Economic conditions in the mid-1960s such as increased corporate liquidity, readily available credit, greater knowledge and sophistication of tender techniques, and the psychological appeal of straight dollars and cents language to normally apathetic shareholders gave impetus to corporate conglomeration. Once a raiding corporation selected its target, hostile battles for control between the respective management teams resulted, and the resulting confusion caused great concern among corporate executives, staff members of the Securities and Exchange Commission, the New York Stock Exchange and members of Congress. *See generally* Cohen, *Tender Offers and Takeover Bids*, 23 Bus. Law. 611 (1968).

The reasons for the concern over the widespread use of the tender offer technique were several. Most obvious was that when the raiding corporation's identity was concealed, the target company was powerless to present convincing reasons to shareholders for not selling securities at prices considerably higher than market prices. Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 Harv. Bus. Rev., March-April 1967, 135, 136-37. The technique also caused shareholders to be pressured into making hurried judgments because of the time limitations of the offer. *See* Cohen, *supra*, 22 Bus. Law. at 153-54. In spite of these and other risks to shareholders,

attempts to bring such tender offers under existing security laws were unsuccessful and, ultimately, the cash tender offer became the most successful and popular means of acquiring control over corporations. *See* Hayes & Taussig, *supra*, 45 Harv. Bus. Rev., March-April 1967, at 136. These unregulated transfers of corporate control came under serious scrutiny and provided the major impetus for passage of the Williams Act in 1968. *See* Note, *supra*, 86 Harv. L. Rev. at 1254.

III.

In response to the problems described above, Congress, in 1968, enacted the Williams Act, 15 U.S.C. §§ 78m(d)-78m(f), 78n(d)-78n(f)(1976 & Supp. 1979)[hereinafter cited as "Williams Act"], as amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976 & Supps. 1977, 1978, 1979) [hereinafter cited as "Exchange Act"].

The key disclosure provision of the Williams Act with respect to tender offers — a term nowhere defined by the Act — is codified in Section 14(d) of the Exchange Act, 15 U.S.C. § 78n(d)(1976). Section 14(d) requires a tender offeror, *simultaneously* with the making of the tender offer, to disclose certain information to the Securities and Exchange Commission [hereinafter referred to as "SEC"] if the successful consummation of the offer would result in ownership of more than 5% of any class of the target company's equity securities. The pertinent portion of the amendment provides:

> It shall be unlawful for any person . . . to make a tender offer for, or a request or invitation for tenders of, any class of any equity security . . . if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 percentum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in Section 78m(d) of this title . . . .

Exchange Act § 14(d)(1), 15 U.S.C. § 78n(d)(1)(1976).

Any person to whom the above provision applies is required to file a statement with the SEC disclosing, *inter alia*, his identity and background, the source and amount of funds or other consideration

to be used for purchases, the number of shares he holds in the target company, any arrangements made involving the target company's stock, and any major changes contemplated in the company's corporate structure if control of the target company is desired. *Id.* In addition to this statement, the offeror is required to file with the SEC copies of all materials used to solicit shares in the target company and to furnish the target company with a copy of all filed information not later than the date such material is communicated to the security holders. *Id.*

Other provisions of the Williams Act go beyond requiring disclosure by the offeror. These provisions regulate the manner in which tender offers may be carried out. For example, shareholders who deposit their securities pursuant to a tender offer are given the right to withdraw their shares during the first seven days of the tender offer and at any time after sixty days from the date of the original tender offer if the offeror has not already purchased the tendered shares. Exchange Act § 14(d)(5), 15 U.S.C. § 78n(d)(5) (1976). Also, if the tender offer is for less than all of the target's outstanding shares and more than the requested number of shares are tendered within the first ten days of the offer, all shares tendered during that period must be purchased *pro rata*, as opposed to on a first come, first served basis. Exchange Act § 14(d)(6), 15 U.S.C. § 78n(d)(6)(1976). Moreover, the Williams Act provides that if, during the course of the tender offer, the amount paid for the target shares is increased, all tendering shareholders must receive the increased price even if they tendered their shares before the price increase was announced. Exchange Act § 14(d)(7), 15 U.S.C. § 78n(d)(7)(1976).[4] Finally, the Williams Act contains an anti-fraud provision designed to prevent false and misleading statements and fraudulent or manipulative practices in connection with a tender offer subject to its provisions. Exchange Act § 14(e), 15 U.S.C. § 78n(e)(1976).[5]

[4] The SEC has more recently promulgated a rule requiring tender offers to remain open for at least twenty days in an effort to discourage potential raiders from attempting a quick takeover, normally referred to as a "Saturday Night Special" or "blitzkrieg." Securities and Exchange Comm. Regulation 14E-1, 17 C.F.R. § 240.14e-1 (1980).

[5] Not discussed above are certain new rules and regulations issued by the Securities and Exchange Commission effective 7 January 1980 modifying the operation of some of the substantive provisions. The discussion above, unless otherwise

In addition to the regulation of classic tender offers under § 14(d) of the Exchange Act described above, Secton 13(d) of the Exchange Act, 15 U.S.C. § 78m(d)(Supp. 1979), contains provisions applying to acquisitions of securities *by any other means.* This section requires, *inter alia*, that within 10 days *after* an acquisition by any means other than a tender offer of more than 5% of the stock of a registered company, the acquiring person must file a disclosure statement with the Securities and Exchange Commission and send a copy of the statement to the issuer of the securities purchased. Under this section, the offeror-purchaser may continue purchasing without restriction during the ten-day period *after* he reaches the 5% level and *before* he files the required disclosure statement.

IV.

Seemingly in response to the failure of the Williams Act to require *advance* disclosure of proposed stock accumulations, the North Carolina Legislature enacted the North Carolina Tender Offer Disclosure Act [hereinafter "Act"] in 1977 as Chapter 78B of our General Statutes. In enacting the Act, North Carolina joined a majority of the states in providing supplemental legislation in the securities field. State legislation in this area has not, however, met with the approval of federal authorities responsible for enforcement of the Williams Act. The position of the Securities and Exchange Commission is that "the method of regulating tender offers which has been adopted by most of the states interferes with and often frustrates the operation of the Williams Act." Securities and Exchange Commission, *Report on Tender Offer Laws* 13 (1980). As a result, the Commission has filed *amicus curiae* briefs on numerous occasions alleging that particular state laws are unconstitutional. See, *e.g., Great Western United Corp. v. Kidwell*, 577 F. 2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173, 99 S.Ct. 2710, 61 L. Ed. 2d 464 (1979).[6]

The North Carolina Act specifically provides for *advance* disclosure for all tender offers. G.S. 78B-4(a)(Cum. Supp. 1979) provides:

noted, relates to the applicable provisions of the Williams Act at the time of Consolidated's purchases of Hanes shares.

[6] The Commission has taken a similar position with respect to the North Carolina Act in another action presently pending before this Court, *Eure and Huyck Corp. v. NVF Company*, docketed as No. 92, Spring Term 1981.

> No offeror shall make a tender offer unless at least 30 days prior thereto he shall file with the Administrator and deliver to the principal office of the subject company personally or by registered United States mail a statement containing all the information required by subsection (d) of this section.

Unlike its federal counterpart, the North Carolina Act does define a "tender offer." Indeed, it is the interpretation of the meaning of that definition which gives rise to this litigation. Under the North Carolina Act, a tender offer is:

> an offer to purchase or invitation to tender, other than an exempt offer, made by an offeror, directly or indirectly, for such amount of any class of equity securities of a subject company that, together with equity securities of such class owned beneficially or of record by the offeror and his associates at the time of the offer or invitation, will in the aggregate exceed five percent (5%) of the outstanding equity securities of such class. A tender offer is "made" when the offer or invitation is first published or sent or given to the offerees.

G.S. § 78B-2(14)(Cum. Supp. 1979).

The term "subject company" is defined as a "corporation or other issuer of securities whose equity securities are the subject of a tender offer" and which is organized under the laws of and doing business in North Carolina or which has its principal place of business and substantial assets in North Carolina. G.S. § 78B-2(12) (Cum. Supp. 1979). The "administrator" of the Act is the Secretary of State. G.S. § 78B-2(1)(Cum. Sup. 1979).

With respect to the advance disclosure requirement, G.S. 78B-4 is the controlling statute. This statute provides in essence that a tender offer subject to the Act's provisions cannot be made unless at least thirty days prior to the date on which the offer is to be made, the offeror has filed with the Secretary of State and delivered to the principal office of the target company a disclosure statement. G.S. § 78B-4(a). This statement must contain substantially the same information as the offeror would be required to disclose at a later time pursuant to the Williams Act. G.S. § 78B-4(b)(Cum. Supp. 1979). Moreover, concurrently with the filing of the required disclosure statement under the North Carolina Act, the offeror must give

notice, either in the form of a reasonably disseminated news release or written communication to the target shareholders, of the following: that a tender offer is proposed to be made and that the disclosure required has been filed with the Secretary of State and delivered to the subject company, the amount of securities to be covered by the proposed tender offer and the date on which the offer is expected to be made, the consideration proposed to be offered, the identity of the offeror, and the purpose of the offer. G.S. § 78B-4(g) (Cum. Supp. 1979).

While the disclosure provisions discussed above are, in most instances, essentially similar to those required by the federal legislation, other provisions of the North Carolina Act are strikingly dissimilar. There are several outright conflicts. The North Carolina Act requires the concurrent filing of the disclosure statement with the Secretary of State, delivery of that statement to the subject corporation, and reasonable dissemination of notice to the equity security holders at least thirty days *prior to* the making of the tender offer. Neither the Williams Act nor the regulations promulgated by the SEC require such an advance notice provision. "Indeed, Congress specifically spurned proposals that a five day advance notice period be incorporated into the Williams Act, and in 1975 rejected amendments suggesting from thirty to sixty day prior notice rules." Comment, The North Carolina Tender Offer Disclosure Act: Congenitally Defective?, 14 Wake Forest L. Rev. 1035, 1043 (1978). Also, the North Carolina Act requires a ten-day waiting period after each amendment to the disclosure statement and a six-day wait after each revision of the offer before the tender offer may be operative. G.S. § 78B-4(e), 4(f)(Cum. Supp. 1979). No similar provision is contained in the Williams Act. Further, the North Carolina Act requires that each tender offer be effective, and presumably irrevocable, for at least twenty-one days, G.S. § 78B-3(1) (Cum. Supp. 1979), while the Williams Act implicitly requires only a ten-day life for the offer. Exchange Act § 14(d)(6), 15 U.S.C. § 78n(d)(6). G.S. 78B-3(1) allows an offeree to withdraw any securities tendered at any time up to three business days before termination of the offer or to withdraw unpurchased securities at any time after sixty days from the date of the initial offer, while Section 14(d)(5) of the Exchange Act, 15 U.S.C. § 78n(d)(5), provides similar withdrawal rights, but only during the seven business days succeeding the offer date or after sixty days from the offer date. Finally, G.S. 78B-3(2)(Cum. Supp. 1979) provides that when an

offer is made for only a portion of the outstanding equity securities of a certain class and more than that number are tendered, the offeror must purchase *pro rata* from each offeree as nearly as possible. The Williams Act counterpart prescribes for a proration of only those shares tendered during the first ten days of the offer. Exchange Act § 14(d)(6), 15 U.S.C. § 78n(d)(6). An additional provision of the North Carolina Act requires that all selling shareholders receive any increase in the consideration offered during the entire effective period of the tender offer even if they sold their shares before the increase in consideration was offered. G.S. § 78B-3(3) (Cum. Sup. 1979).

The North Carolina Act also provides for a right of private civil action for injured parties, injunctive relief by petition of the State, offeror or subject corporation, and criminal penalties. G.S. § 78B-6, -7, -8(Cum. Supp. 1979). An offeror who makes an offer subject to the provisions of the Act and who fails to comply with its filing and disclosure provisions is liable to any offeree whose equity securities are sold to the offeror for the securities themselves or for such damages as the offeree shall have sustained as the proximate result of the conduct of the offeror in violation of the Act. G.S. § 78B-6(a)(3).

In comparing the Williams Act to the North Carolina Act and other state acts, one commentator has noted:

> [S]ince the Williams Act does not require any advance disclosure of either a "creeping" or a "classic" tender offer, it does not adequately protect either management or the shareholders against surprise or blitz tender offers which have come to be known as "Saturday night specials." Such tactics may deprive management of an opportunity to respond intelligently to the offer, may discourage or prevent competing offers, and may rush the shareholders into making unwise decisions. The state statutes are all intended to correct these perceived deficiencies in the federal law. They do so in a variety of ways, ranging from the highly protective and regulatory, such as in Pennsylvania, to the mildest and least burdensome form of advance notification, such as in Delaware.
>
> The statute that was finally enacted in North Carolina is a compromise between two separate bills that reflected

> these different points of view. One was quite protective, regulatory and burdensome for offerors; the other was very much less so. The resulting compromise was intended to strike the best balance between, on the one hand, the need to give management and the shareholders of the target company adequate information and time to evaluate and respond, and, on the other hand, the need to avoid discouraging either initial or competing tender offers that may be beneficial to the target company and its shareholders.

R. Robinson, *North Carolina Corporation Law and Practice* § 7-12 (2d ed. Supp. 1980)(footnotes omitted).

V.

Plaintiffs vigorously contend (1) that the North Carolina Act expressly covers open market purchases such as those made by Consolidated from plaintiffs, (2) that under the proper construction of the Act, Consolidated was *required* to make a conventional tender offer for Hanes shares so that all Hanes shareholders would have been afforded the substantive protections of G.S. 78B-3, and (3) that under any construction of the Act, Consolidated should have filed the disclosure statement required by G.S. 78B-4. We must reject plaintiffs' contentions and affirm the trial court.

A.

We first turn our attention to the meaning of "tender offer." Courts and other authorities agree generally that:

> A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price. Cash or other securities may be offered to the shareholders as consideration; in either case, the consideration specified usually represents a premium over the current market price of the securities sought. This opportunity to tender shares at a premium remains open for only a limited period of time, often about two weeks.
>
> A distinctive aspect of the conventional tender offer is that offerors typically condition their obligation to purchase on the aggregate tender of a stated number of

> shares. If fewer than the stated number are tendered, the offeror need not purchase any shares. If more than the stated number are tendered, the offeror is not required to purchase the excess. Meanwhile, during the period in which the overall response is being determined, the shareholder relinquishes control over his tendered shares; they are placed with a depositary, the shareholder having only limited access to them. The position of a shareholder in a conventional tender offer is thus in sharp contrast with his position in ordinary market and negotiated transactions, where sellers retain control over their securities until a sale is completed.

Note, *supra*, 86 Harv. L. Rev. at 1251-52 (footnotes omitted); *see Smallwood v. Pearl Brewing Co.*, 489 F. 2d 579, 597 n. 22 (5th Cir.), *cert. denied*, 419 U.S. 873, 95 S. Ct. 134, 42 L. Ed. 2d 113 (1974).

The definition stated above is one which has been evolved by the courts over the years, for the term "tender offer" is nowhere specifically defined in the Williams Act. Obviously, the activities of Consolidated in purchasing the shares of Hanes do not fall within the generally accepted definition of a conventional tender offer quoted above. Indeed, plaintiffs do not so contend. Plaintiffs correctly note, however, that the North Carolina Act does define a "tender offer" and contend that Consolidated's activities here fall squarely within that definition.

Under the definitional statute, tender offer covers "an offer to purchase *or* invitation to tender." G.S. § 78B-2(14) (emphasis added). Pointing to the disjunctive "or," plaintiffs contend that our statutory definition of tender offer specifically encompasses two different types of transactions: (1) an "offer to purchase" the requisite amount of securities and (2) an "invitation to tender" such amount. According to plaintiffs' interpretation, the "invitation to tender" component of the definition, by use of the particularized term "tender," brings the conventional form of tender offer within the coverage of the Act, and the party making such a conventional tender offer would be subject to the requirements of our Act as well as the requirements of the federal legislation. On the other hand, plaintiffs argue, the "offer to purchase" component of the statutory definition under the state Act indicates a legislative intent to apply the Act to regulate acquisitions by means other than conventional tender offers. Plaintiffs contend that our Legislature elected to

cover *all offers* to purchase the requisite amount of security and, consequently, open market purchases such as those utilized in the instant case are also subject to the Act. Plaintiffs correctly note that "[c]oncentrated open-market accumulations can have an impact on shareholders just as significant as a conventional tender offer . . .," Knapp, *The Open Market Purchase Problem*, 32 Bus. Law. 1453, 1453 (1977), and contend that the North Carolina legislation was specifically enacted to cover such accumulations and any other types of offers for stock purchase otherwise qualifying under the Act.

That the North Carolina Act was not intended to embrace the open market transaction situation is indicated in the definitional statute itself. The last sentence of G.S. 78B-2(14) provides, "A tender offer is 'made' when the offer or invitation is first published or sent or given to the offerees." Plainly, therefore, there is no "tender offer" under the North Carolina Act until an offer or invitation to purchase *is communicated to shareholders.* Those even casually acquainted with the operation of major stock exchanges or over the counter marketing arrangements are aware that open market transactions involve no such offer or invitation and no such communication to shareholders as is contemplated by the statute. Plaintiffs' attempt to explain away this provision of our definitional statute is, we think, without merit. Plaintiffs contend that, in the context of open market purchases, a tender offer would be "made" when the buy order was entered that would increase the offeror's holdings above 5%. At that time, plaintiffs argue, the critical offer is "given" to the offerree. Plaintiffs cite no authority to support such an interpretation. The obvious inference to be drawn from the provision that a direct offer be *conveyed* from offeror to shareholder is that ordinary open market purchases[7] are not within the Act's coverage.

The last sentence of the definitional statute clearly indicates when a tender offer is deemed to have been "made." It is "made" when the offer or invitation is "first published or sent or given to the offeree." G.S. § 78B-2(14). In an open market purchase, there is nothing to *publish* nor is there anything to *send* or *give* to the offeree.

[7] We use the term "ordinary open market purchases" to mean transactions which are accomplished through the ordinary give-and-take of the marketplace and which are not effected or accompanied by additional pressures on the shareholders to sell.

We note also that the language, "published or sent or given to" is the precise language employed in Section 14(d)(1) of the Exchange Act, 15 U.S.C. § 78n(d)(1), to indicate the effective date of a tender offer under federal law. The drafters of the North Carolina legislation must have placed some reliance on the federal statute, its language and meaning, in preparing the state legislation.

Moreover, we do not find persuasive plaintiffs' emphasis on the disjunctive nature of the North Carolina definitional statute. We find nothing to support plaintiffs' contention that the phrase "offer to purchase" was intended to embrace open market purchases while the phrase "invitation to tender" was separately intended to embrace the conventional tender offer. Indeed, we find that the terms are simply different legislative expressions embracing the same concept of an offeror expressing a desire to purchase shares of stock from corporate shareholders through slightly different means and that each term encompasses only "conventional" tender offers. It is our understanding that in making a tender offer, an offeror expresses its offer either in terms of an offer to purchase the shares owned by shareholders of a company or in terms of an invitation to these shareholders to tender their shares to a depositary who will hold the shares pending ultimate purchase by the tender offeror. The difference, if any, is subtle and is in form, not substance. Apparently, it is typical for conventional tender offers to be couched in terms of "offers to purchase" rather than "invitations to tender." *Smallwood v. Pearl Brewing Co.*, 489 F. 2d at 569-97. In *Smallwood*, the court noted that "in conventional tender offers the offeror typically *offers to purchase* all or a portion of a company's shares at a premium price . . . .' *Id.* at 597 n. 22.

Our conclusion that the North Carolina Act does not apply to open market transactions is buttressed by a review of numerous provisions of both G.S. 78B-3 and 78B-4 which could not possibly apply to the open market transaction situation. G.S. 78B-3(1) provides in part that every tender offer shall provide that the offer may be withdrawn by any offeree at any time up to three days before the termination of the effectiveness of the tender offer and that the period of effectiveness of any tender offer shall not be less than twenty-one days from the date the tender offer is made. Clearly, this provision cannot apply to an open market purchase on a stock exchange in which the purchase and sale is complete and final upon execution of the trade and must be consummated by delivery of the

stock certificates and payment within five business days of the trade without privilege for alteration, withdrawal or rescission. Regulation T, Federal Reserve Board, 12 CFR ¶ 220.3 (1980) [hereinafter "Regulation T"]; Rule 64, New York Stock Exchange, 2 N.Y. Stock Exchange Guide (CCH) ¶ 2064 (1978) [hereinafter "Rule 64"]. G.S. 78B-3(2) provides in part for a *pro rata* acceptance of securities by the offeror if more are tendered "than the offeror is bound or willing to accept." The result, if more shares were offered than the offeror had offered to purchase, would be that prior purchases would have to be somehow undone and then a proration of each sharehoder's stock would be implemented. Such a requirement clearly cannot be applied to trades executed on a major stock exchange. Regulation T, *supra*; Rule 64, *supra*.

Additionally, G.S. 78B-3(3) requires that all offerees receive the same amount of consideration per share; if the consideration offered is increased at any time during the pendency of the offer, the increase must be paid to *all* whose shares are purchased even if the purchase was consummated prior to the increase in consideration. Applying such a provision to the open market situation would mean that if different prices were paid for stock purchased in the open market — an obviously normal occurrence over almost any period of time — then all offeree-stockholders could, under the terms of that provision, require the offeror to pay all offering shareholders the highest price paid for any stock. The chaos that would result in the marketplace from the application of this requirement and the impossibility of administering such a provision in the open market context, where every transaction is final and is not subject to revision, shows with abundant clarity that our Legislature could not have intended this provision to apply to purchases in the open market.

Additionally, plaintiffs themselves concede that the above noted provisions, the entirety of G.S. 78B-3, "as a practical matter" *cannot* apply to open market purchases. Plaintiffs contend, however, that the inapplicability of G.S. 78B-3 to the open market "tender offer" does not render their position untenable because the inapplicability of some of the Act's provisions to certain situations was anticipated and partial application of the Act was expressly authorized by the Act's severability clause. That clause provides:

> If any provision or clause of this Chapter or application thereof to any person or circumstances is held invalid,

> such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable.

G.S. § 78B-11(Cum. Supp. 1979). Because of this provision, plaintiffs argue, the disclosure requirements are still valid and must be applied in the open market context. Plaintiffs contend that the disclosure portion of the Act is its fundamental purpose and that, should we decide that the Act does not require an offeror to employ a conventional tender offer, then the disclosure provisions of the Act remain applicable by virtue of the severability clause.

Plaintiffs' reliance on the severability clause is misplaced. While the severability clause obviously protects other provisions of the Act from invalidity due to a finding that one or more provisions are invalid, a severability is relevant to a decision only when the validity of a *particular* provision of the Act is at issue. Here, the inapplicable provisions of G.S. 78B-3 remain relevant to our consideration *in determining legislative intent* with respect to the application of the Act as a whole to open market purchases. Clearly, in interpreting the legislative intent, we cannot ignore all the provisions of the Act simply because it contains a severability clause common to most statutes enacted by our Legislature. Moreover, we note that G.S. 78B-3 is entitled "*Mandatory Provisions* of and Limitation of Tender Offers" (emphasis added). The statute expressly states that "the following provisions apply to *every* tender offer" (emphasis added). Because G.S. 78B-3 is, by its express terms, mandatory in application to *every* tender offer, we must decline to interpret and apply the severability clause to convert the denominated mandatory requirements into permissive ones. In so construing the Act, we are guided by a well-established canon of statutory construction:

> In order to discover and give effect to the legislative intent we must consider the act as a whole, having due regard to each of its expressed provisions; for there is no presumption that any provision is useless or redundant. That the act consists of several sections is altogether immaterial on the question of its unity. "The construction of a statute can ordinarily be in no wise affected by the fact that it is subdivided into sections or titles. A statute [is] passed as a whole and not in parts or sections and is

> animated by one general purpose or intent. Consequently the several parts or sections of an act are to be construed in connection with every other part or section and all are to be considered as parts of a connected whole and harmonized, if possible, so as to aid in giving effect to the intention of the lawmakers."

Jones v. Board of Education, 185 N.C. 303, 307, 117 S.E. 37, 39 (1923) (citations omitted).

We will not apply the severability clause to vary and to contradict the express terms of a statute, for we cannot believe the Legislature intended such a result. Construing "tender offers" as broadly as plaintiffs would have us produces an absurd result. On the other hand, if "tender offer" under our Act was intended to cover only conventional tender offers, as we believe it does, each provision of the single regulatory scheme enacted by our Legislature is harmonious one with the other.

Moreover, in addition to the provisions of G.S. 78B-3, certain provisions of G.S. 78B-4, *the disclosure statute of the Act*, are impossible of application to open market transactions. Even G.S. 78B-4(a), requiring compliance with the remaining provisions of the Act and disclosure thirty days prior to the making of the "tender offer," seems inconsistent with the concept of open market stock trading as we understand it. Stock market prices, as even the most casual observer knows, change constantly and the market price at the end of a thirty-day period would almost always be different from that announced thirty days before. Technically, a disclosure through public announcement could be made thirty days prior to the trading period on a stock exchange, but it is inconceivable to us that our Legislature would, *sub silentio*, attempt statutorily to inject such an inconsistent and unusual requirement into the workings of the free marketplace. Moreover, G.S. 78B-4(b) requires the disclosure of "all of the terms and conditions of the proposed tender offer." In the workings of the stock marketplace, however, the terms and conditions of a purchase cannot be accurately predicted, and such a requirement seems incongruous.

G.S. 78B-4(b) also requires that the disclosure statement materially specify the amount of all funds to be used, and G.S. 78B-4(g) provides for a written notice to all shareholders of the company containing, *inter alia*, "the amount of the securities covered by the

proposed tender offer," "the date on which such offer is expected to be made" and "the consideration proposed to be offered." Again, such provisions seem wholly inapplicable to the open market transaction in which the purchaser often does not know the amount of funds that will be required, exactly how many shares will be acquired or what the total consideration will be until after all purchase transactions are final.

If the terms of the original tender offer are revised, a statement containing the terms and conditions of the revised offer and an explanation of the changed terms must be filed with the Secretary of State and delivered to the principal office of the target company at least six days before the revisions become effective. G.S. § 78B-4(f). Purchases made on the open market are rarely identical in terms, and an advance prediction of the terms on which a single purchase will be made is impossible. Additionally, each purchase is final upon execution and cannot thereafter be modified or revoked. We cannot believe that the Legislature would impose upon tender offerors a requirement that is impossible to meet.

In a word, the provisions noted above, and others, are simply inconsistent with the normal operation of the open stock market, would be unworkable in an open market context, and, indeed, appear appropriate only when applied to the situation of a conventional tender offer.

The language of a statute should always be interpreted in a way which avoids an absurd consequence: "A statute is never to be construed so as to require an impossibility if that result can be avoided by another fair and reasonable construction of its terms." *Hobbs v. Moore County*, 267 N.C. 665, 671, 149 S.E. 2d 1, 5 (1966); *accord, In re Annexation Ordinance*, 284 N.C. 442, 202 S.E. 2d 143 (1974); *Town of Hudson v. City of Lenoir*, 279 N.C. 156, 181 S.E. 2d 443 (1971).

B.

Plaintiffs also advance the proposition that, since the provisions of G.S. 78B-3 can be applied only in the context of a formal tender offer wherein a depositary for the tendered shares is used, we should construe that statute to require use of a conventional tender offer by an offeror who seeks to acquire in excess of 5% of the stock of a subject company. Put another way, plaintiffs argue that the effect of G.S. 78B-3 is to require persons seeking to purchase

more than 5% of the voting stock of a subject company to use the conventional tender offer so that all shareholders of the subject company will receive the information the Legislature has deemed necessary to an informed decision. Such reasoning is, we think, strained and illogical. First, it assumes that the offeror has made purchases that constitute a tender offer under the Act, a proposition we have rejected above. Moreover, had our Legislature any intent to restrict the permissible methods of corporate takeover, as that here argued by plaintiffs, it surely would have said so in understandable language. In support of their argument, plaintiffs cite us to *Telvest, Inc. v. Bradshaw*, 618 F. 2d 1029 (4th Cir. 1980), which they contend interprets the Virginia Takeover Bid Disclosure Act to require use of a conventional tender offer in lieu of open market purchases when the object of the purchaser is to gain control and when the acquisition would increase the purchaser's holdings beyond the 10% threshold. The circuit court found error in a lower court ruling enjoining application of the Virginia Takeover Bid Disclosure Act to open market purchases. *Telvest* has no application here. The Virginia act unquestionably was intended to cover takeovers effected through open market purchases.[8] In *Telvest*, the Fourth Circuit merely reversed the order of a district court enjoining application of the act to open market purchases because the trial court had not properly applied the balance-of-hardship test[9] in considering whether to issue the temporary injunction. While the effect of the Virginia statute may be to require that acquisitions be made through a conventional tender offer, we think the relevant Virginia statute and its legislative history clearly are distinguishable from the North Carolina Act. Virginia, unlike North Carolina, has specifically dealt with the open market transaction problem. Our Legislature has equal ability to handle the open market transaction situation in similar plain legislative language. Had our legislators intended to limit the means of acquiring corporate control to the conventional tender offer methods, we think they would have

[8] As originally enacted, the Virginia act *specifically exempted* open market purchases in former Va. Code Ann. § 13.1-529(b)(iii). That *exemption* was narrowed substantially by a 1979 amendment of that provision. The amendment added a proviso limiting the open market exemption to only those open market purchases by a purchaser who had acquired no more than 1% of the outstanding shares of the class purchased during the preceding six months.

[9] *See Maryland Undercoating Co. v. Payne*, 603 F. 2d 477 (4th Cir. 1979); *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F. 2d 189 (4th Cir. 1977).

said so; the absence of any express intent and the strained interpretation necessary to reach the result urged upon us by plaintiffs indicate that such was not their intent.

C.

Plaintiffs next call to our attention the six separate types of offers which are expressly exempt from the North Carolina Act and contend that the subject matter of the exemptions shows that the Act covers open market purchases. An "exempt offer" is defined as being any one of the following:

a. An offer made by the subject company or any issuer of equity securities to purchase its own equity securities or equity securities of its subsidiary;
b. Offers to purchase equity securities from not more than 25 offerees within a twelve-month period;
c. An offer, if the acquisition of any equity security pursuant to the offer, together with all other acquisitions by the offeror and his associates of securities of the same class during the preceding 12 months, would not exceed two percent (2%) of the outstanding securities of such class;
d. An offer to purchase equity securities of a class not registered pursuant to section 12 of the Securities Exchange Act of 1934;
e. An offer that is subject to approval by the shareholders of the subject company at a meeting for which proxies have been solicited pursuant to section 14 of the Securities Exchange Act of 1934; or
f. Bids made by a registered broker-dealer in the ordinary course of his business and not with the purpose of changing the control of an issuer of equity securities.

G.S. § 78B-2(7)(Cum. Supp. 1979).

Consolidated has not argued that its activities fall within any of the statutory exemptions. Plaintiffs contend that since G.S. 78B-2(7)(f) exempts certain open market purchases from the Act when the purchaser does not have the purpose of changing the control of the target corporation, the Act must, therefore, apply to open market purchases. Plaintiffs reason that a contrary interpretation would render this particular exemption unnecessary because there would be no need to exempt certain open market purchases from

the Act if they were not within the coverage of the Act.

Plaintiffs' reliance on the statutory exemptions is misplaced. The cited exemption nowhere refers to open market purchases. Plaintiffs obviously interpret the subsection's reference to "registered broker-dealer[s]," to imply reference to open market transactions. Such, however, is not necessarily the case. While the services of "brokers" or "dealers" are almost always used in connection with the open market purchases, their services are certainly not limited to such transactions. The financial pages of newspapers and other publications are replete with advertisements noting that some "broker" or "dealer" has effected the private negotiations of some other type of security transaction not effected on the open market. Indeed, broker-dealers are almost always used in connection with *conventional* tender offers. Moreover, we note that the counterpart statutes in at least four other states which also contain broker-dealer exemptions have been held inapplicable to open market transactions. *Chromalloy American Corp. v. Sun Chemical Corporation*, 483 F. Supp. 116 (E.D. Mo. 1980) (holding that neither the Missouri nor Delaware Takeover Acts applied to open market purchases); *UV Industries, Inc. v. Sharon Steel Corporation*, No. 79-58-SD (D. Maine March 13, 1979) (holding that the Maine Takeover Act did not apply to open market purchases); *Cutler-Hammer, Inc. v. Tyco Laboratories, Inc.*, No. 78-C-221 (E.D. Wisc. April 28, 1978) (holding that neither the Delaware nor Wisconsin Takeover Acts apply to open market purchases).

VI.

We next turn to a review of federal decisions interpreting the meaning of tender offer under the Williams Act. Plaintiffs contend that we should not do so because the meaning of tender offer under the Williams Act has been developed by judicial and administrative interpretations of the term, while under the North Carolina Act the statutory definition should control. Plaintiffs are correct, as we have noted above, in noting that the Williams Act does not contain a definition of tender offer, while the North Carolina Act does. We disagree with plaintiffs, however, that this distinction compels us to ignore the decisions construing the Williams Act. First, as discussed in the preceding section of this opinion, we find that the North Carolina definition embraces only the conventional tender offer addressed by Congress in enacting the Williams Act. We have

also noted above that the North Carolina Legislature used, in some instances, exact language from the Williams Act and otherwise employed strikingly similar language. When a term has long-standing legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary, and when language or statutes are adopted from another state or country, constructions placed on such language or statutes are presumed to be adopted as well. *See* 73 Am. Jur. 2d *Statutes* § 239 (1974).

Since the Williams Act does not define the term "tender offer," it is not surprising that the courts and commentators have enunciated numerous definitions. Our review of the authorities, however, discloses that the differences are subtle and the characteristics of a typical tender offer are well recognized. It is almost universally agreed that the term "tender offer" does not include open market purchases alone, even if aimed at acquiring control, unless there is concomitant pressure on shareholders greater than that in other open market transactions. *See* E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control* 11-13 (1977); Einhorn & Blackburn, *The Developing Concept of "Tender Offer": An Analysis of the Judicial and Administrative Interpretations of the Term*, 23 N.Y.L. Sch. L. Rev. 379, 380-82 (1978).

In *Brascan Ltd. v. Edper Equities Ltd.*, 477 F. Supp. 773, 790-91 (S.D.N.Y. 1979), the court stated:

> The consequence of bringing such large scale open market and privately negotiated purchases within the scope of the Williams Act would be to rule, in effect, that no large scale acquisition program may be lawfully accomplished except in the manner of a conventional tender offer. While this may be a sensible legislative provision . . . there is nothing in the legislative history of the text of the Williams Act which suggests that it intended to bring about such consequences.

The legislative history is supportive of this view. Perhaps the best and most succinct descriptions of a "tender offer" is that contained in the House Report of the Committee on Interstate and Foreign Commerce, which held hearings on the proposed Act:

> The offer normally consists of a bid by an individual or

> group to buy shares of a company — usually at a price above the current market price. Those accepting the offer are said to tender their stock for purchase. The person making the offer obligates himself to purchase all or a specified portion of the tendered shares if certain conditions are met.

H. R. Rep. No. 1711, 90th Cong., 2d Sess., 1, reprinted in [1968] U.S. Code Cong. & Ad. News 2811, 2811. The quoted definition has received widespread recognition by the courts. *E.g., Smallwood v. Pearl Brewing Company*, 489 F. 2d 579; *Dyer v. Eastern Trust and Banking Company*, 336 F. Supp. 890, 908 (D. Maine 1971).

Plaintiffs correctly note that several courts and commentators have taken the position that other unique methods of stock acquisition have been treated as tender offers for purposes of the statute. Our research of these authorities reveals, however, an underlying element in most which is absent from the case at bar: *pressure on shareholders to make uninformed, ill-considered decisions to sell.*

We glean from the proceedings leading to enactment of the Williams Act that the primary concern of Congress was with the potential pressure on shareholders to make hurried and ill-considered decisions to sell. *See Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 17 (1967) (statement of SEC Chairman Cohen). The introducers of the legislation were obviously concerned that shareholders were unable to make knowledgeable, carefully considered decisions in the conventional cash tender offer context. This was so, first, because no disclosure by the offeror was required so the shareholder could not make informed decisions as to whether to sell his holdings or maintain his investment in a company likely to change hands. The shareholder often did not know the identity of the real party behind the tender offer. At the same time, the premium price and the first come, first served condition tended to pressure the shareholder into selling quickly. Section 14(d)(1) of the Exchange Act was intended to ensure the disclosure necessary for an informed decision in a potential takeover situation, while Sections 14(d)(5)-(7) were designed to permit the shareholders sufficient opportunity to evaluate the information disclosed without disadvantaging themselves with regard to other tendering shareholders, and Section 14(e) guaranteed that even in the absence of an

immediate takeover threat, as well as in other situations in which Sec. 14(d)(1) would not apply, no fraud would be permitted.

The legislative history of the Williams Act makes clear that open market and negotiated purchases are not subject to the early disclosure provisions contained in Section 14(d)(1) because of the disruptive effect this could have on these modes of securities acquisition.[10]

The same reasoning would bar the application of other sections of the Act. In ordinary market transactions, no pressure is applied by the prospective purchaser on the selling shareholder; the latter reaches his decision to sell independently. The significant factors emphasized by the federal courts in determining whether a conventional tender offer has been made under the Williams Act have been summarized to include:

> (1) the extent of solicitation, whether systematic, widespread and active, or private and sporadic;
> (2) whether the manner of the solicitation was such as to exert pressure on a potential seller by conventional tender offer techniques, such as limitation on decisional time frame, fixed premium price, deposit provisions, or similar requirements;
> (3) the character of solicited shareholders as a gauge of actual need for the statute's protection: whether presumably insulated from offeror pressure, such as a small and powerful insider group, or major or institutional holders, or more vulnerable, such as the small public investor;
> (4) whether there is evidence of actual negotiation des-

[10] *See* 113 Cong. Rec. 854-56 (1967); *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 16, 17, 24-25, 36 (1967) (statement of SEC Chairman Cohen). In introducing the bill in the Senate, Senator Williams stated:

> Substantial open market or privately negotiated purchases of shares may . . . relate to shifts in control of which investors should be aware. While some people might say that this information should be filed before the securities are acquired, disclosure after the transaction avoids upsetting the free and open auction market where buyer and seller normally do not disclose the extent of their interest and avoid prematurely disclosing the terms of privately negotiated transactions.

113 Cong. Rec. 856.

pite pressure or sophistication;

(5) whether the substantive provisions, sections 14(d)(5)-(8), of the Act are mechanically applicable to a challenged program; and

(6) whether control of the corporation is the aim of the offeror.

Note, Cash Tender Offers: A Proposed Definition, 31 U. Fla. L. Rev. 694, 714-15 (1979) (footnotes omitted).

In several court actions, the SEC has argued that numerous factors should be considered in determining whether a defendant's activities constituted a tender offer. They are whether there is active and widespread solicitation of shareholders; whether the solicitation is made for a large percentage of the issuer's stock; whether there is a premium offered over market price; whether the terms of the offer are firm rather than negotiable; whether the offer is contingent on tender of a fixed number of shares; whether the offer is open for a limited period of time; whether the offerees are subjected to pressure to sell their stock; and whether public announcements of a purchasing program precede or accompany rapid accumulation. *E.g., Brascan Ltd. v. Edper Equities Ltd.*, 477 F. Supp. at 791 & n. 13; *see Wellman v. Dickinson*, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979).[11]

Unquestionably, the most significant factor considered by the courts in determining whether the offeror's tactics were tantamount to a conventional tender offer has been that of attendant pressure on shareholders. *See S-G Securities, Inc. v. Fuqua Investment Co.*, 466 F. Supp. 1114, [1979] Fed. Sec. L. Rep. (CCH) ¶ 96,750 (D. Mass. 1978); *Financial General Bankshares, Inc. v. Lance*, [1978] Fed. Sec. L. Rep. (CCH) ¶ 96,403 (D.D.C. 1978); *Loews Corp. v. Accident & Casualty Insurance Co.*, No. 74 C 1396 (N.D. Ill. July 11, 1974); *Cattlemen's Investment Co. v. Fears*, 343 F. Supp. 1248 (W.D. Okla. 1972), *vacated per stipulation*, No. C 72-152 (W.D. Okla. May 8, 1972). Clearly, open market purchases which are accompan-

[11] While the Securities and Exchange Commission has taken the position that forms of open market purchase programs which are, in effect, tender offers should be regulated as such under the Williams Act, it has excluded from the tentative definition, published for comment, offers through a broker or dealer at the then current market price, in the ordinary course of business and without solicitation of any order to sell on the part of the offeror or broker or dealer. SEC Release Number 34-16385, 44 Fed. Reg. 70349 (Dec. 6, 1979).

ied by pressure on shareholders to make hurried decisions with little information would pose dangers which the Williams Act and the North Carolina Act were designed to prevent and should be treated as conventional tender offers. "The purchaser, by judiciously managing publicity releases concerning the projected number of shares to be purchased, price to be paid, and expected length of time necessary for the purchases to be completed, can make purchases using all the techniques of a tender offer without ever making a formal offer." Einhorn & Blackburn, *supra*, 23 N.Y.L. Sch. L. Rev. at 386 (footnote omitted). A review of several federal cases is illustrative. In *Cattlemen's Investment Co. v. Fears*, 343 F. Supp. 1248 (W.D. Okla. 1972), the court held that the active and widespread solicitation of shareholders by mail, telephone and personal visits directed toward the purchase of shares and an effort to acquire corporate control, contained all the potential dangers which Section 14(d) of the Exchange Act sought to alleviate and therefore constituted a tender offer under the Williams Act. The filing of suit followed a 5% shareholder's attempt to gain control of the target corporation through solicitation by employees of his separately controlled corporation. Purchases were made over a six-week period during which the offeror doubled his holdings in the target corporation without making a preacquisition disclosure as required by the Williams Act.

It is arguable, of course, that this decision stands only for the proposition that allegedly private offers must be truly private to avoid regulation. More logically, however, the decision appears to be an attempt by that court to include privately negotiated transactions within the scope of the Williams Act. However, the court's opinion clearly indicates that the Exchange Act is applicable in such a situation only if the solicitation of shareholders is widespread and has the potential of forcing shareholders into hurried investment decisions. Under those circumstances, a private transaction is, in practice, indistinguishable from the traditional tender offer and a regulation appears more logical. While the court obviously extended the meaning of "tender offer" beyond that conventionally accorded the term, it did identify the threshold characteristic necessary for application of the Williams Act — the active, widespread solicitation of shareholders.

In *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F. 2d 1195 (2d Cir. 1978), the court rejected the contention that whenever

a purchaser of stock intends to acquire and exercise control of a company, its actions should be subject to the provisions of the Williams Act. *Kennecott* resulted from an ongoing proxy contest begun by Curtiss-Wright for control of Kennecott. Kennecott had alleged that Curtiss-Wright's quiet acquisition of some 9.9% of its outstanding shares over a three-and-a-half-month period was a tender offer in violation of Section 14(d) of the Williams Act. Curtiss-Wright had purchased 3,287,400 shares of Kennecott on forty-three trading days during that period. On seventeen of those days, Curtiss-Wright's purchases exceeded 50% of the daily volume of trading on the New York Stock Exchange. While most of the stock was acquired on the New York Stock Exchange and other national securities exchanges, several transactions were not ordinary market purchases. For example, White, Weld and Company, Curtiss-Wright's broker, solicited fifty Kennecott shareholders off the floor of the exchange, consummating sales with willing sellers on the floor of the exchange. Also, Salamon Brothers, another Curtiss-Wright broker, solicited approximately a dozen institutional holders of Kennecott, consummating an unspecified sale off the exchange.

In holding that Curtiss-Wright had not made a tender offer, the court of appeals emphasized that no pressure was exerted on sellers other than the normal pressure of the marketplace. The court also noted that Kennecott's proposed interpretation would render the 5% filing provisions of the Act meaningless except in cases where the purchaser did not intend to obtain a controlling interest.

Of particular significance is the court's conclusion that certain provisions of the Act would be impossible to perform if the liberal interpretation of tender offer was applied. The court stated:

> Although broad and remedial interpretations of the Act may create no problems insofar as the anti-fraud provisions of subsection (e) of section 78(n) are concerned, this may not be true with regard to subsections (d)(5)-(d)(7). Subsection (d)(5) provides that securities deposited pursuant to a tender offer may be withdrawn within seven days of the publication or delivery to shareholders of the tender offer or at any time after sixty days from the date of the original tender offer. Subsection (d)(6) requires offerors to purchase securities on a *pro rata* basis where more are tendered than the offeror is bound or willing to

> take. Subsection (d)(7) provides that where the offeror increases the offering price before the expiration of his tender offer, those tenderors whose stock has already been taken up are entitled to be paid the higher price. *It seems unlikely that Congress intended "tender offer" to be so broadly interpreted as to make these provisions unworkable.*

Kennecott Copper Co. v. Curtiss-Wright Corp., 584 F. 2d at 1207 (emphasis added); *see Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.*, 356 F. Supp. 1066, 1073-74 (S.D.N.Y.), *aff'd*, 476 F. 2d 687 (2d Cir. 1973).

In *S-G Securities, Inc. v. Fuqua Investment Co.*, 466 F. Supp. 1114 (D. Mass. 1978), a case cited to us by plaintiffs, the court acknowledged that defendant's actions in acquiring the stock in question did not constitute a "tender offer" as that term had been conventionally understood but held that methods of acquisition other than the conventional tender offer fall within the purview of the Williams Act. In so holding, however, the court stressed that the liberal interpretation of the Act would be applied only "*where such transactions posed the same potential dangers that § 14(d) was designed to alleviate.*" *Id.* at 1124 (emphasis added).

Moreover, in distinguishing *Kennecott* and other cases, the court stressed that the purchases in question in those cases were consummated prior to any widespread public announcement of a conventional tender offer. In *S-G Securities*, on the other hand, the purchases in question were preceded by two or three widely publicized press releases which outlined with some specificity the details of the proposed buying program. The court noted that such publicity created a risk of the pressure on sellers that the disclosure and remedial tender offer provisions of the Williams Act were designed to prevent. The court specifically held that where there is (1) a publicly announced intention by the purchaser to acquire a substantial block of the stock of the target company for the purpose of acquiring control thereof and (2) a subsequent rapid acquisition by the purchaser of large blocks of stock through open market and privately negotiated purchases, such actions constitute a tender offer for purposes of Section 14(d) of the Exchange Act. The *S-G Securities* court left undisturbed the proposition that a pure open market purchase program does not constitute a tender offer, indicating instead only that widespread public announcements preced-

ing open market purchases would expose such acquisition to the strictures of the Williams Act.

In *Wellman v. Dickinson*, 475 F. Supp. at 820, the court, referring to *Kennecott*, stated that "the transactions in Kennecott were in large part effectuated on the floor of the [New York Stock] Exchange and it is clear that open market purchases [do not constitute a tender offer and therefore] are not subject to Section 14's pre-acquisition filing requirements."

In the case of *Strode v. Esmark, Inc.*, [1978] Fed. Sec. L. Rep. (CCH) ¶ 97,538 (Cir. Ct. Ky. 1980), a state circuit court upheld the Kentucky Takeover Bids Disclosure Act. The facts in *Strode*, however, are markedly different from those in the instant case. There, the offeror's purchases of the target corporation's stock "led the market" on bidding days by having the highest bid and by keeping the bid at the top of the list of market makers appearing to the general public. The court noted that such a bidding strategy operated as a signal to the marketplace that the offeror's broker was continuously interested in purchasing the target company's stock and constituted a continuing invitation to purchase shares. That strategy was accompanied by telephone calls in an effort to obtain stock and by the broker's contacting other brokerage firms and institutional holders of the target company's shares to indicate a continuing interest in the purchase of substantial amounts of shares with the request that if any of the parties were able to obtain the target shares, the broker would like for them to offer those shares to it first. This, the court noted, resulted in essence in the offeror's offering a premium and engaging in active solicitation through its broker. The court also noted that the offeror continued acquiring stock by this means subsequent to public disclosure through other filings in which the disclosed purpose of the transaction was acquisition of the target corporation.

The repeated emphasis by the courts on shareholder pressure is, we think, consistent with the acknowledged primary purpose of the Williams Act — to protect the public investor by providing him with otherwise unobtainable information without which an informed decision cannot be made, *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 35, 97 S. Ct. 926, 946, 51 L. Ed. 2d 124, 149 (1977); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58, 95 S. Ct. 2069, 2075-76, 45 L. Ed. 12, 20-21 (1975).

Comparison of the factors emphasized by the reviewing courts with the record before us compels the conclusion that the tactics employed by Consolidated in purchasing the Hanes shares were not tantamount to a "tender offer" within the meaning of the Williams Act: (1) There was no solicitation of shareholders by Consolidated or its brokers, (2) Consolidated's activities resulted in no unusual pressure on the shareholders, such as rapidly accelerating price, or decisional time frame in which to sell, (3) the substantive provisions of the Williams Act, like those of the North Carolina Act, would not have been mechanically applicable.

Under the factors urged for consideration by the Securities and Exchange Commission, we would reach the same conclusion: (1) there was no active and widespread solicitation of shareholders, (2) there was no premium offered over market price, (3) Consolidated's "offer" of terms was subject to the workings of the normal marketplace, (4) the offer was not contingent on tender of a fixed number of shares, (5) the "offer" was not open for a limited period of time, (6) the shareholders were not subjected to pressure to sell their stock, and (7) there were no public announcements of a purchasing program preceding or accompanying the rapid accumulation of Hanes stock.

Plaintiffs here were subject to no more than the normal workings of the marketplace, a risk assumed by all those who elect to invest funds in the common stock of large corporations. To argue that the protections of the federal and state legislation should be extended to such shareholders because the activities of the offering company generated some increase in the price of the stock on the open exchange is to stretch the meaning of the legislation far beyond its obvious intent. The argument that the natural rise in price in the marketplace generated by the presence of an eager buyer is tantamount to offering a premium to the shareholders, has been expressly rejected. *City Investing Company v. Coons*, No. 2-779A211 (Ct. App. Ind. October 13, 1980) (Indiana Takeover Offers Act not applicable to open market purchases).

As one commentator has noted:

> It is hard to imagine . . . an offer which is made at current market price . . . , which is for an unlimited number of shares and is open for an unlimited period of time, and which is absent an attendant pressure on shareholders or

> any public announcements of purchasing programs that can still be said to compel any investor, even a relatively unsophisticated investor to make a hurried, uninformed investment decision.

Frome, *Expanded Definition of Tender Offer*, *N.Y.L.J.*, Feb. 29, 1980, at 2, col. 4.

VII.

In light of our holding above that the North Carolina Act is not applicable to purchases of securities on the open market, it is unnecessary for us to address Consolidated's contention that the North Carolina Act is unconstitutional by virtue of conflict with the supremacy and commerce clauses of the United States Constitution.[12]

The order of the trial court allowing summary judgment for defendants is

Affirmed.

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

[12] We note only that decisions from the several jurisdictions are conflicting on this point and that one commentator has noted that the North Carolina Act would probably not withstand judicial scrutiny in response to an attack upon its constitutionality. Comment, The North Carolina Tender Offer Disclosure Act: Congenitally Defective?, *supra*. Another has suggested that, should we hold the Act valid, the Act will then need amending to preserve its validity against the preemptive effect of the new rule 14(d)-2. Robinson, *North Carolina Corporation Law and Practice* § 7-12 (1980).

JAMES ROBERT DICKENS v. EARL V. PURYEAR AND ANN BREWER PURYEAR

No. 86

(Filed 7 April 1981)

1. Rules of Civil Procedure §§ 8, 56— motion for summary judgment before responsive pleading filed — raising of affirmative defense proper

A party whose responsive pleading is not yet due may by motion for summary judgment and in support of the motion raise an affirmative defense to an asserted claim before the party pleads responsively to the claim.

2. Rules of Civil Procedure § 56— summary judgment motion — failure to refer to affirmative defense

If an affirmative defense required to be raised by a responsive pleading is sought to be raised for the first time in a motion for summary judgment, the motion must ordinarily refer expressly to the affirmative defense relied upon; however, defendants' failure expressly to refer to the affirmative defense of the statute of limitations was not a bar to consideration of the defense on defendants' motion for summary judgment, since plaintiff was not surprised by the limitations defense and had full opportunity to argue and present evidence relevant to the limitations question, and plaintiff's complaint was cast in terms of the tort of intentional infliction of mental distress rather than assault and battery, thus demonstrating plaintiff's awareness that the statute of limitations was going to be an issue.

3. Assault and Battery § 1— elements of assault and battery

An assault is an offer to show violence to another without striking him, and a battery is the carrying of the threat into effect by the infliction of a blow; damages recoverable for assault and battery include those for plaintiff's mental disturbance as well as for plaintiff's physical injury.

4. Trespass § 2— intentional infliction of mental distress — elements

The tort of intentional infliction of mental distress, recognized in N. C., consists of extreme and outrageous conduct which is intended to cause and does cause severe emotional distress to another.

5. Trespass § 2— intentional infliction of mental distress — summary judgment for defendant improper

In plaintiff's action to recover for the intentional infliction of mental distress, the trial court erred in entering summary judgment for the male defendant where the evidence tended to show that plaintiff suffered assault and battery at the hands of defendant and others; defendant threatened plaintiff with death in the future unless plaintiff went home, pulled his telephone off the wall, packed his clothes, and left the state; such threat was not one of imminent or immediate harm, but was a threat for the future apparently intended to and which allegedly did inflict serious mental distress; and although plaintiff's recovery for injury, mental or physical, directly caused by the assaults and batteries was barred by

the statute of limitations, these assaults and batteries could be considered in determining the outrageous character of the ultimate threat and the extent of plaintiff's mental or emotional distress caused by it.

6. Conspiracy § 2.1— conspiracy intentionally to inflict mental distress — insufficiency of evidence

In plaintiff's action to recover for intentional infliction of mental distress where plaintiff alleged that the female defendant conspired to commit the tort, summary judgment for the female defendant was proper where the evidence tended to show only that the male defendant was present when plaintiff arrived at the scene of the alleged tort; upon command of the male defendant, she emerged from a nearby building and stated her desire not to see plaintiff; the female defendant drove off with her daughter before the commission of the assaults and batteries and the alleged intentional infliction of mental distress; and plaintiff's evidentiary showing was therefore insufficient to indicate that at trial he might be able to prove an agreement between the two defendants intentionally to inflict mental distress upon him.

Justice MEYER did not participate in the consideration and decision of this case.

Judge Braswell presiding at the 28 March 1978 Non-Jury Session of WAKE Superior Court granted defendants' motions for summary judgment. On 18 March 1980 the Court of Appeals, in an opinion by *Judge Vaughn* with *Chief Judge Morris* and *Judge Arnold* concurring, affirmed. 45 N.C. App. 696, 263 S.E. 2d 856 (1980). We allowed plaintiff's petition for discretionary review on 3 June 1980. This case was docketed and argued as No. 42, Fall Term 1980.

Ransdell, Ransdell & Cline, by William G. Ransdell, Jr., Phillip C. Ransdell, and James E. Cline, Attorneys for plaintiff appellant.

Ragsdale & Liggett, by George R. Ragsdale and Peter M. Foley, Attorneys for defendant appellee Earl V. Puryear.

Manning, Fulton & Skinner, by Howard E. Manning and Michael T. Medford, Attorneys for defendant appellee Ann Brewer Puryear.

EXUM, Justice.

Plaintiff's complaint is cast as a claim for intentional infliction of mental distress. It was filed more than one year but less than three years after the incidents complained of occurred. Defendants moved for summary judgment before answer was due or filed. Much of the factual showing at the hearing on summary judgment

related to assaults and batteries committed against plaintiff by defendants. Defendants' motions for summary judgment were allowed on the ground that plaintiff's claim was for assault and battery; therefore it was barred by the one-year statute of limitations applicable to assault and battery. G.S. 1-54(3).

Thus this appeal raises two questions. First, whether defendants, by filing motions for summary judgment before answer was due or filed, properly raised the affirmative defense of the statute of limitations. Second, whether plaintiff's claim is barred by the one-year statute of limitations applicable to assault and battery. We hold that defendants properly raised the limitations defense but that on its merits plaintiff's claim is not altogether barred by the one-year statute because plaintiff's factual showing indicates plaintiff may be able to prove a claim for intentional infliction of mental distress — a claim which is governed by the three-year statute of limitations. G.S. 1-52(5). We further hold that summary judgment was, nevertheless, appropriately entered as to the *femme* defendant inasmuch as plaintiff has made no showing sufficient to indicate he will be able to prove a claim against her.

The facts brought out at the hearing on summary judgment may be briefly summarized: For a time preceding the incidents in question plaintiff Dickens, a thirty-one year old man, shared sex, alcohol and marijuana with defendant's daughter, a seventeen year old high school student. On 2 April 1975 defendants, husband and wife, lured plaintiff into rural Johnston County, North Carolina. Upon plaintiff's arrival defendant Earl Puryear, after identifying himself, called out to defendant Ann Puryear who emerged from beside a nearby building and, crying, stated that she "didn't want to see that SOB." Ann Puryear then left the scene. Thereafter Earl Puryear pointed a pistol between plaintiff's eyes and shouted "Ya'll come on out." Four men wearing ski masks and armed with nightsticks then approached from behind plaintiff and beat him into semi-consciousness. They handcuffed plaintiff to a piece of farm machinery and resumed striking him with nightsticks. Defendant Earl Puryear, while brandishing a knife and cutting plaintiff's hair, threatened plaintiff with castration. During four or five interruptions of the beatings defendant Earl Puryear and the others, within plaintiff's hearing, discussed and took votes on whether plaintiff should be killed or castrated. Finally, after some two hours and the conclusion of a final conference, the beatings ceased.

Defendant Earl Puryear told plaintiff to go home, pull his telephone off the wall, pack his clothes, and leave the state of North Carolina; otherwise he would be killed. Plaintiff was then set free.[1]

Plaintiff filed his complaint on 31 March 1978. It alleges that defendants on the occasion just described intentionally inflicted mental distress upon him. He further alleges that as a result of defendants' acts plaintiff has suffered "severe and permanent mental and emotional distress, and physical injury to his nerves and nervous system." He alleges that he is unable to sleep, afraid to go out in the dark, afraid to meet strangers, afraid he may be killed, suffering from chronic diarrhea and a gum disorder, unable effectively to perform his job, and that he has lost $1000 per month income.

On 28 April 1978 Judge Preston by order extended the time in which defendants would be required to file responsive pleadings or motions until twenty days after the Court of Appeals decided a case then pending before that court.[2] Defendants, acting pursuant to this order, filed no answer. On 7 September and 15 November 1978 defendants filed, respectively, motions for summary judgment. The motions made no reference to the statute of limitations nor did they contest plaintiff's factual allegations. Judge Braswell, after considering arguments of counsel, plaintiff's complaint, plaintiff's deposition and evidence in the criminal case arising out of this occurrence,[3] concluded that plaintiff's claim was barred by G.S. 1-54(3), the one-year statute of limitations applicable to assault and battery. On 29 March 1979 he granted summary judgment in favor of both defendants.

I.

We first address plaintiff's contention that defendants' motions

[1] This same occurrence gave rise to a criminal conviction of defendant Earl Puryear for conspiracy to commit simple assault. *See State v. Puryear*, 30 N.C. App. 719, 228 S.E. 2d 536, *appeal dismissed*, 291 N.C. 325, 230 S.E. 2d 678 (1976).

[2] The order provided, in pertinent part: "Defendants are allowed until twenty (20) days following the filing of a decision by the North Carolina Court of Appeals in *Byrd v. Hodges*, 77 CVS 4422, Wake County, which case is presently on appeal to that Court, to file responsive pleadings or motions herein."

[3] *See* n. 1, *supra*.

for summary judgment were procedurally defective. Plaintiff argues initially that defendants' failure to file answer was fatal, procedurally, to the trial court's allowing the motions on statute of limitations grounds. We disagree.

On the question of whether an affirmative defense can be first raised, in the absence of an answer, by a motion for summary judgment, there is an apparent tension between Rules of Civil Procedure 8(c) and 56. Rule 8(c) requires a party to set forth in a responsive pleading "any . . . matter constituting an avoidance or affirmative defense" including, among other numerous affirmative defenses, the statute of limitations.[4] Rule 56, on the other hand, provides that a defending party "may, *at any time*, move with or without supporting affidavits for a summary judgment . . . ."[5] (Emphasis supplied). Rule 56(c) provides, further, that summary judgment shall be rendered "forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

Whatever tension there is between these two rules has been consistently resolved by the federal courts in favor of permitting a party to ground a motion for summary judgment upon an affirmative defense about which there is no genuine factual issue even though the party has filed no answer.[6] Moore summarizes the problem and the solution in 2A Moore's Federal Practice ¶ 8.28 (2d ed. 1980):

"Rule 8(c) might seem to imply that affirmative defens-

[4] Rule 8(c) provides in pertinent part:

"*In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . .* and any other matter constituting an avoidance or affirmative defense. Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurences, or series of transactions or occurrences, intended to be proved." (Emphasis supplied.)

[5] Rule 56(b) provides:

"(b) *For defending party.*— A party against whom a claim, counterclaim or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

[6] These cases include *Funding Systems Leasing Corp. v. Pugh*, 530 F. 2d 91 (5th Cir. 1976); *Connelly Foundation v. School District of Haverford Township*,

> es may be raised only by a pleading (where one is required or permitted) and not otherwise. This, however, is too narrow a construction of the rule. A defendant may move for summary judgment under Rule 56 where 'there is no genuine issue as to any material fact' and he 'is entitled to judgment as a matter of law'; and *it is clear that summary judgment is proper where the defendant shows the existence of an affirmative defense even though he has filed no answer.*" (Emphasis supplied.)

Inasmuch as our rules are drawn from the federal rules it is customary for this Court to look for guidance in interpreting our rules to federal rules decisions. *Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975); *Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971). There are, moreover, two North Carolina cases which support our conclusion here. Although distinguishable, both *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976), and *Cooke v. Cooke*, 34 N.C. App. 124, 237 S.E. 2d 323 (1977), held that unpleaded affirmative defenses raised by evidence adduced at the hearing could be considered *in opposition to* a motion for summary judgment.

[1] We agree with the federal decisions and the position taken by Moore. We hold that a party whose responsive pleading is not yet due may by motion for summary judgment and in support of the motion raise an affirmative defense to an asserted claim before the party pleads responsively to the claim.

[2] Plaintiff next argues that failure of defendants' motions for summary judgment to refer expressly to the statute of limitations was fatal to defendants' ability to urge the statute as a ground for

---

461 F. 2d 495 (3rd Cir. 1972); *Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.*, 185 F. 2d 196 (9th Cir. 1950) (statute of limitations); *Gifford v. Travelers Protective Assn.*, 153 F. 2d 209 (9th Cir. 1946) (statute of limitations); *Kithcart v. Metropolitan Life Ins. Co.*, 150 F. 2d 997 (8th Cir. 1945) (statute of limitations); *Cordaro v. Lusardi*, 354 F. Supp. 1147 (S.D.N.Y. 1971); *Schetter v. United States*, 136 F. Supp. 931 (W.D. Penn. 1956). *See also Diaz-Buxo v. Trias Monge*, 593 F. 2d 153 (1st Cir. 1979); *Lambert v. Conrad*, 536 F. 2d 1183 (7th Cir. 1976); *Thomas v. Consolidation Coal Co.*, 380 F. 2d 69 (4th Cir. 1967), *cert. denied*, 389 U.S. 1004 (1967), *reh. denied*, 389 U.S. 1059 (1968); *Williams v. Murdoch*, 330 F. 2d 745 (3rd Cir. 1964). *See generally* 2A Moore's Federal Practice ¶ 8.28 (2d ed. 1980); 6 Moore's Federal Practice ¶¶ 56.17[4], 56.17[58] (2d ed. 1980).

allowing their motions. Under the circumstances here we disagree. Although Rule 7(b)(1) requires that motions generally "shall state the grounds therefor," Rule 56 "does not require any grounds be stated in a motion for summary judgment." *Conover v. Newton*, 297 N.C. 506, 513, 256 S.E. 2d 216, 221 (1979). We held in *Conover* that a ground other than that stated in the motion for summary judgment may be the basis for allowing it; we noted, however, that the ground not expressly mentioned was "clearly within the issue raised by [the] motion." *Id.* The federal courts have consistently held likewise.[7]

Nevertheless, if an affirmative defense required to be raised by a responsive pleading is sought to be raised for the first time in a motion for summary judgment, the motion must ordinarily refer expressly to the affirmative defense relied upon. Only in exceptional circumstances where the party opposing the motion has not been surprised and has had full opportunity to argue and present evidence will movant's failure expressly to refer to the affirmative defense not be a bar to its consideration on summary judgment.

Here plaintiff was not surprised by the limitations defense and had full opportunity to argue and present evidence relevant to the limitations questions. Plaintiff's complaint is cast in terms of the tort of intentional infliction of mental distress rather than assault and battery. This demonstrates plaintiff's awareness that the statute of limitations was going to be an issue. Plaintiff did present evidence and briefs on the question before Judge Braswell. Thus, as the Court of Appeals said, "this affirmative defense was clearly before the trial court." Therefore defendants' failure expressly to mention this defense in their motions will not be held to bar the court's granting the motions on the limitations ground.

II.

We turn now to the merits of defendants' motions for summary judgment. Defendants contend, and the Court of Appeals agreed, that this is an action grounded in assault and battery. Although

[7] *See, e.g., Broderick Wood Prods. Co. v. United States*, 195 F. 2d 433 (10th Cir. 1952); *Board of Nat'l Missions of Presbyterian Church v. Smith*, 182 F. 2d 362 (7th Cir. 1950); *Wisnouse v. Telsey*, 367 F. Supp. 855 (S.D.N.Y. 1973). *See generally* 6 Moore's Federal Practice ¶ 56.14[1] (2d ed. 1976); 10 C. Wright and A. Miller, Federal Practice and Procedure § 2719 (1973); 5 C. Wright and A. Miller, Federal Practice and Procedure §§ 1191-1193 (1969).

plaintiff pleads the tort of intentional infliction of mental distress, the Court of Appeals concluded that the complaint's factual allegations and the factual showing at the hearing on summary judgment support only a claim for assault and battery. The claim was, therefore, barred by the one-year period of limitations applicable to assault and battery. Plaintiff, on the other hand, argues that the factual showing on the motion supports a claim for intentional infliction of mental distress — a claim which is governed by the three-year period of limitations.[8] At least, plaintiff argues, his factual showing is such that it cannot be said as a matter of law that he will be unable to prove such a claim at trial. We agree with plaintiff's position.

To resolve the question whether defendants are entitled to summary judgment on the ground of the statute of limitations we must examine both the law applicable to the entry of summary judgment and the law applicable to the torts of assault and battery and intentional infliction of mental distress. We think it better to begin with a discussion of applicable tort law.

A.

[3] North Carolina follows common law principles governing assault and battery. An assault is an offer to show violence to another without striking him, and a battery is the carrying of the threat into effect by the infliction of a blow. *Hayes v. Lancaster*, 200

[8] Although defendants argue that even the tort of intentional infliction of mental distress is governed by the one-year statute of limitations, we are satisfied that it is not. The one-year statute, G.S. 1-54(3), applies to "libel, slander, assault, battery, or false imprisonment." As we go to some length in the opinion to demonstrate, the tort of intentional infliction of mental distress is none of these things. Thus the rule of statutory construction embodied in the maxim, *expressio unius est exclusio alterius*, meaning the expression of one thing is the exclusion of another, applies. *See* Appeal of Blue Bird Taxi Co., 237 N.C. 373, 75 S.E. 2d 156 (1953). No statute of limitations addresses the tort of intentional infliction of mental distress by name. It must, therefore, be governed by the more general three-year statute of limitations, G.S. 1-52(5), which applies to "any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." Even if we had substantial doubt about which statute of limitations applies, and we do not, the rule would be that the longer statute is to be selected. *See, e.g., Payne v. Ostrus*, 50 F. 2d 1039 (8th Cir. 1931); *Matthews v. Travelers Indemnity Ins. Co.*, 245 Ark. 247, 432 S.W. 2d 485 (1968); *Scovill v. Johnson*, 190 S.C. 457, 3 S.E. 2d 543 (1939); *Shew v. Coon Bay Loafers, Inc.*, 76 Wash. 2d 40, 455 P. 2d 359 (1969); *see generally* 51 Am. Jur. 2d *Limitation of Actions* § 63 (1970).

N.C. 293, 156 S.E. 530 (1931); *Ormond v. Crampton*, 16 N.C. App. 88, 191 S.E. 2d 405, *cert. denied*, 282 N.C. 304, 192 S.E. 2d 194 (1972). The interest protected by the action for battery is freedom from intentional and unpermitted contact with one's person; the interest protected by the action for assault is freedom from apprehension of a harmful or offensive contact with one's person. *McCracken v. Sloan*, 40 N.C. App. 214, 252 S.E. 2d 250 (1979); *see also* Prosser, Law of Torts §§ 9, 10 (4th ed. 1971) (hereinafter "Prosser"). The apprehension created must be one of an immediate harmful or offensive contact, as distinguished from contact in the future. As noted in *State v. Ingram*, 237 N.C. 197, 201, 74 S.E. 2d 532, 535 (1953), in order to constitute an assault there must be:

> "[A]n overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some *immediate* physical injury to the person of another . . . .
>
> . . . .
>
> "The display of force or menace of violence must be such to cause the reasonable apprehension of *immediate* bodily harm. *Dahlin v. Fraser*, 206 Minn. 476." (Emphasis supplied.)

See also State v. Roberts, 270 N.C. 655, 155 S.E. 2d 303 (1967); *State v. Johnson*, 264 N.C. 598, 142 S.E. 2d 151 (1965).

A mere threat, unaccompanied by an offer or attempt to show violence, is not an assault. *State v. Daniel*, 136 N.C. 571, 48 S.E. 544 (1904); *State v. Milsaps*, 82 N.C. 549 (1880). The damages recoverable for assault and battery include those for plaintiff's mental disturbance as well as for plaintiff's physical injury. *Trogdon v. Terry*, 172 N.C. 540, 90 S.E. 583 (1916); *Hodges v. Hall*, 172 N.C. 29, 89 S.E. 802 (1916); *Bedsole v. Atlantic Coast Line R.R. Co.*, 151 N.C. 152, 65 S.E. 925 (1909).

Common law principles of assault and battery as enunciated in North Carolina law are also found in the Restatement (Second) of Torts (1965) (hereinafter "the Restatement"). As noted in § 29(1) of the Restatement, "[t]o make the actor liable for an assault he must put the other in apprehension of an *imminent* contact." (Emphasis supplied.) The comment to § 29(1) states: "The apprehension created must be one of imminent contact, as distinguished from any contact in the future. 'Imminent' does not mean immediate, in the

sense of instantaneous contact.... It means rather that there will be no significant delay." Similarly, § 31 of the Restatement provides that "[w]ords do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an *imminent* harmful or offensive contact with his person." (Emphasis supplied.) The comment to § 31 provides, in pertinent part:

> "a. Ordinarily mere words, unaccompanied by some act apparently intended to carry the threat into execution, do not put the other in apprehension of an imminent bodily contact, and so cannot make the actor liable for an assault under the rule stated in § 21 [the section which defines an assault]. For this reason *it is commonly said in the decisions that mere words do not constitute an assault,* or that some overt act is required. *This is true even though the mental discomfort caused by a threat of serious future harm on the part of one who has the apparent intention and ability to carry out his threat may be far more emotionally disturbing than many of the attempts to inflict minor bodily contacts which are actionable as assaults. Any remedy for words which are abusive or insulting, or which create emotional distress by threats for the future, is to be found under* §§ *46 and 47* [*those sections dealing with the interest in freedom from emotional distress*].
>
> Illustration:
>
> 1. A, known to be a resolute and desperate character, *threatens to waylay B on his way home on a lonely road on a dark night. A is not liable to B for an assault* under the rule stated in § 21. *A may, however, be liable to B for the infliction of severe emotional distress by extreme and outrageous conduct,* under the rule stated in § 46." (Emphasis supplied.)

Again, as noted by Prosser, § 10, p. 40, "[t]hreats for the future ... are simply not present breaches of the peace, and so never have fallen within the narrow boundaries of [assault]." Thus threats for the future are actionable, if at all, not as assaults but as intentional inflictions of mental distress.

The tort of intentional infliction of mental distress is recog-

nized in North Carolina. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). "[L]iability arises under this tort when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.'" *Id.* at 196, 254 S.E. 2d at 622, *quoting* Prosser, § 12, p. 56. In *Stanback* plaintiff alleged that defendant breached a separation agreement between the parties. She further alleged, according to our opinion in *Stanback*, "that defendant's conduct in breaching the contract was 'wilful, malicious, calculated, deliberate and purposeful' .... [and] that 'she has suffered great mental anguish and anxiety ...' as a result of defendant's conduct in breaching the agreement .... [and] that defendant acted recklessly and irresponsibly and 'with full knowledge of the consequences which would result ....'" *Id.* at 198, 254 S.E. 2d at 622-23. We held in *Stanback* that these allegations were "sufficient to state a claim for what has become essentially the tort of intentional infliction of serious emotional distress. Plaintiff has alleged that defendant intentionally inflicted mental distress." *Id.* at 196, 254 S.E. 2d at 621-22.

The tort alluded to in *Stanback* is defined in the Restatement § 46 as follows:

> "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

The *holding* in *Stanback* was in accord with the Restatement definition of the tort of intentional infliction of mental distress. We now reaffirm this holding.

There is, however, troublesome *dictum* in *Stanback* that plaintiff, to recover for this tort, "must show some physical injury resulting from the emotional disturbance caused by defendant's alleged conduct" and that the harm she suffered was a "foreseeable result." *Id.* at 198, 254 S.E. 2d at 623. Plaintiff in *Stanback* did not allege that she had suffered any physical injury as a result of defendant's conduct. We noted in *Stanback*, however, that "physical injury" had been given a broad interpretation in some of our earlier cases, *e.g.*, *Kimberly v. Howland*, 143 N.C. 398, 403-04, 55 S.E. 778, 780 (1906), where the Court said,

> "The nerves are as much a part of the physical system as

> the limbs, and in some persons are very delicately adjusted, and when 'out of tune' cause excruciating agony. We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs."

We held in *Stanback* that plaintiff's "allegation that she suffered great mental anguish and anxiety is sufficient to permit her to go to trial upon the question of whether the great mental anguish and anxiety (which she alleges) has caused physical injury." *Stanback v. Stanback*, *supra*, 297 N.C. at 199, 254 S.E. 2d at 623. We held, further, that plaintiff's allegation that "defendant acted with full knowledge of the consequences of his actions . . . sufficiently indicated that the harm she suffered was a foreseeable result of his conduct." *Id.* at 198, 254 S.E. 2d at 623.

After revisiting *Stanback* in light of the earlier authorities upon which it is based and considering an instructive analysis of our cases in the area by Professor and former Dean of the University of North Carolina Law School, Robert G. Byrd,[9] we are satisfied that the *dictum* in *Stanback* was not necessary to the holding and in some respects actually conflicts with the holding. We now disapprove it.

If "physical injury" means something more than emotional distress or damage to the nervous system, it is simply not an element of the tort of intentional infliction of mental distress. As noted, plaintiff in *Stanback* never alleged that she had suffered any physical injury, yet we held that she had stated a claim for intentional infliction of mental distress. In *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W. 2d 428 (1930), defendants came to the home of the plaintiff at night and accused him of stealing hogs. They told him that if he did not leave their community within 10 days they "would put a rope around his neck." Defendants' threats caused the plaintiff to remove his family from the area. Plaintiff testified that he was afraid they would kill him if he did not leave and that he suffered great mental agony and humiliation because he had been accused of

[9] *See generally* Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C. L. Rev. 435 (1980).

something of which he was not guilty. In sustaining a jury verdict in favor of plaintiff, the Arkansas Supreme Court rejected defendants' contention that plaintiff was required to show some physical injury before he could recover. The Court said, 181 Ark. 139, 25 S.W. 2d at 428:

> "The [defendants] rely upon the rule . . . that in actions for negligence there can be no mental suffering where there has been no physical injury.
>
> "The rule is well settled in this state, but it has no application to willful and wanton wrongs and those committed with the intention of causing mental distress and injured feelings. Mental suffering forms the proper element of damages in actions for willful and wanton wrongs and those committed with the intention of causing mental distress."

Similarly, the question of foreseeability does not arise in the tort of intentional infliction of mental distress. This tort imports an act which is done with the intention of causing emotional distress or with reckless indifference to the likelihood that emotional distress may result. A defendant is liable for this tort when he "desires to inflict severe emotional distress . . . [or] knows that such distress is certain, or substantially certain, to result from his conduct . . . [or] where he acts recklessly . . . in deliberate disregard of a high degree of probability that the emotinal distress will follow" and the mental distress does in fact result. Restatement § 46, Comment *i*, p. 77. "The authorities seem to agree that if the tort is wilful and not merely negligent, the wrong-doer is liable for such physical injuries as may proximately result, whether he could have foreseen them or not." *Kimberly v. Howland, supra*, 143 N.C. at 402, 55 S.E. at 780.

We are now satisfied that the *dictum* in *Stanback* arose from our effort to conform the opinion to *language* in some of our earlier cases the *holdings* of which led ultimately to our recognition in *Stanback* of tort of intentional infliction of mental distress.

The earliest of these cases is *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936). This case involved a bill collector who used highhanded collection tactics against plaintiff debtor. In an effort to collect the debt defendant said to plaintiff, "By G—, you are like all the rest of the damn deadbeats. You wouldn't pay when you could . . . . If you are so damn low you won't pay, I guess when I

get the sheriff and bring him down here you will pay then." Plaintiff, who was pregnant, became emotionally distraught and her evidence tended to show that her distress caused her child to be prematurely stillborn. This Court sustained a verdict and judgment for the plaintiff. The Court recognized that earlier cases permitting recovery under such circumstances required that there be a forcible trespass. Without deciding whether a forcible trespass existed in the case before it the Court concluded that "[t]he gravamen of plaintiff's cause of action is trespass to the person. (Citation omitted.) This may result from an injury either willfully or negligently inflicted." 210 N.C. at 810, 188 S.E. at 626. The Court said further, 210 N.C. at 812, 813, 188 S.E. at 627-28:

> "It is no doubt correct to say that fright alone is not actionable, *Arthur v. Henry, supra*, but it is faulty pathology to assume that nervous disorders of serious proportions may not flow from fear or fright. *Hickey v. Welch*, 91 Mo. App., 4; 17 C.J., 838. Fear long continued wears away one's reserve.
>
> "'As a general rule, damages for mere fright are not recoverable; but they may be recovered where there is some physical injury attending the cause of the fright, or, *in the absence of physical injury*, where the fright is of such character as to produce some physical *or mental impairment* directly and naturally resulting from the wrongful act'—Sutton, J., in *Candler v. Smith*, 50 Ga. App., 667, 179 S.E., 395.
>
> "If it be actionable willfully or negligently to frighten a team by blowing a whistle, *Stewart v. Lumber Co., supra*, or by beating a drum, *Loubz v. Hafner, supra*, thereby causing a run-away and consequent damage, it is not perceived upon what logical basis of distinction the present action can be dismissed as in case of nonsuit. *Arthur v. Henry, supra.*

Kirby, rightly or wrongly, has been read to require some physical injury in addition to emotional distress. *See* Prosser § 12, p. 59, n. 19.

Statements that "fright" alone is not actionable and that the harm suffered must be a foreseeable result of defendant's conduct appear in other cases relied on in *Stanback*, all of which, in turn,

rely on *Kirby*. These are: *Crews v. Finance Co.*, 271 N.C. 684, 157 S.E. 2d 381 (1967) (highhanded debt collection efforts; held, plaintiff could recover for resulting nervousness, acute angina, and high blood pressure); *Slaughter v. Slaughter*, 264 N.C. 732, 142 S.E. 2d 683 (1965) (defendant, son of plaintiff, exploded firecrackers outside his home where plaintiff was a guest with the purpose of frightening his children who were in the room with plaintiff; held, plaintiff could recover for a fractured left hip suffered when she fell as a result of becoming emotionally upset at the noise); *Langford v. Shu*, 258 N.C. 135, 128 S.E. 2d 210 (1962) (plaintiff, defendant's next door neighbor, frightened by defendant's practical joke, a "mongoose box," stumbled while fleeing the box, fell and tore a cartilage in her knee; held, plaintiff could recover for damages to her knee); *Martin v. Spencer*, 221 N.C. 28, 18 S.E. 2d 703 (1942) (defendant directed verbal abuse at plaintiff and engaged in altercation with plaintiff's brother in a dispute over a boundary; held, plaintiff could recover for a miscarriage which, according to her evidence, resulted from "fright occasioned by the conduct of the defendant."); *Sparks v. Products Corp.*, 212 N.C. 211, 193 S.E. 31 (1937) (held, plaintiff could recover for "shock and injury to her nerves, resulting in loss of weight, nervousness, periodical confinement in bed, and other ailments" caused by defendant's blasting operation which hurled a rock through the roof of plaintiff's home).

Although these earlier cases, except for *Sparks v. Products Corp.*, did permit recovery under circumstances similar to those to which the modern tort of intentional infliction of mental distress is directed, the cases did not actually come to grips with the tort as it is now recognized by Prosser and the Restatement and as we recognized it in *Stanback*. These earlier cases were concerned with a broader concept of liability than the relatively narrow one now known as intentional infliction of mental distress. They were concerned with permitting recovery for injury, physical and mental, intentionally or negligently inflicted. The opinion in *Kirby* consistently refers to injuries which result from either wilful or negligent conduct. *Crews*, which relied on *Kirby*, dealt with intentional actions of a bill collector. The opinion, however, relied on § 436 of the Restatement. This section deals with *negligent* infliction of mental distress which results in physical harm. *Compare* Restatement § 46, particularly Comment *a*, p. 72, with § 436. To the extent, then, that these earlier cases required some "physical injury"[10] apart from mere mental or emotional distress and, in addition, talked in

terms of foreseeability, they did so in the context of negligently inflicted injuries and not in the context of the tort, as it is now recognized, of intentional infliction of mental distress. This Court in *Williamson v. Bennet*, 251 N.C. 498, 112 S.E. 2d 48 (1960) denied recovery for a serious nervous disorder unaccompanied by physical injury, allegedly caused by defendant's negligent operation of an automobile. Denial, however, was on the ground that the connection between the relatively minor accident and plaintiff's condition was too tenuous and too "highly extraordinary" to permit recovery. The Court noted, however, *id.* at 503, 112 S.E. 2d at 51:

> "This cause involves mental distress and invasion of emotional tranquility. It concerns itself with fear and resultant neurasthenia allegedly caused by *ordinary negligence.* In so far as possible we shall avoid consideration of those situations wherein fright, mental suffering and nervous disorder result from intentional, wilful, wanton or malicious conduct." (Emphasis original.)

Stanback, then, should not be read as grafting "physical injury" and "foreseeability" requirements on the tort of intentional infliction of mental distress. Neither should it be read as grafting the requirements of this tort on other theories of recovery for mental and emotional distress dealt with in our earlier cases. We leave those theories where they lay before *Stanback.*

[4] *Stanback*, in effect, was the first formal recognition by this Court of the relatively recent tort of intentional infliction of mental distress. This tort, under the authorities already cited, consists of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another. The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery may be had for the emotional distress so caused and

[10] A strong argument can be made that even these earlier decisions did not intend to make "physical injury" an essential element of the claims asserted. When the Court said that "mere fright" was not actionable it was probably attempting to distinguish *not* between physical injury and emotional disturbance but rather between momentary or minor fright and serious emotional or nervous disorders. *But see Williamson v. Bennett, infra*, in text.

for any other bodily harm which proximately results from the distress itself.

B.

We now turn to some principles governing the entry of summary judgment. The movant must clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as a matter of law. *Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978). The record is considered in the light most favorable to the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). "[A]ll 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." *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E. 2d 189, 194 (1972), *quoting* 6 Moore's Federal Practice ¶ 56.15[3] at 2337 (2d ed. 1971).

In ruling on summary judgment, a court does not resolve questions of fact but determines whether there is a genuine issue of material fact. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). An issue is material "if the facts alleged are such as to constitute a legal defense or are of such nature as to effect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971). Thus a defending party is entitled to summary judgment if he can show that claimant cannot prove the existence of an essential element of his claim, *Best v. Perry*, 41 N.C. App. 107, 254 S.E. 2d 281 (1979), or cannot surmount an affirmative defense which would bar the claim.

Summary judgment is, furthermore, a device by which a defending party may force the claimant to produce a forecast of claimant's evidence demonstrating that claimant will, at trial, be able to make out at least a *prima facie* case or that he will be able to surmount an affirmative defense. Under such circumstances claimant need not present all the evidence available in his favor but only that necessary to rebut the defendant's showing that an essential element of his claim is non-existent or that he cannot surmount an affirmative defense. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E. 2d 419, 421 (1979); *see generally* Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L. J. 745 (1974).

C.

[5] The question, then, is whether in light of the principles applicable to motions for summary judgment and those applicable to the torts of assault and battery and intentional infliction of mental distress, the evidentiary showing on defendants' motions for summary judgment demonstrates as a matter of law the non-existence of a claim for intentional infliction of mental distress. Stated another way, the question is whether the evidentiary showing demonstrates as a matter of law that plaintiff's only claim, if any, is for assault and battery. If plaintiff, as a matter of law, has no claim for intentional infliction of mental distress but has a claim, if at all, only for assault and battery, then plaintiff cannot surmount the affirmative defense of the one-year statute of limitations and defendants are entitled to summary judgment on the ground of the statute.

Although plaintiff labels his claim one for intentional infliction of mental distress, we agree with the Court of Appeals that "[t]he nature of the action is not determined by what either party calls it . . . ." *Hayes v. Ricard*, 244 N.C. 313, 320, 93 S.E. 2d 540, 545-46 (1956). The nature of the action is determined "by the issues arising on the pleading and by the relief sought," *id.*, and by the facts which, at trial, are proved or which, on motion for summary judgment, are forecast by the evidentiary showing.

Here much of the factual showing at the hearing related to assaults and batteries committed by defendants against plaintiff. The physical beatings and the cutting of plaintiff's hair constituted batteries. The threats of castration and death, being threats which created apprehension of immediate harmful or offensive contact, were assaults. Plaintiff's recovery for injuries, mental or physical, caused by these actions would be barred by the one-year statute of limitations.

The evidentiary showing on the summary judgment motion does, however, indicate that defendant Earl Puryear threatened plaintiff with death in the future unless plaintiff went home, pulled his telephone off the wall, packed his clothes, and left the state. The Court of Appeals characterized this threat as being "an immediate threat of harmful and offensive contact. It was a present threat of harm to plaintiff . . . ." 45 N.C. App. at 700, 263 S.E. 2d at 859. The Court of Appeals thus concluded that this threat was also an assault

barred by the one-year statute of limitations.

We disagree with the Court of Appeals' characterization of this threat. The threat was not one of imminent, or immediate, harm. It was a threat for the future apparently intended to and which allegedly did inflict serious mental distress; therefore it is actionable, if at all, as an intentional infliction of mental distress. *Wilson v. Wilkins, supra*, 181 Ark. 137, 25 S.W. 2d 428; Restatement § 31, Comment *a*, pp. 47-48.

The threat, of course, cannot be considered separately from the entire episode of which it was only a part. The assaults and batteries, construing the record in the light most favorable to the plaintiff, were apparently designed to give added impetus to the ultimate conditional threat of future harm. Although plaintiff's recovery for injury, mental or physical, directly caused by the assaults and batteries is barred by the statute of limitations, these assaults and batteries may be considered in determining the outrageous character of the ultimate threat and the extent of plaintiff's mental or emotional distress caused by it.[11].

Having concluded, therefore, that the factual showing on the motions for summary judgment was sufficient to indicate that plaintiff may be able to prove at trial a claim for intentional infliction of mental distress, we hold that summary judgment for defendants based upon the one-year statute of limitations was error and we remand the matter for further proceedings against defendant Earl Puryear not inconsistent with this opinion.

III.

[6] Finally, we consider whether summary judgment for defendant Ann Puryear was proper notwithstanding the fact that the one-year limitation period of G.S. 1-54(3) does not completely bar plaintiff's claim. Plaintiff alleges that Ann Puryear conspired with

[11] We note in this regard plaintiff's statement in his deposition that "[i]t is not entirely [the future threat] which caused me all of my emotional upset and disturbance that I have complained about. It was the ordeal from beginning to end." If plaintiff is able to prove a claim for intentional infliction of mental distress it will then be the difficult, but necessary, task of the trier of fact to ascertain the damages flowing from the conditional threat of future harm. Although the assaults and batteries serve to color and give impetus to the future threat and its impact on plaintiff's emotional condition, plaintiff may not recover damages flowing directly from the assaults and batteries themselves.

Earl Puryear to commit the tort of intentional infliction of mental distress upon plaintiff, and submits that there is evidence of conspiracy sufficient to withstand her motion for summary judgment. Defendant Ann Puryear argues in response that plaintiff's evidence is insufficient to establish anything more than conjecture or suspicion as to her participation in the alleged conspiracy.

A conspiracy has been defined as "an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way." *State v. Dalton*, 168 N.C. 204, 205, 83 S.E. 693, 694 (1914). The common law action for civil conspiracy is for damages caused by acts committed pursuant to a conspiracy rather than for the conspiracy, *i.e.*, the agreement, itself. *Shope v. Boyer*, 268 N.C. 401, 150 S.E. 2d 771 (1966). Thus to create civil liability for conspiracy there must have been an overt act committed by one or more of the conspirators pursuant to a common agreement and in furtherance of a common objective. *Id.* Although civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission of the issue to a jury. *Edwards v. Ashcraft*, 201 N.C. 246, 159 S.E. 355 (1931); *State v. Martin*, 191 N.C. 404, 132 S.E. 16 (1926). An adequately supported motion for summary judgment triggers the opposing party's responsibility to come forward with facts, as distinguished from allegations, sufficient to indicate he will be able to sustain his claim at trial. *See Connor Co. v. Spanish Inns*, 294 N.C. 661, 242 S.E. 2d 785 (1978); *see also Moore v. Fieldcrest Mills, Inc., supra*, 296 N.C. 467, 251 S.E. 2d 419.

In the present case, as earlier discussed, the one-year statute of limitations serves to bar plaintiff's claim for assault and battery. Plaintiff's evidentiary showing, therefore, must be enough to indicate that at trial plaintiff will be able to prove the existence of an agreement between defendants to intentionally inflict mental distress as distinguished from an agreement to commit assault and battery. Judge Braswell, in ruling upon defendant Ann Puryear's motion for summary judgment, considered plaintiff's complaint, a transcript of plaintiff's deposition, and a portion of the transcript in the criminal case arising out of this occurrence. The facts gleaned from these sources indicate only that Ann Puryear was present when plaintiff arrived, that upon Earl Puryear's command she emerged from a nearby building and stated her desire not to see

plaintiff, and that she drove off with her daughter before the commission of the assaults and batteries and the alleged intentional infliction of mental distress. Plaintiff's evidentiary showing, then, is insufficient to indicate that at trial plaintiff may be able to prove an agreement between Earl Puryear and Ann Puryear to intentionally inflict mental distress upon him. The plaintiff in essence relies on the allegations of conspiracy in his complaint and possible speculation or conjecture as to an agreement resulting from Ann Puryear's presence at the site where plaintiff was beaten and threatened. This is not enough to survive defendant Ann Puryear's motion for summary judgment. *See Edwards v. Ashcraft, supra*, 201 N.C. 246, 159 S.E. 2d 355. *See also Moore v. Fieldcrest Mills, Inc., supra*, 296 N.C. 467, 251 S.E. 2d 419.

For the reasons stated the decision of the Court of Appeals affirming summary judgment in favor of Earl Puryear is reversed. The claim against Earl Puryear is remanded to that court with instructions that it be remanded to Wake Superior Court for further proceedings not inconsistent with this opinion. The decision of the Court of Appeals affirming summary judgment in favor of Ann Puryear is affirmed.

Reversed in part.

Affirmed in part.

Justice MEYER did not participate in the consideration and decision of this case.

IN THE MATTER OF: THE APPEAL OF NORTH CAROLINA SAVINGS AND LOAN LEAGUE AND BURKE COUNTY SAVINGS AND LOAN ASSOCIATION FROM JUDGMENT OF CREDIT UNION COMMISSION IN CONTESTED CASE RELATING TO BY-LAWS OF STATE EMPLOYEES' CREDIT UNION AND NORTH CAROLINA BANKERS ASSOCIATION, INC., PETITIONER v. NORTH CAROLINA CREDIT UNION COMMISSION AND ROY D. HIGH, ADMINISTRATOR OF CREDIT UNION, RESPONDENTS

No. 82

(Filed 7 April 1981)

1. Banks and Banking § 1— amendment of bylaws of State Employees' Credit Union — standard for judicial review of agency decision

The appropriate standard for judicial review of the decision of the N. C. Credit Union Commission enlarging the field of membership of the State Employees' Credit Union was that provided by G.S. 150A-51(4), and the appropriate line of inquiry on appeal was therefore whether the Commission's approval of the Credit Union bylaw amendment was "affected by . . . error of law."

2. Banks and Banking § 1— State Employees' Credit Union — local government employees — no common bond of similar occupation

State, county and municipal employees do not share a "common bond" of similar occupation within the meaning of G.S. 54-109.26, and the N. C. Credit Union Commission therefore erred in approving an amendment to the bylaws of the State Employees' Credit Union permitting an expansion of the field of membership to include certain county and municipal employees.

3. Banks and Banking § 1— credit union — common bond

To qualify as a common bond within the meaning of G.S. 54-109.26, which provides that all persons eligible for membership in a credit union must share one and the same common bond, the trait or factor must be common to all eligible membership, and its very nature must provide the assurance of stability.

4. Banks and Banking § 1— State Employees' Credit Union — local government employees — no common bond of similar occupation

Because county, municipal and state employees do not *all* engage in similar types of work with similar job descriptions, they do not share a common bond of similar occupation, since similarity in occupation means similarity in the actual work done rather than similarity in who is benefited and who pays; therefore, an amendment to the bylaws of the State Employees' Credit Union permitting an expansion of the field of membership to include certain county and municipal employees could not be upheld on this basis.

5. Banks and Banking § 1— State Employees' Credit Union — local government employees — no common bond of similar association or interest

The class of persons eligible for membership in the State Employees' Credit Union under the amended bylaw in question did not possess the common bond of similar association or interest, and limitation of membership to governmental

employees covered under a state administered retirement system did not provide a common bond of similar interest.

Justice EXUM dissenting.

Justice COPELAND joins in the dissent.

ON discretionary review of the decision of the Court of Appeals, 45 N.C. App. 19, 262 S.E. 2d 361 (1980) (opinion by *Judge Hedrick* with *Judges Martin* (*Robert M.*) and *Wells* concurring), which reversed judgment in favor of petitioners by *Judge Braswell*, entered at the 2 January 1979 Session of WAKE Superior Court. In entering judgment for the petitioners, *Judge Braswell* reversed the North Carolina Credit Union Commission's decision of 10 August 1978 approving an amendment to the bylaws of the State Employees' Credit Union.

By this appeal, we consider whether those persons added by the bylaw amendment to the field of membership of the State Employees' Credit Union share a "common bond," within the meaning of G.S. 54-109.26, with those previously eligible for membership.

This case was argued as No. 17 at the Fall Term 1980.

Law Offices of John R. Jordan, Jr., by John R. Jordan, Jr., Robert R. Price, and Henry W. Jones, Jr.; and Alfred P. Carlton, Jr., for petitioner-appellant North Carolina Bankers Association, Inc.

Brooks, Pierce, McLendon, Humphrey & Leonard, by L.P. McLendon, Jr., and Edward C. Winslow III, for petitioner-appellants North Carolina Savings and Loan League and Burke County Savings and Loan Association.

Byrd, Byrd, Ervin & Blanton, P.A., by John W. Ervin, Jr., for petitioner-appellant Burke County Savings and Loan Association.

Bailey, Dixon, Wooten, McDonald & Fountain, by J. Ruffin Bailey and Gary S. Parsons, for respondent-appellee State Employees' Credit Union.

Barringer, Allen and Pinnix, by Thomas L. Barringer, for respondent-appellees North Carolina Credit Union Commission and Roy D. High, Administrator of Credit Unions.

C. Ronald Aycock for respondent-appellee North Carolina Association of County Commissioners.

Ernest Ball for respondent-appellee North Carolina League of Municipalities.

CARLTON, Justice.

I.

This case arose from the North Carolina Credit Union Administrator's (hereinafter "Administrator") approval on 15 September 1977 of an amendment to the By-Laws (sic) of the State Employees' Credit Union, allowing an expansion of its field of membership to include employees of local governmental units who participate in retirement systems administered by the State of North Carolina and federal employees working in conjunction with these units. Prior to the amendment, Article II, Section 1 of the bylaws provided that:

> The field of membership shall be limited to those having the following common bond: employees of the State of North Carolina and Federal employees working in conjunction with State departments; employees of Public Boards of Education; employees of associations formed for the benefit of State Employees, . . . and unremarried spouses of persons who died while in the field of membership of this credit union: persons retired from the above employment as pensioners and/or annuitants from the above employment or service; members of their immediate families, and organizations of such persons: and employees of agencies or departments whose employees are subject to the State Personnel Act.

As amended, the bylaw would read as follows:

> The field of membership shall extend to those having the following common bond: employees of governmental units in North Carolina whose employees are covered under a retirement system administered by the State of North Carolina*; Federal employees working in conjunction with these governmental units; employees of agencies or departments whose employees are subject to the State Personnel Act; employees of associations formed for the benefit of the above persons; unremarried spouses of persons who died while in the field of membership; persons retired from any of the above as pensioners and/or

annuitants; members of their immediate families and organizations of such persons . . . .

*Employees of county, municipal, and related government units (excluding employees of county departments of Social Services, Health, Mental Health, and Civil Defense) who currently have a credit union chartered by North Carolina or the Federal Government and who are not included in that field of membership are not eligible for membership in the State Employees' Credit Union.

In response to a request by the North Carolina Bankers Association, the North Carolina Credit Union Commission (hereinafter "Commission") conducted hearings on 5 and 6 June 1978 to review the decision of the Administrator. The Commission granted petitions from the North Carolina Savings and Loan League and the Burke County Savings and Loan Association to intervene in opposition to the amendment. The State Employees' Credit Union (hereinafter "Credit Union"), the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities were granted leave to intervene in support of the Administrator's action. On 10 August 1978 the Commission issued a decision affirming the approval of the bylaw amendment by the Administrator.

Pursuant to G.S. 150A-43, the Bankers Association, Savings and Loan League and Savings and Loan Association (hereinafter "petitioners") filed petitions in superior court for review of the Commission's decision, contending that the members added by the amendment lacked a "common bond" with the previous State employee membership of the Credit Union in violation of G.S. 54-109.26. Judge Braswell agreed with petitioners and reversed the Commission in a judgment entered 10 January 1979. The Commission, Administrator, State Employees' Credit Union, North Carolina Association of County Commissioners and North Carolina League of Municipalities (hereinafter "respondents") appealed. The Court of Appeals reversed the superior court and remanded for entry of an order affirming the decision of the Commission. Petitioners filed a petition for discretionary review with this Court pursuant to G.S. 7A-31, which we allowed 6 May 1980.

Other facts pertinent to the decision are noted in the footnote

below.[1]

[1] The State Employees' Credit Union (hereinafter "Credit Union") is a state-chartered credit union with a field of membership traditionally limited to State employees and certain others, such as public school teachers, whose salaries, for the most part, are paid by the State. It is apparently undisputed that the Credit Union is the largest in the world, exceeded in total assets only by the Pentagon Federal Credit Union and the Navy Federal Credit Union. At the time of the hearing in the trial court, the Credit Union employed some 200 persons in at least 18 full-time offices throughout the State. At the end of 1977, the Credit Union had assets of $270 million and had $72 million in real estate loans and $151 million in personal loans. In August 1978, the Credit Union had 15,000 members, some 70,000 of whom had joined in the preceding three years. During this period, approximately 2,500 new members joined the Credit Union each month and the field of persons eligible for membership totaled 200,000 *and their families.* G.S. 54-109.29 (Cum. Supp. 1979) provides that a qualified person remains a member of the Credit Union for life even though he may later cease to meet the requirements of membership. It is unquestioned that the Credit Union is one of the largest financial institutions in the State of North Carolina.

While directly in competition with private industry, the Credit Union is accorded numerous tax advantages. Both banks and savings and loan associations are subject to a state excise tax, the equivalent of an income tax and both pay federal income taxes. Credit unions are not subject to the state excise tax and are expressly exempt from federal income taxes. Banks and savings and loan associations are subject to intangible taxes on certain types of assets while credit unions are expressly exempted from any intangibles tax on all assets. Moreover, credit unions are the beneficiaries of a blanket "restriction of taxation" provided by G.S. 54-109.99 (Cum. Supp. 1979).

Other statutory requirements imposed on the private sector are not imposed on credit unions. Credit unions must maintain certain reserves based on a small percentage of risk assets while banks are required to maintain reserves based upon a substantially more burdensome reserve requirement. Commercial institutions are subject to strict examinations involving such areas as quality of management, technical compliance with consumer protection laws and securities procedures, as well as basic financial soundness. In contrast, the regulations with respect to examination of credit unions refer to financial soundness and liquidity only. It is particularly noteworthy that state-chartered credit unions are not subject to the general usury law of North Carolina and have their own interest rate structure set by the Credit Union Commission.

The services offered by the Credit Union are strikingly similar to those provided by the private sector. The record indicates that services offered by the Credit Union include consumer loans, mortgage loans, consumer financing, counseling, draft accounts, personal money orders, travelers' checks, United States Government bond sales, share accounts, and passbook accounts.

The impact of the favorable treatment accorded credit unions vis-à-vis the private sector was dramatized by the witness from the Watauga Savings and Loan Association. His testimony indicated that federal insurance regulations limit the amount of interest that may be paid by a savings and loan association on passbook savings to 5 1/4%. The Credit Union, on the other hand, was paying 7% on passbook

II.

[1] We first consider the appropriate standard for judicial review of this administrative agency's decision.

The basic issue with which the courts below were confronted, and which we must now consider, is the propriety of an action taken by the North Carolina Credit Union Commission and its Administrator. The Credit Union Commission is an agency of the state, G.S. § 54-109.10 (Cum. Supp. 1979), and review of its actions is governed by the Administrative Procedure Act (hereinafter "APA"), General Statutes, Chapter 150A. G.S. § 150A-2(1) (1978).

Under the APA, a reviewing court's power to affirm the decision of the agency and to remand for further proceedings is not circumscribed. However, the court may reverse or modify only 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 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

---

savings in Watauga County at the time of the hearing in the trial court. Moreover, the witness testified that to his definite knowledge the savings and loan association was losing customers to the Credit Union.

Appellants' concern over the liberal interpretation of the "common bond" limitation is readily understood in light of the effect of the amendment. The amendment expanded the Credit Union's field of membership to include "all employees of governmental units in North Carolina whose employees are covered under a retirement system administered by the State of North Carolina." There are eight separate retirement systems administered by different departments of State government for various categories of local government employees. This includes virtually all employees of the units of local government, including employees of various cities, counties and other units such as housing authorities, airports, ports, ABC boards, etc. The result would be that approximately 30,000 persons and their families would be added to the field of the Credit Union's potential members by approval of the bylaw amendment. Additionally, the Credit Union would become eligible to merge with existing local credit unions serving an additional 23,000 employees. These numbers would undoubtedly be larger today and will continue to grow as government bureaucracy continues to grow.

under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

G.S. § 150A-51 (1978).

The Court of Appeals, while recognizing that its review was governed by G.S. 150A-51, failed to specify under which of the above listed standards it reviewed the decisions of the superior court and the Commission. Judge Braswell, in the superior court, relied on the first, second, fifth and sixth standards in reversing the Commission's decision. While we agree with the result reached by the superior court, we think it failed to apply the correct standard in reviewing the Commission's actions. In our opinion, the appropriate line of inquiry is whether the Commission's approval of the bylaw amendment is "[a]ffected by . . . error of law." G.S. § 150A-51(4). Thus, the proper standard of review has nowhere been addressed in the lower courts. Selection of the proper standard is important in every appeal from an administrative decision because use of the correct standard clarifies the basic issues and focuses the reviewing court's inquiry on the relevant factors.

The appropriate standard can be determined only after an examination of the issues presented by the appeal. While petitioners claim that the Commission's decision is in violation of the constitution, in excess of statutory authority, unsupported by substantial evidence and arbitrary and capricious, both they and respondents agree that the propriety of the Commission's actions turns on the meaning accorded the term "common bond" in G.S. 54-109.26, or, as aptly put by Judge Hedrick, writing for the Court of Appeals, "whether the membership of the State Employees' Credit Union as enlarged by the amendment meets the 'common bond' requirement of G.S. § 54-109.26." When the issue with which this Court is confronted on this appeal is accurately set forth it becomes obvious that the basic issue is one of statutory interpretation. Any error made in interpreting a statute is an error of law, and the fourth of the standards enumerated above, whether substantial rights of petitioners have been prejudiced because the Commission's decision is affected by an error of law,[2] is the scope of our inquiry on this appeal.

[2] Because we decide this issue in favor of petitioners, we do not reach the question of the constitutionality of the bylaw amendment. Were we to decide the

This case does not involve a decision that is made in excess of statutory authority, that is unsupported by substantial evidence, or one that is arbitrary or capricious. Although it can be argued that if the Commission approved a bylaw based on an erroneous and overly broad statutory interpretation it exceeded its statutory authority, this argument ignores the gist of the alleged error, the meaning of "common bond." If the scope of the bylaw exceeds that permissible under the statute, the *basic* error is still one of law, not of exceeding statutory authority. No one denies the statutory authority of the Administrator and Commission to approve and enact bylaw amendments; it is the bylaw itself with which we are concerned. When determining which standard or standards are appropriate to employ in a particular case, the standard which deals most directly with the alleged error, the gravamen of the petitioners' complaint, is the proper scope of review.

Nor does this appeal raise questions of the sufficiency of the evidence to support the Commission's implicit finding that a "common bond" exists. If the "common bond" requirement is satisfied by employment in the public sector, as the Court of Appeals held, there is ample and uncontroverted evidence that all persons made eligible for membership by the amended bylaw possess the characteristic of governmental employment.

We also disagree with the superior court's conclusions that the Commission's decision was arbitrary and capricious and that the decision was in violation of constitutional provisions. The record is devoid of evidence showing that the Commission acted in any manner other than reasonably, albeit erroneously. And, in view of our disposition of the case in petitioners' favor, we need not consider the constitutional issue.

The remainder of this opinion will be concerned with the proper interpretation of "common bond." When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. Daye, *North Carolina's Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. Rev. 833,915 (1975); *see State ex rel. Commissioner of Insurance v. Rate Bureau*, 300 N.C. 381, 450, 269 S.E. 2d 547, 589 (1980); Director,

statutory issue otherwise, however, we would have to consider the bylaw's constitutionality.

Office of Workers' Compensation Programs, *U.S. Department of Labor v. O'Keefe*, 545 F. 2d 337 (3d Cir. 1976). Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. "The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Company*, 323 U.S. 134, 140, 65 S. Ct. 161, 164, 89 L. Ed. 124, 129 (1944). For the reasons given below, we find the Commission's interpretation of "common bond" unpersuasive.

III.

[2] The issue presented by this appeal is whether the field of membership of the Credit Union as set forth in the amended bylaw possesses a "common bond" as required by G.S. 54-109.26. We answer this question in the negative and reverse the Court of Appeals.

G.S. 54-109.26 (Cum. Supp. 1979) is the source of the common bond requirement and sets out, to some extent, what constitutes a common bond:

> "Membership" defined.— (a) The membership of a credit union shall be limited to and consist of the subscribers to the articles of incorporation and such other persons within the common bond set forth in the bylaws as have been duly admitted members, have paid any required entrance fee or membership fee, or both, have subscribed for one or more shares, and have paid the initial installment thereon, and have complied with such other requirements as the articles of incorporation or bylaws specify.
>
> (b) Credit union membership may include groups having a common bond of similar occupation, association or interest, or groups who reside within an identifiable neighborhood, community, or rural district, or employees of a common employer, and members of the immediate family of such persons.

We can affirm the Court of Appeals and allow the amended bylaw

to stand only if the field of membership set forth therein possesses a "common bond."

In construing the meaning of "common bond," we must, as is always the case in statutory interpretation, ascertain and adhere to the intent of the Legislature in enacting this requirement. *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978). The best indicia of that legislative intent are "the language of the act, the spirit of the act and what the act seeks to accomplish." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972).

The language of G.S. 54-109.26 is the basic source for determining the meaning of and the legislative intent behind the requirement of a common bond. Subsection (b) of that statute identifies three ways in which a common bond may be established: (1) similar occupation, association or interest; (2) residence within an identifiable neighborhood, community, or rural district; and (3) common employer. Unless the membership requirements of a credit union fall within one of the three specified categories, the "common bond" requirement has not been met and the bylaw governing membership must fall.

State, county and municipal employees, who by the amended bylaw are within the field of membership, clearly do not fall within the category of residence within a common identifiable neighborhood nor do they share a common employer. If the bylaw contested here is to pass the muster of the "common bond" requirement, it must do so under the category of similar occupation, association or interest. The Court of Appeals upheld the bylaw because it found that all persons within the newly defined field of membership share a similar occupation. We disagree.

First, it is obvious from subsection (a) of G.S. 54-109.26 that all persons eligible for membership in a credit union must share one and the same common bond: "The membership of a credit union shall be limited to and consist of . . . persons within the common bond . . . ." If the contested bylaw is to be upheld on the basis of similar occupation, then *each* member must share a similar occupation with every other member. If the commonality is premised on association or interest, all persons within the field of membership must possess the same association or interest.

Additionally, if the common bond requirement were anything

but universal for the entire membership, it would be rendered meaningless. For example, it is beyond question that there are certain groups of county and municipal employees who share similar occupations with state employees: both state and local governments employ law enforcement officers, public health personnel, tax collectors, etc. If the requisite degree of commonality required for a "common bond" to exist could be met by showing similarity of occupation for sub-groups of the membership only, the scope of eligible membership would know no bounds and the Legislature's enactment of the common bond requirement would be rendered a nullity.

Respondents urge that we construe the common bond limitation of credit union membership broadly so as to most fully effectuate the Legislature's intent. While we are bound to construe the limitation with due regard to the legislative intent, we are powerless to construe away the limitation just because we feel that the legislative purpose behind the requirement can be more fully achieved in its absence.

[3] Undoubtedly, the Legislature enacted the common bond provision to promote the financial stability of credit unions by requiring that the members possess substantial unity of character and interest. Only with some assurance of stability can the purpose of credit unions be achieved:

> A credit union is a cooperative, nonprofit association, incorporated . . . for the purposes of encouraging thrift among its members, creating a source of credit at a fair and reasonable rate of interest, and providing an opportunity for its members to use and control their own money in order to improve their economic and social condition.

G.S. § 54-109.1 (Cum. Supp. 1979). To ensure the financial stability of credit unions the Legislature imposed the requirement that all persons eligible for membership in a particular credit union possess a commonality of interest. G.S. § 54-109.26. Thus, the nature of the common bond itself must provide some guarantee of financial cohesiveness and stability. Not all shared interests carry even a minimal assurance of financial success, and, for that reason, not all shared traits constitute common bonds. Only those factors common to the entire field of membership which, of themselves, tend to

promote financial stability qualify as common bonds. It does not follow, however, that all factors which provide some guarantee of financial stability satisfy the common bond requirement. To qualify as a common bond, the trait or factor must be *common to all eligible for membership*, and its very nature must provide the assurance of stability. The Legislature has chosen and specified the means to achieve financial stability; we are bound by the limitations inherent in that means and cannot ignore those limitations simply because we see a better way to achieve the Legislature's purpose. For this reason, we cannot adopt petitioners' argument that any factor which contributes to the success of a credit union qualifies as a common bond. Otherwise, the growth of credit unions would continue unchecked, if for no reason other than the adage that "there is safety in numbers."

A. *Similar Occupation*

[4] The Court of Appeals found the requisite similarity in occupation in who is served by the eligible members, *i.e.*, the public, and who paid the members' salaries, *i.e.*, the public:

> In our opinion public employees are united by the common bond of similar occupation for the simple reason that they are all employed in the service of the community, whether that community be narrowly defined as is the case with local public employees, or broadly delineated as in the case of state public employees. They all occupy positions in public service. Moreover, such employees are all paid from public funds generated by taxing the citizenry. They serve the public; the public pays their salaries. These two characteristics are common to the membership as envisaged by the amendment to the bylaw in question here. We hold that these factors in particular provide sufficient similarity of occupation, despite the individual place and position of the employee, to meet the "common bond" requirement of G.S. 54-109.26.

We cannot accept the Court of Appeals' interpretation of occupation. We consider similarity in occupation to mean similarity in the actual work done — similarity in occupational duties and responsibilities. Under the similar occupation category, groups such as nurses, law enforcement officers and textile workers could each band together to form their own *separate* credit union. Similarity in

occupation cannot be premised upon similarity in who is benefited and who pays. If we were to affirm the Court of Appeals and adopt its reasoning, all employees in the private sector could form a credit union; private industry would provide the common bond. Private industry benefits from their labor and pays their salaries. Such a broad interpretation would make a farce of the common bond requirement and would render void and without meaning the legislative declaration that "credit union [membership]... be *limited* to... persons within the common bond . . . ." G.S. § 54-109.26 (emphasis added).

The Court of Appeals specifically rejected the definition of "similar occupation" that we now adopt. They reasoned thusly:

> The fallacy of petitioners' approach to defining "similar occupation" by reference to job description becomes obvious when we examine the composition of the Credit Union prior to the amendment. If petitioners' logic were to prevail, the Chief Justice of our Supreme Court, a State government employee, would have nothing in common with an orderly at Dorothea Dix Hospital, also a State government employee. Yet, by virtue of their occupational status as State government employees, both have been eligible for membership in the State Employees' Credit Union since its creation. On the other hand, a State highway patrolman would have no more in common, as far as employment description, with a county sheriff than he would have with a Greek professor at a State-supported university. But, as petitioners see it, the State patrolman and the county sheriff are not eligible for membership in the same credit union. When viewed in this light, petitioners' position regarding the meaning of "similar occupation" defeats their purported purpose to prove that local and county governmental employees enjoy no "common bond" of similar occupation with State government employees.

The Court of Appeals apparently confused the categories providing the common bond. The Chief Justice of this Court, an orderly at a state hospital and a highway patrolman can belong to the same credit union because they *all* share a common employer, the state. The same highway patrolman can belong to a credit union composed of law enforcement officers, state, county and municipal,

because *all* share a similar occupation, law enforcement. But, although a county sheriff does share the common bond of similar occupation with some state employees, he does not share any single common bond with *all* state employees, and, for that reason, the county sheriff cannot belong to a credit union composed solely of state employees. The "common bond" must be a single one, shared by all persons eligible for membership.

Because county, municipal and state employees do not *all* engage in similar types of work with similar job descriptions, they do not share a common bond of similar occupation and the amended bylaw cannot be upheld on this basis. As to this point, the Court of Appeals is reversed.

B. *Similar Association or Interest*

[5] We now turn to a determination of whether the class of persons eligible for Credit Union membership under the amended bylaw possesses the common bond of similar association or interest.

These terms are nowhere defined in the statute which sets them forth. In ordinary parlance, "association" means the act of associating or bringing into company with another, *American Heritage Dictionary of the English Language* 80 (1969), and "interest" has several meanings, including a feeling of curiosity or fascination, an advantage or self-interest and a right, claim or legal share. *Id.* at 683. While we could construe the terms in the statute to comport with their meanings in common usage, we think the Legislature intended otherwise and used those words in a limited sense.

As emphasized above, the Legislature expressly set forth the common bond requirement as a limitation on the scope of a credit union's membership. Were we to interpret "association" and "interest" broadly in their ordinary senses, any common curiosity or fascination, no matter how small or insignificant, would satisfy the common bond requirement, with the end result that the statutorily imposed common bond limitation would, in practice, be no limitation whatsoever. We refuse to interpret one subsection in a manner that renders another subsection of the same statute a nullity.

Additionally, when the terms "association" and "interest" are read within the context of the other categories of common bonds, it becomes obvious that shared commonality in association or interest must be both substantial and vital.

The commonality of those who share similar occupations lies in their livelihood, the means by which those persons make a living. The common interest of those who share a common employer are substantial in number and vital in character. Common residential area requires a common interest in the geographic area in which one makes one's home. All these interests are substantial and each is vitally important to the persons involved.

Whether a common trait constitutes a similar association or interest can be determined only on a case-by-case basis; we do not pretend in this opinion to delineate or even attempt to give examples of what traits constitute this type of common bond. But whatever "traits" those terms include, they must rise to at least the same level of substantiality and be just as vital as the other types of common bonds enumerated by the Legislature.

Respondents contend that the limitation of membership to governmental employees covered under a state-administered retirement system provides a common bond of similar interest. An examination of just what this common interest is, however, reveals that the threshold requirements of a "common bond" have not been met.

The retirement systems administered by the state are eight in number. They are funded by separate sources and serve separate classifications of employees and are not all administered by the same state agency. The record discloses that six are administered under the State Treasurer: the Uniform Judicial Retirement System, the Teachers' and State Employees' Retirement System, the Local Governmental Employees' Retirement System, the Uniform Solicitorial Retirement System, the Uniform Clerks of Superior Court Retirement System, and the Legislative Benefit and Retirement Fund; the other two, the Law-Enforcement Officers' Benefit and Retirement Fund and the Firemen's Pension Fund are administered by the State Auditor's Office. The function of the state in administering these funds is limited to mere bookkeeping, and the bookkeeping for each fund is done separately. Even if common administration were a similar interest which would satisfy the common bond requirement, membership in a state-administered retirement system still would not provide a common bond because the retirement systems do not share a common bookkeeper and the bookkeeping and investment for each fund is done separately and independently. The only commonality shared by all persons who are covered by a state-administered retirement system is that the

persons who perform the bookkeeping functions for each fund share a common employer, the state. That shared interest is remote and insubstantial; such an interest does not rise to the level of a common bond.

Respondents raised this contention in the Court of Appeals, and that court rejected it. As to this point, the Court of Appeals is affirmed.

Thus, we hold that state, county and municipal employees included within the Credit Union's membership by the amended bylaw do not possess a common bond of similar association or interest. We conclude that the class of persons set forth in the amended bylaw possesses no common bond of any type.[3] For that reason, the action of the Commission in approving the amended bylaw must be reversed because it is affected by error of law, G.S. § 150A-51(4).

IV.

In light of our decision above, it is unnecessary for us to address petitioners' contention that the Commission's approval of the amendment was in violation of the equal protection clause of the United States and North Carolina Constitutions and in violation of the provision against unlawful discrimination in taxation contained in Article V, section 2 of the North Carolina Constitution. For the same reason, it was unnecessary for Judge Braswell to rule on the constitutional issue in the trial court, and that portion of his judgment must be vacated. We note, however, that serious constitu-

[3] It is suggested in dissent that the "sad" result of this opinion is that local government employees will not hereafter be able to obtain credit. This is not only an insult to that segment of the state's population, it is a reckless disregard of the rule that appellate courts must base their decisions only on information contained in the record and not on individual speculation. The speculation that local government employees will be unable to obtain credit at private financial institutions does not comport with the minority's insistence that we view this case with "common sense and some familiarity with the world around us."

It is too late in the day to respond to other points raised in the minority opinion. Suffice it to say that a fair reading of this opinion will indicate that our decision is in no way based on the tax advantages accorded credit unions or on the size of this credit union. Contrary to the assumptions made by the dissent, our interpretation of the term "common bond" is based solely on what we perceive to be the legislative intent. The suggestion by the minority that there are ulterior motives for this decision is, we think, both unfair and unwarranted.

tional questions would arise were the Court of Appeals' opinion allowed to stand. If the meaning of "common bond" were broadened to the extent allowed by that court, then the constitutional issue would have to be examined anew. There must be a discernible justification for the preferential treatment granted credit unions in the absence of a meaningful common bond limitation.

V.

For the reasons stated above, the decision of the Court of Appeals is affirmed in part and reversed in part. This cause is remanded to that court with instructions to remand to the Superior Court, Wake County, for entry of judgment consistent with this opinion.

Affirmed in part,

Reversed in part and

Remanded.

Justice EXUM dissenting.

I agree with the majority that the dispositive question on this appeal is whether municipal and county employees, whom I will refer to as local government employees, share with state government employees a "common bond," as that term is used in G.S. 54-109.26 (Cum. Supp. 1979), so that all can belong to the same credit union. Being satisfied that there is the necessary common bond between the two groups of governmental employees, I respectfully dissent from the majority's conclusion to the contrary and vote to affirm the decision of the Court of Appeals.

It takes little more than common sense and some familiarity with the world around us to know that local government employees and state government employees share a common bond of "similar occupation, association or interest" as those terms are used in the statute. Judge Hedrick made the point nicely when, for a unanimous Court of Appeals panel, he wrote:

> "In our opinion public employees are united by the common bond of similar occupation for the simple reason that they are all employed in the service of the community, whether that community be narrowly defined as is the case with local public employees, or broadly deli-

> neated as in the case of State public employees. They all occupy positions in public service. Moeover, such employees are all paid from public funds generated by taxing the citizenry. They serve the public; the public pays their salaries. These two characteristics are common to the membership as envisaged by the amendment to the bylaw in question here. We hold that these factors in particular provide sufficient similarity of occupation, despite the individual place and position of the employee, to meet the 'common bond' requirement of G.S. Sec. 54-109.26."

45 N.C. App. 19, 23, 262 S.E. 2d 361, 364 (1980). Surely these factors give local and state government employees sufficient similarity of "association" and "interest," if not "occupation," under the majority's unrealistic, restrictive view of what similar occupation means — a view which I reject.

Similar occupation does not mean identical occupation in the sense that all workers must perform identical work-related functions in order to be in the same credit union. The majority correctly asserts, for example, that all workers in the textile industry, or all persons involved in law enforcement, could form "their own separate credit union." Yet workers engaged in the textile industry do a multitude of different functions and have a number of different occupations in the majority's narrow view of that term. They include weavers, dyers, mechanics, engineers, chemists, and even physicians. Yet all are workers in the textile industry and all contribute to the making of the ultimate product, textile goods. The same may be said of those engaged in law enforcement. Their varying occupations include traffic patrolmen, detectives, administrators, chemists, ballistics experts, crime scene reconstruction experts, etc. Yet all could, the majority concedes, join a "law enforcement" credit union because they are all engaged in law enforcement activity.

So it is with those who work for local and state government. Although they perform different functions and may be said to have different occupations, they are joined by the common bond of being public servants. They all contribute together producing essentially the same product, *i.e.*, those and only those governmental services which are demanded by the people through the constitution and statutes of this state. They work in the same industry — the industry of government.

Nor, as I think the above discussion demonstrates, are governmental employees and private sector employees on different sides of the same "common bond" coin. Contrary to the majority's assertion, it does not follow that if local and state government employees are permitted to form a credit union under the common bond of "similar occupation, association or interest," then a "private sector" credit union must also be permitted. The private sector consists of a multitude of different industries, composed in turn of many different privately-owned for-profit business organizations, which make countless different products and provide a variety of different services and which run on capital voluntarily and privately supplied from countless investors.

The acid test, as the majority correctly notes, is whether the common bond is sufficient "to promote the financial stability of credit unions by requiring that the members possess substantial unity of character and interest. Only with some assurance of stability can the purpose of credit unions be achieved." The common bond requirement is for the protection of the credit union itself not, as the majority seems to imply, for the purpose of restricting the size or operation of any given credit union in order to protect private for-profit financial institutions with whom credit unions may compete. The common bond of those employees engaged in providing governmental services to our people at both state and local levels meets this test. A purported private sector "common bond" would surely not.

The tax advantages given to credit unions organized under Chapter 54 of the General Statutes are not provided, as the majority suggests, because their size and operations are restricted by the common bond requirement. The tax advantages are provided because these credit unions are non-profit associations operated and controlled by their own members. They provide credit to people whose only collateral is often the income they derive from a steady job. They provide credit, in other words, to people who would not be able to obtain it at privately-owned for-profit financial institutions. The majority seems to view the common bond requirement as a method for restricting the growth and operational potential of membership owned, nonprofit, credit unions so that they will not unduly compete with privately-owned for-profit financial institutions. This mistaken view of the reason for the common bond requirement has, I fear, led the majority to an unduly restrictive view

of what constitutes the common bond of similar occupation, association or interest, a restrictive view never intended by the legislature.

The majority, for example, speaks at length in note 1 of the size of the North Carolina State Employees' Credit Union and seems concerned because it might compete unfairly with for-profit financial institutions in the private sector. While the State Employees' Credit Union may be large when compared with other credit unions, its size and operational potential even if expanded to include local government employees is quite small when compared to the size and operational potential of private for-profit financial institutions. According to the majority's figures the Credit Union's assets in 1977 were $270,000,000 with some $223,000,000 in loans. As I read the record, if local government employees are added to the membership there would be approximately 250,000 eligible members in North Carolina. Without this addition there are approximately 200,000 eligible members. Yet *all* North Carolina credit unions, including the State Employees' Credit Union, have only 4.5% of total consumer savings in the state.

The record shows on the other hand that the total assets of the 186 savings and loan associations which comprise the North Carolina Savings & Loan League have assets approaching ten *billion* dollars. The total assets of all banks in North Carolina (both state and national), according to figures obtained from the Commissioner of Banks, was more than twenty-two *billion* dollars as of 30 September 1980. The record shows, further, that the total North Carolina work force numbers approximately 2,600,000 persons. Therefore only 9.5% of the total work force would be eligible for membership in the State Employees' Credit Union if it is expanded to include local government employees who themselves comprise only 2% of that work force. It is estimated that only 5% of credit union members save exclusively at their unions. The rest save also at banks and savings and loan associations. The expansion of the Credit Union to include local government employees would seem to constitute little, if any, economic threat to private for-profit financial institutions.

The really sad aspect of the majority's opinion is that thousands of local government employees who are not eligible for credit at private for-profit financial institutions simply cannot obtain the credit needed "to improve their economic and social conditions." The statute entitles them to membership in the State Employees'

Credit Union where such credit would be available. The majority erroneously denies them this privilege.

Justice COPELAND joins in the dissent.

JOANNE KNOTT HAMLIN (WHITT) v. JOSEPH JOHN HAMLIN III

No 55

(Filed 7 April 1981)

1. **Divorce and Alimony § 25; Infants § 6— child custody and visitation hearing — absence of father**

While the trial court should ordinarily require the presence of both parents at a child custody and visitation hearing so that the court might better evaluate the character and fitness of each parent, the trial court in this particular case did not err in conducting a hearing on a motion to modify a child custody and visitation order without the presence of defendant father where defendant had been working in Alaska for several years and his job schedule was the reason for his absence at the hearing; the child was 14 years of age when the order appealed from was entered and nothing in the record suggested that he had any physical or mental disability; defendant's present wife and his parents were present at the hearing; numerous hearings had been conducted with respect to the child's custody and visitation since 1973; defendant was represented at the hearing by the same attorney who had represented him in this matter since 1974; and the attorney had a written power of attorney from defendant which authorized the attorney "to guarantee in my name and bind me to comply with the orders of the court, as fully and completely as if I were present in court."

2. **Rules of Civil Procedure § 7— sufficiency of motion — failure to state rule number**

Defendant's motion for modification of a child visitation order was sufficient to comply with the requirements of G.S. 1A-1, Rule 7(b)(1), and plaintiff was not prejudiced by failure of defendant to state the number of the rule under which he was proceeding as required by Rule 6 of the General Rules of Practice for the Superior and District Courts.

Justice CARLTON dissenting.

Jutice HUSKINS joins in the dissent.

APPEAL by plaintiff from the decision of the Court of Appeals affirming order of *Gash, Judge*, entered at the 11 July 1979 Session of RUTHERFORD District Court.

This appeal is another chapter in the long controversy between

the parties relating to visitation by their son, John, with defendant, his father. The history of the controversy is summarized as follows:

On 31 August 1973, Judge Matheney entered a judgment in an action brought by defendant herein against plaintiff herein seeking, among other things, custody of John. The court found extensive facts including findings that defendant father was living and working with his parents on a dairy farm in Rutherford County; that plaintiff mother was teaching school in Person County and living with her mother; that plaintiff and defendant were fit and suitable persons to have custody of John; that plaintiff's mother and other members of her family and defendant's parents were all of good character and would have wholesome influences on John; but that it would be in John's best interests that his mother be granted primary custody. The court provided that the mother be awarded primary custody of the child but that the father be awarded temporary custody for three months during the summer. The judgment further provided that John might visit with his father every third weekend during the winter months and with his mother every third weekend during the summer months.

On 6 March 1974 plaintiff instituted this action seeking an absolute divorce from defendant on the ground of one-year's separation. She alleged that the parties were married to each other on 5 December 1964 and that they had separated on 5 March 1973. She also asked for permanent custody of their son, Joseph John Hamlin IV, who was born on 15 September 1965.

Defendant answered, admitting that plaintiff was entitled to an absolute divorce, but counterclaimed with the request that he be awarded permanent custody of John.

On 1 May 1974, plaintiff was granted an absolute divorce by Judge Gash. At the 17 June 1974 session of the court, a hearing was held on plaintiff's motion to modify the custody judgment which had been previously entered in the matter by Judge Matheney. In her motion plaintiff sought an award of full-time custody of John. At the conclusion of the hearing, Judge Gash entered an order denying the motion on the ground that no showing had been made of a change in circumstances since the entry of the original judgment. In the same order, the judge denied plaintiff's motion for a change of venue to Person County, concluding that the ends of justice would not be served by such an action. Judge Gash also ordered that an

action which had been previously filed by defendant relating to custody be consolidated with the present action.

On 14 October 1977 the parties filed a document entitled "AGREEMENT AND STIPULATION TO AMENDMENT OF JUDGMENT". The document recites that in the summer of 1975 defendant took John to Alaska where defendant was then living; that defendant did not give plaintiff any notice that he was taking John outside of the State of North Carolina; and that defendant had been indicted in Person County for violating the provisions of G.S. § 14-320.1. The parties then agreed that neither of them would thereafter take John outside of North Carolina without the consent of the other or without permission of the court.

At the 26 June 1978 session of the court, Judge Gash conducted a hearing on motions by each party that Judge Matheney's judgment be modified. Plaintiff asked that the judgment be modified so as to forbid defendant from taking John out of the state. Defendant asked that the judgment be modified so as to permit John to spend the summer months with him in Alaska where defendant, his new wife and their children were then residing. On 30 June 1978, following the hearing, Judge Gash entered an order in which he made findings of fact and concluded, among other things, that John should be allowed to visit defendant in Alaska for a period not to exceed 18 days, including travel time. The order further provided that defendant, his present wife and his parents were to execute a good and sufficient bond in the amount of $40,000 to assure John's return to the custody of plaintiff following the visitation. The parties were unable to agree on the form of the bond, and on 15 August 1978 Judge Gash entered an order specifying its form. Defendant gave notice of appeal from the 30 June 1978 order and the 15 August 1978 order but failed to perfect the appeal.

On 29 June 1979 defendant filed a motion asking the court to permit his son, then age 14, to spend four weeks of the summer with defendant and his family in Alaska. On 11 July 1979 Judge Gash conducted a hearing on this motion. Thereafter, on 13 July 1979, he entered an order finding facts and concluding, among other things, that the best interests of John "would be served by making provision for visitation during the remainder of his minority to and with his father". The order provided that John could visit defendant at his home in Alaska for periods not to exceed 45 days, including travel time, and that defendant would pay all costs of travel. The

order further provided that defendant would post a bond in the amount of $40,000 to assure John's return to the custody of plaintiff at the end of the 45-day periods. Judge Gash also approved a bond tendered by defendant and executed by defendant (by his attorney-in-fact), his wife and his parents. Security for the bond was an indenture on real estate belonging to defendant's parents located in Rutherford County.

Plaintiff appealed from the 13 July 1979 order. On 2 September 1980 the Court of Appeals in an unpublished opinion (48 N.C. App. 630, 269 S.E.2d 327 [1980]) written by Judge Webb with Judge Hedrick concurring affirmed the order from which plaintiff appealed. Judge Wells dissented and plaintiff appealed to this court pursuant to G.S. § 7A-30(2).

Robert W. Wolf and James H. Burwell, Jr., attorneys for plaintiff appellant.

Hamrick and Hamrick, by J. Nat Hamrick, for defendant appellee.

BRITT, Justice.

Plaintiff contends the following issues are presented by this appeal:

> 1. The Court erred in the proceeding with the hearing of the defendant appellee's purported motion in the absence of the defendant and in the absence of adequate authorization from the defendant appellee for the defendant to be bound by the results of such hearings.
>
> 2. The Court erred in proceeding with the hearing on the purported motion and notice filed by the defendant for that said purported motion and notice fails to comply with the requirements of Rule 7 of the North Carolina Rules of Civil Procedure, and also Rule 6 of General Rules of Practice for the Superior Court, supplemental to the Rules of Civil Procedure.

We find no merit in either contention.

[1] Addressing plaintiff's first contention, we note initially that G.S. § 1-11 provides that "[a] party may appear either in person or by attorney in actions or proceedings in which he is represented." In

5 Am. Jur. 2d, Appearance, § 1, we find:

> The term 'appearance' is used particularly to signify or designate the overt act by which one against whom suit has been commenced submits himself to the court's jurisdiction, although in a broader sense it embraces the act of either plaintiff or defendant in coming into court. Generally, however, it is used in former sense, ...

The decisions of this court which interpret the quoted statute have dealt generally with the question of representation in court proceedings, whether by counsel or in *propria persona*. We have held that the right is alternative and that a party has no right to "appear" both by himself and by counsel. *See New Hanover County v. Sidbury*, 225 N.C. 679, 36 S.E.2d 242 (1945); *McClamroch v. Colonial Ice Company*, 217 N.C. 106, 6 S.E.2d 850 (1940); *Abernethy v. Burns*, 206 N.C. 370, 173 S.E. 899 (1934).

Nevertheless, our research fails to disclose, and counsel has not cited, any statute, rule of court or decision which mandates the presence of a party to a civil action or proceeding at the trial of, or a hearing in connection with, the action or proceeding unless the party is specifically ordered to appear. Those who are familiar with the operation of our courts in North Carolina know that quite frequently a party to a civil action or proceeding does not appear at the trial or a hearing related to the action or proceeding. A proceeding involving the custody of a child is in the nature of a civil action. *See* G.S. § 50-13.5 (1976 & Cum. Supp. 1979).

In the case at hand, plaintiff argues that she was deprived of the right to call defendant as an adverse witness and cross-examine him. If plaintiff desired to call defendant as a witness she should have had a subpoena issued for him or asked for an order of the court requiring him to be present. The record does not disclose that plaintiff advised the court that she wished to call defendant as a witness. In fact, it appears in the record that at the 11 July 1979 hearing "counsel for both parties stipulated that the evidence had not changed from the evidence offered at the hearing held on June 30, 1978, and that the Court should use its recollection of the evidence then offered, except that during the proceedings, it was stipulated that the defendant appellee no longer owned a residence in the State of Alaska."

Plaintiff also suggests that since defendant was not at the

hearing, he might not be bound by the action of the court. We reject this suggestion for two reasons.

The first reason is that the record reveals that Mr. J. Nat Hamrick and his firm have represented defendant continuously since 1974 when they filed an answer duly verified by defendant. It is well-settled in North Carolina that counsel employed to conduct litigation has complete authority over the action, all that is incident to it, and all other matters which properly pertain to the action. *Better Home Furniture Co. v. Baron*, 243 N.C. 502, 91 S.E.2d 236 (1956); *Coker v. Coker*, 224 N.C. 450, 31 S.E.2d 364 (1944); *Harrington v. Buchanan*, 222 N.C. 698, 24 S.E.2d 534 (1943).

The second reason is that Mr. Hamrick had a written power of attorney from defendant providing as follows:

> I hereby nominate J. NAT HAMRICK my attorney as attorney-in-fact for me to execute any and all undertakings, bonds, agreements, covenants to judgment and any other papers written with regard to the hearing on the custody and visitation of my son, Joseph John Hamlin IV, and to guarantee in my name and bind me to comply with the orders of the court, as fully and completely as if I were present in court.

The power of attorney specifically authorizes Mr. Hamrick, among other things, "to guarantee in my name and bind me to comply with the orders of the court, as fully and completely as if I were present in court". The authority granted by a power of attorney will be presumed to continue in the absence of anything showing a revocation of that authority. *See Morris Plan Industrial Bank v. Howell*, 200 N.C. 637, 158 S.E. 203 (1931).

Our decision today should not be interpreted as a precedent that hearings relating to the custody of children, and their visits with their respective parents, should ordinarily be heard when one of the parents is not present, even though the absent parent appears through a duly authorized attorney. Except in unusual cases, both parents should be present at these hearings, to the end that the trial judge might better evaluate the character and fitness of each parent.

In view of the unusual facts in the case *sub judice*, we think the trial judge was justified in hearing the motion in question without the presence of defendant father. John was 14 years of age when the

order appealed from was entered; he will be 16 in September of this year and nothing in the record suggests that he has any physical or mental disability. The record indicates that defendant has been working in Alaska for several years and that his job schedule was the reason for his absence at the hearing. Defendant's present wife and his parents, John's grandparents, were present at the hearing. Furthermore, it appears that numerous hearings had been conducted with respect to John's custody and his visits since the first hearing in 1973, some of which were attended by defendant. Judge Gash's order dated 30 June 1978 (also relating to visitation privileges) recites that the hearing was conducted at that time without defendant being present by agreement of the parties.

The procedure which was employed by Judge Gash is acceptable when applied to the facts of the present case. However, it would be unacceptable if it were applied as a matter of general practice. In those instances where the court is dealing with matters which affect children of tender years or children with special problems, or when compelling circumstances do not otherwise dictate, the presiding judge should require the presence of both parents so that the court is in the position to gauge what disposition is in the best interest of the child.

[2] With respect to the second question raised by plaintiff, she argues that defendant's "motion" filed on 29 June 1979 should have been dismissed by the trial court for failure to comply with Rule 7(b)(1) of our Rules of Civil Procedure and Rule 6 of the General Rules of Practice for the Superior and District Courts.

G.S. § 1A-1, Rule 7(b)(1) provides:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Rule 6 of the General Rules of Practice provides in pertinent part that "[a]ll motions, written or oral, shall state the rule number or numbers under which the movant is proceeding. (*See* Rule 7 of Rules of Civil Procedure.)"

While defendant's motion is inartfully drawn, we agree with the Court of Appeals that it is clear from reading the motion that defendant was asking the court to modify its previous order with respect to John visiting his father during the summer. He gave as his reason a change in circumstances in that defendant had moved to and was working in Alaska. Defendant alleged that he had supported John continuously since the parties separated; that plaintiff not only did not want defendant to see his son but she would not allow John to talk with him on the telephone without her being present.

As to plaintiff's argument that defendant did not comply with Rule 6 of the General Rules of Practice in that he did not state the number of the Rule of Civil Procedure under which he was proceeding, we can perceive no prejudice plaintiff suffered by this omission. *See City of Durham v. Lyckan Development Corp.*, 26 N.C. App. 210, 215 S.E.2d 814, *cert. denied*, 288 N.C. 239, 217 S.E.2d 678 (1975). The philosophy of the General Rules of Practice for the Superior and District Courts is stated in Rule 1 thusly: "They (the Rules) shall at all times be construed and enforced in such manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them."

Since the written motion filed by defendant fully informed plaintiff of the relief he was seeking and his reasons therefor, we hold that the trial court did not err in denying plaintiff's motion to dismiss defendant's motion for failure to comply with the rules of court.

We can appreciate the substantial responsibility placed on district court judges in providing for custody of children. G.S. § 50-13.2(c) clearly authorizes the court to enter an order providing for the child to be taken outside of the state; however, if the order contemplates the return of the child to this state, the judge *may* require the person having custody out of this state to give bond or other security conditioned upon the return of the child to this state in accordance with the order of the court. Judge Gash exercised his option under this statute.

Since the trial judge has the opportunity to see and hear the parties and the witnesses, he is vested with broad discretion in cases involving custody of children. *E.g., Blackley v. Blackley*, 285 N.C. 358, 204 S.E.2d 678 (1974); *see also Paschall v. Paschall*, 21 N.C.

App. 120, 203 S.E.2d 337 (1974); *In Re Custody of Stancil*, 10 N.C. App. 545, 179 S.E.2d 844 (1971). We perceive no abuse of discretion in this case. Unless the contrary appears, it is presumed that judicial acts and duties have been duly and regularly performed. *Lovett v. Stone*, 239 N.C. 206, 79 S.E.2d 479 (1954); *Henderson County v. Johnson*, 230 N.C. 723, 55 S.E.2d 502 (1949).

For the reasons stated, the decision of the Court of Appeals affirming the order appealed from is

Affirmed.

Justice CARLTON dissenting.

I respectfully dissent from the majority opinion because I think it reaches an incorrect result and, in so doing, creates a dangerous precedent in the child custody law of North Carolina. While representation by proxy may be the norm in other civil cases, it should be the exception in child custody actions. I want to dissociate myself completely from new law which will allow lawyers to obtain powers of attorney from errant parents involved in child custody litigation and shuffle off to court for a hearing in which the trial judge will have no opportunity to question and view the demeanor of *both* parents when deciding the child's fate.

The majority determines that, under the facts of this case, representation by proxy is acceptable. The majority first applies the most elementary rules of civil procedure to child custody litigation and concludes that "[t]hose who are familiar with the operation of our courts in North Carolina know that quite frequently a party to our civil action or proceeding does not appear at the trial . . . ." Parties may "quite frequently" fail to appear in ordinary civil litigation, but I think it unheard of in child custody suits. The majority does, however, recognize that the child custody suit is an exception to the "general rule" that no personal appearance is required:

> In those instances where the court is dealing with matters which affect children of tender years or children with special problems, or when compelling circumstances do not otherwise dictate, the presiding judge should require the presence of both parents so that the court is in the position to gauge what disposition is in the best interest of the child.

I agree with this statement but do not believe it goes far enough. In

my opinion, the presence of both parents is almost always necessary for the court to be in "the position to gauge what disposition is in the best interest of the child," and, like the majority, I would require a showing of compelling circumstances before allowing a parent to make an appearance by proxy. My disagreement with the majority is what constitutes "compelling circumstances." In finding that the circumstances of this case justify the physical absence of the father, the majority has, I fear, created a dangerous precedent.

The facts of this case demonstrate my point. While the record discloses that John is neither a child of tender years nor one with special problems, it also discloses facts which, I contend, show that the presence of the father was necessary to determine what disposition was in the *child's* best interests. The father has not personally appeared before the district court since at least 1974, some five years before the 1979 custody hearing. Since his last appearance, the father has remarried, fathered a child, and moved to Alaska, far from the North Carolina towns of Rutherfordton and Roxboro. John has seen very little of his father during that period. In the summer of 1975, the defendant took John to Alaska without the plaintiff-mother's knowledge or permission and, while the child was in Alaska, attempted to withdraw him from his Person County school and enroll him in Alaska's correspondence study program. Additionally, in June of 1978 John wrote a letter to Judge Gash, the presiding judge over both the 1978 and 1979 custody hearings, informing the judge of John's desire not to go to Alaska. John stated that "I want to see my father but *not* in Alaska" (emphasis in original). Given these factors and the great distance which the child will have to travel to see his father, the father's physical presence at the hearing was crucial to a determination of the child's best interests. Without his presence, the district court could not make a reliable assessment of the child's best interests.

This case does not present "compelling circumstances" which would excuse the father's absence. Inconvenience, no matter how great, should rarely rise to the level of "compelling circumstances." If the father were ill or otherwise unable to travel, I would be more inclined to excuse his absence. Moreover, if the matter to be considered at the hearing was a minor change in visitation rights, his absence would be more readily excused. However, the "visitation period" of over six weeks in the case *sub judice* amounted to an award of temporary custody and was nothing less than a major

change for the child and the parents. Under such circumstances, the presence of both parents should be required, and my review of the record discloses no compelling reason to excuse him from appearing.

I also disagree with the majority's holding that plaintiff need not be concerned that defendant may not be bound by action of the court because his attorney has a power of attorney in hand. I think plaintiff has every right to be concerned about this paternal representation by proxy. There is nothing to prevent defendant from revoking the power of attorney at any time. Moreover, those familiar with child custody litigation know that such a document would provide little comfort or assistance to plaintiff should defendant elect to disobey the court order and keep the child with him in Alaska. Should that happen, even with the posted bond and new uniform laws on child custody adopted by an increasing number of states, the burden on plaintiff in seeking the child's return would be enormous. While this burden on plaintiff would be no less had defendant personally appeared and prevailed on his claim, the risk of such a consequence is an additional reason why the trial court should have required defendant's presence so that he could be questioned and his demeanor observed.

I think our statutes pertaining to custody require the presence of both parents at all hearings on custody or visitation. G.S. 50-13.2 (a) (Cum. Supp. 1979) first provides that child custody orders shall be based on that which will "best promote the interest and welfare of the child." This is the "polar star by which the discretion of the courts is to be guided." *In re Lewis*, 88 N.C. 31, 34 (1883); *accord*, *Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E. 2d 73 (1966); 3 R. Lee, *N.C. Family Law* § 224, at 21 (3d ed. 1963). I submit that it is virtually impossible for a trial judge to make this determination as between competing parents without the presence of both parents. Determination of child custody and visitation rights is one of the most difficult tasks faced by a trial judge under the best of circumstances. What is in a child's best "interest and welfare" involves many factors. A few, such as adequacy of room and board, are capable of mechanical determination. Most, such as determination of a parent's attitude and demeanor, are intangible and capable of determination by the trial judge only with the closest possible observation of the parties and the child. Clearly, such determinations cannot be made by the trial court when one of the parents is not in

court. I think it a clear abuse of discretion for a trial court to take an action such as that disclosed by this record without the parent in court. The majority finds some consolation in the failure of the mother to subpoena the father in this case. The grave decision of child custody should not, in my opinion, be so seriously affected by procedural niceties.

Additionally, the record indicates that plaintiff may not have had an opportunity to subpoena defendant. Defendant's notice of motion of 29 June 1979 stated that defendant would appear at the hearing. Although the record does not disclose when plaintiff learned that defendant would not appear, the power of attorney was not filed with the court until 4 p.m. on 11 July 1979, the day of the hearing.

Finally, I would find that the trial court has flagrantly violated another portion of G.S. 50-13.2(a). That portion of the statute provides, "An order awarding custody must contain findings of fact which support the determination by the judge of the best interest of the child." There is not the *first* finding of fact in the order of 11 July 1979 to support the conclusion that "the best interests of the child would be served by making provision for visitation during the remainder of his minority to and with his father." While the statute refers to a custody order and we are here concerned with a visitation order, the right to visitation for a six-week period is tantamount to temporary custody and the statute is clearly applicable.

I, of course, do not know what is in the "best interest and welfare" of this child. The trial court is in a far superior position to make such a determination because it can personally observe the witnesses and the parties. Here, I simply feel that the trial court abused its discretion in proceeding without the father and erred in failing to make the required findings of fact.

The necessity for the findings of fact and the presence of both parents for observation in determining what is in "the best interest and welfare" of the child is dramatized by reviewing some facts disclosed by the record:

— In the original custody order of 31 August 1973 the trial court found that while there was testimony about the "qualifications" of the paternal grandmother, there was "very little concerning the father's fitness and

qualifications."

— That, in spite of the liberal visitation privileges granted defendant in the 31 August 1973 order, from that date until 26 June 1974, visits took place only for seven days in December of 1973 and one day in March of 1974.

— That defendant, in June 1975, removed the child from the state during his summer visit and took him to Alaska without notice to the mother and was subsequently indicted for violation of G.S. 14-322.1 by a grand jury in Person County.

— That during the time the child was in Alaska, defendant attempted to withdraw his son from the North Carolina school system and enroll him in a correspondence school in Alaska.

In light of these earlier findings *and* the complete *lack* of any findings in the 11 July 1979 order to support the conclusion reached, I find serious error.

For the reasons stated, I vote to reverse the Court of Appeals.

Justice HUSKINS joins in this dissent.

STATE OF NORTH CAROLINA v. WILLIAM EDWARD HAMLETTE

No. 3

(Filed 7 April 1981)

1. Criminal Law § 73.4— victim's statements to police — admissiblity as res gestae

In a first degree murder prosecution the trial court did not err in permitting two police officers to relate the victim's statements made to them within three to thirteen minutes of the shooting since the victim, when he made the statements, was suffering from three gunshot wounds, was bleeding from the mouth and chest, was at the crime scene, and at the time of the second statement was being prepared by ambulance attendants for the trip to the hospital; such circumstances supported the trustworthiness of the statements made while the victim was under the immediate influence of the act; and the statements did not in any way

lose their spontaneous character because they were in response to questions such as: "What is wrong?" "Who shot you?" "How did they leave?"

2. Homicide § 16— dying declarations — requirements for admissiblity

Dying declarations by the person whose death is at issue are admissible in N. C. provided that, at the time they were made, the declarant was in actual danger of death; he had full apprehension of the danger; death did in fact ensue; and defendant, if living, would be a competent witness to testify to the matter. G.S. 8-51.1.

3. Homicide § 16.1— dying declarations — declarant's full apprehension of his danger

In a prosecution of defendant for first degree murder, the trial court properly admitted testimony by a police officer about a communication to him by the homicide victim approximately thirty minutes after the shooting at a time when doctors had just finished hooking the victim up to a blood transfusion in preparation for surgery for the gunshot wounds, and properly excluded as a dying declaration a statement made by the victim to a girlfriend four days after the shooting at a time when the circumstances did not indicate that death was obviously imminent and there was no indication that the victim believed he was near death; furthermore, it was impossible for the court on appeal to determine if statements made to another of the victim's girlfriends were dying declarations.

4. Criminal Law § 35— offense committed by another — evidence improperly excluded

In a prosecution for first degree murder where defendant contended that it was not he but one of the State's witnesses who shot deceased, the trial court erred in excluding evidence which pointed directly to the witness as the guilty party, including evidence that the witness was also arrested and charged with the shooting; the victim of the shooting and the witness were rivals for the affections of a named female; the witness was at the house of the woman on the day of the shooting and had been there a number of times in the past; on the Monday before the shooting on Thursday defendant drove the witness to the woman's house and the witness then ran out of the house with the murder victim chasing him with what appeared to be a shotgun; the witness came back to defendant's house fifteen minutes after the shooting in question and five minutes after they had parted company and told defendant to keep quiet about the shooting and "he would not say anything" and "everything was under control"; and the witness had at one time lied to police officers in telling them that he did not know where the gun used in the shooting was located.

5. Criminal Law § 135.4— sentencing phase — prior conviction of felony

In a first degree murder case evidence was sufficient for the jury to find in the sentencing phase of the trial the aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person, since defendant had testified in the guilt phase that he had been convicted of armed robbery in Virginia five years prior to the shooting in question, and he further stated that he had served about two years in Virginia prisons and had been on parole about ten months at the time of the shooting.

6. Criminal Law § 135.4— sentencing phase — prior conviction of felony involving violence to person

When the State establishes that defendant was convicted of a felony which involved the use or threat of violence to the person and the conduct upon which this conviction was based occurred prior to the event out of which the capital offense arose, the aggravating circumstance listed in G.S. 15A-2000(e)(3) must be submitted to the jury, and there was thus no merit to defendant's contention that the State must in fact show him to have acted violently in the previous felony rather than merely showing a previous felony involving violence.

7. Criminal Law § 135.4— sentencing phase — instruction on heinous murder improper

In a first degree murder case the trial court, during sentencing phase of the trial, erred in instructing the jury to consider as an aggravating circumstance whether the murder was especially heinous, since the evidence tended to show that defendant, after riding around and drinking beer most of the evening, saw the victim and shot him three times from behind without any established motive and then fled; the victim lingered for twelve days and then died from the gunshot wounds; and this was heinous but not "especially heinous" within the meaning of that term as used in G.S. 15A-2000(e)(9).

APPEAL by defendant from *Britt, J.*, 16 June 1980 Criminal Session, PERSON Superior Court.

Upon plea of not guilty, defendant was tried upon a bill of indictment charging him with murder in the first degree of Willard Lawrence Bailey.

On 21 February 1980 in Roxboro, North Carolina, Bailey was shot three times as he talked on a public telephone in the parking lot of a store known as Convenience Corner. Pricilla Betterton, an off-duty policewoman, was in her car in the parking lot, heard the shots and saw Bailey run by her into the Convenience Corner. Betterton got out of her car as Bailey emerged from the store. Over objection, at trial, Betterton was allowed to testify that Bailey told her William Hamlette shot him and that Hamlette left with Earl Torain. Similar statements made to another officer a few minutes later were also admitted in evidence over defendant's objection.

Bailey was taken to Person Memorial Hospital for emergency surgery. He was moved to N. C. Memorial Hospital in Chapel Hill on 25 February 1980. Bailey lingered twelve days after the shooting and died. The trial court admitted several statements made by Bailey to others during his hospitalization which identified defendant as his assailant.

Earl Torain testified for the State and identified defendant as

the perpetrator of the crime and described how the shooting took place. Defendant denied shooting Bailey and asserted Torain shot him.

The jury found defendant guilty of first degree murder. In the sentencing phase, the jury found two aggravating circumstances: (1) defendant had been previously convicted of a felony involving the threat or use of violence to the person and (2) the murder was especially heinous. The jury found no mitigating circumstances and recommended a penalty of death. Judgment was entered upon the jury recommendation and defendant appealed.

Rufus L. Edmisten, Attorney General, by Thomas F. Moffitt, Assistant Attorney General, for the State.

James E. Ramsey and Mark Galloway, attorneys for defendant appellant.

HUSKINS, Justice.

Defendant assigns three errors to the guilt determination phase and eight errors to the sentence determination phase of the trial. We shall address all errors in the guilt phase. In view of our disposition in that phase requiring a new trial, we discuss only two of the errors assigned in the sentencing phase.

Guilt Phase

[1] In his first assignment of error, defendant contends the trial court erred in permitting police officers Pricilla Betterton and Steve Clayton to relate the victim's statements made to them within three to thirteen minutes of the shooting. Defendant argues the statements lacked the necessary spontaneity to qualify as part of the *res gestae*. We disagree and uphold the trial court's admission of the spontaneous utterances as part of the *res gestae*.

At approximately 11 p.m. on the night of 21 February 1980, Betterton was sitting in her car in the Convenience Corner parking lot. She was off duty but in uniform. She heard four to six gunshots and saw Bailey run by her car into the convenience store and say something to the attendant. The attendant picked up the phone and appeared to make a phone call. Before the attendant replaced the receiver, Bailey came back outside. Betterton approached him and saw he had been shot. Blood was coming from his mouth and the front of his shirt. She first asked him to sit down and he did. She

asked him was was wrong and who shot him. He replied, "William Hamlette." This occurred within three minutes after the gunshots were fired. She broke off the conversation and went into the store to ascertain if an ambulance and the police had been called. She picked up a brown paper bag upon which to make notes and returned to Bailey. No more than one minute had passed. She asked him a second time who shot him and he again responded, "William Hamlette." She asked how he left and Bailey said he left with Earl Torain in a 1965 Mercury. She asked if they had an argument and Bailey responded that he was hurting and wanted an ambulance.

Within two minutes an ambulance and Officer Clayton arrived. This was ten minutes after the shots were fired. Clayton received the call on the shooting at 11:03 and arrived on the scene at 11:08. He talked with Betterton for two minutes and then talked to Bailey as the ambulance attendants prepared him for the trip to the hospital. Clayton observed blood running out of his mouth and a bloodstain on his shirt. In response to Clayton's questions, Bailey stated he had been shot by William Hamlette; Earl Torain was with Hamlette; Hamlette and Torain left in a 1965 Mercury headed north toward South Boston; the shooting had occurred at the telephone booth, and "he could see the people when the shooting occurred."

The trial court conducted *voir dire* examinations of both Betterton and Clayton and concluded statements made to them by Bailey were admissible under the *res gestae* rule. Defendant argues the statements were hearsay narratives of the shooting, a prior event, and were not made contemporaneously with the event or with enough spontaneity to qualify as admissible *res gestae* statements.

Statements are admissible as spontaneous utterances when made by a participant or bystander in response to a startling or unusual incident whereby the declarant is without opportunity to reflect or fabricate. *State v. Bowden*, 290 N.C. 702, 228 S.E.2d 414 (1976); *see generally*, 1 Stansbury's N. C. Evidence § 164 (Brandis rev. 1973); McCormick on Evidence § 297 (1972). "[S]uch statements derive their reliability from their spontaneity when (1) there has been no sufficient opportunity to plan false or misleading statements, (2) they are impressions of immediate events and (3) they are uttered while the mind is under the influence of the activity of the surroundings." *State v. Deck*, 285 N.C. 209, 214, 203 S.E.2d 830, 833-34 (1974); *see also State v. Johnson*, 294 N.C. 288, 239 S.E.2d 829

(1978); *State v. Cox*, 271 N.C. 579, 157 S.E.2d 142 (1967). It is this *spontaneity* and not being *part* of the incident which makes it relevant evidence. For example, where the utterance is made by an observer and not a participant, the statement may be admissible. *See, e.g., State v. Feaganes*, 272 N.C. 246, 158 S.E.2d 89 (1967). Also, statements made after and therefore not part of the event are admissible if they are spontaneous utterances. *See, e.g., State v. Spivey*, 151 N.C. 676, 65 S.E. 995 (1909); Annot., 4 A.L.R.3d 149 (1965).

In the instant case, only three minutes passed between the witness Betterton's hearing of the shots and Bailey's statement that defendant shot him. Within thirteen minutes after the shooting, Bailey told Clayton that defendant had shot him. When he made these statements, he was suffering from three gunshot wounds, was bleeding from the mouth and chest, was at the crime scene and, at the time of the second statement, was being prepared by ambulance attendants for the trip to the hospital. These circumstances support the trustworthiness of these statements made while the victim was under the immediate influence of the act. The statements are admissible spontaneous utterances.

The statements do not in any way lose their spontaneous character because they were in response to questions such as: "What is wrong?" "Who shot you?" "How did they leave?" *See, e.g., State v. Johnson, supra* ("Who shot you?"); *State v. Cousin*, 291 N.C. 413, 230 S.E.2d 518 (1976) ("What happened?"). This was not a situation wherein the declarant had time to reflect and fabricate untruthful answers. Rather, the responses were excited reactions to a startling event.

In his second assignment of error, defendant argues the trial court erred in admitting certain hearsay testimony to the effect that the victim identified defendant as the man who shot him. This questioned testimony was admitted into evidence as dying declarations of the victim.

Under the dying declaration hearsay exception, the State sought to offer the testimony of three witnesses that the victim identified defendant as the person who shot him. The testimony of Linda Walton to this effect was excluded while that of Debbie Moss and police officer Melvin Ashley was admitted.

[2] Dying declarations by the person whose death is at issue have

long been admissible in North Carolina provided: (1) at the time they were made the declarant was in actual danger of death; (2) he had full apprehension of the danger; (3) death did in fact ensue; and (4) defendant, if living, would be a competent witness to testify to the matter. *State v. Stevens*, 295 N.C. 21, 28, 243 S.E.2d 771, 776 (1978); *State v. Crump*, 277 N.C. 573, 178 S.E.2d 366 (1971); *State v. Poll*, 8 N.C. 442, 9 Am. Dec. 655 (1821); *see generally* 1 Stansbury's N. C. Evidence § 146 (Brandis rev. 1973). The General Assembly codified the essentials of these requirements in G.S. 8-51.1 which reads:

> The dying declarations of a deceased person regarding the cause or circumstances of his death shall be admissible in evidence in all civil and criminal trials and other proceedings before courts, administrative agencies and other tribunals to the same extent and for the same purposes that they might have been admissible had the deceased survived and been sworn as a witness in the proceedings, subject to proof that:
>
> (1) At the time of the making of such declaration the deceased was conscious of approaching death and believed there was no hope of recovery;
>
> (2) Such declaration was voluntarily made.

The party seeking admission of the out-of-court statement need not show that the declarant stated he had given up all hope of living or considered himself to be in the throes of death. All that must be shown is that the declarant believes he is going to die. *State v. Stevens, supra; State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978). This belief is best shown by his express communication to this effect. *State v. Lester, supra.* However, it is not necessary that declarant personally express his belief that he has no chance of recovery. This may be shown by the circumstances. *State v. Brown*, 263 N.C. 327, 139 S.E.2d 609 (1965); *State v. Franklin*, 192 N.C. 723, 135 S.E. 859 (1926). The rationale behind this exception to the hearsay rule is the general trustworthiness of statements made under such circumstances. The ordinary motives for falsehood are absent and there are powerful considerations which would impel the dying declarant to speak the truth, perhaps more so than does a solemn oath in court. *State v. Stevens, supra; State v. Lester, supra.* The admissibility of these declarations is a decision for the trial judge, and appel-

late review is limited to the narrow question of whether there is any evidence tending to show the prerequisites of admissibility. *State v. Stevens*, *supra*, 295 N.C. at 28-29, 243 S.E.2d at 776; *see also State v. Bowden*, 290 N.C. 702, 228 S.E.2d 414 (1976). With these rules of evidence in mind, we turn to the hearsay testimony of the three witnesses which the State sought to offer as dying declarations.

[3] The only question as to admissibility in all three situations is whether the declarant had full apprehension of his danger. Clearly, the other prerequisites to competency contained in G.S. 8-51.1 and our case law were met. For example, defendant does not contest the competency of the declarant to testify had he lived nor the fact that death was impending even though the declarant lingered twelve days before finally dying. We address the declarations in the order in which the declarant made them in the last days of his life.

Melvin Ashley, a police officer, was called as a defense witness. Upon cross-examination, Ashley testified about a communication to him by Bailey at the Person County Hospital approximately thirty minutes after the shooting. Doctors had just finished hooking Bailey up to a blood transfusion. He was prepared for surgery for three gunshot wounds which had caused substantial pain and hemorrhaging in the upper body and mouth. No one told Bailey he was dying and Bailey did not indicate he had such a belief. At this point, Ashley asked Bailey who shot him and Bailey identified defendant as the man who shot him. The trial court conducted a *voir dire* and concluded the statement was admissible as a dying declaration. The evidence supports the ruling of the trial court. The wounds, the time and the surroundings were such that a man could justifiably believe his death was imminent and believe he had no hope of recovery. The fact that Bailey lingered for several days does not render this statement inadmissible. In *State v. Franklin*, 192 N.C. 723, 135 S.E. 859 (1926), this Court upheld the admission, as a dying declaration, of a statement made under similar circumstances. In the *Franklin* case, "at the time deceased made the declarations offered as evidence, he had been shot in the abdomen and was suffering intense pain. One of the declarations was made to a neighbor who came to his home immediately upon learning that deceased had been shot; another was made to the physician and surgeon at the hospital to which deceased was taken for an operation, and just before the operation was performed; and the other was made to a brother of deceased, on Monday morning after deceased had been fatally

wounded on the preceding Sunday afternoon." 192 N.C. at 724, 135 S.E. at 860. The declarant's statements were admitted as dying declarations even though the declarant did not die for three days. The statement to Ashley in the present case is no different from the admitted statement in the *Franklin* case to the hospital physician just after the shooting and just before an operation was performed. The statement may also have been admissible as a spontaneous utterance in view of the circumstances and the short time lapse from the actual shooting to the time the statement was made. Within the thirty minutes, declarant could hardly have fabricated the identity of his assailant. *See State v. Cousin, supra; State v. Bowden, supra.*

The next statement the State sought to offer as a dying declaration was made by Bailey to a girlfriend, Linda Walton, at 11:30 on the morning of Bailey's first full day in N. C. Memorial Hospital in Chapel Hill. This was Tuesday, 26 February 1980, four days after the shooting. At this time, Bailey was on a respirator and receiving intervenous transfusions. He had a urine bag. A tube ran from his nose into his stomach. He could not talk but did communicate by writing, which he was allowed to do at his own insistence. He wrote, "I came here last night." Walton acknowledged that she knew this. Bailey then wrote the name "William Hamlette." Walton asked if Hamlette was the one who shot him and he nodded his head yes. He then held up three fingers and wrote, "He shot me three times from behind." Walton testified on *voir dire* cross-examination about Bailey's condition when he made these incriminating declarations as follows:

> When I saw him first was on the Tuesday. He could not smile or talk because of the respirator in his mouth. I thought from his reaction that he was glad to see me. He tried to move and speak but could not. In my opinion he could have spoken were it not for the respirator. His handwriting was legible even on a paper towel. There was nothing wrong with his handwriting, and nothing wrong with his looks or the look in his eye. Nothing indicated to me that death was imminent. He did not say he thought he was dying. He wrote, "When I get out of here, I want you to pick me up," and I said "okay."

The trial court correctly concluded the statements to Linda Walton were not admissible as dying declarations. There is no indication Bailey believed he was near death. Nor do the circumstances sur-

rounding this statement indicate death was obviously imminent. The statements would, however, be admissible to corroborate Bailey's dying declarations or spontaneous utterances identifying his assailant. *State v. Harding*, 291 N.C. 223, 230, 230 S.E.2d 397, 401 (1976).

The final statements the State sought to offer as dying declarations were those made to Debbie Moss, another of Bailey's girlfriends. Linda Walton visited Bailey in the hospital only twice before he died — the first time on Bailey's first day at N. C. Memorial, Tuesday, 26 February 1980, and the second time on Friday, 29 February 1980. Moss, on the other hand, visited Bailey several times during the twelve days before he died. She visited him at both Person Memorial Hospital and N. C. Memorial Hospital. It is not clear from the record exactly how many times or when Bailey told her William Hamlette shot him. It was clearly more than once and the last was within two days of his death. It appears that one time was "when he first got over there" — that is, when he was transferred to N.C. Memorial. He could not talk but wrote the initials "W. H." which he indicated by nodding his head meant William Hamlette. (Interestingly, at no point does Moss's testimony tie up Hamlette as the assailant.) At the time Bailey made these statements, he was in the intensive care unit with "a lot of machines hooked up to him." On one visit, Moss told Bailey she was pregnant, and he wrote on a piece of paper with a pen, "I don't know yet to have it or not." She further testified that "during all of the visits in Chapel Hill he wrote on my hand once and he wrote on a piece of paper once the message that I just testified about." A reasonable interpretation of his statement concerning the child, allegedly his child, being carried by Debbie Moss is that he was unsure he would live to enjoy and support it.

The trial court concluded these were dying declarations made under the apprehension of death. The testimony of Moss in the record before us is unclear. We are unable to determine whether these statements were dying declarations. In view of the remand for a new trial on another ground, we will not pass upon the admissibility of the declarations to Moss by the victim. Upon retrial of the case if Moss is again examined, the trial court must make a ruling on the admissibility of this evidence based upon the rules of evidence set forth in this case and in our other decisions. We do, however, note that even if the statements are inadmissible as dying declarations,

they may be competent to corroborate the dying declarations and spontaneous utterances of the deceased to others. *See State v. Harding, supra.*

[4] Defendant's third and final assignment of error in the guilt phase deals with the exclusion of evidence that the offense was committed by another. We hold the evidence was erroneously excluded.

Defendant testified it was not he but the State's witness Earl Torain who shot the deceased. Defendant testified he was driving his car north on U.S. 501 with Torain in the passenger seat and Torain directed him to turn around and enter the Convenience Corner parking lot. Defendant did so without any knowledge of Torain's intention to shoot someone. Defendant testified Torain opened fire on Bailey without any warning.

Defendant claims evidence excluded by the trial court would show Bailey and Torain were rivals for the affections of Debbie Moss which would therefore establish a motive for the shooting. The excluded evidence is summarized as follows:

1. Earl Torain was also arrested and charged with the shooting.

2. Earl Torain was at the house of Debbie Moss on the day of the shooting and had been there a number of times in the past. He came to her home about twice a week. Moss had been out to eat with Torain once before 21 February 1980 and several times since the shooting.

3. Defendant was allowed to testify that on the Monday before the shooting on Thursday, he drove Earl Torain to Debbie Moss's house. The trial court then excluded testimony that Torain ran out of the house with Bailey chasing him with what appeared to be a shotgun.

4. Torain came back to defendant's house fifteen minutes after the shooting and five minutes after they had parted company and told defendant to keep quiet about the shooting and "he would not say anything if I would not say anything" and "everything was under control."

5. Torain had at one time lied to police officers in telling them he did not know where the gun used in the shooting was located.

Defendant maintains this evidence corroborates his version of the shooting and establishes a clear motive for Torain to shoot Bailey.

The State rebuts defendant's arguments on each evidentiary item as follows:

1. The only reason a warrant was issued for Torain was because he was present at the scene with the person who allegedly fired the shots. There was no other evidence implicating Torain and the charges were, therefore, dropped.

2. Debbie Moss testified that Earl Torain came to her home to visit her mother.

3. This inquiry was based on the love-triangle theory which had already been discredited during the testimony of Debbie Moss. Such evidence was irrelevant.

4. Torain denied going to defendant's apartment after the shooting and the testimony by defendant as to what defendant allegedly said at the apartment was self-serving hearsay.

5. Any error in excluding testimony by the officer that Torain had not told him about the location of the gun was harmless since Torain had already testified he told the officers he did not know where the murder weapon was and later changed his mind and brought the weapon to the officers.

A defendant may introduce evidence tending to show that someone other than defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible. *State v. Stanfield*, 292 N.C. 357, 233 S.E.2d 574 (1977); *State v. Jenkins*, 292 N.C. 179, 232 S.E.2d 648 (1977); *State v. Shinn*, 238 N.C. 535, 78 S.E.2d 388 (1953); *State v. Smith*, 211 N.C. 93, 189 S.E. 175 (1937). "[T]he admissibility of another person's guilt now seems to be governed, as it should be, by the general principle of relevancy under which the evidence will be admitted unless in the particular case it appears to have no substantial probative value." 1 Stansbury's N. C. Evidence § 93 at 302-03 (Brandis rev. 1973).

Here, the evidence in question pointing to Torain should have been admitted. It was all relevant as direct or corroborative evi-

dence pointing directly to Torain as the guilty party. This evidence went beyond inference or conjecture. *State v. Jenkins, supra*, provides a ready contrast to the present case. In *Jenkins*, the defendant was charged with an armed robbery which occurred on 8 November 1975. The prosecuting witness was not permitted to testify that he recalled an earlier incident in the spring or summer of 1975 involving his refusal to sell beer to two intoxicated individuals. The defendant contended this was evidence that other persons might have a motive to rob the prosecuting witness. We held there was no error in the exclusion because the evidence did not point directly to another. In the case at hand, the excluded evidence does point directly to Torain. Its exclusion was error prejudicial to defendant which entitles him to a new trial.

Sentencing Phase

In view of our disposition of matters in the guilt phase, we will discuss only those assigned errors in the sentencing phase which may arise upon retrial of the case and which defendant contends are not controlled by our previous decisions on capital sentencing. *See State v. Barfield*, 298 N.C. 360, 259 S.E.2d 510 (1979), *cert. den.*, 448 U.S. 907, 65 L.Ed.2d 1137, 100 S.Ct. 3050 (1980); *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. den.*, 446 U.S. 941, 64 L.Ed.2d 796, 100 S.Ct. 2165 (1980); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979).

Defendant contends the trial court erred in instructing the jury to consider defendant's prior conviction of armed robbery as an aggravating circumstance because (1) such instruction was not authorized under the facts of the case and (2) such an instruction does not require the jury to consider defendant's past with care and deliberation when deciding on punishment. Defendant's arguments on this aggravating circumstance are without merit.

[5] Under the provisions of G.S. 15A-2000(e)(3), the jury may find as an aggravating circumstance that the "defendant had been previously convicted of a felony involving the use or threat of violence to the person."

> This section requires that there be evidence that (1) defendant had been convicted of a felony, that (2) the felony for which he was convicted involved the "use or threat of violence to the person," and that (3) the conduct

> upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose. If there is no such evidence, it would be improper for the court to instruct the jury on this subsection.

State v. Goodman, supra, 298 N.C. at 22, 257 S.E.2d at 583.

There is substantial evidence supporting this aggravating circumstance. Defendant testified in the guilt phase he had been convicted of armed robbery in Virginia five years prior to the shooting of Bailey. He further stated he had served about two years in Virginia prisons and had been on parole about ten months at the time of the shooting. *Armed* robbery is a felonious crime which involves "use or threat of violence to the person."

[6] Defendant's second argument attacking an instruction on this aggravating circumstance is that G.S. 15A-2000(e)(3) omits consideration of the actual nature of defendant's acts and the extent of his involvement in the previous felony "involving the use or threat of violence to the person." Defendant contends the State must in fact show him to have acted violently in the previous felony rather than merely showing a previous felony involving violence. Defendant cites as examples the conviction of the driver as opposed to the gunman or the accessory as opposed to the principal in felonies involving the threat or use of violence. The record of this case contains no evidence of the extent of defendant's participation or involvement in the felonious armed robbery over five years ago in Virginia. He contends this deprives him of the right to have the jury give careful and deliberate consideration to his past conduct when deciding on punishment. *See Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973, 98 S.Ct. 2954 (1978); *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859, 96 S.Ct. 2909 (1976).

There is no merit in these arguments. All the State need prove to have this aggravating circumstance submitted to the jury are the evidentiary matters explained in *Goodman* and set forth in the statute. When the State establishes that defendant was (1) convicted of a felony which (2) involved the "use or threat of violence to the person" and (3) the conduct upon which this conviction was based occurred prior to the events out of which the capital offense arose, the aggravating circumstance listed in G.S. 15A-2000(e)(3) must be submitted to the jury. *State v. Silhan*, 302 N.C. 223, 275

S.E.2d 450 (1981). On its face, armed robbery involves the threat or use of violence to the person. Defendant may, of course, present evidence, if he has any, in mitigation of his involvement in the previous felony which triggers this aggravating circumstance.

[7] Defendant also contends the trial court erred in instructing the jury to consider as an aggravating circumstance whether the murder was especially heinous. *See* G.S. 15A-2000 (e) (9). Defendant argues the crime was not especially heinous, and we agree.

The instruction on "especially heinous" was in conformity with definitions and statements of law approved in *State v. Goodman*, 298 N.C. 1, 25-26, 257 S.E.2d 569, 585 (1979), and *State v. Johnson*, 298 N.C. 47, 81-82, 257 S.E.2d 597, 621 (1979). However, it was improper to submit this aggravating circumstance for jury consideration because the evidence is insufficient to support a finding that this was an especially heinous capital felony. In *Goodman*, we adopted the view that this aggravating circumstance does not arise unless the murder is a "conscienceless or pitiless crime which is unnecessarily tortuous to the victim." In doing so, we limited the application of this circumstance so it would not become "a 'catchall' provision which can always be employed in cases where there is no evidence of other aggravating circumstances." 298 N.C. at 25, 257 S.E.2d at 585.

According to the evidence in the present case, defendant, after riding around and drinking beer most of the evening, saw the victim and shot him three times from behind without any established motive and then fled. The victim lingered for twelve days and died from the gunshot wounds. This was heinous but not "especially heinous" within the meaning of that term as used in the statute. In comparison with other capital cases we have decided, it was not unnecessarily tortuous or outrageously wanton or vile. *Contrast State v. Goodman, supra*, and *State v. Johnson, supra, with State v. Oliver and Moore*, 302 N.C. 28, 274 S.E.2d 183 (1981). This aggravating circumstance should not have been submitted to the jury.

For the errors noted, defendant is entitled to a

New trial.

STATE OF NORTH CAROLINA v. WILLIE DANIEL PILKINGTON

No. 65

(Filed 7 April 1981)

1. **Constitutional Law § 28; Criminal Law § 86.2— cross-examination of defendant — prior convictions — reference to criminal record of another person**

In this prosecution for taking indecent liberties with a child under 16, defendant was not denied a fair trial in violation of due process because the prosecutor cross-examined him concerning convictions of driving under the influence and reckless driving based upon the record of another person who had the same first and last names as defendant where the prosecutor relied upon the "indexes to criminal actions" which were kept in the office of the clerk of superior court; the prosecutor did not act in bad faith but had sufficient information upon which to base her questions on cross-examination; pursuant to pretrial discovery, defendant had notice for at least seven weeks prior to the trial that the State had criminal records indicating that a person with the same name as defendant was under a suspended sentence as a result of a plea of guilty to a charge of reckless driving which had been reduced from an original charge of driving under the influence; and neither defendant nor defense counsel attempted, either prior to or at the trial, to correct the prosecutor's erroneous reliance on the records of another person.

2. **Criminal Law § 86.2— cross-examination of defendant about prior convictions**

The Supreme Court will adhere to the existing rule governing cross-examination of a defendant as to prior convictions.

Justice EXUM dissenting.

Justice CARLTON joins in the dissent.

ON discretionary review to review the decision of the Court of Appeals, reported pursuant to Rule 30(e), affirming defendant's conviction before *Godwin, J.*, at the 11 June 1979 Session of WAKE Superior Court and affirming the denial of defendant's motion for appropriate relief by *McLelland, J.*, on 9 November 1979.

Defendant was charged in a bill of indictment, proper in form, with taking and attempting to take indecent liberties with a child under sixteen.

At trial the State's evidence tended to show: On 8 October 1978, Roy E. Provost, aged 11, was fishing at a pond near his home. He testified that defendant came and sat next to him. Defendant began talking with the child and at one point asked him if he wanted to earn ten dollars by engaging in a homosexual act. Subse-

quent to this conversation, defendant grabbed Provost by the thigh, attempted to touch his private parts, and did so at least once. When he was able to get away, Provost ran home. On the way, he saw the license plate number of defendant's car and wrote it down when he returned to his home. The child's mother called the police, and, after they arrived, he accompanied them to the pond where he identified defendant's car. A policeman testified in corroboration of Roy's testimony. Defendant was arrested in the vicinity of the pond.

Defendant was the sole witness for the defense. He testified that he was visiting his sister who lived near the pond where the crime allegedly occurred. His sister was not at home when he arrived so he went to the pond to wait for her. Although he spoke to several children at the pond, he denied seeing or talking with Roy.

The jury found defendant guilty, and he was sentenced to four years in prison.

After filing a proper notice of appeal, defendant filed a motion for appropriate relief pursuant to G.S. 15A-1414. By this motion, defendant averred, among other things, that the assistant district attorney's inquiry into his alleged prior convictions was improper because the assistant district attorney based her questions on a criminal record which was not that of defendant. Judge McLelland denied defendant's motion, and defendant appealed.

A unanimous panel of the Court of Appeals upheld defendant's conviction and the denial of the motion for appropriate relief. The court, in an unpublished opinion by Chief Judge Morris, held that since the assistant district attorney had acted on information and in good faith, no error had been committed. We allowed defendant's petition for discretionary review on 7 October 1980.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, and Rebecca R. Bevacqua, Assistant Attorney General, for the State.

Smith Moore Smith Schell & Hunter, by McNeil Smith and Stephen W. Earp and John Boddie for defendant.

BRANCH, Chief Justice.

[1] By assignments of error four and five, defendant contends that the trial court erred in denying his motion for appropriate relief on grounds that he was denied a fair trial and deprived of his constitu-

tional right to due process. Defendant maintains that the trial judge erred in permitting the prosecutor to cross-examine him concerning prior convictions based on an erroneous criminal record.

The portion of the cross-examination pertinent to the question here presented is as follows:

Q. I believe you testified on direct examination that you had lived in both Johnston County and Wake County before, is that correct?

A. Right.

Q. Okay. Have you ever lived at 304 Linden Avenue in Raleigh?

A. Where again?

Q. 304 Linden Avenue in Raleigh?

A. No.

Q. Ever lived at 814 Wake Forest Road in Raleigh?

A. No.

Q. Have you ever lived at 3714 Old Garner Road?

A. No.

Q. Could you tell me the places you have lived in Raleigh?

A. Dacian Road and Cameron Court Apartments. Then Hillsborough and Morgan.

Q. Okay. Did you ever live at 324 North Moore Street in Clayton, North Carolina?

A. Yes, I did.

Q. And that is in Johnston County, isn't it?

A. Right.

Q. Okay. And I believe that you testified on direct examination that you had been convicted in Johnston County of an offense, is that correct?

A. Yes.

Q. And what offense was that offense that you had had and convicted?

A. Detaining an officer in the line of duty.

Q. Is that resisting, obstructing and delaying, is that the nature of the charge?

A. Repeat that again.

Q. Resisting, obstructing and delaying a law enforcement officer in the carrying out of his duties, is that the charge?

A. I wouldn't consider it so but I don't know. That is what is on the record.

Q. When was that conviction, sir?

A. I believe it was '74.

Q. And what, if anything, else besides that have you been convicted of or pled guilty to?

A. Nothing other than traffic violations.

Q. Okay. Isn't it, isn't it a fact that at the present time you are under a suspended sentence?

MR. COOK: Objection.

COURT: The objection is sustained. You are to give no consideration to an unanswered question. An answer to the question is evidence.

Q. Mr. Pilkington, have you ever been convicted of driving under the influence?

A. No. I don't drink.

Q. And have you ever been convicted of ____

MR. COOK: Objection.

COURT: Overruled.

EXCEPTION.

DEFENDANT'S EXCEPTION NO. 8

Q. Have you ever been convicted of reckless driving?

A. No.

In support of his motion for appropriate relief, defendant offered evidence tending to show that the above-quoted cross-examination concerning convictions of driving under the influence and reckless driving was based upon the record of another person named Willie Pilkington and that during the cross-examination, the prosecutor referred to and appeared to read from a document of some kind.

In opposition to the motion, the State offered the affidavit of Linda C. Mobley, the assistant district attorney assigned to the case. She averred that pursuant to a request for voluntary discovery she met defendant's attorney, Mr. Rodney Cook, on 22 March 1979 and without any court order orally provided him with information requested by him. She specifically noted that she had furnished information indicating that Willie Pilkington had been convicted of and pled guilty to several traffic offenses including a "reckless driving" charge which had been reduced from an original charge of driving under the influence. She further informed defense counsel that according to information furnished her, defendant was at that time under a suspended sentence as a result of his plea of guilty to the "reckless driving" charge. The affidavit also stated that prior to trial, and over his counsel's objection, defendant had personally talked with her and at no time before trial did Mr. Cook or defendant inform the prosecutor that the information furnished was incorrect. After trial she and Mr. Cook discussed the accuracy of the records, and further investigation disclosed that defendant and the Willie Pilkington charged with driving under the influence had different birthdays. This information did not appear on the disposition record in the clerk's office but only appeared on the original citations for the traffic offenses.

Defendant offered no evidence at the hearing to refute Ms. Mobley's affidavit.

At the conclusion of the hearing, Judge McLelland found facts consistent with those set out above and further concluded (1) that the State had "a reasonable basis for believing the charges and convictions were in fact those of defendant," (2) that the questions asked on cross-examination were asked in good faith and that defendant was not prejudiced by the questions, and (3) that defendant

"received a fair trial on these matters." The court thereupon denied defendant's motion for appropriate relief for a new trial.

The rule in this jurisdiction is that, for purposes of impeachment, a witness, including a defendant in a criminal case, is subject to cross-examination concerning his convictions of crimes. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). Likewise, a defendant who elects to testify may be questioned concerning specific acts of criminal and degrading conduct. In both instances, the State is bound by the witness's answers and may not introduce extrinsic evidence to contradict them. Both rules are further subject to the proviso that the questions asked by the prosecutor must be based on information and must be asked in good faith. *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978).

In the instant case, defendant does not contend that the prosecutor acted in bad faith. Furthermore, it does not appear that the prosecutor lacked sufficient information upon which to base her questions on cross-examination. She initially relied upon the "indexes to criminal actions" which were records kept in the office of the Clerk of Superior Court of Wake County. The reliability of this information is attested by the fact that, when properly authenticated, such records are admissible as evidence of the facts recorded which are within the scope of the official's authority or duty. *See* 1 Stansbury's North Carolina Evidence § 153 (Brandis Rev. 1973).

The crux of defendant's argument is that despite the prosecutor's good faith, she used the *wrong* records to impeach him and thus defendant was denied a fair trial. In support of this contention, defendant relies on *Thomas v. State*, 59 So. 2d 517 (Fla., 1952), and *People v. Fishgold*, 189 Misc. 602, 71 N.Y.S. 2d 830 (1947).

In *Thomas* a private prosecutor questioned the defendant about crimes with which he had no connection. At one point in the cross-examination, the prosecutor stated, "I am going to read the record," and then proceeded to ask defendant about five separate convictions. During this examination, defendant's counsel objected and suggested that the private prosecutor might have the wrong record. The Florida Supreme Court reversed the conviction citing both overzealousness on the part of the private prosecutor and the prejudicial nature of the cross-examination.

In *Fishgold* an assistant district attorney cross-examined de-

fendant about crimes based on an erroneous record. The opinion indicates that the error was an "honest" one and based on a similarity between defendant's fingerprints and the fingerprints of the man whose record formed the basis of the cross-examination. Nevertheless a New York court found that the conviction was unfairly obtained when this error was combined with others at the trial, and the court granted a new trial.

The instant case is readily distinguishable from the cases cited by defendant in that here defendant had notice for at least seven weeks prior to trial that the State had access to the criminal records involved and would in all probability use those records as the basis for impeachment of defendant. Having received this information, neither defendant nor defense counsel attempted, either prior to or at trial, to correct the prosecutor's erroneous reliance on the records. A criminal defendant's past record is peculiarly within his own knowledge. In light of defendant's failure here to tell the prosecutor of her error once he was armed with knowledge of the erroneous records, we do not believe he should now be heard to allege that the use of these records was unfair. Our conclusion in this regard is buttressed by a number of federal cases which hold that one who has been convicted of a crime cannot later obtain relief when he knew that a witness testified falsely and the defendant did nothing to demonstrate falsity before or during trial. *See* Annot., Conviction on Testimony Known to Prosecution to Be Perjured as Denial of Due Process - Federal Cases, 2 L.Ed. 2d 1575, 1577(1)(b), Waiver 1958).

Further, the assistant district attorney asked once and only once whether defendant had been convicted of driving under the influence or reckless driving. Both questions were answered in the negative, and the assistant district attorney pursued the matter no further. We cannot perceive how prejudicial error could have resulted from this brief and innocuous cross-examination.

These assignments of error are overruled.

[2] Finally, defendant contends that we should reconsider and revise our rule governing cross-examinations as to prior convictions. We rejected a similar contention in the recent case of *State v. Ross*, 295 N.C. 488, 246 S.E. 2d 780 (1978). In that case, Justice Moore speaking for the Court stated:

> This Court has declined similar requests to revise its rule regarding impeachment in *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537 (1976); *State v. Foster*, *supra;* and *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972). In *State v. Foster*, *supra*, the Court said, in justification of the rule, "The rule is necessary to enable the State to sift the witness and impeach, if it can, the credibility of a defendant's self-serving testimony . . . ." Such continued support for the rule stems from the recognition that evidence of a witness's repeated violations of the law is relevant to the trustworthiness and credibility to be afforded him by the jury. Lack of trustworthiness may be evidenced by a witness's repeated and abiding contempt for the laws which he is legally and morally bound to obey . . . The probative value of evidence of prior crimes seems all the more relevant in the case of the witness who is also a defendant, for he, unlike a witness not on trial, has a direct interest in the outcome of the case, and there are therefore more substantial reasons for calling his credibility into account.
>
> To be sure, a defendant with a prior record is put to a dilemma in deciding whether he should testify in his own defense. But the likelihood of undue prejudice accruing from the attempted impeachment of his testimony does not outweigh the court's substantial interest in arriving at the truth. Sufficient protection from undue prejudice is afforded by the court's instructions limiting consideration of the evidence of prior offenses to the matter of the defendant's credibility as a witness. Due process does not require more.

Id. at 493, 246 S.E. 2d at 784-85.

We elect to adhere to the established rule.

Under the facts and circumstances of this case, we hold that defendant received a fair trial, free from prejudicial error.

Affirmed.

Justice EXUM dissenting.

I respectfully dissent from the majority's decision that defendant received a fair trial. In my view he did not.

Despite the state's admission that it cross-examined defendant

about prior criminal convictions using by mistake someone else's police record, the majority concludes this event was "innocuous" and one in which the defendant acquiesced. I believe both conclusions, on this record, to be incorrect.

The cross-examination at issue went as follows:

"Q. And what, if anything, else besides that have you been convicted of or pled guilty to?

A. Nothing other than traffic violations.

Q. Okay. Isn't it, isn't it a fact that at the present time you are under a suspended sentence?

MR. COOK: Objection.

COURT: The objection is sustained. You are to give no consideration to an unanswered question. An answer to the question is evidence.

Q. Mr. Pilkington, have you ever been convicted of driving under the influence?

A. No. I don't drink.

Q. And have you ever been convicted of —

MR. COOK: Objection.

COURT: Overruled.

EXCEPTION.

DEFENDANT'S EXCEPTION NO. 8

Q. Have you ever been convicted of reckless driving?

A. No.

Q. Could I call your attention, please —

MR. COOK: Objection.

COURT: The objection is sustained if it is intended to challenge the answer that he has given to you.

I do not drink at all. I am single. I have never been married. I am not a homosexual. I am not a bisexual. I have never participated in homosexual conduct. I did not

> talk with Roy Provost at all at the lake on October 8, 1978. I did not even see him there."

The prosecutor was reading from a document purporting to be the defendant's criminal record. In fact it was someone else's record whose name was "Willie Pilkington."

It stretches judicial imagination beyond credulity to conclude that the cross-examination was "innocuous." The jury's verdict depended on whether it believed eleven-year-old Roy Provost or the defendant. It could not believe one without disbelieving the other. The defense rested entirely on the credibility of defendant who, the record shows, was honorably discharged from the U.S. Army in 1975 and who had been at all times steadily and gainfully employed. Except for a conviction for "detaining a police officer in the line of duty" for which he was fined $30.00, his record was free from any serious blemish. Whatever tactic, therefore, that successfully impeached defendant's credibility can hardly, under the circumstances of this case, be called "innocuous."

In *United States v. Semensohn*, 421 F. 2d 1206 (2d Cir. 1970), the Court noted that "[t]he accused's credibility was the crucial issue in the case." It, therefore, awarded a new trial because the prosecutor was permitted to ask defendant on cross-examination whether he had been convicted of grand larceny when, in fact, defendant had previously pled guilty only to misdemeanor larceny. The Court said, *id.* at 1209:

> "Thus, it was crucial to Semensohn that he appear to be telling the truth, and the prosecutor's unwarranted assault upon his credibility clearly tended to undermine his only defense, that he was the innocent victim of the criminal enterprise of the Government's witnesses.
>
> "Under the circumstances we hold that the conviction below must be reversed."

It is, furthermore, difficult to conceive of a defendant, testifying in his own defense, being placed in a more unfair situation than this. His position was such that he was penalized more in the eyes of the jury for truthfully denying the convictions than if he had lied and admitted them. For with the prosecutor in possession of a document that purports to be a defendant's criminal record, a defendant who denies convictions apparently recorded on the document is, in the

jury's eyes, a liar. His credibility is not impeached, it is destroyed. If, as here, his defense rests upon his credibility as a witness, his case is lost. On the other hand had defendant lied and admitted the convictions, his credibility before the jury would have been more intact. The jury might have reasoned, and defendant could have argued, that convictions of driving under the influence and reckless driving simply have no bearing on credibility in a case involving indecent liberties with a child.

Thus the procedure as used here by the state, albeit mistakenly, put a premium on lying. It made a truthful defendant *vis-a-vis* the prior convictions appear to be a liar in the eyes of the jury. The procedure was grossly unfair, prejudicial and, as the majority seems to concede, would ordinarily result in a new trial.

The majority declines, however, to award a new trial primarily upon its conclusion that defendant somehow acquiesced in being cross-examined on the basis of someone else's police record. Simply to state the proposition undermines its validity. In a case such as this where all depends on whom the jury believes, it is inconceivable that a defendant would knowingly and understandingly acquiesce in being cross-examined on the basis of someone else's police record.

A careful review of the record on appeal satisfies me that defendant did not acquiesce in this procedure. In fact, he objected twice to the complained of line of questioning only to have his first objection sustained and his second, made in apt time, overruled. Defendant never, prior to or during trial, saw the document which the state thought at trial was his police record. In the light most favorable to the state the record on appeal shows, at most, the following: On 5 March 1979 defendant, through counsel, filed a written discovery request in which he asked for, among other things, 'knowledge or memoranda of knowledge in the possession of the State concerning any previous charges against this defendant that are of the same nature or very similar nature as this charge." According to the prosecutor's affidavit at the hearing on defendant's motion for appropriate relief, she, after receiving defendant's counsel's 5 March letter, discussed orally with defendant's counsel defendant's criminal record. She said she informed Mr. Cook that 'my records indicated that Willie Pilkington had been convicted or pled guilty to several traffic offenses including a 'reckless driving' charge which had originally been 'DUI-Second Offense.' I further informed Mr. Cook that based on my records it was my belief that

the defendant was presently under a suspended sentence for his plea of guilty to 'reckless driving.'" According to her affidavit, however, it was not until after trial and "after the defendant had taken the stand and denied these charges" that "Mr. Cook and I discussed whether the defendant's record that I had provided was accurate." The state, of course, concedes that the document it used at trial was not, in fact, the police record of the defendant.

Defendant, therefore, had only been orally advised by the state that according to its records he had prior traffic convictions which included a DUI-Second Offense charge which had been reduced to reckless driving. Defendant admitted that he had "other . . . traffic convictions" on his record. Neither defendant, however, nor his counsel was ever shown before or at trial the actual document upon which the state relied in its cross-examination showing driving-under-influence and reckless driving convictions. Defendant, therefore, could not have acquiesced in the use of this document at trial.

It is, furthermore, the use of the document at trial which constitutes the gravamen of the unfair and prejudicial procedure used by the prosecution. Had the prosecution not cross-examined on the basis of a document purporting to be defendant's criminal record but, without using a document, simply asked defendant about the convictions, less damage would have been done. At least defendant's truthful denials would not have appeared as egregiously false in the eyes of the jury as, in fact, they did.

It was, therefore, the use of a document which purported to be but was not defendant's criminal record in connection with the cross-examination that constituted the denial in this case of a fair trial. Defendant, not having seen the document, could not have known whether it correctly or incorrectly purported to be his criminal record. He could not, therefore, have acquiesced in its use.

My position is supported by the authorites cited and distinguished in the majority opinion. In my view these cases are indistinguishable in principle from the present one. In *Thomas v. State*, 59 So. 2d 517 (Fla. 1952), defendant was awarded a new trial because the prosecutor cross-examined him about the convictions of someone else with the same name as defendant. In *People v. Fishgold*, 189 Misc. 602, 71 N.Y.S. 2d 830 (1947), a new trial was awarded because the criminal record of someone else was used to impeach a testifying defendant although the prosecutor was unaware of the error and used the record in good faith. In *Fishgold* the Court persua-

sively noted, 189 Misc. at 605, 71 N.Y.S. 2d at 833:

> "While it is unquestionably true that the defendant denied the commission of the crimes imputed to him by these questions, nevertheless it would be absurd to suppose for one moment that the jury believed those denials. Every jury knows that the prosecuting officer occupies an office and possesses powers which enable him to obtain the criminal record of any individual, whether he be a witness or a party. By incorporating the Lukowski record into his questions, the District Attorney provided an occasion for the jury's disbelief of the defendant's denials — a disbelief which may well have affected the result."

Concluding then, that the cross-examination complained of was grossly unfair and prejudicial to defendant and that he did not acquiesce in it, I believe defendant was denied due process of law and for that reason is entitled to a new trial.

I cast my vote accordingly.

Justice CARLTON joins in this dissent.

STATE OF NORTH CAROLINA v. THEODORE AVERY

No. 89

(Filed 7 April 1981)

1. Constitutional Law § 50— six months between arrest and trial — no denial of speedy trial

Defendant was not denied his constitutional right to a speedy trial by a six month delay between his arrest and his trial, since such lapse of time was insufficient under the circumstances of these crimes even to be "presumptively prejudicial" so as to trigger inquiry into other factors; a significant portion of the delay was attributable to defendant's motion for change of venue; there was nothing in the record to indicate that defendant requested a speedy trial; and defendant did not allege any prejudice resulting from the delay.

2. Criminal Law § 91— statutory right to speedy trial not denied

Defendant was not denied his statutory right to a speedy trial where his indictment occurred on 4 September 1979; trial began on 28 January 1980, more than 120 days later; on 5 September 1979 defendant moved for change of venue

or, in the alternative, for a special venire; on 29 October, the next criminal session of Bertie Superior Court, his motion for special venire was allowed; that portion of time between 5 September and 29 October was properly excluded in computing the time within which defendant's trial should begin; and when the 54 days between filing and disposition of defendant's motion was excluded, defendant was tried within 120 days after indictment. G.S. 15A-701(b)(1)(d).

3. Criminal Law § 92.3— multiple offenses — transactional connection — joinder proper

The "transactional connection" required by G.S. 15A-926 for joinder of offenses at trial existed between the offenses in this case and the State's motion for joinder was properly allowed where all the offenses involved related directly to defendant's escape from jail and his efforts to avoid recapture; the assault on the jailer was the means by which defendant effected his jail break; the larceny of the pistol was to provide defendant with a weapon and thus render his recapture more difficult; the larceny of the pickup truck was to facilitate his flight from jail; the murder of a police officer was to prevent defendant's recapture; there was thus a series of acts connected together by their relation to a single event, defendant's escape from jail; and the events giving rise to the offenses were not so separate in time, place and circumstances that their joinder was unjust, and that the murder occurred the day following the assult, jailbreak and larceny would not alter this conclusion.

4. Escape § 6; Larceny § 6.1— value of stolen vehicle — defendant as prisoner — admissibility of evidence

In a prosecution of defendant for felonious larceny of a motor vehicle, jailbreak, and other offenses, the jailer could properly testify as to the fair market value of his pickup truck which defendant allegedly stole, and the jailer's statement that defendant was a prisoner constituted a statement of physical fact based upon the jailer's personal knowledge and did not constitute an opinion which should have been excluded.

5. Larceny § 6.1— absence of permission to take pistol — admissibility of testimony

In a prosecution of defendant for felonious larceny of a firearm and other offenses, there was no merit to defendant's objection to the sheriff's testimony that he did not give defendant permission to "take, steal and carry away, the pistol from the county jail," since the prosecutor's question as to whether defendant had authority to take the pistol was asked not to prejudice the jury but to establish an element of an offense with which defendant was charged; moreover, the prosecutor's error in using the word "steal" in his question was harmless given the abundance of testimony that the pistol, property of the county, was taken without proper authority from the jail.

6. Homicide § 21.7— murder of officer — officer's warrantless entry into home — no defense

There was no merit to defendant's contention that an officer's warrantless entry into the home of defendant's sister was unlawful and that it therefore constituted a complete defense to a charge of homicide since there was no evidence that defendant shot the officer to death in an attempt to prevent the officer

from entering the dwelling, that defendant at any time believed himself or other occupants of the dwelling to be in danger of death or great bodily harm, or that the officer intended to commit a felony; and there was no evidence of either defense of the habitation or defense of self.

7. Criminal Law § 102.7— prosecutor's comment on credibility of witnesses — no improper argument

The prosecutor's argument that, if the jury believed defendant, then it would have to conclude that other witnesses including the sheriff had lied was not inappropriate, since the prosecutor did not call anyone a liar or intimate that in his opinion any witness was a liar.

Justice MEYER did not participate in the consideration and decision of this case.

BEFORE *Judge Donald L. Smith*, presiding at the 28 January 1980 Session of BERTIE Superior Court, defendant was found guilty by a jury of second degree murder, felonious larceny of a firearm, felonious larceny of a motor vehicle, jailbreak and misdemeanor assault. He was sentenced to life imprisonment on the murder conviction, ten years on the felonious larceny convictions to begin at the expiration of the life sentence, and thirty days on the assault conviction to run concurrently with the life sentence.[1] Defendant appeals of right to this Court pursuant to G.S. 7A-27(a).[2] This case was docketed and argued as No. 48, Fall Term 1980.

Rufus L. Edmisten, Attorney General, by James Peeler Smith, Assistant Attorney General, (and Lex Allen Watson II, 1980 Summer Intern, Campbell Law School).

Joseph J. Flythe, Attorney for defendant appellant.

EXUM, Justice.

Defendant Avery assigns as his error the denial of his constitutional and statutory rights to a speedy trial, joinder of the offenses for trial, certain evidentiary rulings, denial of his motion to dismiss at the close of all the evidence, denial of his motion for mistrial, and an erroneous charge to the jury by the trial judge. Upon careful examination of defendant's contentions we conclude that he received a fair trial free from prejudicial error.

[1] The record does not reflect judgment in the jailbreak case.

[2] Defendant's motion to bypass the Court of Appeals on the felonious larceny, jailbreak and assault convictions was allowed by this Court on 16 June 1980.

The state's evidence tends to show the following: At approximately 5:00 p.m. on 1 August 1979 defendant and one Stephen Hall, both prisoners in the Bertie County jail, assaulted the jailer as he placed a bucket in their cell. While Hall blocked the cell door to prevent the jailer's escape, defendant repeatedly struck the jailer with his fists and with a black boot. Defendant, threatening to kill the jailer, demanded the keys to his pickup truck; the jailer gave the keys to Hall. Defendant locked the jailer in a cell and, after prying open a cabinet drawer with a hammer, stole a .38 caliber pistol belonging to Bertie County and a money box containing change for the soft-drink machine. Defendant and Hall then fled the jail in the jailer's pickup truck and traveled towards Perrytown, North Carolina.

During the trip defendant said that "if anybody tried to stop him, he was going to kill them." Defendant and Hall abandoned the truck in an open field and walked to a nearby house where friends of Hall lived. Hall secured a ride to Perrytown; he turned himself in to law enforcement authorities the next day. Defendant was able to get a ride to the home of his sister, Shirley Avery, in Lewiston, where he spent the night.

Shortly after dark on 2 August 1979 Sheriff Edward Daniels, after being informed that defendant might be found in one of three houses, divided law enforcement officers into three groups with each being responsible for the search of one of the houses. In Sheriff Daniels' group were Officers Tom Ashley, Calvin Cherry and Donald Cowan. This group proceeded to the house of Shirley Avery. Upon arrival Sheriff Daniels, accompanied by Officer Ashley, went to the porch, identified himself, and knocked on the door; Officers Cherry and Cowan remained outside the house. Receiving no response, Sheriff Daniels again identified himself and knocked on the door. There was no response, although he could hear music coming from within the house. Officer Ashley then turned the door knob and pushed the door open. The two men entered the house and, while calling out, "If anyone is in here, come out," walked through the living room and a bedroom. As they prepared to enter a bathroom located at the rear of the bedroom Sheriff Daniels and Officer Ashley heard a woman's voice asking who was in her house. They returned to the front porch where they were confronted by Shirley Avery. After Sheriff Daniels explained the purpose of their search Shirley Avery denied any knowledge of her brother's whereabouts.

While Sheriff Daniels was talking to Shirley Avery, Officer Cherry entered the house. He walked through the living room and bedroom and then, with his flashlight focused on the floor, stepped into the bathroom. A shot was fired, striking Officer Cherry in the chest and killing him. Officer Ashley, unaware of the presence of a window in the bathroom, rushed to the bedroom, trained his weapon upon the bathroom door, and "heard a noise as if somebody was going to come out." He was then informed by Sheriff Daniels that someone had been seen either running around the house or going out the window. Later that night a neighbor told Sheriff Daniels that she had seen defendant, wearing only black pants, climb out of the bathroom window of Shirley Avery's house.

At approximately 6:00 a.m. on 3 August defendant entered the kitchen of a trailer where two young girls were. He asked them not to tell anyone they had seen him. The girls left the trailer and told an SBI agent that defendant was inside. Several officers searched the trailer; they pulled defendant, wearing only black pants, from beneath a bed. A .38 caliber pistol was found under the bed. A ballistics expert testified that in his opinion the bullet which killed Officer Cherry was fired from this pistol. The pistol was further identified as being like the pistol taken from the Bertie County jail.

Defendant testified that he did not shoot Officer Cherry. He said he was some twenty-five feet away from his sister's house when he heard a gunshot. He went to the bathroom window, peeped in, and saw Sheriff Daniels standing over Officer Cherry's body. It appeared to him that "Sheriff Daniels was trying to put the pistol back into Calvin Cherry's holster." Defendant remained at the bathroom window approximately five seconds after which he picked up a pistol he found lying on the ground in front of the window. He ran and was later apprehended.

I.

[1] Defendant Avery first assigns as error the denial of his constitutional right to a speedy trial. Both the fundamental law of this state and the Sixth Amendment to the United States Constitution guarantee those persons formally accused of crime the right to a speedy trial. *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976), *cert. denied*, 429 U.S. 1049 (1977); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969). Interrelated factors to be considered in determining whether a defendant's constitutional right to a speedy

trial has been violated are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to defendant resulting from the delay. *Barker v. Wingo*, 407 U.S. 514 (1972); *State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978); *State v. Wright*, *supra*; *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976).

Here the length of delay between defendant's arrest on 3 August 1979 and his trial on 28 January 1980 was approximately six months. This lapse of time is insufficient under the circumstances of these crimes even to be "presumptively prejudicial" so as to trigger inquiry into the other factors. *Barker v. Wingo*, *supra* at 530. Further, a significant portion of this delay was attributable to defendant's motion for change of venue; there is nothing in the record to indicate that defendant requested a speedy trial; and finally, defendant does not allege nor can we find any prejudice to defendant by the delay. Defendant's brief contains only the bare allegation that defendant was deprived of his constitutional right to a speedy trial; it contains no argument nor citation of authority to support this allegation. This assignment of error is overruled.

II.

[2] Defendant Avery also assigns as error the denial of his statutory right to a speedy trial. On 28 January 1980 Judge Donald L. Smith denied defendant's 23 January motion to dismiss for failure to grant a speedy trial under the Speedy Trial Act, G.S. 15A-701. The statute requires a defendant's trial to begin "[w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last."[3] Here the last of the above-named events, defendant's indictment, occured on 4 September 1979; trial began on 28 January 1980, more than 120 days later. But G.S. 15A-701(b) provides:

> "The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant including,

[3] The statute applies to a defendant "who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1981 . . . ." G.S. 15A-701(a1)(1980 Interim Supplement).

> but not limited to, delays resulting from . . . .
>
> d. Hearings on pretrial motions or the granting or denial of such motions . . . ."

On 5 September 1979 defendant moved for change of venue or, in the alternative, for a special venire. On 29 October, the next Criminal Session of Bertie Superior Court, his motion for special venire was allowed by Judge Small. Defendant was tried on 28 January by a jury selected from a Northampton County venire pursuant to Judge Small's order. Judge Smith, in denying defendant's motion to dismiss, excluded the period of delay from 30 October 1979 to 28 January 1980 from computations under the Speedy Trial Act.

We conclude that Judge Smith properly denied defendant's motion to dismiss on statutory speedy trial grounds. We need not, however, consider the propriety of Judge Smith's exclusion of the entire 30 October to 28 January period. That portion of the period between 5 September and 29 October was properly excludable under our holding in *State v. Oliver*, 302 N.C. 28, ___ S.E.2d ___ (1981). When this much of the period is excluded, the trial occurred within 120 days of indictment.

In *Oliver* we recognized that a motion for change of venue, while pending, necessarily delays the setting of a case for trial until it is determined. We concluded, therefore, that such a motion is within the statutory reference to "pretrial motions" found in G.S. 15A-701(b)(1)(d). We held: "Provided the motion is heard within a reasonable time after it is filed and the state does not delay the hearing for the purpose of thwarting the speedy trial statute, the time between the filing of the motion and its disposition is properly excluded in computing the time within which a trial must begin." *Id.* at 41, ___ S.E. 2d at ___ . In *Oliver* a 29-day period between filing and disposition of defendant's motion for change of venue was found to be reasonable.

Although the 54-day period in the present case would ordinarily approach the borders of reasonableness, we find it under the circumstances here to be within those borders. It is clear the delay was attributable to comparatively infrequent sessions of criminal superior court in Bertie County. We judicially notice that the next Criminal Session of Bertie Superior Court after defendant's 5 September motion began 29 October. *See State v. Shook*, 293 N.C. 315, 237 S.E. 2d 843 (1977); *State v. Wright*, *supra*, 290 N.C. 45, 224 S.E.

2d 624. The frequency with which the superior court sits is a factor properly considered in determining whether a defendant's motion for change of venue or for a special venire has been heard within a reasonable time for purposes of computing the time excludable under the Speedy Trial Act. Since defendant Avery's motion was determined at the next criminal session after it was filed, we hold it was determined within a reasonable period of time.

Consequently, after excluding under G.S. 15A-701(b)(1)(d) the 54 days between filing and disposition of defendant's motion, it is clear that defendant was tried within 120 days after indictment. This assignment of error is overruled.

III.

[3] Defendant Avery assigns as error the joinder for trial of the murder, felonious larceny, jailbreak and misdemeanor assault charges. The state's pre-trial motion for joinder pursuant to G.S. 15A-926 was allowed by the trial court over defendant's objection. Defendant objects because the events which resulted in the larceny, jailbreak and assault charges occurred "several hours before the alleged murder and at a completely different place."

North Carolina General Statute 15A-926 provides, in pertinent part:

> "§ 15A-926. *Joinder of offenses and defendants.*— (a) Joinder of Offenses.— Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan . . . ."

The statute, then, requires a "transactional connection" between the offenses sought to be joined for trial. *State v. Greene*, 294 N.C. 418, 421, 241 S.E. 2d 662, 664 (1978). Motions to join for trial offenses which have the necessary transactional connection under G.S. 15A-926 are addressed to the discretion of the trial court and, absent a showing of abuse of discretion, its ruling will not be disturbed on appeal. *State v. Greene, supra; State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296, *death sentence vacated*, 429 U.S. 809 (1976); *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), *death sentence*

vacated, 428 U.S. 903 (1976). If, however, granting the state's motion for joinder would hinder a defendant's ability to present his defense or otherwise receive a fair trial the motion should be denied.[4] *State v. Greene, supra; State v. Davis, supra.* In determining whether a defendant will be prejudiced by joinder, one question is "whether the offenses are *so separate in time or place* and *so distinct in circumstances* as to render a consolidation unjust and prejudicial to defendant." *State v. Johnson*, 280 N.C. 700, 704, 187 S.E. 2d 98, 101 (1972). (Emphasis original.)

We hold that joinder in the present case was proper. The requisite "transactional connection" existed between the offenses joined; all related directly to defendant's escape from the Bertie County jail and his efforts to avoid recapture. The assault on the jailer was the means by which defendant effected his jailbreak; the larceny of the pistol was to provide defendant with a weapon and thus render his recapture more difficult; the larceny of the pickup truck was to facilitate his flight from the jail; and the murder of Officer Cherry was to prevent defendant's recapture. We find, then, a "series of acts . . . connected together" by their relation to a single event, defendant's escape from jail. Further, the events giving rise to the offenses were not so separate in time, place and circumstances that their joinder was unjust. That the murder occurred the day following the assault, jailbreak and larceny does not alter this conclusion. *See, e.g., State v. Powell*, 297 N.C. 419, 255 S.E. 2d 154 (1979) (two offenses occurring some four days apart properly joined for trial); *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971) (three offenses occurring on at least two dates properly joined for trial). The state's motion for joinder was, therefore, properly granted. This assignment of error is overruled.

IV.

Defendant assigns as error the admission of certain evidence over his objection. Defendant contends the Bertie County jailer's testimony that on 1 August his pickup truck had a fair market value of $3000 and that on that date defendant was a "prisoner" constitutes inadmissible opinion evidence. Defendant also contends Sheriff Daniels' testimony that he did not give defendant permission to

[4] G.S. 15A-927(b)(1) provides that the trial court must grant a pre-trial motion for severance of offenses if "it is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense."

"take, steal and carry away this gun [the gun stolen from the Bertie County jail]" was improperly admitted since its only effect was to excite the jury's prejudice or sympathy. These contentions are patently without merit.

[4] The jailer's testimony as to the fair market value of his pickup truck was properly admitted. He had earlier testified that he purchased the truck four years ago when it was new, that it cost him $5000 plus the value of an old truck he traded, and that the truck was in good condition when stolen. The witness, therefore, while not an expert, had such knowledge and experience so as to enable him intelligently to value his truck. *See Huff v. Thornton*, 287 N.C. 1, 213 S.E. 2d 198 (1975); *State v. Tolley*, 30 N.C. App. 213, 226 S.E.2d 672, *cert. denied*, 291 N.C. 178, 229 S.E. 2d 691 (1976); *State v. Cotten*, 2 N.C. App. 305, 163 S.E. 2d 100 (1968); *see generally* 1 Stansbury's North Carolina Evidence § 128 (Brandis rev. 1973).

The jailer's statement that defendant was a "prisoner" constitutes a statement of physical fact based on the jailer's personal knowledge. It is not an opinion. We agree with the holding of the Court of Appeals in *State v. Carroll*, 17 N.C. App. 691, 692, 195 S.E. 2d 306, 307 (1973), that "[t]he fact that a person is a prison inmate is a status based on observable facts .... The witness having personally observed these facts may testify to them." At least the statement is admissible as a "shorthand statement of fact." *See* 1 Stansbury's North Carolina Evidence § 125 (Brandis rev. 1973).

[5] Defendant's objection to Sheriff Daniels' testimony that he did not give defendant permission to "take, steal and carry away" the pistol from the Bertie County jail is also without merit. Defendant was charged with larceny of a firearm. To constitute larceny one must wrongfully take and carry away the personal property of another without his consent and with the requisite felonious intent. *See, e.g., State v. Bowers*, 273 N.C. 652, 161 S.E. 2d 11 (1968); *State v. Griffin*, 239 N.C. 41, 79 S.E. 2d 230 (1953). Thus the prosecutor's question as to whether defendant had authority to take the pistol was asked not to prejudice the jury but to establish an element of an offense with which defendant was charged. The prosecutor should not have included the word "steal" in his question. We are satisfied, however, that this error was harmless given the abundance of testimony that the pistol, property of Bertie County, was taken without proper authority from the jail. Certainly the error does not

present a reasonable possibiity that in its absence a different result would have been reached at trial. G.S. 15A-1443(a). Defendant's evidentiary assignments of error are, therefore, overruled.

V.

[6] Defendant assigns error to denial of his motion to dismiss at the close of all the evidence. His sole contention is that Officer Cherry's warrantless entry into the home of Shirley Avery was unlawful; therefore it constitutes a complete defense to the homicide charge. This argument is obviously without merit.

In order that we may deal immediately and quickly with the patently fatal flaw in defendant's argument we will assume, without deciding, that (1) defendant, who was not residing in the dwelling, has standing to complain of an unlawful entry and (2) the entry by Officer Cherry was unlawful. Even so, Cherry's unlawful entry would not constitute a defense to defendant's killing him unless defendant was privileged to use deadly force to prevent the unlawful entry. *State v. McCombs*, 297 N.C. 151, 253 S.E. 2d 906 (1979). "[T]he use of deadly force in defense of the habitation is justified only to *prevent* a forcible entry into the habitation under such circumstances . . . that the occupant reasonably apprehends death or great bodily harm to himself or other occupants at the hands of the assailant or believes that the assailant intends to commit a felony . . . . Once the assailant has gained entry, however, the usual rules of self-defense replace the rules governing defense of habitation . . . ." *Id.* at 156-57, 253 S.E. 2d at 910. (Emphasis original.) Thus even if we assume that defendant was entitled to resist arrest because of Cherry's assumed unlawful entry under the doctrine of *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970), defendant was not privileged to use deadly force in resisting unless he reasonably believed himself to be in danger of death or great bodily harm. *State v. Sanders*, 295 N.C. 361, 245 S.E. 2d 674 (1978).

Here there is no evidence that defendant shot Cherry to death in an attempt to prevent Cherry from entering the dwelling, that defendant at any time believed himself or other occupants of the dwelling to be in danger of death or great bodily harm, or that Cherry intended to commit a felony. There is no evidence of either defense of the habitation or defense of self. Defendant testified that he did not shoot Cherry.

This assignment of error is overruled.

VI.

[7] Defendant assigns as error the denial of his motion for a mistrial. The prosecutor, in his closing argument to the jury, stated:

> "If you believe the defendant, you've got to believe that everybody else up here who has testified in this whole trial lied, including three of his own witnesses."

Defendant's objection to this remark was sustained. The prosecutor continued his argument, pointing out that various witnesses must have been mistaken if defendant's testimony was to be believed, and then stated, "The Sheriff must have been lying about [not] putting the gun in Calvin Cherry's holster." After defendant's objection to this remark was sustained the jury was excused and defendant, contending the prosecutor's remarks were so prejudicial that they deprived him of a fair trial, moved for a mistrial. His motion was denied; the trial court then instructed the jury that it "should not consider the [prosecutor's] remarks about whether someone was lying or not."

The control of argument of counsel is left primarily to the sound discretion of the trial judge who properly allows counsel wide latitude to argue all the facts and reasonable inferences presented by the evidence together with the law applicable thereto. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974), *death sentence vacated*, 428 U.S. 902 (1976). This Court has held, however, that it is "improper for a lawyer in his argument to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar." *State v. Miller*, 271 N.C. 646, 659, 157 S.E. 2d 335, 345 (1967).

The prosecutor's remarks here complained of were not prohibited by this rule. By them he did not call anyone a liar or intimate that in his opinion any witness was a liar. His argument was that if the jury believed the defendant, then it would have to conclude that other witnesses including the sheriff had lied. We see nothing inappropriate in this argument. *State v. Noell, supra*, 284 N.C. 670, 696, 202 S.E. 2d 750, 767. Even if there was some slight impropriety, it was rendered harmless by the trial court's curative instructions. *State v. Britt, supra*, 288 N.C. 699, 220 S.E. 2d 283; *State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975).

VII.

Defendant assigns as error the trial judge's failure in his final charge to the jury to state correctly the law applicable to warrantless entries by police officers into private dwellings for the purpose of making an arrest. Since, as we have already demonstrated, Officer Cherry's warrantless entry into Shirley Avery's home even if unlawful constituted no defense to the homicide charge, the trial judge need not have instructed on the point at all. The trial judge, as we read his instructions, did not present the possibility of an unlawful entry as a defense to the murder charge. He was simply telling the jury under what circumstances, generally speaking, an officer may enter a dwelling without a warrant to make an arrest. *See* G.S. 15A-401(e) for our statute setting out these circumstances. The instructions, not being material to any issue in the case, were mere surplusage. Even if erroneous, therefore, they did not prejudice defendant.

Defendant in his final assignment of error asks this Court to carefully review the record to evaluate the cumulative effect of the assignments of error brought forward. We have done so and are satisfied that defendant received a fair trial free from prejudicial error.

No error.

Justice MEYER did not participate in the consideration and decision of this case.

STATE OF NORTH CAROLINA v. JOHN EDDIE BURNEY

No. 48

(Filed 7 April 1981)

1. Criminal Law §§ 29, 91.6- denial of continuance to obtain additional psychiatric evaluation

The trial court did not err in the denial of a motion for continuance to permit defendant to obtain an evaluation by another psychiatrist because the report of the psychiatrist who found defendant capable of standing trial contained a statement that the psychiatrist was "unable to evaluate satisfactorily judgment and insight because additional information about his present situation is not available" where such statement related to the defendant's mental status upon admission to the mental health facility for observation and did not relate to defendant's capacity to stand trial.

2. Constitutional Law § 32— right to public trial — exclusion of all but certain persons from courtroom

In this prosecution for first degree rape of a child of 12 years of age or less who was at least 4 years younger than defendant, the constitutional right of defendant to a public trial was not violated by the court's order entered pursuant to G.S. 15-166 that, during the testimony of the 7 year old victim, the courtroom be cleared of all persons except defendant, defendant's family, defense counsel, defense witnesses, the prosecutor, the State's witnesses, officers of the court, members of the jury, and members of the victim's family. Art. I, §§ 18 and 24 of the N. C. Constitution; Sixth Amendment to the U.S. Constitution.

3. Criminal Law § 76.8— admissibility of incriminating statements

The trial court properly denied defendant's motion to suppress incriminating statements made by him while in custody where the court made findings based on competent *voir dire* evidence that defendant was advised of his *Miranda* rights before he was questioned; defendant fully understood his constitutional rights, including his right to remain silent and to have counsel; and defendant freely, knowingly, intelligently and voluntarily waived his constitutional rights and made a statement to police officers.

APPEAL by defendant from judgment of *Lamm, J.*, entered at the 12 May 1980 session of RICHMOND Superior Court.

Upon a plea of not guilty defendant was tried on a bill of indictment, proper in form, which charged him with the first-degree rape of Sabrina Ann McDonald, a child of the age of 12 years or less and who was at least 4 years younger than defendant.

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

On 17 March 1980, defendant, age 26, spent the night with his girlfriend, Elizabeth McDonald, in her home. After dressing her 7 year-old daughter, Sabrina, for school, Mrs. McDonald left for work around 6:00 a.m. Defendant remained at the house with Sabrina and the other McDonald children. After Mrs. McDonald left the house, defendant went to Sabrina's room and had vaginal intercourse with her.

That evening, Sabrina told her mother about the assault. She was then taken to the emergency room of Richmond Memorial Hospital where she was examined. The examination revealed that the child was suffering from a discharge indicative of infection and she was treated for gonorrhea. Although vaginal smears proved negative, tests performed on the child's underclothing disclosed the presence of spermatozoa.

Defendant made incriminating statements to the police which were reduced to writing. While defendant denied having intercourse with Sabrina, he admitted engaging in acts which would constitute taking indecent liberties with a child.

Although defendant did not testify, he did present evidence which tended to show that while he was treated for gonorrhea on 25 January 1980, he did not have either that disease or syphilis on 20 March 1980, two days after the alleged assault.

The jury returned a verdict finding the defendant guilty of first-degree rape. From judgment imposing a life sentence, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General J. Chris Prather, for the state.

Richard G. Buckner for defendant appellant.

BRITT, Justice.

[1] By his first assignment of error defendant contends the trial court committed prejudicial error in denying his motion for a continuance of the trial. This assignment has no merit.

On 21 March 1980 defendant was found to be indigent and Mr. Buckner was appointed to represent him. On 2 April 1980, Judge Collier, upon motion of defendant, ordered that he be committed pursuant to G.S. § 15A-1002 (1978 & Int. Supp. 1980) to Dorothea Dix Hospital for observation and treatment for a period necessary to determine defendant's "capacity to proceed", but in no event was this period to exceed 60 days. Judge Collier further ordered that a copy of the hospital's report concerning defendant be forwarded to defendant's attorney.

Prior to trial[1] defendant moved for a continuance on the ground that a copy of the hospital's report had not been sent to his attorney as had been ordered by Judge Collier. The trial judge informed defense counsel that he had received a copy of the report that day and would be glad to furnish him a copy of it. Counsel stated that he felt that he was entitled to an opportunity to study the report at length, and to have defendant's own experts examine it.

[1] The record does not disclose the date on which defendant moved for a continuance. We assume the motion was made at the session at which defendant was tried.

Upon inquiry from the court, counsel stated that he had been informed previously that the report was in the clerk's office in a sealed envelope addressed to the presiding judge. He further stated that the clerk had suggested that he ask the presiding judge for a copy. Before ruling on the motion for a continuance, the court gave counsel time to read the report and go over it with defendant.[2]

Thereafter, the court heard further argument on the motion for a continuance. Defense counsel pointed out to the court that the examining physician had noted in the report that "I am unable to evaluate satisfactorily judgment and insight because additional information about his present situation is not available." It was the position of defense counsel that the statement in the report justified the granting of a continuance so that defendant could obtain an evaluation by another psychiatrist.

Before ruling on the motion to continue, the trial court directed the attention of defense counsel to the conclusion reached by Dr. Bob Rollins, a psychiatrist at Dorothea Dix Hospital who authored the report in question. It was the physician's opinion that "Mr. Burney is capable of proceeding with trial, that he has an understanding of his legal situation, and he is able to cooperate with his Attorney."[3] The court concluded that Dr. Rollins had reached a conclusion regarding defendant's capacity to stand trail and that there was nothing in the report which would tend to show that the doctor had an insufficient basis upon which to form an opinion.

Ordinarily, the granting or denial of a motion to continue is within the discretion of the trial judge. *E.g.*, *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). However, when the motion is based on a right guaranteed by the federal or state constitution, the question presented is one of law and is subject to review on appeal. *Id.* Whether a defendant bases his appeal upon an abuse of judicial discretion or upon a denial of his constitutional rights, for him to be entitled to a new trial because his motion to continue was not allowed, he must show both that there was error in the denial and that he was prejudiced thereby. *E.g.*, *State v. Robinson*, 283 N.C. 71, 194 S.E.2d 811 (1973).

[2] While we cannot justify the hospital's failure to send defendant's counsel a copy of the report as ordered by Judge Collier, we must note that with a minimum of effort counsel could have obtained a copy of the report sent to the presiding judge.

[3] The report is not made a part of the record on appeal. The portions quoted by defense counsel and the trial judge constitute all of the report that we have before us.

We hold that defendant has failed to establish that the trial court committed prejudicial error. First, the statement in the report by Dr. Rollins that he was unable to evaluate satisfactorily defendant's judgment and insight because additional information about defendant's situation was not then available does not speak to defendant's capacity to stand trial. Defendant was committed to Dorothea Dix Hospital for the limited purpose of assessing his capacity to proceed with trial. *See* G.S. § 15A-1002 (1978 & Int. Supp. 1980). That question turns upon whether by reason of mental defect or illness the defendant was unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings against him, or to assist in his defense in a rational or reasonable manner. G.S. § 15A-1001 (1978). The record reflects that the attorney for the defendant agrees with the assessment of the trial judge that the observation in question by Dr. Rollins was in regard to defendant's mental status upon admission to the facility. The pertinent time in regard to capacity is that of trial, conviction, sentencing, or punishment, not that of admission to an appropriate facility for observation and treatment. *Id.* Second, due to defendant's failure to include the hospital report as part of the record on appeal, we are unable to consider its full text. It is incumbent upon the appellant to ensure that the record is properly made up and transferred to the court. *State v. Atkinson*, 275 N.C 288, 167 S.E.2d 241 (1969), *death sentence vacated*, 403 U.S. 948 (1971).

[2] By his second assignment of error, defendant contends the trial court committed prejudicial error in granting the state's motion to exclude all but certain persons from the courtroom while the alleged victim gave her testimony. We find no merit in the assignment.

Prior to the introduction of evidence, the state moved, pursuant to G.S. § 15-166 (Cum. Supp. 1979), that all but certain persons be removed from the courtroom during the testimony of the 7 year-old child. Defendant objected, and, after hearing arguments from the district attorney and defense counsel, the court found as a fact that defendant was charged with the first-degree rape of a child of 12 years of age or less, who is at least 4 years younger than defendant. Invoking its discretion under G.S. § 15-166, the court ordered that during the testimony of Sabrina the courtroom be cleared of all persons except defendant and his family, his attorney, defense

witnesses, the assistant district attorney, the state's witnesses, officers of the court, the members of the jury, and the members of the child's family.

G.S. § 15-166 provides:

> In the trial of cases for rape and of or a [sic] sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.

Although the action of the trial court was authorized by the quoted statute, defendant argues that the action violated Article I, Sections 18 and 24, of the state constitution, as well as the sixth amendment to the United States Constitution.[4] This argument is not persuasive.

Defendant initially directs this court to our decision in *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967). *Yoes* was a rape case in which we held that defendant's right to a public trial had not been violated by the action of the trial court in excluding bystanders from the courtroom during the testimony of the prosecutrix. Defendant attempts to distinguish *Yoes* from the case *sub judice* by pointing out that representatives of the press had not been excluded in that case. If this were a first amendment case, that distinction may have been entitled to more consideration on appeal. This case, however, invokes defendant's personal assertion of his right to a public trial as guaranteed by the state and federal constitutions. The court's holding in *Yoes* was not based upon the presence in the courtroom of members of the press. It instead, was grounded upon the fact that members of his family were allowed to remain in the courtroom at all times, even during the testimony of the prosecuting witness. In that regard, it appears that more people were allowed to remain in the courtroom during Sabrina's testimony than was the case in *Yoes*.

[4] Section 18 of Article I of the North Carolina Constitution requires that "[a]ll courts shall be open . . . ." Section 24 of the same Article provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court . . ." The Sixth Amendment of the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . . ."

Defendant does not rely solely upon *State v. Yoes, supra*, in arguing that the trial court committed prejudicial error. Instead, defendant directs our attention to a line of cases from the United States Supreme Court which involves closure of the courtroom: *Richmond Newspapers, Inc. v. Virginia*, ___ U.S. ___, 65 L. Ed.2d 973, 100 S. Ct. 2814 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed.2d 608, 99 S. Ct. 2898 (1979); *In re Oliver*, 333 U.S. 257, 92 L. Ed. 682, 68 S. Ct. 499 (1948). We conclude that defendant's reliance upon these cases is misplaced.

Oliver involved the application of a Michigan statute which authorized state circuit judges to sit as one-man grand juries and to exercise the customary powers of grand juries, including the power to commit a witness for contempt. In *Oliver*, a Michigan circuit judge invoked his powers under the statute and summarily committed a witness for contempt because of an alleged inconsistency between his testimony and that of at least one other witness. The entire proceeding was in secret and was without the presence of any members of the public whatsoever. The precise issue involved in *Oliver* was not the secrecy of the grand jury proceeding. Rather, the decision turned upon the Supreme Court's concern with the right of a criminal defendant to a public trial where guilt and punishment are the relevant questions at issue as opposed to the probable cause inquiry of the grand jury. In reversing the action of the Michigan Supreme Court affirming the entry of the commitment order, the Supreme Court grounded its decision on two bases. First, the entire proceeding was in complete secrecy. This secrecy even extended to denying petitioner's attorney access to him in jail. Second, the nature of the proceeding denied to petitioner the right to have a reasonable opportunity to defend himself against an accusation of false and evasive swearing.

Neither prong of the *Oliver* decision applies to the facts of the present case. First, the trial here was not in complete secrecy. The proceedings were open throughout with the exception of the time at which Sabrina testified. It was only at that point that the courtroom was cleared of spectators and members of the press. Even then, the proceedings remained open to members of certain identifiable groups, including the witnesses for defendant and members of defendant's family. Second, there is no indication in the record that the ability of defendant to present a defense in his own behalf was in any way inhibited by the conduct of the trial judge. The facts of the

present case do not establish that access to the proceedings was denied to the public. Instead, it is clear that access to the courtroom was restricted to the members of identifiable groups for only a small segment of the overall proceeding.[5]

Gannett was a murder case from New York in which the defendants sought an order barring the press and members of the general public from attending a pretrial hearing on their motion to suppress certain evidence. The state did not oppose the motion, and the trial court granted it. The publisher of a local newspaper challenged the action of the court. In upholding the action of the trial judge, the United States Supreme Court held that the press and members of the general public have no constitutional right independent of that of an accused's sixth amendment right to a public trial to insist upon access to a pretrial judicial proceeding in a criminal case. Speaking for the majority, Mr. Justice Stewart observed that even with respect to actual criminal trials, the tradition of publicity had not been universal, 443 U.S. at 388-89 n. 19, 61 L. Ed.2d at 626, 99 S. Ct. at 2909-10. The majority opinion then pointed specifically to instances where members of the public have been excluded from the courtroom in cases involving violent crimes against minors. *See, e.g., Geise v. United States*, 262 F. 2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959); *Hogan v. State*, 191 Ark. 437, 86 S.W.2d 931 (1935); *Beauchamp v. Cahill*, 297 Ky. 505, 180 S.W.2d 423 (1944). That is precisely the situation with which we are now confronted in the present case. Furthermore, even if it were not

[5] In this regard, we find the observation of the California Supreme Court in the case of *People v. Swafford*, 65 Cal. 223, 3 P. 809 (1884), to be pertinent. In *Swafford*, the trial court had excluded all observers from the courtroom except the judge, jurors, witnesses, and persons connected with the case. On appeal, the defendant argued that the trial court had no jurisdiction to try him other than publicly. The Supreme Court of California disagreed, noting that

> The word 'public' is used in the clause of the constitution in opposition to secret. As said by Judge Cooley, it is not meant that every person who sees fit shall, in all cases, be permitted to attend criminal trials. 'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with, and not unjustly condemned; and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly observed, if, without partiality or favoritism, a reasonable portion of the public is suffered to attend, notwithstanding that those persons whose presence would be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether.'

for the observation in dictum by Mr. Justice Stewart, we are compelled to state that unlike the situation in *Gannett* there was no general exclusion of the public from the proceedings below. Members of the families of defendant and the victim, as well as witnesses for both sides, were allowed to remain in the courtroom during the child's testimony. Furthermore, the exclusion did not apply to the entire proceeding but only to the testimony of a 7 year-old child. In other words, in the case *sub judice*, there was a greater degree of access than that which was upheld in *Gannett*.

In *Richmond Newspapers*, a defendant who was on trial for the fourth time for murder moved that the trial be closed to the public. The prosecutor informed the court that he had no objection to the motion. Thereupon, the trial judge ordered that the courtroom be cleared of all persons except the witnesses when they testified. A newspaper publisher challenged the order. Although seven members of the United States Supreme Court were unable to agree upon a majority opinion, they did concur in the decision that the court order violated the right of access of the public and the press to criminal trials. Defendant argues that *Richmond Newspapers* controls the case at bar by pointing to the words of Mr. Chief Justice Burger who noted that "[A]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." ___ U.S. at ___, 65 L. Ed.2d at 992, 100 S. Ct. at 2830. The Chief Justice had earlier observed that the trial court had made no findings to support closure; that no inquiry had been made as to whether alternative solutions would have met the need to assure fundamental fairness; and that there was no recognition of any right of the press or the general public to attend the trial. ___ U.S. at ___, 65 L. Ed.2d at 992, 100 S.Ct. at 2829. The decision in *Richmond Newspapers* does not entitle defendant to a new trial for several reasons.

First, defendant is attempting to fashion support for a sixth amendment claim from a case which has manifest first amendment underpinnings. Defendant cannot demand a new trial upon the assertion of an alleged violation of the constitutional rights of a third person under these particular facts. *Compare United States v. Payner*, ___ U.S. ___, 65 L. Ed.2d 468, 100 S. Ct. 2439 (1980). Second, the trial judge found as a fact that defendant was charged with the first-degree rape of a girl under the age of 12. It is implicit in these findings that the state would offer her testimony as evidence. This consideration alone would satisfy the language upon

which defendant relies. Obviously, rape and other sexual offense cases involve matters of the most sensitive and personal nature. These considerations are compounded when a child of tender years is involved and is called upon to testify in strange surroundings before unknown persons as to matters the child may not fully understand. This court has historically recognized the delicate sensitivities which are inherent in prosecutions of sexual offenses. *See State v. Pearson*, 258 N.C. 188, 128 S.E.2d 251 (1962). It is this delicacy, as well as the age of the child, which makes out a showing of an overriding interest to justify closure. Third, unlike *Richmond Newspapers*, the present case did not involve a closure of all trial proceedings. It involved the closing of the courtroom for only a limited period of time. In summary, *Richmond Newspapers* does not serve to support defendant's demand that he be awarded a new trial because a trial judge in the interest of the fair administration of justice may impose reasonable limitations upon the access of the public and the press to a criminal trial. ___ U.S. at ___ n. 18, 65 L. Ed.2d at 992, 100 S. Ct. at 2830. We find no violation of that standard in the present case. Even if we were to perceive such a violation, such a violation, on the facts of the present case, would be harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 17 L. Ed.2d 705, 87 S. Ct. 824 (1967).

[3] By his third and final assignment of error, defendant contends the trial court erred in denying his motion to suppress as evidence incriminating statements made by him. This assignment is without merit.

It is the rule in this jurisdiction that when the state attempts to offer into evidence a defendant's in-custody statements, made in response to questioning by police and in the absence of counsel, the state must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel. *State v. Siler*, 292 N.C. 543, 234 S.E.2d 733 (1977); *State v. Biggs*, 289 N.C. 522, 223 S.E.2d 371 (1976). "[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Miranda v. Arizona*, 384 U.S. 436, 479, 16 L. Ed.2d 694, 726, 86 S. Ct. 1602, 1630 (1966).

In compliance with this rule the trial court conducted a lengthy *voir dire* hearing at which Officers Snead and Jarrell testified.

Defendant offered no evidence at the voir dire. Following the hearing, the court made findings of fact and conclusions of law including findings and conclusions that before being questioned defendant was advised of his *Miranda* rights; that he fully understood his constitutional rights, including his right to remain silent and to have counsel; and that he freely, knowingly, intelligently and voluntarily waived his constitutional rights and made a statement to the police officers. The court denied defendant's motion to suppress and admitted into evidence the statements allegedly made by him.

It is well-settled that after conducting a voir dire hearing, a trial judge's findings of fact, if they are supported by competent evidence, are conclusive and binding on the appellate courts. *E.g., State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742 (1975), *death sentence vacated*, 428 U.S 908 (1976); *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975). In the case at hand, the trial judge's findings are fully supported by competent evidence, and the findings support the conclusions of law.

We conclude that defendant received a fair trial, free from prejudicial error.

No error.

JOHN E. MARSHALL, MARNA J. MARSHALL, DEVON G. BELL, RHONDA T. ROGERS, EDWARD L. HOWELL, AMON G. STEWART, BETTY J. STEWART, AND G. C. BROWN v. ERNEST W. MILLER, AND WIFE, JANE D. MILLER, INDIVIDUALLY AND D/B/A SPANISH TRAILS, ALIAS SPANISH TRAILS MOBILE HOME PARK, AND IRA GROSSMAN

No. 72

(Filed 7 April 1981)

Unfair Competition § 1— unfair trade practices — good faith irrelevant

In determining whether a violation of G.S. 75-1.1 has occurred, the question of whether the defendant acted in bad faith is not pertinent, and the character of the plaintiff, whether public or private, should not alter the scope of the remedy under this statute.

ON petition for discretionary review of a decision of the Court of Appeals, 47 N.C. App. 530, 268 S.E. 2d 97 (1980), vacating a judgment by *Alexander, J.* at the 18 September 1979 Session of

District Court, GUILFORD County in favor of plaintiffs and awarding defendants a new trial. Plaintiffs' petition for discretionary review was denied 4 November 1980. The Attorney General filed a motion for reconsideration of that denial on 24 November 1980 asking that this Court grant discretionary review for the limited purpose of considering whether the Court of Appeals erred in holding that proof of bad faith is required to establish a violation of G.S. 75-1.1. We allowed discretionary review for that limited purpose on 6 January 1981.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General John R. B. Matthis, Assistant Attorney General Alan S. Hirsch and Assistant Attorney General James C. Gulick, amicus curiae, for the State.

Edwards, Greeson, Weeks & Turner by Joseph E. Turner for plaintiff appellants.

Hatfield, Hatfield & Kinlaw by John B. Hatfield, Jr. and Kathryn K. Hatfield for defendant appellees.

MEYER, Justice.

Plaintiffs, residents of a mobile home park in Greensboro, North Carolina, bring this action seeking damages from defendants, owners and managers of the park. Each of the plaintiffs seeks damages for certain misrepresentations allegedly made by defendants concerning services which defendants would provide to plaintiffs, lessees of lots in the mobile home park. Plaintiffs offered evidence, and the jury found as fact, that defendants had led plaintiffs to believe that they would be furnished the following services or amenities by the mobile home park: two playgrounds, one basketball court, one swimming pool, adequate garbage facilities and pickup, complete yard care, paved and lighted streets and common facilities. The jury further found that, during the period between 7 October 1974 and the filing of this action on 7 October 1977, defendants had failed to provide any of those facilities or services. Based on these findings of fact by the jury, Judge Alexander determined as a matter of law that certain of defendants' misrepresentations constituted unfair or deceptive acts or practices in or affecting commerce within the meaning of G.S. 75-1.1. The procedure to be followed by trial courts, that the jury find facts upon which the trial judge bases conclusions of law as to whether a practice is proscribed by G.S.

75-1.1, was outlined by this Court in *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). Judge Alexander, following this procedure, determined that the defendants had engaged in unfair and deceptive practices, and damages assessed by the jury were trebled pursuant to G.S. 75-16.

The Court of Appeals found error in several of the issues submitted to the jury. Our review is limited to Issue No. 4, which was as follows:

> Did the defendant, after October 7, 1974, without the intent and/or the ability to perform lead the plaintiffs or any of them to believe that he would provide the following equipped facilities for their use, reasonable wear and tear accepted (sic)?
>
> (a) Two playgrounds
>
> ANSWER: Yes.
>
> (b) One basketball court
>
> ANSWER: Yes.
>
> (c) One swimming pool
>
> ANSWER: Yes
>
> (d) Household water
>
> ANSWER: No
>
> (e) Adequate garbage facilities and pickup
>
> ANSWER: Yes
>
> (f) Complete yard care, that is, mowing and trimming
>
> ANSWER: Yes
>
> (g) Paved streets
>
> ANSWER: Yes
>
> (h) Lighted streets
>
> ANSWER: Yes

(i) Common facilities

ANSWER: Yes

The Court of Appeals deemed that statement of the issue erroneous because defendants could be adjudged to have committed unfair or deceptive acts without a showing that they acted in bad faith.

In determining that bad faith was an essential element of plaintiffs' claim, the Court of Appeals recognized that G.S. 75-1.1(a) closely follows the portion of Section 5 of the Federal Trade Commission Act codified at 15 U.S.C. § 45(a)(1) (hereinafter FTC Act). In fact, the language of our statute is identical to that section of the FTC Act. Both acts further provide for government enforcement, our state Act through actions brought by the Attorney General to obtain mandatory orders. (G.S. 75-14). The court may impose civil penalties in suits instituted by the Attorney General in which the defendant is found to have violated G.S. 75-1.1 and the "acts or practices which constituted the violation were, when committed, specifically prohibited by a court order or knowingly violative of a statute." G.S. 75-15.2. Unlike our own statutory scheme, however, the FTC Act confers no private right of action upon an injured party. *Holloway v. Bristol-Myers Corp.*, 485 F. 2d 986 (D.C. Cir. 1973); *Carlson v. Coca Cola Co.*, 483 F. 2d 279 (9th Cir. 1973). Rather, the provisions for private enforcement found in our statute are more closely analogous to Section 4 of the Clayton Act, which provides for private suits with treble damage recovery for violation of federal antitrust laws. 15 U.S.C. § 15 (1976).

It is established by earlier decisions of this Court that federal decisions interpreting the FTC Act may be used as guidance in determining the scope and meaning of G.S. 75-1.1. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980); *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). Federal courts have uniformly held that the FTC may issue a cease and desist order to enforce Section 5 where an act or practice has a capacity to deceive, regardless of the presence or absence of good faith on the part of the offending party. *Chrysler Corp. v. F.T.C.*, 561 F. 2d 357, 363 (D.C. Cir. 1977); *Doherty, Clifford, Steers & Shenfield, Inc. v. F. T. C.*, 392 F. 2d 921 (6th Cir. 1968); *Montgomery Ward & Co. v. F.T.C.*, 379 F. 2d 666 (7th Cir. 1967). Although recognizing the precedential value of FTC decisions, the Court of Appeals held that, because our state Act provides for a private action, federal decisions to the effect that

bad faith was not necessary to show a violation of the FTC Act were not dispositive. Good faith, said the Court of Appeals, may be irrelevant where the Attorney General seeks injunctive relief under G.S. 75-14, a remedy analogous to an FTC cease and desist order, but it should be relevant where a party is potentially liable in a private action for treble damages under G.S. 75-16. Our task is to determine whether the intent of the Legislature will be more fully served if the addition of a private action under our statute brings with it a concomitant requirement that a private party must show bad faith in order to recover treble damages. In resolving that question, we are guided by two other questions: (1) what was this State's unfair and deceptive trade practice act intended to accomplish, and (2) how can the purpose for which the law was passed be most fully realized.

Between the 1960's and the present, North Carolina was one of forty-nine states to adopt consumer protection legislation designed to parallel and supplement the FTC act. Leaffer and Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 Geo. Wash. L. Rev. 521 (1980). The statute enacted in North Carolina in fact had its genesis in the first of several alternative forms suggested to the states by the Federal Trade Commission and the Committee on Suggested State Legislation of the Council of State Governments. Council of State Governments, Suggested State Legislation (Vol. XXIX 1970); Lovett, *State Deceptive Trade Practices Legislation*, 46 Tulane L. Rev. 724, 732 (1972). The Commission encouraged state-level legislation because it recognized that enforcement of the FTC Act's broad Section 5 proscription against "unfair or deceptive acts or practices" could not possibly be accomplished without extra-agency assistance. L. Richie & H. I. Saferstein, Private Actions for Consumer Injury Under State Law—The Role of the Federal Trade Commission, in FTC Trade Regulation—Advertising, Rulemaking and New Consumer Protection 415 (PLI 1979). In enacting G.S. 75-16 and G.S. 75-16.1, our Legislature intended to establish an effective private cause of action for aggrieved consumers in this State.

Such legislation was needed because common law remedies had proved often ineffective. Tort actions for deceit in cases of misrepresentation involved proof of scienter as an essential element and were subject to the defense of "puffing." Comment, *Maryland's*

Consumer Protection Act: A Private Cause of Action for Unfair or Deceptive Trade Practices, 38 Md. L. Rev. 733, 734 (1979). Proof of actionable fraud involved a heavy burden of proof, including a showing of intent to deceive. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974). Actions alleging breach of express and implied warranties in contract also entailed burdensome elements of proof. *See* Langer & Ormstedt, *The Connecticut Unfair Trade Practices Act*, 54 Conn. B. J. 338 (1980). A contract action for rescission or restitution might be impeded by the parol evidence rule where a form contract disclaimed oral misrepresentations made in the course of a sale. Use of a product after discovery of a defect or misrepresentation might constitute an affirmance of the contract. Any delay in notifying a seller of an intention to rescind might foreclose an action for rescission. Richie and Saferstein, *supra* at 416-17. Against this background, and with the federal act as guidance, North Carolina and all but one of her sister states have adopted unfair and deceptive trade practices statutes. Richie & Saferstein, *supra* at 441.

In its opinion, the Court of Appeals sought to draw a distinction between actions brought by the Attorney General and private actions brought by aggrieved consumers. Careful examination of the applicable precedent in this jurisdiction and our interpretation of the intent of the Legislature leads us to conclude that, in determining whether a violation of G.S. 75-1.1 has occurred, the question of whether the defendant acted in bad faith is not pertinent. The character of the plaintiff, *i.e.* whether public or private, should not alter the scope of the remedy under this statute.

As authority for finding bad faith to be an essential element in a private cause of action under G.S. 75-1.1, Judge Parker cited *Trust Co. v. Smith*, 44 N.C. App. 685, 262 S.E. 2d 646 (1980) and *United Roasters Inc. v. Colgate Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980). In *Smith*, defendants, defaulting obligors on a note used to secure the purchase of a mobile home, filed a third party claim against the dealer who sold them the mobile home, alleging that the sale of the home and dealer's failure to perform certain services constituted unfair or deceptive trade practices in violation of G.S. 75-1.1. At the close of all evidence, the trial court granted defendant dealer's motion for summary judgment on that issue. The Court of Appeals affirmed the trial court, saying that even if plaintiff's allegations were true, that would only constitute a breach

of warranty, and such a breach standing alone does not constitute a violation of Chapter 75. 44 N.C. App. at 691, 262 S.E. 2d at 650. The court also said:

> We need not decide now what specific actions, if any, which do not constitute fraud, would nonetheless be a violation of G.S. 75-1.1. Nevertheless, under the evidence presented *in this case*, absent evidence of willful deception or bad faith, we cannot conclude that the existence of defects in the mobile home or Tunstall's failure to perform the above stated services constitutes a violation of G.S. 75-1.1 to warrant the award of treble damages under G.S. 75-16. Assuming *arguendo* that such facts, if established, constitute a breach of warranty, *a breach alone does not constitute a violation of Chapter 75*, and it is, therefore, inappropriate to treble damages resulting solely from the breach. (Citation omitted).

Id. (Emphasis added).

Appellants contend, and Judge Parker agreed, that that language requires a showing of bad faith in order for a party to recover treble damages. We do not agree for two reasons. First, the court there clearly limited its opinion to the facts of the case before it. Second, in *Smith* the alleged deceptive acts had occurred and suit had been filed prior to the amendment to G.S. 75-1.1 adopted by the Legislature in 1977. The form of G.S. 75-1.1 (a) and (b) controlling in *Smith* read as follows:

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) The purpose of this section is to declare, and to provide civil means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, *to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.* (Emphasis added).

Any inference in *Smith* that bad faith is an essential element of a cause of action under G.S. 75-1.1 may have been based on the emphasized language found in section (b). We do not feel that

former section (b) supports such a holding. Thus any possible implication in *Smith* that a party must show bad faith in order to recover treble damages for a violation of G.S. 75-1.1 is expressly overruled.[1]

United Roasters, also relied on by the Court of Appeals, presents a more difficult question. In that case before a United States District Court, plaintiff complained of alleged unfair competition by defendant in breaching a contract between the parties, and moved for treble damages. Judge Maletz, sitting by designation, ruled that under North Carolina law treble damages were only recoverable where a jury finds intentional wrongdoing on the part of defendant. Judge Maletz reached that result by analyzing three North Carolina cases: *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 245 S.E. 2d 801, *cert. denied*, 295 N.C. 653, 248 S.E. 2d 257 (1978); *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975); and *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *cert. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). While it is true that in each of those cases the jury had found, or the parties had stipulated, that defendant had acted intentionally, we do not find, as did Judge Maletz, that these cases establish that intentional wrongdoing is necessary in order to find a violation of G.S. 75-1.1. It simply shows that the previous cases involved defendants whose actions were so egregious as clearly to have been in bad faith.

Nor do we concur in Judge Maletz's conclusion that, because G.S. 75-16 is punitive in nature, the "requirement of a jury finding of intentional wrongdoing to constitute a violation of the statute is consistent with the position of the courts of North Carolina generally concerning punitive damages." 459 F. Supp. at 1059. To begin with, it is an oversimplification to characterize G.S. 75-16 as punitive. The statute is partially punitive in nature in that it clearly serves as a deterrent to future violations. But it is also remedial for other reasons, among them the fact that it encourages private enforcement and the fact that it provides a remedy for aggrieved parties. It is, in effect, a hybrid. *State Ex. Rel. Edmisten v. J. C. Penney Co.*, 292 N.C. 311, 319, 233 S.E. 2d 895, 900 (1977); *Holley v. Coggin Pontiac*, 43 N.C. App. 229, 237, 259 S.E. 2d 1, 6-7 (1979).

As it is a hybrid statute, providing a remedy for an entirely statutory cause of action, analogies to other rules of common law

[1] We note that the amendment to G.S. 75-1.1, effective 27 June 1977, deleted *all* of the language of (b) quoted above.

governing the imposition of punitive damages should not control. More significantly, whereas common law actions grounded in tort or contract *allow* both actual and multiple damages, G.S. 75-16 provides in effect that any actual damages assessed *shall* be trebled by the trial court if a violation of G.S. 75-1.1 is found. Many of our sister states provide that the awarding of exemplary or treble damages shall be proper only upon a finding of intentional wrongdoing. *See* Conn. Gen. Stat. Ann. § 42-110g (West Cum. Supp. 1980) (punitive damages in the discretion of the court); Ga. Code Ann. § 106-1210 (Cum. Supp. 1980) (if violation was "intentional" exemplary damages allowed); La. Rev. Stat. Ann. § 51:1409 (West Cum. Supp. 1981) (if deceptive act knowingly used, damages trebled); Mass. Gen. Laws Ann. Ch. 93A § 11 (West Cum. Supp. 1981) (if act willful or knowing, damages may be trebled); S.C. Code § 39-5-140 (1976) (if violation willful or knowing, actual damages trebled); Tenn. Code Ann. § 47-18-109 (1979) (if violation willful or knowing, actual damages trebled); Tex. [B&C] Code Ann. tit. 2, § 17.50(b)(1) (Cum. Supp. 1980) (if violation done knowingly, trier of fact may treble the amount of actual damages under $1,000.00).

Absent statutory language making trebling discretionary with the trial judge, we must conclude that the Legislature intended trebling of any damages assessed to be automatic once a violation is shown. To rule otherwise would produce the anomalous result of recognizing that although G.S. 75-1.1 creates a cause of action broader than traditional common law actions, G.S. 75-16 limits the availability of any remedy to cases where some recovery at common law would probably also lie.

Nor do we find the fact that a violation of any provision of the Retail Installment Sales Act, G.S. Chapter 25A, is only a violation of G.S. 75-1.1 when it is "knowing and willful" probative on the issue before us. As correctly argued by the Attorney General, full compliance with that Act requires meeting a number of technical requirements. It is therefore not inconsistent with our decision today that, by statute, only a knowing and willful violation of that Act constitutes an unfair or deceptive trade practice. Equally significant is the fact that in many instances the Legislature has declared that violation of certain statutes also constitutes a violation of G.S. 75-1.1, without any requirement of intentional wrongdoing. *See, e.g.*, G.S. 66-100(e) (violation of any provisions of the Business Opportunity Sales statute); G.S. 66-111(d) (violation of any provision of the

Loan Brokers statute); G.S. 66-125(c) (violation of any provision of the Prepaid Entertainment Contracts statute).

Most of the prior reported decisions interpreting G.S. 75-1.1 have dealt with the scope of the statute. *See, e.g., State ex rel. Edmisten v. J. C. Penney Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977); *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977). But in *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980), this Court addressed the question of what, as a matter of law, makes a trade practice "unfair or deceptive." Justice Britt, writing for the Court, began his analysis of that question by noting that the meaning of the terms is not enunciated by the FTC Act, but that "[i]t is critical that the generality of the standards of illegality be noted." *Id.* at 262, 266 S.E. 2d at 620 (citations omitted).

Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. *Id.* at 262-63, 266 S.E. 2d at 621. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Id.* at 263, 266 S.E. 2d at 621. As also noted in *Johnson*, under Section 5 of the FTC Act, a practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. *Id.* at 265, 266 S.E. 2d at 622; *Trans World Accounts, Inc. v. Federal Trade Commission*, 594 F. 2d 212 (9th Cir. 1979); *Resort Car Rental System, Inc. v. Federal Trade Commission*, 518 F. 2d 962 (9th Cir.), *cert. denied sub nom MacKenzie v. United States*, 423 U.S. 827 (1975). Consistent with federal interpretations of deception under Section 5, state courts have generally ruled that the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail under the states' unfair and deceptive practices act. *Johnson v. Insurance Co.*, 300 N.C. 247, 265-66, 266 S.E. 2d 610, 622 (1980); Annot. 89 ALR 3d 449, 465; *see Leaffer and Lipson, supra* at 535 and the numerous cases cited in n. 87.

If unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant. Good faith is equally irrelevant. What is relevant is the effect of the actor's conduct on the consuming public. Consequently, good faith is not a defense to an alleged violation of G.S. 75-1.1.

As mentioned above, the Court of Appeals felt that, as this was a private action rather than one instituted by the Attorney General, good faith was a proper defense. There is some authority in other jurisdictions for such a distinction. *See, e.g., Bartner v. Carter*, 405 A. 2d 194 (Me. 1979) (where "loss of money or property" is an essential element of the claim, private action showing mere proof of capacity to deceive is insufficient).

We reach the contrary result for several reasons. First, nothing in our earlier decisions in *Hardy* and *Johnson* limits the precedential value of FTC jurisprudence to cases or actions brought by the Attorney General. Indeed, both cases actually involved private litigants. Second, unlike statutes enacted by some of our sister states, there is no explicit statutory requirement of a showing of bad faith in G.S. 75-1.1. Finally, as discussed above, under the standards for determining what is unfair and deceptive according to *Johnson*, the intent or good faith belief of the actor is irrelevant.

In an area of law such as this, we would be remiss if we failed to consider also the overall purpose for which this statute was enacted. The commentators agree that state statutes such as ours were enacted to supplement federal legislation, so that local business interests could not proceed with impunity, secure in the knowledge that the dimensions of their transgression would not merit federal action. Given the small dollar amounts often involved in such suits, statutory provision for treble damages found in G.S. 75-16 serves two purposes. First, it makes more economically feasible the bringing of an action where the possible money damages are limited, and thus encourages private enforcement. *See*, II Areeda & Turner, Antitrust Law 149-50 (1978), *quoted in Survey of Developments in North Carolina Law, 1980 — Commercial Law*, 59 N.C. L. Rev.____ (1981). Second, it increases the incentive for reaching a settlement. Further provison for attorney fees, found in G.S. 75-16.1, also encourages private enforcement in the marketplace. The dissimilarity in language used by our Legislature in G.S. 75-1.1 and G.S. 75-16.1, in that willfulness *is* specifically mentioned in the latter, was apparently not accidental. The fact that attorney fees may only be awarded upon a specific finding that defendant acted "willfully" indicates, rather clearly we think, that the omission of willfulness, intentional wrongdoing or bad faith as an essential element under G.S. 75-1.1 was deliberate, and supports the result in this case. We further note that G.S. 75-16.1 also provides that an unsuccessful

plaintiff may be charged with defendant's attorney fees should the court find that "[t]he party instituting the action knew, or should have known, the action was frivolous and malicious." This is an important counterweight designed to inhibit the bringing of spurious lawsuits which the liberal damages provisions of G.S. 75-16 might otherwise encourage.

Were we to agree with the Court of Appeals, we think we would seriously weaken the effectiveness of G.S. 75-1.1 and circumvent the intent of the Legislature. For reasons not here addressed the Court of Appeals ordered this cause remanded for a new trial. Except as modified herein, we adopt the opinion of the Court of Appeals. For the reasons stated, the case is remanded to the Court of Appeals with directions that it be further remanded to the District Court, Guilford County for proceedings not inconsistent herewith.

Modified and affirmed.

PORSH BUILDERS, INC. v. CITY OF WINSTON-SALEM, A NORTH CAROLINA MUNICIPAL CORPORATION; WAYNE A. CORPENING, MAYOR; JON B. DEVRIES; EUGENE F. GROCE; ERNESTINE WILSON; VIRGINIA H. NEWELL; JOHN J. CAVANAGH; ROBERT S. NORTHINGTON, JR.; VIVIAN K. BURKE; LARRY D. LITTLE, MEMBERS OF THE BOARD OF ALDERMEN FOR THE CITY OF WINSTON-SALEM, AND THE REDEVELOPMENT COMMISSION OF WINSTON-SALEM, A POLITICAL SUBDIVISION OF THE CITY OF WINSTON-SALEM

No. 96

(Filed 7 April 1981)

1. Municipal Corporations § 4.5— sale of redevelopment commission property — highest responsible bidder

In the statute providing for sale of municipal redevelopment commission property to the "highest responsible bidder," G.S. 160A-514(d), the term "responsible" was intended to give the municipality power to use its discretion only to the extent of determining whether a bidder had the resources and financial ability to complete the project set forth in his proposal for the development of the property and does not allow the municipality to consider which bid best complies with the redevelopment plan.

2. Municipal Corporations § 4.5— sale of redevelopment commission property — rejection of highest bid

The provision of G.S. 160A-514(d) giving the governing board of a munici-

pality the power to reject all bids for redevelopment commission property does not impliedly authorize the board to reject the highest bid if a lower bid "more nearly" complies with the redevelopment plan.

3. Municipal Corporations § 4.5— sale of redevelopment commission property — authority of municipal governing body to approve sale

The provision of G.S. 160A-514(d) making sales of municipal redevelopment commission property subject to the approval of the governing body of the municipality merely places final authority in the board to determine whether all submitted bids satisfy the zoning requirements of the district and are in general conformity with the redevelopment plan and does not give the board authority to determine which bid "more nearly" complies with the redevelopment plan.

4. Municipal Corporations § 4.5— sale of redevelopment commission property — necessity for accepting high bid

In selling the property of a municipal redevelopment commission to private developers, the municipal board of aldermen is required to accept the "highest responsible bid," if any, where that bid complies with the applicable zoning restrictions and the redevelopment plan for the property to be sold.

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

Justice CARLTON dissenting.

DEFENDANTS appeal as a matter of right from a decision of the Court of Appeals, 47 N.C. App. 661, 267 S.E. 2d 697 (1980) (opinion by *Webb, J.*, with *Vaughn, J.*, concurring and *Martin (Harry C.), J.*, dissenting). The Court of Appeals reversed summary judgment in favor of defendants entered by *Walker, S.J.*, at the 20 November 1978 Civil Session of Superior Court, FORSYTH County. This case was argued as No. 116, Fall Term, 1980.

Plaintiff instituted this action on 17 October 1978, seeking an order directing the Mayor and Board of Aldermen of Winston-Salem to accept a bid made by plaintiff to buy a certain parcel of real estate in the City of Winston-Salem, or, in the alternative, an order awarding damages. The parcel at issue was acquired by the City as a part of a tract of land to be developed in accordance with the Crystal Towers Community Development Plan. The parcel, designated as Parcel 1 of the Crystal Towers Community Development Area, was offered for sale by the Winston-Salem Redevelopment Commission pursuant to the terms of G.S. 160A-514. Plaintiff submitted a bid of $6,550.00 with a plan to build six apartment units upon the property. One other bid was submitted by Mr. John Ozmun in the amount of $4,750.00, with a proposal to move a single family dwelling onto the parcel. The City of Winston-Salem Plan-

ning Staff determined that both proposals met the zoning requirements of the area and satisfied the residential purposes of the Crystal Towers Community Development Plan. The Planning Staff further opined that Mr. Ozmun's proposal "more nearly" complied with the Development Plan, in that if Parcel 1 were sold to Mr. Ozmun, he would agree to sell certain other property to the City for development as housing for the elderly, one of the goals specified in the Development Plan. The Winston-Salem Board of Aldermen rejected plaintiff's bid and accepted Mr. Ozmun's bid on 16 October 1978 by a five to four vote, with the Mayor casting the deciding vote.

The Forsyth County Superior Court granted defendants' motion for summary judgment on 20 November 1978 and on 21 November 1978 denied plaintiff's motion for injunctive relief pending appeal. The Court of Appeals, Judge Harry C. Martin dissenting, reversed summary judgment entered in favor of defendants, holding that if the Board of Aldermen elected to accept either of the two bids, it would have to accept plaintiff's bid as the "highest responsible bid" under the language of G.S. 160A-514(d). Defendants appeal as a matter of right pursuant to G.S. 7A-30(2).

Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr.; City Attorney Ronald G. Seeber; and Assistant City Attorney Ralph D. Karpinos for defendant-appellants.

Frye, Booth and Porter by Leslie G. Frye and John P. Van Zandt, III, for plaintiff-appellee.

COPELAND, Justice.

The sole question presented by this appeal is whether defendants were required under the language of G.S. 160A-514 to accept plaintiff's bid as the "highest responsible bid," if defendants decided to accept either bid submitted. For the reasons stated below, we find the Court of Appeals' majority opinion correct in its interpretation of the statute as allowing defendants to either reject all bids or accept plaintiff's "highest responsible bid," and hold that summary judgment entered in favor of defendants was properly reversed.

G.S. 160A-514(c) and (d) govern the sale to private developers of property owned by the Winston-Salem Redevelopment Commission and provide:

"(c) A commission may sell, exchange, or otherwise transfer real property or any interest therein in a redevelopment project area to any redeveloper for residential, recreational, commercial, industrial or other uses or for public use in accordance with the redevelopment plan, subject to such covenants, conditions and restrictions as may be deemed to be in the public interest or to carry out the purposes of this Article; provided that such sale, exchange or other transfer, and any agreement relating thereto, may be made only after, or subject to, the approval of the redevelopment plan by the governing body of the municipality and after public notice and award as specified in subsection (d) below.

(d) Except as hereinafter specified, no sale of any property by the commission or agreement relating thereto shall be effected except after advertisements, bids and award as hereinafter set out. The commission shall, by public notice, by publication once a week for two consecutive weeks in a newspaper having general circulation in the municipality, invite proposals and shall make available all pertinent information to any persons interested in undertaking a purchase of property or the redevelopment of an area or any part thereof. The commission may require such bid bonds as it deems appropriate. After receipt of all bids, the sale shall be made to the highest responsible bidder. All bids may be rejected. All sales shall be subject to the approval of the governing body of the municipality . . . ."

In its conclusions of law supporting entry of summary judgment in favor of defendants, the trial court stated that G.S. 160A-514(c) and (d) confer upon defendants the discretion to consider more than the dollar amount bid in determining which bid, if any, to accept. Specifically, the trial court found defendants authorized to consider "the redevelopment plan of each bidder, the housing needs of the City, the housing policies of the City, the revenue to be derived from each bid," and other factors relevant to the property in question. We agree with the majority decision of the Court of Appeals that neither subsection of G.S. 160A-514 can be interpreted to give defendants the discretionary powers recited by the trial court.

Municipal corporations are created by legislative enactment and possess only those powers conferred in the express language of a statute and those necessarily implied by law therefrom. *Campbell v. First Baptist Church*, 298 N.C. 476, 259 S.E. 2d 558 (1979); Matter of Ordinance of Annexation No. 1977-4, 296 N.C. 1, 249 S.E. 2d 698 (1978); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972). The municipality may not exercise any power not granted to it, and possesses no inherent authority to exercise powers either expressly or impliedly prohibited by statute. *Greene v. City of Winston-Salem*, 287 N.C. 66, 213 S.E. 2d 231 (1975). In addition, it is generally held that statutory delegations of power to municipalities should be strictly construed, resolving any ambiguity against the corporation's authority to exercise the power. This Court has long held that "[a]ny fair, reasonable doubt concerning the existence of the power is resolved against the corporation." *Shaw v. City of Asheville*, 269 N.C. 90, 97, 152 S.E. 2d 139, 144 (1967), *quoting from Elizabeth City v. Banks*, 150 N.C. 407, 412, 64 S.E. 189, 190 (1909). *See also* 56 Am. Jur. 2d *Municipal Corporations* §§ 195, 210 (1971).

[1] Applying the above rules of statutory interpretation to the language of G.S. 160A-514 (c) and (d), we find that the statute cannot be construed to vest the amount of broad discretion in defendants that was contemplated by the trial court. Subsection (d) specifically directs that "[a]fter receipt of all bids, the sale *shall* be made to the highest responsible bidder." (Emphasis added.) Defendants contend that by the use of the word "responsible," the legislature intended to give the governing board of a municipality broad discretion to accept a lower bid if it determines that the lower bid will make a more effective contribution to the redevelopment plan. We disagree. The adjective "responsible" modifies the term "bidder," not the term "bid." "Responsible" is defined in Black's Law Dictionary 1180 (5th ed. 1979) as follows:

> "Liable; legally accountable or answerable. Able to pay a sum for which he is or may become liable, or to discharge an obligation which he may be under."

We hold that the term "responsible" in G.S. 160A-514(d) was intended to give the municipality power to use its discretion only to the extent of determining whether a bidder has the resources and financial ability to complete the project set forth in his proposal for the development of the property. This phrase does not allow the

municipality to consider which bid best complies with the redevelopment plan.

[2] Likewise, we reject defendants' allegation that since subsection (d) of the statutue expressly empowers the governing board of a municipality to reject all bids, it impliedly authorizes the board to reject the highest bid if a lower bid "more nearly" complies with the redevelopment plan. Again, there is no language in the statute to support defendants' proposed interpretation. The clear meaning of the language of subsection (d) is that although the municipality may reject all bids, if any bid is accepted, it must be the "highest responsible bid."

Our interpretation is supported by this Court's recent opinion construing the same statute in *Campbell v. First Baptist Church, supra*. There Chief Justice Branch, writing for the Court, stated:

> "As we read the statute, each subsection confers upon a redevelopment commission the authority to perform certain acts necessary to carry out the redevelopment project, and the use of the word 'may' merely denotes that the commission is not *required* to do each and every act authorized in G.S. 160A-514. However, should a commission elect to exercise the authority conferred upon it by a particular section, then the procedural requirements 'shall' be followed." 298 N.C. at 483, 259 S.E. 2d at 563.

Subsection (c) provides that a municipality *may* sell property, and if it chooses to exercise this power, the sale must be made according to the procedural requirements set forth in subsection (d). One requirement specified under subsection (d) is that "[a]fter receipt of all bids, the sale shall be made to the highest responsible bidder." The use of the term "shall" renders the procedural requirement mandatory, if the governing body of the municipality decides to accept any bid.

[3] Defendants further maintain that the authority to use the discretionary powers outlined by the trial court stems from the provision in subsection (d) that "[a]ll sales shall be subject to the approval of the governing body of the municipality." They argue that the express delegation of authority to approve the sale impliedly gives them the power to determine which bid "more nearly" complies with the redevelopment plan. Were we to accept

defendants' argument, the provision that the sale shall be made to the "highest responsible bidder" would be rendered meaningless. If a sale could only be "approved" by the governing board after the board determined that the sale was being made to the bidder whose plan best satisfied the purposes and specifications of the redevelopment plan, then no more than one "responsible bidder" could exist and there would have been no need for the legislature to specify that the sale shall be made to the *highest* responsible bidder. We believe the provision vesting authority in the governing board to approve the sale was merely intended to place final authority in the board to determine whether all submitted bids satisfy the zoning requirements of the district and are in general conformity with the redevelopment plan. The clause also allows the board to ultimately decide whether all bids should be rejected. Thus, the approval provision serves as a protective measure to insure that the Redevelopment Commission's actions under the statute are in conformity with the zoning laws and the redevelopment plan. This interpretation reconciles the approval clause and the requirement that the sale shall be made to the highest responsible bidder, so that each sentence of the statute remains fully effective. It is well established that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980); *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980); *State Ex Rel. Commissioner of Insurance v. North Carolina Automobile Rate Administrative Office*, 294 N.C. 60, 241 S.E. 2d 324 (1978). Our interpretation of G.S. 160A-514(c) and (d) complies with this rule of construction and comports with the legislature's intent.

[4] For the foregoing reasons, we affirm the Court of Appeals' majority holding that under the language of G.S. 160A-514, defendants are required to accept the "highest responsible bid," if any, where that bid is in compliance with the applicable zoning restrictions and redevelopment plan for the property to be sold. The Court of Appeals' decision reversing summary judgment in favor of defendants is

Affirmed.

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

Justice CARLTON dissenting.

I respectfully dissent from the majority opinion because I think it incorrectly interprets the intent of our Legislature with respect to the responsibility of a municipal governing body in reviewing the sale to private developers of property owned by a redevelopment commission. In my opinion, this decision seriously impairs the ability of city officials to manage responsibly the business affairs of the city with which they are entrusted.

The sole issue presented by this appeal is the interpretation of the requirement in G.S. 160A-514(d) that "[a]fter receipt of all bids, the sale shall be made to the highest responsible bidder." The majority holds that the term "responsible" in the statute:

> was intended to give the municipality power to use its discretion *only* to the extent of determining whether a bidder has the resources and financial ability to complete the project set forth in his proposal for the development of the property. *This phrase does not allow the municipality to consider which bid best complies with the redevelopment plan.*

(Emphases added.) With this narrow, restrictive interpretation of the statute I strongly disagree.

In reaching its interpretation of the statutory phrase "highest responsible bidder," I think that the majority has ignored the cardinal rule of statutory construction: In ascertaining legislative intent, courts should consider the *language* of the statute, the *spirit* of the statute and what it seeks to *accomplish*. *Stevenson v. Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972). In reviewing the language, spirit and goal of G.S. 160A-514 I think that the trial court properly concluded that the statute authorizes a city governing board "to give consideration to the redevelopment plan of each bidder, the housing needs of the City, the housing policies of the City, the revenue to be derived from each bid, and factors other than merely the dollar amount bid for the property in question." The majority reaches a contrary conclusion with absolutely no citation of authority.

In first reviewing the *language* of the statute, the statutory phrase in question refers to the "highest responsible bidder." To hold, as the majority does, that this phrase refers only to determin-

ing whether a bidder has sufficient financial resources to make good his bid and to perform his proposed plan is to ignore completely the precise legislative usage of the word "responsible." The statute does not provide, as the majority indicates, that a sale shall be made to the *highest bidder*. Had the Legislature intended for city boards to limit their consideration solely to dollars and cents, why insert the word "responsible?" The word was used, I submit, because the Legislature intended this phrase to mean more than mere financial considerations.

In reading G.S. 160A-514 in conjunction with the remaining statutes in Article 22, Chapter 160A, the *spirit* and *goal* of the statute in question becomes clear, and the legislative intent in employing the phrase "highest responsible bidder" becomes easily discernible. As the trial court apparently concluded, this Article of our General Statutes is obviously concerned with factors such as the redevelopment plan of bidders, the housing needs and policies of a city, the revenue to be derived by a city from bids received, and other factors other than mere dollar amounts. *See* G.S. § 160A-513 (1976). To hold otherwise would be to interpret as meaningless the statutory provision requiring that bids and sales must be approved by the governing body, G.S. § 160A-514(d). Under the majority's interpretation, such approval would be merely a mechanical and ministerial act which could be performed by any city employee by simply comparing the bid amounts. I do not believe this to be spirit or goal of our redevelopment statutes.

In reaching its decision, I think the majority has ignored the clear language of G.S. 160A-514(c). As I read this statute, it limits sales by redevelopment commissions to bidders whose plans are consistent with the redevelopment or community development plan for an area and requires the governing body's, in this case the Board of Aldermen's, approval of such sales. By this statute, it seems clear to me that our Legislature has authorized the Board of Aldermen to determine which plans are consistent with, or more consistent with, the redevelopment plan. Here, a majority of the Board concluded that the Ozmun bid was more consistent with the community plan and more fully achieved the objectives sought to be achieved by the plan. Clearly, then, in determining who is the "highest responsible bidder," the Board of Aldermen is authorized, and indeed required, to consider which plan would be most consistent with the redevelopment plan of the city.

I certainly agree with the majority that the phrase "highest responsible bidder" refers to financial considerations. I cannot agree, however, with the majority's holding that the only financial consideration is that of the dollar amount of the bids submitted. Other financial considerations must surely be more important to a city board. The board should be able to consider which plans submitted would generate the most tax revenue for the city in the long run and which plan would be most consistent with the housing goals and policies of the city. In other words, it is inconceivable to me that the Legislature intended that a governing body could not consider, in determining the "highest responsible bidder," the overall financial impact upon a city when making its determination as to the "highest responsible bidder."

The instant case is illustrative of this point. The record discloses that the City was committed to acquire for Section 8 Elderly Housing a lot across the street from the one here in question. The minutes of the Board meeting of 16 October 1978 indicate that Mr. Ozmun held an option on this lot and intended to move onto it a house he had purchased. This would make it necessary for the City to purchase a house and lot, rather than a lot only, if Parcel 1 (the lot sold by the City to Ozmun) were sold to Porsh Builders. The Ozmun bid committed Mr. Ozmun to move his house onto Parcel 1 rather than the Section 8 housing lot. Obviously, the action of the Board of Aldermen precluded the City from having to expend considerable sums in purchasing a house and lot. Surely this savings would exceed the difference between the Ozmun and Porsh bids. Moreover, the minutes established that the Ozmun bid would generate more tax funds for the City than the Porsh bid. The record discloses that approval of the Ozmun bid would result in the receipt into the City of substantial rent subsidy funds and would make available eleven additional units of low-rent housing in the City. I believe that these are valid considerations in determining which is the "highest responsible bidder."

While the majority cites no authority for its holding, my view is supported by decisions from other jurisdictions. In *Claus v. Babiarz*, 41 Del. Ch. 158, 165, 190 A. 2d 19, 23 (1963), the court said, "It has been held by eminent authority that a municipality in disposing of property is not required to consider only the price which is offered. It may take into consideration its economical, financial and industrial interest, including the tax yield from proposed develop-

ment." (Citations omitted.) *See Futterman-Marott Corporation v. City of Fort Wayne*, 248 Ind. 503, 230 N.E. 2d 102 (1967).

My view is also supported by the well-established rule in this jurisdiction that, "The courts will not interfere with the exercise of discretionary powers conferred on municipal corporations for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion . . . ." 9 *Strong's North Carolina Index 3d*, Municipal Corporations § 4 at p. 134 (1977), and cases cited therein. I believe that the power granted by G.S. 160A-514 is discretionary and I find no contention here that this Board abused its discretion. Indeed, I think the Board, based on the record before us, properly exercised its discretion. The record establishes that the Board considered numerous factors before reaching its determination. For example, it considered (1) the relationship between the Ozmun proposal and the availability to the City of another site for Section 8 housing, (2) federal funding of approximately $300,000 which would be available for Section 8 housing, (3) federal rental assistant payments of approximately $1.3 million over a forty-year period for the maintenance of tenants in the proposed Section 8 housing project, (4) the City Planning Staff's determination that the Ozmun plan more nearly complied with the redevelopment plan of the City, (5) the greater increase in housing stock which would result from acceptance of the Ozmun bid than would result from acceptance of the Porsh proposal, (6) the increase in availability of housing for the elderly low-income citizens in the City which would result from acceptance of the Ozmun proposal, and (7) a substantial increase in the tax base and tax revenues which would result from acceptance of the Ozmun proposal. In light of these factors, the relatively small difference in bids of $1,800 pales in comparison. To ignore the enumerated factors and require the City to accept the bid on a mere $1,800 difference, as the majority would require, would not only, in my view, constitute a failure to award to the highest *responsible* bidder, such action would be highly irresponsible.

In my opinion, the majority's decision will seriously impair the ability of city boards to provide proper fiscal management of city affairs. It is inconceivable to me that our Legislature intended such a result. The majority result is wholly unreasonable when the practical ramifications of its result are considered. For example, it would require a city (1) to ignore the anticipated tax revenue or

other municipal revenues to be generated by the bids submitted, (2) to ignore the housing policies or other applicable policies of the city, (3) to accept a bid with conditions unacceptable to the city, and (4) to accept the highest dollar bid even though, as here, the public notice of sale specifically states that the redevelopment plan of the bidder must first be approved by the Board of Aldermen. Surely such relevant factors as these are not to be ignored by men and women duly elected to provide sound business management to the affairs of North Carolina's municipalities.

The absurdity of the majority result is best illustrated by a hypothetical. If Bidder A submitted a bid of $50,000 for a particular area on which it planned construction which would result in a tax base of $100,000 and Bidder B submitted a bid of $49,500 for the same property on which it planned construction which would result in a tax base of $1,000,000, the majority would hold that the "highest responsible bidder" is Bidder A because his bid was $500 more than Bidder B. In other words, the majority would require the city to take the $500 bid differential and ignore a $900,000 tax base differential which would benefit the city with tax revenues for years to come.

Such a result violates not only what I perceive to be the legislative intent; it flies in the face of what I know to be plain common sense.

STATE OF NORTH CAROLINA v. STERLING BOONE

No. 15

(Filed 7 April 1981)

1. Criminal Law § 81— medical discharge from army — witness's testimony properly excluded

In a prosecution for armed robbery and kidnapping where defendant pled not guilty by reason of insanity, the trial court did not err in excluding testimony by defendant's father concerning defendant's discharge from the army and the nature of his discharge, since the father was testifying with respect to a letter which arrived at defendant's home; the father testified that he could not read well and that someone had read the letter to him; the father was therefore not in a position to testify about the letter and its contents; the writing itself was the best evidence of its contents and it was subequently admitted into evidence; and the evidence of defendant's "medical discharge" which he complained was excluded

was in fact admitted.

2. Criminal Law § 169— testimony not permitted at trial — failure of record to include excluded evidence

In a prosecution for armed robbery and kidnapping where defendant pled not guilty by reason of insanity, any error of the trial court in refusing to allow defendant's father to testify about his observations of defendant's acts in the past year was waived by defendant's failure to include the witness's answers in the record on appeal.

3. Criminal Law § 63.1— mental capacity — lay opinion admissible

The trial court did not err in allowing the district attorney to ask defendant's father his opinion as to whether defendant knew right from wrong and the father's answer that "at times he knew the difference between right and wrong" was properly admitted, since lay opinion may be received concerning the mental capacity of a defendant in a criminal case.

4. Criminal Law § 63.1— defendant's irrational behavior — exclusion of evidence not prejudicial error

In a criminal prosecution where defendant pled the defense of insanity, a deputy sheriff who testified that defendant started a fire in the mattress in his cell and waved his arms across the fire should also have been allowed to testify that defendant "was totally unaware of what he was doing," since opinion evidence by lay witnesses and lay testimony reciting irrational acts prior to or subsequent to the alleged offense is allowed in this State, and the deputy should have been permitted to give his opinion of defendant's mental state as well as relate the irrational act he observed; however, exclusion of the opinion by the trial judge was not prejudicial error since the admitted testimony by the deputy, defendant's family and his expert witnesses placed before the jury a complete history and description of defendant's mental condition.

5. Criminal Law § 52— hypothetical question — improper form

There was no merit to defendant's contention that the trial court erred in excluding the answers of defendant's psychiatric witness to his hypothetical questions and then allowing the State's expert witness to answer a hypothetical question on rebuttal, since defendant's hypothetical questions were properly excluded because of factual errors or unsupported hypotheses, while the district attorney's question contained no such errors.

6. Robbery § 5— instructions

Where the trial judge used the terms fact and element interchangeably in his jury charge and at one point stated that the crime of armed robbery was made up of seven separate facts, it would have aided clarity to say that the crime was made up of seven separate elements; however, no prejudice was shown and the jury clearly understood the elements required to find defendant guilty of armed robbery.

7. Criminal Law § 5.1— defense of insanity — last issue for jury

The trial court did not err in instructing the jury first to determine defend-

ant's guilt or innocence of the crimes charged and then to reach the insanity issue only if it first found defendant guilty of the crimes.

8. Kidnapping § 2— sentence determined by trial judge

The jury finds whether the defendant committed a kidnapping as defined in G.S. 14-39(a), and the trial judge then pronounces sentence pursuant to G.S. 14-39(b); therefore, there was no merit to defendant's contention that the trial court erred in not allowing the jury to determine whether the mitigating circumstances set forth in G.S. 14-39(b) existed whereby the punishment for kidnapping could be reduced.

Justice EXUM dissenting.

APPEAL by defendant from *Godwin, J.*, at the 20 May 1980 Criminal Session, DURHAM Superior Court.

Defendant was convicted of armed robbery and kidnapping. Life sentences were imposed which he appeals to this Court pursuant to G.S. 7A-27(a).

On 26 September 1979, at approximately 4 a.m., defendant and another person entered a convenience store located just outside the Durham city limits. Defendant was wearing a stocking mask and carrying a handgun. He announced to the store attendant, Alfonza Jones, "This is a robbery. Open the cash register." Jones complied with the instruction. Defendant asked Jones to go to the cooler where beer and frozen products were kept. Jones complied. When they entered the cooler, defendant told Jones, "This is not cold enough." Jones was then locked in a storage room and told he would be killed if he tried to get out.

Defendant and his companion took money and food stamps from the store. As they left, they were confronted by an armed guard from a nearby car dealership. The security guard had observed the robbery taking place. Shots were exchanged between the guard and the two robbers. Defendant went to the storage room, kicked down the locked door, grabbed the store attendant and proceeded out of the store with the attendant in front of him with a gun pointed to his head. The other robber followed close behind defendant and his human shield. Defendant announced he was going to kill Jones. The security guard shot Jones in the right shoulder, causing Jones to fall to the ground, and then shot defendant in the head. As defendant fell to the ground, his gun discharged a bullet into the attendant's right hand. The other robber fled the scene and was subsequently captured. Defendant was taken to

Duke hospital and later moved to Central Prison Hospital. He was subsequently moved to Dorothea Dix Hospital for psychiatric examination. He was seen by Dr. John McCall, a psychologist, Dr. Milton Gipstein, a psychiatrist, both of whom were privately employed and testified for the defense at trial, and Dr. Billy W. Royal, a forensic psychiatrist, who testified for the State.

At trial, defendant pled not guilty by reason of insanity. His evidence in reliance upon this plea was based on testimony by his father, mother, sister, psychologist, psychiatrist and a jailer. The evidence to this effect and the State's rebuttal of it will be more fully discussed where it is pertinent to defendant's assignments of error.

Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General, and Nonnie F. Midgette, Assistant Attorney General, for the State.

William A. Smith, Jr., attorney for defendant appellant.

HUSKINS, Justice.

Defendant has grouped eight assignments of error and numerous underlying exceptions into one argument in which he contends the trial court erred in excluding evidence which tended to show he was legally insane at the time the crimes were committed. Defendant argues essentially seven different evidentiary rulings which we deal with *seriatim*.

[1] The trial court excluded testimony by defendant's father concerning defendant's discharge from the army and the nature of his discharge. This evidence was properly excluded. Defendant's father was testifying about defendant's Exhibit No. 2, a letter which arrived at his home. The father was apparently attempting to testify that the letter was a medical discharge letter. The father had already testified, "I can't read too good .... Someone read it to me." Obviously, this witness was not in a position to testify about the letter and its contents. The writing itself was the best evidence of its contents and it was subsequently admitted into evidence. *See generally Mahoney v. Osborne*, 189 N.C. 445, 127 S.E. 533 (1925). Thus, the evidence of defendant's "medical discharge" which defendant complains was excluded was in fact admitted.

[2] Defendant's father was also not allowed to testify about his observations of defendant's acts in the past year. The answers to

these excluded questions were not included in the record on appeal. Any error is waived by this omission. *State v. Davis*, 282 N.C. 107, 191 S.E.2d 664 (1972); *State v. Fletcher*, 279 N.C. 85, 181 S.E.2d 405 (1971). In any event, evidence of defendant's behavior and mental state was admitted when defendant's mother and sister testified. Defendant has failed to show any prejudice.

[3] On cross-examination, the district attorney was allowed over objection to ask defendant's father his opinion whether defendant knew right from wrong. Defendant's father answered that "at times he knew the difference between right and wrong." This evidence was properly admitted. In this State, lay opinion may be received concerning the mental capacity of a defendant in a criminal case. *State v. Hammonds*, 290 N.C. 1, 224 S.E.2d 595 (1976); *State v. Potts*, 100 N.C. 457, 6 S.E. 657 (1888); *see generally* 1 Stansbury's N. C. Evidence § 127 (Brandis rev. 1973).

[4] Deputy Sheriff Maurice Hayes was called by defendant to testify about an incident involving defendant after his arrest in this case. Deputy Hayes testified defendant had started a fire in the mattress in his cell and when deputies arrived at the cell, they found defendant waving his arms across the fire. Deputy Hayes' statement that defendant "was totally unaware of what he was doing" was excluded by the trial court. This was error. Opinion evidence by lay witnesses and lay testimony reciting irrational acts prior or subsequent to the alleged offense is allowed in this State. *State v. Hammonds, supra; State v. Potts, supra.* The deputy should have been permitted to give his opinion of defendant's mental state as well as relate the irrational act he observed. However, under the circumstances of this case, we find the ruling of the trial judge was not prejudicial. The admitted testimony by Deputy Hayes, defendant's family and his expert witnesses placed before the jury a complete history and description of defendant's mental condition. We are unable to discern any real prejudice to defendant resulting from the exclusion of this one statement. *Compare State v. Bundridge*, 294 N.C. 45, 239 S.E.2d 811 (1978).

[5] Defendant contends the most damaging error by the trial court was the exclusion of Dr. Gipstein's answers to his hypothetical questions, and then allowing the State's expert witness to answer a hypothetical question on rebuttal. Dr. Gipstein's excluded opinion, which was preserved in the record, is as follows:

> Confining my consideration to only the facts as you posed them to me in your hypothetical, I can say that the defendant might or could have been laboring under a mental illness at the time of the crime and might or could have not known the nature and quality of his acts. And even if he did understand the nature and quality of his acts, he might not have known they were wrong.

The State's expert, Dr. Billy W. Royal, was allowed to testify that "I think assuming all those comments that you made I would assume the person was aware of his actions at that time .... Yes, I think that a person who did that would know the difference between right and wrong." Our examination and analysis of the hypothetical questions reveal that defendant's questions were properly excluded because of factual errors or unsupported hypotheses while the district attorney's question contains no such errors.

When the relevant facts are not within the personal knowledge of the expert witness, they must, as a general rule, be testified to by other witnesses and then incorporated in a hypothetical question addressed to the expert. Where an expert witness has personal knowledge of some of the facts of the case, he may base his opinion partly on his personal observation or knowledge and partly on the factual evidence of other witnesses presented to him hypothetically. *State v. Hensley*, 294 N.C. 231, 240 S.E.2d 332 (1978). The hypothetical question should include only those facts supported by the evidence already introduced or those facts which a jury might logically infer from the evidence. The question should not contain repetitious, slanted or argumentative words or phrases. *State v. Taylor*, 290 N.C. 220, 226 S.E.2d 23 (1976); *see generally* 1 Stansbury's N. C. Evidence § 137 (Brandis rev. 1973). The trial court in applying these rules of evidence properly sustained the objection to the hypothetical questions asked of defendant's expert psychiatrist.

Defendant twice posed a hypothetical question to Dr. Gipstein, which the doctor was not allowed to answer. Nothing would be served by quoting the questions in full in this opinion. Defendant in his brief concedes misstatements of fact in both questions. In the first hypothetical, Dr. Gipstein was asked to assume as fact "that Dr. McCall performed several psychological tests that revealed that the defendant suffered from simple schizophrenia; . . . that because of his lack of ego strength and severe schizophrenia, he does not have the capacity to distinguish right from wrong . . . ." Dr.

McCall had in fact testified he did *not know* whether defendant knew the difference between right and wrong. Further, the jury could not logically infer this fact from the testimony of Dr. McCall. In fact, defendant makes a somewhat contradictory argument elsewhere in his brief that it was prejudicial error for the district attorney to attempt to elicit from Dr. McCall this very evidentiary fact. Defendant in that argument notes what the record reveals: Dr. McCall was not tendered for the purpose of giving an opinion on whether defendant knew right from wrong nor did he offer such an opinion. Objection to the question was properly sustained since it contained facts neither supported by nor logically inferred from the evidence.

The second hypothetical was a mere rephrasing of the original question and contains similar fatal defects. In the second question, as defendant concedes, there was a misstatement of the sequence of events in the robbery in question. Because of these errors in fact, the witness could not give an intelligent opinion on the mental capacity of defendant. It is not necessary that irrelevant facts be included in a hypothetical question, nor is it necessary that the relevant facts in evidence be repeated verbatim. *State v. Taylor, supra.* But in this case, the hypothetical questions required assumption of facts neither in evidence nor logically inferred therefrom. The objections were properly sustained.

By way of contrast, the hypothetical question asked of the State's expert witness on rebuttal lacks this flaw. Objection to that hypothetical question was properly overruled. It appears defendant's witness was qualified to answer a proper hypothetical question. The problem in this case involves the improper form of that question. *Contrast State v. Wade,* 296 N.C. 454, 251 S.E.2d 407 (1979); *see generally* 1 Stansbury's N. C. Evidence § 137 (Brandis rev. 1973).

In his second argument, defendant has grouped and brought forward three alleged errors in the instructions of the trial court to the jury. We find the questioned instructions to be free of prejudicial error.

[6] In his charge to the jury on the crime of armed robbery, the judge used the terms *fact* and *element* interchangeably. For example, the judge stated "the crime of armed robbery is made up of seven separate *facts.*" It would aid clarity to say that the crime is

made up of seven separate *elements*. However, no prejudice is shown. When the charge is construed as a whole, it is free of error on this point. The jury clearly understood the elements required to find defendant guilty of armed robbery. *See State v. Slade*, 291 N.C. 275, 229 S.E.2d 921 (1976).

[7] Defendant also contends prejudicial error was committed in the instruction, submission and determination of the issue whether defendant was "not guilty by reason of insanity." The trial judge told the jury to consider first whether the State had met its burden of proving all of the elements of the crimes because it might be unnecessary to reach the question of sanity. He instructed the jury to consider the question of sanity once it determined defendant was guilty of the charged crimes. The issues submitted to the jury were (1) "does the jury find the defendant, Sterling Boone, guilty of kidnapping or not guilty by reason of insanity?" and (2) "does the jury find the defendant, Sterling Boone, guilty of robbery with a dangerous weapon or not guilty by reason of insanity?" The jury returned verdicts of guilty of both crimes. We see no error in this procedure. The trial judge's instruction follows procedural guidance outlined in *State v. Linville*, 300 N.C. 135, 265 S.E.2d 150 (1980). The basic guidance given by that decision is that the jury should establish defendant's guilt or innocence of the crime first and reach the insanity issue only if it first found defendant guilty of the crime. This procedure was followed by the trial court in the present case.

[8] Defendant argues error in the kidnapping charge in that the jury was not allowed to determine whether the mitigating circumstances set forth in G.S. 14-39(b) existed whereby the punishment for kidnapping could be reduced. He contends a jury finding is required on whether the kidnapping victim suffered a serious injury. This same reasoning is the basis of his final argument which deals with the judgment of life imprisonment imposed for the kidnapping offense. Defendant's argument was rejected in dicta in *State v. Williams*, 295 N.C. 655, 669-79, 249 S.E.2d 709, 719-25 (1978). In *Williams*, we said:

> Normally, a jury need only determine whether a defendant has committed the substantive offense of kidnapping as defined in G.S. 14-39(a). The factors set forth in subsection (b) relate only to sentencing; therefore, their existence or nonexistence should properly be determined by the trial judge.

295 N.C. at 669, 249 S.E.2d at 719. We adhere to that reasoning in this case. The jury finds whether the defendant committed a kidnapping as defined in G.S. 14-39(a). The trial judge then pronounces sentence pursuant to G.S. 14-39(b). The life sentence was properly imposed.

No error..

Justice EXUM dissenting.

Because I believe the trial judge erroneously sustained the state's objection to the psychiatric opinion of defense witness Dr. Milton Gipstein, and that the error was prejudicial, I respectfully dissent from the contrary decision of the majority and vote for a new trial.

The only defense offered in this case was insanity. In an effort to prove this defense defendant offered the testimony of his father, mother, and sister. He also offered the testimony of Dr. John McCall, a clinical psychologist, who tested defendant and diagnosed him as a schizophrenic. He attempted to offer the testimony of Dr. Gipstein, a psychiatrist employed by the North Carolina Department of Correction, who, if permitted, would have testified in response to a hypothetical question that at the time of the crime "defendant might or could have been laboring under a mental illness . . . and might or could have not known the nature and quality of his acts. And even if he did understand the nature and quality of his acts, he might not have known they were wrong."

The state successfully objected to the question. Yet it was permitted later in the trial to offer the opinion of psychiatrist Dr. Billy Royal by way of a hypothetical question similar to the one used by defendant to the effect that defendant did not suffer from a mental disease or defect at the time of the crime.

Apparently the trial court sustained the state's objection to the question asked of Dr. Milton Gipstein because defendant somehow improperly phrased the hypothetical question. A majority of this Court finds no error in this ruling because the question contains "a misstatement of the sequence of events in the robbery in question."

Defendant asked two hypothetical question of Dr. Gipstein. I agree with the majority's conclusion that the first question improperly characterized Dr. McCall's opinion. Therefore the state's objec-

tion was properly sustained to it.

I can find nothing wrong, however, with the second hypothetical question put to Dr. Gipstein. The question occupies some three pages in the record. Approximately 18 lines are concerned with the sequence of events at the robbery. The most significant aspect of the question includes hypothetical facts dealing with: (1) defendant's boyhood and family background; (2) anti-psychotic medication taken by the defendant; (3) his actions at Duke Medical Center where he was taken after the robbbery; and (4) the results of the testing performed on him by Dr. McCall, a psychologist. Furthermore, Dr. Gipstein testified that he personally examined the defendant in jail after the crime for approximately two hours on one occasion and three and one-half hours on another. He had reviewed copies of defendant's medical records at Duke Medical Center, the police report of the robbery, the psychological testing report performed by Dr. McCall, Dr. Royal's report, and had interviewed defendant's family members.

It seems clear to me that the sequence of events at the robbery had nothing to do with Dr. Gipstein's professional opinion of defendant's sanity, even if this sequence was put to him slightly out of order. My examination of the hypothetical statement of what happened in the robbery indicates that it does not vary materially from the facts presented in the state's evidence. That portion of the hypothethical question dealing with the robbery was as follows:

> "[T]hat early in the morning of the 26th of September, 1979, he and one other went into the Li'l General Store and he held a gun on the clerk, demanded money and later he took the clerk to a cooler and then from the cooler to a storage room, and the storage room door was subsequently locked; that he and the other person identified by the name of Bullock, left the store and when they got outside, a shot was fired at them by a security officer; that shots were exchanged by Mr. Bullock and the security officer, that he took the clerk from the storage room and he went outside holding the clerk by the seat of the pants, and holding a gun against him, where subsequently the clerk was shot and the defendant was shot."

Later defendant's counsel corrected this aspect of the question by saying, "that the defendant and the defendant Bullock were in the

process of leaving the store or were in the store and a shot was fired by a witness by the name of Mr. Buchanan, a security officer."

The essential requirement of a hypothetical question is that it be "sufficiently explicit for the witness to give an intelligent and safe opinion." *State v. Dilliard*, 223 N.C. 446, 448, 27 S.E. 2d 85, 87 (1943). This Court recently put the rules governing hypothetical questions as follows, *Dean v. Coach Co.*, 287 N.C. 515, 518, 215 S.E. 2d 89, 91-92 (1975):

> "As a general rule, a hypothetical question which omits any reference to a fact which goes to the essence of the case and therefore presents a state of facts so incomplete that an opinion based on it would be obviously unreliable is improper, and the expert witness's answer will be excluded. (Citations omitted.) However, there is substantial authority to the effect that the interrogator may form his hypothetical question on any theory which can be deduced from the evidence and select as a predicate therefor such facts as the evidence reasonably tends to prove."

The hypothetical question put in this case to Dr. Gipstein was fully sufficient in form and content under the rule cited to permit the witness to give an intelligent, safe and reliable opinion.

Furthermore, since Dr. Gipstein had personally examined defendant, reviewed his medical and psychological records, the police report of the crime, and had interviewed defendant's family, he, in fact, had personal knowledge of all of the matters contained in the hypothetical question and could have been permitted to express his opinion based on this personal knowledge without the use of a hypothetical. *State v. Taylor*, 290 N.C. 220, 226 S.E. 2d 23 (1976); *State v. Griffin*, 288 N.C. 437, 219 S.E. 2d 48 (1975), *death sentence vacated*, 428 U.S. 904 (1976) (psychiatric expert's opinion based on examination of defendant); *State v. Holton*, 284 N.C. 391, 200 S.E. 2d 612 (1973). When an expert witness's opinion is, in fact, based on personal knowledge, defects in the form of the hypothetical do not render his opinion inadmissible. *Price v. Gray*, 246 N.C. 162, 97 S.E. 2d 844 (1957). It is clear from the record that Dr. Gipstein's opinion was in fact based on his own personal knowledge acquired from his own investigation of the defendant and the crime.

In conclusion, I believe the hypothetical question was proper in form and substance. Even if there was a misstatement of the sequence of events at the robbery, which I do not detect, the mistake was not material. Finally it seems clear that Dr. Gipstein was in fact testifying from his own knowledge gained from his personal examination of defendant and investigation of the crime so that any defect in the form of the hypothetical should not have rendered his opinion inadmissible. The trial court's ruling to the contrary deprived defendant of the most credible evidence available to him that he was insane. For error in the ruling, I believe defendant is entitled to a new trial.

STATE OF NORTH CAROLINA v. DAVID E. MILLER, JR., AND ROLAND RILEY WILLIAMS

No. 87

(Filed 7 April 1981)

1. Criminal Law § 162.4— motion to strike — part of answer admissible — similar testimony admitted without objection

Defendant's motion to strike a witness's entire answer to a question was properly denied where part of the witness's answer was responsive to the question and part was not, and where the part which was not responsive was the subject of earlier testimony by the witness without objection.

2. Criminal Law § 71— instantaneous conclusion of the mind — shorthand statement of the fact

A witness's testimony that defendant would not return his gun to him in front of other people in his apartment was admissible as an instantaneous conclusion of the mind or a shorthand statement of fact.

3. Criminal Law § 113.1— credibility of witness — summarizing evidence

Absent a special request, the court is not required to summarize the evidence which merely reflects on the credibility of a given witness.

4. Criminal Law § 50.1— inadmissible opinion testimony — harmless error

An officer's testimony that defendant's written statement varied from his oral statement only in that it was in more detail constituted inadmissible opinion testimony since the jury was as competent as the officer to make a comparison and determine whatever consistencies or inconsistencies there were in the two statements. However, the admission of the officer's testimony was harmless error where there was in fact no material difference between the oral and written statements, and both statements were before the jury.

5. Criminal Law §§ 75, 95.1— admission of defendant's statements for corroboration — no necessity for repeating limiting instruction

The trial court's instruction, given before an officer related an oral statement made by defendant, that the officer's testimony "as to what [defendant] told him" was admitted solely for the purpose of corroboration was sufficient to insure that both oral and written versions of defendant's statement were considered only for corroborative purposes, and the court did not err in failing to repeat the instruction prior to the officer's reading of the written statement to the jury.

6. Criminal Law § 86.2— cross-examination of defendant — time spent in prison

The trial court properly permitted the prosecutor to cross-examine defendant about how much time he had spent in prison where defendant had admitted on direct examination the various crimes of which he had been convicted and the punishment imposed in regard thereto.

7. Criminal Law §§ 53.1, 57; Homicide § 15.4— gauge of gun used in murder — testimony by pathologist

In a prosecution for first degree murder, an expert forensic pathologist who examined the victim's body was properly permitted to give an expert opinion as to the size, or gauge, of the gun used to murder the victim.

Justice MEYER did not participate in the consideration and decision of this case.

Before *Judge Barefoot*, presiding at the 14 and 21 January 1980 Criminal Sessions of BEAUFORT Superior Court, and a jury, defendants, whose trials were joined, were convicted of murder in the first degree of one James Perry Ebron. Both defendants were sentenced to life imprisonment because, as to defendant Williams, the jury recommended life and as to defendant Miller, the jury could not agree on a sentence. Both defendants appeal as of right to this Court pursuant to G.S. 7A-27. This case was docketed and argued as No. 45, Fall Term 1980.

Rufus L. Edmisten, Attorney General, by William F. Briley, Assistant Attorney General, for the state.

John A. Wilkinson, Attorney for defendant appellant Miller.

Franklin B. Johnston, Attorney for defendant appellant Williams.

EXUM, Justice.

Defendants assign as error numerous evidentiary rulings and the failure of the trial judge adequately to summarize the evidence in his charge to the jury. After careful examination of each of

defendants' contentions we conclude that both received a fair trial free from prejudicial error.

The state's evidence tends to show the following: At approximately 2:00 a.m. on 27 September 1979 a customer of the Stop-N-Go store in Washington, North Carolina, discovered the body of the deceased, James Perry Ebron, the store operator, lying face down on the floor in the store near the cash register. Later that morning Ebron died from a wound inflicted to his head by a small gauge, 28 or .410, shotgun. Some $141.69 was missing from the cash register. One of the investigating policemen, Danny Respass, had been in the store at approximately 1:50 a.m. on 27 September as a customer. Ebron had waited on him at that time. One Jimmy Lee Cole drove up to the store at approximately 2:00 a.m. on 27 September to purchase gas. After making his purchase, he got into his car to leave. Defendants Williams and Miller, who were acquaintances of Cole, jumped into his car and told him "to drive because [they] had just robbed the store." Cole took the defendants to his home and went upstairs to wake his wife. When he returned downstairs, Williams had gone but Miller was still there. Cole and his wife took Miller to downtown Washington and then returned home.

When Cole awoke on the morning of 27 September, Williams was at his home. Cole ordered him out of his house. Later that evening Cole contacted Officer Respass and told him what had transpired between him, Williams and Miller. Later Williams came by Cole's home and asked Cole to be "an alibi for him." Cole refused, went upstairs and asked his wife to call Respass. Cole kept Williams in his home until Respass arrived with another officer and placed Williams under arrest.

Both defendants testified. They denied any participation in the event at the Stop-N-Go store on the evening in question.

Assignments of error raised by both defendants are discussed in Part I of this opinion; those raised only by defendant Miller are discussed in Part II; and those raised only by defendant Williams are discussed in Part III.

I.

In an effort to show that Ebron was alive at 1:00 a.m. on 27 September the state offered the testimony of William Alonza Jones, a Stop-N-Go employee who worked the shift immediately before

Ebron's shift. Without objection this witness testified that because the store was required to stop selling beer at 1:00 a.m. the employees did not restock the coolers until after that time. When restocking the coolers all empty bottles, beer cartons, and plastic beer wrappers are thrown on the floor in front of the coolers. William Alonza Jones testified that when he returned to the store at 2:30 a.m. he observed the beer cooler area and that "empty cartons were lying on the floor." The following exchange then occurred:

> "Q. And was there beer in the display there that was not there when you left there at eleven o'clock?
>
> MR. WILKINSON: OBJECTION for the record, Your Honor.
>
> COURT: OVERRULED.
>
> EXCEPTION NO. 2
>
> A. Well, the beer had been pulled to the front, that's the way we stock the cooler, you pull all - - - you take all the loose beers out and stack them and pull all the rest of the beer to the front.
>
> Q. All right, what happens to the loose . . .
>
> MR. WILKINSON: May it please the Court, I move on the basis of that statement, I move now to strike the answers to which I previously . . .
>
> COURT: All you have to do is make your motion to strike, you don't have to make any comments.
>
> MR. WILKINSON: All right.
>
> COURT: Motion denied."

On cross-examination William Alonza Jones testified that he had told Ebron not to stock the cooler until after 1:00 a.m. and that when he returned at 2:30 a.m. he observed a number of empty plastic beer containers in the aisle near the cooler.

[1] We see no error in the complained of testimony to which Mr. Wilkinson objected. The question to which he objected was proper inasmuch as it called for the witness to testify to that which he observed both when he left the store at 11:00 p.m. and when he

returned at 2:30 a.m. Part of his answer was responsive to the question and part was not. Defendant's motion to strike the entire answer was, therefore, appropriately denied. *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975); *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), *death sentence vacated*, 428 U.S. 903 (1976). Even the part which was not responsive, having to do with the custom of the store, was the subject of earlier testimony by the witness without objection. This assignment of error is overruled.

[2] One of the state's witnesses, Ruby Spencer, testified that he had pawned his .410 gauge shotgun to defendant Miller several days before the shooting under investigation. On the day following the shooting, Ruby Spencer testified he saw defendant Miller in downtown Washington and told him he had been paid and would pick up his gun later. When he arrived home at 11:00 p.m. on 28 September, Miller was there together with several other people who were living with Spencer at the time. Spencer asked Miller for his gun. He testified, "And he wouldn't let me have the gun in front of them . . . . " Spencer said he then went into a "small hall outside the room" where "Miller gave me the gun back."

Defendants objected and moved to strike his statement that Miller wouldn't let him have the gun in front of the other people in the apartment. This testimony was not inadmissible as a conclusion or opinion as defendants argue. It was simply a statement of fact. At least it was admissible as an "instantaneous conclusion of the mind" or a "shorthand statement of the fact." 1 Stansbury's North Carolina Evidence § 125 (Brandis rev. 1973) (hereinafter North Carolina Evidence), and cases therein collected.

[3] Defendants next assign as error what they contend to be the trial judge's inadequate summarization of the evidence in violation of G.S. 15A-1232, which provides:

> "In instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. He must not express an opinion whether a fact has been proved."

Specifically defendants complain of the trial court's failing to summarize the testimony of their witness, William Duke. Duke had

testified that according to surveys and photographs he had made of the Stop-N-Go store, Jimmy Lee Cole, when he pulled up to the gas pump on the night in question, would have had a clear view of the interior of the store in the area around the cash register. Defendants relied on this evidence, apparently, to impeach Cole's testimony that he saw no one other than the deceased in the store both when he purchased and pumped the gas. Defendants contend that it would have been impossible for Cole to have bought gas at or about the time the defendants were alleged to have been in the store without seeing them; therefore, his entire testimony as to what happened should be disregarded by the jury.

Suffice it to say that an examination of the charge reveals that the court summarized the evidence both for the state and the defendants in a manner sufficient to permit him to apply the law applicable to the case. "[A]bsent a special request, the court is not required to summarize the evidence which merely reflects upon the credibility of a given witness." *State v. Alston*, 294 N.C. 577, 589, 243 S.E. 2d 354, 363 (1978). There was no such request made here. This assignment of error is, consequently, overruled.

II.

We now consider those assignments of error raised only by defendant Miller. A number of these we may confidently overrule without discussion. By them defendant complains of (1) the state's being permitted to inquire into matters on redirect which were not raised during cross-examination, (2) "an unreasonable restraint on defendant's cross-examination," (3) the admission of prior statements of the state's witness Jimmy Lee Cole for purposes of cross-examination, and (4) admission of an allegedly unresponsive answer. These particular assignments of error, like those dealt with summarily in *State v. Freeman*, 295 N.C. 210, 218, 244 S.E. 2d 680, 685 (1978), "are either patently without merit or challenge miniscule errors which are harmless beyond a reasonable doubt. Any discussion of these questions would necessarily be (1) a mere repetition of . . . well-established rules . . . and (2) a wordy demonstration that the testimony challenged" was indeed admissible. Thus, as in *Freeman*, "we have decided not to add to the surplusage of such discussions already in the books." *Id.* at 219, 244 S.E. 2d at 685.

We turn now to several of defendant Miller's contentions which, by comparison at least, are somewhat more serious than

those to which we have summarily referred.

[4] Officer Respass testified to what Jimmy Lee Cole had told him about the incident and that he had reduced Cole's statement to writing. The prosecutor asked, "Did [the written statement] vary in any way from the first time you talked to him?" Over objection Respass was permitted to answer, "The only variance [was that] it was in more detail." Respass then read Cole's written statement into evidence.

Defendant contends that Respass's comparison of the two statements was inadmissible opinion testimony. We agree. The jury was as competent as Respass to make a comparison and determine whatever consistencies or inconsistencies there were in the two statements. *State v. Shuford*, 152 N.C. 809, 67 S.E. 923 (1910); *State v. McLaughlin*, 126 N.C. 1080, 35 S.E. 1037 (1900). *Compare* however, *State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333 (1976). *See generally* 1 North Carolina Evidence § 124. Clearly, however, the admission of this testimony could not have prejudiced defendant. In fact there was no material difference between the oral and written statements. Both were before the jury. Counsel for both sides, consequently, could make whatever they desired of consistencies or inconsistencies in the statements. The jury was not, and we are satisfied it did not consider itself to be, bound by Respass's characterization of the statements. There is no reasonable possibility that had he not given this opinion a different result would have been reached at trial. *See* G.S. 15A-1443(a). This assignment of error is overruled.

[5] Defendant Miller assigns as error the failure of the trial judge to instruct the jury that Jimmy Cole's written statement was admitted solely for purposes of corroboration. When Officer Respass took the stand on redirect examination the trial judge instructed the jury:

> "[M]embers of the jury, what this witness is getting ready to testify as to what Jimmy Cole told him is for the purpose of corroborating what Mr. Cole said when he was on the stand, if you find that it does corroborate him . . . ."

Officer Respass then related Cole's oral statement. Defendant requested the above instruction be repeated prior to Respass's read-

ing Cole's written statement. This request was denied. Respass then read Cole's written statement. The statement was in Detective Howard's writing and signed by Cole.

Although an abundance of precaution might have dictated that the trial judge repeat the instruction, his failure to do so was not legal error. The instruction given pertained to "what Jimmy Cole told him [Respass]," and thus was broad enough to include both Cole's oral and written statements. Furthermore, there was no material variation between the two statements. In effect Cole gave only one statement, which the investigating officers ultimately reduced to writing. Therefore, the single limiting instruction was itself sufficient to ensure that the oral and written versions of Cole's statement were considered by the jury only for corroborative purposes. This assignment of error is overruled.

[6] Defendant Miller next assigns as error the prosecutor's question, asked upon cross-examination, "How much time have you spent in prison all together, Mr. Miller?" After his objection to this question was overruled, Miller answered, "About sixteen or seventeen years, give or take."

The prosecutor's question as to the length of time defendant spent in prison was not improper, and defendant's objection to it was properly overruled. We held in *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977), "Where, for purposes of impeachment, the witness has admitted a prior conviction, the time and place of the conviction and the punishment imposed may be inquired into upon cross-examination. This is permissible regardless of whether the witness is the accused." *Id.* at 142-43, 235 S.E. 2d at 825. In *Finch* we noted the necessity of first showing that the witness was convicted of an offense prior to cross-examining him relative to the punishment imposed. Here, Miller admitted on direct examination the various crimes of which he had been convicted and the punishments imposed in regard thereto. Consequently, the prosecutor's inquiry into the total punishment imposed was nothing more than a clarification of Miller's testimony on direct examination. This assignment of error is overruled.

III.

We now discuss one assignment of error raised only by defendant Williams.

[7] Defendant Williams contends an insufficient foundation was laid to permit Dr. Lawrence Harris to render an expert opinion as to the size, or gauge, of the gun used to murder Perry Ebron. Dr. Harris first testified that he was a professor of pathology at East Carolina School of Medicine and Regional Pathologist for the Chief Medical Examiner's Office for the State of North Carolina. He had previously held a similar position in Vermont. Dr. Harris was thus qualified and permitted to testify as an expert forensic pathologist. Dr. Harris then described his findings on examination of James Ebron's body and gave his opinion as to the cause of death. Over objection Dr. Harris was permitted to give his opinion as to the size, or gauge, of the murder weapon. He testified, "The entrance wound is quite small for a shotgun . . . therefore, from my experience, personal and professional, with shotguns, it had to be something in the range of a 28 gauge or a .410 gauge . . . ." On cross-examination the witness admitted that "the size of the hole located in the deceased's mouth area would be determined to a large extent by the distance from which the gun was fired." He further testified on cross-examination, however, "It is my opinion that neither a twelve gauge, sixteen gauge nor a twenty gauge shotgun could have produced the size hole which I examined in deceased. In my opinion any one of those three guns would have produced a larger hole regardless of the distance within a range of several yards that you might be referring to."

We find no error here. Expert medical testimony is permitted on a wide range of subjects including the nature of the instrument producing a particular injury. 1 Stansbury's North Carolina Evidence § 135, n. 51 and cases cited therein. Dr. Harris was qualified as an expert forensic pathologist. As such his skills included not only determining the cause of death from a medical standpoint but also determining the nature of the instrumentality of death in a homicide case including, for example, the caliber of a bullet, or the gauge of a gun which caused the death-dealing wound. He is in a better position to have an opinion on these subjects than the jury. This assignment of error is overruled.

Two other of Williams' assignments of error relating to the admission of evidence and for which he cites no authority are patently without merit and not deserving of discussion. *See State v. Freeman, supra*, 295 N.C. 210, 244 S.E. 2d 680.

In the trial of these defendants we find

No error.

Justice MEYER did not participate in the consideration and decision of this case.

STATE OF NORTH CAROLINA v. GRANT DAWSON

No. 12

(Filed 7 April 1981)

1. **Criminal Law § 89.10— prior shoplifting by defense witness — cross-examination proper**

In a prosecution for discharging a firearm into an occupied vehicle where defendant's entire defense was built on misidentification and alibi, the Court of Appeals erred in concluding that the prosecutor's asking questions of defendant's mother concerning prior shoplifting by her was highly prejudicial to defendant, since the prosecutor's questions referred to specific acts of shoplifting; had the witness replied that she had shoplifted on a prior occasion such evidence would have been relevant to the question of her credibility; and the record did not show that the prosecutor's questions were asked in bad faith and an affirmative showing that the prosecutor acted upon a good faith belief in asking the questions was not required.

2. **Criminal Law § 73.1— hearsay testimony — admission prejudicial**

In a prosecution for discharging a firearm into an occupied vehicle where defendant's entire defense was built on misidentification and alibi, the trial court erred in admitting into evidence over defendant's objections testimony by a police officer concerning defendant's concealing of a pistol in his car, since the testimony was hearsay, was offered apparently for the purpose of showing defendant's bad character, and was offered to impeach defendant's father on a collateral matter.

3. **Criminal Law § 66.10— identification of defendant — confrontation at police station**

In-court identification of defendant by the State's witnesses was not tainted by a confrontation between the witnesses who were standing outside the police station and defendant who was brought to the station, since all witnesses had an opportunity to observe their assailant at the time of the shooting; all five witnesses stated that their in-court identification of defendant was not influenced by seeing him at the police station; and the viewing of defendant by the witnesses was wholly accidental and not suggested by any police officer.

ON the State's petition for discretionary review of a decision of the Court of Appeals reported at 48 N.C. App. 99, 268 S.E. 2d 572 (1980), reversing the judgment of *Long, Judge*, entered 9 August

1979 in the Superior Court, ROCKINGHAM County, wherein defendant was found guilty of the felony of discharging a firearm into occupied property, a violation of G.S. § 14-34.1. The State's petition for discretionary review pursuant to G.S. 7A-31 was allowed on 4 November 1980.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Dennis P. Myers for the State.

Bethea, Robinson, Moore & Sands, by Norwood E. Robinson, and Tharrington, Smith & Hargrove, by Wade M. Smith for the defendant appellee.

MEYER, Justice.

In brief summary, the State's evidence tended to show that at around 10:00 p.m., on 18 August 1978, Donald W. Cox and four friends were riding in Cox's jeep in Eden, North Carolina. As Cox proceeded up Maplewood Drive, an off-white or yellow colored station wagon approached from the opposite direction and turned "sideways" in the road "like he was blocking off the road." As Cox started to pull around the station wagon, the person on the passenger side of the wagon jumped out, ran to the back of the station wagon and "hollered 'Stop or I will shoot.'" The person then fired four shots at the jeep as Cox accelerated in order to flee from the scene. The jeep was struck in three places, with at least one of the bullets penetrating the metal of the jeep and grazing one of the occupants. None of the occupants received any substantial injury. The jeep passed within ten to twelve feet of the person who fired the shots.

A few minutes later the station wagon overtook the jeep, followed it awhile, then passed and turned off into a side street.

Shortly after the shooting, Tim McCrickard, a passenger in the jeep, told Cox he thought the assailant was the older of the "Dawson brothers." McCrickard did not know Dawson's first name, however, so the group went to the Pizza Hut "to find out the guy's first name." McCrickard was told that it was Grant Dawson, and the group proceeded to the police station, where Cox swore out a warrant for Grant Dawson's arrest.

At trial, all five occupants of the jeep positively identified the defendant as the person who fired the shots.

Defendant offered evidence tending to show that he was at home with his family on the night of the shooting. The defendant testified that from approximately 7:30 p.m. until the police arrived to arrest him at approximately 11:10 p.m., he was in his parents' bedroom watching television with his father and his brother Scott. Both defendant's father and brother Scott corroborated defendant's testimony. Defendant's other two brothers also testified that the defendant was at home that evening. Defendant's mother testified that she owned a Chrysler New Yorker station wagon "which is an off-white beige." She further stated that her son was at home all day the day of the incident, and that at 9:30 p.m. that night she observed him in the master bedroom watching television. After 9:30 p.m. she was in the kitchen, and testified that, because of the design of the house, it would not have been possible for her son to leave without her seeing him do so. Defendant also offered three character witnesses.

The jury returned a verdict of guilty of discharging a firearm into occupied property. Defendant was sentenced to six months imprisonment. On appeal, the Court of Appeals held that defendant had not received a fair trial because of certain questions improperly asked of defendant's mother by the district attorney. We allowed the State's petition for discretionary review of that decision.

Defendant contends that he was denied a fair trial because of improper cross-examination of his mother. It is defendant's contention that the District Attorney's cross-examination tended to impeach the credibility of this crucial alibi witness by characterizing her as a "shoplifter." While we question the propriety of the prosecutor's conduct in asking such questions, we are unable to conclude that this possible abuse was error sufficient to warrant a new trial. However, our review of a separate assignment of error, not reached by the Court of Appeals in its decision, does disclose prejudicial error in the admission of certain rebuttal testimony offered by the State. For that reason the case must be remanded for a new trial.

[1] The Court of Appeals found prejudicial error in the questions asked by the prosecutor of defendant's mother in the following exchange:

Q. Have you on any occasion or occasions shoplifted?

MR. ROBINSON: Objection.

A. No. I was [sic] not.

Q. Do you know what I am talking about?

A. I assume by shoplifting you mean stealing.

Q. Do you often—

MR. ROBINSON: Objection to the question.

COURT: Overruled.

Q. Have you at any time or times picked up things from Mann's Drug Store without paying for them?

MR. ROBINSON: Objection.

COURT: Overruled.

A. They have been charged, no. I never picked up anything without paying for them.

Q. I will ask if you carried them home, left the store without paying for them?

MR. ROBINSON: Objection.

COURT: Overruled.

A. They had been charged to the account.

Q. Without saying anything to anybody about it?

A. Not that I know of.

Q. And that if some of the articles were not returned?

A. I have never stolen anything in my life.

Q. No further questions.

COURT: Members of the jury, you may not consider the implication of the question.

The Court of Appeals correctly recognized that, for purposes of impeachment, a witness may be cross-examined by the asking of "disparaging questions concerning collateral matters relating to

his criminal and degrading conduct." *State v. Williams*, 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971). Cross-examination of a witness on a collateral point is allowed in order for counsel to test the credibility of the witness. The purpose of permitting inquiry into *specific* acts of criminal or degrading conduct is to allow the jury to consider these acts in weighing the credibility of a witness who has committed them. *State v. Purcell*, 296 N.C. 728, 252 S.E. 2d 772 (1979). In *Purcell*, this Court further explained that such questions must concern some identifiable specific act on defendant's part.

The most succinct statement of the bounds of permissible cross-examination in this area is found in *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). There this Court marked the limits of such cross-examination: "generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith." *Id.* at 675, 185 S.E. 2d at 181.

Applying the two-prong standard set forth in *Williams* to the facts before us, we are unable to say that the trial judge abused his discretion in allowing the prosecutor to proceed. Parts of the cross-examination by the prosecutor in *State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1977), were held by this Court to have been improper, but there the district attorney affirmatively stated to the witness "you are lying through your teeth" and later encouraged the witness to "[t]hink up a good story." *Id.* at 215, 241 S.E. 2d at 68. Likewise, a general survey of applicable cases shows that abuse of discretion is generally found anywhere the prosecutor affirmatively placed before the jury his own opinion or "facts" which were either not in evidence or not properly admissible. *See State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1977) (prosecutor said witness was lying through his teeth); *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975) (prosecutor phrased question so as to inform jury that defendant had previously been sentenced to death row); *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954) (prosecutors' seventeen improper questions which accused defendant of numerous crimes assumed unproven insinuations to be facts.) Nor were the questions here improper under *State v. Purcell*, 296 N.C. 728, 252 S.E. 2d 772 (1979). In *Purcell*, the question "You have killed somebody haven't you, Mr. Purcell?" was held improper because it was overly broad. Since killing is not wrong *per se*, the question was improper because it could have elicited irrelevant evidence, such as the fact that defendant had killed someone in the line of military or police duty.

Conversely, "shoplifting" is always a criminal act. Furthermore, had Mrs. Dawson replied in the affirmative, such evidence would have been clearly relevant to the question of her credibility. Finally, the matters sought to be elicited by the district attorney's questions here were sufficiently specific to comply with the rule of *Purcell* that such questions refer to a specific instance.

The second limitation of permissible cross-examination in this area is that the questions must not be asked in bad faith. In considering this requirement, the Court of Appeals concluded that "[s]ince the record fails to show that the prosecutor had a good faith basis for asking the questions, the cross-examination was improper." 48 N.C. App. at 107, 268 S.E. 2d at 577. We deem the logical inference of that language, that the record must *show affirmatively* that the prosecutor acted upon a good faith belief in asking the questions, to be an incorrect statement of the law. Rather, the rule in this jurisdiction is that the questions of the prosecutor will be considered proper unless the record shows that the questions were asked in bad faith. *State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975), *death sentence vacated*, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976). As we stated in *State v. Gaiten*, 277 N.C. 236, 240, 176 S.E. 2d 778, 782 (1970): "This record fails to show that the questions asked were not based on information and asked in good faith, and when a record is silent on a particular point, the action of the trial judge is presumed to be correct. (Citation omitted). We hold that the court correctly allowed the challenged cross-examination." It is true, as Justice Huskins stated in *State v. Britt*, 288 N.C. 699, 71, 220 S.E.2d 283, 291 (1975), that counsel may not ask "impertinent and insulting questions which he knows will not elicit competent or relevant evidence but are designed simply to badger and humiliate the witness." That language is not controlling here for the simple reason that, as stated above, had Mrs. Dawson admitted being a "shoplifter" that evidence would have been both competent and relevant. In sum, we find the strictures that questions must not be asked in bad faith and must be designed to elicit only competent evidence to be sufficient safeguards under the facts of this case.[1] No *affirmative* showing of good faith by the prosecutor is required.

Because the Court of Appeals, in its disposition of this appeal,

[1] Where a trial court wishes to ascertain whether the questions are based on information and asked in good faith, this Court has approved the trial court's holding a *voir dire*. *State v. Heard*, 262 N.C. 599, 138 S.E. 2d 243 (1964).

found error in the cross-examination of defendant's mother and remanded for a new trial, it did not consider any of defendant's other assignments of error. Our disagreement with the rationale of the Court of Appeals leads us to consider defendant's other assignments. We find prejudicial error in the admission of certain testimony offered by the State on rebuttal; and, based on that finding, affirm the remand of the case for a new trial.

[2] The improperly admitted testimony was elicited from State's witness Officer Frank Watkins. In pertinent part, Watkins testified as follows:

Q. He testified about some occasion when you were supposed to have found a pistol in the car?

A. Yes, sir.

Q. Tell us about that.

A. Well, I received a call from the radio dispatcher one night and it was some time back that Mr. Dawson—

MR. ROBINSON: Objection.

COURT: Overruled. I take it this is not offered to show the truth of it but why he may have done so.

EXCEPTION NO. 26

A. That his son was out past the time that he was supposed to be—

MR. ROBINSON: Objection on the basis this is hearsay.

COURT: But if not offered to show the truth it is admissible, even though hearsay if it goes to show why he went to stop a vehicle then it is admissible.

MR. ROBINSON: No objection to him stating the consequence of a call but to relate the call that is what I am objecting to.

COURT: Overruled.

EXCEPTION No. 27

A. I received a call that Dr. Dawson's son Grant was out later than he was supposed to be and that Grant had

Dr. Dawson's gun in the car and if I seen him to stop him and carry him home. I stopped—

MR. ROBINSON: Objection, motion that be stricken from the evidence and that the jury be instructed not to consider it.

COURT: Overruled.

EXCEPTION NO. 28

A. I stopped Grant on Stadium Drive and asked if I could search the car, and he said that I could and the pistol was stuck up under the driver's seat in a holster. I took possession of the pistol and asked Grant why he had the gun in the car. He said that he had just gotten paid and had a large sum of money. I said what do you consider a large sum and he said I got ninety dollars, and I said why did you put the gun under the seat, you know that you are concealing it. He said that he parked the car on the street and didn't want anyone to steal the gun out of the car.

I went to Dr. Dawson's house and got in touch with Dr. Dawson. He came to the door. I gave Dr. Dawson the gun and I told him that there would be no charges because I knew that the gun was there before I stopped him and Dr. Dawson thanked me and the Dr. asked Grant the same thing, why he put the gun under the seat and he said to keep anybody from stealing it.

Our finding of impropriety in this testimony is based on the fact that the testimony was hearsay,[2] and was offered apparently for the purposes of showing the defendant's bad character, and more importantly, to discredit defendant's father. On cross-examination, defendant had admitted being stopped by an officer who searched his car and found a pistol under the car seat, but had said that he did not know it was there. On redirect examination by defendant's counsel, defendant's mother testified that she knew

[2] More specifically, this testimony about the content of the telephone call was double hearsay. Officer Watkins in fact testified that the police dispatcher told him that Dr. Dawson had called the police station and had told the dispatcher that Grant was out too late, that the gun was in the car, and that he should be stopped and carried home.

about her son having been stopped and the pistol being found; that she always kept the gun in the automobile because someone had picked her up one time; that she kept it on the dash but put it under the seat when her son Grant took the car; and Grant "did not know that it was there;" that the only time the police could have been asked to stop Grant was when her father had a severe heart attack and the family was trying to reach him. Defendant's father, on recross-examination, stated that he had not at any time asked the police to stop his son and remove a pistol from his car; that the matter of his making any such request was "a total absolute surprise" to him. Dr. Dawson also testified on direct examination by defendant's counsel that no one ever came to his home or office to bring a gun; that it (the testimony concerning his alleged request) sounded like a total fabrication and was a total fabrication. The admission of the above quoted hearsay-upon-hearsay testimony of Officer Watkins on this collateral issue was error. As Dr. Dawson was an important alibi witness for defendant, this incompetent testimony from Officer Watkins which may have lessened Dr. Dawson's credibility must be considered prejudicial.

The trial court overruled defense objections to this testimony on the grounds that the testimony was not offered to prove the veracity of the phone call, but only to explain why the officer stopped the car. The record does not disclose when the incident occurred. Officer Watkins testified that "it was some time back." The difficulty is that the fact that an officer had stopped defendant's car at some prior time and removed a gun was irrelevant to this trial. As it was irrelevant, and because three other witnesses had already testified differently about the incident, we think the testimony was in fact offered to impeach a witness (Dr. Dawson) on a collateral matter. Since Dr. Dawson, on cross-examination, denied ever telephoning the police to stop Grant, the State was bound by this denial. It was therefore improper for the State to attempt to contradict Dr. Dawson by the use of extrinsic testimony. 1 Stansbury's North Carolina Evidence § 48 (Brandis rev. 1973). Such testimony was equally objectionable as being both hearsay and as concerning only a collateral matter. Defendant's stated objection to the testimony at trial was that it was hearsay. Failure of the trial court to sustain defendant's timely objection resulted in reversible error.

Our review of other assignments of error by defendant is limited to those which may again be brought forward after retrial.

[3] Defendant contends by his first assignment that the trial court erred in not finding that the State's witnesses' in-court identification of the defendant was tainted by an illegal pretrial confrontation. Apparently the five occupants of the jeep were standing outside the police station, unable to leave because the jeep had a flat tire as a result of the shooting, when defendant was brought to the police station. Defendant walked past the witnesses. Upon motion by defense counsel, the trial court held a *voir dire* wherein all five witnesses stated, and the trial court found, that they had an opportunity to observe the assailant at the time of the shooting and that their in-court identification of defendant was not influenced by seeing defendant at the police station. The trial court also found that the viewing of the defendant by the witnesses was wholly accidental and not suggested by any police officer. These findings of the trial court are supported by the evidence and thus binding on appeal. *State v. Thomas*, 292 N.C. 527, 234 S.E. 2d 615 (1977); *State v. Legette*, 292 N.C. 44, 231 S.E. 2d 896 (1977). This assignment is overruled.

Nor did the trial court err in not suppressing testimony concerning the identification of the station wagon allegedly used in the assault. Defendant filed a motion to suppress "[a]ll evidence and statements to be made by officers who went upon the premises of the defendant and searched the premises without a search warrant." At trial, State's witness Tim McCrickard testified without objection that he recognized the car as he rode in a police car which passed in front of the Dawson house later on the night of the shooting incident. Testimony by the police officer about McCrickard's identification of the car was limited by the trial judge as admissible only for corroboration of McCrickard's testimony. All of the testimony was properly admitted. Defendant's argument that the identification was possible only after an illegal entry by the police officer into the driveway of defendant's home is refuted by the factual record. McCrickard recognized the car as he rode with the officer on a public street. The officer only turned into the driveway in order to see the license plate of the car which McCrickard recognized. This assignment is overruled.

We deem it unnecessary to discuss other assignments since the errors alleged may not occur on retrial.

The cause is remanded to the Court of Appeals with instructions for further remand to the Superior Court, Rockingham County

for a new trial.

Modified and affirmed.

STATE OF NORTH CAROLINA v. JOHNNY LEE FREEMAN

No. 99

(Filed 7 April 1981)

1. **Criminal Law § 83— competency of spouse to testify against other spouse — power of Supreme Court to change common law rule**

G.S. 8-57 does not codify the common law rule prohibiting one spouse from testifying against the other in a criminal action but merely provides that, aside from the exceptions listed therein, the common law rule remains unchanged and in full effect, and the Supreme Court possesses the authority to alter such judicially created common law rule.

2. **Criminal Law § 83— competency of spouse to testify against other spouse — modification of common law rule**

The common law rule prohibiting one spouse from testifying against another in a criminal action is modified so as to prohibit such testimony only if the substance of the testimony concerns a "confidential communication" between the marriage partners made during the duration of their marriage.

3. **Criminal Law § 83— competency of spouse to testify against other spouse — meaning of "confidential communication"**

In determining whether a spouse's testimony includes a "confidential communication," the question is whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship.

4. **Criminal Law § 83.1— competency of wife's testimony against husband**

A wife's testimony that her husband shot and killed her brother in her presence in a public place was competent in a prosecution of the husband for first degree murder of her brother, since the actions of the husband in a public place and in the presence of a third person could not have been a communication made in the confidence of the marital relationship or one which was induced by affection and loyalty in the marriage.

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

THE State appeals pursuant to G.S. 15A-979(c) from an order entered by *Thornburg, J.*, at the 5 September 1980 Schedule "C" Criminal Session of Superior Court, MECKLENBURG County. This case was argued as No. 128, Fall Term, 1980.

Defendant was charged in an indictment, proper in form, with first degree murder. The trial court granted defendant's motion *in limine* to suppress the testimony of his wife, on the ground that under the common law of North Carolina, codified at G.S. 8-57, defendant's wife is incompetent to testify against him in a criminal proceeding. Solely for the purpose of the court's determination on defendant's motion to suppress his wife's testimony, the parties stipulated to the following facts:

> "1. That the defendant herein, Johnny Lee Freeman, and Rosemary Caldwell Freeman were, as of 6 June 1980, lawfully married, and had been so married for at least three years, their marriage having taken place in York, South Carolina.
>
> 2. That Rosemary Freeman had separated from the defendant shortly after their marriage and had not resumed cohabitation with him.
>
> 3. That Rosemary Freeman had lived in her mother's home since her separation from the defendant.
>
> 4. That on the evening of 6 June 1980, Rosemary Freeman was employed as a worker in the kitchen of the 'Rebel Room', a restaurant located on Freedom Drive in the City of Charlotte. At or about 8:00 p.m. on that date, the restaurant closed for the evening, and Rosemary telephoned her brother, Steve Caldwell, to come and take her home from work.
>
> 5. That after placing said telephone call, Rosemary went to a grocery store near the restaurant to await her brother's arrival. Several minutes later, she saw her brother drive up to the front door of the grocery store and stop his car. He was followed by the defendant in another car.
>
> 6. That the defendant pulled his car to a point roughly adjacent to Steve Caldwell's car as Rosemary came out of the front door of the grocery store.
>
> 7. That as Rosemary opened the passenger side door of her brother's car, defendant approached the car carrying a shotgun. As he came within a few feet of Steve Cald-

well's car, the defendant said: 'Do ya'll want to talk to me?' This statement was followed almost immediately by a blast from defendant's shotgun.

8. That the shotgun blast passed by Rosemary and went through Steve Caldwell's car, striking him in the neck and killing him as he sat behind the steering wheel.

9. That Rosemary immediately grabbed defendant's shotgun and attempted to wrest it away from him. A struggle between Rosemary and defendant ensued during which the shotgun was discharged into the air several times, and Rosemary was finally thrown to the pavement.

10. That upon being thrown to the pavement, Rosemary let go of the shotgun, whereupon defendant walked back to the car he was driving, placed the gun inside, and drove away.

11. That Rosemary Freeman, if called and sworn as a State's witness, would testify to all of the above facts.

12. That Rosemary Freeman has expressed her desire to testify against defendant in any subsequent trial of this case.

13. That a sawed-off shotgun was found under the feet of Steve Caldwell, the victim.

14. That as of the present time, the State has been unable to secure any potential witness who can testify to all of the above facts surrounding the shooting in this case except Rosemary Freeman, defendant's wife."

Attorney General Rufus L. Edmisten by Assistant Attorney General Marvin Schiller for the State.

Public Defender Fritz Y. Mercer, Jr. by Assistant Public Defender Cherie Cox for defendant-appellee.

COPELAND, Justice.

The sole issue presented by this appeal is whether this Court should continue to adhere to the common law rule rendering spouses incompetent to testify against each other in a criminal proceeding. We believe that the common law rule no longer com-

plies with the purposes for which it was created, therefore, we alter the rule in the manner set forth below to more closely achieve its purpose without unduly hindering the administration of criminal justice.

[1] Defendant contends that because the common law rule preventing spouses from testifying against each other in a criminal action is codified at G.S. 8-57, this Court is without power to judicially modify the rule. G.S. 8-57 provides in pertinent part that "[n]othing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding," with such exceptions as are thereinafter set forth. This Court has previously held that this provision of G.S. 8-57, and similar provisions of the previous versions of this statute, are not affirmative statements by the legislature that spouses are not competent as witnesses against each other in a criminal proceeding. G.S. 8-57 and its predecessors merely state that, aside from the exceptions listed therein, the common law rule pertaining to the competency of spouses to testify against each other remains unchanged and in full effect. *State v. Alford*, 274 N.C. 125, 161 S.E. 2d 575 (1968); *Rice v. Keith*, 63 N.C. 319 (1869). *See also State v. Suits*, 296 N.C. 553, 251 S.E. 2d 607 (1979). Absent a legislative declaration, this Court possesses the authority to alter judicially created common law when it deems it necessary in light of experience and reason. *State v. Alford, supra; State v. Wiseman*, 130 N.C. 726, 41 S.E. 884 (1902). *See also Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L. Ed. 2d 186 (1980); *Hawkins v. United States*, 358 U.S. 74, 79 S.Ct. 136, 3 L. Ed. 2d 125 (1958). Consequently, we hold that this Court is empowered to change the common law rule at issue in this case, and defendant's allegations to the contrary are without merit.

At common law, the spouse of a defendant was incompetent to testify either for or against the defendant in a criminal proceeding. *Trammel v. United States, supra; State v. Suits, supra; State v. Alford, supra;* 1 Stansbury's North Carolina Evidence §59 (Brandis Rev. 1973). This rule disqualifying the testimony of a spouse arose from two long-abandoned medieval doctrines; first, that an accused was prohibited from testifying in his own behalf due to his interest in the action, and second, that husband and wife were considered to be one under the law, with the wife possessing no separate legal existence. *Trammel v. United States, supra; Funk v. United States,*

290 U.S. 371, 54 S.Ct. 212, 78 L. Ed. 369 (1933); *State v. Alford, supra;* 8 J. Wigmore, Evidence §2227 (McNaughton Rev. 1961 & Supp. 1980). The portion of the common law rule preventing one spouse from testifying on behalf of the other in a criminal proceeding has long been abandoned by statute in this jurisdiction. G.S. 8-57; 1 Stansbury's North Carolina Evidence § 59 (Brandis Rev. 1973). *See also State v. Rice,* 222 N.C. 634, 24 S.E. 2d 483 (1943). The portion of the doctrine which prohibits one spouse from testifying against the other in a criminal proceeding remains in effect under the modern justification that the peace and harmony of the marriage relationship will be preserved and fostered when each spouse may rely on the other's disability to testify. It is thought that the spousal disqualification will encourage free and open communication between marriage partners. *Trammel v. United States, supra; Hawkins v. United States, supra; State v. Alford, supra; State v. Brittain,* 117 N.C. 783, 23 S.E. 433 (1895); *State v. Jolly,* 20 N.C. 108 (1838); 8 J. Wigmore, Evidence §2228 (McNaughton Rev. 1961 & Supp. 1980).

When we consider the common law rule preventing spouses from testifying against each other as to *any* matter at issue in a criminal proceeding in light of its purpose to promote marital harmony, we find that the rule sweeps more broadly than its justification. In the case *sub judice,* defendant invoked the rule of spousal disqualification not to protect confidential marital communications, but to exclude evidence of criminal acts committed in a public place and in the presence of a third person. Under these circumstances, the rule is employed more to thwart the system of justice than to promote family peace. It is difficult to discern how defendant's marriage could be bolstered by excluding Mrs. Freeman's testimony indicating that defendant shot and killed her brother in her presence. In such a situation, the public interest in ascertaining the truth outweighs any policy to promote marital harmony. *Trammel v. United States, supra; State v. Alford, supra. See also State v. Clark,* 296 N.W. 2d 372 (Minn. 1980); 8 J. Wigmre, Evidence § 2332 (McNaughton Rev. 1961 & Supp. 1980). In the event that an application of a common law rule cannot achieve its aim, as in the case before us, then adherence to precedent is the only justification in support of the rule, and the courts are compelled to re-examine the common law doctrine. *Trammel v. United States, supra; Francis v. Southern Pacific Co.,* 333 U.S. 445, 68 S.Ct. 611 (1948) (Black, J., dissenting); *Funk v. United States, supra; State v. Alford, supra.*

[2] We hold that the common law rule at issue in this case must be modified to comply with its purpose. Henceforth, spouses shall be incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a "confidential communication" between the marriage partners made during the duration of their marriage.[1] This holding allows marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation. However, by confining the spousal disqualification to testimony involving "confidential communications" within the marriage, we prohibit the accused spouse from employing the common law rule solely to inhibit the administration of justice. In the words of Jeremy Bentham more than a century and a half ago, our holding prevents the accused in a criminal action from converting his home into "a den of thieves." *Trammel v. United States*, 445 U.S. at 51-52, 100 S. Ct. at 913, 63 L. Ed. 2d at 195, *quoting from* 5 Rationale of Judicial Evidence 340 (1827).

---

[1] The common law rule rendering spouses incompetent to testify against one another in criminal proceedings has been abrogated to some extent in almost every jurisdiction. However, the rule prohibiting testimony which concerns a confidential communication between spouses during the marriage has remained effective in some form in every jurisdiction.

Only six states provide that spouses are completely incompetent to testify against each other in a criminal proceeding: Hawaii Rev. Stat. § 621-18 (1976); Iowa Code Ann. § 622.7 (West 1950); Ohio Rev. Code Ann. § 2945.42 (Page 1980 Supp.).; Pa. Stat. Ann. tit. 19, § 683 (Purdon 1964); Tex. Crim. Pro. Code Ann. § 38.11 (Vernon 1979); Wyo. Stat. § 1-12-104 (1977). Mississippi provides that spouses are incompetent to testify against each other, Miss. Code Ann. § 13-1-5 (1972), but the spousal disqualification may be waived if both partners consent. *See Brewer v. State*, 233 So. 2d 779 (Miss. 1970).

Five jurisdictions have altered the common law spousal disqualification by statute, providing for a privilege against adverse spousal testimony which is vested in the witness spouse alone, but have also provided by statute that spouses are incompetent to testify as to confidential communications made between them during the marriage: D.C. Code Encycl. § 14-306 (West 1966); Ky. Rev. Stat. § 421.210 (Cum. Supp. 1978); Md. Cts. & Jud. Proc. Code Ann. §§ 9-101, 9-105, 9-106 (1980); Mass. Ann. Laws Ch. 233, § 20 (Law. Co-op 1974); Mo. Ann. Stat. § 546.260 (Vernon 1953).

Twelve jurisdictions provide by statute for a privilege aginst adverse spousal testimony which is vested in both spouses or in the accused spouse alone. This privilege extends to all testimony against the accused spouse and to any testimony concerning a confidential communication made between the spouses during the marriage: Colo. Rev. Stat. § 13-90.107 (1973); Idaho Code § 9-203 (Supp. 1980); Mich. Comp. Laws Ann. § 600.2162 (1968); Minn. Stat. Ann. § 595.02 (West Cum. Supp. 1980); Montana Code Ann. § 26-1-802 (1979); Neb. Rev. Stat. § 27-505 (1979); N.J.

[3,4] Whether a particular segment of testimony includes a "con-

Stat. Ann. § 2A-84A-17 (West 1976); Or. Rev. Stat. § 44.040 (1979); Utah Code Ann. § 78-24-8 (1977); Va. Code § 19.2-271.2 (Cum. Supp. 1980); Wash. Rev. Code Ann. § 5.60.060 (Cum. Supp. 1981); W. Va. Code §§ 57-3-3, 57-3-4 (1966).

Five states entitle the witness-spouse alone to assert a privilege against adverse spousal testimony, with court decisions holding that these statutory provisions do not affect the common law privilege not to testify as to confidential communications within the marriage: Ala. Code § 12-21-227 (1975); Cal. Evid. Code §§ 970-973 (West 1966); Conn. Gen. Stat. Ann. § 54-84 (West Cum. Supp. 1980); Ga. Code Ann. § 38-1604 (1981); La. Rev. Stat. Ann. § 15:461 (West 1967). *See also Arnold v. State*, 353 So. 2d 524 (Ala. 1977); *People v. Delph*, 94 Cal. App. 3d 411, 156 Cal. Rptr. 422 (1979); *Robinson v. State*, 232 Ga. 123, 205 S.E. 2d 210 91974); *State v. Bennett*, 357 So. 2d 1136 (La. 1978). Rhode Island also provides for a privilege against adverse spousal testimony vested in the witness spouse. R.I. Gen. Laws § 12-17-10 (1970). This statute has been interpreted as an alteration of the common law privilege to prevent testimony involving confidential communications; this privilege is now vested in the witness spouse alone. *State v. Angell*, 405 A. 2d 10 (R.I. 1979).

Four states have abolished the spousal disqualification totally in criminal cases, but provide by statute that spouses are incompetent to testify as to confidential communications made during the marriage: Ill. Ann. Stat. ch. 38, § 155-1 (Smith-Hurd Cum. Supp. 1980); Ind. Code Ann. §§ 34-1-14-4, 34-1-14-5 (Burns 1973); N.H. Rev. Stat. Ann. §516:27 (1974); Vt. Stat. Ann. tit. 12, §1605 (1973). Delaware and Tennessee have also abolished the spousal disqualification in criminal proceedings. Del. Code Ann. tit. 11, § 3502 (1979); Tenn. Code Ann. § 40-2404 (1975). These statutes have no effect on the common law rule in those states rendering spouses incompetent to testify as to confidential communications between them. *Mole v. State*, 396 A. 2d 153 (Del. 1978); *Royston v. State*, 450 S.W. 2d 39 (Tenn. Crim. App. 1969).

Nine jurisdictions have abolished the spousal disqualification in criminal proceedings, but also provide by statute that the accused spouse has a privilege to prevent the other spouse from testifying as to any confidential communication between them. Ariz. Rev. Stat. Ann. §§ 12-2231, 12-2232 (1956 & Supp. 1980); Ark. Stat. Ann. § 28-1001, Rules 501 and 504 (1979); Fla. Stat. Ann. §§ 90:501, 90:504 (Harrison 1979); Kan. Stat. Ann. §§ 60-407, 60-428 (1976); Me. Rev. Stat. Ann., Maine Rules of Evidence, Rules 501, 504 (West Supp. 1980); N.Y. Crim. Proc. Law § 60.10 (McKinney 1971), N.Y. Civ. Proc. Law § 4502, 4512 (McKinney 1963); N.D. Cent. Code, N.D. Rules of Evid., Rules 501, 504 (Supp. 1979); Okla. Stat. Ann. tit. 12, §§ 2103, 2501, 2504 (West 1980); S.D. Codified Laws Ann. §§ 19-13-1, 19-13-12 thru 19-13-15 (1979). New Mexico and South Carolina have abolished the spousal disqualification in criminal proceedings and provided by statute that the witness spouse alone may assert a privilege not to testify as to confidential communications between the spouses during the marriage: N.M. Stat. Ann. § 38-6-6 (1978); S.C. Code § 19-11-30 (1977). *See also State v. Motes*, 264 S.C. 317, 215 S.E. 2d 190 (1975).

The United States Supreme Court held in *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed. 2d 186 (1980), that in federal courts the privilege against adverse spousal testimony shall vest only in the witness spouse. This decision did not affect the independent rule establishing a privilege to prohibit testimony concerning a confidential marital communication. *Blau v. United States*, 340 U.S. 332, 71 S.Ct. 301, 95 L. Ed. 306 (1951).

fidential communication" within the meaning of the rule we adopt in this case is to be determined by the guidelines set forth in our previous decisions interpreting the term under G.S. 8-56, the statute preserving a privilege in civil actions not to testify as to "confidential communications" with one's spouse. In making such a determination, the question is whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship. *Wright v. Wright*, 281 N.C. 159, 188 S.E. 2d 317 (1972); *Hicks v. Hicks*, 271 N.C. 204, 155 S.E. 2d 799 (1967); *Hagedorn v. Hagedorn*, 211 N.C. 175, 189 S.E. 507 (1937); *McCoy v. Justice*, 199 N.C. 602, 155 S.E. 452 (1930); *State v. Freeman*, 197 N.C. 376, 148 S.E. 450 (1929); *Whitford v. North State Life Ins. Co.*, 163 N.C. 223, 79 S.E. 501 (1913). When this definition is applied to the facts of the case *sub judice*, it is apparent that Mrs. Freeman's proposed testimony included no confidential communication which would render it incompetent under the rule established in this case. Mrs. Freeman stipulated that had she been allowed to testify, she would have stated that defendant parked his car in a public parking lot, approached her and her brother carrying a shotgun, asked if they wished to speak with him, and immediately discharged the shotgun, killing Mrs. Freeman's brother. Such actions in a public place and in the presence of a third person could not have been a communication made in the confidence of the marital relationship or one which was induced by affection and loyalty in the marriage. *See, e.g., Hicks v. Hicks, supra; State v. Freeman, supra.* Consequently, Mrs. Freeman's testimony is competent and admissible under the rule adopted in this case.[2]

[2] It would be possible to find the wife competent to testify in this case on the rationale that the partners had been separated for over three years, there was no possibility of reconciliation, and therefore there was no marital relationship to protect. Although this reasoning works well in this case, it is unsatisfactory as a precedent. One of the purposes of the requirement that spouses live in a state of separation for one year before obtaining a no-fault divorce is to insure that there is no possibility of reconciliation before the divorce becomes final. Thus, the public policy to promote peace and harmony in the marriage still exists even where the parties are separated, so long as there is a possibility of reconciliation. Consequently, it would be unwise to abolish the spousal disqualification in criminal proceedings merely on the ground that the parties were living in a state of separation. It would be necessary for the court to make findings of fact in each case regarding the possibility of reconciliation of the partners. The vast majority of courts which have dealt with the effect of separation on the rule rendering spouses incompetent to testify against each other in a criminal proceeding have held that it would unduly burden the courts to require

For the reasons stated above, we find that although the trial court correctly followed the previous decisions of this Court in granting defendant's motion *in limine* to suppress the testimony of his wife, the suppression of Mrs. Freeman's testimony was error under the rule established in this case. Accordingly, the judgment of the trial court is

Reversed.

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

OUTER BANKS CONTRACTORS, INC. v. SARAH E. FORBES, AND REGGIE OWENS

No. 50

(Filed 7 April 1981)

Contracts § 27— subcontractor's action for money judgment — no summary judgment for landowner

Plaintiff subcontractor was entitled to try its claim for a money judgment against defendant landowner for labor and materials supplied in connection with the improvement of certain real estate where plaintiff asked for a money judgment in its complaint, attached to its complaint as an exhibit an itemized statement of the labor and materials which had been furnished, stated in answers to interrogatories the substance of a contractual claim, and thereby came forward with specific facts upon which to base the conclusion that a contract existed between it and defendant landowner; moreover, a consent order entered into by the parties which recited that one defendant was the owner of the real property in question, that the other defendant was the general contractor for making certain improvements thereon, and that plaintiff was a subcontractor who had furnished

---

them to make findings on the possibility of reconciliation in each case. The status of separation has therefore had no effect on the common law rule. 98 A.L.R. 3d 1285 (1980). *See especially People v. Oyola*, 6 N.Y. 2d 259, 160 N.E. 2d 494, 18 N.Y.S. 2d 203 (1959); *People v. Fields*, 38 App. Div. 2d 231, 328 N.Y.S. 2d 542, *aff'd on lower court opinion*, 31 N.Y. 2d 713, 289 N.E. 2d 557, 337 N.Y.S. 2d 517 (1972).

On the other hand, the abolition of the spousal disqualification, except where the subject matter of the testimony concerns a "confidential communication" within the marriage, serves the dual purpose of satisfying the aim of the common law rule to promote marital harmony and avoiding an undue burden on the courts. The courts of this state are accustomed to determining whether testimony concerns a "confidential communication" within the marriage. This determination must be made in civil cases involving a "confidential communication." G.S. 8-56.

labor and materials in connection with the project did not amount to a stipulation which served unalterably to fix the rights and liabilities of the parties to one another, as the clear purpose of the consent order was to serve as a vehicle whereby an additional party could be brought into the litigation, and defendant landowner therefore could not rely upon the consent order to show that defendant was her general contractor, that plaintiff was his subcontractor, and that there was no contractual relationship between her and plaintiff.

ON discretionary review of the decision of the Court of Appeals reported in 47 N.C. App. 371, 267 S.E.2d 63 (1980), affirming in part and reversing in part the judgment entered by *Beaman, J.*, at the 11 December 1978 Civil Session of District Court, DARE County.

In this action plaintiff seeks to obtain a money judgment against defendant Forbes and to enforce a lien upon certain real property belonging to her. In its complaint, filed in November 1973, plaintiff alleges that it is a North Carolina corporation which is engaged in the construction business in Dare County; that on or about 1 April 1973 defendant Forbes entered into a contract with plaintiff under the terms of which plaintiff was to supply labor and materials which were to be used in connection with the improvement of certain real estate in the town of Nags Head, North Carolina; that plaintiff furnished labor and materials pursuant to the contract worth $3,487.50 between 6 April and 4 June 1973; and that upon defendant Forbes' failure to pay for the labor and materials which had been furnished, plaintiff filed a notice and claim of lien in the office of the clerk of superior court of Dare County on 28 September 1973.

Defendant Forbes filed answer on 15 December 1973 denying the allegations of the complaint and asserting that she had not entered into any contract with plaintiff. She alleged that the only contract which she had entered into concerning the Nags Head project had been with R. D. Owens. She concluded her answer by alleging that she had paid Owens for all of the labor and materials which had been furnished by him and any subcontractors.

On 9 January 1976 the parties consented to an order whereby the court found that Owens had been the prime contractor for the construction of the Laughing Gull Lookout Cottages; that plaintiff had been a subcontractor who had furnished certain labor and materials for the project; and that it had ruled on 16 December 1975 that a written contract between defendants Forbes and Owens be adhered to in another lawsuit between them concerning the Nags

Head project. The court then concluded that "in order to bring this matter to its final conclusion" Owens' presence in the litigation was required, and it ordered that he be made a party defendant. Thereafter, on 19 January 1976, plaintiff filed an amended complaint which alleged a claim against Owens. The amended complaint also restated plaintiff's original claim against defendant Forbes.

In an order entered 14 December 1978, Judge Beaman granted defendant Forbes' motions (1) to strike plaintiff's amended complaint for the reason that it was filed without leave of court or the consent of defendant Forbes; and (2) for summary judgment. Plaintiff appealed from the order. In an opinion by Judge Webb, concurred in by Judges Arnold and Wells, the Court of Appeals affirmed the trial court's dismissal of plaintiff's claim for a lien. However, the Court of Appeals reversed the trial court's dismissal of plaintiff's claim for a money judgment, holding that there existed a genuine issue of material fact in regard to that claim.[1]

Defendant Forbes petitioned this court for discretionary review pursuant to G.S. § 7A-31. We allowed the petition on 16 September 1980.

Aldridge, Seawell & Khoury, by Daniel D. Khoury, for plaintiff appellee.

Shearin, Gaw & Archbell, by Norman W. Shearin, Jr., and Ralph T. Baker for defendant appellant.

BRITT, Justice.

Although defendant Forbes' petition to this court for discretionary review of the decision of the Court of Appeals did not expressly ask that our review be limited to that part of the decision which was adverse to her, a request for that limitation is obviously implied. Plaintiff did not petition for discretionary review of the portion of the decision which was adverse to it, namely, the affirmance of summary judgment in favor of defendant on the claim for enforcement of a lien. In its new brief plaintiff raises no question relating to the correctness of the Court of Appeals' holding on the claim. Rule 16(a) of the Rules of Appellate Procedure provides that

[1] Plaintiff did not assign as error before the Court of Appeals the trial court's action in granting defendant Forbes' motion to strike the amended complaint. Accordingly, any objection to that particular portion of the order of 11 December 1978 is deemed waived. N.C. R. App. P. 16.

the scope of our review of decisions of the Court of Appeals shall be "limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court." Therefore, the only question presented to us is whether the Court of Appeals erred in reversing the entry of summary judgment in favor of defendant Forbes on the claim for a money judgment. We agree with the decision of the Court of Appeals.

In its complaint, plaintiff alleged that pursuant to an indivisible contract entered into between it and defendant Forbes, it furnished labor and materials for which defendant Forbes had agreed to pay $3,478.50; and that defendant had failed to pay said indebtedness. Plaintiff attached to its complaint, as an exhibit, an itemized statement of the labor and materials which had been furnished.

In her answer defendant Forbes denied entering into the contract. Following the conclusion of discovery proceedings, she moved for summary judgment. In an affidavit, she stated that

> 3) I entered into a written agreement dated March 17, 1972, with R. D. Owens, an additional defendant in this action, for the construction by Mr. Owens of the improvements described (as The Laughing Gull Cottage Court) . . . .
>
> 4) The aforesaid written contract with Mr. Owens was the sole contract entered into by me regarding the labor and materials which plaintiff alleges in its complaint were furnished to the real property owned by me. I have not entered into any contract, written or oral, with Outer Banks Contractors, Inc., the plaintiff, for the furnishing of labor and materials as alleged in plaintiff's complaint. All my dealings of a contractual nature regarding the matter in controversy were with Mr. R. D. Owens.

In opposition to defendant Forbes' motion for summary judgment, plaintiff offered its answers to interrogatories propounded to it by the movant. Answering on behalf of plaintiff corporation, Alvis Beacham, the president of the firm stated that on or about 1 April 1977 [sic][2], he entered into an oral contract with defendant

[2] Plaintiff's complaint alleges that the contract between it and defendant

Forbes; that the contract was entered into at defendant Forbes' property; that plaintiff was to "perform certain improvements with regard to a driveway or parking facilities for tenants of the defendant"; and that plaintiff was to be paid for its work.

Defendant Forbes argues that she was entitled to the entry of summary judgment on plaintiff's contract claim for two reasons. We find neither contention persuasive.

First, she contends that although plaintiff had the opportunity to come forward with specific facts upon which to base the conclusion that a contract existed between it and defendant Forbes, it failed to do so. We disagree. While the answers to defendant Forbes' interrogatories do not establish the precise details of the work which was to be performed, the answers do establish the substance of a contractual claim. It should be noted that plaintiff's exhibit A, a part of the complaint, is a component of the record of this case. At the hearing on the motion for summary judgment, that exhibit was competent evidence of several of the precise details of the contract to which the answers of the interrogatories do not speak. Exhibit A is a statement from plaintiff to defendant Forbes dated 11 June 1973. According to the statement, plaintiff furnished materials to defendant Forbes for the construction project in the form of clay base, sand, and stone. The quantities of the various materials which were furnished, as well as the price which was charged for each, are detailed by the statement. The dates upon which the materials were furnished at the site are also embodied by the document. The statement also indicates that defendant Forbes was furnished with the use of a bulldozer on four occasions, as well as the use of a motorgrader on one occasion. Again, the dates upon which these services were provided, as well as their respective costs, are embodied in the statement. Since the statement would have been competent evidence, *see Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), it would have been proper for the trial court to have considered it in passing upon defendant Forbes' motion. We hold that plaintiff did not fail to come forward with evidence of specific facts with which to resist defendant's motion for summary judgment.

Forbes was entered into on or about 1 April 1973. The present action was filed in November 1973. In her brief, defendant Forbes concedes that "[T]he year 1977 used in plaintiff's answer to interrogatories is apparently erroneous since it is not suing on a 1977 agreement."

Second, defendant Forbes contends that the order consented to by the parties on 9 January 1976 amounts to a judicial admission which serves to establish conclusively the relationship of the parties to this litigation. She argues that Owens was her general contractor, that plaintiff was his subcontractor, and that there was no contractual relationship between her and plaintiff.

The consent order of 9 January 1976 does not amount to a judicial admission. It will be recalled that the order recited that defendant Forbes was the owner of the real property in question, that defendant Owens was the general contractor for making certain improvements thereon, and that plaintiff was a subcontractor who had furnished labor and materials in connection with the project. While it is manifest that plaintiff consented to the entry of the order through its attorney of record, it cannot be fairly said to amount to a stipulation which serves to unalterably fix the rights and liabilities of the parties to one another.

A judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute. *See generally* 2 Stansbury's North Carolina Evidence § 166 (Brandis rev. 1973). Such an admission is not evidence, but it, instead, serves to remove the admitted fact from the trial by formally conceding its existence. *E.g., State v. McWilliams*, 277 N.C. 680, 178 S.E.2d 476 (1971). Stipulations are viewed favorably by the courts because their usage tends to simplify, shorten, or settle litigation, as well as save costs to litigants. *Rickert v. Rickert*, 282 N.C. 373, 193 S.E.2d 79 (1972); *Rural Plumbing and Heating, Inc. v. H. C. Jones Construction Co.*, 268 N.C. 23, 149 S.E.2d 625 (1966); *Chisolm v. Hall*, 255 N.C. 374, 121 S.E.2d 726 (1961). Yet, the effect or operation of a stipulation will not be extended by the courts beyond the limits set by the parties or by the law. *Rickert v. Rickert, supra; Lumber Co. v. Lumber Co.*, 137 N.C. 431, 49 S.E. 946 (1905). In determining the extent of the stipulation, it is appropriate to look to the circumstances under which it was entered, as well as to the intentions of the parties as expressed by the agreement. *Rickert v. Rickert, supra.* Stipulations will receive a reasonable construction so as to effect the intentions of the parties, but in ascertaining the intentions of the parties, the language employed in the agreement will not be construed in such a manner that a fact which is obviously intended to be controverted is admitted or that a right which is plainly not intend-

ed to be waived is relinguished. *Id.*

Upon consideration of the language of the consent order in light of the foregoing principles of law, it is our conclusion that the order does not amount to a judicial admission of status. The document itself provides

> This cause coming on to be heard . . ., upon application of Outer Banks Contractors, Inc., the plaintiff, with the consent of Sarah E. Forbes, defendant, wherein the plaintiff shows to the Court that Reggie Owens, who is not a party to this action, is a necessary party to this action without whose presence before the Court a complete determination of the controversy which is the subject matter of this action cannot be had because:
>
> (a) The plaintiff was a subcontractor who furnished labor and materials for the construction of the Laughing Gull Lookout Cottages owned by the defendant, Sarah E. Forbes;
>
> (b) Reggie Owens was the prime contractor in the construction of said cottages for the defendant;
>
> (c) . . . .
>
> (d) . . . .
>
> (e) That in order to bring this matter to its final conclusion that the additional defendant, Reggie Owens needs to be added to said lawsuit;
>
> (f) . . . .
>
> IT IS NOW ORDERED that Reggie Owens be and he is hereby made a party defendant to this action; . . . .

The order makes it clear that its purpose was to establish a basis upon which the court could order that Owens be brought into the litigation as a party defendant. That being the case, it would be unreasonable for the courts, in light of the guidelines for construction enunciated in *Rickert v. Rickert*, *supra*, to ignore the plain language of the document regarding the parties' motivation for entering into it and construe it in such a manner that the status of all of the parties are determined for all time and for all purposes by its mandate.

In substance, the consent order is a pleading which serves to bring before the court an additional party to the litigation and properly align his position and posture. While a pleading can serve as a judicial admission, it is important to note that such is not invariably the case. *See generally* 2 Stansbury's North Carolina Evidence § 177 (Brandis rev. 1973). Final pleadings which define the issues to be litigated and upon which the case goes to trial can embody a judicial admission of a matter and serve to conclusively remove the establishment of that fact from the issues which are to be tried. *Champion v. Waller*, 268 N.C. 426, 150 S.E.2d 783 (1966); *Safeguard Insurance Co. v. Wilmington Cold Storage Co.*, 267 N.C. 679, 149 S.E.2d 27 (1966); *Snell v. Candle Sand & Rock Co.*, 267 N.C. 613, 148 S.E.2d 608 (1966). Other pleadings, including pleadings in another case, amended pleadings, withdrawn pleadings in the same case, and collateral pleadings which serve some purpose other than the defining of issues, do not amount to judicial admission which are conclusive as to the matters contained therein. *E.g., State ex rel. Commissioner of Insurance v. North Carolina Rating Bureau*, 291 N.C. 55, 229 S.E.2d 268 (1976). Such pleadings may be utilized by a party to litigation as evidential admissions in precisely the same way as if it had been embodied in some other form. *E.g., Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395 (1965).

In the present case, we are dealing not with a final pleading which serves to define the pertinent issues upon which the case is to go to trial, but with a collateral pleading which fulfills some other objective of the parties. The clear purpose of the consent order was to serve as a vehicle whereby an additional party could be brought into the litigation. Sound judicial construction of the consent order dictates that the manifest purpose behind the entry of the order be given due consideration to the end that facts which are at the heart of the present case are not conclusively established and that rights which a party seeks to enforce are not abandoned. Therefore, we conclude that the consent order does not amount to a judicial admission.

Plaintiff has sought relief on two distinct theories of recovery: a claim based on a contract between itself and defendant Forbes, and a claim for a lien as a first tier subcontractor. While these theories appear to be inconsistent, they need not invariably be so. It is conceivable that under a given set of facts, a party may be able to assert a claim not only as a party to a direct contract with the owner

but also as a subcontractor. That particular conclusion must, in the proper case, depend upon sufficient evidence to support a *prima facie* case as to each claim. A fundamental principle of the Rules of Civil Procedure is that a litigant is entitled to assert as many separate claims as he may, in good faith, have, regardless of their consistency. G.S. § 1A-1, Rule 8(e)(2).

While we do not attempt to forecast the likelihood of plaintiff's eventual success in the future litigation of this matter, it is our conclusion that plaintiff is entitled to pursue its claim for a money judgment beyond the summary judgment stage.

For the reasons set out above, the decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. DANNY LEE LOREN (ALSO KNOWN AS LUCAS LEE PARRISH; ALSO KNOWN AS LEE LOREN)

No. 21

(Filed 7 April 1981)

1. **Criminal Law § 71— shorthand statement of fact**

An officer's testimony that, when he stopped defendant's car and told defendant to step out of the car, defendant "was acting like he was trying to hide something" was competent as a shorthand statement of fact.

2. **Criminal Law § 128.2— document in view of jury — motion for mistrial**

The trial court did not err in the denial of defendant's motion for mistrial made on the ground that the prosecutor placed on a table in full view of the jury a document containing a picture of defendant and what purported to be a criminal record of defendant in Florida where the trial court found that it was virtually impossible for any member of the jury to have read the writing on the document.

3. **Criminal Law § 33.3— defendant's change of appearance between arrest and trial — irrelevancy — harmless error**

Testimony elicited from defendant on cross-examination that he had obtained a haircut and a shave during the interval between his arrest and trial, if irrelevant, was not prejudicial to defendant.

APPEAL by defendant from *Gaines, J.*, 30 June 1980, Criminal Session of TRANSYLVANIA Superior Court.

Upon pleas of not guilty, defendant was tried upon bills of indictment charging him with the following offenses: (1) first degree rape; (2) first degree sexual offense, fellatio; (3) first degree sexual offense, anal intercourse; and (4) assault with a deadly weapon with intent to kill inflicting serious injury. Mrs. Mary Jane Smith was the alleged victim of the offenses.

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

On 5 May 1980, Mrs. Smith, who was not then living with her husband, was working at a grocery store in Brevard, North Carolina. Late in the afternoon of that day, defendant, whom Mrs. Smith had known casually for about two months, entered the store and made a small purchase. After a brief conversation with her, he left the store.

Around 7:30 p.m. Mrs. Smith was at her apartment. Responding to a knock at her door, she found defendant standing in the doorway. He told her that he thought he would stop by and have a drink with her. After being admitted to the apartment, defendant made several telephone calls, including one to the Governor's Mansion in Raleigh. He insisted that he was being harassed by the police. After defendant and Mrs. Smith took several drinks, listened to some records and danced, he left at around 9:00 p.m.

Shortly thereafter, he returned to the apartment with a bottle. After talking with her, defendant insisted on kissing Mrs. Smith. She protested his advances and asked him to leave. She then went into her kitchen to prepare defendant a drink. Defendant followed her and when she turned around, he stabbed her in the abdomen with a knife.

Thereafter, defendant put the knife to her throat, forced her to undress, and raped her. He also forced her to commit fellatio on him and to submit to anal intercourse. A short while later, Mrs. Smith escaped from defendant. She ran out the front door and across the street to the sheriff's office.

Mrs. Smith was taken to the hospital where she was examined and treated by Dr. R. L. Stricker. The doctor testified that he found a stab wound in her abdomen, two puncture wounds in her small intestine and two puncture wounds in her large intestine; that he found redness about her genitalia; that he repaired the puncture

wounds; and that the victim was emotionally upset.

Defendant elected to take the witness stand in his own behalf. He admitted having sexual relations with Mrs. Smith but insisted that she consented. He denied stabbing her. He also admitted that he had been convicted of driving an automobile under the influence of intoxicants in Transylvania County. He further admitted that he had been convicted of forgery in the state of Florida; that he had been sentenced to prison for 2-½ years; that he had served 2 years of the sentence; that he had been paroled; and that he was wanted in Florida for parole violations.

The jury returned verdicts finding defendant guilty as charged in the rape and sexual offense charges. On the assault count, he was found guilty of assault with a deadly weapon inflicting serious injury. The court entered judgments imposing concurrent life sentences in the rape and sexual offense cases, and a 10 year prison sentence in the assault case. The latter sentence is to begin at the expiration of the life sentences.

Defendant appealed and this court allowed his motion to bypass the Court of Appeals in the assault case.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Tiare B. Smiley, for the state.

H. Paul Averette, Jr. for defendant appellant.

BRITT, Justice.

[1] By his first assignment of error, defendant contends the trial court committed prejudicial error in permitting a police officer to testify that defendant "was acting like he was trying to hide something". This assignment has no merit.

The challenged testimony was offered by Deputy Sheriff Hank Whitmire. He testified that he was on duty during the early morning hours of 6 May 1980; that after a warrant was issued for defendant's arrest, he passed a car which he recognized as defendant's car; that after some difficulty, he succeeded in getting defendant's car to stop; that he approached the car and told defendant to step out with his hands up; that defendant would not get out; and "that he sat there and he acted like he was doing something, like he was trying to hide something, and I told him —". At that point defendant objected and moved to strike. The court overruled the

motion.

The record discloses that immediately thereafter, the following transpired:

> Q. (By Mr. Leonard): What exactly did you see him do? Demonstrate to the members of the jury what you saw him do.
>
> A. I had my headlights on and my spotlight on him in the driver's seat and I could see him moving around like he was trying to do something, hide something or do something.
>
> I told him three times to step out of the car. He wouldn't get out. I pulled my service revolver and advised him that I had a felony warrant, for him to step out of the car with both hands in the air.
>
> So, he opened the door, he kicked it open with his foot, and he still continued to shuffle around. So, I told him I wasn't going to tell him again, he was going to have to step out of the car.
>
> So he stuck his hands out and says, okay, and he stood up. I walked up to the car and made him put his hands on the car and spread his feet. At that time, Officer Carter (I believe it was, I'm not sure) arrived on the scene.

Officer Whitmire then testified that after defendant got out of the car, leaving the door open, he saw in plain view a knife pouch with a knife in it, lying under the edge of the driver's seat.

Defendant argues that the testimony to the effect that he looked like he was trying to hide something amounted to opinion evidence which was inadmissible. We reject this argument.

In 1 Stansbury's North Carolina Evidence § 125 at 389-92 (Brandis Rev. 1973) we find:

> Opinion evidence is always admissible when 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. Even when it might be *possible* to describe the facts in detail, it may still be *impracticable* to do so because of the limitations of

> customary speech, or the relative unimportance of the subject testified about, or the difficulty of analyzing the thought processes by which the witness reaches his conclusion, or because the inference drawn is such a natural and well understood one that it would be a waste of time for him to elaborate the facts, or perhaps for some other reason.
>
> It is neither possible nor desirable to lay down a hard and fast rule to cover the infinite variety of situations that may arise, but the admissibility of opinion evidence under the circumstances suggested above is thoroughly established. The idea is variously expressed by saying that 'instantaneous conclusions of the mind,' or 'natural and instinctive inferences,' or the 'evidence of common observers testifying to the results of their observation' are admissible, or by characterizing the witness's statement as a 'shorthand statement of the fact' or as 'the statement of a physical fact rather than the expression of a theoretical opinion.'

While it might have been possible for the officer to have described defendant's actions in order for the jury to infer that defendant appeared to be looking for something, it was impracticable to do so. We conclude that the testimony about which defendant complains was merely a shorthand statement of fact. *See generally State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976); *State v. Spaulding*, 288 N.C. 397, 219 S.E.2d 178 (1975), *death sentence vacated*, 428 U.S. 904 (1976); *State v. Goines*, 273 N.C. 509, 160 S.E.2d 469 (1968).

There is an additional reason why the court did not commit error in admitting the testimony. As indicated above, after defendant's motion to strike was denied, the witness testified again, without any objection, that he could see defendant "moving around like he was trying to do something, hide something or do something." When evidence is admitted over objection, but evidence of like import is thereafter admitted without objection, the benefit of the objection is ordinarily lost. 4 Strong's N.C. Index, Criminal Law, § 162.

[2] Defendant's second assignment of error relates to his cross-examination by the prosecuting attorney. During the course of the cross-examination, defendant was asked several questions about

his criminal record in Florida. Thereafter, in the absence of the jury, defendant's attorney moved for a mistrial because of alleged improper conduct by the prosecuting attorney. Defendant's counsel stated that during the cross-examination of defendant, the prosecuting attorney placed a document 8-½ inches by 11 inches in size, on a table in full view of the jury; that the document contained a picture of and what purported to be a criminal record of defendant in Florida; and that "each and every juror upon leaving the courtroom had an opportunity to look at that photograph, and, in fact, several of them did".

The trial judge, after examining the document in question, concluded: ". . . upon examining the photograph and considering the distance of the jurors and one of the jurors closest to the photograph and the writing underneath, the Court finds it virtually impossible for the jury to have read the handwriting on the photograph." The court refused to examine the jury regarding the matter and denied defendant's motion for a mistrial. We find no error in the conduct of the trial court.

Defendant argues that the only purpose that could have been served by placing the document on the table in the view of the jurors was to convey to them the impression that defendant was a criminal and had a criminal record; and that such conduct, without any precautionary instruction by the court, was so highly improper and unfair that it deprived him of his fundamental right to due process as guaranteed by law.

A mistrial is appropriately ordered when a party shows the occurrence of serious improprieties which render a fair and impartial verdict impossible. *State v. Chapman*, 294 N.C. 407, 241 S.E.2d 667 (1978). In a criminal case, the allowance or refusal of a motion for a mistrial rests largely in the discretion of the trial court and its ruling is not reviewable absent a showing of an abuse of discretion. *E.g., State v. Yancey*, 291 N.C. 656, 231 S.E.2d 637 (1977).

The record indicates that defendant was reluctant to admit any criminal record in Florida. Thereupon, the assistant district attorney showed him the document in question and asked if that was his picture on it. Without objection, he stated that it was. As we indicated above, the trial court found that it was virtually impossible for any member of the jury to have read the writing on the document. We are unable to perceive any prejudice to defendant

and hold that the court did not abuse its discretion in denying defendant's motion for a mistrial.

[3] On recross-examination defendant was asked if his appearance had changed any between the time of his arrest and the time of his trial. Over objection, he testified that he had obtained a haircut and a shave during that interval. This is the basis of defendant's final assignment of error.

Defendant argues that since there was no question of identity raised in the trial, the testimony was irrelevant; and that the only possible inference that the jury could draw from the evidence was that defendant had changed his appearance in order to create a more favorable impression with the jury.

Assuming, *arguendo*, that the evidence was irrelevant, we can perceive no prejudice to defendant. Common sense would suggest that any party to a lawsuit, particularly a defendant in a criminal action, should "put his best foot forward" and attempt to make the best impression possible on the court and jury that hear his case. In order to obtain a new trial it is incumbent on a defendant to not only show error but also to show that the error was so prejudicial that without the error it is likely that a different result would have been reached. G.S. § 15A-1443(a) (1978); *State v. Sparks*, 297 N.C. 314, 255 S.E.2d 373 (1979). The assignment of error is overruled.

We conclude that defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JAMES L. SIMPSON

No. 19

(Filed 7 April 1981)

1. Rape § 9— failure to name defendant in indictment — fatal defect

Since defendant was neither named nor otherwise identified in the body of the indictment charging him with carnal knowledge of a virtuous female under the age of 12, the defect was fatal and the trial court had no jurisdiction to place defendant on trial and to pronounce judgment on the verdict.

2. Rape § 19— taking indecent liberties with child — instructions proper

In a prosecution of defendant for taking indecent liberties with a child, there was no merit to defendant's contention that the trial court failed to charge on the element of intent, erred in its charge on reasonable doubt, and erred by giving confusing and contradictory instructions to the jury.

DEFENDANT appeals from judgments of *Tillery, J.*, entered at the 7 November 1979 Regular Criminal Session of NEW HANOVER Superior Court.

Defendant was tried upon separate bills of indictment. The indictment in Case No. 79-CR-13196 reads as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 3rd day of July, 1979, in New Hanover County _____ unlawfully and wilfully did feloniously ravish, abuse and carnally know Samantha Cumber, a virtuous female child under the age of 12 years, by force and against her will, the said defendant at the time being more than 16 years of age, against the form of the statute in such case made and provided and against the peace and dignity of the State;
>
> This act was in violation of the following law: G.S. 14-21.
>
> s/ Mary E. Pipines
> Assistant District Attorney

The indictment in Case No. 79-CR-13197 reads as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 3rd day of July, 1979, in New Hanover County James L. Simpson unlawfully and wilfully did feloniously attempt to take and take immoral, improper, and indecent liberties with Allison Cumber, who was under the age of 16 at that time, for the purposes of arousing and gratifying sexual desire. At the time, the defendant was over sixteen years of age and at least five years older than that child; Violation of N.C. G.S. 14-202.1.
>
> s/ Mary E. Pipines
> Assistant District Attorney

The State's evidence tends to show that Samantha and Allison Cumber are sisters. On 3 July 1979, they lived with their mother, brother and uncle in a residence on a farm in New Hanover County. Defendant, age forty, lived in a house on the same farm a short distance away. The girls were playing together in their yard on the morning of 3 July 1979 when defendant asked them if they wanted to play in the water. They put on their bathing suits and played in the water for some time, after which defendant told them to go to his home, which they did. There, they washed their feet in his tub. Samantha left. Defendant then "pulled out the bottom" of Allison's bathing suit and licked and kissed her genital area. At his instructions she lay down on a bed and defendant rubbed his privates between her legs. Allison was then permitted to leave the house when Samantha returned. Defendant then pulled down her underpants, licked and kissed her genital area, put his penis between her legs and rubbed it against her. Thereafter, defendant placed his penis in her rectum and vagina. Samantha said this hurt her and she began to cry. During this last assault a knock was heard at the door and defendant told Samantha to pull up her pants and "not to tell anybody."

Curtis Rochelle, brother of the girls, testified he had gone to sleep on the couch and, when he awoke, saw only Allison playing outside. He observed that the doors and windows at defendant's house were closed and thought it unusual because defendant had no fan or air conditioning. He went to defendant's house and heard Samantha crying. He knocked on the door and waited three or four minutes before Samantha opened the wooden door. She was unable to get the screen door open. Curtis took Samantha home, questioned both girls, and they told of defendant's conduct. Officers were called.

Dr. David Turnbull found external injuries to the vulva and blood in the genital area and on Samantha's clothing. Dr. Lloyd Roberts, a gynecologist, examined Samantha under anesthesia and observed fresh injuries to the wall of the vagina.

When defendant was arrested later that evening and advised of the charges against him, he blurted out "Rape! I never did that much to them girls."

At trial, defendant testified he had been drinking the night before 3 July 1979. He admitted the girls were at his home and

washed their feet in his tub but denied any sexual contact with the girls in any manner. On cross-examination, he admitted a prior conviction for assault on a female.

The jury convicted defendant of first degree rape of Samantha Cumber and of taking indecent liberties with Allison Cumber. He was sentenced to life imprisonment for the rape which was to commence after a five-year sentence imposed in the other case. He gave notice of appeal to the Supreme Court in the rape case, and we allowed his motion to bypass the Court of Appeals in the other case to the end that both cases receive initial appellate review in this Court.

Rufus L. Edmisten, Attorney General, by J. Michael Carpenter, Assistant Attorney General, for the State.

David Rock Whitten, attorney for defendant appellant.

HUSKINS, Justice.

[1] We first note *ex mero motu* that a fatal defect appears on the face of the indictment in Case No. 79-CR-13196 in that defendant is neither named nor otherwise identified in this single-count indictment charging rape of Samantha Cumber.

Article I, § 22 of the Constitution of North Carolina provides:

> Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may . . . waive indictment in non-capital cases.

Where, as here, no presentment or impeachment is involved and no waiver of indictment has been made, a valid bill of indictment is essential to the jurisdiction of the court to try defendant for a felony. *State v. Crabtree*, 286 N.C. 541, 212 S.E.2d 103 (1975). An indictment must clearly and positively identify the person charged with the commission of the offense. *State v. Hammonds*, 241 N.C. 226, 85 S.E.2d 133 (1954); *State v. Camel*, 230 N.C. 426, 53 S.E.2d 313 (1949). The name of the defendant, or a sufficient description if his name is unknown, must be alleged in the body of the indictment; and the omission of his name, or a sufficient description if his name is unknown, is a fatal and incurable defect. *State v. McCollum*, 181 N.C. 584, 107 S.E. 309 (1921); *State v. Phelps*, 65 N.C. 450 (1871).

In *McCollum*, the record showed that the bill of indictment contained five counts. Defendant was acquitted by the jury on all counts save one. The count upon which he was convicted did not contain the name of the defendant or any name whatever. The Court said:

> It is very generally held in an indictment consisting of several counts that each count should be complete in itself, and that in order to this some name should be given the defendant. If it is the wrong name, or defectively stated, the question should ordinarily be raised by plea in abatement or motion to quash, but where no name at all appears in the bill or in the only count on which a conviction is had, it is held in this jurisdiction that such a charge is fatally defective, and the judgment must be arrested. And this course should be taken though the question is presented for the first time in the Supreme Court on appeal.

181 N.C. at 585, 107 S.E. at 309 (citations omitted).

In a single-count indictment, our statutes are consistent with this case law. However, *McCollum* and other cases to like effect are no longer authoritative in the requirement that a judgment based on one count in a multiple count indictment must be arrested if the one count does not name the defendant. G.S. 15A-924 (a) (1) provides: "A criminal pleading must contain: (1) The name or other identification of the defendant but the name of the defendant need not be repeated in each count unless required for clarity." To like effect is G.S. 15A-644 which provides that an indictment must contain, among other things, criminal charges pleaded in accordance with the above quoted statute. *See also* G.S. 15-144.2 (a).

In Case No. 79-CR-13196, since defendant is neither named nor otherwise identified in the body of the bill of indictment, the defect is fatal and the trial court had no jurisdiction to place defendant on trial and to pronounce judgment upon the verdict. The judgment pronounced must therefore be arrested. It is so ordered. Even so, the defective bill under which defendant was tried and convicted will not serve to bar further prosecution if the district attorney be so advised. *State v. Miller*, 231 N.C. 419, 57 S.E.2d 392 (1950).

[2] We turn now to defendant's assigned errors which we discuss only as they relate to the indecent liberties conviction.

Defendant's first assignment of error challenges portions of the charge to the jury. He contends the challenged portions show that the court failed to charge on the element of intent in the indecent liberties case, erred in its charge on reasonable doubt, and erred by giving confusing and contradictory instructions to the jury.

We have carefully examined the charge as a whole and especially the portion to which each exception pertains. While the charge is poorly organized and certainly not a model to be followed, we find no merit in any of the exceptions which make up defendant's first assignment of error. A jury charge must be read as a whole and in the same connected way that the judge intended it and the jury considered it. *State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976); *State v. Wilson*, 176 N.C. 751, 97 S.E. 496 (1918). The general rule is that a charge will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. *State v. Bailey*, 280 N.C. 264, 185 S.E.2d 683, *cert. den.*, 409 U.S. 948, 34 L.Ed.2d 218, 93 S.Ct. 293 (1972); *State v. Gatling*, 275 N.C. 625, 170 S.E.2d 593 (1969); *State v. Cook*, 263 N.C. 730, 140 S.E.2d 305 (1965). If the charge as a whole presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal. *State v. Hall*, 267 N.C. 90, 147 S.E.2d 548 (1966).

There is nothing in the charge relating to Case No. 79-CR-13197 (indecent liberties) which would prejudice or mislead a mind of ordinary firmness and intelligence. When it is considered and construed in accordance with the foregoing rules of construction, the charge is sufficient. The isolated phraseology challenged by defendant's exceptions had no prejudicial effect on the result of the trial and may not be used as grounds for a new trial. Defendant's first assignment of error is overruled.

Defendant's motion to set aside the verdict in Case No. 79-CR-13197 is merely formal and requires no discussion. Such motion is addressed to the discretion of the trial court and is not reviewable absent abuse of discretion. *State v. Lindley*, 286 N.C. 255, 210 S.E.2d 207 (1974); *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817 (1974); *State v. McNeil*, 280 N.C. 159, 185 S.E.2d 156 (1971). No

abuse of discretion is shown.

For the reasons stated we conclude that defendant had a fair trial free from prejudicial error in Case No. 79-CR-13197 wherein he was charged with taking indecent liberties with Allison Cumber. The verdict and judgment in that case must therefore be upheld.

In Case No. 79-CR-13196—Judgment Arrested.

In Case No. 79-CR-13197—No Error.

STATE OF NORTH CAROLINA v. JAMES CURTIS VONCANNON

No. 29

(Filed 7 April 1981)

Larceny § 7.4— larceny of tractor — possession of recently stolen property

The State's evidence was insufficient to be submitted to the jury on the issue of defendant's guilt of felonious larceny of a tractor under the doctrine of possession of recently stolen property where it tended to show that defendant went to the home of his sister and her husband, asked if another person could park the tractor on their property, and told the sister and her husband that he had no idea who this other man was; permission was given: defendant left the home and the tractor was subsequently parked at the home; neither defendant's sister nor her husband saw defendant drive the tractor or saw the man referred to by defendant; and the tractor parked at the home of defendant's sister on 5 June had been stolen sometime between 3 and 5 June.

APPEAL by the State pursuant to G.S. 7A-30 (2) from decision of the Court of Appeals, 49 N.C. App. 633, 272 S.E. 2d 153 (1980), granting a new trial on defendant's appeal from a larceny conviction before *Mills, J.*, at the 7 January 1980 Session of STANLY Superior Court.

At trial the State's evidence tended to show that a tractor belonging to Kinlaw International, Inc., disappeared from the company's premises sometime between 3 June 1979 and 7 June 1979 when it was discovered on a farm in Davidson County. The discovery was made after Maxwell Kinlaw, president and owner of the company, received two phone calls concerning the tractor on 7 June. One of the calls was anonymous; the other came from Baxter Varner who owns a tract of land in Davidson County. Varner called to ask if one of Kinlaw's tractors was missing because a tractor with

Kinlaw tags was parked on his land. When Kinlaw searched his property and discovered that one of his tractors had disappeared, he and a Stanly County deputy drove to Davidson County and identified the tractor parked on Varner's land as the tractor missing from the company. They discovered that the front dashboard of the tractor had been tampered with, and the tractor had been "straight wired" to get it started. The tractor, though on Varner's land, was parked close to a house which Varner rented to Mr. and Mrs. John W. York, Jr.

The Yorks testified that someone parked the tractor on the property at night on 5 June 1979, after defendant, Mrs. York's brother, asked if another person could park the tractor on the property. They testified that defendant drove up to the house in his truck between 10:30 and 11:00 p.m. that night. He asked them whether another man could park a tractor on the property. He told Mrs. York that he had no idea who this other man was. Neither of the Yorks saw this other man, nor did they see defendant on or near the tractor. Mrs. York did testify that on 7 June a carload of men came and looked at the tractor, but that none of the men was defendant. A sheriff's deputy testified that the tractor was not examined for fingerprints.

Defendant took the stand in his own defense and testified that he was simply helping a motorist in distress. He testified that he met the man on the tractor at a closed Gulf service station on Highway 49 near the York home. Defendant was driving along Highway 49 at about 10:00 p.m. returning from a job in Charlotte to Asheboro when he stopped to get a soda at a machine outside the station. Defendant noticed a man on a tractor. The man on the tractor told defendant that he was trying to get the tractor home after purchasing it at an auction, and he needed gas. He asked defendant if he knew of a gas station that was open that late at night. Defendant told the man he did not know of one because he was not from the area. When the man asked if defendant thought it would be safe to leave the tractor at the gas station overnight, defendant suggested that he might be able to leave it at his sister's place which was nearby. Defendant went on to testify to essentially the same conversation with the Yorks about which they had already testified. Michael Lee Fleming, who at the time of the incident was an employee of defendant, corroborated defendant's story, testifying that he accompanied defendant on the night in question.

The jury returned a verdict of guilty of larceny. Defendant appealed from a judgment imposing a two-to-five year sentence, suspended for five years on condition that defendant pay a fine of $1,000 plus court costs and make restitution to Kinlaw International for damage to the tractor. The Court of Appeals in an opinion by Hill, J., with Arnold, J., concurring, found no error in the trial judge's failure to dismiss the case but awarded a new trial because the trial judge failed to hold an *in camera* inspection of a certain witness's prior recorded statements before denying defendant access to the statements. Judge Hedrick dissented. The State appealed pursuant to G.S. 7A-30 (2).

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, and Acie L. Ward, Assistant Attorney General, for the State.

Joe D. Floyd for defendant.

BRANCH, Chief Justice.

Defendant first contends that the Court of Appeals erred by affirming the trial judge's denial of defendant's motion to dismiss. The State relied exclusively on the doctrine of recent possession of stolen goods. Defendant, however, argues that the record contains no direct evidence of possession by defendant. He concludes that the doctrine of recent possession cannot be the basis of a conviction of larceny without direct evidence of possession by defendant.

The State admits that the record contains no direct evidence that defendant possessed the tractor. It argues, however, that it introduced sufficient circumstantial evidence of possession to trigger the doctrine of recent possession. Since the Yorks never saw the mysterious man on the tractor, the State contends, the jury could reasonably infer defendant possessed and controlled the tractor despite defendant's version of events.

> We recently dealt with a similar issue in *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981). In that case, we recited the law of the doctrine of recent possession:
>
> [The] doctrine is simply a rule of law that, upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property.

* * *

> [T]he presumption spawned by possession of recently stolen property arises when, and only when, the State shows beyond a reasonable doubt: (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972); *State v. Foster*, 268 N.C. 480, 151 S.E. 2d 62 (1966); *State v. Turner*, 238 N.C. 411, 77 S.E. 2d 782 (1953); *State v. Epps*, 223 N.C. 741, 28 S.E. 2d 219 (1943); and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt. *State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369 (1968).
>
> > The possession sufficient to give rise to such inference does not require that the defendant have the article in his hand, on his person or under his touch. It is sufficient that he be in such physical proximity to it that he has the power to control it to the exclusion of others and that he has the intent to control it. One who has the requisite power to control and intent to control access to and use of a vehicle or a house has also the possession of the known contents thereof.
>
> *State v. Eppley, supra*, 282 N.C. at 254, 192 S.E. 2d at 445 (citations omitted).

Id. at 673-75, 273 S.E. 2d at 293-94.

In *Maines* we also reiterated the prohibition against convicting a defendant on the basis of "stacked inferences." The State in *Maines* presented no direct evidence of the defendant's possession of the stolen goods; it relied solely on the inference of possession from the fact that the defendant was driving the car, owned by another, in which the stolen goods were found. We concluded that the conviction was improper because to permit conviction would have been to allow the inference of guilt based on recent possession to be stacked on the inference of possession based on the control of

the car. Quoting *State v. Parker*, 268 N.C. 258, 262, 150 S.E. 2d 428, 431 (1966), we said,

> Inference may not be based on inference. Every inference must stand upon some clear or direct evidence, and not upon some other inference or presumption.

State v. Maines, supra at 676, 273 S.E. 2d at 294.

In this case, the facts present the same legal situation in a different context. Nevertheless, here as in *Maines*, evidence of defendant's possession was at most circumstantial based on the fact that he asked his brother-in-law to permit an unnamed person to park the tractor on his brother-in-law's premises. To convict defendant the jury would have to infer that defendant was in possession of the tractor and then infer that he was the person who stole the tractor based on the inferred possession. Thus, the State was permitted to build its case by stacking the inference of guilt based upon the doctrine of recent possession on top of the inference of possession based on circumstantial evidence.

Considering the complete lack of any direct evidence tending either to connect defendant with the crime or to show him in possession of the stolen property, we hold that the possession shown in defendant is insufficient to support a verdict of guilty of the larceny charged in the bill of indictment. Nonsuit was therefore appropriate. The decision of the Court of Appeals upholding the denial of defendant's motion for nonsuit is

Reversed.

STATE OF NORTH CAROLINA v. BOBBY NEVILLE

No. 32

(Filed 7 April 1981)

Criminal Law § 7— entrapment — denial of acts underlying offense charged

Where a defendant denies the commission of the acts underlying the offense charged, he cannot raise the inconsistent defense of entrapment.

ON appeal from the decision of the Court of Appeals, ___ N.C. App. ___, 272 S.E. 2d 164 (1980), finding no error in the judgment

of *Brewer, J.*, entered 1 February 1980 in ORANGE County Superior Court.

Defendant was charged in indictments, proper in form, with possession with intent to sell, and with selling, lysergic acid diethylamide (hereinafter referred to as LSD). He entered a plea of not guilty to each charge.

Evidence for the State tended to show that James Boone, Special Agent for the State Bureau of Investigation, was on special undercover assignment in August 1979 in Chapel Hill, North Carolina. While there, he worked closely with an informant, Donnie McAdoo. Boone testified that on 22 August 1979, he and McAdoo attempted to purchase drugs from the owner of the Disco Lounge. Defendant entered the lounge and interrupted the conversation to say that he could obtain LSD and cocaine for the men. Shortly thereafter, Boone, McAdoo, and defendant drove to an apartment on Broad Street where defendant left the car, went inside, and returned a few minutes later. Defendant told Boone that "200 hits of LSD" would cost $260. Boone paid the money and defendant again went inside the apartment. He returned shortly with two strips of blue paper in a plastic bag and handed them to Boone.

Thomas H. McSwain, an expert in the field of forensic chemistry employed by the State Bureau of Investigation, testified that the plastic bag contained "substance Lysergic Acid Diethylamide."

Defendant presented evidence and testified in his own behalf. He testified that he was present at the Disco Lounge on 22 August and that McAdoo approached him and asked if he was interested in making twenty dollars. McAdoo explained that his partner, Boone, had cheated him, and "he planned to cheat Boone in order to get even." McAdoo told defendant to "pretend that he, McAdoo, was getting the drugs from [defendant]." According to defendant, the three of them drove to the Broad Street apartment, and defendant went inside. When he returned, "McAdoo got out of the car and pretended that I had given him drugs. Then he got back into the car and handed the plastic bag to Boone. I never gave McAdoo anything. He had the plastic bag containing the blue strips of paper before he left the club. It was never in my possession."

The jury returned verdicts of guilty on both charges. Defendant was sentenced to three to four years' imprisonment on the

conviction of possession and to four years' imprisonment on the conviction of selling LSD. The Court of Appeals, in an opinion by Judge Martin (Robert M.), Judge Vaughn concurring, found no error in defendant's trial. Judge Wells dissented. Defendant appealed to this Court pursuant to G.S. 7A-30 (2).

Rufus L. Edmisten, Attorney General, by Ralf F. Haskell, Assistant Attorney General, for the State.

Charles E. Vickery for defendant.

BRANCH, Chief Justice.

Defendant's sole assignment of error is to the failure of the trial court to give an instruction on the defense of entrapment. He admits that he denied possessing LSD and concedes that North Carolina follows the majority rule which precludes the assertion of the defense of entrapment when the defendant denies one of the essential elements of the offense charged. *See State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399 (1971) (subsequent history omitted); *State v. Boles*, 246 N.C. 83, 97 S.E. 2d 476 (1957); Annot., 61 A.L.R. 2d 677 (1958). He further recognizes that the rationale of that rule "is that the law will not countenance a claim that defendant did not commit the offense and a claim that he was entrapped into the commission of the very offense which he denied committing." *State v. Neville*, ____ N.C. App. at ____, 272 S.E. 2d at 166. Nevertheless, defendant contends that the defenses upon which he relies are not inconsistent. He asserts that he does not deny *participating* in a scheme intended to look like he was selling drugs to informant McAdoo. The defense which he put before the jury and which the jury rejected was that he *pretended* to possess and sell the LSD. At the same time, however, he specifically denied actually possessing LSD or selling it to McAdoo or to Boone. His defense is that he did not *do the acts* underlying the offenses charged; yet he seeks an instruction that he was induced and entrapped by the government to do those acts. In our opinion, it is inconsistent for defendant to assert on the one hand that he did not do certain acts and then to insist that the government induced him to do the very acts which he disavows doing.

Defendant relies on the case of *Henderson v. United States*, 237 F. 2d 169 (5th Cir. 1956), to support his contention. However, we do not find that case to be controlling. The defendant in *Henderson* was charged with conspiring illegally to distill whiskey. The defendant

admitted his acts in operating the illegal distillery but denied that he was a party to a conspiracy. The court allowed him to assert his defense of entrapment, even in view of his denial of the offense charged, stating that the two defenses were not so repugnant that "the proof of the one necessarily disproves the other." The court noted the general rule and its rationale but held that under the circumstances of that particular case the defendant should be permitted to say, "I did not go so far as to become a party to the conspiracy, but to the extent that I did travel down the road to crime, I was entrapped." 237 F. 2d at 173. The defendant in *Henderson* admitted committing illegal offenses, and insofar as the commission of those acts is concerned, he could have been entrapped. Defendant in the case at bar, however, admits no illegal acts whatsoever. He plainly denies ever possessing or selling LSD. The defense of entrapment presupposes the existence of the acts constituting the offense. *Zamora v. State*, 508 S.W. 2d 819 (Tex. Crim. App. 1974); 21 Am. Jur. 2d, "Criminal Law" §144 (1965). Where a defendant claims he has not done an act, he cannot also claim that the government induced him to do that act.

We are not inadvertent to the cases which apparently allow a defendant to raise an entrapment defense even while denying the commission of the offenses charged. Our review of these cases, however, reveals that they deal with the situation where either the State's own evidence raises an inference of entrapment, *State v. Knight*, 230 S.E. 2d 732 (W.Va. 1976), or the defendant denies the intent required for the commission of the offense. *United States v. Demma*, 523 F. 2d 981 (9th Cir. 1975). In the former instance, the submission of the defense is obviously proper; in the latter instance, the entrapment defense is not inconsistent with the defense of lack of mental state since the defense of entrapment itself is an assertion that it was the will of the government, and not of the defendant, which spawned the commission of the offense. *McCarroll v. State*, 294 Ala. 87, 312 So. 2d 382 (1975). In the instant case, the State's evidence raises no inference of entrapment, and defendant here has denied doing any *acts* which were elements of the offense charged. Our research has not disclosed a single case in which a defendant denies doing the *acts* charged and simultaneously claims that the government made him do those very acts. We therefore hold that where, as here, the defendant denies the commission of the acts underlying the offense charged, he cannot raise the inconsistent defense of entrapment. The decision of the Court of Appeals finding

no error in defendant's trial is

Affirmed.

ELIZABETH ANN TAYLOR v. JACK HAYES

No. 25

Before *Judge Keiger* presiding at the 30 October 1978 Civil Session of FORSYTH District Court and a jury, judgment, based on the jury verdict, was entered in favor of plaintiff for money damages. The Court of Appeals, on rehearing, in an opinion by Judge Hill in which Chief Judge Morris and Judge Parker concurred, found no error. We allowed defendant's petition for further review on 2 August 1980.

Legal Aid Society of Northwest North Carolina, Inc. by Ellen W. Gerber, Attorney for plaintiff appellee.

White and Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker, Edward L. Powell, and Robert B. Womble, Attorneys for defendant appellant.

PER CURIAM.

This is an action by a tenant against her landlord for treble damages pursuant to G.S. 75-16, for defendant's alleged violation of G.S. 75-1.1 (a) which prohibits "[u]nfair methods of competition in or affecting commerce, and unfair and deceptive acts or practices in or affecting commerce. . . ." Plaintiff claimed that defendant induced her to rent his apartment by making fraudulent misrepresentations concerning the condition of the apartment. The jury found in favor of plaintiff and awarded damages for defendant's misrepresentations in the sum of $785.00. Judge Keiger concluded that by making the misrepresentations to plaintiff as found by the jury, "defendant committed an unfair or deceptive trade practice within the meaning of [G.S. 75-1.1]." He, consequently, trebled the jury's award of damages and entered judgment in the sum of $2,355.00.

In an opinion filed 5 February 1980 the Court of Appeals initially concluded that there was error in the introduction of evidence. On rehearing, however, the Court of Appeals concluded ultimately that no error had been committed and affirmed the

judgment of the trial court.

After we allowed defendant's petition for further review, he presented in his new brief only three questions. Two of them concerned the admission of evidence. The third deals with whether there was sufficient evidence to be submitted to the jury on the question of defendant's misrepresentations.

After reviewing the record, the briefs, and hearing oral arguments on the questions presented, we conclude that the petition for further review was improvidently granted. Our order granting further review is, therefore, vacated. The decision of the Court of Appeals affirming the judgment of the Forsyth District Court remains undisturbed and in full force and effect.

Discretionary Review improvidently granted.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

AREY v. BD. OF LIGHT & WATER COMM.

No. 40PC

Case below: 50 NC App 505

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 5 May 1981.

BANK v. WORONOFF

No. 7PC

Case below: 50 NC App 160

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 May 1981.

CONE v. CONE

No. 110PC

Case below: 50 NC App 343

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 May 1981.

FINANCIAL CORP. v. HARNETT TRANSFER

No. 126PC

Case below: 51 NC App 1

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 May 1981.

GOLDEN v. REGISTER

No. 103PC

Case below: 50 NC App 650

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 May 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

NYE v. LIPTON

No. 20PC

Case below: 50 NC App 224

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 May 1981.

SERMONS v. PETERS, COMR. OF MOTOR VEHICLES

No. 117PC

Case below: 51 NC App 147

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 May 1981.

STATE v. ALLEN

No. 135

Case below: 51 NC App 247

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 May 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 May 1981.

STATE v. BILLUPS

No. 97PC

Case below: 49 NC App 373

Application by defendant for further review denied 5 May 1981.

STATE v. BROOKS

No. 102PC

Case below: 51 NC App 90

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 May 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. CHERRY

No. 130PC

No. 35 (Fall Term)

Case below: 51 NC App 118

Petition by State for discretionary review under G.S. 7A-31 allowed 5 May 1981.

STATE v. CLANTON

No. 56PC

Case below: 49 NC App 698

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 5 May 1981.

STATE v. COOLEY

No. 46PC

Case below: 50 NC App 544

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 May 1981.

STATE v. DIZOR

No. 133PC

Case below: 51 NC App 247

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 May 1981.

STATE v. EDWARDS

No. 60PC

Case below: 32 NC App 599

Application by defendant for further review denied 5 May 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. LANIER

No. 37PC

Case below: 50 NC App 383

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 5 May 1981.

STATE v. PERRY

No. 47PC

Case below: 50 NC App 540

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 May 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 May 1981.

STATE v. PETERS

No. 109PC

Case below: 50 NC App 746

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 May 1981.

STATE v. QUINERLY

No. 95PC

Case below: 50 NC App 563

Application by defendant for further review denied 5 May 1981.

STATE v. SMITH

No. 111PC

Case below: 50 NC App 746

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 May 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

STATE v. TAYLOR

No. 50PC

Case below: 51 NC App 248

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 May 1981.

STATE v. THOMPSON

No. 36PC

Case below: 50 NC App 484

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 May 1981.

STATE v. TILLETT & STATE v. SMITH

No. 123

Case below: 50 NC App 520

Motion of Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 5 May 1981.

STATE v. TYNER

No. 3PC

Case below: 50 NC App 206

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 5 May 1981.

STATE v. WITHERS

No. 42PC

Case below: 50 NC App 547

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 May 1981.

Disposition of Petitions For Discretionary Review Under G.S. 7A-31

VANDIVER v VANDIVER

No. 29PC

Case below: 50 NC App 319

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 May 1981.

APPENDIXES

AMENDMENTS TO STATE BAR RULES

AMENDMENTS TO CODE OF PROFESSIONAL RESPONSIBILITY

AMENDMENT TO RULES GOVERNING ADMISSION TO PRACTICE OF LAW

PRESENTATION OF HIGGINS PORTRAIT

AMENDMENTS TO STATE BAR RULES

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 July 13, 1979.

BE IT RESOLVED by the Council of The North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, as appears in 221 NC 585 and as amended in 268 NC 734, 274 NC 608 and 277 NC 742, be and the same is hereby amended by adding the following:

Sec. 5. Standing Committees of the Council

i. Positive Action Committee of not less than seven members, one of whom shall be designated as Chairman and one as Vice-Chairman, for the purpose of implementing a program of intervention for lawyers with a substance abuse problem which affects their professional conduct; provided, no member of the Grievance Committee shall be a member of the Positive Action Committee. Such Committee's creation shall in no wise be construed so as to hinder, limit or otherwise affect the disciplinary process, but such Committee, under such rules and procedures as the Council shall promulgate, shall function and exist as follows:

(1) Have jurisdiction to investigate and evaluate allegations of substance abuse by lawyers, which specifically includes, but is not limited to, conferring with any lawyer who is the subject of such allegations as to such allegations, and making recommendations to such lawyer, should it be determined that he or she in fact has a substance abuse problem, of sources of help for such problem;

(2) Perform similar functions as to cases referred to it by a disciplinary body, reporting the results thereof to the referring body.

(3) Except as noted herein and otherwise required by law, results of investigations, conferences and the like shall be privileged and held in the strictest confidence between the lawyer involved and the Committee. For good cause shown where the allegation of substance abuse is made by the lawyer's family, the Committee may, in its discretion, release such information to such

person or persons as in its judgment will be in the best interest of the lawyer involved;

(4) Should such investigation and evaluation clearly indicate that the lawyer involved is engaging in conduct detrimental to the public, the courts, or the legal profession, the Committee shall take action, including, if warranted, filing of a grievance, as may appear appropriate to the Committee.

(5) The Committee may, under appropriate rules and regulations promulgated by the Council, establish District Committees, which may exercise any or all of the functions set forth herein to the extent provided in any such rules and regulations.

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 have been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting, unanimously adopt said amendment to the Rules and Regulations of The North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of The North Carolina State Bar, this the 24th day of July, 1979.

B.E. JAMES, Secretary-Treasurer
North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 23 day of August, 1979.

JOSEPH BRANCH
CHIEF JUSTICE

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 23 day of August, 1979.

CARLTON, J.
For the Court

AMENDMENTS 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 July 17, 1981.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article X, Canon 3 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 283 NC 807, is hereby amended to read as follows:

EC 3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. *However, a statutory definition of "practice of law" has been enacted in North Carolina, N.C. Gen. Stat. Sec. 84-2.1, and defines certain specific acts as the performance of legal services.* Functionally, the practice of law, *as generally defined,* relates to the rendition of services for others that call for professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved *and there is not specific statutory prohibition relating to the act,* non-lawyers, such as court clerks, police officers and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

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 amendments to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of July, 1981.

B.E. JAMES, Secretary-Treasurer
North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 17th day of August, 1981

JOSEPH BRANCH
CHIEF JUSTICE

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 17th day of August, 1981

MEYER, J.
For the Court

AMENDMENT TO RULES GOVERNING ADMISSION TO PRACTICE OF LAW

The amendment below to the Rules Governing Admission to the Practice of Law in the State of North Carolina was duly adopted at the regular quarterly meeting of the Council of the North Carolina State Bar on July 17, 1981.

BE IT RESOLVED that the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same are hereby amended by rewriting Rule.1004(1) as appears in 289 NC 741, and 298 NC 821 as follows:

Rule .1004. Scores.
(1) Upon written request *the Board will release to an unsuccessful applicant his total score on the immediately preceding bar examination and his score on the immediately preceding Multistate Bar Examination.*

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 Governing Admission to the Practice of Law in the State of North Carolina and Rules and Regulations of the North Carolina State Bar has been duly adopted by the Council of the North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 20th day of July, 1981.

B.E. JAMES, Secretary
North Carolina State Bar

After examining the foregoing amendment to the Rules Governing Admission to the Practice of Law of 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 24th day of August, 1981.

JOSEPH BRANCH
CHIEF JUSTICE

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules Governing Admission to the Practice of Law of the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 24th day of August, 1981.

BRITT, J.
For the Court

Ceremonies

For The Presentation Of A Portrait

Of

The Late Justice Carlisle Wallace Higgins

To

The Supreme Court Of North Carolina

7 May 1981

Courtroom Of The Supreme Court

Justice Building

Raleigh

INTRODUCTORY REMARKS
BY
CHIEF JUSTICE JOSEPH BRANCH

For the members of the Higgins' family and for the members of this Court, I wish to express appreciation for your presence at this meaningful ceremony.

At the request of the Higgins' family, the address of presentation will be delivered by Judge Frank M. Parker. Because of his close friendship and close association particularly during the latter days of Justice Higgins' life, it is most appropriate that Judge Parker be the person to deliver this address. The Court recognizes Judge Frank M. Parker.

PRESENTATION ADDRESS
BY
THE HONORABLE FRANK M. PARKER

May it please the Court:

On October 17th, 1887 there was born in the little community of Ennice in Alleghany County, North Carolina, to the marriage of Martin Alexander Higgins and Jennie Bledsoe Higgins their first child, a boy. They named their son for his paternal grandfather who had been killed while serving in the Confederate Army, Isaac Carlisle Higgins.[1] Early exhibiting that independence of spirit which was to become a prominent feature of his personality, the boy himself soon changed his name to Carlisle Wallace Higgins, and it is by that name that he was thereafter known throughout the long and eventful life which we honor here today.

The characteristics of independence, courage, self-reliance, and freedom of spirit developed quite naturally in Carlisle Wallace Higgins. His forebears were among those first pioneers who came down the Valley of Virginia, eventually to settle in the mountains of Northwestern North Carolina, first conquering and then planting the wilderness as they came. The life into which he was born and in which he spent his boyhood was still very much the life of the American frontier. No railroad came into Alleghany County and no industrial smoke stack or automobile exhaust polluted its pure air. Small game still abounded and its sparkling streams still teamed with trout. People still lived much as their ancestors had always lived, close to the land, wresting a living from its soil by farming, raising cattle and sheep, and cutting its virgin timber. For a boy who loved the out-of-doors as did Carlisle Higgins, it was an idylic existence. He early learned the uses of firearms, starting with an old muzzle-loading rifle, and he learned the ways of the trout from master fishermen among his mountain neighbors.

He started his education in a one-room schoolhouse near his home. If he did not immediately exhibit a love for learning, he did early establish that he possessed both an active imagination and a capacity for leadership which at times made life difficult for the succession of young schoolmasters who came to

1. Information as to name and date of birth (see footnote 2 *infra*) obtained from original entries in Higgins family bible verified by Justice Higgins's younger sister, Mrs. Clyde Carico, of Bel Air, Md., who survived him.

teach at the school. He and four of his school-mates could form a conspiracy simply by looking at one another, without a word being spoken. His initiative in carrying out these conspiracies finally prompted one frustrated young teacher to write to his parents:

> "The limited facilities of this school are inadequate to deal with your son, Carlisle."

Whether it was this frustration on the part of his schoolmaster or simply that he had exhausted the resources of the local school, I do not know, but the fact remains that during his fourteenth and fifteenth years, Carlisle Higgins dropped out of school altogether.[2] These were, for him, happy and satisfying years. Aside from hunting and fishing, he spent his time profitably in raising and trading cattle and sheep, an activity for which he exhibited a considerable talent. This highly satisfying life style ended abruptly when his father, a successful farmer and business man who knew the value of an education, packed him off to Bridle Creek Academy in Grayson County, Virginia. There he received a thorough grounding in English, Latin, and Mathematics, and under the stimulus of excellent teachers for the first time experienced the joys of learning.

In 1908 he entered the University at Chapel Hill, in that institution finding one of the great and enduring loves of his life. There, he continued to apply himself seriously to his studies, taking time from them primarily only to engage in intercollegiate debating, for which he exhibited a marked aptitude. Although an excellent athlete, he did not participate in varsity sports, finding to his chagrin that a summer spent in playing semi-professional baseball in Virginia had rendered him ineligible. He graduated from the University in 1912 and immediately entered its law school, completing his studies there in 1914. While at the University he made many lasting friendships. One of these, in particular, was to play a significant role in his later life. William B. Umstead and Carlisle W. Higgins were classmates in law school.

2. Because of this two year hiatus, Carlisle W. Higgins, not wishing to appear older than his classmates, incorrectly reported his year of birth as 1889 instead of 1887 when he resumed his education, and he maintained this fiction for many years thereafter, reporting his age correctly only in his later years. The history of the Supreme Court which appears in 274 N.C. 611, 621, reports his year of birth incorrectly as 1889 instead of 1887.

After receiving his license to practice law, which was granted by the Supreme Court at its Fall term in 1914, Carlisle Higgins returned to Alleghany County, where he entered into practice at Sparta with the Honorable Rufus A. Doughton. Never did a young lawyer have a greater teacher for his partner or a quicker opportunity to put into practice all that he could learn. Mr. Doughton, or Governor Doughton[3] as he was generally called, was one of the ablest and most respected trial lawyers in all of Western North Carolina. However, the same qualities of character and leadership which attracted clients also made his services much in demand in the governmental affairs of this State.[4] During those frequent and extended periods when Governor Doughton's public service required his absence from Sparta, it was his young partner, Carlisle Higgins, who alone faced the older and more experienced trial lawyers of his area. He soon established that he was more than their match.

In 1916 Carlisle Higgins took the single most constructive step of his long and distinguished career. On November 26 of that year he married Myrtle Bryant, of Independence, Virginia, and for more than sixty years thereafter, until her death on September 17, 1977, he was blessed in having the love and companionship of that truly great lady.

Upon our entry into the first World War, Carlisle Higgins promptly enlisted in the United States Army, choosing the infantry as the only proper service for a mountain man. While undergoing training he nearly lost his life in the terrible flu epidemic in the winter of 1917-18, only his strong constitution pulling him through. Upon the close of the war he returned to his law practice in Sparta, at first again in partnership with Governor Doughton, and later alone when Mr. Doughton became Commissioner of Revenue. Although no longer partners, the close relationship between them continued so long as Mr. Doughton lived. On one occasion they found themselves in court on opposite sides of a civil case. Carlisle Higgins, encountering

3. Rufus A. Doughton served as Lieutenant Governor of North Carolina from 1893 to 1896.

4. In addition to serving as Lieutenant Governor, Rufus A. Doughton represented Alleghany County in the House of Representatives in the Sessions of 1887, 1889, 1891, 1903, 1907, 1909, 1911, 1913, 1915, 1917, 1919, 1921, 1923 and 1933. He was Speaker of the House in the Session of 1891, and served as North Carolina Commissioner of Revenue from 1923 to 1927. He also served as chairman of the State Highway Commission.

unexpected difficulty when one of his witnesses refused to testify freely, sought to repair the damage by asking leading questions. This went on for some time without protest from Mr. Doughton, but finally he arose and addressed the Court:

> "Your Honor, I am forced to object to this manner of questioning. I know that my young friend knows better than to lead his witness in this fashion."

To this, Higgins responded:

> "Oh no, Governor, I am not leading this witness. I *was* leading him a little while ago but I'm *pushing* him now!"

Governor Doughton threw up his hands, laughed, and sat down. Years later Carlisle Higgins said that Rufus Doughton was the kindest man he had ever known.

During the period of their residence in Sparta, Carlisle and Myrtle Higgins had two children, a son, Carlisle W. Higgins, Jr., and a daughter, Mary Cecile Higgins (now Mrs. Robert Bridges), both of whom are with us here today. Also during this period Carlisle Higgins was twice elected to the State legislature. In 1925 he represented Alleghany County in the State House of Representatives, and in 1929 he was the only Democrat elected from any of the northwestern mountain counties to serve in the State Senate.

In 1930 he was elected Solicitor of the old 11th Judicial District, then composed of Ashe, Alleghany, Surry, Forsyth, Rockingham, and Caswell Counties. His predecessor, the Honorable S. Porter Graves, had been an able attorney, but because of ill health had not been able to keep up with his dockets, which had become badly behind. When, four years later, Carlisle Higgins completed his service as Solicitor, he had lost over 30 pounds and suffered from ulcers, but his dockets were current. He achieved this result not alone by intensive and sustained effort, but by developing, to a remarkable degree, the ability to discard all irrelevant material in his quest for central and fundamental points in the prosecution of criminal cases. This ability to concentrate on essentials was to serve him well throughout all of his later career.

In 1934, on recommendation of Senator Bailey, President Roosevelt appointed Carlisle Higgins United States District Attorney for the Middle District of North Carolina, a post which

he continued to hold until 1945. During his tenure as District Attorney, Carlisle and Myrtle Higgins moved their home from Sparta to Greensboro, which was more conveniently located for the work of the United States Attorney. While serving as United States Attorney, Carlisle Higgins participated in prosecuting one of the largest series of anti-trust cases ever undertaken up until that time when 104 corporations and individuals engaged in the fertilizer business were charged with violating the anti-trust laws. The cases took over three years to try, but in the end the government was successful. Indeed, Carlisle Higgins's success as a trial advocate in representing the United States Government, both as prosecutor of those charged with violating its laws and as defender of claims against it, won him such recognition in the United States Department of Justice that he was soon chosen by the Department to represent the Federal Government on special assignments in courts all over the United States.

This same recognition of his abilities as a trial advocate also led to his being chosen in November, 1945, to go to Japan as Assistant Chief, and later as Acting Chief, of Counsel of the International Prosecution Section in the prosecution of General Tojo and other Japanese war lords before the International Military Tribunal for the Far East. For this purpose he was again inducted into the Army, this time as a Colonel serving on the Staff of General Douglas MacArthur. On this assignment he remained in Japan for more than a year, returning to the United States only after the prosecution's case had been successfully completed. As a result of this prosecution, General Tojo and a number of the other defendants were convicted and ultimately executed for their crimes. Carlisle Higgins's experiences in Japan led him to have a profound admiration for the Japanese people, though not for the leaders who had led them into the war.

On returning to the United States in the spring of 1947, Carlisle and Myrtle Higgins moved their home from Greensboro to Winston-Salem, where he entered the private practice of law in partnership with J. Erle McMichael. His services as a trial advocate were in immediate demand, and he spent the next seven years constantly in court representing clients in cases all up and down the eastern seaboard, from New York to Florida. This practice, together with his extensive trial practice while representing the United States Government, eventually

took him to court room appearances in State or Federal courts located in 37 of our 50 states. As a result of his nation-wide trial experience, he arrived at the opinion that the North Carolina lawyers, as a whole, were the most competent trial lawyers he appeared against.

In addition to his law practice, Carlisle Higgins continued his interest in public affairs. When, in 1952, his old friend and school-mate, William B. Umstead, called on him for help, he readily responded and successfully managed Umstead's campaign for Governor. Again, in 1954, he responded to the call of the State Democratic Party Executive Committee and served for a time as National Committeeman for North Carolina. On June 8, 1954, Governor Umstead announced his appointment as an Associate Justice of the North Carolina Supreme Court to succeed Justice Sam Ervin, who resigned from the Court to accept appointment to the United States Senate.

Justice Higgins took the oath of office as an Associate Justice of the Supreme Court on August 30, 1954. He was then almost 67 years old, an age at which most men think of retiring. At the time there was considerable speculation among members of the Forsyth County Bar that he would not remain long on the Court, not because he would want to retire but because he would find life on the Court not sufficiently active to suit his tastes. These speculations proved false. Justice Higgins was elected in November, 1954, to the balance of the unexpired term of Justice Ervin, and was re-elected in November, 1958, and again in 1966 to full eight-year terms, retiring only when his term expired on December 31, 1974. He thus served for a total of twenty years and four months. Although several Justices had combined service as Associate Justice and as Chief Justice for longer periods, Justice Higgins served as Associate Justice longer than any person in the history of the Court save one, and Justice Platt Walker's service as an Associate Justice exceeded that of Justice Higgins by only 23 days.

During his long service, Justice Higgins wrote 1140 full opinions, 51 dissenting opinions, and an unknown number of per curiam opinions for the Court. It is not, however, the length of his service or the number of his opinions which we honor here today. Rather, it is the quality of his service. As an appellate Judge he knew no constituency but the law itself, being ever mindful that the Supreme Court, unlike the trial courts, in

deciding a particular case also determines the rights and liabilities of parties not then before it. He scorned judicial activism, believing firmly that the courts should confine themselves to their proper sphere and should not invade that of the legislature. At the same time he never hesitated to advocate changes in court-made law when he thought prior court decisions had been wrong. This willingness to correct past errors caused him to be considered somewhat of a maverick when he first came upon the Court, leading one of his elders on the Court to ask him somewhat petulantly:

> "Higgins, how many of these time-honored precedents are you going to try to change?"

to which he bluntly replied:

> "Every one that I think is wrong."

As he himself once remarked, he "had but little respect for status and none at all for quo."

In writing his opinions he had a remarkable ability to encapsulate a legal concept in a concise and vivid phrase, as a few examples will illustrate. In one case he pointed out that the legislative grant of power to the Utilities Commission to consider "all other facts" which would enable it to determine just and reasonable rates was not "a grant to roam at large in an unfenced field." Utilities Commission v. Public Service Co., 257 NC 233,237 (1962). In another, he observed that the legislative directive that the Workmen's Compensation Act be liberally construed did not "permit either the Commission or the courts to hurry evidence beyond the speed which its own force generates." Lawrence v. Mill, 265 NC 329, 331 (1965). In still a third, he observed that our former rule of evidence excluding hospital records was as "out-of-date as the bustle, asafoetida, and the tomahawk." Sims v. Insurance Co., 257 NC 32, 42 (1962). Speaking of the fifth amendment, he noted that while "(t)he high court in Washington calls the shots with respect to Fifth Amendment rights, (w)e mark the targets according to the calls." State v. Thorpe, 274 NC 457, 462 (1968). When confronted with an excessively verbose record and brief, he observed that "(i)f there is a grain of merit in this appeal, it is covered up in the chaff." Morgan v. Bell Bakeries, Inc., 246 NC 429, 434 (1957). As he viewed it, the dominant function of the criminal law was "to protect society from criminals rather than to protect criminals

from punishment." State v. McPherson, 276 NC 482, 486 (1970). How better could any of these ideas have been expressed?

Above all, he had the ability not only to think clearly and logically but to express himself in clear and precise language. In an era when appellate opinions have tended to become overlong, his were models of conciseness, omitting all but essential facts and saying only what needed to be said. He paid the trial bench and the bar the implied compliment of assuming that they already knew a great deal of law and that it was neither necessary nor desirable for him to say more than was essential for decision of the case at hand. The result was that his opinions became, and still remain, of real service to the busy trial judges and practicing bar, who find it possible to read them quickly and to understand at once what the Court was holding.

When Justice Higgins first came on the court, the Justices were not furnished legal Research Assistants. Later, when these were supplied, he exhibited an uncanny ability to select young men of superior talents after only a brief interview. A close and lasting relationship developed between him and his "boys," as he called them. All of them have been successful in their chosen profession, and the list of the fraternity who served him reads as an honor roll of the Bar.[5] Many of them are with us here today.

Although this morning we are primarily concerned with Justice Higgins's career as a member of this Court, a complete picture requires that mention also be made of other aspects of his life. I have already mentioned his love for the University at Chapel Hill. This love found expression in the life-long support which he gave its athletic teams. Seldom was there a football or basketball game at Chapel Hill without his being in attendance. He had been a fine athlete himself. In addition to playing semi-professional baseball, as a young man he was a successful amateur boxer. Despite the loss of his left eye in an accident in 1929, he continued into his middle life to play golf of championship calibre, and he continued throughout his long life to be

5. Those who served as legal Research Assistants for Justice Higgins were: Joseph Frederick Schweidler, Raleigh (now deceased); Daniel Watson Fouts, Greensboro; Leslie Gray Frye, Winston-Salem; Robert Alden Jones, Forest City; Clifton Leonard Moore, Burgaw; Reginald Stanley Hamel, Charlotte; Wade Marvin Smith, Raleigh; Don Gilbert Miller, High Point; Vernon Haskins Rochelle, Kinston; Joseph William Moss, Greensboro; Roger William Smith, Raleigh; John Breckenridge Regan III, Lumberton; John Lewis Shaw, Raleigh; Hunter Spencer Barrow, Raleigh; Richard Rankin Reamer, Salisbury; Will Hardy Lassiter, III, Rocky Mount; William Hunter Gammon, Raleigh; and Gary Lambeth Murphy, Charlotte.

one of the finest marksmen with a rifle that this country has produced.

The love of the out-of-doors instilled in him as a boy remained with him all of his life. He became an avid and successful big-game hunter, making many trips into the wilds of the West and far into the Canadian Yukon Territory, returning with trophies of Grizzly Bear, Black Bear, Moose, Caribou, and Mountain Sheep. As a hunter in the far north he won such respect from his Indian guides that after one of his trips into the Yukon when he shot a Dall Ram near the peak of a high mountain in the St. Elias range, they named the mountain "Mt. Higgins" in his honor. On another trip, in August, 1955, he almost lost his life when the violent jolts from a bucking horse he was riding broke open old adhesions, causing him to suffer a totally incapacitating perforated ulcer. The weather closed in, and for five days he lay on the ground, unable to travel. Finally his Indian friends made a stretcher on which they carried him for nine hours to a lake where a float plane could land. He was flown 185 miles to Whitehorse, and then on the following day flown an additional 1,000 miles to Seattle. The surgeon who operated on him in Seattle reported it was doubtful if he could have survived another day, yet so strong was his constitution that within a month he was back attending to his duties on the Court. Even after this experience he returned in later years on hunting trips to the far northern wilderness which he loved.

He was tough, that is certain, tough intellectually as well as physically. Intellectually, he would not tolerate illogical thought processes or imprecise expression. His physical toughness was demonstrated even during his last year on the Court, when he stumbled and fell on the stone steps at the entrance to this building, breaking his wrist. He went to the hospital, where his injury was tended, but then insisted on returning immediately to his office to complete his day's work. He was 87 years old at the time.

Yet for all his toughness, he had a softer, gentler side. This showed particularly in his relationship with children. He loved children, and they in turn loved him. He had an almost miraculous ability to establish an immediate empathy with children, even very small children, who would come readily and trustingly into his arms.

In other ways, too, he was something of a paradox. He

hunted animals all of his life, yet despite this, and perhaps in part because of it, he spent much of his time during the last years of his life feeding and caring for the birds and squirrels of our capital city.

Above all, he had a talent for friendship. His sparkling wit and unexcelled skill as a story teller made him an altogether delightful companion, and the list is legion of those who eagerly sought and treasured his friendship.

Following his retirement from the Supreme Court, Justice Higgins continued to live in Raleigh, where he entered into an association as counsel with the law firm of Tharrington, Smith and Hargrove, in which two of his former research assistants, Wade and Roger Smith, are partners. Although he declined to appear in court, on most mornings he was the first person to appear at the office, and he was delighted when he could help other members of the firm, which, because of this tremendous background of legal expertise made readily available by his phenominal memory, he was frequently able to do. This association continued until his death.

He died in Raleigh on October 9, 1980. Had he lived another eight days, he would have been 93 years of age. He had suffered a fall on July 16, 1980, from which he never fully recovered. Until that accident he retained the physical vigor and vitality which characterized his life, and almost to the moment of his death he sparkled with the wit and wisdom which had so long delighted his friends and family.

We honor today a great man whose long life was well and fully lived. In a sense he wrote his own memorial, not alone in the opinions which he wrote for this Court, but more especially in the hearts of the myriad of those who knew and loved him.

In addition to his son and daughter, Justice Higgins was survived by three grand-daughters, Margaret Bridges Ogden, Rebecca Higgins Stalfort, and Mary Margaret Higgins, and by one great grand-daughter, Lindsay Elizabeth Ogden, who was the delight of her great grandfather's last years.

On behalf of his family, it is my privilege to present to this Court the portrait of Justice Carlisle Wallace Higgins, which was painted by Mr. Ken Fox, an artist of New York City. The portrait will be unveiled by Justice Higgins's great grand-daughter, Miss Lindsay Elizabeth Ogden.

REMARKS OF CHIEF JUSTICE JOSEPH BRANCH IN ACCEPTING THE PORTRAIT OF THE LATE JUSTICE CARLISLE WALLACE HIGGINS

Miss Lindsay Elizabeth Odgen, the great granddaughter of Associate Justice Higgins, will unveil the portrait. She will be escorted by her mother, Mrs. Patty Bridges Ogden, and be assisted by Becky Higgins Stalford and Peggy Higgins, the granddaughters of Associate Justice Higgins. After the unveiling those taking part in this portion of the ceremony will please return to their respective seats.

We are grateful to Judge Frank M. Parker for this impressive and moving memorial address. He has brought to us many significant events in the life of former Associate Justice Carlisle W. Higgins and has correctly portrayed him as a patriot who gave his services to his country in two world wars, an outstanding attorney, a fearless but fair prosecutor and a jurist whose clear and concise opinions have added to the quality and understanding of the law. He was indeed a loyal friend, a worthy adversary and a man whose life was dedicated to his family and to his profession.

We who knew him find it difficult to refrain from recalling incidents in his life which impressed us and made him a very special person. However, Judge Parker has expressed our sentiments well, and we will be satisfied to only say that we fully concur.

The Court wishes to express appreciation to the Higgins' family for the gift of this portrait. It will be hung in an appropriate place in this building and will be a source of strength to us and our successors throughout the years. These proceedings will be spread upon the minutes of this Court and will be printed in a volume of the North Carolina Reports.

In conclusion the Court requests that you remain seated or standing in your present position until otherwise directed by the Clerk. The Clerk will escort the members of the Higgins' family to their places in a receiving line and the members of the Court will be the first to pass along the receiving line. Others who wish to greet the Higgins' family will come as directed by the Clerk.

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

ABORTION

APPEAL AND ERROR

APPEARANCE

ARREST AND BAIL

ARSON

ATTORNEYS AT LAW

§ 7.5. Allowance of Fees as Part of the Costs

Where a surviving spouse is forced to engage in litigation to determine whether a right of dissent from the will of the deceased spouse exists, the discretionary power given the trial judge under G.S. 6-21(2) includes the power to award attorney's fees for the surviving spouse when, in the opinion of the trial court, the proceeding was one of substantial merit. *In re Kirkman*, 164.

There is no statutory or case law requirement that a specific finding be made in a caveat proceeding as to whether the case was without substantial merit before attorneys ' fees may be awarded to caveators' counsel. *In re Ridge*, 375.

BANKS AND BANKING

§ 1. Control and Regulation

The N.C. Credit Union Commission erred in approving an amendment to the bylaws of the State Employees' Credit Union permitting an expansion of the field of membership to include certain county and municipal employees since the employees do not share a "common bond" of similar occupation within the meaning of G.S. 54-109.26, nor do the employees possess the common bond of similar association or interest. *Savings and Loan League v. Credit Union Comm.*, 458.

BILLS OF DISCOVERY

§ 6. Discovery in Criminal Cases; Sanctions

A photograph of defendant was not required to be excluded from evidence because the State failed to produce it prior to trial pursuant to defendant's request for voluntary production. *S. v. Silhan*, 223.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.1. Identification of Defendant as Perpetrator; Fingerprints.

An 11 year old rape victim's tentative identification of defendant as her assailant and expert testimony that defendant's fingerprints were found on the inside frame of a bedroom window where the victim's assailant entered were sufficient for the jury on issues of defendant's guilt of first degree burglary and first degree rape. *S. v. Harren*, 142.

CARRIERS

§ 5.1. Motor Carrier Rates

The criterion for review of an order of the Utilities Commission relating to the dedicated service provision in the tariff schedule for motor vehicle common carriers of petroleum products was whether the order is affected by errors of law within the meaning of G.S. 62-94(d)(4). *Utilities Comm. v. Oil Co.*, 14.

The Court of Appeals erroneously held as a matter of law that the dedicated service provision in the tariff schedule for motor vehicle common carriers of petroleum products is discriminatory and preferential in violation of G.S. 62-140. *Ibid.*

A common carrier of petroleum products which commits a part of its equipment to dedicated use should not be regarded as a matter of law as a contract carrier. *Ibid.*

CONSTITUTIONAL LAW

§ 17. Personal and Civil Rights in General

Decision of the Court of Appeals that a human fetus is not a "person" within the protection of the N.C. Constitution is affirmed. *Stam v. State*, 357.

§ 18. Free Speech

Defendant's accosting of customers in a private parking lot at a privately owned and operated mall to sign a petition was not an exercise of free speech protected by the First Amendment to the U.S. Constitution or by Art. I., § 14 of the N.C. Constitution. *S. v. Felmet*, 173.

§ 26.5. Full Faith and Credit to Foreign Judgments

Trial court and Court of Appeals erred in refusing to give full faith and credit to an Illinois divorce decree awarding child custody to defendant mother. *Lynch v. Lynch*, 189.

§ 28. Due Process of Criminal Defendant

In a prosecution for taking indecent liberties with a child under 16, defendant was not denied a fair trial in violation of due process because the prosecutor cross-examined him concerning convictions of driving under the influence and reckless driving based upon the record of another person who had the same first and last names as defendant. *S. v. Pilkington*, 505.

§ 30. Discovery; Access to Evidence

Trial court did not err in denial of defendant's motion to have prior written statements of a rape and assault victim placed in an envelope and sealed for purposes of appellate review. *S. v. Silhan*, 223.

§ 32. Right to Public Trial

Defendant's right to a public trial was not violated by the court's order that, during the testimony of the 7 year old rape victim, the courtroom be cleared of all persons except defendant, defendant's family, defense counsel, defense witnesses, the prosecutor, the State's witnesses, officers of the court, members of the jury, and members of the victim's family. *S. v. Burney*, 529.

§ 33. Ex Post Facto Laws

There was no merit to defendant's contention that the trial court imposed an ex post facto punishment upon him because, pursuant to the statute in effect at the time of the burning, he would have been eligible for parole under a sentence of life imprisonment after serving 10 years, but he was instead sentenced under statutes which changed the time period required before he could be considered eligible for parole from 10 to 20 years. *S. v. Wright*, 122.

§ 51. Speedy Trial; Delay Between Arrest and Trial

A defendant charged with first degree burglary was not denied his constitutional right to a speedy trial by the delay of less than eight months from the time of his arrest to commencement of his trial, *S. v. Tann*, 89; by a delay of six months between arrest and trial, *S. v. Avery*, 517.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

The "death qualification" jury selection process in a first degree murder case did not deprive defendant of a jury selected from a representative, fair cross-section of the community on the guilt phase of the case. *S. v. Oliver*, 28.

Defendant was not denied a fair trial before a representative cross-section

CONSTITUTIONAL LAW–Continued

of the community by the excusal prior to the sentencing phase of a capital case of any jurors who said unequivocally that they could not impose the death penalty. *S. v. Silhan*, 223.

§ 65. Right of Confrontation

Defendant's right of confrontation was not denied because the victim's written statements had not been disclosed to defense counsel prior to trial where the trial judge offered to grant a recess to permit defense counsel to study the statements and offered to permit defense counsel to recall any of the State's witnesses for cross-examination about the statements. *S. v. Silhan*, 223.

§ 79. Cruel and Unusual Punishment; Sentence Within Statutory Maximum

The imposition on defendant of two concurrent terms of life imprisonment for kidnapping and first degree rape did not constitute cruel and unusual punishment. *S. v. Squire*, 112.

§ 83. Equal Protection as Applied to Punishment

Concurrent sentences of life imprisonment for kidnapping and first degree rape did not violate defendant's equal protection rights because other persons involved in the same offenses received lesser punishments. *S. v. Squire*, 112.

CONTRACTS

§ 6. Contracts Against Public Policy

A contract requiring plaintff to pay tuition in advance with no refund in order for defendant to prepare and hold a place in its school for plaintiff's child was not unconscionable. *Brenner v. School House, Ltd.*, 207.

§ 18.1. Modification of Contract

In an action to recover tuition paid by plaintiff for the enrollment and teaching of plaintiff's child in defendant's school, an enforceable modification of the contract provisions prohibiting a tuition refund was created if defendant's headmistress promised to refund to plaintiff the full tuition payment when plaintiff informed her that his former wife would not permit his child to attend the school. *Brenner v. School House, Ltd.*, 207.

§ 20.1. Impossibility of Performance; Frustration of Purpose

A contract which required plaintiff to pay a nonrefundable tuition for the entire school year in advance in order for defendant to hold a place in the school for plaintiff's child and to teach the child during the school year was not subject to rescission under the doctrines of impossibility of performance or frustration of purpose because plaintiff's former wife would not allow the child to attend the school. *Brenner v. School House, Ltd.*, 207.

§ 27. Sufficiency of Evidence in Contract Action

Plaintiff subcontractor was entitled to try its claim for a money judgment against defendant landowner for labor and materials supplied in connection with the improvement of certain real estate. *Contractors, Inc. v. Forbes*, 599.

CORPORATIONS

§ 16.1. State Regulation of Sale of Securities

The North Carolina Tender Offer Disclosure Act does not apply to open

CORPORATIONS–Continued

COUNTIES

CRIME AGAINST NATURE

CRIMINAL LAW

CRIMINAL LAW–Continued

§ 21.1. Preliminary Hearing

Denial of post-indictment motions for a probable cause hearing did not violate G.S. 15A-606(a) or deprive defendants of equal protection and due process. *S. v. Oliver*, 28.

§ 26.9. Double Jeopardy; New Trial After Appeal

If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy would not preclude the State from relying on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed and which was either not then submitted to the jury or was found by the jury to exist. *S. v. Silhan*, 223.

§ 29. Mental Capacity to Stand Trial

Finding by the trial court that defendant was mentally competent to stand trial was clearly supported by the evidence. *S. v. Jackson*, 101.

§ 33.1. Relevancy of Evidence to Show Identity of Perpetrator

Candy wrappers and a toboggan found in a truck used by defendants were relevant in a murder and armed robbery prosecution. *S. v. Oliver*, 28.

§ 33.3. Evidence as to Collateral Matters

Testimony elicited from defendant on cross-examination that he had obtained a haircut and a shave during the interval between his arrest and trial was not prejudicial to defendant. *S. v. Loren*, 607.

§ 34. Evidence of Defendant's Guilt of Other Offenses; Inadmissibility

Trial court in rape, kidnapping and larceny case did not err in the denial of defendant's motion for a mistrial made because a witness's unresponsive answer to a question by defense counsel disclosed that defendant had committed a prior murder. *S. v. Young*, 385.

§ 34.7. Evidence of Other Offenses to Show Motive

Testimony that defendant sneaked into a fair without paying because he had no money was competent to show that defendant's motive for a killing was pecuniary gain. *S. v. Hawkins*, 364.

§ 35. Evidence That Offense Was Committed by Another

In a first degree murder case where defendant contended that it was not he but one of the State's witnesses who shot deceased, trial court erred in excluding evidence which pointed directly to the witness as the guilty party. *S. v. Hamlette*, 490.

§ 42. Articles and Clothing Connected With the Crime

The trial court did not err in permitting the prosecutor to introduce into evidence all exhibits not previously admitted rather than requiring that each exhibit be individually introduced. *S. v. Silhan*, 223.

§ 42.2. Foundation for Admissibility of Articles Connected With the Crime

Physical evidence connected with the crimes charged was not inadmissible because the State failed to offer positive testimony that the objects had undergone no material change. *S. v. Oliver*, 28.

§ 42.3. Identification of Clothing and Connection With Crime

Boots taken from defendant at the time of his arrest were sufficiently

identified so as to permit them to be offered into evidence without showing a chain of custody. *S. v. Silhan*, 223.

§ 42.4. Identification of Weapons and Connection With Crime

In a prosecution for armed robbery, Court of Appeals erred in determining that the admission of handguns taken from defendants five weeks after the crime with which they were charged was prejudicial error. *S. v. Milby*, 137.

§ 43.1. Photographs of Defendant

A photograph of defendant taken a month before the crimes and testimony as to the circumstances surrounding the photograph were competent to show that within a month of the crimes in question defendant wore a cap and glasses similar to that which one victim testified were worn by her assailant. *S. v. Silhan*, 223.

§ 45. Experimental Evidence

A procedure in which a witness for the State identified defendant's van as being the vehicle which she had seen near the crime scene did not constitute an experiment, and testimony concerning the van identification was not rendered inadmissible because of the State's failure to comply with established procedures governing the admission of experiments. *S. v. Silhan*, 223.

§ 50. Expert and Opinion Testimony in General

A police officer's testimony that defendant had what appeared to be slivers of glass in his clothing did not violate the opinion rule of evidence. *S. v. Lucas*, 342.

§ 50.1. Admissibility of Opinion Testimony

In a prosecution of defendants for conspiring to burn a building and personal property therein, trial court erred in excluding a witness's testimony as to his opinion that the char pattern on the floor of the second story of the building did not indicate the use of an accelerant and there was only one origin of the fire. *S. v. Culpepper*, 179.

An officer's testimony that defendant's written statement varied from his oral statement only in that it was in more detail constituted inadmissible opinion testimony but was not prejudicial to defendant. *S. v. Miller*, 572.

§ 57. Evidence in Regard to Firearms

An expert forensic pathologist who examined a murder victim's body was properly permitted to give an opinion as to the gauge of the gun used to murder the victim. *S. v. Miller*, 572.

§ 61.2. Footprints or Shoeprints

Defendant's contention that only an expert could properly testify as to identification of shoeprints is not the law in this State. *S. v. Jackson*, 101.

§ 61.3. Tire Tracks

A sufficient foundation was presented for the admission of testimony concerning a comparison of tire tracks found near the crime scene and tracks made by a tire on defendant's van. *S. v. Silhan*, 223.

A witness's testimony that a tire print could have been made by defendant's vehicle was not rendered incompetent by the inability of the witness to state conclusively that defendant's tire made the print. *Ibid.*

CRIMINAL LAW–Continued

§ 63.1. Competency of Evidence as to Sanity

Trial court did not err in allowing the district attorney to ask defendant's father his opinion as to whether defendant knew right from wrong, and the father's answer was properly admitted. *S. v. Boone*, 561.

A deputy sheriff should have been allowed to testify concerning irrational acts by defendant, but such error was not prejudicial. *Ibid.*

§ 66. Evidence of Identity by Sight

A van identification procedure was not unduly suggestive and a witness was properly permitted to testify as to her identification of defendant's van. *S. v. Silhan*, 223.

§ 66.4. Lineup Identification

A rape victim's testimony concerning her pretrial lineup identification of defendant was not rendered inadmissible because the identification was tentative. *S. v. Harren*, 142.

§ 66.10. Confrontation at Police Station or Jail

Although an officer's statement to a seven-year-old witness that he would be taken to the police station where he "could see that man again" coupled with a showup procedure in which the witness viewed the defendant singly through a two-way mirror constituted an unnecessarily suggestive pretrial identification procedure, the witness's identification of defendant was inherently reliable considering the totality of circumstances and did not create a substantial likelihood of misidentification so that both his out-of-court and in-court identifications of defendant were admissible in evidence. *S. v. Oliver*, 28.

In-court identification of defendant by the State's witnesses was not tainted by a confrontation between the witnesses who were standing outside the police station and defendant who was brought to the station. *S. v. Dawson*, 581.

§ 66.11. Confrontation at Scene of Crime or Arrest

Court did not err in admitting a burglary victim's in-court identification of defendant and evidence of the victim's identification of defendant in a one-man showup conducted at the victim's home within an hour after the crime and at a time when defendant was without counsel since defendant was not entitled to counsel because he was not in custody, there was no reasonable possibility that the one-man showup could have led to a mistaken identification, and the in-court identification was independent in origin from the showup. *S. v. Tann*, 89.

§ 68. Other Evidence of Identity

Trial court's denial of defendant's motion to suppress nontestimonial identification evidence was without error and the State was not required to procure an express waiver of counsel by defendant. *S. v. Temple*, 1.

The trial court did not err in allowing an expert witness to testify that bite marks appearing on a homicide victim's body were made by defendant's teeth. *Ibid.*

§ 71. Shorthand Statements of Fact

A witness's testimony that defendant would not return his gun to him in front of other people in his apartment was admissible as an instantaneous conclusion of the mind or a shorthand statement of fact. *S. v. Miller*, 572.

CRIMINAL LAW–Continued

An officer's testimony that defendant "was acting like he was trying to hide something" was competent as a shorthand statement of fact. *S. v. Loren*, 607.

§ 73.1. Admission of Hearsay as Prejudicial or Harmless Error

In a prosecution for discharging a firearm into an occupied vehicle where defendant's entire defense was built on misidentification and alibi, trial court erred in admitting testimony by a police officer concerning defendant's concealing of a pistol in his car, since the testimony was hearsay, was offered apparently for the purpose of showing defendant's bad character, and was offered to impeach defendant's father on a collateral matter. *S. v. Dawson*, 581.

§ 73.4. Statement as Part of Res Gestae; Spontaneous Utterances

The trial court in an arson case did not err in allowing the State's witness to testify that, upon discovering the fire, she immediately exclaimed to the driver of the car in which she was riding that, "That boy [defendant] just set that girl's house on fire." *S. v. Wright*, 122.

A first degree murder victim's statements to police made within three to thirteen minutes of the shooting were admissible as part of the res gestae. *S. v. Hamlette*, 490.

§ 75.3. Effect on Confession of Confronting Defendant With Evidence

There was no merit to defendant's contention that officers coerced his confession by confronting him with evidence recovered from the scene of the crime. *S. v. Temple*, 1.

§ 75.8. Requirement that Defendant be Warned of Constitutional Rights; Warning Before Resumption of Interrogation

There was no merit to defendant's contention that, by continuing to interrogate him after he indicated that he did not wish to answer any questions, officers violated his constitutional rights. *S. v. Temple*, 1.

§ 75.9. Volunteered Statements

In-custody statements volunteered by defendant while he was being taken by automobile from the magistrate's office to the police station were properly admitted in defendant's trial for first degree burglary. *S. v. Tann*, 89.

§ 80.2. Discovery and Inspection of Writings

Trial court did not err in denial of defendant's motion to have prior written statements of a rape and assault victim placed in an envelope and sealed for purposes of appellate review. *S. v. Silhan*, 223.

§ 83. Competency of Husband or Wife to Testify Against Spouse

The common law rule prohibiting one spouse from testifying against another in a criminal action is modified so as to prohibit such testimony only if the substance of the testimony concerns a "confidential communication" between the marriage partners made during the duration of their marriage. *S. v. Freeman*, 591.

§ 83.1. Actions in Which Husband or Wife May Testify Against Spouse

A wife's testimony that her husband shot and killed her brother in her presence in a public place was competent in a prosecution of the husband for first degree murder of her brother. *S. v. Freeman*, 591.

CRIMINAL LAW–Continued

§ 86.2. Impeachment of Defendant by Prior Convictions

In a prosecution for taking indecent liberties with a child under 16, defendant was not denied a fair trial in violation of due process because the prosecutor cross-examined him concerning convictions of driving under the influence and reckless driving based upon the record of another person who had the same first and last names as defendant. *S. v. Pilkington*, 505.

The trial court properly permitted the prosecutor to cross-examine defendant about how much time he had spent in prison. *S. v. Miller*, 572.

§ 87. What Witnesses May be Called

Trial court had the discretion to permit the State to call and question a witness subpoenaed by defendant. *S. v. Squire*, 112.

§ 87.1. Leading Questions

Trial judge did not abuse his discretion in permitting the district attorney to ask leading questions directed to the State's 15-year-old witness. *S. v. Squire*, 112.

§ 87.3. Use of Writings to Refresh Recollection

An officer was properly allowed to use notes in order to refresh his recollection although the court had previously ruled that the notes could not be introduced into evidence. *S. v. Squire*, 112.

Trial court did not err in refusing to afford defendant access to notes carried to the witness stand by the investigating officer. *S. v. Jackson*, 101.

§ 88.1. Scope of Cross-Examination

The prosecutor was properly permitted to ask a defense witness on cross examination whether he would do anything to cover up for his friend. *S. v. Oliver*, 28.

§ 89.2. Corroboration of Witness Generally

An officer's testimony as to what a State's witness had told him was properly admitted to corroborate testimony by another State's witness. *S. v. Squire*, 112.

§ 89.3. Corroboration by Prior Statements of Witness

Prior written statements of a rape and assault victim were properly admitted to rehabilitate the victim's credibility before the jury. *S. v. Silhan*, 223.

Rape victim's testimony as to her previous identification of defendant at the probable cause hearing was competent to corroborate her in-court identification of defendant. *S. v. Lucas*, 342.

§ 89.10. Impeachment by Questions as to Prior Degrading and Criminal Conduct

In a prosecution for discharging a firearm into an occupied vehicle where defendant's entire defense was built on misidentification and alibi, Court of Appeals erred in concluding that the prosecutor's asking questions of defendant's mother concerning prior shoplifting by her was highly prejudicial to defendant. *S. v. Dawson*, 581.

§ 90. Rule That Party May Not Discredit Own Witness

Trial court did not abuse its discretion in permitting the State to impeach

CRIMINAL LAW–Continued

its own witness where the prosecutor was surprised by the witness's testimony at the trial. *S. v. Squire*, 112.

§ 91. Time of Trial; Speedy Trial Act

The time between the filing of a motion for a change of venue and its disposition is properly excluded in computing the statutory speedy trial period provided the motion is heard within a reasonable time after it is filed. *S. v. Oliver*, 28.

In calculating the time within which a criminal trial must begin under the Speedy Trial Act, the excludable delay permitted for a mental examination of defendant runs from the date of entry of the order of commitment to the date the report of the mental examination becomes available to both defendant and the State. *S. v. Harren*, 142.

Defendant's rights under the Speedy Trial Act were not violated by the lapse of more than 120 days between his arrest and trial where defendant was brought to trial only 77 days after he was indicted. *S. v. Young*, 385.

Defendant was not denied his statutory right to a speedy trial, though trial occurred more than 120 days after indictment, since time between the filing and disposition of defendant's motion for change of venue or special venire was properly excluded in computing the time between indictment and trial. *S. v. Avery*, 517.

§ 91.6. Continuance to Obtain Additional Evidence

The trial court did not err in the denial of a motion for continuance to permit defendant to obtain a second psychiatric evaluation. *S. v. Burney*, 529.

§ 92.3. Consolidation of Charges Against Same Defendant

The "transactional connection" required by G.S. 15A-926 for joinder of offenses at trial existed between the offenses in this case and the State's motion for joinder was properly allowed where all the offenses related directly to defendant's escape from jail and his efforts to avoid recapture. *S. v. Avery*, 517.

Trial court did not err in consolidating for trial a charge against defendant for felonious escape and charges against defendant for rape, kidnapping and larceny because evidence that defendant was serving a prison sentence for a prior conviction was allowed to be presented to the jury. *S. v. Young*, 385.

§ 93. Order of Proof

Trial court did not err in requiring defendant to present his evidence before the State put on its evidence during a hearing on defendant's motion to suppress. *S. v. Temple*, 1.

§ 95.1. Request for Limiting Instruction as to Evidence Competent for Restricted Purpose

The trial court's instruction that an officer's testimony "as to what [defendant] told him" was admitted solely for the purpose of corroboration was sufficient to insure that both oral and written versions of defendant's statement were considered only for corroborative purposes. *S. v. Miller*, 572.

§ 99.3. Expression of Opinion by Court; Remarks and Other Conduct With Respect to Admission of Evidence

The recall of a rape victim's father after a bench conference to permit him to testify as to the unavailability of certain notes in order to comply with the best

CRIMINAL LAW–Continued

§ 131. New Trial for Newly Discovered Evidence

Defendant was not entitled to a mistrial based on his discovery, on the fourth day of trial, of a previously undisclosed SBI lab report. *S. v. Jackson*, 101.

§ 135.4. Sentencing Phase of Capital Case

Where defendants were convicted of the capital offense of first degree murder on the theory that the murder was committed during the perpetration of an armed robbery, it was error for the court to submit the underlying felony of armed robbery to the jury in the sentencing phase of the trial as an aggravating circumstance. *S. v. Oliver*, 28.

Trial court properly submitted to the jury the aggravating circumstance as to whether the first degree murder of a storekeeper was especially heinous, atrocious or cruel but erred in submitting such aggravating circumstance for the first degree murder of a bystander at the store. *Ibid.*

Portions of defendant's criminal record which were read to the jury during the sentencing phase of a first degree murder case were competent to negate defendant's evidence that he had no significant history of prior criminal activity. *Ibid.*

In a prosecution for first degree murder of a storekeeper during an armed robbery and first degree murder of an innocent bystander, trial court properly submitted to the jury the aggravating circumstance as to whether the bystander was murdered for "pecuniary gain" although the evidence showed that the money had already been obtained from the storekeeper at the time the bystander was shot. *Ibid.*

Where a first degree murder case was submitted to the jury upon theories of premeditation and deliberation and felony murder and the jury did not specify the theory upon which it relied in returning the guilty verdict, the underlying felony may not be considered as an aggravating circumstance in the penalty phase of the trial. *S. v. Silhan*, 223.

Trial court should have submitted to the jury the aggravating circumstance as to whether the crime of first degree murder was "especially heinous, atrocious or cruel." *Ibid.*

If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy would not preclude the State from relying on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed and which was either not then submitted to the jury or was found by the jury to exist. *Ibid.*

Upon vacating defendant's death sentence on a first degree murder conviction because the trial court erroneously submitted the underlying felony of rape as an aggravating circumstance, the Supreme Court will remand the case for a new sentencing hearing where there was evidence of the "prior felony" and "especially heinous" aggravating circumstances at the hearing appealed from and neither aggravating circumstance was submitted to the jury. *Ibid.*

The most appropriate way to show the "prior felony" aggravating circumstance would be to offer duly authenticated court records. *Ibid.*

The State could offer evidence of defendant's bad character to rebut evidence of his good character presented by defendant as a mitigating circumstance. *Ibid.*

In a first degree murder case evidence was sufficient for the jury to find in the sentencing phase of the trial the aggravating circumstance that defendant

CRIMINAL LAW–Continued

had been previously convicted of a felony involving the use or threat of violence to the person. *S. v. Hamlette*, 490.

In a first degree murder case the trial court erred in instructing the jury during the sentencing phase to consider as an aggravating circumstance whether the murder was especially heinous. *Ibid.*

§ 138.1. More Lenient Sentence to Codefendant

Concurrent sentences of life imprisonment for kidnapping and first degree rape did not violate defendant's equal protection rights because other persons involved in the same offenses received lesser punishments. *S. v. Squire*, 112.

§ 138.2. Cruel and Unusual Punishment

The imposition on defendant of two concurrent terms of life imprisonment for kidnapping and first degree rape did not constitute cruel and unusual punishment. *S. v. Squire*, 112.

§ 138.7. Evidence Considered at Sentencing Hearing

In a first degree rape case trial court did not err in admitting testimony at defendant's sentencing hearing concerning an earlier rape. *S. v. Jackson*, 101.

§ 146.4. Appeal of Constitutional Questions

Statute permitting appellate review of a contention that defendant was convicted under a statute that violates the U.S. Constitution or the N.C. Constitution even though no objection, exception or motion on such ground was made in the trial division is unconstitutional. *S. v. Elam*, 157.

DAMAGES

§ 2.5. Compensatory Damages for Mental Distress

Trial court erred in entering summary judgment for defendant in plaintiff's action to recover for the intentional infliction of mental distress where evidence tended to show that plaintiff suffered assault and battery at the hands of defendant and others; defendant threatened plaintiff with death in the future unless plaintiff left the State; and such threat was a threat for the future apparently intended to and which allegedly did inflict serious mental distress. *Dickens v. Puryear*, 437.

§ 7. Liquidated Damages

A contract clause prohibiting the refund of any portion of the tuition paid by plaintiff to defendant in order for defendant to prepare and hold a place in its school for plaintiff's child was neither a penalty nor a provision for liquidated damages. *Brenner v. School House, Ltd.*, 207.

DEEDS

§ 20.3. Restrictions Against Multiple Family Dwellings

A restrictive covenant limiting the use of subdivision lots to residential purposes and limiting the use to detached single family dwellings was not violated by use of a lot for a "family care home" for mentally retarded adults. *Hobby & Son v. Family Homes*, 64.

DIVORCE AND ALIMONY

§ 1.1. Residency Requirement

Trial court properly granted defendant's motion to dismiss plaintiff's action for divorce from bed and board on the ground that plaintiff failed to meet the six month N.C. residency requirement. *Lynch v. Lynch*, 189.

§ 23.1. Jurisdiction in Action for Alimony Without Divorce and Child Custody

The portion of plaintiff's complaint seeking custody of his minor son constituted a separate action severable from his divorce proceeding so that dismissal of his divorce action for lack of subject matter jurisdiction did not result in a dismissal of the custody action. *Lynch v. Lynch*, 189.

§ 23.4. Service of Process

Trial court did not have personal jurisdiction over the nonresident defendant in a child custody proceeding. *Lynch v. Lynch*, 189.

§ 25. Custody Hearing Without Father's Presence

The trial court did not err in conducting a hearing on a motion to modify a child custody and visitation order without the presence of defendant father. *Hamlin v. Hamlin*, 478.

FRAUD

§ 9. Pleadings

Plaintiff's complaint was sufficient to state a claim for constructive fraud where he alleged that defendant fraudulently induced his brother and business associate, plaintiff's father, to sell his interest in the business to defendant at a grossly inadequate price. *Terry v. Terry*, 77.

HOMICIDE

§ 12.1. Indictment; Premeditation and Deliberation

Trial court did not err in denial of defendant's motion for a bill of particulars requiring the State to declare prior to trial whether it would prosecute a first degree murder indictment on a theory of premeditation and deliberation or felony murder. *S. v. Silhan*, 223.

Trial court did not err in denial of defendant's motion that the State elect at the close of the evidence which theory of first degree murder would be submitted to the jury. *Ibid.*

§ 15.4. Expert and Opinion Evidence

An expert forensic pathologist who examined a murder victim's body was properly permitted to give an opinion as to the gauge of the gun used to murder the victim. *S. v. Miller*, 572.

§ 16.1. Dying Declarations; Competency of Evidence

Trial court in a first degree murder case properly admitted as dying declarations communications made to a police officer by the victim thirty minutes after the shooting, and properly excluded as a dying declaration a statement made by the victim to a girlfriend four days after the shooting. *S. v. Hamlette*, 490.

§ 20.1. Photographs

Trial court's error in allowing the jury to be shown photographs of the

INSURANCE

§ 79.1. Automobile Liability Insurance Rates; Approval or Disapproval by Commissioner of Insurance

Surcharges on automobile liability insurance coverages ceded to the N.C. Reinsurance Facility to recoup past facility losses and on all automobile liability coverages to recoup anticipated losses on ceded "clean risks" did not constitute rates and no filing with or approval by the Commissioner of Insurance was required by law with respect to the surcharges in question. *Hunt v. Reinsurance Facility*, 274.

§ 13.4. Persons Entitled to Payment of Fire Insurance

An innocent wife can recover under an insurance policy issued to her husband, which insures property owned by them as tenants by the entirety, when the loss by fire resulted from an intentional burning of the property by the husband. *Lovell v. Insurance Co.*, 150.

JUDGES

§ 7. Misconduct in Office; Proceedings Before Judicial Standards Commission

Evidence was sufficient to support the conclusion of the Judicial Standards Commission that respondent's conduct constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute where it tended to show that respondent attempted to obtain sexual favors from female criminal defendants and that respondent attempted to preside over a session of court at which he was to appear to answer a charge of failure to stop at a stop sign. *In re Martin*, 299.

There was no merit to respondent's contention that the Judicial Standards Commission erred in considering evidence concerning his conduct with a female criminal defendant who appeared before him because that conduct occurred in a previous term of office. *Ibid.*

JURY

§ 6. Voir Dire Examination

Court did not err in denying defendants' motion for an individual voir dire of each juror and sequestration of the jurors during voir dire. *S. v. Oliver*, 28.

§ 6.4 Voir Dire Questions as to Belief in Capital Punishment

Where challenges for cause were supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court did not err in refusing to allow defendant to question the jurors challenged. *S. v. Oliver*, 28.

§ 7.7. Waiver of Right to Challenge

Defendant could not complain on appeal about the trial court's denial of his challenges for cause to two prospective jurors where he failed to renew his challenge for cause for either juror after having exhausted his peremptory challenges. *S. v. Silhan*, 223.

§ 7.8. Particular Grounds for Challenge and Disqualification

Trial court did not abuse its discretion in the denial of defendant's challenge for cause of a 65-year-old juror who stated she was not sure her health would allow her to sit for more than one day and felt that a trial lasting more than a week would be too strenuous for her. *S. v. Oliver*, 28.

JURY–Continued

§ 7.11. Scruples Against, or Belief in, Capital Punishment

Trial court in a capital case properly excused for cause prospective jurors who admitted a specific inability to impose the death penalty under any circumstances. *S. v. Oliver*, 28.

The "death qualification" jury selection process in a first degree murder case did not deprive defendant of a jury selected from a representative, fair cross-section of the community on the guilt phase of the case. *Ibid.*

Defendant was not denied a fair trial before a representative cross-section of the community by the excusal prior to the sentencing phase of a capital case of any jurors who said unequivocally that they could not impose the death penalty. *S. v. Silhan*, 223.

KIDNAPPING

§ 1. Elements of Offense

Trial court did not err in failing to instruct the jury on kidnapping in the second degree. *S. v. Squire*, 112.

§ 2. Punishment

Defendant's evidence was insufficient to meet his burden of proving the mitigating circumstances for kidnapping set forth in G.S. 14-39(b), and the trial judge acted properly in sentencing defendant to life imprisonment for kidnapping. *S. v. Squire*, 112.

Trial court did not err in not allowing the jury to determine whether the mitigating circumstances set forth in G.S. 14-39(b) existed whereby the punishment for kidnapping could be reduced. *S. v. Boone*, 561.

LARCENY

§ 6.1. Value of Property Stolen

In a prosecution of defendant for felonious larceny of a motor vehicle, jailbreak, and other offenses, the jailer could properly testify as to the fair market value of his pickup truck which defendant allegedly stole. *S. v. Avery*, 517.

§ 7.4. Sufficiency of Evidence; Possession of Stolen Property

State's evidence was insufficient to be submitted to the jury on the issue of defendant's guilt of felonious larceny of a tractor under the doctrine of possession of recently stolen property. *S. v. Voncannon*, 619.

LIMITATION OF ACTIONS

§ 12.1. New Action After Failure of Original Suit

Where plaintiff takes a voluntary dismissal under G.S. 1A-1, Rule 41(a)(2) and defendant appeals from that dismissal, plaintiff's one year period to reinstitute his claim does not run from the taking of the dismissal in the trial court, but instead runs from the date of final appellate action. *West v. Reddick, Inc.*, 201.

MASTER AND SERVANT

§ 75. Medical and Hospital Expenses

The 1973 amendment to G.S. 97-25 which eliminated the ten-week limitation

MASTER AND SERVANT–Continued

for the recovery of medical expenses for an employee's treatments which are necessary "to effect a cure or give relief" will not be applied retroactively. *Peeler v. Highway Comm.*, 183.

MUNICIPAL CORPORATIONS

§ 4.5. Housing and Urban Redevelopment

In selling the property of a municipal redevelopment commission to private developers, the municipal board of aldermen is required to accept the "highest responsible bid" where that bid complies with the applicable zoning restrictions and the redevelopment plan for the property to be sold. *Builders, Inc. v. City of Winston-Salem*, 550.

NUISANCE

§ 10. Abatement of Public Nuisances

Moral nuisance statutes which permit an injunction against the sale or exhibition of obscene matter which has not been judicially determined to be obscene impose a constitutionally permissible prior restraint. *Chateau X v. Andrews*, 321.

OBSCENITY

§ 3. Prosecutions for Disseminating Obscenity

Moral nuisance statutes which permit an injunction against the sale or exhibition of obscene matter which has not been judicially determined to be obscene impose a constitutionally permissible prior restraint. *Chateau X v. Andrews*, 321.

RAPE

§ 5. Sufficiency of Evidence and Nonsuit

An 11-year-old rape victim's tentative identification of defendant as her assailant and expert testimony that defendant's fingerprints were found on the inside frame of a bedroom window where the victim's assailant entered were sufficient for the jury on issues of defendant's guilt of first degree burglary and first degree rape. *S. v. Harren*, 142.

State's evidence was sufficient for the jury in a prosecution for second degree sexual offense where it tended to show that defendant penetrated the genital opening of the prosecutrix's body with his fingers. *S. v. Lucas*, 324.

§ 6. Instructions

Trial court did not err in instructing that the jury could consider the defendant's appearance and evidence as to whether he was operating a vehicle and was married in determining his age. *S. v. Silhan*, 223.

§ 6.1. Instructions On Lesser Degrees

Where the only dispute in a rape case is whether an admitted act of sexual intercourse was accomplished by consent or by force, the lesser included offenses of assault with intent to commit rape and assault upon a female should not be submitted to the jury. *S. v. Edmondson*, 169.

RAPE–Continued

§ 9. Indictment Charging Carnal Knowledge of Female Under Twelve Years of Age

A bill of indictment charging defendant with carnal knowledge of a virtuous female under the age of 12 was fatally defective since defendant was neither named nor otherwise identified in the body of the bill of indictment. *S. v. Simpson*, 613.

§ 19. Taking Indecent Liberties With Child

Trial court's instructions were proper in a prosecution of defendant for taking indecent liberties with a child. *S. v. Simpson*, 613.

RECEIVING STOLEN GOODS

§ 2. Indictment

Possessing stolen property in violation of G.S. 14-71.1 is not a lesser included offense of receiving stolen property in violation of G.S. 14-71. *S. v. Davis*, 370.

ROBBERY

§ 3.2. Competency of Physical Objects and Documentary Evidence

In a prosecution for armed robbery, Court of Appeals erred in determining that the admission of handguns taken from defendants five weeks after the crime with which they were charged was prejudicial error. *S. v. Milby*, 137.

RULES OF CIVIL PROCEDURE

§ 7. Pleadings Allowed; Form of Motions

Defendant's motion for modification of a child visitation order was sufficient to comply with the requirements of Rule 7(b)(1), and plaintiff was not prejudiced by failure of defendant to state the number of the rule under which he was proceeding. *Hamlin v. Hamlin*, 478.

§ 8. General Rules of Pleading

A party whose responsive pleading is not yet due may by motion for summary judgment and in support of the motion raise an affirmative defense to an asserted claim before the party pleads responsively to the claim. *Dickens v. Puryear*, 437.

§ 12. Defenses and Objections

Rule 12(a)(1)a authorized defendant to file without permission those portions of his amended answer which were a responsive pleading to the paragraphs of the complaint subject to defendant's motion to strike which was denied by the court. *Brenner v. School House, Ltd.*, 207.

§ 41.1. Voluntary Dismissal

Where plaintiff takes a voluntary dismissal under G.S. 1A-1, Rule 41(a)(2) and defendant appeals from that dismissal, plaintiff's one year period to reinstitute his claim does not run from the taking of the dismissal in the trial court, but instead runs from the date of final appellate action. *West v. Reddick, Inc.*, 201.

RULES OF CIVIL PROCEDURE–Continued

§ 50. Motion for Judgment N.O.V.; Generally

When a motion for judgment n.o.v. is joined with a motion for a new trial, it is the duty of the trial court to rule on both motions. *Graves v. Walston*, 332.

§ 50.4. Judgment Notwithstanding Verdict

Plaintiffs had no standing after the verdict to move for judgment n.o.v. where they did not move for directed verdict at the close of their evidence or at the close of all the evidence. *Graves v. Walston*, 332.

§ 55. Default

Defaults may not be entered after answer has been filed, even though the answer is late. *Peebles v. Moore*, 351.

§ 56. Summary Judgment

A party whose responsive pleading is not yet due may by motion for summary judgment and in support of the motion raise an affirmative defense to an asserted claim before the party pleads responsively to the claim. *Dickens v. Puryear*, 437.

Defendants' failure expressly to refer to the affirmative defense of the statute of limitations was not a bar to consideration of the defense on defendants' motion for summary judgment. *Ibid.*

SEARCHES AND SEIZURES

§ 5. Particular Methods of Search; Plain View Rule

In a first degree rape case where the victim contended that her assailant executed the crime at knife point, the trial court did not err in denying defendant's motion to suppress a knife found among his belongings. *S. v. Jackson*, 101.

§ 7. Search and Seizure Incident to Arrest

Defendant's clothing was properly seized at the police station as an incident of his lawful arrest. *S. v. Lucas*, 342.

§ 23. Application for Warrant; Evidence Sufficient

An affidavit for a search warrant was sufficient to enable the magistrate to find probable cause for the issuance of a warrant to search defendant's van and seize the right rear tire thereof. *S. v. Silhan*, 223.

§ 34. Search of Vehicle

Defendant cannot complain that officers impounded his vehicle and kept it under custody until a search warrant could be obtained rather than seizing a knife which was in plain view on the dashboard of the car at the time the car was impounded. *S. v. Squire*, 112.

TAXATION

§ 5.2. Statutory Restrictions; Purposes

Wake County exceeded its statutorily conferred power in levying a tax to fund medically unnecessary abortions. *Stam v. Stam*, 357.

§ 7. Public Purpose

State funding of elective abortions does not violate Art. V, § 5 of the N.C. Constitution. *Stam v. State*, 357.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices

In determining whether a violation of G.S. 75-1.1 has occurred, the question of whether the defendant acted in bad faith is not pertinent, and the character of the plaintiff, whether public or private, should not alter the scope of the remedy under this statute. *Marshall v. Miller*, 539.

WILLS

§ 61. Dissent of Spouse and Effect Thereof

Where a surviving spouse is forced to engage in litigation to determine whether a right of dissent from the will of the deceased spouse exists, the discretionary power given the trial judge under G.S. 6-21(2) includes the power to award attorney's fees for the surviving spouse when, in the opinion of the trial court, the proceeding was one of substantial merit. *In re Kirkman*, 164.

WITNESSES

§ 1.2. Age; Children as Witnesses

Trial court did not err in ruling that a seven-year-old boy was a competent witness in a murder and armed robbery case or in permitting the prosecutor to ask the witness leading questions during the voir dire to determine his competency. *S. v. Oliver*, 28.

UNIFORM COMMERCIAL CODE

§ 25. Remedy for Breach of Warranty

The notice "within a reasonable time" required by the U.C.C. in an action for breach of warranty against the immediate seller is a condition precedent to recovery which must be pled and proved by plaintiff. *Maybank v. Kresge Co.*, 129.

When the plaintiff in an action for breach of warranty is a lay consumer and notification is given to defendant seller by the filing of an action within the period of the statute of limitations, and when the applicable policies behind the requirement of notice to the seller have been fulfilled, the plaintiff is entitled to go to the jury on the issue of reasonable notice to the seller. *Ibid.*

UTILITIES COMMISSION

§ 51. Judicial Review; Generally

The criterion for review of an order of the Utilities Commission relating to the dedicated service provision in the tariff schedule for motor vehicle common carriers of petroleum products was whether the order is affected by errors of law within the meaning of G.S. 62-94(d)(4). *Utilities Comm. v. Oil Co.*, 14.