NORTH CAROLINA REPORTS

VOLUME 303

SUPREME COURT OF NORTH CAROLINA

SPRING TERM 1981

RALEIGH
1982

CITE THIS VOLUME
303 N.C.

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THE SUPREME COURT
OF
NORTH CAROLINA

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J. PHIL CARLTON
JAMES G. EXUM, JR.
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DAVID M. BRITT
BURLEY B. MITCHELL, JR.[1]

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SUSIE SHARP

Retired Justices

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CHRISTIE SPEIR PRICE[3]

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1. Appointed Associate Justice by Gov. James B. Hunt, Jr., and took office 3 February 1982.
2. Retired as Associate Justice 1 February 1982.
3. Appointed effective 14 September 1981.

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1. Appointed Resident Judge 1 April 1982 to succeed George M. Fountain who retired 31 March 1982.
2. Appointed Resident Judge, Twenty-First District 22 January 1982.
3. Retired 1 February 1982.
4. Appointed Emergency Judge 1 April 1982.

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1. Appointed 25 January 1982.
2. Appointed 8 February 1982 to succeed John Hill Parker who resigned 1 February 1982.
3. Appointed Chief Judge 1 February 1982 to succeed Derb S. Carter who retired 30 January 1982.
4. Appointed 1 February 1982.

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CASES REPORTED

PETITIONS TO REHEAR

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

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

GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following individuals were admitted to the practice of law in the State of North Carolina:

On February 11, 1982, the following individuals were admitted:

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GLENDA RAINWATER BEARD, Durham, applied from the State of Kentucky
THOMAS J. ANDREWS, Durham, applied from the State of Massachusetts
JOHN DOUGLAS MCCULLOUGH, Raleigh, applied from the District of Columbia
REID CLAIN JAMES, Concord, applied from the State of Kentucky

Given over my hand and Seal of the Board of Law Examiners this the 9th day of March, 1982.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 20th day of March, 1982, and said persons have been issued certificates of this Board:

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1981

STATE OF NORTH CAROLINA v. HERMAN NATHANIEL McCOY

No. 88

(Filed 5 May 1981)

1. Constitutional Law § 51— pre-accusation delay—due process

A pre-accusation delay violates due process only if the defendant can show that the delay actually prejudiced the conduct of his defense and that it was unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant.

2. Constitutional Law § 51— due process—speedy trial—delay between warrant and trial

Neither defendant's right to due process nor his Sixth Amendment right to a speedy trial was violated by an eleven month delay between the issuance of the arrest warrant and his trial for second degree murder where the delay was not for the purpose of permitting the prosecution to gain unfair advantage over defendant; defendant was hospitalized from gunshot wounds for approximately four months after the warrant was issued and was physically unable to be tried during such time; all but approximately six weeks of the remaining delay was caused by defendant's own motions for continuance and for medical examinations to determine his competency to stand trial; and defendant showed no prejudice to his ability to defend himself because certain witnesses had moved away and the crime scene had been rearranged before his arrest since the witnesses referred to all testified for the State and were subject to defendant's cross-examination and the crime scene was photographically preserved.

3. Criminal Law § 91— statutory speedy trial—exclusion of delay from continuance granted to defendant

In computing the 120-day statutory speedy trial period, the trial court properly excluded a delay of 27 days resulting from a continuance granted to defendant pursuant to G.S. 15A-701(b).

4. Criminal Law § 91— time excludable for mental examination

In G.S. 15A-1002(b)(2) the legislature intended to declare that 60 days or less is a reasonable time to conduct an examination to determine defendant's capacity to stand trial, and the State was entitled to exclude at least 60 of the 67 days defendant was held in a mental health facility to determine his capacity to stand trial plus the number of days between the examination and the date the report became available to defendant and the State.

5. Criminal Law § 29— finding of competency to stand trial

Although defendant had suffered gunshot wounds and was apparently experiencing headaches as a result of his injuries, the trial court did not err in finding him competent to stand trial on the basis of an uncontradicted report of the forensic psychiatrist who examined defendant.

6. Criminal Law § 161.2— broadside assignment of error

An assignment of error which purported to raise a number of different legal issues was broadside and ineffective.

7. Criminal Law § 75.15— incriminating statement in hospital emergency room—admissibility

The trial court did not err in the admission of incriminating statements made by defendant to an SBI Agent in a hospital emergency room after defendant received treatment for gunshot wounds on the ground that defendant "must have been" under the influence of pain-killing drugs so that he could have not knowingly and understandingly made the statements where the trial court conducted a *voir dire* hearing concerning defendant's mental and physical condition at the time he made the statements, and the court made extensive findings of fact in accordance with the State's evidence that defendant's attending physician gave permission for defendant to be interviewed and that defendant was alert, responsive and coherent at the time he made the statements.

8. Bills of Discovery § 6— summary of defendant's statement furnished counsel—failure to furnish second summary of statement

In a murder prosecution in which the district attorney, pursuant to defendant's discovery request, furnished defense counsel with a summary of an oral statement made by defendant, the trial court did not err in refusing to strike an SBI agent's testimony on the ground that defendant had not been provided a copy of a second summary of defendant's statement prepared by the agent for his own use at the trial where neither summary appeared in the record on appeal and there was thus no showing that one summary materially differed from the other.

9. Bills of Discovery § 6— violation of discovery statute—offer of recess—evidence not excluded

Even if it is assumed that the State failed to comply with the discovery statute, G.S. 15A-903(e), in failing to notify defense counsel of tests performed upon the deceased's bedcovers and a bullet removed from her body until three days before trial, the trial court properly acted within its discretion in refusing to suppress evidence of the tests and in ordering a recess to permit defendant to examine the evidence and question the State's witnesses and offering to continue the recess to allow defendant to locate a ballistics expert, especially since the district attorney notified defendant of the tests as soon as he became aware of them.

10. Homicide § 21.7— second degree murder—sufficiency of evidence

The evidence was sufficient to be submitted to the jury on the question of defendant's guilt of second degree murder where the jury could reasonably find from the evidence that defendant fatally shot deceased, who was in bed under the bedcovers, with a deadly weapon at close range in the head, watched deceased call for help but did nothing to assist her, thereafter cut the telephone wires and conversed with other occupants of the dwelling without mentioning the shooting, and then fled the dwelling, and where defendant's testimony tending to show that he shot the victim either accidentally or in self-defense did more than merely explain or clarify the evidence favorable to the State but was inconsistent with much of that evidence and the inferences which could reasonably be drawn therefrom.

11. Criminal Law §§ 96, 128.2— withdrawal of evidence from jury—error cured

The trial court in a homicide case did not err in the denial of defendant's motion for a mistrial when an officer testified that he "went to Central Prison and picked up the defendant" where the trial court allowed defendant's motion to strike such testimony and instructed the jury not to consider it, and where defendant refused the trial court's offer to explain to the jury that defendant was in Central Prison solely for psychiatric evaluation.

12. Criminal Law § 169.6— exclusion of testimony—absence of answers in record

An exception to the exclusion of testimony by defendant could not be sustained where the record failed to show what defendant would have testified had he been permitted to answer questions to which objections were sustained. Furthermore, defendant was not prejudiced by the exclusion of such testimony where he got before the jury other testimony which fully supported each contention which he says testimony he was not permitted to give would also have supported.

13. Homicide § 24.1— instruction on presumptions of unlawfulness and malice—use of "or it is admitted"—harmless error

When instructing the jury on the presumptions of unlawfulness and malice arising from proof of a killing by the intentional use of a deadly weapon, the trial court should not use the clause "or it is admitted" in a case where defendant does not in open court admit an intentional shooting. However, such an instruction was not prejudicial to defendant in this case since the jury must have understood it to be simply a statement of an abstract

legal principle and not the trial judge's expression of an opinion regarding defendant's testimony.

Justice CARLTON concurring.

Chief Justice BRANCH, Justices HUSKINS and MEYER join in this concurring opinion.

DEFENDANT appeals from *Judge Herbert Small* presiding at the 7 January 1980 Criminal Session of WILSON Superior Court. Upon a plea of not guilty to an indictment duly returned defendant was tried and convicted of second degree murder of Dorothy Smith and sentenced to life imprisonment. His appeal is pursuant to G.S. 7A-27(a). This case was docketed and argued as No. 47, Fall Term 1980.

Rufus L. Edmisten, Attorney General, by Myron C. Banks, Special Deputy Attorney General, for the State.

Robert A. Farris, Jr., Attorney for defendant appellant.

EXUM, Justice.

Defendant assigns as error the denial of his statutory and constitutional rights to a speedy trial, the determination that he was competent to stand trial, numerous evidentiary rulings, the denial of his motions for nonsuit and mistrial, and portions of the trial court's instructions to the jury. We have carefully examined each assignment of error and conclude that defendant's trial was free from prejudicial error.

The state's evidence tends to show the following: Defendant resided in Wilson County with the deceased, Dorothy Smith, with whom he shared a bed, and with witnesses Grace Williams, Nellie Smith and Judy Batts. Defendant, Dorothy Smith, and other household members consumed alcoholic beverages during the day and night of 11 February 1979 and all retired about midnight. Grace Williams, Nellie Smith and Judy Batts were each awakened during the early morning hours by defendant who asked to be taken to the hospital because he had a headache. They all refused. Shortly thereafter they heard the front door open and close and a car leave. Upon entering defendant's bedroom five minutes later they found Dorothy Smith's bloodstained body. The telephone wires in both the bedroom and kitchen had been torn from the

wall. Grace Williams and Nellie Smith used a neighbor's telephone to notify the police. Lieutenant Wayne Gay responded to the call. He arrived at the residence at approximately 4:00 a.m. on 12 February, viewed the body, removed exhibits and interviewed the inhabitants. Not long thereafter Deputy Sheriff Richard Winstead apprehended defendant in Gold Rock, North Carolina, and removed a .22 caliber pistol from him. SBI Agent Terry Newell talked with defendant in Nash General Hospital at approximately 9:00 a.m. After being advised of and waiving certain of his constitutional rights, defendant stated that he had shot Dorothy Smith. Dr. Robert Hadley examined Dorothy Smith's body and found a gunshot wound and a superficial stab wound. In his opinion the cause of death was a bullet wound to the brain and a subsequent hemorrhage. SBI Agent Richard Szymkiewicz, a gunshot residue expert, testified that in his opinion the bullet was fired from a distance of twelve inches. The state also offered the stipulated testimony of SBI Ballistics Agent Robert Cerwin to the effect that the bullet removed from Dorothy Smith's body was a .22 caliber lead bullet.

Defendant's evidence, presented through his own testimony, tended to show that he shot Dorothy Smith either accidentally or in self-defense. He testified that while both were in bed Smith, who weighed some fifty pounds more than he did, without provocation struck him in the face, kicked him between the legs, and attempted to stab him with a knife. In response he grabbed his pistol and struck her hand to push her back, whereupon the gun discharged and a bullet struck her face. Defendant fled the residence in fear that other members of the household would try to harm him upon discovery of Smith's death.

I

Defendant by his first assignment of error contends his motions to dismiss for undue delay in his trial were improperly denied. Defendant maintains the delay between issuance of the warrant (12 February 1979) and trial (7 January 1980) violated his constitutional right to a speedy trial. He further contends that the delay between indictment (25 June 1979) and trial violated our statutory speedy trial requirements. G.S. 15A-701. We find no merit in either contention.

Defendant's motions to dismiss on constitutional and statutory speedy trial grounds came on for hearing before Judge Small on 7 January 1980 just before trial was scheduled to begin. Judge Small offered the state and defendant opportunity to present evidence. Both declined to offer evidence and relied solely on "the file."

"The file," insofar as it is reproduced in the record on appeal, reveals the following facts material to these motions: Defendant, after leaving the scene of the shooting in Wilson County, robbed a service station in Gold Rock, Nash County. During the course of this robbery he shot and wounded a law officer and was in turn shot five times. He was taken to Nash General Hospital in Rocky Mount where he was placed under arrest for armed robbery but not for murder. A murder warrant for defendant's arrest arising from the shooting of Dorothy Smith was issued on 12 February 1979. Defendant remained hospitalized for treatment of his wounds from 12 February 1979 until 1 June 1979 when the murder warrant was served on him.

Defendant was indicted for Smith's murder on 25 June and arraigned on 2 July at which time he entered a plea of not guilty. The case was set for trial on 24 July. On 6 July defendant moved to continue the case beyond the calendared trial date in order to interview Lt. Gay who was then on vacation. Judge David Reid, Jr., granted the motion, and continued the case until the 20 August 1979 Session of Wilson Superior Court. On 20 July defendant moved to dismiss the charges on the ground the delay between the issuance and service of the warrant had already violated his constitutional right to a speedy trial.

On 23 August Judge Elbert S. Peel entered an *ex parte* order continuing the case to 1 October because "all available court time was utilized in the disposition of other serious cases." On 11 October defendant moved for a psychiatric and medical examination to determine his competency to stand trial. Judge Reid granted the motion on 11 October and ordered the trial calendared for 29 October. On 7 November Judge Peel continued the matter because defendant was still in Dorothea Dix Hospital pursuant to his earlier request for a pre-trial evaluation of his competency to stand trial. Judge Peel again continued the case on 20 December for the same reason. On 3 January 1980 a copy of Dorothea Dix's

forensic unit's report on defendant's competency to stand trial was made available to the state and defendant.

On 7 January Judge Herbert Small on the basis of "the file" before him concluded that defendant had been denied neither his constitutional nor statutory right to a speedy trial and denied defendant's motion to dismiss. We agree with this ruling.

A

We take up first defendant's claim that his constitutional right to a speedy trial has been denied. "The right of every person formally accused of crime to a speedy and impartial trial is secured by the fundamental law of this State, *State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309 (1965), and guaranteed by the Sixth Amendment to the federal constitution, made applicable to the State by the Fourteenth Amendment. *Klopfer v. North Carolina*, 386 U.S. 213, 18 L.Ed. 2d 1, 87 S.Ct. 988 (1967). Prisoners confined for unrelated crimes are entitled to the benefits of this constitutional guaranty. *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969)." *State v. McKoy*, 294 N.C. 134, 140, 240 S.E. 2d 383, 387-88 (1977). The Sixth Amendment provides, in part: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . ." In *United States v. Marion*, 404 U.S. 307 (1971), the Supreme Court made it clear that the Sixth Amendment's speedy trial clause "is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." *Id.* at 313. *Marion* held, also, that a putative defendant is protected against delayed accusations, *i.e.*, accusations occuring some time after the crime was allegedly committed, not by constitutional speedy trial guarantees but by the dictates of constitutional due process. *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Duke*, 527 F. 2d 386 (5th Cir. 1976); *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976).

[1] The Due Process Clause is concerned essentially with the fundamental fairness of the proceedings. *United States v. Lovasco, supra*, 431 U.S. 783. The clause "has a limited role to play in protecting against oppressive delay." *Id.* at 789. Essentially a pre-accusation delay violates due process only if the defendant can show that the delay actually prejudiced the conduct of his defense and that it was unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily in order to gain

tactical advantage over the defendant. *See United States v. Marion, supra,* 404 U.S. 307; *United States v. Lovasco, supra,* 431 U.S. 783. *Lovasco* makes clear that the *sine qua non* of a due process violation is actual prejudice to the defense of the case. *Lovasco* probably establishes that defendant must also demonstrate an unjustified and unreasonable delay undertaken by the prosecution to gain some tactical advantage. *But see State v. Dietz, supra,* 289 N.C. 488, 223 S.E. 2d 357, in which, prior to *Lovasco,* this Court noted that in considering an alleged due process violation most courts weighed "the reasonableness of the delay against the prejudice to the accused." *Id.* at 491, 223 S.E. 2d at 359. Because the constitutional speedy trial mandate is designed to protect interests in addition to ensuring a fair trial for defendant, its violation may occur even in the absence of actual prejudice to the defense of the case. *State v. McKoy, supra,* 294 N.C. 134, 240 S.E. 2d 383. *See also Barker v. Wingo,* 407 U.S. 514 (1972), especially Justice White concurring.

Here the arrest warrant was issued on 12 February 1979 but defendant was not arrested pursuant to it until 1 June 1979. A question arises as to whether the delay between issuance and execution of the arrest warrant is governed by Sixth Amendment speedy trial standards, as defendant argues, or by due process standards. The Court said in *United States v. Marion, supra,* 404 U.S. at 320-21:

> "[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
>
> "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer."

This language standing alone and without reference to the facts and other portions of the opinion in *Marion,* suggests that the Sixth Amendment speedy trial mandate does not reach the period

prior to arrest or indictment but after the mere issuance of an arrest warrant.[1]

In *Marion* the Supreme Court considered whether a delay of approximately three years between the crime and a pre-arrest indictment *which was the first formal accusation against defendant* was violative of the Sixth Amendment. The Court held that it was not since "the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused,' an event that occurred in this case only when the appellees were indicted . . . ." *Id.* at 313. The Court said:

> "[T]he protection of the [Sixth] Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution . . . . The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him." *Id.*

Pre-*Marion* cases rather consistently held that any delay after issuance but before service of an arrest warrant was subject to scrutiny pursuant to the Sixth Amendment's speedy trial provision. *Dickey v. Florida*, 398 U.S. 30 (1970); *State v. Neas*, 278 N.C. 506, 180 S.E. 2d 12 (1971); *State v. Johnson, supra*, 275 N.C. 264, 167 S.E. 2d 274; *Jones v. Superior Court*, 3 Cal. 3d 734, 91 Cal. Rptr. 578, 478 P. 2d 10 (1971); *see generally* Annot., "Delay Between Filing of Complaint or Other Charge and Arrest of Accused as Violation of Right to Speedy Trial," 85 A.L.R. 2d 980 (1962), in which a number of the earlier cases are collected.

Marion was interpreted in *Dillingham v. United States*, 423 U.S. 64 (1975), as dealing with "the question whether in assessing a denial of speedy trial claim, there was to be counted a delay between the end of the criminal scheme charged and the indictment of a suspect not arrested or *otherwise charged* previous to the indictment." *Id.* (Emphasis supplied.) In light of *Dillingham*,

1. Several courts have so held, *see, e.g., Arnold v. McCarthy*, 566 F. 2d 1377 (9th Cir. 1978); *People v. Hannon*, 19 Cal. 3d 588, 138 Cal. Rptr. 885, 564 P. 2d 1203 (1977); *State v. Baker*, 164 Conn. 295, 320 A. 2d 801 (1973); *Preston v. State*, 338 A. 2d 562 (Del. 1975); *Henson v. United States*, 287 A. 2d 106 (D.C. App. 1972); *see also Coca v. District Court*, 187 Colo. 280, 530 P. 2d 958 (1975); *State v. Allen*, 269 S.C. 233, 237 S.E. 2d 64 (1977).

the Fifth Circuit has noted that "the Sixth Amendment is activated whenever the defendant becomes an accused, either through arrest *or otherwise*, whether or not an indictment has also been returned." *United States v. Duke, supra*, 527 F. 2d 386, 388 n. 1 (5th Cir. 1976). (Emphasis supplied.) In *Duke* the Court also noted that after *Marion* and *Dillingham* the speedy trial cases were divided into two groups, those involving "pre-accusation" delay to which the due process standards enunciated in *Marion* applied and those involving "post-accusation" delay to which Sixth Amendment speedy trial standards applied. *Id.* The District of Columbia Circuit has said, "[i]t thus appears established that the Sixth Amendment right to a speedy trial attaches at the time of arrest or of formal charges, whichever comes first." *United States v. Jones*, 524 F. 2d 834, 839, n. 7 (D.C. Cir. 1975). The New York Court of Appeals relied on *Marion* for the proposition that a "defendant's right to a speedy trial . . . is violated if there is an excessive delay between institution of the prosecution—whether by felony information or complaint, detainer warrant or indictment—and the trial." *People v. White, supra*, n. 3, 32 N.Y. 2d at 397, 345 N.Y.S. 2d at 516-17, 298 N.E. 2d at 662. Other state courts have also interpreted *Marion* to mean that the constitutional speedy trial clock begins to run when any formal complaint is issued against defendant notwithstanding that no indictment has been issued nor an arrest made.[2]

The question, therefore, whether constitutional speedy trial standards or due process standards apply to any period of delay between the issuance of an arrest warrant and defendant's actual arrest when both these events precede indictment is not easily answered. Fortunately it is unnecessary for us here to determine it because defendant cannot, as we shall demonstrate, prevail under either standard.

[2] First, as we shall show below, defendant has suffered no prejudice to his defense as a result of this period of delay, nor was the delay for the purpose of permitting the state to gain some unfair advantage over defendant. Therefore the delay did not violate defendant's right to be accorded due process.

2. *State v. Lindsay*, 96 Idaho 474, 531 P. 2d 236 (1975); *Daniels v. State*, 30 Md. App. 432, 352 A. 2d 859 (1976); *People v. White*, 32 N.Y. 2d 393, 345 N.Y.S. 2d 513, 298 N.E. 2d 659 (1973); *see also People v. Jennings*, 11 Ill. App. 3d 940, 298 N.E. 2d 409 (1973); *State v. Brouillette*, 286 N.W. 2d 702 (Minn. 1979).

Whether the Sixth Amendment's speedy trial mandate has been violated must be determined in accordance with the guidelines first and ably set out in *Barker v. Wingo, supra*, 407 U.S. 514. We cannot improve on the exegesis of this case by Justice Huskins in *State v. McKoy, supra*, 294 N.C. 134, 140-41, 240 S.E. 2d 383, 388:

> "The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972).
>
> "So unless a fixed time limit is prescribed by statute, a claim that a speedy trial has been denied must be subjected to a balancing test in which the court weighs the conduct of both the prosecution and the defendant. The main factors which the court must weigh in determining whether an accused has been deprived of a speedy trial are (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant, and (4) prejudice to the defendant. *Barker v. Wingo, supra; State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976); *State v. Brown*, 282 N.C. 117, 191 S.E. 2d 659 (1972); *State v. Johnson, supra.* No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. 'Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.' *Barker v. Wingo, supra. See* Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 478, n. 15 (1968), for a slightly different approach.

"Thus the circumstances of each particular case must determine whether a speedy trial has been afforded or denied, and the burden is on an accused who asserts denial of a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution. *State v. Johnson, supra.* An accused who has caused or acquiesced in the delay will not be allowed to use it as a vehicle in which to escape justice. *Barker v. Wingo, supra; State v. Wright, supra; State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309 (1965); *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)."

Applying these principles to the case at hand without, however, deciding that they necessarily apply to any delay prior to defendant's arrest, we note first that the delay between issuance of the arrest warrant and trial was approximately eleven months. We doubt that for a murder case such as this one this delay, in the language of *Barker v. Wingo, supra*, 407 U.S. at 530, is enough to be "presumptively prejudicial," so as to require us to inquire "into the other factors that go into the balance." Our analysis might well stop here; in order, however, to demonstrate clearly that no constitutional speedy trial violation has occurred we consider the other factors.

With regard to the reason for the delay, there is nothing in the record to suggest that it was arbitrary or deliberate or designed by the prosecution to hamper the defense or take undue advantage of defendant. Defendant was hospitalized for approximately four months after the warrant was issued and could not, during this period, have been tried. After the warrant was served and defendant was indicted, the case was delayed primarily because of defendant's 6 July motion for a continuance and his 11 October motion for medical examinations to determine his competency to stand trial. It is true that the case was continued on 23 August to 1 October 1979 by Judge Peel's *ex parte* order because "all available court time was utilized in the disposition of other serious cases." While lengthy, unreasonable delays "in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal justice system are limited and that each case must await its turn," *Barker v. Wingo, supra*, 407 U.S. at 538 (Justice White concur-

ring), we think a delay of slightly more than one month for this reason does not violate the constitutional speedy trial mandate.

Since defendant was apparently physically unable to be tried until June 1979 and since all but approximately six weeks of the remaining delay was caused by defendant's own motions, we must conclude that defendant contributed to or acquiesced in a substantial portion of the eleven-month period between issuance of the warrant and trial.

Finally defendant has shown no prejudice to his ability to defend himself. He claims prejudice in his brief because "by the time defendant was afforded counsel, the witnesses who had previously lived in the home had moved . . . to places unknown to defendant or his counsel" and because the crime scene "had long since been rearranged" before his actual arrest. The witnesses referred to, however, all testified for the state and were subject to defendant's cross-examination. The crime scene, moreover, was photographically preserved, and the photographs were admitted into evidence without objection.

We conclude, therefore, that neither defendant's constitutional right to a speedy trial nor his right to due process was violated by the eleven-month delay or any portion thereof between issuance of the arrest warrant and trial.[3]

B

We turn now to defendant's statutory speedy trial claim. Pursuant to G.S. 15A-701(a1)(1) the 120-day period within which defendant was required to be tried commenced running on 25 June

3. We note, however, that it is important in this state that an arrest warrant be served promptly after its issuance not only because service constitutes formal notice to defendant of the pending charges, but also because a number of statutory rights accrue not upon the issuance of the warrant but upon the accused's arrest pursuant thereto. *See, e.g.*, G.S. 15A-501, 511, and 601. Although we conclude that because of the circumstances of this case defendant has not been prejudiced by the delay in his arrest, we hasten to say that we disapprove the state's failure to serve the arrest warrant until some four months after it was issued. Defendant's hospitalization during this period provided no excuse or justification for not serving the warrant. It should have been served promptly upon its issuance.

1979, the date of his indictment.[4] Defendant was not tried until 7 January 1980, 196 days later. Judge Small, in concluding that defendant was brought to trial within 120 days of indictment, excluded the periods from 6 July to 20 August 1979, 23 August to 1 October 1979, and 11 October 1979 to 3 January 1980. Defendant challenges each of these exclusions. We find that a portion of the periods from 6 July to 20 August 1979 and from 11 October 1979 to 3 January 1980 were properly excluded. These proper exclusions are sufficient to bring defendant's trial well within the 120-day requirement of G.S. 15A-701(al). We do not consider the exclusion of the period from 23 August to 1 October 1979.

[3] The first exclusion, 6 July to 20 August (45 days), was grounded on defendant's motion to continue the case filed 6 July. General Statute 15A-701(b) provides in part:

> "(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:
>
> . . . .
>
> (7) *Any period of delay* resulting from a continuance granted . . . if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding." (Emphasis supplied.)

On 6 July Judge Reid granted defendant's motion for continuance after making the findings and giving reasons as required by G.S. 15A-701(b)(7). On 6 July, however, the trial was then scheduled for 24 July. Defendant moved that the court "continue the trial of his

4. G.S. 15A-701 (al) (1980 Interim Supplement) provides, in pertinent part:

"[T]he trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1981, shall begin within the time limits specified below:

(1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or *is indicted, whichever occurs last.*" (Emphasis supplied.)

case from July 24, 1979 to a later term." Judge Reid ordered that the case "be continued from July 24 to August 20, 1979. The "period of delay," therefore, as a result of this continuance, was not from 6 July to 20 August (45 days) as found by Judge Small; it was from 24 July to 20 August (27 days). Thus Judge Small erred only insofar as he excluded more than 27 days on the basis of Judge Reid's granting defendant's 6 July motion for continuance.

[4] Defendant, on 11 October 1979, moved for an examination to determine his competency to stand trial. Judge Reid granted the motion and calendared the trial for 29 October. Defendant was transferred to Dorothea Dix Hospital. On 7 November and again on 20 December Judge Peel by *ex parte* orders continued the case because defendant remained hospitalized at Dorothea Dix. Defendant was thereafter returned to Wilson County, and defendant's counsel received a copy of Dorothea Dix's forensic unit's report on 3 January 1980. Judge Small excluded the period of time between 11 October and 3 January. Defendant contends that only the period between 11 October, the date of his motion, and 29 October, the date on which trial was calendared after his motion was allowed, should be excluded.

We disagree. North Carolina General statute 15A-701(b) provides in part:

> "(b) 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, but not limited to, delays resulting from
>
> a. A mental or physical examination of the defendant, or a hearing on his mental or physical incapacity."

The delay properly excludable due to defendant's mental examination "runs from the date of entry of the order of commitment to the date the report becomes available to both defendant and the State." *State v. Harren*, 302 N.C. 142, 146, 273 S.E. 2d 694, 697 (1981). In calculating the excludable days under G.S. 15A-701(b)(1)(a) the first day is excluded and the last day is included. *Id.* Under *Harren*, therefore, nothing else appearing, Judge Small properly excluded 84 days (11 October 1979 to 3 January 1980) attributable to defendant's mental examination.

Defendant argues further that since he was in custody and subject to the state's control the examination should have been completed before the 29 October 1979 trial date. The examination took place on 17 December and the report was prepared on 18 December. Defendant notes that only a short time was needed to conduct the examination and prepare a report. He argues that the state took an unreasonably long time to conduct his examination; therefore it is not entitled to exclude the entire period consumed by this process.

We agree that the state may not consume an unreasonable amount of time in conducting mental and physical examinations and filing reports thereon. General Statute 15A-1002(b)(2) provides that "[*i*]*n no event* may the period [during which defendant is held in a state mental health facility to determine defendant's capacity to proceed] exceed 60 days." (Emphasis supplied.) *See* n. 5, *infra*. We believe the legislature intended to declare that sixty days or less is a reasonable time to conduct this kind of mental examination. It has said that "in no event" may more time be consumed. In *Harren*, furthermore, the time between the commitment order and the report's availability was only 37 days.

In this case we must assume, nothing else appearing, that defendant was transferred to Dorothea Dix Hospital on 11 October when the commitment was issued. *See State v. Harren, supra*. Defendant was examined at Dorothea Dix on 17 December, *67* days after he was committed. Presumably he was then released and returned to the Wilson County jail. Thus defendant was held in Dorothea Dix a mere seven days longer than the statute permits. While we do not approve this practice, it does not in this case result in a violation of our Speedy Trial Act. Even if we deducted this seven-day period from the 84-day period excluded by Judge Small so as to exclude only 77 days from the 120-day statutory period, defendant was still tried well within the 120-day period. (27 days for defendant's motion for continuance and 77 days for the mental examination equals 104 days. 196 days between indictment and trial, less 104 excludable days, equals 92 days.) We do not, therefore, decide that any amount of time a defendant is held in a state mental facility to determine his capacity to proceed which exceeds 60 days may not be excludable from the 120-day statutory speedy trial period. There are, of course, other remedies for a defendant who is held in a mental

health facility beyond the permitted statutory period. The state should be assiduous in observing this 60-day period, but because it is unnecessary to decide on these facts whether the state should be penalized for not observing it in terms of the requirements of our Speedy Trial Act, we decline to do so.

II

[5] Defendant by this second assignment of error contends the trial court erred in finding him competent to stand trial. A forensic psychiatrist at Dorothea Dix Hospital, after examining defendant, concluded that he did not suffer from "serious mental illness" and that he was "competent to proceed since he understands the charges pending against him and is able to assist his lawyer." After defendant's return to Wilson County, Judge Small, acting pursuant to G.S. 15A-1002, held a hearing on 7 January 1980 to determine defendant's capacity to proceed.[5] The state relied on the report of the forensic psychiatrist who examined defendant. Defendant offered no evidence. Conceding that he was not in such physical discomfort as to preclude assisting in his case, defendant, through counsel, nevertheless urged that he be given neurological tests since "there may well be a physical cause for his lapse of memory, headaches, and [things of] that nature." Judge Small, after reciting the findings in the psychiatrist's report and noting that defendant had previously been physically incapacitated to stand trial and still experienced headaches, found nothing in the evidence which would "justify the Court in finding that the Defendant, by reason of mental illness or defect, is unable to understand the nature and objects of the proceedings against him, or is

5. G.S. 15A-1002 provides, in pertinent part:

"(b) When the capacity of the defendant to proceed is questioned, the court:

. . . .

(2) May commit the defendant to a State mental health facility for observation and treatment for the period necessary to determine the defendant's capacity to proceed. In no event may the period exceed sixty days. . . .

(3) Must hold a hearing to determine the defendant's capacity to proceed. If examination is ordered pursuant to subdivision (1) or (2), the hearing must be held after the examination. Reasonable notice must be given to the defendant and to the prosecutor and the State and the defendant may introduce evidence."

unable to comprehend his own situation in reference to the proceedings, or is unable to assist in his defense in a rational or reasonable manner." He concluded that defendant had capacity to stand trial.

There was no error in this conclusion. "The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed."[6] *State v. Cooper*, 286 N.C. 549, 565, 213 S.E. 2d 305, 316 (1975); *accord, State v. Buie*, 297 N.C. 159, 254 S.E. 2d 26, *cert. denied*, 444 U.S. 971 (1979). When the trial judge determines the question of a defendant's capacity without a jury the court's findings of fact, if supported by the evidence, are conclusive on appeal. *State v. Willard*, 292 N.C. 567, 234 S.E. 2d 587 (1977); *State v. Cooper, supra.* Here although defendant had been wounded and was apparently experiencing headaches as a result of his injury, there was uncontradicted expert opinion that he was competent to stand trial. This opinion was sufficient to support the trial judge's conclusion to the same effect. *See State v. Buie, supra.* This assignment of error is overruled.

III

[6] Defendant's third assignment of error challenges a number of evidentiary rulings in this language:

> "His Honor erred in overruling defendant's timely objections and motions to strike to improper questions and testimony presented by the district attorney."

Under this assignment defendant lists fourteen exceptions. An examination of the record and defendant's brief reveals that the exceptions relate variously to different legal issues. In his brief defendant challenges under this assignment of error the admission of various items of evidence on the ground that they were, respectively, hearsay, irrelevant, admitted without laying a prop-

6. As set out in G.S. 15A-1001, the test is whether "by reason of mental illness or defect [the defendant] is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner."

er foundation, admitted without appropriate limiting instructions, admitted as expert opinion without properly qualifying the expert.

This assignment of error, purporting to raise a number of different legal issues, is insufficient under our Rules of Appellate Procedure to raise any of them. Rule 10(c) requires, among other things, that "[e]ach assignment of error . . . shall, so far as practicable, be confined to a single issue of law [and] shall state plainly and concisely and without argumentation the basis upon which error is assigned . . . ." This much of Rule 10(c) simply restates in part "the basic function and desired form of the assignment of error as developed in judicial decisions over the years." Commentary, App. R. 10(c). Defendant's assignment of error here does not state "plainly and concisely and without argumentation the basis upon which error is assigned." Furthermore it attempts to present several different questions of law. An assignment of error which "attempts to present several different questions of law in one assignment [is] . . . broadside and ineffective." *State v. Blackwell*, 276 N.C. 714, 721, 174 S.E. 2d 534, 539, *cert denied*, 400 U.S. 946 (1970); *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. Chavis*, 24 N.C. App. 148, 195, 210 S.E. 2d 555, 584 (1974), *cert. denied*, 287 N.C. 261, 214 S.E. 2d 434 (1975), *cert. denied*, 423 U.S. 1080 (1976) and cases there cited.

We have, nonetheless, carefully examined all of the evidentiary rulings complained of and find no error in any of them.

This assignment of error is overruled.

IV

[7] Defendant next assigns error to the admission of SBI Agent Newell's testimony regarding defendant's incriminating statements made in the hospital emergency room. Defendant contends the statements should be excluded because defendant "must have been" under the influence of pain-killing drugs so that he could not have knowingly and understandingly made a statement. Before permitting this testimony the trial court conducted a lengthy *voir dire* hearing concerning defendant's mental and physical condition at the time he made this statement. The state's evidence tended to show that defendant was alert, responsive and coherent. His attending physician gave permission for defendant

to be interviewed. Defendant "did not appear to be sleepy or confused nor did he hesitate to answer questions at any time." The trial court made extensive findings of fact in accord with this evidence. Defendant did not except to any of these findings. From these findings the trial court correctly concluded that the statement "was made freely, voluntarily, understanding [sic] and knowingly . . . ." There is, consequently, no merit to this assignment; it is overruled.

V

By his fifth assignment of error, defendant contends that because the state failed to comply with several discovery requests certain related evidence should not have been admitted.

A

[8] On 20 July 1979 defendant through counsel requested the district attorney to provide him copies of or permit him to inspect all test results, physical evidence and written or oral statements made by defendant.[7] In a letter dated 9 August 1979 the district attorney informed defendant's counsel that Lt. Gay had been requested to provide him with all laboratory reports which might be received from the SBI. Enclosed in this letter was a summary of defendant's oral statement. Apparently, however, sometime after 9 August SBI Agent Newell prepared another summary of defendant's statement for his own use in order to refresh his memory at trial. Newell did use it for that purpose at trial.

Upon discovering this second summary, defendant moved to strike agent Newell's testimony on the ground defendant had not been provided a copy of the second summary. After a *voir dire* on this question the court denied the motion to strike. We find no error in this ruling. Neither summary appears in the record on appeal. Obviously the existence of a summary other than that provided defendant is significant only if one summary materially differed from the other. Defendant does not contend that any such difference existed. We cannot presume there was a difference.

7. This request was in accordance with our statutory discovery procedures. *See* G.S. 15A-903(a)(2), (d), (e).

B

[9] Defendant urges error in the trial court's failure to suppress testimony concerning the results of tests performed on the deceased's bedcovers and on a .22 caliber bullet removed from her body. Defendant, as noted above, had sought discovery of this evidence. Apparently the district attorney was not aware of its existence until several days before trial, at which time he notified defendant's counsel. The test results were not given to the district attorney until the third day of trial. Defendant's counsel was immediately notified. The trial court declared a recess and gave defendant an opportunity to inspect this evidence and to examine the state's witnesses who would testify about it. The court also offered to continue the recess for "such additional time as you [defendant] deem would be reasonable to see what you can pursue or develop." Defense counsel, noting that "I've looked for ballistics experts before and there are just not any," doubted that he could locate such an expert within a reasonable time. After additional discussion the trial court refused to suppress the evidence because defendant made no showing of prejudice. Trial then continued and the complained of evidence was offered.

We find no error in this procedure. Even if we assume, for purposes of argument, that the state failed to comply with the discovery statute, exclusion of evidence is but one of several sanctions authorized by G.S. 15A-910.[8] Another is to "grant a continuance or recess." The sanction to be imposed rests in the trial judge's discretion and, absent abuse, is not reviewable on appeal. *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978); *State v. Thomas*, 291 N.C. 687, 231 S.E. 2d 585 (1977). We find no abuse here. Given that the district attorney notified defendant three

8. G.S. 15A-910 provides:

"*Regulation of discovery—failure to comply.*—If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(4) Enter other appropriate orders.

days before trial of the evidence and knew of it himself no sooner, the trial court's ordering a recess to permit defendant to examine the evidence and question the state's witnesses and offering to continue the recess to allow defendant to locate a ballistics expert was well within the due exercise of that discretion permitted the court under the circumstances. This assignment of error is, therefore, overruled.

VI

[10] Defendant next assigns as error the denial of his motion to dismiss for evidentiary insufficiency at the conclusion of all the evidence. We think the evidence was sufficient to be submitted to the jury on the question of defendant's guilt of second degree murder.

The state's evidence tended to show that when asked by SBI Agent Newell what happened at Dorothy Smith's house, defendant said, simply, "I shot her." Newell testified, "I asked him where was he when he shot her and he said he was sitting on the side of the bed when he shot her. He said he shot her with his gun. I asked him how long had he been living with Dorothy Smith and he said that he had been going with her about five or six years but he had only been living with her for seven months. . . . I asked him where he went when he left Dorothy Smith's house and he said he headed north and had a flat tire, tried to get someone to help him get the car back on the road. I don't recall asking him any other questions." The state also offered evidence that after he shot the deceased, defendant awakened other occupants of the dwelling and asked them to take him to the hospital because he suffered from a severe headache. He did not mention the shooting. He then fled the dwelling alone. When the other occupants discovered the deceased, lying naked upon her bed mortally wounded, they attempted to telephone for help but discovered the cords to both telephone extensions had been cut. Additional evidence showed that there was a bullet hole in each of three pieces of bedcovering taken from the bed in which the deceased was found. The bullet which made the holes was fired from a distance of not more than one foot. The deceased died from a single bullet wound to the brain.

Defendant's testimony, essentially, was that he and the deceased were sleeping together on the night he killed her. He

touched her on the shoulder. She reacted by striking him with her fist. She then attacked him with a knife and they struggled for several minutes on the bed for possession of the knife. During this struggle the deceased kicked him off the bed. He grabbed his gun off a dresser where he had earlier placed it. The deceased got up from the bed and lunged at him. "I just reached . . . and when I grabbed her hand and started to push her back, the gun went off and hit her. She still had the knife in her hand then. She fell back on the bed . . . and I sat there I don't know how long." Defendant testified further, "I sat there drinking . . . trying to get myself together . . . and I guess I panicked." He said the deceased "called Nellie Mae's name once or twice" and that he decided "the best thing to do is try to get out of here before the kids wake up and say we've been in a fight and end up hurting me or . . . making me hurt them." Defendant said, "when the gun went off the covers were partly across her legs and I took and throwed them back up before I left out. I don't know that the shot that hit her passed through the bedcovers but it could have because the cover was over her when she got up. They might have been over her head at that time. I couldn't see, it was dark in there and all I could see was the blade, the knife that she had in her hand. I was watching that more than anything else." Defendant then "got in the car and started for 301 Highway."

Defendant, relying only on a quotation from 4 Strong's North Carolina Index 3d, *Crim. Law* § 106, p. 549, argues that the evidence against him raises "no more than a surmise, suspicion and conjecture of guilt" which is "insufficient . . . even though the suspicion . . . aroused . . . is strong." We disagree.

The legal principles governing a motion for dismissal at the close of all the evidence are well-established. Such a motion is properly denied "when there is any evidence, whether introduced by the State or defendant, which will support the charges contained in the bill of indictment . . . considering the evidence in the light most favorable to the State and drawing every reasonable inference, deducible from the evidence, in favor of the State." *State v. Everhart*, 291 N.C. 700, 702, 231 S.E. 2d 604, 605-06 (1977). All contradictions and discrepancies in the evidence are resolved in the state's favor. *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *reversed on other grounds*, 432 U.S. 233 (1977). Defendant's evidence may be considered insofar as it

merely explains or clarifies or is not inconsistent with the state's evidence. *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193 (1977); *State v. Bruton*, 264 N.C. 488, 499, 142 S.E. 2d 169, 176 (1965). If *all* the evidence shows nothing but an accidental killing, *State v. Griffin*, 273 N.C. 333, 159 S.E. 2d 889 (1968); *State v. Church*, 265 N.C. 534, 144 S.E. 2d 624 (1965), or a killing in self-defense, *State v. Johnson*, 261 N.C. 727, 136 S.E. 2d 84 (1964); *State v. Carter*, 254 N.C. 475, 119 S.E. 2d 461 (1961), homicide charges must be dismissed.

In order for the evidence to support the charge, there must be "substantial evidence . . . of every essential element that goes to make up the crime charged," *State v. Allred*, 279 N.C. 398, 404, 183 S.E. 2d 553, 557 (1971), or evidence from which a rational jury may find beyond a doubt the existence of all such elements. *Jackson v. Virginia*, 443 U.S. 307 (1979). Second degree murder is the "unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Rogers*, 299 N.C. 597, 603, 264 S.E. 2d 89, 93 (1980). We said in *State v. Foust*, 258 N.C. 453, 458, 128 S.E. 2d 889, 893 (1963):

> "Malice as an essential characteristic of the crime of murder in the second degree may be either express or implied. 40 C.J.S., Homicide, sec. 16, p. 862; 26 Am. Jur., Homicide, sec. 41, p. 185. This Court said in *S. v. Benson, supra*:
>
> > 'Malice is not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. *S. v. Banks*, 143 N.C. 652. It may be shown by evidence of hatred, ill-will, or dislike, and it is implied in law from the killing with a deadly weapon; and a pistol or a gun is a deadly weapon. *S. v. Lane*, 166 N.C. 333.' "

An unlawful killing means a killing without justification or excuse. *See State v. Hankerson, supra.*

The evidence in this case considered in its entirety does more than permit surmise, suspicion or conjecture as to defendant's guilt of second degree murder. It constitutes substantial

evidence that defendant shot the deceased unlawfully and with malice. Considering the evidence in the light most favorable to the state, and drawing all reasonable inferences in the state's favor, we conclude that the jury could reasonably find: Defendant fatally shot deceased, who was in bed under the bedcovers, with a deadly weapon at close range in the head. Defendant then watched deceased call for help but did nothing to assist her. Thereafter he cut the telephone wires and conversed with other occupants of the dwelling without mentioning the shooting. He then fled the dwelling. Defendant's actions after the shooting, taken together, are not normally characteristic of one who has killed accidentally or in self-defense. This conduct and the manner in which the shooting occurred as shown by evidence favorable to the state constitute sufficient evidence of defendant's guilt of second degree murder to be submitted to the jury.

This is not a case where all the evidence points to an accidental or self-defense shooting. Defendant's version of the incident does more than merely explain or clarify the evidence favorable to the state. It is inconsistent with much of that evidence and the inferences which can be reasonably drawn therefrom. At least the evidence favorable to the state casts a different light on the homicide than that provided by defendant's testimony tending to show that he shot Dorothy Smith either accidentally or in self-defense. The court, therefore, is not bound by this testimony. *See generally Jackson v. Virginia, supra; State v. Freeman*, 295 N.C. 210, 244 S.E. 2d 680 (1978); *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928 (1977); *State v. Hankerson, supra; State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972); *State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968); *State v. Bright*, 237 N.C. 475, 75 S.E. 2d 407 (1953); *State v. Brabham*, 108 N.C. 793, 13 S.E. 217 (1891). Defendant's motion to dismiss at the close of all the evidence was, therefore, properly denied.

VII

[11] Defendant by his seventh assignment of error contends the trial court erred in denying his motion for mistrial. Deputy Sheriff Elmer Ballance testified that he picked up some exhibits from the SBI laboratory in Raleigh. In response to the prosecutor's question, "what did you do at that time?", Ballance answered, "I left the lab and went to Central Prison and picked

up the defendant." Defendant's motion to strike this answer was granted and the trial court instructed the jury not to consider the answer nor be influenced by it in reaching their verdict. The trial court said, "[T]hat is something that is immaterial to the guilt or innocence of the defendant and should not have any effect on your decision in this case." After the state's evidence was concluded and the court had denied defendant's motion to dismiss the charges for insufficiency of the evidence, defendant moved for a mistrial.

The motion was based in part on the response of Deputy Sheriff Ballance that he had picked up defendant at Central Prison and in part on other alleged errors which we have already disposed of in a manner contrary to defendant's contentions. The trial court then offered to explain to the jury that defendant was in Central Prison solely for psychiatric evaluation. Defendant declined this offer, whereupon the court denied his motion for mistrial.

This denial was proper. When incompetent evidence is withdrawn from the jury's consideration by appropriate instructions from the trial court, error in its admission is normally cured. *State v. Ruof*, 296 N.C. 623, 252 S.E. 2d 720 (1979); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Brown*, 266 N.C. 55, 145 S.E. 2d 297 (1965). This is because jurors are assumed to possess sufficient intelligence and character to comply with the cautionary instructions of the trial judge. *State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216 (1966). There are, of course, some situations in which courts have concluded that juries cannot adequately comply with cautionary instructions. *Bruton v. United States*, 391 U.S. 123 (1968). This is not one of those situations. That defendant refused additional safeguards offered by the trial court supports this conclusion. This assignment of error is overruled.

VIII

[12] Defendant by his eighth assignment of error contends the trial court erred in excluding certain testimony which he sought to offer. Testifying in his own behalf, defendant stated that he left the crime scene because he was afraid other household members would attempt to harm him upon discovering that he had shot Dorothy Smith. His counsel asked whether other household members had "ever given you any trouble before when

you had fights with her [Dorothy Smith]?" Although an affirmative answer would have supported one of defendant's contentions that he fled not to avoid apprehension but to avoid conflicts with other household members, the district attorney's objection to the question was sustained. Defendant's answer, however, was not elicited for the record. This omission is dispositive of defendant's exception since "[a]n exception to the exclusion of evidence cannot be sustained when the record fails to show what the witness would have testified had he been permitted to answer." *State v. Fletcher*, 279 N.C. 85, 99, 181 S.E. 2d 405, 414 (1971); *see also State v. Adams*, 299 N.C. 699, 264 S.E. 2d 46 (1980); *see generally* 1 Stansbury's North Carolina Evidence § 26 at 62 (Brandis rev. 1973). Defendant also contends the trial court erred in sustaining the district attorney's objection to a question concerning whether defendant's headaches were related to his loss of memory. After defendant testified, "Before this, off and on once or twice I have had trouble remembering," his counsel asked, "Are they in any way related to the headaches that you complained about?" Again, defendant's exception must fail since his answer was not elicited for the record.

We are satisfied, furthermore, that even if defendant had been permitted to answer these questions favorably to himself, there is no reasonable possibility that the jury would have reached a different result. *See* G.S. 15A-1443. Defendant fully presented to the jury the fact that one of the reasons he fled the scene was to avoid trouble between himself and others in the household. He testified, "I left the house because if they would have come in there, them kids would have seed that woman hurt and the first thing they would have thought about was trying to hurt me, and I would have been trying to stop them from hurting me and that way they might have got hurt and I didn't want to hurt her." He also told the jury that his loss of memory "occurred at the same time I had headaches in the past." Thus defendant got before the jury testimony which fully supported, respectively, each contention which he says testimony he was not permitted to give would also have supported. This assignment of error is overruled.

IX

Defendant by his final assignment of error challenges, without any supporting authority in his brief, twelve portions of

the trial court's instructions to the jury. The assignment of error reads: "His Honor erred in instructing the jury as to the law in the State of North Carolina and as to the facts of the case." An examination of the briefs and the record reveal that a number of legal questions purport to be presented by this assignment of error.

This assignment of error fails to comply with Appellate Rule 10(c) for the same reason that the assignment of error discussed in Part III of this opinion fails to comply. It is a broadside exception to the charge and may be overruled on that ground alone. *State v. Coffey*, 289 N.C. 431, 222 S.E. 2d 217 (1976); *State v. Kirby, supra*, 276 N.C. 123, 171 S.E. 2d 416. In *Kirby* this Court considered an assignment of error to the charge which read: "The court erroneously charged the jury as to the facts, law and evidence produced in the case to the prejudice of the defendant . . . ." Justice Huskins, writing for the Court, aptly said, 276 N.C. at 131, 171 S.E. 2d at 422:

> "This assignment—like a hoopskirt—covers everything and touches nothing. It is based on numerous exceptions and attempts to present several separate questions of law—none of which are set out in the assignment itself—thus leaving it broadside and ineffective."

Nevertheless we have again carefully examined all of the challenged instructions and conclude that none involve prejudicial error. We overrule without discussion defendant's assignment of error as it pertains to eleven of his exceptions to the jury instructions.

[13] In order, however, to reiterate an earlier caution we have given concerning one of the instructions here complained of, we do elect to mention it briefly. The instruction was taken from the *North Carolina Pattern Jury Instructions for Criminal Cases.* N.C.P.I.-Crim. § 206.30. The trial judge charged:

> "If the state proves, beyond a reasonable doubt, *or if it is admitted* that the defendant intentionally killed Dorothy Smith with a deadly weapon or that he intentionally inflicted a wound upon Dorothy Smith with a deadly weapon that proximately caused her death, you may infer: first—that the killing was unlawful; and, second—that it was done with malice." (Emphasis supplied).

Defendant complains of the language, "or if it is admitted," on the ground that the jury may have understood this instruction to be an expression of the trial judge's opinion that defendant in his testimony somehow admitted that he had intentionally fired the weapon. Defendant, of course, made no such admission, having testified consistently that the weapon discharged accidentally. In *State v. Wilkins*, 297 N.C. 237, 254 S.E. 2d 598 (1979), we considered this very assignment of error in a homicide case much like the one now before us. In *Wilkins* the state offered evidence that defendant, after an argument with his wife, rather inexplicably shot her dead with a pistol. Defendant testified that the pistol accidentally discharged. In that case the judge charged:

> "If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Marian Wilkins . . . ."

Defendant Wilkins complained that this instruction suggested that he had, while testifying, admitted intentionally shooting his wife when in fact he had made no such admission. We concluded that the instruction was not prejudicial; we cautioned, however, "there was no evidentiary basis for the trial judge to include the clause 'or it is admitted' in the quoted instruction, and the instruction would have been more accurate without it . . . ." *Id.* at 243, 254 S.E. 2d at 602.

So it is here. The instruction, "or it is admitted," should not be given in a case where the defendant does not in open court admit to an intentional shooting. However, as in *Wilkins*, we conclude that the instruction was not prejudicial to the defendant. We are satisfied the jury understood the instruction to be, as it was intended to be, simply a statement of an abstract legal principle, not the trial judge's expression of an opinion regarding defendant's testimony. Therefore had the complained of language been omitted there is no reasonable possibility that the jury would have reached a different result. *See* G.S. 15A-1443.

Defendant having failed to show prejudicial error, the verdict and judgment will not be disturbed.

No error.

Justice CARLTON concurring.

I concur in the result reached by the majority. However, I wish to note that I consider the majority's extensive discussion of the question whether the Sixth Amendment's right to speedy trial attaches at the time the arrest warrant is issued to be pure dictum.

Chief Justice BRANCH, Justices HUSKINS and MEYER join in this concurring opinion.

WESTERN AUTO SUPPLY COMPANY v. JAMES OLIVER VICK, TRADING AND DOING BUSINESS AS A WESTERN AUTO ASSOCIATE STORE

No. 11

(Filed 5 May 1981)

1. Usury § 1— elements

In N. C. the elements of usury are a loan or forbearance of money, an understanding that the money loaned shall be returned, payment or an agreement to pay a rate of interest greater than that allowed by law, and a corrupt intent to take a greater return than that allowed by law for the use of money loaned.

2. Usury § 1.2—forbearance defined

For the purpose of applying the law of usury to a given transaction in order to determine its applicability, the term "forbearance" means the contractual obligation of a lender or creditor to refrain for a given period of time from requiring the borrower or debtor to repay the loan or debt which is then due and payable.

3. Usury § 1.2— transaction constituting loan

It is the established law of N. C. that if the purchaser of a note requires the endorsement of the seller as guaranty of payment, as between the immediate parties thereto, the transaction is, in effect, a loan.

4. Usury § 1.2— purchase of inventory for Western Auto Store—assignment of chattel paper to plaintiff—transaction as forbearance

The Court of Appeals properly held that the transactions between the parties amounted to a forbearance of money upon an understanding that credit so extended by the forbearance would be repaid where the evidence tended to show that, under the terms of his franchise as a Western Auto dealer, defendant was entitled to make wholesale purchases from plaintiff on open credit accounts; the accounts could be collected on ten days notice to defendant; at all times, defendant had the option of paying for the amount due either in cash or

by transferring to plaintiff the chattel paper which had been generated by the sale of the merchandise which he had received; though, in effect, defendant had assigned the installments which were due to plaintiff, he remained liable for collecting the amounts due from the individual installment debtors and forwarding the collections to plaintiff; whether or not the individuals made the appropriate payments to defendant, he remained obligated to pay the installments as they became due; in the event that a particular account became more than ninety days in arrears, defendant was required to repurchase the chattel paper from plaintiff even though the payments on the account might have been current; to the extent that defendant remained ultimately responsible for the payment of the principal amounts due on the accounts assigned to plaintiff, plaintiff engaged in the forbearance of defendant's debt by refraining from collecting amounts due from defendant directly until such time as it became satisfied that the chattel paper transferred would not otherwise be paid off; and it was apparent that both parties to the arrangement contemplated that defendant's obligation to repay the credit extended was absolute in the event that the chattel paper was not paid out by the consumers who had executed it.

5. Usury § 1.3— amount of interest—amount financed determined on transaction by transaction basis

Where defendant purchased the assets of a Western Auto Store and, under the terms of his franchise, was entitled to make wholesale purchases from plaintiff on open credit accounts, the accounts could be collected on ten days notice to defendant, and defendant, at all times, had the option of paying for the amount due either in cash or by transferring to plaintiff the chattel paper which had been generated by the sale of the merchandise which he had received, the Court of Appeals was correct in viewing the transactions between the parties as separate and distinct occurrences for purpose of applying the usury laws; and where the parties stipulated that none of the transfers involved more than $50,000, the nine percent per annum interest limitation provided by G.S. 24-1.1(3) applied to the present action.

6. Usury § 1— corrupt intent—sufficiency of evidence

The corrupt intent required to show usury is merely the intention to take the interest which is called for in the loan or forbearance agreement, and in the event that the agreed upon interest exceeds that allowed by law under the particular circumstances of the case, the requisite usurious intent exists. The record in the present case established this intention on the part of plaintiff where the parties' purchase agreement called for the letters of transmittal to be structured so that defendant would deduct from the total amount due under each agreement submitted for acceptance the portion of the finance charges due under the contract which were to be retained by plaintiff when the sums due under the agreement were collected and forwarded to it; the amount of the deduction so made varied depending upon the length of the contract transferred; and in any event, the deduction was never less than 65% of the finance charge, nor was it ever more than 70% of the finance charge.

7. Usury § 1— usurious transactions—no time-price sales

Transactions between the parties which defendant claimed were usurious did not fall within the time-price exception to the usury statutes since the

transactions complained of were not bona fide sales, and the transactions did not embody a price differential which was fixed at the time of the sale.

Justice MEYER dissenting.

Justices EXUM and CARLTON join in this dissenting opinion.

Justice CARLTON dissenting.

Justice MEYER joins in this dissenting opinion.

ON discretionary review of the decision of the North Carolina Court of Appeals reported at 47 N.C. App. 701, 268 S.E. 2d 842 (1980), reversing the judgment of *Browning, J.*, entered at the 11 June 1979 Civil Session of NASH Superior Court.

Plaintiff is a Delaware corporation registered to do business in North Carolina. It engages primarily in the sale of merchandise at wholesale to owners of Western Auto Associate Stores. Defendant was a field service supervisor for plaintiff for three years before going into business for himself as the owner of a Western Auto Associate Store in Rocky Mount, North Carolina.

On or about 17 August 1971, plaintiff and defendant entered into an agreement whereby defendant was to purchase the assets of a Western Auto Store in Rocky Mount which plaintiff had previously operated for its own account. Upon purchase of the business by defendant, the operation became an associate store. Under the associate store concept, defendant owned and operated his store independently of any control by plaintiff. As the owner of an associate store, defendant was entitled to sell private brands of merchandise he had purchased from plaintiff. In addition, defendant had the right to invoke the goodwill which plaintiff had established in the operation of the store for its own account by holding out his business as a Western Auto Associate Store or as a Western Auto dealer.

In connection with the transaction, the parties executed three documents: (1) a contract governing the terms of the franchise; (2) a "purchase agreement" regulating the assignment of conditional sales contracts by defendant to plaintiff and the respective liabilities of the parties concerning such a transaction; and (3) a security agreement granting plaintiff a security interest in much of defendant's then-owned and after-acquired business property.

In connection with the acquisition of the assets of the store, defendant also purchased chattel paper which had been generated by the operation of the business as a company-owned enterprise. At the time of the transaction, the total outstanding balance attributable to the chattel paper amounted to approximately $175,000. Under the terms of the "purchase agreement", defendant became legally responsible for the amounts due under the paper so transferred.

At the time that defendant began operating the store, he was furnished a supply of retail installment sales forms. These forms were to be utilized by defendant in documenting any retail sale of merchandise which involved a time payment arrangement. Defendant was also furnished a supply of transmittal forms which were to be employed in transferring the executed retail installment sales agreements for credit on his account. It was upon such transactions that defendant's counterclaim hereinafter referred to was founded.

Under the associated stores plan, four types of credit accounts were available to the owner of a local operation: (1) a "regular account" to which customary or regular purchases of merchandise and other supplies would be charged; (2) a "trade acceptance" account to which purchases of merchandise (usually seasonal in nature) would be charged for which payment was to be made at a subsequent designated date; (3) a "dating terms" account tc which purchases of specially offered merchandise would be charged for which payment would be made at a later date (ususally a shorter time period than that allowed by the trade acceptance account); and (4) a "floor plan" account to which purchases of larger items of merchandise would be charged for which payment would be made in six consecutive monthly installments after the delivery of goods.

Pursuant to the terms of a memorandum dated 29 December 1972, as to charges made to defendant's regular account, payment would be due not later than the tenth day of the month for charges reflected in the account statement issued by plaintiff around the first of the month, and payment would be due not later than the twenty-fifth day of the month for charges reflected on the account statements provided by the plaintiff at mid-month.

The charges which were made to defendant's regular account, as well as those to the other three accounts in some instances, were satisfied by either making cash payments to plaintiff or by submitting to plaintiff chattel paper which had been generated by the continued operation of the Rocky Mount store. When such transfers were made, the chattel paper was accompanied by a letter of transmittal. That document would identify the agreements so transferred by the name of the purchaser involved and the contract number of the agreement. In addition, the letter indicated the amount due under each agreement, as well as the applicable finance charge. The initial purchase agreement required defendant to compute the amount of credit that he was requesting under each letter of transmittal. The required computation called for defendant to deduct an appropriate portion of the finance charge from the total amount due under each contract which was being submitted for credit. On a contract of eighteen months or less, the deduction amounted to 65% of the finance charge. On a contract of between nineteen and thirty-six months, the deduction amounted to 70% of the finance charge. These deductions represented the portion of the finance charge which plaintiff was to retain for itself when the sums due under the chattel paper were collected in full. None of the transfers of chattel paper involved an amount equal to or greater than $50,000. Defendant never received any money from plaintiff in connection with such transfers.

After submission of the documents to plaintiff, one copy of the transmittal letter would be returned to defendant bearing a notation on it by plaintiff as to the amount of credit that was being extended pursuant to the particular transaction. The amount of the credit so provided would be reflected on the next statement of account which would be issued by plaintiff to defendant.

These statements of account were furnished periodically to defendant by plaintiff. Initially, the statements were furnished as often as weekly, but commencing in January 1977, they began to be issued on a semi-monthly basis. Each statement of account would detail the charges that had been made to each of defendant's accounts. Appropriate credits would also be outlined on the statements. Furthermore, in regard to the chattel paper that had been transferred to plaintiff by defendant, plaintiff would submit an installment billing for the aggregate amount due during the

month on the chattel paper. If there was any shortfall between the total amount due at that time on the assigned accounts and the amount that the debtors had actually paid to defendant, he was required to remit the difference to plaintiff. This responsibility was reinforced by the obligation on the part of defendant to collect all payments which were due on the chattel paper, to send out any delinquency notices that were required, and to repossess any merchandise if the monthly payments were not forthcoming. Periodically, auditors would be dispatched by plaintiff to examine the ledger cards which defendant was to maintain on each account. If the examiners found any account to be more than ninety days in arrears, defendant was required to pay to plaintiff the entire balance then due on the particular account so identified. This repurchase obligation was imposed notwithstanding the fact that the monthly payments on such accounts made by defendant would be current. Upon such a repurchase, the chattel paper would be returned to defendant.

In early 1976, plaintiff filed suit against defendant, alleging, *inter alia*, that defendant had defaulted on his obligations under the purchase agreement; that plaintiff had demanded that defendant repurchase for cash all of the chattel paper which had been transferred to it; and that defendant had failed and refused to repurchase the chattel paper in question. According to the complaint, the total amount of the obligation owed by defendant to plaintiff was in excess of $398,000. Defendant answered, denying the allegations of the complaint. He also counterclaimed for damages, contending that plaintiff had wrongfully sold defendant's inventory, equipment, fixtures, accounts receivable, and chattel paper; that such sale was not in a commercially reasonable manner; and that the transfers of chattel paper were subject to the usury laws of North Carolina.

By consent of the parties, defendant's counterclaim for usury was ordered severed from the remainder of the action and tried without a jury. Upon trial of the counterclaim, the trial court denied plaintiff's motion for an involuntary dismissal pursuant to G.S. § 1A-1, Rule 41(b)(1969); however, the court entered judgment on the counterclaim in favor of plaintiff. The judgment was certified for immediate appellate review under G.S. § 1A-1, Rule 54(b)(1969).

Defendant appealed from the entry of judgment in favor of plaintiff. Plaintiff cross-appealed from the trial court's denial of its motion to dismiss. The Court of Appeals, in an opinion by Judge Wells, concurred in by Judges Webb and Martin (Harry C.), affirmed the trial court's denial of the motion to dismiss, but it reversed the entry of judgment in favor of plaintiff. On 4 November 1980, we allowed plaintiff's petition for discretionary review of the decision of the Court of Appeals pursuant to G.S. § 7A-31 (1969).

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington and Carl N. Patterson, Jr., for plaintiff.

Biggs, Meadows, Etheridge & Johnson, by M. Alexander Biggs and Samuel W. Johnson, for defendant.

Berry, Bledsoe, Hogewood & Edwards, P.A., by Harry A. Berry, Jr., Dean Gibson and Gary D. Chamblee, for the North Carolina Consumer Finance Association, Inc., amicus curiae.

A. Thomas Small for First Union National Bank of North Carolina, amicus curiae.

BRITT, Justice.

The Court of Appeals held that the transactions between the parties which gave rise to defendant's counterclaim involved the payment of interest in return for the forbearance of money owed on account. Accordingly, the court concluded that the North Carolina usury statutes governed the conduct of the parties in the transfer of the chattel paper under the purchase agreement. In particular, the Court of Appeals directed its attention to two of the findings of fact which had been made by the trial court and excepted to by defendant. The challenged findings are:

> 10. Without regard to whether payment for merchandise purchased by Vick from Western Auto and reflected on a 'statement of account' rendered by Western Auto to Vick was made in cash or with chattel paper, the amounts for which Vick was given cash or chattel paper—equivalent credit upon his account(s) were no longer deemed by Western Auto or Vick to be owed by Vick to Western Auto for the merchandise purchases by Vick reflected in his account(s).

* * *

16. From the written agreements entered into between Western Auto and Vick and their course of dealing thereunder, which was not inconsistent therewith, it is clear that Western Auto and Vick intended and viewed the transactions between them as the purchase and sale of merchandise and the purchase and sale of chattel paper.

While the findings of fact entered by a trial court are conclusive on appeal if they are supported by any competent evidence, even though there may be evidence in the record to support contrary findings, *e.g., Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979), if there is no evidence in the record to support the findings to which proper exceptions have been entered, such findings must be set aside. *Textile Insurance Co. v. Lambeth*, 250 N.C. 1, 108 S.E. 2d 36 (1959). The Court of Appeals concluded that these findings are unsupported by any competent evidence and with that conclusion and the decision favorable to defendant we agree.

I.

[1] It is well-established in North Carolina that the elements of usury are a loan or forbearance of money, an understanding that the money loaned shall be returned, payment or an agreement to pay a rate of interest greater than that allowed by law, and a corrupt intent to take a greater return than that allowed by law for the use of money loaned. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); *Henderson v. Security Mortgage and Finance Co.*, 273 N.C. 253, 160 S.E. 2d 39 (1968); *Preyer v. Parker*, 257 N.C. 440, 125 S.E. 2d 916 (1962). A commercial transaction which involves chattel paper is often structured in such a manner that its essential character is masked. The courts of this state regard the substance of a transaction, rather than its outward appearance, as controlling. *Thompson v. Soles*, 299 N.C. 484, 263 S.E. 2d 599 (1980). Specifically, when there is an allegation that the usury laws have been violated by a particular act or course of conduct, the courts of North Carolina will not hesitate to look beneath the formality of the activity to determine whether such an incident is, in fact, usurious. *Kessing v. National Mortgage Corp., supra; Sherrill v. Hood*, 208 N.C. 472, 181 S.E.

330 (1935); *Ripple v. Mortgage and Acceptance Corp.*, 193 N.C. 422, 137 S.E. 156 (1927).

When it is broken down into its component parts, the course of dealing between the parties to the present litigation was not complicated. Under the terms of his franchise, defendant was entitled to make wholesale purchases from plaintiff on open credit accounts. The accounts could be collected on ten days notice to defendant. At all times, defendant had the option of paying for the amount due either in cash or by transferring to plaintiff the chattel paper which had been generated by the sale of the merchandise which he had received. Though, in effect, defendant had assigned the installments which were due to plaintiff, he remained liable for collecting the amounts due from the individual installment debtors and forwarding the collections to plaintiff. Whether or not the individuals made the appropriate payments to defendant, he remained obligated to pay the installments as they became due. In the event that a particular account became more than ninety days in arrears, defendant was required to repurchase the chattel paper from plaintiff even though the payments on the account might have been current.

The trial court concluded that the transactions outlined above did not amount to a loan or a forbearance; that if defendant owed any amount to plaintiff, it was in excess of $300,000 and not subject to the usury laws; that defendant was not obligated to make any interest payments; that plaintiff did not intend to reserve for itself any interest in the transactions; and that the time-price doctrine served to remove the parties' course of conduct from the purview of the usury laws. The Court of Appeals disagreed, and it concluded that the substance of the transactions between the parties involved the payment of interest in return for the forbearance in the collection of money owed on account.

II.

Throughout the relationship between the parties, plaintiff regularly extended credit to defendant for purchases by him of merchandise. Under the terms of the purchase agreement, plaintiff agreed to accept as payment for merchandise it had sold to defendant, in lieu of cash, chattel paper owned by defendant and generated in the prosecution of his business, provided that the chattel paper was delivered to the company; that no payment on

the chattel paper was then past due; and that the assignment was properly executed. At all times, defendant remained obligated to collect, at his own expense, the payments which became due on the accounts so submitted. In the event that defendant failed to collect such payments from the debtors, he remained obligated to pay the amount then due to plaintiff. If any account became more than ninety days in arrears or if the merchandise to which the chattel paper related was repossessed, defendant was required by the terms of the purchase agreement to "repurchase" the chattel paper in question.

A loan is a delivery or transfer of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum being agreed upon for its use. *E.g., Boerner v. Colwell Co.*, 21 Cal. 3d 37, 577 P. 2d 200, 145 Cal. Rptr. 380 (1978). At no time did plaintiff make any sum of money available to defendant's use. That being the case, if the series of transactions involved in the case *sub judice* are to come within the scope of the usury statutes, it must be demonstrated that in some manner there has been a forbearance in the payment of money.

[2] For the purpose of applying the law of usury to a given transaction in order to determine its applicability, the term "forbearance" means the contractual obligation of a lender or creditor to refrain for a given period of time from requiring the borrower or debtor to repay the loan or debt which is then due and payable. *E.g., State ex rel. Turner v. Younker Brothers, Inc.*, 210 N.W. 2d 550 (Iowa 1973); *Cecil v. Allied Stores Corp.*, 162 Mont. 491, 513 P. 2d 704 (1973); *Carper v. Kanawha Banking & Trust Co.*, 207 S.E. 2d 897 (West Va. 1974); *compare Boerner v. Colwell Co.*, 21 Cal. 3d at 44, 577 P. 2d at 204, 145 Cal. Rptr. at 384.

[4] The essence of plaintiff's theory of the case *sub judice* as it relates to the concept of forbearance is that during the course of the series of transactions in question, defendant did not owe any debt to it the collection of which was forborne. In support of its argument, plaintiff has directed this court to three primary considerations. First, according to stipulation of fact number 10, "Vick satisfied the charges made to his regular account, and in some instances the charges made to . . . (his other accounts). . . ,

by either sending to Western Auto cash payments or by submitting to Western Auto chattel paper." Second, the chattel paper transferred to plaintiff had an inherent cash value which was equivalent to the amount of credit which defendant had received. Third, after there had been a transfer of chattel paper to plaintiff, both parties regarded the series of transactions as being the purchase and sale of goods, and the purchase and sale of chattel paper. We find plaintiff's position to be untenable.

Throughout the course of his business relationship with plaintiff, defendant had two options which were open to him regarding debts he had incurred with the firm regarding merchandise he had ordered for display and sale in his Rocky Mount place of business. While defendant could have extinguished the amount due on account by the payment of cash at all times, he had an alternative course of conduct available to him. Subject to certain conditions, defendant was entitled to transfer to plaintiff chattel paper which had been generated in the prosecution of his business in lieu of cash payment. Such a transfer would be in connection with a pre-existing debt that defendant had incurred regarding merchandise he had ordered from plaintiff. While plaintiff has argued to this court that such a transfer extinguished the pre-existing debt on the various accounts, such an argument ignores the uncontroverted fact that the transfer of the chattel paper was not absolute because the nature of the transfer imposed upon defendant a continuing personal obligation in regard to the collection and payment of amounts due under the paper. It is in this regard that we find the requirement of forbearance of a debt which is due and payable.

Some of defendant's duties in regard to the chattel paper which had been transferred were clerical in nature and required no incurrence of personal liability. It will be recalled that defendant was required to submit any such chattel paper accompanied by appropriately documented and prepared letters of transmittal. Furthermore, defendant was required to collect the payments due on the chattel paper from the debtors with whom he had contracted. These particular activities are insignificant when they are viewed in light of the context of the continuing obligation which defendant bore in relation to the chattel paper in question. It cannot be argued, nor can it be concluded, that the transfer of the chattel paper was absolute. It was only upon a complete

payout of the amount due under a particular agreement that defendant's duty in regard to that agreement was extinguished. Until that time, plaintiff had full recourse against defendant. In the event that a debtor missed a payment for whatever reason, defendant was obligated to make the payment on the debtor's behalf. If any account became more than ninety days past due, defendant had the absolute obligation to take back the chattel paper representing that account and pay to plaintiff the amount due on the account. This obligation was imposed even though defendant had made the appropriate payments himself as they had fallen due. In addition, if merchandise which had been sold under the terms of the chattel paper was repossessed by defendant, plaintiff required him to repurchase the specific chattel paper which related to the merchandise in question. In other words, at no time did defendant dispose of the chattel paper so transferred by making a final and irrevocable assignment of it to plaintiff. Not until such time as the account represented by the chattel paper in question was paid off would defendant be assured that he had no further obligation to plaintiff regarding that account. In the event that there was a default, defendant was personally liable for the amount then due as an individual payment or for the total amount outstanding. Even if no default ever occurred, defendant's liability remained absolute until the moment of payout. While plaintiff could have structured the arrangement in such a way that it could have taken the chattel paper as absolute payment of the amount due on defendant's accounts, the fact remains that it chose to do otherwise. To the extent that plaintiff accepted chattel paper from defendant in this manner, there was a forbearance of a debt due and payable.

[3] While there is well-reasoned authority to the contrary in other jurisdictions, *e.g., Lake Hiwassee Development Co., Inc. v. Pioneer Bank*, 535 S.W. 2d 323 (Tenn. 1976); *A.B. Lewis Co. v. National Investment Corporation of Houston*, 421 S.W. 2d 723 (Tex. Civ. App. 1967), it has been the established law of North Carolina for over 120 years that if the purchaser of a note requires the endorsement of the seller as a guaranty of payment, as between the immediate parties thereto, the transaction is, in effect, a loan. *Associated Stores, Inc. v. Industrial Loan and Investment Co.*, 202 F. Supp. 251 (E.D. N.C. 1962), *aff'd per curiam*, 326 F. 2d 756 (4th Cir.), *cert. denied*, 379 U.S. 830 (1964); *Sedbury v. Duffy*, 158 N.C.

432, 74 S.E. 355 (1912); *Bynum v. Rogers*, 49 N.C. 399 (1857); *Ballinger v. Edwards*, 39 N.C. 449 (1847); *McElwee v. Collins*, 20 N.C. 350 (1839). It is our conclusion that this line of authority remains viable and serves to control the case at bar.

Though it is at most only persuasive authority and is not binding upon this court, we find Judge Craven's opinion in *Associated Stores, Inc. v. Industrial Loan & Investment Co., supra*, to have been an accurate, as well as a perceptive, analysis of the law of North Carolina on this point. In *Associated Stores*, the plaintiff was engaged in the business of the installment sale of vacuum cleaners and sewing machines. On those occasions when it needed to borrow money to prosecute its business, the capital would be furnished by defendant Industrial Loan & Investment. The defendant agreed to provide the substantial sums of money required by the retailer through the device of purchasing at a discount the conditional sales contracts which had been generated by the retail sale of appliances. The discount was usually eleven percent. Although the series of transactions took the form of the purchase and sale of individual conditional sales contracts, in one or the other of the written contracts by which the transfers were effected or by endorsement of the instruments, Associated Stores guaranteed the payment of the principal amount due to Industrial. Bound as he was to apply the law of North Carolina to the case before him, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938), Judge Craven looked to the line of cases anchored by *Bynum v. Rogers, supra*, and held that the series of transactions between Associated Stores and Industrial invoked the application of the North Carolina usury laws. The underpinning of the decision of the district court was its conclusion that the transfer with recourse in all events allowed Industrial to recoup the money it had advanced to Associated Stores as well as to collect interest on the transaction.

The seminal case in North Carolina in this regard is *Bynum v. Rogers, supra*. In *Bynum*, one Murchison was obligated to raise a sum of money to meet his liabilities at a subsequent session of the county court. In order to do so, he executed a note payable to defendant Rogers who, in turn, endorsed the note over to plaintiff at a discount of six percent. Speaking for a unanimous court, Chief Justice Nash drew upon precedent to hold that the transfer

of a note which has been discounted upon an endorsement or guaranty was a transaction subject to the usury laws.

The factual pattern in *Bynum* is identical to that in *Associated Stores.* In both cases, an instrument or some other type of commercial paper was transferred to another person upon being discounted. In both instances, the transferor was not absolutely released from the obligations imposed by the instrument upon its discount and subsequent transfer. Instead, the transferor remained liable for the principal amount due under the document by way of endorsement or other guaranty. Stated differently, under the terms of these transactions there would not be a complete release of liability until the principal amount would be discharged by the obligor. The net effect of such an arrangement would be that any funds or credit which would be extended by the transferee in return for the document would be conditional in nature and depend upon the ultimate satisfaction of the underlying obligation. This is the situation which is presented by the facts of the present case.

[4] While defendant did not receive cash upon transferring the chattel paper to plaintiff, the end result was that the debts which had been incurred through the purchase of inventory were forborne by the extension of credit to defendant's account. Otherwise, defendant would have been obligated to pay the debts so guaranteed with cash within ten days of the billing date. If the merchandise secured by the chattel paper happened to be repossessed, or if an account became more than ninety days past due, defendant was obligated to make good the amount of the debt which was then outstanding. Furthermore, in the event that a particular payment on an individual account was not made, defendant was required to make the missed payment to plaintiff. Though defendant was required to collect the payments due on the accounts which had been assigned and to send out any notices of delinquency, he remained ultimately responsible for the payment of the principal amounts due under the agreement. To that extent and in that manner, plaintiff engaged in the forbearance of defendant's debt by refraining from collecting amounts due from defendant directly until such time as it became satisfied that the chattel paper transferred would not be otherwise paid off. Furthermore, it is apparent that both parties to this arrangement contemplated that defendant's obligation to repay the credit ex-

tended was absolute in the event that the chattel paper was not paid out by the consumers who had executed it.

We therefore conclude that the Court of Appeals was correct in holding that the transactions between the parties amounted to a forbearance of money upon an understanding that the credit so extended by the forbearance would be repaid.

III.

[5] The third element which must be established in order to make out a case of usury is the charging of interest at an unlawful rate. According to G.S. § 24-1 (1965), the legal rate of interest at the time of the transactions between the parties was six percent per annum. However, as even a cursory examination of Chapter 24 of the General Statutes will reveal, the ceiling of six percent is by no means absolute, and it is fraught with exceptions. Throughout the time of the transactions in question between the parties,[1] G.S. § 24-1.1 (Cum. Supp. 1977), provided as follows:

> Except as otherwise provided in this chapter or other applicable law, the parties to a loan, purchase money loan, advance or forbearance may contract in writing for the payment of interest not in excess of:
>
> (1) Eight percent (8%) per annum where the principal amount is fifty thousand dollars ($50,000.00) or less and is secured by a first mortgage or first deed of trust on real property; or
>
> (2) Ten percent (10%) per annum where the principal amount is more than fifty thousand dollars ($50,000.00) but not more than one hundred thousand dollars ($100,000.00) and is a business property loan; or
>
> (3) Nine percent (9%) per annum where the principal amount is one hundred thousand dollars ($100,000.00) or less and is not a transaction set forth in (1) or (2)

1. The record does not reflect the precise dates upon which the transactions occurred. However, the parties did enter into the overall transaction in 1971 and it lasted no later than late 1975.

above; provided, a minimum charge of ten dollars ($10.00) or one dollar ($1.00) per payment may be agreed to and charged in lieu of interest; or

(4) Twelve percent (12%) per annum where the principal amount is more than one hundred thousand dollars ($100,000.00) but not more than three hundred thousand dollars ($300,000.00); or

(5) Any rate agreed upon by the parties where the principal amount is more than three hundred thousand dollars ($300,000.00).

As used in this section, a 'business property loan' is a loan purchase money loan, advance or forbearance secured by real property of the borrower which is held or acquired for sale, lease or use in connection with the borrower's trade, business or profession other than farming and livestock operations, and the proceeds of which are to be used for the purpose of either acquiring, refinancing or improving such real property or in connection with such trade, business or profession of the borrower. A written statement of the borrower's intention to use the loan proceeds for such purpose, signed by the borrower and accepted in good faith by the lender, shall be conclusive evidence of the purpose for which the loan is made. As used in this section, interest shall not be deemed in excess of the rates provided where interest is computed monthly on the outstanding principal balance and is collected not more than thirty-one days in advance of its due date.

The eight percent rate designated by subsection one cannot apply to the facts of the present case because there is no evidence in the record which would indicate that the forbearances were secured by a first deed of trust upon real property. The ten percent rate which is allowed by subsection two does not apply to the present case because the parties have stipulated that no transaction in which chattel paper was submitted to plaintiff involved an amount equal to or greater than $50,000. It is for this reason that the provisions of subsections four and five do not apply either. By its own terms, section three applies to the facts of this case. Each of the transactions involved in the present case was less than $50,000 according to the stipulation of the parties. None of them fits within the limitations of the remaining sections.

Therefore, the pertinent limitation of interest is nine percent per annum.

The Court of Appeals was correct in viewing the transactions between the parties as separate and distinct occurrences for purpose of applying the usury laws. While it is true that the total outstanding balance was somewhat more than $50,000, it would be unreasonable to look to the total outstanding balance as being the determinative factor with respect to the application of a given statute where, as was the case between the parties, a number of distinct and temporarily removed transfers of commercial paper were involved in the process. Furthermore, while each transaction was governed by the initial purchase agreement, that agreement provided that

> The Company, subject to the terms and provisions contained herein, (i) will accept as payment, in lieu of cash, in whole or in part for merchandise which the Dealer buys from the Company, Chattel Paper owned by the Dealer if (a) the chattel paper is delivered to the Company, (b) no payment disclosed thereon as due the Dealer from the Customer is past due at the time of acceptance by the Company, (c) the assignment thereof is properly executed and (d) *the Chattel Paper is otherwise, in the sole judgment of the Company, satisfactory to the Company*, ...

In other words, while the initial purchase agreement served to govern the terms of any subsequent transaction involving the transfer of chattel paper, the agreement did not absolutely commit plaintiff to the acceptance of any chattel paper tendered to it by defendant. It follows, therefore, that each of the transfers which was made thereafter was made pursuant to a separate and distinct agreement of the parties. The parties have stipulated that none of the transfers involved more than $50,000. Therefore, we conclude that the nine percent per annum limitation applies to the present case.[2]

2. The parties have stipulated through the pretrial order that the precise amount of interest owed by defendant to plaintiff was to be determined at a later time. However, the parties cannot stipulate as to the rate of interest which applies. That is a question of law to be determined by the courts. To that extent, the Court of Appeals was in error to conclude that it did not need to reach the issue of which provision of Chapter 24 governed the series of transactions between the parties.

IV.

[6] The fourth and final element which must be established in order to make out a *prima facie* case of usury is that of a corrupt intent on the part of the party actually lending money or forbearing upon a debt. That party, in the present case, is plaintiff. It is the law of North Carolina that the corrupt intent which is required for usury is the intentional charging of a rate of interest which is greater than that which is allowed by law. *Kessing v. National Mortgage Corp.*, 278 N.C. at 530, 180 S.E. 2d at 827. Stated differently, the corrupt intention which is required by the line of authority anchored by *Kessing* is not that the offender intended to violate the usury laws. The intent which is required is merely the intention to take the interest which is called for in the loan or forbearance agreement. In the event that the agreed upon interest exceeds that allowed by law under the particular circumstances of the case, the requisite usurious intention exists.

The record in the present case establishes this intention on the part of plaintiff. The purchase agreement called for the letters of transmittal to be structured so that defendant would deduct from the total amount due under each agreement submitted for acceptance the portion of the finance charges due under the contract which were to be retained by plaintiff when the sums due under the agreement were collected and forwarded to it. The amount of the deduction so made varied depending upon the length of the contract transferred. In any event, the deduction was never less than 65% of the finance charge, nor was it ever more than 70% of the finance charge. Nothing more must be proven under the requirements of *Kessing*.

V.

[7] A vendor of property may establish one price for cash and another price for credit, and the mere fact that the credit price exceeds the cash price by a greater percentage than is permitted by the usury laws is a matter of concern to the parties to the transaction and not to the courts, provided that there is no evidence of bad faith. *Michigan National Bank v. Hanner*, 268 N.C. 668, 151 S.E. 2d 579 (1966); *Carolina Industrial Bank v. Merrimon*, 260 N.C. 335, 132 S.E. 2d 692 (1963). If there is a bona fide purchase of property as opposed to a subterfuge to conceal a loan at a usurious rate, then the usury laws have no application what-

soever, even though the sale is made at an exorbitant price. *Carolina Industrial Bank v. Merrimon, supra.* The reason for the recognition of the time-price doctrine is manifest: The usury laws are directed at the extraction of more than the legal rate of interest for the use of money, and a purchaser can refrain from paying the price asked by the seller if he so chooses. *Id.* The Court of Appeals rejected plaintiff's contention that the time-price doctrine should apply to the present case for two reasons: The transactions were not bona fide sales; and the transactions did not embody a price differential which was fixed at the time of the sale. We agree with both reasons.

First, as we have noted earlier, the transfers involved in the present case were not absolute. Defendant remained at all times under a continuing obligation to plaintiff to pay off the balance due on any transferred account in the event that the merchandise sold under the account was repossessed or in the event that the account became more than ninety days past due. Furthermore, it must be remembered that if an individual debtor failed to make his installment payment, defendant was required to make the appropriate payment to plaintiff. In short, the transaction never involved the release of liability until such time as the accounts accepted by plaintiff were fully paid.

Second, there is no evidence in the record that a genuine price differential was established between the parties at the time of sale. The pertinent time in this regard is that of the time of the sale at wholesale of merchandise to defendant by plaintiff. While it is true that the chattel paper was discounted upon transfer, that discount did not in any manner affect the price of the merchandise he received from plaintiff for his store. The wholesale price of the goods defendant received from plaintiff remained the same regardless of whether he paid for the goods in cash or transferred discounted chattel paper.

VI.

In light of the foregoing, we conclude that the Court of Appeals was correct in reversing the judgment of the trial court in favor of plaintiff. Our decision makes it unnecessary for us to consider plaintiff's argument that the trial court erred in denying its motion to dismiss defendant's counterclaim.

For the reasons stated herein the decision of the Court of Appeals is affirmed. Consequently, this cause is remanded to the Court of Appeals and that court will remand the cause to the trial court for further proceedings consistent with this opinion.

Affirmed.

Justice MEYER dissenting.

I respectfully dissent from the majority for several reasons.

First, I find the majority's reliance on prior North Carolina cases to be misplaced. It is true that prior decisions of this Court, such as *Bynum v. Rogers*, 49 N.C. 399 (1857), have said that if the purchaser of a note requires the endorsement of the seller as a guaranty of payment the transaction is, between the immediate parties, in effect, a loan. But *Bynum* and its companion cases involved settings far removed, both factually and temporally, from that found in the case at bar.

The controlling precedent so heavily relied on by the majority dates from 1857. Given the fact that the character of commercial transactions, particularly inventory financing, has changed so much since that time and the fact that negotiable instrument law in this State is now governed by the Uniform Commercial Code, I believe the majority's reliance on such venerable case law is misguided. Furthermore, although the majority recognizes that Judge Craven's opinion in *Associated Stores* has no precedential value for this Court, and apart from my finding it factually distinguishable, I would emphasize that the fact that Judge Craven was *bound* to apply North Carolina law meant that he could not rule contrary to the holding in *Bynum*. We are not so bound to rely blindly on prior decisions of this Court.

The majority is correct that this Court will look beyond form to the substance of the transaction involved. Thus in *Bynum*, where the factual record showed that the note was created solely so that one Murchison could raise necessary capital, this Court found a loan. In this case a consideration of either form or substance compels me to conclude that the majority has erred.

There is evidence in the record before us to support the trial court's findings numbered 10 and 16 to the effect that when Vick

was given credit on his account with plaintiff, whether by reason of a cash payment or by transferring chattel paper, an equivalent amount of his debt to plaintiff was considered by the parties to have been paid and the parties intended and viewed the transactions between them as a purchase and sale, not as a loan or forbearance. Finding of fact number 14, to which Vick did not except, states that both parties viewed the chattel paper as having inherent cash value equal to the amount credited to Vick's account. At the time the payment or chattel paper was credited to Vick's debt to the plaintiff, that portion of the debt was canceled and could not be revived. It is true that, as to the chattel paper, Vick continued to have certain obligations, but such obligations were based on the agreement to repurchase and not on Vick's being a primary debtor. Under the written agreement between Vick and Western Auto and under the course of conduct between the parties pursuant to those agreements, the chattel paper was accepted and credited to Vick's account as final payment.

This is a critical point. In reviewing the arrangement between the two parties, the majority says that "the net effect . . . would be that any funds or credit which would be extended by the transferee in return for the document would be conditional in nature and depend upon the ultimate satisfaction of the underlying obligation." That is simply not the case. The credit entries to Vick's accounts upon his remitting chattel paper were absolute for the simple reason that he was then allowed to charge additional items to the now-cleared account. Western Auto's internal bookkeeping reflected this; Mr. Gallimore, a witness for plaintiff, testified that Vick's transmittal of sufficient chattel paper ended his obligation on his inventory account. This even the majority implicitly recognizes, because it casts defendant's obligation as being "a continuing personal obligation in regard to the collection and payment of amounts due *under the paper*," not an obligation on his inventory account.

Other elements of the majority's characterization of the matter before us are equally troublesome. Apparently the majority finds a forbearance in the fact that plaintiff "[refrained] from collecting amounts due from defendant directly until such time as it became satisfied that the chattel paper transferred would not be otherwise paid off." Actually, plaintiff had no reason to proceed against defendant directly until the defaulting obligors actually

defaulted. The risk of default in turn was assigned to the defendant by a separate and distinct contract, the repurchase agreement, because defendant was in the best position to oversee the extension of credit and collections therefrom. Finally, the defendant's obligation to repay credit extended cannot be characterized as absolute, when, as the majority says, it was "absolute *in the event*" that the consumers who executed the chattel paper in turn defaulted on their obligations.

Representative of what I feel to be the proper resolution of the issue before us is the Supreme Court of Tennessee's opinion in *Lake Hiwassee Developing Co., Inc. v. Pioneer Bank*, 535 S.W. 2d 323 (1976). There the unanimous opinion of that court characterized the single issue in the case as "whether the purchase of notes at a discount beyond the legal rate of interest, and guaranteed at face value by the indorser, constitutes a 'loan' rather than a 'sale' so as to bring the transaction within the operation of [the] usury statutes." The court answered that question in the negative.

While the entire opinion of the court in *Lake Hiwassee* is, in my view, a correct interpretation of the law, I find two points made there especially relevant to the facts of our case. First, the court carefully considered and distinguished several older Tennessee cases where it was clear that the note was made "for the purpose of being sold, to raise money, or as an artifice to evade the usury laws . . . ." Second, the court there recognized that "commercial law shows that endorsement with recourse is standard procedure" in states which have adopted the Uniform Commercial Code. I fear the majority has not sufficiently evaluated its position in light of the substantive evolution of negotiable instruments' law since 1857.

My misgivings about the majority opinion are not confined to the legal issues involved. The question before us is not just a matter of form over substance. It is a question of recognizing or not recognizing a rather commonly used business practice which, in this case, would allow a chain store operator to buy his business from the parent company when he might otherwise be unable to do so. Certainly there is in such a relationship the possibility of abuse, but Vick was free to buy his wholesale merchandise from other parties and he was free to sell his chattel paper to anyone

he chose. I must assume he chose to deal with Western Auto because he found the terms there, including the amount of the chattel paper discount, the most advantageous. Rather than serving to create, in effect, a loan, Vick's guaranty of the paper served to increase its value, to his benefit. Thus, if we say the usury laws forbid such a transaction, we must consider who will be most harmed. I submit it will not be the large wholesalers like Western Auto, because they will simply forego the requirement of guaranty and collection by the retailer and increase the discount of the paper accordingly. Rather, it will be retailers like Vick who suffer, because they will be unable to obtain the greatest value for the chattel paper they generate.

Justices EXUM and CARLTON join in this dissenting opinion.

Justice CARLTON dissenting.

I join in the dissenting opinion filed by Justice Meyer and dissent for other reasons as well.

I must also register my disagreement with section III of the majority opinion dealing with the element of usurious intent. My first objection to that section is that it is wholly unnecessary and thus dictum. The only issues presented for our review are whether the usury laws apply to *this* arrangement for sale of chattel paper or, more specifically, whether the arrangement employed by Western Auto and Vick in transferring chattel paper was a sale or a loan or forbearance, and, if the transaction constitutes a loan or forbearance, whether the time-price doctrine applies.

The issue of usurious intent is not only not before us, its consideration is premature. I find it a rather novel approach to determine that usurious intent exists before there has been any determination that the interest charged Vick was greater than the legal maximum. I would prefer that we not consider that issue unless and until it is established that the interest charged exceeds the applicable legal rate.

Furthermore, I cannot agree with the definition given usurious intent by the majority. While *Kessing* is certainly capable of the interpretation given it by the majority, I think *Kessing*, in light of the established precedent in this area, re-

quires more than just the intentional charging of interest regardless of whether the entity making the loan is aware that the rate of interest actually charged exceeds the legal maximum. I would hold that the corrupt intent required to establish usury is the intent to charge more than the law allows, *i.e.*, knowledge that the interest actually charged exceeds the legal maximum.

That *Kessing* is capable of this interpretation is, I think, obvious from the following passage:

> In an action for usury plaintiff must show (1) that there was a loan, (2) that there was an understanding that the money lent would be returned, (3) that for the loan a greater rate of interest than allowed by law was paid, and (4) that there was corrupt intent to take more than the legal rate for the use of the money. The corrupt intent required to constitute usury is simply the intentional charging of more for money lent than the law allows. Where the lender intentionally charges the borrower a greater rate of interest than the law allows and his purpose is clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown.

Kessing v. National Mortgage Corporation, 278 N.C. 523, 530, 180 S.E. 2d 823, 827 (1971) (citations omitted). *Kessing* states that corrupt intent can be inferred only when the first three elements—a loan, an intent to repay, and an interest rate which exceeds the legal maximum—are shown *on the face* of the debt instrument. The majority found that the first two elements were shown on the face of the debt instruments, but nowhere does the majority find or the debt instruments show a greater rate of interest than allowed by law. Therefore, I submit that under *Kessing* the majority's conclusion that usurious intent exists is erroneous.

Furthermore, an examination of our earlier cases shows that corrupt intent requires that the loaner know that the interest charged exceeds the maximum. In *Ector v. Osborne*, 179 N.C. 667, 669, 103 S.E. 388, 399 (1920), we stated, " 'The corrupt intent mentioned in the books consists in the charging or receiving the excessive interest with the knowledge that it is prohibited by law, and the purpose to violate it. Our statute makes it usury if the interest is *knowingly* charged or received at the unlawful rate.' " (Quoting *MacRackan v. Bank of Columbus*, 164 N.C. 24, 26, 80 S.E.

184, 185 (1913) (emphasis in original). We said in *Swamp Loan and Trust Company v. Yokley*, 174 N.C. 573, 576, 94 S.E. 102, 103 (1917) that: "The corrupt intent consists in knowingly 'taking, receiving, reserving or charging a greater rate of interest than 6 per centum per annum . . .'" (citations omitted).

> A profit, greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, imposed upon the necessities of the borrower in a transaction where the treaty is for a loan and the money is to be returned in all events, is a violation of the usury laws, it matters not what form or disguise it may assume.

Doster v. English, 152 N.C. 339, 341, 67 S.E. 754, 755 (1910). These cases establish that the corrupt intent required to establish usury is the intentional charging of a greater interest than the law allows.

In my opinion, *Kessing* in no way departs from or alters this standard. *Kessing* states that when, on the face of a loan instrument, the rate of interest charged is greater than the legal maximum, corrupt intent is inferred. If the rate of interest charged appears on the face of the instrument and that rate exceeds the legal maximum, that knowledge is imputed to the person making the loan; we are all presumed to know what the law says. Under the above-quoted cases and under *Kessing*, I submit that the element of usurious or corrupt intent has not been shown to exist.

My next point of disagreement with the majority is its analysis of the time-price doctrine as applied to the facts of this case. The majority concludes that the time-price doctrine is inapplicable because the transfers of the chattel paper were not absolute. I find this factor irrelevant. As I understand the opinion, the majority has decided that the transactions amounted to credit sales of merchandise to Vick with his obligation to pay secured by the assignment of the chattel paper. If, as the majority has concluded, the transactions here constitute a loan or forbearance, the relevant transaction is the sale of the merchandise to Vick. No one has claimed that the chattel paper was to be paid for over a period of time. I find the majority's treatment of the chattel paper transfer transaction to be both confusing and misleading, for it attempts to apply the time-price doctrine to the chattel paper transfer, a transaction which it has declared to be a mere

security agreement for a loan. The majority seems to recognize in its next paragraph that the relevant transaction for purposes of the application of this doctrine is the sale of merchandise to Vick, and with that statement I agree. I simply wish to say that this opinion adds to the confusion in this area of the law.

In conclusion, I would note that the areas of law involved in this case—usury, the transfer of chattel paper and the time-price doctrine—are all murky areas, difficult to understand and to apply. I not only disagree with the result reached by the majority for the reasons stated by Justice Meyer and here, I am concerned that the majority opinion compounds the confusion.

Justice MEYER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. DANNY ALLEN PARTON

No. 81

(Filed 5 May 1981)

1. Constitutional Law § 45— no right by defendant to act as co-counsel

While defendant had the right to appear either *in propria persona* or by counsel, defendant had no Sixth Amendment right to serve as co-counsel with his court-appointed attorney. G.S. 1-11; G.S. 15A-1242.

2. Criminal Law § 15.1— pretrial publicity—motion for change of venue

Defendant's right to due process was not violated by the trial court's denial of his motion for change of venue of his trial for two murders on the ground of prejudicial pretrial publicity, including a newspaper's continued reference to the fact that the bodies of two victims were found in shallow graves, the possibility that defendant killed as many as eight women, and the fact that police were engaged in searches for the six additional bodies, where defendant himself initially confessed to having murdered eight women and having buried their bodies in shallow graves in a secluded wooded area, the newspaper articles were factual accounts of defendant's confessed actions and the evidence uncovered by the law enforcement officials investigating the crimes, and the newspaper's coverage was no more inflammatory or prejudicial than any coverage likely to be found in any jurisdiction to which the trial might be moved.

3. **Indictment and Warrant § 8.4— motion to elect between charges—delay of ruling until trial**

The trial court did not err in delaying until trial its decision on defendant's motion to require the State to elect which of two first degree murder charges against defendant to call first for trial where the State had repeatedly informed defendant that it intended to call both murder charges to trial during the 3 December 1979 session of court; after the State filed its motion to consolidate the two charges on 23 October 1979, defendant was aware of the possibility that both charges would be called to trial on 3 December 1979 and should have been prepared for that eventuality; and the trial judge clearly warned defendant three days before trial that he should be prepared to defend either or both of the charges at the opening of the court session.

4. **Criminal Law § 92.4— consolidation of murder charges for trial**

Two murder charges against defendant were sufficiently similar in time, place and circumstances so as to justify their consolidation for trial, although the killing of one victim occurred approximately 30 days before the killing of the second victim, where both women died of manual strangulation and were buried approximately one-eighth of a mile apart in a secluded wooded area; defendant admitted in the same confession that he committed both killings and led law officers to both graves at the same time; defendant was assisted by the same individual in disposing of both bodies; the witnesses to be presented in both trials were substantially the same; and it would have been impractical and nearly impossible to have presented evidence of the events surrounding one killing without also presenting evidence of the other killing.

5. **Constitutional Law § 31— indigent defendant—denial of funds for private investigator**

The constitutional and statutory rights of an indigent defendant charged with two murders were not violated by the trial court's denial of his motion requesting funds with which to hire an investigator to research the backgrounds and characters of the State's witnesses and the two victims where there was nothing in the record to show that such an investigation would require any unique skill or unduly burdensome time requirements which would have prevented defense counsel from adequately conducting the investigation himself, and the record showed that defendant was able competently to cross-examine the State's witnesses on all the issues mentioned in his motion requesting an investigator and was able to investigate fully the characters of all the individuals at issue. G.S. 7A-450(b); G.S. 7A-454.

6. **Criminal Law § 91.6— denial of continuance—no violation of constitutional rights**

Defendant's rights to the effective assistance of counsel, due process of law, and confrontation of the witnesses presented against him were not violated by the denial of his motion for continuance because defendant was charged with two counts of murder, three counts of first degree rape, and one count of conspiracy to commit rape and defendant was available for consultation with his attorney for only 77 of the 135 days between his arrest and trial where defendant was only placed on trial for the two murder charges; defense counsel could have utilized the entire 135 days in preparation of those portions

of the defense which did not require consultation with defendant; the offenses of which defendant was charged were interrelated and involved many of the same witnesses; and the investigation and preparation of a defense on one charge overlapped that for the other charges.

7. Criminal Law § 75.15— admissibility of confession—intoxicated defendant

The fact that defendant was intoxicated at the time of his confession does not preclude the conclusion that defendant's statements were freely and voluntarily given, and an inculpatory statement is admissible unless the defendant was so intoxicated as to be unconscious of the meaning of his words.

8. Criminal Law § 75.15— admissibility of confession—intoxicated defendant

Defendant's statements to law officers subsequent to his arrest for disorderly intoxication in Florida were not inadmissible because of defendant's intoxication where the trial court conducted a hearing and found that defendant was not unconscious and did not exhibit conduct amounting to a mania as a result of the use of alcohol, drugs, or both, and the court's findings were supported by the evidence presented at the hearing, including testimony by the arresting officer that, although he believed defendant to be intoxicated at the time of his arrest, defendant was not staggering and appeared coherent, and that after being advised of his constitutional rights and stating that he understood them, defendant told the officer that he had not come to the police station to be "hassled" but wished to confess to a murder.

9. Juror § 7.14— peremptory challenge of juror after acceptance by State and defendant

The trial court did not err in allowing the State to challenge peremptorily a juror after his acceptance by both the State and defendant where it appeared upon re-examination of the juror that he had discussed his opposition to the dealth penalty with other selected jurors in the jury room in violation of the trial judge's instructions not to discuss the case and that his opposition to the death penalty was not fully expressed at his initial examination, and where the juror stated upon re-examination that he would rather not be put to the test of having to decide whether to recommend the death penalty and repeatedly requested to be excused because of his opinion on the death penalty. G.S. 15A-1214(g).

10. Criminal Law §§ 34.3, 128.2— murder trial—reference to possibility defendant killed other persons—mistrial denied

In this prosecution upon two charges of first degree murder, the trial court did not err in denying defendant's motion for a mistrial because of unresponsive answers by two State's witnesses which referred to the possibility that defendant had killed other persons where the trial court found that neither the State nor the witnesses were attempting intentionally to prejudice the jury by these remarks; the trial court promptly instructed the jury to ignore such statements and offered to instruct the jury to disregard such evidence if defendant so desired; and an expert defense witness testified without objection that during his interrogation of defendant while defendant was under the influence of Sodium Amytal, he asked defendant why he said

that he had killed more than two people, and that defendant responded that he probably wanted to be caught and punished.

11. Criminal §§ 142.3, 145.5— restitution as condition for parole or work release

A requirement that a defendant pay restitution under G.S. 148-33.2(c) or G.S. 148-57.1(c) as a condition of obtaining work release or parole is not inherently unconstitutional. Furthermore, defendant's challenge to an order that he pay $20,000 into each of the estates of two murder victims before he may be considered eligible for parole or work release on the ground that the order discriminates against him as an indigent in violation of his right to equal protection may be considered only after a review of his financial and other circumstances at the time he becomes eligible for parole or work release privileges.

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

DEFENDANT appeals from judgment of *Lewis, J.*, entered at the 3 December 1979 Criminal Session of Superior Court, MCDOWELL County. This case was argued as No. 9, Fall Term, 1980.

Defendant was tried upon indictments, proper in form, charging him with first degree murder of Kathy Roxanna Mosley on 24 May 1979 and first degree murder of Mary Kathryn Carnes on 19 June 1979. The jury found defendant guilty of second degree murder for the killing of Kathy Roxanna Mosley and first degree murder for the killing of Kathryn Carnes. From the trial court's judgment sentencing him to two terms of life imprisonment, to be served consecutively, defendant appeals as a matter of right pursuant to G.S. 7A-27(a).

State's witness Henry Burnette testified at trial that he was present at defendant Danny Parton's residence in the North Cove section of McDowell County on 24 May 1979, accompanied by defendant, Kathy Mosley, and Kay Wright. He stated that while he was in a barn next to defendant's house, defendant came to him and confessed that he had just killed Kathy Mosley. Mr. Burnette followed defendant into the house and observed Ms. Mosley's body lying upon the bed. He and Kay Wright helped defendant place the body in Ms. Wright's car, drive to a secluded wooded area, dig a grave, and bury the body.

Henry Burnette further testified that he arrived at defendant's residence at approximately 6:00 p.m. on 19 June 1979 and

found Kathryn Carnes present at the house. On the following day Burnette accompanied defendant and Ms. Carnes to Hunnicutt Creek in McDowell County, ostensibly to go fishing. Defendant parked the truck in which they were riding approximately one-half mile from the grave of Kathy Mosley. He informed Burnette that he was going to kill Kathryn Carnes and that they were going to dig her grave before they killed her. Ms. Carnes watched while the two men dug a grave. Burnette stated that he then walked into the woods but returned to the grave site when defendant called him. Upon his return he observed Ms. Carnes lying on the ground with a rope tied around her neck, gasping for air. Defendant then pulled the rope tighter and choked her until she died. The two men buried the body, after which defendant told Burnette that a man had paid him $4,000.00 to kill Ms. Carnes.

Further evidence presented by the State tended to show that at approximately 2:47 a.m. on 18 July 1979, defendant was arrested for disorderly intoxication in Bartow, Florida. He was immediately advised of his constitutional rights. Upon his arrival at the Police Department, defendant stated that he wished to confess to the murder of Kathy Mosley and advised the Florida police to contact officials in Gastonia, North Carolina. Defendant then confessed that he had killed both Kathy Mosley and Kathryn Carnes and had buried their bodies in a wooded area in McDowell County. Defendant repeated his confession at approximately 4:30 p.m. on 18 July 1979 to Sergeant Reid of the Gaston County Police Department, who had been summoned to Florida by the Bartow Police Department. Upon his return to North Carolina, defendant showed law enforcement officers where he had buried the bodies, and both bodies were uncovered in the locations indicated. State Medical Examiner Dr. Page Hudson identified the bodies as those of Kathy Mosley and Kathryn Carnes. He testified that both women died of strangulation.

Defendant testified in his own behalf, admitting that he killed Ms. Mosley but denying any participation in the murder of Kathryn Carnes. He stated that on 24 May 1979 Kathy Mosley came to his house, whereupon the two began to argue. Ms. Mosley had been living with defendant intermittently for two and one-half years prior to this time. During the argument Ms. Mosley slapped defendant and defendant reciprocated. He testified that he could not recall his exact actions in killing Ms. Mosley, but

that he remembered being wet with sweat and seeing her lying dead on the bed.

Defendant further stated that he remembered none of the events surrounding the death of Kathryn Carnes. He recalled that he left to go fishing with Ms. Carnes and Henry Burnette on 19 or 20 June 1979, but remembered nothing after leaving his residence that day. He claimed to have been drinking a great deal of alcohol and ingesting a number of drugs on that day. He did not recall how he knew the exact location in which Ms. Carnes' body was buried.

Dr. Rollins, a physician at Dorothea Dix Hospital and a psychiatric consultant at Central Prison, testified that he injected defendant with the drug Sodium Amytal on 21 November 1979 at Dorothea Dix Hospital. Sodium Amytal is an anesthetic drug administered for the purpose of relaxing the conscious mind of the patient and creating a mental state which encourages the patient to answer questions truthfully. Under the influence of this drug defendant again admitted killing Ms. Mosley but denied any participation in the killing of Ms. Carnes. Upon further interrogation by Dr. Rollins, he stated that Henry Burnette killed Ms. Carnes. Defendant related that he had consumed a large amount of alcohol and drugs during the period of time surrounding Ms. Carnes' death. Dr. Rollins testified on cross-examination that individuals who are excessive alcohol users may be tolerant to Sodium Amytal and less likely to succumb to the anesthetic effects of the drug. He stated that it was possible for one to tell a falsehood under the influence of the drug.

The jury found defendant guilty of second degree murder for the killing of Kathy Mosley and first degree murder for the killing of Kathryn Carnes. The jury could not unanimously agree within a reasonable time whether to impose the death penalty or a sentence of life imprisonment for defendant's first degree murder conviction, therefore the judge imposed a sentence of life imprisonment pursuant to G.S. 15A-2000(b). Defendant also received a sentence of life imprisonment for the second degree murder conviction, the terms to be served consecutively.

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

Charles E. Burgin for defendant.

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

COPELAND, Justice.

Defendant argues eleven 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 denying defendant's motion to participate as co-counsel at his trial, in violation of his constitutional right to represent himself. It has been established that the Sixth Amendment to the United States Constitution, made applicable to the states by the due process clause of the Fourteenth Amendment, guarantees the accused in a state criminal action the right to proceed without counsel and represent himself at trial when he voluntarily and knowingly elects to do so. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975); *State v. House*, 295 N.C. 189, 244 S.E. 2d 654 (1978); *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976); *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972). Defendant urges us to interpret the holding of the United States Supreme Court in *Faretta v. California, supra*, as establishing not only the right to represent oneself in a criminal action, but also as establishing the right of an accused to represent himself as co-counsel with an attorney. This Court has previously held in *State v. House, supra*, that the *Faretta* decision extends only to an accused's right to forego all assistance of counsel and does not create a right to be simultaneously represented by himself and an attorney. It has long been established in this jurisdiction that a party has the right to appear *in propria persona* or, in the alternative, by counsel. There is no right to appear both *in propria persona* and by counsel. G.S. 1-11; G.S. 15A-1242; *State v. Phillip*, 261 N.C. 263, 134 S.E. 2d 386 (1964); *New Hanover County v. Sidbury*, 225 N.C. 679, 36 S.E. 2d 242 (1945); *McClamroch v. Colonial Ice Co.*, 217 N.C. 106, 6 S.E. 2d 850 (1940). *See also U.S. v. Lang*, 527 F. 2d 1264 (4th Cir. 1975), *cert. denied*, 424 U.S. 920, 96 S.Ct. 1127, 47 L.Ed. 2d 328 (1976); *Moorefield v. Garrison*, 464 F. Supp. 892 (W.D.N.C. 1979). The vast majority of jurisdictions which have interpreted the *Faretta* decision have also refused to extend the

holding to include a sixth amendment right for an accused to serve as co-counsel with his attorney. *United States v. Daniels*, 572 F. 2d 535 (5th Cir. 1978); *United States v. Bowdatch*, 561 F. 2d 1160 (5th Cir. 1977); *United States v. Cyphers*, 556 F. 2d 630 (2d Cir. 1977), *cert. denied*, 431 U.S. 972, 97 S.Ct. 2937, 53 L.Ed. 2d 1070 (1977); *People v. Wheeler*, 68 Cal. App. 3d 1056, 137 Cal. Rptr. 791 (1977); *People v. Culhane*, 45 N.Y. 2d 757, 380 N.E. 2d 315, 408 N.Y.S. 2d 489 (1978), *cert. denied*, 439 U.S. 1047, 99 S.Ct. 723, 58 L.Ed. 2d 706 (1979). Consequently, we find that since defendant in this case elected to retain the services of his court-appointed attorney, the trial court properly denied defendant's motion to participate as co-counsel at the trial, and defendant's allegations to the contrary are without merit.

[2] By his second assignment of error, defendant argues that the trial court violated his constitutional right to due process in denying his motion for change of venue on the ground of prejudicial pretrial publicity. Defendant complains that several articles appearing in *The McDowell News* over the period from 20 July 1979 to 20 August 1979 gave such biased and inflammatory accounts of the events surrounding the offenses of which he was charged that it was impossible for him to obtain a fair trial by an impartial jury in McDowell County. Defendant notes as particularly inflammatory the newspaper's continued reference to the fact that the bodies of Kathy Mosley and Kathryn Carnes were found in shallow graves, the possibility that defendant killed as many as eight women, and the fact that police were engaged in searches for the six additional bodies.

A motion for change of venue is addressed to the sound discretion of the trial judge and the ruling thereon will not be disturbed on appeal absent an abuse of that discretion. *State v. Faircloth*, 297 N.C. 101, 253 S.E. 2d 890 (1979); *State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128, 99 S.Ct. 1046, 59 L.Ed. 2d 90 (1979); *State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325, *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3212, 49 L.Ed. 2d 1211 (1976). The burden is on the defendant to show that the pretrial publicity was so prejudicial that he could not obtain a fair trial in the county in which the offense was committed. *State v. Faircloth, supra; State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976). We find that defendant in this case failed to meet his burden to show that he could not obtain a fair trial in

McDowell County, and the trial judge did not abuse his discretion in denying defendant's motion for change of venue.

The newspaper articles at issue were factual accounts of defendant's confessed actions and the evidence uncovered by the law enforcement officials investigating the crimes. None of the articles seem calculated to inflame the public. Defendant himself initially confessed to having murdered eight women and having buried their bodies in shallow graves in a secluded wooded area of McDowell County. He cannot complain that the newspaper chose to print the contents of his confession and the facts of the subsequent police investigation. The newspaper's coverage was within the bounds of propriety and no more inflammatory or prejudicial than any coverage likely to be found in any jurisdiction to which the trial might be moved. *See State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977); *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975). In addition, we note that the record of the proceedings below fails to show that defendant exhausted his peremptory challenges during the selection of the jury, or that defendant was forced to accept any juror which he found objectionable. There is nothing to indicate that any juror held an opinion prior to the trial that would prevent him or her from acting in an impartial manner. Under such circumstances we have held that a defendant has failed to show that he was prejudiced by pretrial publicity. *State v. Tilley, supra; State v. Brower, supra; State v. Harrill, supra.* The trial judge committed no prejudicial error in denying defendant's motion for change of venue, and defendant's assignment of error is overruled.

[3] Defendant next argues that the trial court erred in delaying until trial its decision on defendant's motion to require the State to elect which of the first degree murder charges against defendant to first call for trial. Defendant initially moved to require the State to elect on 17 October 1979. The trial court deferred ruling on the motion until defendant's arraignment on 23 October 1979, at which time defendant again moved that the State be required to elect which of the capital cases would be first called to trial. The State advised the Court that it intended to try both murder charges at the 3 December 1979 Criminal Session of Superior Court in McDowell County, but did not indicate which of the charges it would call first. The State also moved at this time to

consolidate the two charges for trial. The trial court held a hearing on the State's motion to consolidate on 29 November 1979, at which time the trial judge informed defendant's counsel that he should be prepared to try both cases at the opening of court on 3 December 1979. The state's motion to consolidate the two murder charges was granted 3 December 1979.

Defendant claims that the trial court's delay in ruling on his motion to require the State to elect deprived him of an opportunity to adequately prepare his defense on either charge. We disagree. The State repeatedly informed defendant that it intended to call both murder charges to trial during the 3 December 1979 session of court. After the State filed its motion to consolidate the two charges on 23 October 1979, defendant was aware of the possibility that both charges would be called to trial on 3 December 1979 and should have been prepared for that eventuality. In addition, the trial judge clearly warned defendant three days before trial that he should be prepared to defend either charge, or both, at the opening of the court session. Consequently, we hold that the trial court in this case committed no prejudicial error in delaying its ruling on defendant's motion to elect until the time of trial.

[4] By his fourth and tenth assignments of error defendant maintains that the trial court erred in granting the State's motion to consolidate the two murder charges for trial and in denying defendant's motion for mistrial on the ground that the charges were improperly consolidated. G.S. 15A-926(a) authorizes the consolidation of charges and provides as follows:

> "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."

This Court has repeatedly held that in deciding whether two or more offenses should be joined for trial, the trial court must determine whether the offenses are "*so separate in time and place* and *so distinct in circumstances* as to render the consolidation unjust and prejudicial to defendant." *State v. Johnson*, 280 N.C. 700, 704, 187 S.E. 2d 98, 101 (1972). Thus, there must be some type of "transactional connection" between the offenses con-

solidated for trial. *State v. Powell*, 297 N.C. 419, 255 S.E. 2d 154 (1979); *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978); *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336 (1972).

We find the murder charges involved in the present action sufficiently similar in time, place, and circumstances to justify consolidation for trial. Although the killing of Kathy Mosley occurred approximately thirty days before the killing of Kathryn Carnes, the circumstances of each killing were remarkably similar. Both women died of manual strangulation and were buried in shallow graves in a secluded wooded area of McDowell County, approximately one-eighth of a mile apart. Defendant admitted to having committed both killings in the same confession, and led law enforcement officers to both graves at the same time. Defendant was assisted by the same individual, Henry Burnette, in disposing of both bodies. The witnesses to be presented in both trials were substantially the same. As pointed out by the trial court, it would be impractical and nearly impossible to present evidence of the events surrounding one killing without also presenting evidence of the other killing. Defendant has failed to show that the consolidation of the two offenses unjustly hindered him or deprived him of his ability to present a defense on either charge. Consequently, we hold that the trial court did not abuse its discretion in granting the State's motion to consolidate the two murder charges for trial and defendant's assignments of error are overruled.

[5] Under his fifth assignment of error, defendant argues that the trial court erred in denying his motion requesting funds with which to hire an investigator. Defendant alleged that the services of an investigator were necessary to enable him to fully research the background and characters of State's witnesses Kay Wright and Henry Burnette and to investigate the prior relationship among these two witnesses, defendant, and the victims. Without this assistance, defendant complains that he was unable to gather enough information to competently cross-examine the State's witnesses at trial, in violation of his sixth amendment due process right to the effective assistance of counsel, his fourteenth amendment right to equal protection of the laws, and his statutory right as an indigent under G.S. 7A-450(b) to be provided ". . . with counsel and the other necessary expenses of representation."

It is well recognized that in order to comply with an indigent defendant's constitutional rights to effective assistance of counsel and equal protection under the laws, the State must provide the basic tools required to prepare an adequate defense at trial or on appeal. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 779 (1963); *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Mason v. State of Arizona*, 504 F. 2d 1345 (9th Cir. 1974), *cert. denied*, 420 U.S. 936, 95 S.Ct. 1145, 43 L.Ed. 2d 412 (1975); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). However, it is equally well established that the constitution does not require the State to furnish a defendant with a particular service simply because the service might be of some benefit to his defense. *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed. 2d 341 (1974). *See* Annot., 34 A.L.R. 3d 1256 (1970). Whether investigative assistance is constitutionally mandated must be determined after consideration of the facts of the case; defendant must demonstrate that the State's failure to provide funds with which to hire an investigator substantially prejudiced his ability to obtain a fair trial. *Mason v. State of Arizona, supra. See also United States Ex Rel Smith v. Baldi*, 344 U.S. 561, 73 S.Ct. 391, 97 L.Ed. 549 (1953). Our Court has held that to deny an indigent defendant the assistance of a state-paid investigator does not, *ipso facto*, constitute a denial of equal protection of the laws, even though such an investigator might be available under the provisions of G.S. 7A-468 to indigent defendants represented by public defenders and is available to defendants who are able to pay for the investigative services. *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976); *State v. Tatum, supra.* Likewise, this Court has interpreted our state statutes, G.S. 7A-450(b) and 7A-454,[1] as requiring that investigative assistance be provided only after a showing by defendant "that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense

1. G.S. 7A-450(b) provides as follows:

"Whenever a person, under the standards and procedures set out in this subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person."

or that without such help it is probable that defendant will not receive a fair trial." *State v. Gray*, 292 N.C. at 278, 233 S.E. 2d at 911. *See also State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980); *State v. Tatum, supra.* The decision whether to provide a defendant with an investigator under the provisions of those statutes is a matter within the discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. *State v. Gray, supra; State v. Montgomery, supra; State v. Tatum, supra.* Thus, there is no constitutional or statutory requirement that the State provide an indigent defendant with investigative assistance merely upon the defendant's request.

We find that defendant in the case *sub judice* failed to demonstrate the necessity for the assistance of an investigator to the extent that his constitutional or statutory rights were violated by the trial court's refusal to grant his motion requesting such assistance. There is nothing to show that an investigation into the background and characters of the State's witnesses and the two victims would require any unique skill or unduly burdensome time requirements that would prevent defense counsel from adequately conducting the investigation himself. Kay Wright was never called by the State as a witness, therefore defendant's contention that he was deprived of the information necessary to effectively cross-examine Ms. Wright was rendered moot and any merit to his contentions was made nonprejudicial. It was noted during the hearing on defendant's motion that defense counsel was a longtime resident of McDowell County, thus we find nothing that would prevent counsel from being able to fully investigate State's witness Henry Burnette, also a McDowell County resident. It is evident from the record that defendant was able to competently cross-examine Burnette on all the issues mentioned in his motion requesting an investigator. In addition the testimony of other defense witnesses indicates that defendant was able to fully investigate the characters of all the individuals at issue. Consequently, we hold that the trial court did not violate any of defendant's constitutional or statutory rights in denying his motion for funds with which to hire an investigator, and defendant's contentions to the contrary are without merit.

G.S. 7A-454 states:

"The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State."

[6] We likewise find no merit in defendant's argument under assignment number six that the trial court erred in denying his motion to continue filed 29 November 1979. Defendant argues that a delay of trial was necessary to allow him to prepare an adequate defense, since of the 135 days between his arrest and the date of trial, defendant was confined at Dorothea Dix Hospital in Raleigh, North Carolina for fifty-eight days, leaving only seventy-seven days during which defendant was available for consultation with his attorney. Defendant thus complains that the denial of his motion violated his constitutional rights to the effective assistance of counsel, due process of law, and confrontation of the witnesses presented against him.

A motion for continuance is ordinarily addressed to the sound discretion of the trial judge and not subject to review on appeal absent an abuse of that discretion. However, when the motion is based on a right guaranteed by the United States or North Carolina Constitutions, the question presented is a reviewable question of law. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, --- U.S. ---, 100 S.Ct. 3050, 65 L.Ed. 2d 1137 (1980); *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978); *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). Implicit in the constitutional guarantees of the effective assistance of counsel and the right to confront witnesses is the right to a reasonable time in which to investigate and prepare a defense. However, no set length of time is guaranteed and whether a defendant is denied due process of law by a trial court's denial of his motion to continue must be determined after consideration of the circumstances in each case. *State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978), *cert. denied*, 440 U.S. 984, 99 S.Ct. 1797, 60 L.Ed. 2d 246 (1979); *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977); *State v. Harris, supra.*

We find that under the facts of the present case, the trial court acted properly in denying defendant's motion for continuance. Defendant maintains that since he was charged with two counts of murder, three counts of first-degree rape, and one count of conspiracy to commit rape, a period of seventy-seven days was insufficient to allow him to prepare his defense since he could devote only thirteen days to each offense charged. We disagree. Although defendant was available to consult with counsel for only seventy-seven of the 135 days between arrest and trial, defense

counsel could have utilized the entire 135 days in preparation of those portions of the defense which did not require consultation with defendant. Furthermore, the offenses of which defendant was charged were interrelated, involving many of the same witnesses. The investigation and preparation of a defense on one charge would overlap with that for the other charges, therefore defendant's contention that he was allowed only thirteen days to prepare each offense is without merit. As a matter of fact, defendant was only placed on trial at this term for the two murder charges. Defendant has failed to show that he was denied ample time to prepare and present his defense.

Defendant next maintains that the trial court erred in denying his motion to suppress his statements made to law enforcement officers subsequent to his arrest for disorderly intoxication in Bartow, Florida at 2:47 a.m. on 18 July 1979. It is his position that, because of his intoxication and illness at the time of his arrest, he was unable to comprehend the reading of his constitutional rights and incapable of intelligently waiving these rights, rendering his subsequent statement inadmissible under the holding in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

[7] When the State offers a defendant's confession into evidence and defendant objects, the trial court must conduct a *voir dire* hearing to determine its admissibility. *State v. Jones*, 294 N.C. 642, 243 S.E. 2d 118 (1978). The trial judge's finding of fact that an inculpatory statement was freely and voluntarily given is conclusive on appeal when supported by competent evidence. *State v. Horton*, 299 N.C. 690, 263 S.E. 2d 745 (1980); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Barfield, supra.* The fact that defendant was intoxicated at the time of his confession does not preclude the conclusion that defendant's statements were freely and voluntarily given. An inculpatory statement is admissible unless the defendant is so intoxicated as to be unconscious of the meaning of his words. *State v. McClure*, 280 N.C. 288, 185 S.E. 2d 693 (1972); *State v. Logner*, 266 N.C. 238, 145 S.E. 2d 867, *cert. denied*, 384 U.S. 1013, 86 S.Ct. 1983, 16 L.Ed. 2d 1032 (1966).

[8] In the present case, the trial court conducted a hearing and found no evidence to support the contention that defendant was unconscious or exhibiting conduct amounting to a mania as a

result of the use of alcohol, drugs, or both. The court therefore concluded that defendant's statements were voluntarily made. We find the trial court's findings supported by the evidence presented at the hearing. Robert Qualar, the officer who arrested defendant at 2:47 a.m. on 18 July 1979, testified that although he believed defendant to be intoxicated at the time of his arrest, defendant was not staggering and appeared coherent. After being advised of his constitutional rights and stating that he understood them, defendant told Officer Qualar that he had not come to the police station to be "hassled," but that he wished to confess to a murder. This statement was not made in response to police interrogation; it appeared totally unsolicited and voluntary. After perusal of all the evidence presented at the hearing we find that the trial judge properly found a free, voluntary waiver of defendant's rights consistent with the requirements of *Miranda v. Arizona, supra,* as reiterated by this Court in *State v. Connley,* 297 N.C. 584, 256 S.E. 2d 234, *cert. denied,* 444 U.S. 954, 100 S.Ct. 433, 62 L.Ed. 327 (1979). Since we have found defendant's initial confession admissible, it is unnecessary to address defendant's argument that his second, third, and fourth confessions, given at approximately 6:00 a.m., 4:30 p.m., and 6:00 p.m. on 18 July 1979, were "tainted" by the constitutionally defective initial statement and therefore inadmissible. *See Miranda v. Arizona, supra, Fahy v. Connecticut,* 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed. 2d 171 (1963). It is uncontested that each of the subsequent statements was preceded by lengthy readings of defendant's *Miranda* warnings, after which defendant stated that he understood his rights and chose to waive them. Defendant's seventh assignment of error is overruled.

[9] By his eighth assignment of error, defendant argues that the trial court erred in allowing the State to peremptorily challenge a juror, Mr. Lonon, after his acceptance by both the State and defendant. G.S. 15A-1214(g) provides that a party who has not exhausted his peremptory challenges may challenge a juror after he has been accepted by a party, but before the jury is impaneled, if "it is discovered that the juror has made an incorrect statement during *voir dire* or that some other good reason exists." The decision whether to reopen examination of a juror previously accepted by both the State and defendant and to excuse such juror either peremptorily or for cause is a matter within the sound

discretion of the trial judge. *State v. Matthews*, 299 N.C. 284, 261 S.E. 2d 872 (1980); *State v. Kirkman*, 293 N.C. 447, 238 S.E. 2d 456 (1977).

The record in the present case does not contain the initial interrogation and responses of Mr. Lonon, therefore we are unable to compare his answers during the initial and rehearing examinations to determine whether an incorrect or inconsistent response was given. However, it is clear from the record of Mr. Lonon's second questioning that he had discussed his opposition to the death penalty with other selected jurors in the jury room, in violation of the trial judge's instructions not to discuss the case, and that Mr. Lonon's aversion to the death penalty was not fully expressed at his initial interrogation. His statement upon re-examination that he would rather not be put to the test of having to decide whether to recommend the death penalty and his repeated requests to be excused due to his opinion on the death penalty were sufficient reason for the trial judge to allow the State to excuse Mr. Lonon by peremptory challenge under G.S. 15A-1214(g). We find no merit in defendant's assignment.

[10] Defendant contends under his ninth assignment that the trial court erred in denying his motion for a mistrial. He complains that two references by witnesses for the State to the possibility that defendant had killed other persons in addition to Kathy Mosley and Kathryn Carnes so prejudiced the jury that he was unable to obtain a fair trial. The first statement complained of was made by Officer Robert Schott in response to questions asking him to relate the substance of defendant's admissions subsequent to his arrest. The statement and the court's response thereto appear in the record as follows:

> "Officer Schott: . . . The first interview lasted 10 minutes exactly. The recorder was turned off. I started to do the necessary paper work and at that time Danny stated that he had killed eight altogether.
>
> Mr. Burgin: Objection and move to strike.
>
> The Court: Objection sustained and motion to strike is allowed as to that last statement. It is not competent evidence in this case at this time, members of the jury."

The second statement occurred during the State's direct examination of Bobby Haynes, Sheriff of McDowell County, concerning defendant's statements to officers as to the location of the bodies of the murder victims, and was recorded as follows:

> "Q. Now, Sheriff, did you have occasion to go to the North Cove section with Officer Reid, Officer Starnes and other members of your Department with Danny Parton on or about the 19th day of July, 1979, 18th or 19th?
>
> A. Yes, we did.
>
> Q. Just tell the members of the jury what you did and where you went and what occurred.
>
> A. All right, after Sergeant Reid came by the office, Mr. Parton was interviewed by Detective Jack Turner of this Department, advised of his constitutional rights and in this interview, Mr. Parton stated that he had murdered two females, buried in the North Cove area. Two more were buried—
>
> MR. BURGIN: Objection.
>
> THE COURT: Sustained.
>
> MR. BURGIN: Move to strike and ask to be heard in the absence of the jury.
>
> THE COURT: Motion to strike is allowed."

Defendant moved for a mistrial, which motion was denied on the grounds that defendant had failed to show that the witnesses' statements were intentionally designed to prejudice the jury, and any prejudicial effect of the statements could be cured by an instruction to the jury to ignore them. Defense counsel refused the trial judge's offer to further instruct the jury to disregard these statements.

We agree that the statements complained of were inadmissible and incompetent evidence. The general rule is that in a defendant's trial for a particular crime, the State cannot offer evidence to implicate the defendant in the commission of another distinct, independent, or separate offense. *State v. Clark*, 298 N.C. 529, 259 S.E. 2d 271 (1979); *State v. Logner*, 297 N.C. 539, 256 S.E. 2d 166 (1979); *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414

(1978). However, where defendant objects to the admission of incompetent evidence and the trial judge promptly instructs the jury not to consider it, the prejudicial impact of the evidence is ordinarily erased and no error entitling defendant to a new trial has occurred. It is assumed that jurors are individuals of sufficient character and intelligence to fully understand and comply with the court's instructions, and it is presumed that they have done so. *State v. McGuire*, 297 N.C. 69, 254 S.E. 2d 165, *cert. denied*, 444 U.S. 943, 100 S.Ct. 300, 62 L.Ed. 2d 310 (1979); *State v. Snead*, 295 N.C. 615, 247 S.E. 2d 893 (1978); *State v. Siler*, 291 N.C. 543, 234 S.E. 2d 733 (1977).

The incompetent statements of Officer Schott and Sheriff Haynes in the present case were unresponsive answers to direct examination by the State and were not in any way solicited by the State. There is sufficient evidence in the record to support the trial judge's finding that neither the State nor the witnesses were attempting to intentionally prejudice the jury by these remarks. Upon defendant's objection, the trial judge promptly instructed the jury to ignore these statements and offered to further instruct the jury to disregard the evidence if defendant so desired. We note that defense witness Dr. Bob Rollins, the psychiatrist who administered Sodium Amytal to defendant at Dorothea Dix Hospital, testified without objection that during his interrogation of defendant under the influence of the drug, he asked defendant why he said that he had killed more than two people, to which defendant responded that he probably wanted to be caught and punished. Under the circumstances of this case we find that the statements complained of by defendant were not so inherently prejudicial that their impact could not have been negated by the trial judge's prompt instructions that the jury should not consider the testimony for any purpose. *See State v. Moore*, 276 N.C. 142, 171 S.E. 2d 453 (1970). Defendant's motion for a mistrial was properly denied.

[11] By his final assignment defendant alleges that the trial court erred in including in its judgment the requirement that defendant pay $20,000.00 into each of the estates of Kathy Mosley and Kathryn Carnes before he may be considered eligible for parole or work release. A trial judge who imposes an active sentence on a defendant is not only authorized but required under the language of G.S. 148-33.2(c) and G.S. 148-57.1(c) to consider

whether, as a rehabilitative measure, restitution or reparation should be ordered or recommended to the Parole Commission as a condition to the defendant's obtaining work-release privileges or parole. Defendant argues that these statutory provisions discriminate against him as an indigent, in violation of his fourteenth amendment right to equal protection of the laws. He claims that the imposition of a $40,000.00 restitution payment as a condition to attaining parole or work-release effectively insures that he will be incarcerated for a longer period than would a pecunious defendant serving the same sentence.

We approve of the reasoning of the Court of Appeals in *State v. Lambert*, 40 N.C. App. 418, 252 S.E. 2d 855 (1979), and *State v. Killian*, 37 N.C. App. 234, 245 S.E. 2d 812 (1978), which held that a requirement that a defendant pay restitution under G.S. 148-33.2(c) or G.S. 148-57.1(c) as a condition of obtaining work-release or parole is not inherently unconstitutional. Whether the restitution requirement is unconstitutional as applied to a particular defendant may only be determined by considering the defendant's financial status and other relevant circumstances at the time when the restitution must be paid. G.S. 15A-1371 requires defendant to serve a prison sentence of forty years before being eligible for consideration for parole. Under G.S. 148-33.1(b), defendant may not be considered eligible for work release privileges until he is eligible for parole or until such privileges are recommended by the presiding judge of the court which imposed the sentence. The presiding judge in the present case did not recommend that defendant be placed in a work-release program. Since the restitution ordered by the trial judge need only be paid after defendant becomes eligible for work-release privileges or parole, and defendant is not yet eligible for either alternative, we are not able to determine at this time whether defendant's constitutional rights were violated by the imposition of the restitution requirement. Defendant's constitutional challenge may only be considered after a review of his financial and other circumstances at the time he becomes eligible for parole or work-release privileges.

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. ALBERT COX, JAMES EARL COVINGTON AND GRAELYN R. GODFREY

No. 14

(Filed 5 May 1981)

1. **Rape § 4.3— character evidence relating to rape victim improper—objection waived**

The testimony of two State's witnesses concerning the character of a rape and kidnapping victim was incompetent where it was apparent from the witnesses' testimony that they were expressing their personal opinion of the prosecutrix's character rather than relating the general opinion held by the community; however, defendants waived their right to object to the testimony by failing to make prompt, timely objections thereto.

2. **Criminal Law § 89.3— prior consistent statement of witness—admissibility**

Testimony by an SBI agent that he did not hear a rape and kidnapping victim make any statement at trial which was inconsistent with her written and verbal statements during a prior interview with him was admissible as tending to establish a prior consistent statement by the prosecuting witness, and there was no error in its admission without a limiting instruction in the absence of defendant's request therefor.

3. **Rape § 6— place where crime occurred—instructions inadequate**

Where the bills of indictment charging defendants with first degree rape specified that each defendant committed the offense charged "on or about the 3rd day of March, 1979, in Pasquotank County," and the State's evidence tended to show that defendants raped the prosecutrix in Pasquotank County, Virginia, and Rocky Mount, N. C., the trial judge committed prejudicial error in failing to charge the jury that they could only convict defendants, if at all, of those rapes which occurred in Pasquotank County.

4. **Criminal Law § 113.7; Kidnapping § 1.3— acting in concert—failure to instruct—no error**

The Court of Appeals erred in granting a new trial on the ground that the trial court committed prejudicial error in failing to instruct the jury on the law of acting in concert as it applied to kidnapping, since the burden of proof which the State must meet to obtain a conviction under the principle of acting in concert is less than its burden to prove that a defendant actually committed every element of the offense charged, and the trial judge's failure to instruct the jury on the law of acting in concert as it related to kidnapping was therefore beneficial to defendants.

5. Kidnapping § 1.2— sufficiency of evidence

Evidence that each defendant unlawfully confined or restrained the victim against her will for the purpose of committing the felony of rape was sufficient to be submitted to the jury where it tended to show that, after the victim climbed into the car with the three defendants and defendant driver refused to follow her instructions, she repeatedly begged all three defendants to take her back to the university campus where she lived; neither defendant in the back seat made any effort to aid the victim or to suggest to the driver that he return to the university campus; all three defendants told the victim they would eventually take her back to the campus if she cooperated with them and threatened to harm her if she did not cooperate; one defendant threatened her with a butcher knife; and there was much evidence to suggest that all three defendants repeatedly raped the victim over a period of two days during which time she repeatedly asked to be allowed to return to the campus.

ON defendants' petition for discretionary review of a decision of the Court of Appeals, 48 N.C. App. 470, 269 S.E. 2d 297 (1980) (opinion by *Erwin, J.*, with *Arnold, J.* and *Hill, J.* concurring), which reviewed judgments entered by *Barefoot, J.*, at the 27 August 1979 Criminal Session of Superior Court, PASQUOTANK County.

Defendants were charged in indictments, proper in form, with first degree rape and kidnapping of Angela Gwenette Pettiford on 3 March 1979 in Pasquotank County. The three defendants were tried together and the jury found each guilty of second degree rape and kidnapping. From the trial court's judgment sentencing each defendant to imprisonment for a minimum of thirty years and a maximum of forty years on each offense, to be served consecutively, defendants appealed to the Court of Appeals as a matter of right pursuant to G.S. 7A-27(b). The Court of Appeals found no error in defendants' convictions of second degree rape and no error in defendant Cox's conviction of kidnapping, but granted a new trial on the kidnapping charges against defendants Covington and Godfrey. We granted defendants' petition for discretionary review under G.S. 7A-31 on 4 November 1980. Under the authority of Rule 16 of the North Carolina Rules of Appellate Procedure, the State seeks review of that portion of the Court of Appeals' decision which awarded a new trial to defendants Covington and Godfrey on the kidnapping charges.

The State's evidence tended to show that shortly after 12:00 a.m. on 3 March 1979, defendant Cox went to the dormitory at Elizabeth City State University in which the prosecutrix, Angela

Pettiford, lived. Ms. Pettiford was attending the University as a freshman at that time, and was defendant Cox's first cousin. She testified that Cox was seeking directions to a place where he could buy some food and asked her where he could sleep for the night. She agreed to walk with Cox across campus to a men's dormitory where another of their first cousins lived. After changing clothes, Ms. Pettiford left her dormitory with defendant, who then suggested that they drive to the men's dormitory in his car. When she walked up to the car she observed two males, whom she identified at trial as defendants Covington and Godfrey, seated in the automobile. Cox explained that the two were hitchhikers he had picked up earlier. Ms. Pettiford climbed into the back seat and attempted to direct Cox to the men's dormitory. Cox ignored her instructions and drove off campus, despite her repeated protests. All three defendants were in the car at this time.

Cox drove to a subdivision outside of Elizabeth City, where his car became stuck in a ditch. A resident of the subdivision helped pull the car back onto the road. He testified that Ms. Pettiford asked him to take her back to the University campus, but that Cox assured him that he would take her himself. Instead, Cox continued to drive away from Elizabeth City toward the Virginia State line. Ms. Pettiford again asked to be taken back to campus, whereupon Cox replied "OK, it's party time." The other two defendants, who were referred to as "Dave" and "Joe" throughout the entire incident, then took beer and wine from behind the back seat and forced the prosecutrix to drink it at knife point. At some point during the journey Ms. Pettiford's clothes were removed and defendants Covington and Godfrey forced her to engage in sexual intercourse with them in the back seat. Defendant Cox later stopped the car, the two males in the back seat got in the front seat, and Cox got in the back seat with Ms. Pettiford. He then forced Ms. Pettiford to have sexual intercourse with him. Later Cox resumed driving and the two other defendants returned to the back seat with Ms. Pettiford. Cox drove on and arrived at his apartment in Alexandria, Virginia, at approximately 6:00 a.m. on 3 March 1979. Cox repeatedly raped Ms. Pettiford at his apartment. The three defendants and Ms. Pettiford left Alexandria at about 12:00 noon on that day and drove to a Holiday Inn Motel in Rocky Mount, North Carolina.

From about 8:30 p.m. that evening until 1:00 a.m. on 4 March 1979 the defendants repeatedly forced the prosecutrix to engage in sexual intercourse with each of them. At some time after 8:00 a.m. that morning defendants took Ms. Pettiford to the bus station in Rocky Mount and sent her by bus to Elizabeth City. Upon arriving in Elizabeth City she called her roommates and asked them to pick her up. When they arrived she related the circumstances of the kidnapping and rapes to them and to her boyfriend, who had accompanied them to the bus station. They immediately contacted law enforcement officers, to whom Ms. Pettiford again related the incident. A Pasquotank County Deputy Sheriff, a State Bureau of Investigation agent, Ms. Pettiford's roommates, and her boyfriend all testified for the State as corroborative witnesses. Ms. Pettiford's statements to each regarding the events which occurred on 3 and 4 March 1979 were identical in all relevant respects. A physician who examined the prosecutrix on the evening of 4 March 1979 testified that he found no indication of injury in the vaginal area, although he did find traces of degenerative sperm.

Each defendant testified in his own behalf, admitting that they engaged in sexual intercourse and other sexual acts with Ms. Pettiford on 3 and 4 March 1979, but stating that all such acts were done with her consent. Each stated that Ms. Pettiford voluntarily agreed to ride with them and was never kidnapped at any point. Defendant Cox presented witnesses who testified to his good character.

Additional facts pertinent to the decision will be related in the opinion below.

John G. Trimpi and C. Everett Thompson for defendant-appellants.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Charles J. Murray for the State.

COPELAND, Justice.

Defendants and the State argue several assignments of error on appeal. We have carefully considered each assignment and conclude that the Court of Appeals correctly found no error which would entitle defendant Cox to a new trial on the kidnapping

charge. For the reasons stated below, we reverse the Court of Appeals' decision awarding a new trial to defendants Covington and Godfrey on the kidnapping charges and reinstate the trial court's judgment on these charges. We also reverse the Court of Appeals' opinion finding no error in defendants' convictions of second degree rape, and remand to the trial court for a new trial for all three defendants on the rape charges.

[1] By their first assignment of error, defendants contend that the Court of Appeals erred in affirming the trial court's denial of defendants' motion to strike the testimony of State's witnesses Dorothy Newby and Shirley Barnes. Dorothy Newby's testimony concerning the character of the prosecutrix and defendants' objections thereto are reported in the record as follows:

> "My name is Dorothy Newby, and I am employed as resident director at Elizabeth City State University. I have been employed with the Elizabeth City State University since August of 1970. I reside in Elizabeth City at 1208 Harris Drive. In my capacity as resident director I have had an occasion to become acquainted with the young lady by the name of Angela Pettiford. I did have an occasion from time to time to see Ms. Pettiford at or about the campus during the last school year in 1978-1979.
>
> Q. And I ask you whether or not you had an opportunity and occasion to form some opinion about the character and reputation of Angela Pettiford?
>
> OBJECTION.
>
> OVERRULED.
>
> Q. You can answer the question. Did you form some opinion?
>
> A. Yes.
>
> Q. And was that opinion based upon the information there on the campus community, or your contact with her on campus?
>
> A. My contact with her on campus.
>
> Q. And what is your opinion as to the character and reputation of Angela Pettiford?

A. My opinion is that she is a very nice young lady, and has a very good character.

CROSS EXAMINATION by Mr. Rosser:

Q. Who have you heard discuss her reputation?

A. I haven't heard anyone discuss her reputation.

MR. ROSSER: Move to strike her testimony.

COURT: I didn't hear your question.

MR. ROSSER: I asked her who had she heard discuss the reputation of Angela Pettiford, and she said she had heard no one discuss it. And I move to strike the testimony as to her character, and reputation.

COURT: I am Denying your Motion."

State's witness Shirley Barnes also testified to the prosecutrix's character, and stated in pertinent part:

"From my personal observations in and about the campus community I did form an opinion satisfactory to myself as to the character and reputation of Angela Pettiford. As to what my opinion as to her character and reputation is, she is a very nice young lady.

CROSS EXAMINATION by Mr. Rosser:

Q. Have you heard anyone discuss her character and reputation prior to today?

A. No.

MR. ROSSER: Move to strike.

COURT: Denied."

It is the general rule in this jurisdiction that a witness may testify concerning a person's character only after he qualifies himself by affirmatively indicating that he is familiar with the person's general character and reputation. A witness who testifies that he does not know the general reputation of the person in question is incompetent to testify as a character witness. *State v. Denny*, 294 N.C. 294, 240 S.E. 2d 437 (1978); *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975), *death sentence*

vacated, 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed. 2d 1205 (1976); *Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168 (1972). The proper procedure for qualifying a character witness was set forth in *State v. Hicks*, 200 N.C. 539, 540-41, 157 S.E. 851, 852 (1931) as follows:

> "The rule is, that when an impeaching or sustaining character witness is called, he should first be asked whether he knows the general reputation and character of the witness or party about which he proposes to testify. This is a preliminary qualifying question which should be answered yes or no. If the witness answer it in the negative, he should be stood aside without further examination. If he reply in the affirmative, thus qualifying himself to speak on the subject of *general* reputation and character, counsel may then ask him to state what it is."

It is apparent from the record that neither Dorothy Newby nor Shirley Barnes was properly qualified as a character witness before testifying that Angela Pettiford was "a very nice young lady" of good character. Consequently, their testimony was incompetent and improperly admitted. However, we find that defendants waived their right to object to the testimony by failing to make a prompt, timely objection thereto.

It is axiomatic that an objection to or motion to strike an offer of evidence must be made as soon as the party objecting has an opportunity to discover the objectionable nature thereof. Unless prompt objection is made, the opponent will be held to have waived it. *State v. Logner*, 297 N.C. 539, 256 S.E. 2d 166 (1979); *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978); *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977). In the present case, no objection was made at the time the objectionable nature of the character witnesses' testimony became apparent. Defendants first objected to the following question addressed to Dorothy Newby: "And I ask you whether or not you had an opportunity and occasion to form some opinion about the character and reputation of Angela Pettiford?" The trial court correctly overruled defendants' objection. The question appeared designed to elicit the foundation for the witness' testimony; there was no indication in the wording of the question that the witness would respond with an inadmissible statement. The objectionable nature of Ms. Newby's

testimony was subsequently revealed in her statement to the effect that her opinion of Ms. Pettiford's character was based upon personal contact with Ms. Pettiford and not from a general knowledge of her reputation on the campus. At this point it became apparent that Ms. Newby was expressing her personal opinion of Ms. Pettiford's character rather than relating the general opinion held by the community. However, defendants made no objection at this time, therefore they are deemed to have waived it.

The incompetency of Ms. Barnes' testimony was revealed when she stated that from her personal observations she formed an opinion of Ms. Pettiford's character. Defendants entered no objection to this statement and allowed the witness to further state her opinion of Ms. Pettiford's good character. Again, defendants failed to make a timely objection to the evidence and therefore waived their right to contest it. Defendants' assignment of error is without merit and overruled.

[2] Defendants argue under their second assignment that the Court of Appeals erred in upholding the trial judge's decision to overrule their objection to certain testimony given by State's witness O. L. Wise. Detective Wise, an agent for the State Bureau of Investigation, interviewed Angela Pettiford and took a written statement from her on 8 March 1979. He testified as a corroborating witness, relating in detail Ms. Pettiford's statements to him concerning the events which transpired on 3 and 4 March 1979. At the end of his lengthy testimony, Detective Wise was asked: "And at any point of time in her statement to you did she say anything different from what she testified to here?" Defendants' objection to the question was overruled, after which the witness replied, "No, sir." Defendants maintain that by permitting the witness to answer the question, the trial court allowed him to make a conclusory statement of opinion which invaded the province of the jury.

Ordinarily, opinion testimony from a lay witness is not admissible since it is the province of the jury to draw whatever inferences are warranted by the evidence presented. *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976), *cert. denied*, 429 U.S. 1050, 97 S.Ct. 1160, 51 L.Ed. 2d 573 (1977). The testimony objected to in the present case, however, was not opinion testimony but

Detective Wise's own personal observations after having interviewed the prosecuting witness and having heard her testimony at trial. Mr. Wise was not expressing an opinion on whether Ms. Pettiford was telling the truth, which was the issue to be decided by the jury; he was merely stating that he did not hear Ms. Pettiford make any statement at trial which was inconsistent with her written and verbal statements during a prior interview. The fact that a witness made a prior consistent statement is admissible as evidence tending to strengthen the witness' credibility. *State v. Mayhand*, 298 N.C. 418, 259 S.E. 2d 231 (1979); *State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374 (1978); 1 Stansbury's North Carolina Evidence § 51 (Brandis Rev. 1973). This evidence is admissible solely for the purpose of corroborating the witness' testimony, and not as substantive evidence. However, when a defendant fails to specifically request an instruction restricting the use of corroborative testimony, it is not error for the trial judge to admit the evidence without a limiting instruction. *State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976), *cert. denied*, 431 U.S. 916, 97 S.Ct. 2178, 53 L.Ed. 2d 226 (1977); *State v. Sawyer*, 283 N.C. 289, 196 S.E. 2d 250 (1973). In the case *sub judice*, defendants did not request an instruction restricting the use of Detective Wise's testimony. His testimony was admissible as tending to establish a prior consistent statement by the prosecuting witness and there was no error in its admission without a limiting instruction. In his charge to the jury, the trial judge repeatedly instructed them that they were to be the sole judges of the credibility of each witness, and the sole judges of the weight to be accorded the evidence presented. Defendants have failed to show that they were prejudiced by Detective Wise's testimony, thus we find no error in its admission and defendants' second assignment is overruled.

[3] By their assignments numbered five through eleven, fifteen through seventeen, and twenty-one through twenty-three, defendants allege that the Court of Appeals erred in finding no error in the trial judge's instructions to the jury concerning the rape charges against them. We find merit in defendants' allegations and hold that all defendants must be awarded a new trial on the rape charges.

The bills of indictment charging defendants with first degree rape specify that each defendant committed the offense charged

"on or about the 3rd day of March, 1979, in Pasquotank County." The State's evidence tended to show that defendants may have raped Ms. Pettiford on 3 March 1979 in Pasquotank County, and that they did rape her in Virginia and in Rocky Mount, North Carolina on 3 and 4 March 1979. The trial judge summarized the evidence tending to prove all the alleged rapes, and then, as to each defendant, instructed the jury in substance as follows:

> ". . . I charge that if you find from the evidence and beyond a reasonable doubt that . . . on or about the 3rd or 4th day of March, 1979, the defendant . . . was more than sixteen years of age, and had sexual intercourse with the prosecuting witness without her consent and against her will, or forcibly overcame her resistance or procured her submission by the use of a deadly weapon, it would be your duty to return a verdict of guilty of first degree rape. . . .
>
> I charge that if you find from the evidence and beyond a reasonable doubt that . . . on or about the 3rd or 4th day of March, 1979, the defendant . . . overcame Angela Pettiford's resistance and had sexual intercourse with her without her consent and against her will, it would be your duty to return a verdict of guilty of second degree rape."

The trial judge at no time instructed the jury that they could only convict defendants, if at all, of first or second degree rape for those incidents which occurred in Pasquotank County.

It is a fundamental rule in the administration of criminal justice that a defendant must be convicted, if at all, of the particular offense charged on the bill of indictment. *State v. Best*, 292 N.C. 294, 233 S.E. 2d 544 (1973); *State v. Watson*, 272 N.C. 526, 158 S.E. 2d 334 (1968); *State v. Jackson*, 218 N.C. 373, 11 S.E. 2d 149 (1940). In the case *sub judice*, the trial judge's charge to the jury created a strong possibility that the jury would convict defendants of offenses not stated in the bills of indictment. By not specifying that defendants could be convicted of only those rapes, if any, which occurred in Pasquotank County, the trial judge allowed the jury to consider whether defendants were guilty of the alleged rapes in Virginia and Rocky Mount. Evidence of all the sexual offenses which purportedly took place on 3 and 4 March 1979 was presented to the jury, and without a limiting instruction, there was nothing to prevent them from considering

defendants' guilt or innocence on all the offenses for which evidence was admitted. It is impossible to discern from the jury's verdict where the particular second degree rape for which they found defendants guilty took place. Consequently, we find that the trial judge committed prejudicial error in failing to charge the jury that they could only convict defendants, if at all, of those rapes which occurred in Pasquotank County. That portion of the Court of Appeals' opinion which found no error in the trial judge's instructions concerning rape is reversed, and the case is remanded for a new trial for all three defendants on the rape charges.

The State assigns as error that portion of the Court of Appeals' decision which awarded a new trial to defendants Covington and Godfrey on the kidnapping charges.[1] By their assignments numbered thirteen, fourteen, nineteen and twenty, defendants Covington and Godfrey argue that in the event this Court reverses the Court of Appeals' decision granting them a new trial, they contend that the Court of Appeals erred in affirming the trial court's denial of their motion for nonsuit on the kidnapping charges and in finding no error in the trial court's failure to instruct the jury on the law pertaining to aiding and abetting a kidnapping. For the reasons stated below, we reverse the Court of Appeals' decision awarding a new trial on the kidnapping charges and find no merit in defendants' remaining assignments of error.

[4] The Court of Appeals granted a new trial on the grounds that the trial court committed prejudicial error in failing to instruct the jury on the law of acting in concert as it applies to kidnapping. At the close of his charge to the jury, the trial judge asked counsel for the defendant and the State if they wished to

1. The State seeks review of this portion of the Court of Appeals' opinion under the authority of Rule 16 of the North Carolina Rules of Appellate procedure, which provides in pertinent part:

> "A party who was an appellee in the Court of Appeals and is an appellee in the Supreme Court may present any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals."

The State properly presented the issue of the trial court's failure to instruct the jury on the law of acting in concert as it applies to kidnapping for review before the Court of Appeals, and is therefore authorized to present this question for review by this Court.

request further instructions. At the State's behest, the trial judge instructed the jury on the law of acting in concert as follows:

> "Members of the Jury, for a person to be guilty of a crime it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit rape each of them is held responsible for the acts of the others done in the commission of the rape."

We fail to understand how the trial judge's omission of an instruction relating the law of acting in concert to the particular offense of kidnapping could prejudice defendants Covington and Godfrey in any manner.

Under the principle of acting in concert, an individual may be found guilty of an offense if he is ". . . present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E. 2d 390, 395 (1979). In order to obtain a conviction under this principle, the State need not prove that the defendant committed any act which constitutes an element of the crime with which he is charged. *State v. Williams*, 299 N.C. 652, 263 S.E. 2d 774 (1980); *State v. Joyner*, *supra*. Thus, the burden of proof which the State must meet to obtain a conviction under the principle of acting in concert is less than its burden to prove that a defendant actually committed every element of the offense charged. The trial judge's failure to instruct the jury in the present case on the law of acting in concert as it relates to kidnapping was therefore beneficial to defendants Covington and Godfrey. In the absence of that instruction, the State had to satisfy the jury that each defendant committed every element of the kidnapping offense in order to obtain a conviction for all three defendants. Had the instruction been given, the jury could have convicted all three defendants of kidnapping if it was satisfied beyond a reasonable doubt that one defendant committed all the elements of kidnapping, while the other two defendants were merely present at the scene and acting with the first defendant according to a common purpose or plan. Since any error by the trial judge in failing to instruct on the law of acting in concert as it pertains to kidnapping was beneficial to defend-

ants Covington and Godfrey, that portion of the Court of Appeals' opinion which granted these defendants a new trial on the kidnapping charges is overruled. For the same reasons, we also find no prejudice to defendants Covington and Godfrey in the trial court's failure to instruct the jury on the law concerning aiding and abetting as it relates to kidnapping, and defendants' assignments numbered fourteen and twenty are overruled.

[5] We likewise find no merit in Covington's and Godfrey's allegations that the Court of Appeals erred in affirming the trial court's denial of their motion for nonsuit on the kidnapping charges. These defendants argue that the evidence presented was insufficient to sustain their convictions of kidnapping.

In ruling upon defendants' motion to dismiss on the grounds of insufficient evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Fletcher*, --- N.C. ---, 272 S.E. 2d 859 (1981); *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980); *State v. Bowman*, 232 N.C. 374, 61 S.E. 2d 107 (1950). The trial court must determine as a question of law whether the State has offered substantial evidence of defendant's guilt on every essential element of the crime charged. "Substantial evidence" is 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).

Kidnapping is defined by G.S. 14-39 as the unlawful restraint, confinement, or removal of an individual from one place to another, without his consent, for the purpose of:

> "(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person."

See also State v. Hunter, 299 N.C. 29, 261 S.E. 2d 189 (1980); *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). There is evidence

in the present case which tends to show that after Ms. Pettiford climbed into the car with the three defendants and defendant Cox refused to follow her instructions, she repeatedly begged all three defendants to take her back to the Elizabeth City State University campus. Neither defendant Covington nor defendant Godfrey made any effort to aid Ms. Pettiford or to suggest to Cox that he return to the University campus. Ms. Pettiford testified that all three defendants told her they would eventually take her back to Elizabeth City if she cooperated with them, and threatened to harm her if she did not cooperate. She stated that defendant Godfrey threatened her with a butcher knife. There is much evidence to suggest that all three defendants repeatedly raped Ms. Pettiford over a period of two days, during which time she repeatedly asked to be allowed to return to Elizabeth City. After considering this evidence in the light most favorable to the State, we find that there was substantial evidence presented to indicate that each defendant unlawfully confined or restrained Ms. Pettiford against her will, for the purpose of committing the felony of rape. The determination of defendants' guilt or innocence was therefore a question to be answered by the jury, and the trial court properly denied defendants' motion to dismiss for insufficiency of the evidence.

We have carefully considered assignments of error numbered twelve and eighteen, presented by defendants Covington and Godfrey, and hold them without merit and overruled.

For the foregoing reasons, that portion of the Court of Appeals' opinion which found no error in defendant Cox's conviction of kidnapping is affirmed. We hold that defendants Covington and Godfrey received a fair trial free from prejudicial error on the kidnapping charges, therefore we reverse the Court of Appeals' decision awarding a new trial to these two defendants, and reinstate the trial court's judgment on the kidnapping offenses. That portion of the Court of Appeals' opinion which found no error in defendants' convictions of second degree rape is reversed, and the case remanded to the trial court for a new trial for all three defendants on the rape charges.

Affirmed in part, reversed in part, and remanded.

SHARRON Y. THORNBURG v. ROBERT ALEXANDER LANCASTER AND MARTHA MITCHELL LANCASTER

No. 90

(Filed 5 May 1981)

1. **Torts § 7.7— settlement as partial or complete—issue of fact—reimbursement order improper**

In an action to recover for personal injuries sustained by plaintiff in an automobile accident where there was an issue of fact as to whether a payment made to plaintiff by defendants' insurer was a partial or final settlement, the trial court's reimbursement order with which plaintiff did not comply was improperly entered, since under G.S. 1-540.3 acceptance of partial or advance payments, absence a properly executed *full* settlement agreement, does not bar the party receiving the payments from suing on the underlying claims.

2. **Rules of Civil Procedure § 41— failure to comply with erroneous order of trial court—order of dismissal improper**

A dismissal under G.S. 1A-1, Rule 41(b) may not be premised upon a party's failure to comply with an erroneous order.

Justice HUSKINS dissenting.

Justices COPELAND and BRITT join in the dissenting opinion.

ON appeal of right by defendants from the decision of the Court of Appeals, one judge dissenting, reported at 47 N.C. App. 131, 266 S.E. 2d 738 (1980), reversing the dismissal of plaintiff's action entered by *Collier, Judge*, at the 29 May 1979 Civil Session of Superior Court, GUILFORD County.

By this appeal, we construe the meaning and scope of G.S. 1-540.3(a), which provides, *inter alia*, that the receipt of advance or partial payments for any claim, potential civil action or action in which any person claims to have sustained *bodily injuries* does not bar or discharge the claims of the person receiving the payments except when the parties have properly executed an agreement in full settlement of all claims.

This case was argued at No. 61 at the Fall Term 1980.

Gerald S. Schafer for plaintiff-appellee.

Tuggle, Duggins, Meschan, Thornton & Elrod, P.A., by Richard L. Vanore, for defendant-appellants.

CARLTON, Justice.

I.

Plaintiff seeks to recover for personal injuries she sustained when her automobile collided with one owned and operated by defendants. In their answer, defendants alleged that plaintiff is barred from bringing this action because she entered into a settlement agreement with defendants' insurance carrier and was paid $3,394.50 as a full and final settlement of her claim.

Defendants filed a motion to dismiss pursuant to Rule 12 and further prayed, in the alternative, that a motion for summary judgment under Rule 56 be granted in their favor.

At the hearing on those motions, Shirley Bennett, a claims representative for defendants' insurer, testified that she handled plaintiff's claim. After several conversations and after plaintiff had furnished medical reports and bills to the claims adjuster, Bennett testified that she and plaintiff agreed to settle the case for $3,000 above plaintiff's medical expenses. After that conversation, Bennett prepared the necessary drafts and releases and mailed them to plaintiff with the following cover letter, dated 23 June 1977:

> Dear Mrs. Thornburg:
>
> As per phone conversation, enclosed are draft and releases. Please sign and have your husband witness your signature. I have paid Dr. Faga direct.
>
> Thank you for your cooperation. Please return the releases in self addressed stamped envelope enclosed.
>
> Yours very truly,
>
> ST. PAUL FIRE & MARINE INS. CO.
>
> Shirley L. Bennett
> Claims Representative
>
> Enclosures

The releases referred to were entitled "FULL AND FINAL RELEASE OF ALL CLAIMS."

Bennett testified that she had no further contact with the plaintiff until 26 July 1977, when the plaintiff telephoned her to

complain of additional medical bills incurred and surgery required as a result of the accident. Bennett told her that if she was not satisfied with the settlement "to send everything back." Plaintiff returned the releases with the additional medical bills on 15 August 1977, but informed Bennett by telephone that she could not return the draft because she had deposited it in her account. Plaintiff also told Bennett at that time, according to Bennett's testimony, that she, the plaintiff, "didn't think it was a final settlement because it was not marked on the draft."

Plaintiff testified that she received the release and draft on or about 26 June 1977. At about the same time, but in any event prior to depositing the draft, plaintiff discovered a knot on her chest. Plaintiff deposited the draft in her checking account sometime before 30 June but did not sign the release. The draft did not contain a release clause. During the first week of July, she consulted her physician, who told her that the knot was cartilage damage to her ribs, apparently caused by the accident. Plaintiff stated that she called Bennett "around the first week in July" to tell her that there would be additional medical expenses. Mrs. Bennett allegedly told both plaintiff and her husband to keep and cash the draft and to send the releases back with the additional bills, which the insurance company would pay. Plaintiff did so. Plaintiff testified that at that time she was unable to return the draft because she had deposited it, but that she offered to send back cash in the amount of the draft. Mrs. Bennett told her to keep it. Plaintiff also stated that she intended that settlement to cover only the "original" injury to her back and neck and that she did not intend that it be a final settlement of all claims.

During the second week of July, plaintiff was admitted to the hospital and underwent surgery to repair the damage to her ribs. Plaintiff's complaint alleged that she incurred medical bills of approximately $1,600 and was unable to work for a period of time, resulting in lost earnings in excess of $900.

Plaintiff's husband's testimony corroborated that of plaintiff.

At the conclusion of the hearing on 4 April 1979, the court filed an order denying defendants' motion to dismiss and, in the alternative, for summary judgment. Judge Kivett ordered plaintiff to reimburse defendants the $3,073.50 paid to her and the

$320.00 paid to her doctor. Plaintiff filed objections and exceptions to the order on 5 April 1979 but did not give notice of appeal. On 3 May 1979 defendants moved to have plaintiff's action dismissed with prejudice for her failure to comply with the reimbursement order. On 24 May 1979 plaintiff filed an affidavit attesting that she did not have and was unable to borrow sufficient funds to comply with the order. On 7 June 1979 Judge Collier ordered a dismissal of plaintiff's action under Rule 41(b) of the North Carolina Rules of Civil Procedure unless within ten days plaintiff complied with the reimbursement order. Plaintiff did not comply, her action was dismissed, and she appealed to the Court of Appeals.

The Court of Appeals reversed the dismissal on the grounds that there was conflicting testimony as to whether the payment was final, advance or partial. Judge Erwin, for the court, wrote that although at the time the draft was tendered the parties intended it to be a final payment, there was conflicting testimony as to the conversations between the insurance adjuster and plaintiff and plaintiff's husband, raising an issue of fact as to whether that was initially intended as final payment was converted to a partial payment by the insurance adjuster's promise that her company would pay the additional medical bills.

The court reasoned that an issue of fact as to the character of the payment rendered the reimbursement order improper because such an order cannot be entered unless the finality of the payment is undisputed. Because the trial court, in this case, necessarily had to make a factual determination prior to the entry of the order, the reimbursement order was invalid. The Court of Appeals then ordered the case remanded to the trial court for a determination of whether plaintiff's failure to comply with the erroneous reimbursement order was proper grounds for a dismissal with prejudice under Rule 41(b). Defendants' cross-assignments of error concerning the trial court's denial of defendants' motions for dismissal and summary judgment were deemed without merit.

Judge Clark, in dissent, found no dispute as to the finality of the payment and therefore considered G.S. 1-540.3 to be inapplicable. He reasoned that because the payment was neither partial nor advance, the trial judge had authority to enter the reimbursement and the dismissal was proper.

II.

[1] The threshold issue in this appeal is whether the reimbursement order with which plaintiff did not comply was properly entered. The propriety of the order depends on whether the payment to plaintiff was partial or final.

Our decision in this case is controlled by G.S. 1-540.3 (Cum. Supp. 1979), which, in relevant part, provides:

> (a) In any claim, potential civil action or action in which any person claims to have sustained bodily injuries, advance or partial payment or payments to any such person claiming to have sustained bodily injuries or to the personal representative of any person claimed to have sustained fatal injuries may be made to such person or such personal representative by the person or party against whom such claim is made or by the insurance carrier for the person, party, corporation, association or entity which is or may be liable for such injuries or death. Such advance or partial payment or payments shall not constitute an admission of liability on the part of the person, party, corporation, association or entity on whose behalf the payment or payments are made or by the insurance carrier making the payments. . . . The receipt of the advance or partial payment or payments shall not in and of itself act as a bar, release, accord and satisfaction, or a discharge of any claims of the person or representative receiving the advance or partial payment or payments, unless by the terms of a properly executed settlement agreement it is specifically stated that the acceptance of said payment or payments constitutes full settlement of all claims and causes of action for personal injuries or wrongful death, as applicable.
>
> (b) . . . .
>
> No claim for reimbursement may be made or allowed by or on behalf of the person or party making such advance payment or payments against the person or party to whom such payment or payments are made except a claim based on fraud.

This statute, by its express terms, applies only to partial or advance payment and prohibits claims for reimbursement only when the payment made was partial or advance; it does not affect the power of a trial judge to order reimbursement when the payment or payments made were in final settlement of all claims. Thus, the propriety of the reimbursement order in the case *sub judice* depends on whether the payment made was partial or final.

The rule governing this determination was altered by the enactment of G.S. 1-540.3. Prior to the passage of G.S. 1-540.3 the intention of the parties regarding the character of the payment was irrelevant. At common law, acceptance by a claimant of any payment, no matter how large or small, accompanied by a statement that the payment is in full settlement constituted accord and satisfaction and operated, *as a matter of law*, to bar any further claim against the party making the payment, *see, e.g., Fidelity & Casualty Co. of N.Y. v. Nello L. Teer Co.*, 250 N.C. 547, 109 S.E. 2d 171 (1959). The obvious purpose of the Legislature in enacting G.S. 1-540.3 was to alleviate the harsh consequences of application of the accord and satisfaction doctrine to personal injury cases and to encourage the making of partial payments to the claimant prior to an agreement on a final settlement. As a result of this statute, seriously injured persons who require long-term medical treatment can now accept piecemeal payments from an insurer before any determination of liability, and those payments represent neither an admission of liability on the part of the insurer nor full satisfaction of the injured party's claims. Under the present law, acceptance of partial or advance payments, absent a properly executed *full* settlement agreement, does not bar the party receiving the payments from suing on the underlying claim. Thus, if the 25 June 1977 payment to plaintiff was a partial or advance payment, her negotiation of the draft does not bar this suit because there is no properly executed settlement agreement, and the entry of the reimbursement order was improper.

Although G.S. 1-540.3 is concerned solely with advance or partial payments, it nowhere defines those terms or indicates how the character of the payment is to be determined. As stated above, whether the payment was partial or final under the statute depends upon the intent of the parties giving and receiving it. The determination of intent is a question of fact and,

therefore, can be resolved only by the trier of fact unless the evidence of intent is undisputed.

The reimbursement order in this case was entered prior to trial and in response to motions to dismiss and for summary judgment. Because a trial judge on such motions cannot resolve issues of fact, *e.g.*, *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972), the order is proper only if the trial judge could find, *as a matter of law*, that the payment was final.

The testimony at the hearing on defendants' motion for summary judgment reveals that there was a dispute regarding the character of the settlement agreement reached. Bennett, the claims adjuster for defendants' insurance carrier, testified that she regarded the agreement as a final settlement of all of plaintiff's claims arising out of the automobile accident. Plaintiff stated that she considered the agreement to cover *only* the injury to her back and neck. Plaintiff's testimony that she intended the settlement to cover only her claim for the injury to her back and neck is sufficient to create an issue as to a material fact, the character of the payment, and to take her case to the jury.[1] Thus, the trial judge could not have found as a matter of law that the payment was final; the trial court's denial of the motions for dismissal and summary judgment was proper; and the entry of the reimbursement order violated the provisions of G.S. 1-540.3, rendering it invalid. The Court of Appeals properly so held.

III.

[2] The remaining question is whether a dismissal under Rule 41(b) of our Rules of Civil Procedure may be premised upon a party's failure to comply with an erroneous order. The Court of Appeals did not decide this question, but vacated the dismissal and remanded for a new ruling in the discretion of the trial court. With this portion of the Court of Appeals' decision, we disagree.

1. Our decision that an issue of fact existed is not premised in any way on plaintiff's testimony as to what occurred *after* she cashed the draft. The dissent erroneously claims that this decision will allow a claimant to convert a final settlement into a partial or advance one by his or her unilateral action. This decision stands only for the proposition that, absent a properly executed settlement agreement, a claimant's testimony that he or she, at the time of the agreement, intended the settlement to be partial or advance creates an issue of fact and is enough to take the case to the jury.

There is nothing in the record before us to indicate that Judge Collier, in hearing the Rule 41(b) motion, gave consideration to the propriety of Judge Kivett's earlier order of reimbursement. He acted properly in this respect, for the only question before him was whether plaintiff had complied with the earlier order. It is well settled in this jurisdiction that one superior court judge cannot correct another's errors of law or change the judgment of another superior court judge previously made in the same action. *E.g., Calloway v. Ford Motor Company*, 281 N.C. 496, 189 S.E. 2d 484 (1972). For Judge Collier to refuse to grant the Rule 41(b) motion on the ground that he disagreed with the earlier order of a fellow superior court judge would, therefore, have been erroneous.

We, however, are not bound by this restriction. Because we hold that the earlier order for reimbursement is invalid, the Rule 41(b) order of dismissal must now fall as well. We agree with the Court of Appeals that no North Carolina or federal case can be found on point. It requires no citation of authority, however, to know that a grave injustice would be committed were we to condone the dismissal with prejudice of an action against a party for failing to obey an earlier order in the matter which was erroneous *ab initio*. Judge Collier's order of 7 June 1979 is, therefore, vacated.

Defendants, appellants in this Court, argue in their new brief that plaintiff failed to appeal from Judge Kivett's order within the time allowed and, therefore, the Court of Appeals was without jurisdiction to consider its validity. However, Rule 16(a) of the Rules of Appellate Procedure provides in pertinent part:

> Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. . . . A party who was an appellee in the Court of Appeals and is an appellant in the Supreme Court may present in his brief any questions going to the basis of the Court of Appeals' decision by which he is aggrieved, and any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals.

Appellant in this Court was the appellee in the Court of Appeals. The question of appealability of Judge Kivett's order did

not go to the substantive basis of the Court of Appeals' decision and defendants did not properly present the question for review to the Court of Appeals; indeed, defendants, in their Court of Appeals' brief, addressed the issue on the merits. The appealability of the reimbursement order is raised for the first time in defendants' brief to this Court. Clearly, the attempt to have this Court address the issue is violative of the quoted portion of Rule 16(a). We have said before that "The attempt to smuggle in new questions is not approved." *State v. Grundler*, 251 N.C. 177, 187, 111 S.E. 2d 1, 8 (1959); *see also, Falls Sales Co. v. Board of Transportation*, 292 N.C. 437, 233 S.E. 2d 569 (1977). We could, of course, address the issue pursuant to our general supervisory and discretionary powers; due to the novel substantive issue presented by this appeal and discussed above, we decline to do so.

IV.

In conclusion, we affirm the decision of the Court of Appeals insofar as it upholds the denial of defendants' motions for dismissal and summary jugment and finds the entry of the reimbursement order improper. That portion of the lower court's decision remanding the Rule 41(b) dismissal motion to the trial court for a new ruling is reversed. The dismissal of plaintiff's action for failure to comply with the reimbursement order is vacated. On remand to the trial court, plaintiff's suit shall be reinstated for trial.

This cause is remanded to the Court of Appeals with instructions to remand to the trial court for further proceedings consistent with this opinion.

Affirmed in part; Reversed in part and Remanded.

Justice HUSKINS dissenting.

I respectfully dissent from that part of the majority opinion which affirms the decision of the Court of Appeals upholding denial of the defense motion for dismissal pursuant to Rule 12(b)(6) or the defense motion for summary judgment pursuant to Rule 56. Summary judgment was appropriate upon defendants' defense that the parties had entered into a full and final settlement of the claim. The reimbursement order of Judge Kivett was error, but it was error favorable to plaintiff.

It is also my view that the dismissal of plaintiff's action for failure to comply with the reimbursement order was not appealed in time to the Court of Appeals and accordingly the late appeal should have been dismissed in the Court of Appeals.

Plaintiff sued for personal injuries suffered in a collision between her car and the car driven by the male defendant and owned by the female defendant. By their answer, defendants assert that plaintiff is barred from prosecuting this case because she entered into a settlement agreement with defendants' insurance carrier and has been paid $3,394.50 in full settlement of her claim. Defendants therefore moved for dismissal on the pleadings or for summary judgment.

At the hearing on the motions, Shirley Bennett, a claims representative for insurer, testified that she and plaintiff agreed to settle plaintiff's claim for $3,000 over the medical bills. In accordance with that agreement, Bennett testified she mailed a draft and final release to plaintiff on 23 June 1977. Both plaintiff and defendants agreed that the check was originally intended as a full and final payment of all claims. On cross-examination, plaintiff testified: "I agreed to a compromise settlement of my claim for $3,000 plus the outstanding medicals. What Mrs. Bennett said was true about the conversation. After that conversation and the argument settled, Mrs. Bennett sent me a letter that confirmed very briefly our conversation and enclosed the draft and release." Plaintiff further testified she "first refused to settle for $2,000 because I was concerned of other problems. . . . I negotiated from $2,000 up to $3,000."

Plaintiff admitted she received the check for $3,073.50 and a transmittal letter with a release entitled "FULL AND FINAL RELEASE OF ALL CLAIMS." Medical expenses amounting to $321 were paid directly to the treating physician. The record shows that the check was endorsed by plaintiff, deposited in her checking account and cleared on 30 June 1977. Plaintiff further admitted that, although she accepted the check and used its proceeds, she failed to sign and return the release.

According to Mrs. Bennett's testimony, on 26 July 1977 plaintiff telephoned her and informed her that plaintiff had incurred further medical bills and had been in the hospital for surgery by reason of the accident. Bennett testified she told plaintiff that if

she was not satisfied with the settlement "to send everything back." Instead of returning everything as directed, plaintiff returned the release unsigned on 15 August 1977 enclosing therewith her additional medical bills and by telephone informed Shirley Bennett that she had deposited the draft in her bank account.

Plaintiff testified she called Shirley Bennett around the first week in July to tell her there would be additional medical expenses and that Bennett told her to go ahead and cash the draft and send the release back with the additional bills, which she did. Plaintiff's husband testified he also spoke to Bennett and that she told him to keep the draft and send the release back unsigned.

Shirley Bennett denied she ever told plaintiff or her husband to keep the draft and return the release unsigned. She testified that plaintiff understood the payment of $3,000 plus medicals was in full and complete settlement of her claim; otherwise, the release would not have been entitled "FULL AND FINAL RELEASE OF ALL CLAIMS."

On 4 April 1979, Judge Kivett denied motions of defendants to dismiss and for summary judgment but ordered plaintiff to reimburse defendants' insurer the sum of $3,073.50 paid to her plus $320 paid to her doctor. Plaintiff did not appeal from this order and did not make the reimbursement as ordered. On 3 May 1979, defendants moved that plaintiff's action be dismissed with prejudice for failure to comply with the reimbursement order of Judge Kivett. Responding to that motion, plaintiff filed an affidavit that she did not have and had been unable to borrow sufficient funds to comply with the order. The motion was heard by Judge Collier on 7 June 1979, and he entered an order dismissing plaintiff's action unless, within ten days, she complied with Judge Kivett's reimbursement order. Plaintiff did not comply and her action was subsequently dismissed.

She appealed to the Court of Appeals and that court reversed with Clark, J., dissenting. The Court of Appeals held that Judge Kivett's reimbursement order was "invalid" and also denied cross-assignments by defendants that the trial court erred in denying the motions to dismiss and for summary judgment. The majority said a genuine issue of material fact does exist and the trier of fact "must determine whether the payment to plaintiff constituted a full settlement of her claim or was an advance

or partial payment. There are also the issues of fact relating to negligence which are raised by plaintiff's complaint. Denial of the motion to dismiss was proper, as the complaint does state a claim upon which relief can be granted." 47 N.C. App. at 134, 266 S.E. 2d at 741. In view of Judge Clark's dissent, defendants appealed to this Court as of right.

It is my view that the Court of Appeals erred in vacating Judge Collier's order of 7 June 1979 dismissing plaintiff's action for failure to comply with Judge Kivett's order of 2 April 1979 and in remanding defendants' Rule 41(b) motion for a new ruling. This ruling is erroneous because plaintiff did not appeal within the time allowed by law from Judge Kivett's reimbursement order which affected "a substantial right" of plaintiff. *See* G.S. 1-277(a); G.S. 7A-27(d). Plaintiff's notice of appeal from that order was not filed until 18 June 1979, long after the ten days allowed by G.S. 1-279(c) had expired. Of course, as the majority here indicates, Judge Collier could not overrule Judge Kivett. The reimbursement order thus became final. The appeal should be dismissed.

The principal grounds for my dissent, however, are not procedural. Rather, it is my view that the Court of Appeals erred in upholding Judge Kivett's denial of defendants' Rule 12(b)(6) motion to dismiss or, in the alternative, defendants' Rule 56 motion for summary judgment based on the compromise settlement agreement between the parties. Judge Kivett erred in ordering plaintiff to return the money paid to her by defendants' insurer in order to allow her to proceed with her action. This was error favorable to plaintiff. It gave her a chance to proceed in an action she had already settled.

It is quite obvious that plaintiff negotiated a complete settlement of her claim and received a settlement draft in the amount agreed upon. She is bound by her admission to that effect. Thereafter, but before depositing the draft in her checking account, she noticed a lump in her chest which, according to her testimony, was an injury which she had not contemplated at the time she negotiated the settlement. Nevertheless, she proceeded to deposit the settlement checks and accept the benefits of the settlement. She is now estopped to take a contrary position. She cannot have her cake and eat it too. The factual dispute about

whether the insurance agent told plaintiff to keep the money sometime in July 1977 after the check was cashed is of no consequence to the resolution of the suit. Plaintiff admits a full settlement had already been agreed upon and entered into before that dispute arose.

The check was not an advance or a partial payment, and G.S. 1-540.3 has no application here. The check for $3,073.50 was mailed to plaintiff by the insurance carrier for defendants with a "full and final settlement" release attached. No rational mind could have thought they were intended as an "advance or partial payment" on plaintiff's claim. The majority opinion from which I dissent permits plaintiff, *by her unilateral action alone*, to convert the check and closing papers intended to consummate a final settlement into an "advance or partial payment" controlled by G.S. 1-540.3. This permits fraud, encourages perjury and subverts the law as I understand it. For the reasons stated, I maintain that G.S. 1-540.3 has no application to this case. The admissions of plaintiff speak far louder than a signed form release.

If plaintiff became dissatisfied with the final settlement to which she had agreed, then it was her duty "to send everything back," decline to consummate the settlement previously agreed upon, and carry her case to the jury—all of which she had a perfect right to do. This right terminated the day she cashed the check which she admits was intended as a final settlement of the claim.

The majority holding in this case will put an end to settlements by mail. Hereafter, no defendant and no liability insurance carrier will ever part with a check or draft in settlement of a claim unless a properly signed final release is simultaneously or first delivered in exchange for it. Out-of-court settlement and compromise should be encouraged as opposed to perjury and fraud in court.

I vote to dismiss the appeal or, in the alternative, to reverse and remand for entry of summary judgment for defendants.

Justices COPELAND and BRITT join in this dissent.

In re Kapoor

IN THE MATTER OF THE DENIAL BY THE SECRETARY OF REVENUE OF CLAIM FOR REFUND OF NORTH CAROLINA INHERITANCE TAXES BY THE ESTATE OF SHANKAR N. KAPOOR, DECEASED

No. 52

(Filed 5 May 1981)

1. **Administrative Law § 5— appeal from decision of Tax Review Board—applicability of Administrative Procedure Act**

Provisions of the N.C. Administrative Procedure Act governed review of a decision of the Tax Review Board denying a refund of N.C. inheritance taxes on certain insurance proceeds where all relevant administrative remedies had been exhausted and there was no adequate judicial review provided under any other statute. G.S. 150A-43.

2. **Taxation § 23— rules of construction of tax statutes**

When the meaning of a term providing for taxation is ambiguous, it is construed against the State and in favor of the taxpayer unless a contrary legislative intent appears, but when a statute provides for an exemption from taxation a contrary rule applies and any ambiguities are resolved in favor of taxation.

3. **Taxation § 27.1— separation agreement—life insurance trust—proceeds as debt of decedent—deduction for inheritance tax purposes**

Where a separation agreement required the decedent to "maintain in full force and effect . . . a life insurance trust in the amount of at least $150,000" for the benefit of decedent's former wife and their children and "to make timely payment of all premiums due on the policies placed in said trust," and all premiums due on the policies had been paid at the time of decedent's death, the decedent's "debt" under the agreement was not the amount of money required to maintain the policies but was the $150,000 in life insurance proceeds required to fund the trust. Furthermore, the obligation to fund the trust was supported by consideration and was a valid contractual debt where the separation and trust agreements showed an intention by decedent to extend his obligation to provide alimony and child support beyond the time of his death in exchange for his former wife's relinquishment of her marital and all other claims against decedent. Therefore, the life insurance proceeds were a "debt of decedent" deductible from decedent's estate for inheritance tax purposes pursuant to G.S. 105-9(4).

Justice MEYER dissenting.

ON discretionary review pursuant to G.S. 7A-31 of the decision of the Court of Appeals, 47 N.C. App. 500, 267 S.E. 2d 418 (1980), reversing judgment for petitioner-estate entered by *Hobgood (Hamilton H.), Judge*, at the 8 October 1979 Civil Session of Superior Court, WAKE County.

By this appeal, we interpret the meaning of G.S. 105-9(4), which provides a deduction from the state inheritance tax for "[d]ebts of decedent."

Haywood, Denny & Miller, by B. M. Sessoms and James H. Johnson III, for appellants.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Boylan, for the Secretary of Revenue.

CARLTON, Justice.

I.

Shankar N. Kapoor, a practicing orthopaedic surgeon, died testate on 23 December 1973 survived by his second wife, Nancy N. Kapoor, his former wife, Ruth Kapoor, and two minor children by his first marriage. Prior to obtaining a divorce, decedent and Ruth Kapoor executed a separation agreement, by the terms of which decedent obligated himself to "maintain in full force and effect . . . a life insurance trust in the amount of at least $150,000" for the benefit of Ruth Kapoor and the children. Decedent established the trust as required and at the time of his death all premiums had been paid and policies in the amount of $151,754.63 were in effect.

The trustee, Wachovia Bank & Trust Company, N.A., collected the policy proceeds. The executor, Central Carolina Bank & Trust Company, filed with the North Carolina Department of Revenue a North Carolina Inheritance and Estate Tax Return and with the Internal Revenue Service a United States Estate Tax Return. In both, the executor included the proceeds of the life insurance policies in the amount of $151,754.63. These amounts were included in the returns without any corresponding deduction. The executor timely paid North Carolina inheritance taxes of $15,464.31 and federal estate taxes of $23,895.53.

Thereafter, the executor requested a refund of the taxes paid on the insurance proceeds from both the state and federal authorities based on a deduction from the proceeds which the executor claimed was allowable under state and federal law. The Internal Revenue Service allowed the claim for refund in the amount of $22,735.07. The requested refund from the North

Carolina Department of Revenue in the amount of $14,510.58 was denied in toto.

The executor, pursuant to G.S. 105-266.1, requested a hearing on the denial of its claim for refund before the Secretary of Revenue, and this hearing was held pursuant to the procedures outlined in G.S. 105-241.1 on 20 January 1978. The Secretary denied the claim for refund.

On 17 February 1978, pursuant to G.S. 105-241.2, the executor filed for review before the Tax Review Board. The Board held a hearing and affirmed the decision of the Secretary of Revenue. Tax Review Board Administrative Decision No. 152 (June 21, 1978).

The executor, pursuant to the Administrative Procedure Act, G.S. Chapter 150A, petitioned for judicial review of this administrative decision on the grounds that the decision was affected by errors of law, unsupported by substantial evidence in view of the entire record and arbitrary and capricious. A hearing was held before Judge Hobgood at the 8 October 1979 Civil Session of Superior Court, Wake County, and Administrative Decision No. 152 of the Tax Review Board was reversed. Judge Hobgood found that the Tax Review Board's conclusions of law were "erroneous upon the facts found" and "erroneous as a matter of law." The Department of Revenue was ordered to refund to petitioner the amount of $14,510.58 together with interest as provided by law.

The Secretary of Revenue appealed, and the Court of Appeals reversed the superior court. The executor petitioned this Court for discretionary review. We allowed the petition on 16 September 1980.

II.

[1] Because this appeal involves review of a decision of an administrative agency, we first determine which statute provides for and governs our review.

When faced with an appeal from a decision of an administrative agency, courts should first turn to the North Carolina Administrative Procedure Act (hereinafter "APA") to discover whether that act controls. The formula for its application is simple. The APA allows judicial review of a final agency deci-

sion in a contested case when all relevant administrative remedies have been exhausted and there is no adequate judicial review provided under any other statute. G.S. § 150A-43 (1978); *accord, State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980). Applying that formula to the case at hand, we find that the Tax Review Board is an agency, within the meaning of that term as set forth in G.S. 150A-2(1) (1978); that all administrative remedies have been exhausted, *see* G.S. 105-241.2 to .3, -266.1 (1979); and that judicial review is not provided for by any other statute.[1] Thus, the provisions of the APA govern our review.

We next ascertain the appropriate scope of inquiry as limited by the standards set forth in G.S. 150A-51 (1978). The appropriate standard or standards can be determined only after examination of the issues raised by the appeal. *North Carolina Savings and Loan League v. North Carolina Credit Union Commission*, 302 N.C. 458, 276 S.E. 2d 404 (1981). On this appeal the statutory term "debt of decedent" must be construed and that interpretation applied to the undisputed facts to determine whether petitioner is entitled to a deduction in the amount of the policy proceeds. In reviewing an administrative agency's interpretation of a term, the appropriate inquiry is whether that interpretation is "affected by . . . error of law," G.S. 150A-51(4). *North Carolina Savings and Loan League v. North Carolina Credit Union Commission*, 302 N.C. 458, 276 S.E. 2d 404. After the meaning of "debt of the decedent" is ascertained, we will then review the Tax Review Board's decision to determine if its conclusion that petitioner is not entitled to the deduction is supported by substantial evidence in view of the entire record, G.S. 150A-51(5). With these standards in mind, we turn to the merits of this appeal.

III.

Petitioner contends that it is entitled to a deduction in the amount of the insurance policy proceeds paid into the trust

1. We note that G.S. 105-241.3 provides for appeal from the decision of the Tax Review Board under the provisions of Article 33 of Chapter 143 of the General Statutes. That Article, dealing with judicial review of certain administrative agency decisions, was repealed effective 1 February 1976. Law of April 12, 1974, 1973 N.C. Sess. Laws 691, Ch. 1331, s. 2, as amended by Law of March 24, 1975, 1975 N.C. Sess. Laws 44, Ch. 69, s. 4.

created for the support and maintenance of decedent's first wife and children by virtue of G.S. 105-9(4) (1979), which provides: "In determining the clear market value of property taxed under this Article, or schedule, the following deductions, and no others, shall be allowed: . . . Debts of decedent." It is the scope of this term which determines the outcome of this appeal.

[2] Special canons of statutory construction apply when the term under consideration is one concerning taxation. When the meaning of a term providing for taxation is ambiguous, it is construed against the state and in favor of the taxpayer unless a contrary legislative intent appears. *Institutional Food House, Inc. v. Coble, Secretary of Revenue*, 289 N.C. 123, 221 S.E. 2d 297 (1976); *In re Clayton-Marcus Company*, 286 N.C. 215, 210 S.E. 2d 199 (1974); *Colonial Pipeline Company v. Clayton, Commissioner of Revenue*, 275 N.C. 215, 226-27, 166 S.E. 2d 671, 679 (1969). But when the statute provides for an *exemption* from taxation a contrary rule applies and any ambiguities are resolved in favor of taxation. *E.g., In re Clayton-Marcus Company*, 286 N.C. 215, 210 S.E. 2d 199. "The underlying premise when interpreting taxing statutes is: 'Taxation is the rule; exemption the exception.' " *Broadwell Realty Corporation v. Coble, Secretary of Revenue*, 291 N.C. 608, 611, 231 S.E. 2d 656, 658 (1977) (quoting *Odd Fellows v. Swain*, 217 N.C. 632, 637, 9 S.E. 2d 365, 368 (1940)). In all tax cases, the construction placed upon the statute by the Commissioner of Revenue, although not binding, will be given due consideration by a reviewing court. *Campbell v. Currie, Commissioner of Revenue*, 251 N.C. 329, 111 S.E. 2d 319 (1959). Despite these special rules, our primary task in interpreting a tax statute, as with all other statutes, is to ascertain and adhere to the intent of the Legislature. *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978). The cardinal principle of statutory construction is that the intent of the Legislature is controlling. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978).

Citing the principle of strict construction of exemptions from taxation, the Secretary of Revenue contends that the term "debts of decedent" should be construed narrowly and technically to include only those obligations of the decedent which were due and owing prior to his death and as to which the person to whom the obligation was owed could have maintained a suit. "Strictly speaking, a decedent's 'debts' include only those obligations which he

owes at the time of his death." 2 Wiggins, *Wills and Administration of Estates in North Carolina* § 238 (1964). The Court of Appeals accepted the Secretary's contentions as to the scope of G.S. 105-9(4) and concluded that the only obligation owed by decedent prior to his death was the maintenance of the life insurance policies by timely payment of all premiums. Because all the premiums due on the policies had been paid at the time of death, decedent had fully performed his obligations under the separation agreement and there was no debt to deduct:

> [W]hat decedent owed under the pertinent provision of the separation agreement was "a life insurance trust in the amount of at least $150,000.00" maintained in full force and effect, and this obligation was fulfilled by the payment of the necessary life insurance premiums. At the time of decedent's death no debt existed with respect to this obligation.

47 N.C. App. at 501, 267 S.E. 2d at 419.

Petitioner, on the other hand, contends that the deduction for debts of the decedent under state law should be interpreted to conform with deductions allowable under federal law. In computing the value of the taxable estate for federal estate tax purposes, deductions are allowed "for claims against the estate" and "for unpaid mortgages on, or any indebtedness in respect of property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate." I.R.C. § 2053(a)(3)-(4). Petitioner contends that the definition of "debts of decedent" suggested by the Secretary and adopted by the Court of Appeals is the same as that of "claims against the estate" under federal law and, had our Legislature intended such a narrow scope for the deduction, it would have used the federal language. According to petitioner, the choice of the term "debts of decedent" in lieu of "claims against the estate" evidences a legislative intent to give the deduction a greater scope than claims against the estate and, therefore, "debts of decedent" was intended to encompass both the claims and indebtedness provisions of federal law. While the federal provisions provide some guidance, absent a clear indication of legislative intent to parallel federal law by use of identical language or otherwise, we cannot accept federal law as controlling. Instead, we will look to "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).

The purpose of our inheritance tax laws is to raise revenues for the operation of the state government by imposing a tax on the transfer of property when the transfer occurs by reason of death. G.S. §§ 105-1, -2 (1979). The tax imposed upon the transfer depends upon the amount going to each beneficiary and each beneficiary's relationship to the decedent. G.S. §§ 105-4 to 105-6.[2] In determining the value of the property taxed under the inheritance laws, deductions are allowed for:

(1) . . . [U]npaid ad valorem taxes accruing during the calendar year of death.

(2) Drainage and street assessments (fiscal year in which death occurred).

. . . .

(4) Debts of decedent.

(5) Estate and inheritance taxes paid to other states, and death duties paid to foreign countries.

G.S. § 105-9 (1979).[3] From this list of allowable deductions, we glean that the Legislature intended that the value of the gross estate be reduced by the amount of obligations associated with the property included therein.

[3] The real questions, then, are what was dedecent's true debt under the separation agreement and whether the debt was validly contracted.

The separation agreement creating the obligation requires Dr. Kapoor, the decedent, to "maintain in full force and effect in

2. An additional tax is imposed when the amount of tax computed on the basis of amount and relationship is less than the maximum state death tax credit allowable by the Federal Estate Tax Act. The additional tax is the amount of the difference between the maximum credit and the state inheritance tax otherwise imposed. G.S. § 150-7 (1979).

3. This statute also allows deductions for taxes accrued and unpaid at the death of the decedent, funeral and burial expenses, the cost of a monument, commissions of the personal representative and other costs of administration. G.S. § 105-9(1), -9(3), -9(6), -9(7), -9(8).

accordance with the provisions thereof, a life insurance trust in the amount of at least $150,000.00 for the benefit of the party of the second part [Ruth Kapoor] and/or their children. The party of the first part agrees to make timely payment of all premiums due on the policies placed in said trust . . . ." The Court of Appeals construed this language as creating an obligation to pay the premiums only and not to create a debt of $150,000. We cannot agree with the Court of Appeals' conclusion. While the separation agreement is phrased in terms of maintenance of the life insurance trust and payment of the premiums, we conclude that Dr. Kapoor's "debt" under the agreement was, in reality, the $150,000. What Mrs. Kapoor bargained for, and what she gave up her marital rights for, was not the amount of money required to maintain the policies, but was the proceeds the policies would yield at Dr. Kapoor's death. That the amount of the proceeds is the debt becomes even more clear when a breach of the agreement by Dr. Kapoor at the time of his death is hypothesized. Mrs. Kapoor would have a claim for the entire amount of the proceeds, not just the amount of premiums unpaid. Indeed, it is conceded by the Secretary of Revenue that had Dr. Kapoor failed to maintain the policies, Mrs. Kapoor would have a claim against the estate for the full amount of the proceeds and that that amount would be deductible as a debt of the decedent. It is clear to us that Dr. Kapoor's "debt" under the separation agreement was to leave, at his death, a trust in the amount of at least $150,000; the obligation to purchase insurance and to pay the premiums was merely the method chosen by the parties to fund the trust and to guarantee the corpus. A breach of this agreement would have no effect upon the amount or character of the contractual obligation owed; the debt would still be the amount of the insurance proceeds had the policies been purchased and maintained as promised. Thus, we hold that decedent's "debt" under the separation agreement was the $150,000 proceeds required to fund the trust.

The sole remaining question is whether the obligation to fund the trust is a valid contractual debt, one supported by consideration.

The duty of a husband to pay alimony is personal and terminates at his death. *See generally* 2 R. Lee, *North Carolina Family Law* § 153 (4th ed. 1980). The same is true of a father's obligation to support his children. *Lee v. Coffield*, 245 N.C. 570, 96

S.E. 2d 726 (1957). However, the husband and father may by contract create an obligation to provide alimony and child support which survives his death and which constitutes a charge against his estate. *Layton v. Layton*, 263 N.C. 453, 139 S.E. 2d 732 (1965); Lee, *supra* at § 153. The intention that the obligation survive the husband-father's death must be clearly expressed. *Layton v. Layton*, 263 N.C. 453, 139 S.E. 2d 732.

We therefore examine the documents before us to determine whether Dr. Kapoor entered into a contractual obligation to support his wife and children by an agreement which expressed a clear intention that the obligation should survive his death. Paragraph 5 of the separation agreement provided essentially that Dr. Kapoor agreed to establish and maintain a life insurance trust in the amount of at least $150,000 for the benefit of his wife and children. He further agreed to make timely payments of all premiums due on the policies. Simultaneously with the execution of the separation agreement, and in accordance with Paragraph 5, Dr. Kapoor executed a trust agreement which named Wachovia Bank & Trust Company, N.A., as trustee and which agreement provided that at least $150,000 of insurance proceeds on Dr. Kapoor's life would be made payable to the trustee. The record discloses that Wachovia was named as trustee and beneficiary of two separate policies totaling $160,000. The trust agreement provided, *inter alia*, that in the event that Ruth Kapoor survived Dr. Kapoor and had not remarried, the net income of the trust would be paid to Ruth Kapoor for so long as she lived and remained unmarried. With respect to the principal of the trust, the trustee was empowered with discretion to provide such amounts to Ruth Kapoor and the children as it deemed "reasonably necessary for the support, care, and comfort" of Ruth Kapoor and the children in the manner to which they had been accustomed during Dr. Kapoor's life and for their emergency and educational needs. The agreement expressly provided that during the life of Ruth Kapoor and while she was not married to a person other than Dr. Kapoor, Dr. Kapoor possessed no right to revoke or amend the agreement and no rights in the insurance policies on his life.

Together, these documents evince an unmistakable intention to extend the obligation to provide alimony and child support beyond Dr. Kapoor's death. In exchange for Dr. Kapoor's promise to fund the trust Mrs. Kapoor relinquished all her marital rights

and all other claims against Dr. Kapoor. The release of marital rights was valid consideration for Dr. Kapoor's promise and a binding and enforceable contract was thereby created.

Because the "debt" of funding the trust was validly contracted for, we hold that petitioner is entitled to deduct from the taxable estate the proceeds going into the life insurance trust as a debt of decedent under G.S. 105-9(4).[4] Accordingly, petitioner is entitled to a corresponding refund of inheritance taxes paid on those proceeds.

The decision of the Court of Appeals is reversed. This cause is remanded to that court with instructions to remand to the Superior Court, Wake County, for reinstatement of the judgment filed on 14 November 1979 in favor of petitioner.

Reversed and Remanded.

Justice MEYER dissenting.

I must respectfully dissent. It is clear that decedent's obligation under the separation agreement was to "maintain in full force and effect in accordance with the provisions thereof, a life insurance trust in the amount of at least $150,000.00 for the benefit of the party of the second part and/or their children" and in connection with said trust "to make timely payment of all premiums due on the policies placed in said trust . . . ." Decedent fully complied with his obligation under the separation agreement. As of the date of his death, he was not indebted for any portion of any premium payment and the trust was in full force and effect.

The majority concludes that the language of the separation agreement creating decedent's obligation to maintain the trust in question clearly expresses a contract to create an obligation that survives his death. I am unwilling to go that far. The majority

4. We note that our decision will not have the effect of allowing a deduction in cases in which the life insurance proceeds are not part of the property taxed under our statutes even though there is still a "debt of the decedent." G.S. 105-9, the sole statute providing for deductions, allows a deduction which is associated with certain property only when that property is taxed under the inheritance laws. If the insurance proceeds were not includable as property of decedent, no deduction for indebtedness associated with those proceeds will be allowed.

concedes that, if any "debt" was created by the separation agreement, it was the " 'debt' of funding the trust . . . ." If that is correct, and if, at the time of decedent's death, there remained no further obligation to fund the trust, wherein can there be found a "debt" of decedent?

Simply put, I cannot equate decedent's "debt" at the time the separation agreement was made (to-wit, to maintain the trust in full force and effect) with an agreement to pay the "proceeds" of $150,000.00. I do not agree that decedent's "obligation to purchase insurance and to pay the premiums was merely the method chosen by the parties to fund the trust and to guarantee the corpus."

While I believe it illogical that the proceeds are not deductible under our state law, I do not believe the law as presently written allows it. That is a matter for the legislature and not for this Court.

I vote to affirm the decision of the Court of Appeals.

STATE OF NORTH CAROLINA v. FREDERICK BRACEY, JR.

No. 24

(Filed 5 May 1981)

1. **Criminal Law § 92— motion to sever—question before court**

The question before the court on a motion to sever is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial.

2. **Criminal Law § 92.3— consolidation of robbery charges against defendant—transactional connection**

Three charges against defendant for common law robbery were properly consolidated for trial on the ground that the offenses were based on a series of acts or transactions connected together or constituting parts of a single scheme or plan where all of the offenses occurred within ten days on the same street in Wilmington; all occurred in the late afternoon; in each case, two black males physically assaulted the attendant of a small business and took petty cash from the person of the victim or the cash box of the business; the assaults were of a similar nature, and each was without weapons, involved an element of surprise and involved choking, beating and kicking the victim; and in each case, the robbers escaped on foot. G.S. 15A-926(a).

3. Jury § 6.3— improper hypothetical question to prospective jurors

The trial court properly refused to permit defense counsel to ask each prospective juror whether such juror would change his opinion that defendant was not guilty simply because eleven other jurors held a different opinion that defendant was guilty since such question could not reasonably be expected to result in an answer bearing upon the qualification of the juror but was designed to commit the juror to a fixed position in regard to the evidence before he had heard it from the witnesses and before he had been instructed on the law by the court.

4. Constitutional Law § 75— right against self-incrimination—impeachment of defendant—use of testimony given at suppression hearing

Where defendant testified at a hearing on a motion to suppress his confession that he was under the influence of PCP or "bam" at the time he confessed, defendant's right against self-incrimination was not violated when the State was permitted to use his testimony from the suppression hearing to cross-examine him for impeachment purposes as to whether he used "bam."

5. Criminal Law §§ 85.3, 86.5— cross-examination of defendant—illegal acts—impeaching good character evidence—motive

Cross-examination of defendant in a robbery prosecution about his purchase and use of marijuana and drinking of beer after defendant testified he did not have a job between certain dates was relevant (1) to impeach the evidence of good character already in evidence, or (2) to establish a pecuniary motive for the robberies.

6. Criminal Law § 102.3— improper jury argument—curative instructions

In this prosecution of defendant for three robberies, defendant was not prejudiced by the prosecutor's jury argument of facts not in evidence concerning a photographic identification of defendant by two of the robbery victims where the trial judge took the first logical opportunity he had to give a curative instruction to the jury.

7. Robbery § 3— competency of evidence in robbery prosecution

In this prosecution of defendant for three robberies, a bloody pack of matches from the wallet of one robbery victim was properly admitted to illustrate the victim's previous testimony of how he was beaten and kicked until blood was drawn and he was rendered unconscious, a picture of a robbery victim taken at the hospital on the day he was robbed was properly admitted to illustrate his testimony concerning the robbery, and diagrams and testimony indicating the location of defendant's residence in relation to the robberies and the location of the robbed establishments in relation to each other were also properly admitted.

8. Criminal Law § 76.1— refusal to suppress confession—motion for new suppression hearing because of newly discovered evidence

In a robbery prosecution in which defendant testified at a hearing on a motion to suppress his confession that he was under the influence of drugs and was drowsy at the time he confessed, an officer testified defendant was alert when he confessed, and the trial judge found that defendant was not under the

influence of drugs when he made his confession, the trial court did not err in refusing to conduct a new suppression hearing because of newly discovered evidence when one of the robbery victims testified at trial that he saw defendant at the police station and he appeared sleepy, since such testimony only corroborated evidence already before the court and was not an "additional pertinent fact" within the meaning of G.S. 15A-975(c).

9. **Criminal Law § 134.4— youthful offender—ambiguity in "no benefit" finding—new sentencing hearing**

A judgment stating that the eighteen-year-old defendant "would benefit as a Committed Youthful Offender but that Society would not" is ambiguous and requires a new sentencing hearing, since the language employed does not reveal whether defendant was found by the trial judge to be eligible or ineligible for the benefits of youthful offender status as required by G.S. 148-49.14.

ON the State's petition for discretionary review of decision of the Court of Appeals, 48 N.C. App. 603, 269 S.E. 2d 289 (1980), which found error in the trial before *Bruce, J.*, at the 30 July 1979 Session of NEW HANOVER Superior Court and ordered a new trial.

Defendant was charged with common law robbery in three separate indictments. The robberies allegedly occurred over a ten-day period from 17 April to 26 April 1979 in a two-block area of Market Street in Wilmington, North Carolina. In each robbery, two men would enter a small business in the afternoon and one of the men would assault the proprietor while the other took money from the cash drawer or the victim. The cases were consolidated for trial over objection of defendant. The evidence of each robbery may be summarized as follows:

In Case No. 79-CR-8013, Howard Edgerton was robbed while standing near the doorway of the Market Street Exxon at about 6:15 p.m. on 17 April 1979. A man came up behind Edgerton, put his arm around Edgerton's throat and began to choke him. The man told Edgerton not to fight him and to give him the money. Edgerton unlocked the cash register. Another man, whom Edgerton identified as defendant, took approximately $78 from the cash register while the first man stood over Edgerton. The two robbers ran around behind the station and left together. The defense's cross-examination of Edgerton questioned Edgerton's identification of defendant. Edgerton admitted he did not give the police much of a description of the two people who robbed him and had told the police it would be a waste of time for him to look at photographs. He admitted he had picked two people out of a

line-up, which did not include defendant, as the robbers and the first time he had seen defendant was the first day of the trial.

In Case No. 79-CR-8012, Thomas B. Hughes was robbed at approximately 4 p.m. on 25 April 1979 while working at his place of business, Pick and Plunder, located at 3020 Market Street, one-half block west of the Market Street Exxon. Hughes was sitting on the sidewalk working on a cash register. Two black males approached him and inquired whether he had an end table to which he replied he did not. Hughes entered his store with the black males following behind him. The two men went out the front door of the store. Then, the one Hughes identified as defendant charged him. Hughes grabbed defendant. The other black male jumped Hughes from behind and started to choke him. The three continued to struggle. The robbers eventually took approximately $95 from Hughes' wallet and left. The defense was not able to discredit Hughes' identification of defendant on cross-examination.

In Case No. 79-CR-8011, John B. Watkins was robbed at approximately 3 p.m. on 26 April 1979 while working at the Jay-Wash which is located almost directly across the street from the Market Street Exxon. Two black men came to his office that day. One of the men hit Watkins in the head and threw him against his desk. The other man, whom Watkins identified as defendant, began going through the desk drawer. Watkins had $22 taken from a cash box and $90 taken from his wallet. Both men hit and kicked him.

The State introduced, over objection, evidence that defendant confessed to committing all three offenses.

Defendant denied robbing Hughes, Edgerton or Watkins and denied confessing to the robberies.

The jury convicted defendant of the robbery of Thomas B. Hughes, Case No. 79-CR-8012, and acquitted him of the other two robberies. Judgment was imposed upon the verdict, and defendant appealed to the Court of Appeals.

Of the several assignments of error, the Court of Appeals, in an opinion by Webb J., with Martin (Robert M.) and Hill, JJ., concurring, addressed only two and held that (1) the trial court erred in consolidating the three charges thereby requiring a new trial

and (2) defendant's testimony on voir dire that he used PCP was not used illegally against him at trial before the jury.

We allowed the State's petition for discretionary review of the decision awarding a new trial for improper joinder. Defendant has brought forward all other assignments of error argued in the Court of Appeals.

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

D. Webster Trask, attorney for defendant appellee.

HUSKINS, Justice.

The first issue we must address is whether the Court of Appeals erred in holding the three separate charges were erroneously consolidated for trial. The Court of Appeals interpreted *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978), a case wherein a charge of assault with intent to commit rape was held to have been properly consolidated with charges of kidnapping and rape which occurred three hours later, to require this result. The Court of Appeals reasoned:

> The rationale of that case was that two separate charges may be consolidated if the scheme or plan is to accomplish one thing. We do not believe it applies in this case. We believe that implicit in the holding of *Greene* is the requirement that there be a transactional connection or a continuing program of action involving the crimes charged in order to consolidate them for trial. In the case sub judice there was no transactional connection or continuing program of action in regard to the three separate armed robberies. We hold that this scheme or plan to commit a series of several different robberies in the future is not a "series of acts of transactions" constituting a single scheme or plan within the meaning of the statute. It was error to consolidate the three separate charges for trial.

48 N.C. App. at 604-05, 269 S.E. 2d at 290. We hold this reasoning and interpretation of *Greene* is erroneous and accordingly reverse.

Consolidation of the offenses for trial is controlled by G.S. 15A-926(a) which provides:

> 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. . . .

This statute supplanted former G.S. 15-152 effective 1 July 1975. *See* 1973 N.C. Sess. Laws c. 1286 §§ 26, 31. The repealed statute allowed joinder of multiple offenses on the basis that they were of the same or similar character without any transactional connection. Official Commentary to G.S. 15A-926. The statute now permits joinder of offenses which are based (1) on the same act or transaction or (2) on a series of acts or transactions connected together or constituting parts of a single scheme or plan. There must be some sort of "transactional connection" between cases consolidated for trial. *State v. Powell*, 297 N.C. 419, 255 S.E. 2d 154 (1979). The court is required to grant a severance motion if it is necessary for "a fair determination of the defendant's guilt or innocence of each offense." G.S. 15A-927(b). The court must determine whether "in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." G.S. 15A-927(b)(2).

[1] The question before the court on a motion to sever is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial. Whether offenses should be joined is a matter addressed to the sound discretion of the trial judge. His ruling will be overturned only upon a showing that he abused his discretion. *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980); *State v. Brown*, 300 N.C. 41, 265 S.E. 2d 191 (1980); *State v. Greene*, supra.

[2] In the present case, the trial judge denied defendant's motion to sever these three offenses and granted the State's motion to consolidate. There was a fourth case which the trial judge did sever from this trial. The trial judge ruled that "there are common issues of fact with respect to three of the cases." It is crucial to note the trial judge's ruling was based on commonality of facts and not just on a commonality of crimes. He did not permit joinder merely because the same criminal offense was involved. He ruled there was a transactional connection. We agree with his ruling.

The evidence in the three cases shows a similar modus operandi and similar circumstance in victims, location, time and motive. All the offenses occurred within ten days on the same street in Wilmington. All occurred in the late afternoon. In each case, two black males physically assaulted the attendant of a small business and took petty cash from the person of the victim or the cash box of the business. The assaults were of a similar nature. Each was without weapons, involved an element of surprise and involved choking, beating and kicking the victim. In each case, the robbers escaped on foot. The evidence was sufficient to justify joinder based on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Joinder was proper under G.S. 15A-926.

Defendant has failed to show any prejudice or abuse of discretion by the trial judge in the joinder. No showing has been made that severance was necessary in this case to insure a fair determination by the jury on each offense. The evidence was not complicated. The jury instruction clearly separates the offenses. The jury's ability to differentiate the offenses is evidenced by its not guilty verdict in two of the three offenses. *See State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). The offenses were not so separate in time and place and so distinct in circumstance that consolidation was rendered unjust and prejudicial to defendant. *State v. Greene*, supra.

The Court of Appeals erred in holding this scheme or plan to commit a series of several different robberies to be without the necessary transactional connection. The facts establish a transactional connection. We hold the trial judge, acting within the framework of G.S. 15A-926(a) and in the exercise of his discretion, properly joined the cases for trial without prejudice to defendant.

[3] Defendant argues he was denied the opportunity to examine prospective jurors properly to determine whether he should exercise a peremptory challenge or whether challenge for cause existed. The trial judge sustained objection to the following question:

> If, after the State has put on all of its evidence and after you have heard all the evidence in the case and after the Judge has instructed you, you held an opinion that the defendant was not guilty, that the State had not met its burden

of proof in this case, would you change that opinion simply because eleven other jurors held a different opinion, that opinion being that the Defendant is guilty? Would any of you change your opinion simply for that reason?

Defendant contends the ruling denied him the right "to make direct oral inquiry of any prospective juror as to fitness and competency" as provided by G.S. 9-15(a) and required by due process guaranteed by the Fifth Amendment of the United States Constitution. We discern no error in the exclusion of this hypothetical question.

The voir dire examination of a juror serves the double purpose of (1) ascertaining whether challenge for cause exists and (2) enabling counsel to exercise intelligently the peremptory challenges allowed by law. The overall purpose is to secure an impartial jury. *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976). "However, counsel's examination into the fitness of the jurors is subject to the trial judge's close supervision. The regulation of the manner and extent of the inquiry rests largely in the trial judge's discretion." *State v. Jackson*, 284 N.C. 321, 325, 200 S.E. 2d 626, 629 (1973); *see also State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. den.* 410 U.S. 958, 35 L.Ed. 2d 691, 93 S.Ct. 1432, 410 U.S. 987, 36 L.Ed. 2d 184, 93 S.Ct. 1516 (1973).

The hypothetical question posed here could not reasonably be expected to result in an answer bearing upon the qualification of the juror. Instead, it is designed to commit the juror to a fixed position in regard to the evidence before he has heard it from the witnesses and before he has been instructed on the law by the court. The trial court should not permit counsel to question prospective jurors as to the kind of verdict they would render or how they would be inclined to vote on a given state of facts. *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1206, 96 S.Ct. 3204 (1976); 47 Am. Jur. 2d, Jury § 205; 50 C.J.S., Juries § 275 a.(2). In a majority of the jurisdictions which have addressed this problem, hypothetical questions of this nature have been considered improper. Annot. 99 A.L.R. 2d 7, § 7 (1965).

No abuse of discretion is shown, and this assignment of error is overruled. However, we are constrained to note with disapproval the trial judge's poor choice of words in disallowing this

voir dire question. His instruction to defense counsel to "quit asking crap over again" is hardly the best articulation of a ruling by a judge in a court of law.

[4] The only other issue addressed by the Court of Appeals is set out in defendant's third argument. There, defendant contends it was error for the State to use information garnered from defendant's testimony during a suppression hearing to impeach his testimony at trial. At the suppression hearing, defendant testified he was under the influence of PCP or "bam" at the time he confessed to the crimes. At trial, the district attorney asked defendant whether he used "bam." Defendant answered over objection that he had used it once, the night before he was arrested. The Court of Appeals correctly rejected defendant's argument that *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968), prohibited the use of this evidence by the State. *Simmons* holds "that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." 390 U.S. at 394, 19 L.Ed. 2d at 1259, 88 S.Ct. at 976. At issue in *Simmons* was the balance between the exercise of Fourth and Fifth Amendment rights. In the present case, there is no problem because defendant took the stand at trial thereby waiving his Fifth Amendment right against self-incrimination. His testimony from the unsuccessful suppression hearing was not introduced as evidence in the State's case in chief. Instead, defendant was questioned on cross-examination about his bad or illegal acts including the use of the illegal drug, PCP. This impeachment use, as opposed to using it to establish guilt, is permissible under the holding in *Simmons*. *Compare Harris v. New York*, 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971).

[5] Defendant's fourth argument concerns the other bad or illegal acts he was questioned about on cross-examination. As well as being questioned about "bam," defendant was asked about his purchase and use of marijuana and drinking of beer. The whole line of questions came after defendant testified he did not have a job between the middle of April 1979 and 26 April 1979. The evidence was relevant for two purposes: (1) to impeach the evidence of good character already in evidence, *State v. Nance*, 195 N.C. 47, 141 S.E. 468 (1928), or (2) to establish a pecuniary

motive for the robberies. *State v. Adams*, 245 N.C. 344, 95 S.E. 2d 902 (1957).

[6] Defendant's fifth argument concerns the failure of the trial judge to grant defendant's motion for mistrial based upon the district attorney's reference in his closing argument to certain facts not in evidence. The record reveals only the following:

ARGUMENT BY MR. TRASK:

ARGUMENT BY MISS PIPINES:

THE FOLLOWING TRANSPIRED DURING ARGUMENT BY MISS PIPINES:

MR. TRASK: Your Honor, I would like that particular statement put in that she has already made that is not on the record.

COURT: All right. Write down what you think she said and put it in the record after we get through with her argument. All right. You may continue.

MISS PIPINES CONTINUES ARGUMENT:

MISS PIPINES CONCLUDES ARGUMENT:

JURY EXCUSED FROM THE COURTROOM.

MR. TRASK: The Defendant objects to the statement which Miss Pipines made during her argument that Mr. Hughes and Mr. Edgerton picked the Defendant's photograph out of a group of photographs and that there was no question about that. The objection is based on the ground—

COURT: Just a minute; Miss Pipines you had better come over here and listen to this.

MISS PIPINES: I don't know. I don't care. So put it in there.

COURT: Let the record show that Miss Pipines agreed that that is what she said.

MISS PIPINES: Now—Well, all right.

COURT: You either—

MISS PIPINES: I don't know. I don't care. Let him put it in there the way he wants. I am not going to stipulate that is what I said.

COURT: You put in there what you will stipulate that you said then.

MISS PIPINES: I don't remember what I said.

COURT: Well, if you don't know, how in the hell do you expect anybody else to remember it. All right. That is what she said.

The record does not reveal any testimony before the jury about Hughes' identification of photographs. All testimony of this nature was on voir dire. Edgerton testified he did not look at any photographs. The prosecutorial indifference and the judicial intemperance manifested in this colloquy is neither condoned nor approved. However, no prejudice appears to have arisen to defendant. The trial judge took the first logical opportunity he had to give the following curative instruction to the jury:

> Now, in this case the attorney for the State argued to you concerning someone looking, or two people looking through some photographs and picking out someone purportedly identified as the defendant. My recollection is that there was no such testimony before you. If so, then that argument would be improper. You may not consider things or contentions of the State that are based upon evidence that they wished had been put on or things they wished had happened. You may only consider their contentions about what evidence was in fact put on before you. If either of the attorneys in their arguments to you made arguments on evidence that was not in fact in evidence, then you are to ignore that argument.

Improper argument of counsel is cured when the trial judge promptly sustains any objection and cautions the jury not to consider it. *State v. Lee*, 293 N.C. 570, 238 S.E. 2d 299 (1977); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). Here, the objection was formally made, argued and apparently ruled upon at the close of the jury arguments. The corrective instruction was therefore made as soon as possible. The assignment of error is overruled.

Defendant's next argument addresses the denial of his motion for mistrial based on his third and fifth arguments. In view of our disposition of those arguments, this assignment of error is without merit. Defendant's mistrial motion was properly denied by the trial judge.

[7] Defendant next presents several arguments relating to certain items of evidence offered by the State. All the arguments are without any legal basis. A bloody pack of matches from the wallet of Hughes was properly introduced to illustrate Hughes' previous testimony of how he was beaten and kicked until blood was drawn and he was rendered unconscious. *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239 (1973); *see generally* 1 Stansbury's N.C. Evidence § 118 (Brandis rev. 1973). A picture of Hughes taken at the hospital on the day he was robbed was also properly admitted to illustrate his testimony concerning the robbery. Hughes described "shoe tracks" upon his body and "all this blood." No prejudice is shown by defendant. In short, the photograph fairly and accurately illustrated his testimony. *State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973); *see generally* 1 Stansbury, supra, § 34. Diagrams and testimony indicating the location of defendant's residence in relation to the robberies and the location of the robbed establishments in relation to each other were also properly admitted. *State v. Smith*, 221 N.C. 278, 20 S.E. 2d 313 (1942); *see generally* 1 Stansbury, supra, § 34.

[8] Defendant contends in his tenth argument that the trial judge erred in refusing to conduct a new suppression hearing because of newly discovered evidence. Defendant had argued his confession was made while under the influence of drugs. At the suppression hearing, he testified he was drowsy while the officer testified he was alert when he made the confession. The trial judge found "the appearance of the defendant was one who was awake, coherent, was not sleepy; that his responses to questions of Officer Prescott were intelligent and responsive." He concluded defendant "knowingly, intelligently and understandingly waived his right to remain silent" and the confession by defendant was admissible.

At trial, one of the victims testified he saw defendant at the police station and he appeared sleepy. Defendant sought a new suppression hearing based on this newly discovered evidence

which the trial judge refused. A new suppression hearing is authorized if "the judge is satisfied . . . that additional pertinent facts have been discovered by defendant which he could not have discovered with reasonable diligence before the determination of the motion." G.S. 15A-975(c). This evidence, which only corroborates evidence already before the court, hardly meets this standard. This is not an "additional pertinent fact." At most, it is cumulative or corroborative evidence. The assignment of error is overruled.

Finally, defendant argues the court erred in failing to instruct the jury that State's witnesses as well as defendant may be interested in the result of the case and their testimony should be considered in that light. Defendant points to an instruction concerning his interest in the outcome of the case. He contends this singled out his testimony as lacking in credibility. Defendant ignores the immediately preceding paragraph in the charge which gives just such an instruction concerning the testimony of all witnesses. The argument is meritless. *See State v. Eakins*, 292 N.C. 445, 233 S.E. 2d 387 (1977).

[9] The conviction of defendant was without prejudicial error and must be upheld. However, in our review we have discovered error in the judgment which requires the sentence be vacated and the case remanded for a *de novo* sentencing hearing.

The judgment of the trial court in pertinent part reads as follows:

> It is ADJUDGED that the defendant be imprisoned for the term of not less than Five (5) nor more than Ten (10) Years minimum, maximum, in the custody of North Carolina Department of Correction. The Court finds the defendant would benefit as a Committed Youthful Offender but that Society would not and it is the intent of the court that defendant should serve a minimum of 2 years before eligible for Parole.

Ambiguity in the "no benefit" finding requires a new sentencing hearing. The record shows defendant was eighteen years old at time of trial. The language employed does not reveal whether defendant was found by the trial judge to be eligible or ineligible for the benefits of youthful offender status as required by G.S.

148-49.14. The sentence appears to be imposed pursuant to G.S. 15A-1371(a). If that be so, the imposition of a minimum term of five years would make defendant eligible for parole upon service of one-fifth of the ten-year maximum term, *i.e.*, two years as expressed in the judgment. However, the language "defendant would benefit as a Committed Youthful Offender but that Society would not" is hardly a clear finding of "no benefit" to defendant form the youthful offender program. *See generally* G.S. 148-49.10 through .16. A criminal judgment is not the place for ambiguous judicial expressions of sarcasm or satire. The judgment must be vacated and the case remanded for resentencing. *State v. Rupard*, 299 N.C. 515, 263 S.E. 2d 554 (1980).

The decision of the Court of Appeals finding error in consolidation of the three indictments for trial is reversed. The judgment pronounced by the trial court is vacated, however, and the case remanded to the Court of Appeals for further remand to New Hanover Superior Court for a new sentencing hearing. At that hearing, if the court finds defendant would not benefit from sentencing as a committed youthful offender, then judgment shall be pronounced as provided by law in such cases. In the absence of such "no benefit" finding, judgment shall be pronounced as provided in G.S. 148-49.10 through .16, and defendant shall be sentenced as a committed youthful offender.

Reversed and remanded.

Bigelow v. Johnson and Johnson v. Millican

MICHAEL D. BIGELOW, BY GUARDIAN AD LITEM, JOHN JOSEPH BIGELOW v. JEFFREY D. JOHNSON, JAMES MARION MILLICAN AND MILLICAN CONSTRUCTION COMPANY

JEFFREY D. JOHNSON v. JAMES MARION MILLICAN AND MILLICAN CONSTRUCTION COMPANY

No. 1

(Filed 5 May 1981)

1. **Automobiles § 13— headlamp on motor vehicle—specific design and construction required**

The legislature intended that a "headlamp" within the contemplation of G.S. 20-129(c) and G.S. 20-131 should be one that was specifically designed and constructed for use as a headlamp, and the five-cell flashlight which plaintiffs attached to their motorcycle fell short of the headlamp requirement.

2. **Automobiles §§ 13, 73— flashlight on motorcycle—no lighted headlamp—contributory negligence as matter of law**

In an action for personal injuries arising from a collision between a motorcycle driven by one defendant, on which plaintiff was riding as a passenger, and an automobile operated by another defendant, the motorcycle driver's failure to equip his vehicle with an adequate headlamp, in violation of G.S. 20-129, constituted negligence as a matter of law, and no substituted light could negate his negligence; moreover, plaintiff passenger could not maintain an action against defendant driver to recover damages resulting from the driver's negligence, since he was contributorily negligent as a matter of law in suggesting the use of a flashlight as a substitute for the original headlamp, assisting in attaching it to the motorcycle, and voluntarily riding with the driver on the motorcycle with full knowledge of the substituted flashlight.

3. **Automobiles § 59.1— entering highway—failure to keep proper lookout—proximate cause as jury question**

Though a motorcycle driver and passenger were negligent in equipping their motorcycle with a flashlight rather than a "headlamp" within the meaning of the applicable statutes, their contributory negligence would not bar their recovery for personal injuries from the driver of an automobile if the substituted flashlight and front caution lights on the motorcycle were burning in such a way that the automobile driver should have observed the approach of the motorcycle in the exercise of reasonable caution; therefore, the trial court erred in directing verdicts for defendants where it was possible to infer from the evidence that the driver's and passenger's negligence in failing to equip the motorcycle with an adequate headlamp was a proximate cause of the collision, it was equally possible to infer that the collision was caused solely by the automobile driver's negligence in breaching his duty to keep a proper lookout, and a jury question thus arose as to causation. G.S. 20-156(a).

PLAINTIFF appeals as a matter of right from a decision of the Court of Appeals, 49 N.C. App. 40, 270 S.E. 2d 503 (1980) (opinion by *Judge Harry C. Martin*, with *Judge Wells* concurring and *Judge Webb* dissenting). The Court of Appeals affirmed directed verdict in favor of defendants entered by *Lupton, J.*, at the 17 September 1979 Session of Superior Court, GUILFORD County.

This action arose from a collision between a motorcycle driven by Jeffrey D. Johnson, on which Michael D. Bigelow was riding as a passenger, and an automobile operated by James M. Millican and registered to Millican Construction Company. The undisputed evidence presented at trial indicates that Michael Bigelow, then aged fifteen, was visiting the home of Jeffrey Johnson, then sixteen years old, at approximately 6:00 p.m. on 25 November 1976. The two boys decided to visit another friend, and desired to travel to this friend's home on Johnson's motorcycle. Johnson had earlier discovered that the headlamp of his vehicle was not working properly, thus Bigelow suggested that they attach a five-cell flashlight to the motorcycle as a substitute for the headlamp. The flashlight was taped to the stabilizer bar between the handlebars, in approximately the same location as the original headlamp. They tested the beam of the flashlight and agreed that it projected a light comparable in brightness to that produced by the original headlamp. The two boys then proceeded to drive to their friend's house at approximately 7:00 p.m., after it had become dark outside.

They drove east on Cornwallis Drive in Greensboro, North Carolina, at a speed of approximately thirty miles per hour in a thirty-five miles per hour zone. Defendant Millican pulled out of the parking lot of a 7-Eleven Store on the south side of Cornwallis Drive and proceeded to turn west into that street. The automobile and the motorcycle collided, damaging the front end of each vehicle and injuring Bigelow and Johnson.

Bigelow and Johnson both testified that they saw the automobile leave the parking lot, that Johnson attempted to stop the motorcycle, and that he gave a verbal warning to Bigelow to "hold on." Millican testified that he looked for lights and vehicles in both directions before leaving the parking lot at a speed of from five to ten miles per hour. He stated that he never saw the motorcycle until after the impact, and that he thought he had run over a box or some other object in the road.

Bigelow, through his guardian,[1] brought an action on 5 May 1978 for personal injuries sustained as a result of the accident against Johnson, Millican, and Millican Construction Company. Johnson, also acting through his guardian,[2] crossclaimed against Millican and Millican Construction Company for contribution, personal injury, and property damage. Millican and Millican Construction Company crossclaimed against Johnson for contribution and counterclaimed against him for property damage to the automobile. The claims were consolidated for trial by an order filed 1 December 1978.

At the close of all the evidence, the trial judge granted directed verdicts for all defendants in both personal injury actions, on the ground that Johnson and Bigelow were contributorily negligent as a matter of law. Millican Construction Company and Johnson settled the cross action for property damage to the automobile and filed notice of dismissal with prejudice. The Court of Appeals affirmed the trial court's entry of directed verdicts in favor of defendants, Judge Webb dissenting. Plaintiffs appeal to this Court as a matter of right pursuant to G.S. 7A-30(2).

Parker & West by Gerald C. Parker for plaintiff-appellant Michael D. Bigelow.

Nichols, Caffrey, Hill, Evans & Murrelle by Lindsay R. Davis, Jr., for defendant-appellee Jeffrey D. Johnson.

Perry C. Henson and Jack B. Bayliss, Jr., for defendant-appellees James M. Millican and Millican Construction Company.

COPELAND, Justice.

Plaintiffs set forth several arguments in support of their allegation that the Court of Appeals erred in affirming the trial court's order entering directed verdicts in favor of defendants. We have carefully reviewed each of plaintiffs' contentions and find that directed verdict was properly granted in favor of defendant Johnson, but improperly granted in favor of defendants

1. Bigelow's motion to continue the action in his own name after attaining his majority on 18 April 1979 was allowed 21 August 1979.

2. Johnson's motion to continue the action in his own name after attaining his majority on 19 April 1978 was granted 21 August 1979.

Millican and Millican Construction Company. For the reasons stated below, we reverse that portion of the Court of Appeals' decision which affirmed the entry of directed verdicts in favor of defendants Millican and Millican Construction Company.

Plaintiffs first allege that the Court of Appeals erred in holding that since plaintiffs' vehicle was not equipped with an adequate headlamp within the definition of the applicable statutes, plaintiffs were contributorily negligent as a matter of law. G.S. 20-129(c) sets forth the headlamp requirements for motorcycles as follows:

"Every motorcycle shall be equipped with at least one and not more than two headlamps which shall comply with the requirements and limitations set forth in G.S. 20-131 or 20-132. The headlamps on a motorcycle shall be lighted at all times while the motorcycle is in operation on highways or public vehicular areas."

The section of G.S. 20-131 pertinent to this appeal provides:

> "(a) The headlamps of motor vehicles shall be so constructed, arranged, and adjusted that . . . they will at all times mentioned in G.S. 20-129, and under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person 200 feet ahead."

The question before us on this appeal is whether the flashlight which plaintiffs attached to the motorcycle on which they were riding sufficed as a "headlamp" within the meaning of these statutory provisions. We agree with the trial court and the Court of Appeals that it did not.

[1] Although G.S. 20-129(c) and G.S. 20-131(a) do not contain a specific definition of a "headlamp" beyond the requirement that it project a driving light sufficient to render clearly discernible an individual 200 feet ahead, we believe that the Legislature's use of the term "headlamp" indicates that not just any light source possessing the requisite brightness will suffice. In the absence of an indication by the Legislature to the contrary, it is presumed that words in a statute are to be accorded their natural and ordinary meaning. *Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979); *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E. 2d 769 (1974). Webster's Third New International Dictionary 1042 (1971) refers to a "headlamp" as synonymous with a

"headlight," which is defined as follows: "A light usu[ally] having a reflector and special lens and mounted on the front of a . . . motor vehicle for illuminating the road ahead." Thus, in its ordinary meaning a "headlamp" signifies not only a light constructed to project a powerful beam, but also a light constructed to diffuse this beam through "a reflector and special lens" in order to better illuminate the road ahead and serve as a warning to other vehicles. Our conclusion that the Legislature employed the term "headlamp" in its ordinary sense is further supported by the language of G.S. 20-131(a) which specifies that a headlamp must be "so constructed, arranged, and adjusted" as to provide the requisite visibility. By the use of this phrase we believe the Legislature intended that a "headlamp" within the contemplation of the statute be one that was specifically designed and constructed for use as a headlamp. While we do not attempt to set forth in detail the particular design or construction that would satisfy the statutory definition, we do hold that the five-cell flashlight which plaintiffs attached to the motorcycle in this case falls short of the headlamp requirement. The flashlight was not constructed to diffuse its beam of light and was never intended or designed for use as a motorcycle headlamp.

[2] Johnson's failure to equip his vehicle with an adequate headlamp, in violation of G.S. 20-129, constituted negligence as a matter of law. *Reeves v. Campbell*, 264 N.C. 224, 141 S.E. 2d 296 (1965), *Cornell v. Gaskins*, 263 N.C. 212, 139 S.E. 2d 202 (1964); *Oxendine v. Lowry*, 260 N.C. 709, 133 S.E. 2d 687 (1963). When a statute prescribes a standard, the standard is absolute. "No person is at liberty to adopt other methods and precautions which in his opinion are equally or more efficacious to avoid injury." *Aldridge v. Hasty*, 240 N.C. 353, 360, 82 S.E. 2d 331, 338 (1954). *See also Stockwell v. Brown*, 254 N.C. 662, 119 S.E. 2d 795 (1961); *Bondurant v. Martin*, 252 N.C. 190, 113 S.E. 2d 292 (1960). Consequently, Johnson's failure to use a "headlamp" as required by statute was negligence *per se*, and no substituted light could negate his negligence.

However, plaintiff Bigelow may not maintain an action against Johnson to recover damages resulting from Johnson's negligence, for we likewise find Bigelow contributorily negligent as a matter of law. It is well established that a motor vehicle passenger must exercise due care for his own safety. *Atwood v.*

Holland, 267 N.C. 722, 148 S.E. 2d 851 (1966); *Dinkins v. Carlton*, 255 N.C. 137, 120 S.E. 2d 543 (1961); *Sorell v. Moore*, 251 N.C. 852, 112 S.E. 2d 254 (1960). A passenger cannot acquiesce in a continued course of negligent behavior on the part of the driver and retain the right to claim damages from him for injuries resulting therefrom. *Lawson v. Benton*, 272 N.C. 627, 158 S.E. 2d 805 (1968); *Bogen v. Bogen*, 220 N.C. 648, 18 S.E. 2d 162 (1941). The uncontested evidence in the case *sub judice* establishes that it was Bigelow who suggested the use of the flashlight as a substitute for the original headlamp and assisted in attaching it to the motorcycle. Bigelow admitted that he voluntarily rode with Johnson on the motorcycle with full knowledge of the substituted flashlight. Under these circumstances, we hold that Bigelow's actions in riding with Johnson on a motorcycle that was not equipped with an adequate headlamp constituted contributory negligence as a matter of law, and the Court of Appeals' decision upholding the entry of a directed verdict in favor of Johnson on Bigelow's claim against him is affirmed.

[3] Although we find both Bigelow and Johnson negligent as a matter of law, we cannot hold as a matter of law that their negligence was a proximate cause of the collision and the injuries resulting therefrom. Negligence bars recovery only if it is a proximate cause of the injuries complained of; otherwise, it is of no legal importance. *Griffin v. Ward*, 267 N.C. 296, 148 S.E. 2d 133 (1966); *Taney v. Brown*, 262 N.C. 438, 137 S.E. 2d 827 (1964); *Short v. Chapman*, 261 N.C. 674, 136 S.E. 2d 40 (1964). The facts of the present case give rise to conflicting inferences of causation. From the evidence presented it is possible to infer that plaintiff's negligence in failing to equip the motorcycle with an adequate headlamp was a proximate cause of the collision. It is equally possible, however, to infer that the collision was solely caused by defendant Millican's negligence in breaching his duty under G.S. 20-156(a) to keep a proper lookout for oncoming vehicles. G.S. 20-156(a) provides that "[t]he driver of a vehicle about to enter or cross a highway from an alley, building entrance, private road, or driveway shall yeild the right-of-way to all vehicles approaching on the highway to be entered." In order to comply with this statute, the driver of a vehicle entering a public highway from a private drive is required to look for vehicles approaching on such highway at a time when this precaution may be effective, and to

defer entry until a reasonable and prudent man would conclude that the entry could be made in safety. *Penland v. Greene*, 289 N.C. 281, 221 S.E. 2d 365 (1976); *Smith v. Nunn*, 257 N.C. 108, 125 S.E. 2d 351 (1962); *C.C.T. Equipment Co., v. Hertz Corp.*, 256 N.C. 277, 123 S.E. 2d 802 (1962).

Since defendant Milican was entering West Cornwallis Drive from the private driveway of a 7-Eleven Store at the time of the collision, G.S. 20-156(a) is applicable to the case *sub judice*. It is uncontroverted that the accident occurred on a cold, dry, clear night. Bigelow and Johnson both testified that at the time of the collision the flashlight mounted on the stabilizer bar and the two amber caution lights on the front of the motorcycle were turned on and operating properly. Both further stated that Johnson saw Millican's vehicle turning onto the public road and attempted to avoid a collision. These facts give rise to the inference that Millican was negligent in failing to detect the presence of the oncoming motorcycle and that his negligence was the only proximate cause of the collision. Even though the motorcycle was not equipped with a "headlamp" within the meaning of the applicable statutes, if the flashlight and front caution lights were burning in such a way that Millican should have observed the approach of the motorcycle in the exercise of reasonable caution, then his failure to delay entry onto the public road was the proximate cause of the injury and plaintiffs' contributory negligence would not bar their recovery.

When conflicting inferences of causation arise from the evidence, it is for the jury to determine from the attendant circumstances what proximately caused the injuries complained of. *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976); *Olan Mills, Inc. of Tennessee v. Cannon Aircraft Executive Terminal, Inc.*, 273 N.C. 519, 160 S.E. 2d 735 (1968); *Bell v. Page*, 271 N.C. 396, 156 S.E. 2d 711 (1967). Since the evidence in the present case is susceptible to conflicting inferences of causation, it was error for the trial court to enter directed verdicts in favor of defendants Millican and Millican Construction Company. We therefore reverse that portion of the Court of Appeals' opinion which affirmed the entry of directed verdicts in favor of these defendants and remand to that court with instructions to remand to the Superior Court, Guilford County, for a new trial on the issue of proximate causation.

That portion of our decision which affirms the entry of directed verdict in favor of defendant Johnson is not affected by our holding reversing the directed verdicts entered in favor of defendants Millican and Millican Construction Company. Despite the outcome of the new trial on the issue of proximate causation, plaintiff Bigelow is precluded as a matter of law from recovering damages from defendant Johnson. If the jury determines that defendant Millican was negligent in failing to observe the approaching motorcycle, and that such negligence was the proximate cause of the collision and plaintiff's injuries arising therefrom, then plaintiff Bigelow could not recover from Johnson since Johnson's negligent failure to equip his vehicle with a proper headlamp was not a proximate cause of the injury. *Meyer v. McCarley & Co., Inc.*, 288 N.C. 62, 215 S.E. 2d 583 (1975); *McGaha v. Smokey Mountain Stages, Inc.*, 263 N.C. 769, 140 S.E. 2d 355 (1965). Should the jury decide that the collision and resulting injuries were proximately caused by Johnson's negligent failure to equip his motorcycle with an adequate headlamp, plaintiff Bigelow is nevertheless barred from recovery against Johnson by his own contributory negligence. *Presnell v. Payne*, 272 N.C. 11, 157 S.E. 2d 601 (1967); *Griffin v. Ward*, 267 N.C. 296, 148 S.E. 2d 133 (1966); *Howard v. Melvin*, 262 N.C. 569, 138 S.E. 2d 238 (1964).

For the reasons stated above, the opinion of the Court of Appeals is

Affirmed in part, reversed in part, and remanded.

STATE OF NORTH CAROLINA v. MICHAEL WILSON ADCOX

No. 38

(Filed 5 May 1981)

1. Criminal Law § 61.2— shoeprints at crime scene—connection with defendant—admissibility of evidence

There was no merit to defendant's contention in a first degree murder case that the trial court erred in admitting testimony concerning the similarity between shoeprints found at the scene of the crime and the soles of a pair of shoes found at the home of defendant's parents where defendant lived, and the passage of time between the crime and seizure of the shoes, 33 days, and the

State's failure to tie ownership of the shoes directly to defendant did not combine to make the evidence inadmissible.

2. **Criminal Law § 34.7— prior offenses by defendant—admissibility to show motive**

In a prosecution of defendant for the first degree murder of a grocery store owner, the trial court did not err in permitting the State to introduce evidence of defendant's involvement in two prior break-ins at the murder victim's grocery store, since the State's evidence that the victim had been subpoenaed to testify before a grand jury about one of the break-ins, that defendant and the victim had argued over defendant's involvement in the break-ins, that defendant had threatened the victim's life during the argument, and that defendant had testified at his previous trial on the same murder charge that he realized his parole on prior offenses would probably be revoked if he were convicted of the break-ins had some logical tendency to indicate defendant's motive to commit the homicide for which he was on trial.

3. **Criminal Law § 113.2— recapitulation of evidence—instruction sufficient**

Since the evidence which defendant sought to have the court summarize in its recapitulation of the evidence was brought out on cross-examination for the purpose of impeaching a witness and showing that she was biased, and none of it was substantive evidence which would exculpate defendant, the trial judge was not required to summarize the evidence in question in order to explain and apply the law to the evidence in the first degree murder case.

APPEAL by defendant from *Farmer, J.*, 7 January 1980 Criminal Session of VANCE County Superior Court.

Defendant was charged in a bill of indictment proper in form with the murder of Walter Hamil Satterwhite, Jr., on 25 May 1979. Defendant entered a plea of not guilty. Defendant had been brought to trial on the same charge at the 26 November 1979 Criminal Session of Vance County Superior Court, which trial ended in a mistrial.

The State's evidence tended to show that the victim Satterwhite was last seen alive at about 12:10 a.m. on 25 May 1979 in a car on Highway 1 in Henderson going north toward his home in Middleburg, North Carolina. A witness testified that at about 1:15 a.m. he saw two men outside Satterwhite's Grocery. He said that he could not identify the men but that they were both white and young. The man he could see best had shoulder-length, sandy-colored hair. The victim's body was found at 7:15 a.m. the same day in the front yard of his home which was located directly across the highway from his store. There was medical evidence that Satterwhite died as a result of a shotgun wound to the chest,

and that the estimated time of death was between 9:45 p.m. 24 May and 1:45 a.m. 25 May.

A rear window of the Satterwhite home was found open. Investigators found an open package of cigarettes, a lighter, an ashtray, and a vase in a closet in decedent's bedroom. A fingerprint on the vase matched one of defendant's prints.

The door to the store was found locked, but upon entry the officers found that the store safe was open and that the cash drawer had been removed. A cigar box regularly kept in the safe to hold coins from the machines in the store was found open on the floor with coins scattered around it. A fingerprint lifted from this cigar box matched one of defendant's fingerprints. Decedent's sister, Jean Satterwhite, who managed the store, testified that this cigar box had not been in the store when defendant had worked at the store earlier in the year. She also testified that this cigar box had not been in the store when two prior break-ins in which defendant had been implicated had been committed. Other witnesses who worked in the store testified that defendant had not been in the store during working hours since he had quit work at the store in February.

Over defendant's objection the trial court permitted the State to introduce evidence of defendant's involvement in the previous break-ins. The clerk of superior court testified that the victim had been subpoenaed to appear on 29 May 1979 before the grand jury which was to consider an indictment against defendant for one of the two break-ins. The court reporter who took the evidence at the 26 November 1979 trial of defendant testified that there defendant stated that he had committed the break-ins, and he knew if he were convicted of the crimes charged his parole would be revoked. Other witnesses testified that defendant admitted his involvement in the other break-ins. Witnesses also testified that they overheard defendant threaten decedent's life on a number of occasions. One of these witnesses testified that defendant made such threats to decedent during an argument about the break-ins.

Investigators also found shoeprints at the scene of the murder. The prints were about eleven inches long and four inches wide and made by coarse ripple-soled shoes. The prints matched the soles of a pair of shoes found by investigators in a search of

the home of defendant's parents where defendant resided until his arrest.

Defendant offered no evidence and relied on evidence adduced on cross-examination of the State's witnesses. This evidence tended to show the following: The eyewitness could not identify defendant as the man he saw outside the grocery the night of the murder. Other than decedent's fingerprints, defendant's fingerprints were only two of eighteen to twenty legible prints found by investigators. A fingerprint found on the sill of the open window at decedent's house did not match defendant's prints. The closet where the vase on which defendant's print was found had been used by defendant when he formerly lived in the Satterwhite home. The shoes with the soles which matched the prints made at the scene of the crime were tied only circumstantially to defendant. Jean Satterwhite's testimony implying that defendant's fingerprint could only have been placed on the cigar box on the night of the murder, was questionable.

The jury found defendant guilty of first-degree murder based on (1) malice, premeditation and deliberation; (2) felony murder by committing the killing while perpetrating an armed robbery; and (3) felony murder by committing the killing while perpetrating a kidnapping. Following a separate sentencing hearing, the jury recommended life imprisonment. On 18 January 1980 Judge Farmer 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 B. Wood and Archie W. Anders, Assistant Attorneys General, for the State.

Perry, Kittrell, Blackburn & Blackburn by George T. Blackburn, II, for defendant.

BRANCH, Chief Justice.

[1] Defendant first contends that the trial court erred by admitting testimony concerning the similarity between shoe prints found at the scene of the crime and the soles of a pair of shoes found at the home of defendant's parents where defendant lived. Defendant argues that the passage of time between the crime and

seizure of the shoes, 33 days, and the State's failure to directly tie ownership of the shoes to defendant combine to make the evidence inadmissible. Defendant relies on language in *State v. Bundridge*, 294 N.C. 45, 239 S.E. 2d 811 (1974), which he contends requires "a reasonable or open and visible, connection" between an article of clothing to be introduced and a defendant. *Id.* at 58, 239 S.E. 2d at 820.

While *State v. Bundridge* deals with the admissibility of clothing generally, we recently considered the specific question of admissibility of shoeprint comparisons in *State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981). In *Jackson*, we said,

> 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). . . . The weight to be given [the evidence] was a matter for the jury since it was not the sole evidence connecting defendant with the crime. If shoeprints were the only evidence connecting defendant to the crime, then a question of *sufficiency of the evidence* would arise . . . . However, the question raised in this assignment is admissibility of the evidence . . . . [Original emphasis.]

Id. at 109, 273 S.E. 2d at 672. This standard is consistent with a full reading of *Bundridge* where, quoting Stansbury, we also said, "The evidence need not bear *directly* on the issue and that the inference to be drawn need not be a *necessary* one." *State v. Bundridge, supra* at 58, 239 S.E. 2d at 820. [Original emphasis.]

Applying these principles to the shoeprint testimony in this case, we find that the State's evidence was admissible. The shoes were seized from defendant's home. One of the permissible inferences from this seizure is that the shoes belonged to defendant. The fact that the jury could draw other inferences from this evidence goes to its weight and not its admissibility.

[2] Defendant next contends that the trial court erred by permitting the State to introduce evidence of defendant's involvement in two prior break-ins at the Satterwhite Grocery. Defendant recognizes that the trial court instructed the jury that the

evidence of the prior crimes was admitted for the limited purpose of showing motive and intent. He argues, however, that the evidence of his involvement in these crimes has no relevance to any motive or intent to kill Satterwhite. He concludes that the evidence was offered solely to show defendant's criminal predisposition and, therefore, was inadmissible.

The general rule is that evidence of prior crimes is inadmissible to demonstrate guilt of the crime charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); 1 Stansbury, North Carolina Evidence § 91 (Brandis rev. 1973). Two of the recognized exceptions to this rule, however, permit the admission of evidence of prior crimes where the prior crimes indicate the motive or intent of the defendant to commit the crime charged. *State v. McClain, supra*; 1 Stansbury, North Carolina Evidence § 92 (Brandis rev. 1973). *State v. Birchfield*, 235 N.C. 410, 70 S.E. 2d 5 (1952), is the leading case indicating the extent to which evidence of prior crimes is admissible to show motive or intent. In *Birchfield* the defendants were charged with assault with intent to kill inflicting serious bodily injury. The State introduced evidence that six weeks prior to the assault for which they were being tried, defendants had been charged by the victim with another shooting. The first charge was pending at the time of the second shooting. This Court held that evidence of the first shooting was admissible at the trial for the second shooting because it "had a logical tendency to show intent and motive on the part of the defendants." *Id.* at 415, 70 S.E. 2d at 8.

In instant case, one of the State's theories was that the victim was killed to prevent his testifying against defendant on the prior break-ins. To support this theory the State introduced evidence of the following: The victim had been subpoenaed to testify before a Vance County Grand Jury about one of the break-ins. Defendant and victim had argued over defendant's involvement in the break-ins, and defendant had threatened the victim's life during the argument. The court reporter at defendant's previous trial on the same murder charge testified that defendant admitted at the trial that he realized if he were convicted of the break-ins then his parole on prior offenses would probably be revoked.

We hold that the evidence of defendant's involvement in prior crimes had some logical tendency to indicate defendant's

motive to commit the crime for which he was on trial, and, therefore, the evidence was admissible.

[3] Defendant's final assignment of error is that the trial judge failed to summarize some evidence defendant adduced on cross-examination which defendant specifically requested to be included in the court's recapitulation of the evidence. Defendant's request concerned certain evidence elicited from Jean Satterwhite. Miss Satterwhite's testimony about the cigar box with defendant's fingerprint provided the key link to the inference that the print could only have been made on the box the night of the murder, thus placing defendant at the scene of the crime. Defendant sought recapitulation of the following evidence:

> 1. The defendant through cross-examination of Jean Satterwhite offered further evidence tending to show
>
> A. That March 10, 1979 was on a Saturday rather than a Friday as the witness has testified to on direct examination.
>
> B. That Joe Cocherall, according to his withholding records, did not work during the first quarter of 1979 at Satterwhite's Grocery. That she could not remember when he did start work.
>
> C. That defendant, through cross-examination of the witness Berry offered . . . further evidence tending to show that he, Berry, processed the cigar box in Satterwhite's Grocery on the floor near the office and packed the same away. That Jean Satterwhite was not present during the time.

The trial judge denied defendant's request.

The law defining the trial judge's duty to recapitulate evidence favorable to defendant is governed by this Court's interpretation of G.S. 15A-1232, which states "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." In *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979), we held that the judge's failure to recapitulate evidence favorable to defendant violated this statute. In *State v. Moore*,

301 N.C. 262, 271 S.E. 2d 242 (1980), we further defined the nature of the requirement that the trial judge recapitulate evidence favorable to defendant. We said,

> The language of the statute [G.S. 15A-1232] and our prior decisions interpreting it require the court to summarize the evidence of both parties only *to the extent necessary to explain the application of the law thereto.* [Original emphasis.] In *Sanders* the evidence elicited on cross-examination and presented in the State's case which was favorable to defendant was substantive evidence which tended to exculpate defendant . . . . The trial judge could not have adequately explained the application of the law in the case without mentioning this evidence. . . . [The evidence in the present case] is all testimony which tends to impeach or show bias in the State's witnesses. It is not substantive in nature and would not clearly exculpate defendant if believed. The capable trial judge was thus able to adequately relate the application of the law to the evidence without mentioning this testimony.

Id. at 277-78, 271 S.E. 2d at 251-52.

Sanders is clearly distinguishable from *Moore* in that *Sanders* involved the summarization of evidence of a statement made to police officers by the defendant and other evidence adduced on cross-examination which tended to exculpate the defendant. Conversely, the evidence in *Moore* which the trial judge failed to summarize tended only to impeach the witness and was not in itself exculpatory.

Here defendant's first two requests for summarization of evidence relate to the reliability of the memory of the witness Jean Satterwhite. Specifically, defendant seeks recapitulation of testimony that at trial during the week of 7 January 1980 the witness Satterwhite could not remember whether 10 March 1979 was on a Friday or a Saturday and that she could not remember whether a certain person worked at Satterwhite's store during the first quarter of 1979.

Defendant's third request for summarization of evidence related to the witness Satterwhite's identification of a cigar box upon which an incriminating fingerprint was found. The witness testified on direct examination that Exhibit 21 was the cigar box

kept in the safe at Satterwhite's store and that it was the cigar box lying on the floor when she entered Satterwhite's store on the morning of 25 May 1979. On cross-examination, she stated that she saw S.B.I. Agent Berry initial the box.

Agent Berry also identified Exhibit 21 as the cigar box found on the floor on the morning of 25 May 1979 and testified that he found a fingerprint matching one of defendant's fingerprints on the cigar box. He further stated that the witness Satterwhite was not present when he processed the box. Defendant requested summarization of the contradictory evidence presented by the testimony of Agent Berry.

It is clear that the evidence which defendant sought to have summarized was brought out on cross-examination for the purpose of impeaching the witness Jean Satterwhite and showing that she was biased. The purpose of impeachment is to reduce the credibility of the witness so that the jury will give less weight to his testimony in deciding the ultimate facts of the case. 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 38.

The record discloses that the trial judge fully recapitulated all substantive evidence elicited on cross-examination, and therefore we are not faced with the question of whether the judge gave equal stress to the evidence of the State and defendant. Since none of the evidence which defendant sought to have summarized was substantive evidence which would exculpate defendant, the trial judge was not required to summarize this evidence in order to explain and apply the law to the evidence in this case. *State v. Moore, supra.*

We note in passing that counsel fully and strongly argued to the jury his contentions concerning the weight which should be given the testimony of the witness Jean Satterwhite.

This assignment of error is overruled.

Our careful examination of this entire record discloses no error warranting that the verdict or judgment be disturbed.

No error.

STATE OF NORTH CAROLINA v. HAROLD BERNARD WILLIAMS

No. 103

(Filed 5 May 1981)

1. **Criminal Law § 76.7— admissibility of confession**

The trial court properly denied defendant's motion to suppress oral and written statements given by him to the police where the court made findings supported by the evidence that defendant was properly advised of his constitutional rights prior to answering any questions by the police; no threats were made against him; no unfulfilled promises were made to him before he signed the written statement; and he knowingly, voluntarily, and understandingly waived his constitutional rights.

2. **Criminal Law § 43.1— admissibility of photograph of defendant**

A photograph of defendant taken at the police station would have been admissible in evidence even if he had not consented to the taking of the photograph.

3. **Criminal Law § 128.2— questions by prosecutor—motion for mistrial**

In this prosecution for rape in which defendant admitted on cross-examination that he had been convicted of assault with intent to commit rape in 1970, the trial court did not abuse its discretion in refusing to declare a mistrial because the district attorney asked the black defendant several questions suggesting that he had previously raped a young white girl the same age as the victim in the present case where the court sustained defendant's objection to every such question and no evidence was ever elicited by such line of questioning.

4. **Criminal Law § 122.2— statement by trial court—no coercion of verdict**

The trial court did not coerce a verdict when the jury returned to the courtroom at 1:00 p.m. after deliberating for some period of time and requested to be allowed to examine an exhibit, the court told the jury that ". . . this is the last jury case of the week and when you finish this case, you'll be through for the week. If you feel like it's going to take some time, I'll be glad to let you come back after lunch or if you feel like you're close to a verdict, I'll be glad to let you go back and continue," the foreman responded that the jury would like to have lunch, the court at 1:29 p.m. ordered a recess until 2:45 p.m., and the jury resumed their deliberations at 2:45 p.m. and returned verdicts of guilty at 3:14 p.m.

APPEAL by defendant from judgments entered by *Collier, J.*, at the 23 September 1980 Criminal Session of FORSYTH Superior Court.

Upon pleas of not guilty, defendant was tried on bills of indictment which charged him with kidnapping and raping Deena

Louise Darnell on 8 March 1980. Evidence presented by the state is summarized in pertinent part as follows:

On the date in question Miss Darnell was 17 years old and a senior at Salem Academy in Winston-Salem. On the evening of that date, she carried one of her friends in her parents' automobile to a tavern. On the way back to Salem Academy, she stopped at a service station to buy a soft drink. As she was returning to her car from the drink machine, she saw a man, whom she later identified as defendant, coming towards her. She entered the car and tried to close the door but the man stuck his umbrella handle in the door and pulled out a gun.

Defendant told Miss Darnell that he wanted money and got into the backseat of the car. At gunpoint he required her to drive to a nearby high school. There he ordered her to get out of the car and go with him to a field near the school. Upon arriving at that place, he ordered her to remove her clothing, and when she refused, he began removing them himself. He forced her to lie down on the ground where he proceeded to have vaginal intercourse with her.

After having considerable conversation with Miss Darnell, and receiving assurances from her that she would not tell the police, defendant permitted her to return to her car. Following his directions she then drove him to what she thought was a park where he got out of the car.

Miss Darnell immediately returned to Salem Academy where she told her roommate what had happened. They called the police, and she was taken to a hospital for an examination. The following afternoon, Miss Darnell went with police to the place where she was raped. At the site police found a leather billfold containing cards and pictures which indicated that it belonged to defendant.

On 25 March 1980 police talked with defendant. Following questioning, he admitted that he was the person who accosted Miss Darnell at the service station; that he went with her to the field near the school; and that he had intercourse with her. He gave the police a written statement.

Defendant presented evidence, including his own testimony, tending to show that he was at home on the night in question;

that he was forced to sign a confession; and that he never saw Miss Darnell before the preliminary hearing in this case.

The jury returned verdicts finding defendant guilty as charged. The court entered judgments imposing two consecutive life sentences.

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

Jack E. Ruby for defendant-appellant.

BRITT, Justice.

[1] By his first assignment of error, defendant contends the trial court erred in denying his motion to suppress the oral and written statements given by him to the police, as well as the photograph of him which was taken at the time of his questioning. We find no merit in this assignment.

At the hearing on defendant's motion to suppress, Detective R. H. Tilley of the Winston-Salem Police Department testified that on the morning of 24 March 1980 he and Detective R. V. Venable went to the residence of defendant; that defendant responded to his knock on the door and asked what they wanted; that they identified themselves as police officers, told defendant they were investigating a kidnapping-rape case and would like for him to go with them to the police station and talk with them; that defendant voluntarily went with them; that after they arrived at the police station, defendant was read his *Miranda* rights; that defendant agreed to answer questions and stated that he did not want to talk with a lawyer and have him present during questioning; that defendant signed a written waiver of his rights; that after a period of questioning, defendant made and signed the incriminating statements proposed to be introduced into evidence; and that defendant gave his permission for the police to take his picture.

Defendant testified at the hearing. He stated that he was forced to go to the police station; that he did not understand what the officers read to him at the station; that the officers told him that the cases would not be prosecuted; and that he signed a paper on the promise that the police would help him get a job.

At the conclusion of the hearing, the court made findings of fact which were consistent with the testimony of Detective Tilley. The court also made conclusions of law that defendant was properly advised of his constitutional rights prior to answering any questions by the police; that no threats were made against him; that no unfulfilled promises were made to him before he signed the statement which he gave to police; and that he knowingly, voluntarily, and understandingly waived his constitutional rights.

The trial judge properly conducted a hearing in the absence of the jury on defendant's motion to suppress evidence relating to the statements in question, and at the conclusion of the hearing he made findings of fact and conclusions of law. G.S. § 15A-977 (1978). The findings of fact made by the judge are conclusive if supported by competent evidence. *State v. Freeman*, 295 N.C. 210, 244 S.E. 2d 680 (1978); *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978); *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977). We hold that the findings are amply supported by competent evidence and that they fully support the conclusion of law that the statements were admissible into evidence.

[2] The photograph of defendant was also admissible into evidence. While testimony at the hearing showed that he consented to the police taking his photograph, it would have been admissible even if he had not consented. This court held in *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), that a defendant's fifth amendment privilege against self-incrimination was not violated when he was photographed in a parole office, and that the fourth amendment offers no shield for that which an individual knowingly exposes to public view.

[3] By his second assignment of error, defendant contends the trial court erred in not declaring a mistrial when the district attorney asked him several questions suggesting that he, a black man, had previously raped a young white girl the same age as Miss Darnell. This assignment has no merit.

On cross-examination defendant admitted that on 9 September 1970 he was tried and convicted of assault with intent to commit rape. The record then reveals the following:

> Q. And you got the maximum sentence allowed by law, didn't you?

MR. HABEGGER: Objection to that, Your Honor.

THE COURT: Sustained.

Q. The victim in this—that case was a 17 year old white high school student, wasn't it?

MR. HABEGGER: Objection.

COURT: Sustained.

Q. Sir?

MR. HABEGGER: Your Honor, objection. Move to strike, Your Honor.

THE COURT: Sustained.

Q. Do you know Donna Duncan?

MR. JOHNSON: Your Honor, object. May we approach the bench?

THE COURT: Yes.

(Mr. Lyle, Mr. Habegger and Mr. Johnson approach the bench.)

Q. (By Mr. Lyle) Do you know Donna Duncan?

MR. JOHNSON: Object, Your Honor.

THE COURT: Sustained.

Q. In 1970, you gave an officer a statement in that case.

MR. JOHNSON: Object to that, Your Honor.

THE COURT: Sustained.

Q. Did you tell the officers that you had done that 1970 case?

MR. JOHNSON: Your Honor, object.

THE COURT: Sustained. Go to some other question.

Q. Did you plead not guilty in that case, Mr. Williams?

MR. JOHNSON: Your Honor, object.

THE COURT: Sustained.

Defendant argues that the district attorney was trying to show that since defendant had been convicted of committing a sexual offense against another white girl, the same age and with the same initials as Miss Darnell, it would be logical for the jury to believe that defendant committed this offense also. We are not impressed with this argument.

We note that defendant did not move for a mistrial until after the jury had returned the verdict. Even then defendant offered no ground for his motion. In any event, granting a motion for a mistrial is a matter within the discretion of the trial judge. *E.g, State v. Yancey,* 291 N.C. 656, 231 S.E. 2d 637 (1977). We perceive no abuse of discretion in this instance.

A defendant who elects to testify in his own behalf is subject to impeachment by questions relating not only to his conviction of crime but also to any criminal or degrading act which tends to discredit his character and challenge his credibility. *E.g., State v. Foster,* 293 N.C. 674, 239 S.E. 2d 449 (1977). In *Foster* this court observed: "Whether the cross-examination transcends propriety or is unfair is a matter resting largely in the sole discretion of the trial judge, who sees and hears the witnesses and knows the background of the case. His ruling thereon will not be disturbed without a showing of gross abuse of discretion. (Citation omitted.)" *Id.* at 685, 239 S.E. 2d at 457.

The record indicates that the trial judge sustained defendant's objection to every question about which he now complains and that he granted defendant's motion to strike. It is clear that the court did not abuse its discretion in denying the motion for mistrial because no evidence was ever elicited by the line of questioning.

[4] By his third and final assignment of error, defendant contends the trial judge gave the jury an instruction that tended to rush them in their deliberations. We find no merit in this assignment.

The record reveals that on 25 September 1980 at around 1:00 p.m., after they had deliberated for some period of time, the jury returned to the courtroom and inquired if they might review the contents of the billfold found at the site of the alleged rape. There being no objection by the state or the defendant, the court al-

lowed the request. The court then made the following statement to the jury:

> Now, members of the jury, I do not want you to feel that I'm trying to rush you into a quick verdict by keeping you here, but this is the last jury case of the week and when you finish this case, you'll be through for the week. If you feel like it's going to take some time, I'll be glad to let you come back after lunch or if you feel like you're close to a verdict. I'll be glad to let you go back and continue.

The foreman responded that they would like to have lunch, The court, after giving the usual instructions to the jury not to discuss the case with anyone during the lunch break, at 1:29 p.m. ordered a recess until 2:45 p.m. The jury resumed their deliberations at 2:45 p.m. and at 3:14 p.m. returned the verdicts.

Defendant argues that the quoted statement by the court might have "hurried those jurors who had a reasonable doubt (about defendant's guilt) into changing their opinion." He also notes that the court failed to instruct the jury that no one of them should surrender his conscientious convictions or his free will and judgment in order to agree upon a verdict, citing *State v. McKissick*, 268 N.C. 411, 150 S.E. 2d 767 (1966).

We do not find defendant's argument persuasive. While we recognize the principle that a trial judge should not coerce a verdict or intimidate a jury, *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978), the quoted statement simply does not rise to the level of coercion or intimidation. The record does not disclose how long the jury had deliberated but it does show that the statement was made at a relatively late lunch hour. Under such circumstances, the court was fully justified in making the statement. *See State v. Cousin*, 292 N.C. 461, 233 S.E. 2d 554 (1977).

We conclude that defendant received a fair trial free from prejudicial error.

No error.

In re Register

IN THE MATTER OF: LORI AND VICKI REGISTER

No. 7

(Filed 5 May 1981)

1. **Divorce and Alimony § 24; Parent and Child § 7— child support—primary liability of father**

The father of a minor child is primarily liable for support of the child and it is his responsibility to pay the entire support of the child in the absence of pleading and proof that circumstances of the case otherwise warrant. G.S. 50-13.4(b).

2. **Divorce and Alimony § 24; Parent and Child § 7— removal of child from mother's home—abuse by stepfather—mother's reconciliation with stepfather—requiring support of child by mother**

Where a child was removed from the mother's home and placed in the custody of the maternal grandparents pursuant to a petition filed by the Department of Social Services alleging abuse of the child which arose out of the association of the child with its stepfather, the decision of the mother to reconcile with the stepfather was not a sufficient circumstance to "otherwise warrant" within the meaning of G.S. 50-13.4(b) so as to permit the trial court to require the mother to pay a portion of the support of the child.

3. **Divorce and Alimony § 24; Parent and Child § 7—requiring mother to make child support payments**

The trial court erred in ordering that the mother and the father of a minor child who was in the custody of its maternal grandparents each pay $12.50 per week for the support of the child where the court made no findings as to the ability of the father to pay the entire amount needed for support of the child, since the court had no authroity to require the mother to make support payments until it had determined that (1) the father could not reasonably make the entire payment and (2) the mother had the ability to make up the balance.

APPEAL pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, 49 N.C. App. 65, 270 S.E. 2d 507 (1980), *Wells, J.*, dissenting, which upheld an order entered 12 December 1979 by *Burnett, J.*, in NEW HANOVER District Court requiring Kenneth Register and Carol Malpass, the parents of Vicki Register, each to contribute one half of the support of their minor child. Only the mother, Carol Malpass, appealed.

The matter originally came to New Hanover District Court upon petition of the Department of Social Services to determine whether Vicki Register and Lori Register were abused or neglected children. A guardian *ad litem* was appointed to in-

vestigate the case and represent the minor children. The matter came on for hearing before Judge Burnett on 5 September 1978. and he concluded the children were abused children as defined by G.S. 7A-278(4) [now G.S. 7A-517(1)]. The abuse apparently stemmed from association with their stepfather, Dudley Malpass. At the time of the September hearing, Carol Malpass was separated from Dudley Malpass. In view of this separation, Judge Burnett allowed Carol Malpass to retain custody of the children pursuant to a 1968 divorce decree and separation agreement between her and her first husband, Kenneth Register. The custody arrangement was made "with the understanding that the mother immediately notify the Court in the event of a reconciliation between her and Dudley Malpass before either of said children reaches the age of 18 years."

On 18 January 1979, the children's guardian *ad litem* sought review of the custody order because the mother notified the guardian that she desired to resume marital relations with Dudley Malpass. When the motion for review was heard, Judge Burnett found as fact that Carol and Dudley Malpass had resumed marital relations, that Vicki Register had been living with friends of her mother since that time and that Lori Register had graduated from high school and was about to move to New Mexico. Judge Burnett also found as fact that "Kenneth Register contributes $12.50 per week for support of the child, Vicki Register, pursuant to a Separation Agreement entered into by him and Carol Malpass on the 4th [sic] day of March 1967." Judge Burnett concluded it was in the best interest of the child, Vicki Register, to place her in custody of the maternal grandmother, Lucy Jordan, and the stepgrandfather, Henry Jordan. The court ordered both Kenneth Register and Carol Malpass to pay $12.50 each per week to the Jordans for maintenance and support of Vicki Register. This order, dated 8 February 1979, also required that the custody and support order be reviewed in six months.

The matter was reviewed in July 1979. At that time, Carol Malpass apparently objected to the court's order that she contribute to the support of her minor child, and a hearing was held on 4 September 1979. The evidence at that time consisted of the testimony of Carol Malpass and copies of the 1967 deed of separation and 1968 divorce judgment of Carol Malpass and Kenneth Register.

Carol Malpass testified that she had worked only two weeks in the past seven years, that she stayed at home to care for her

six-year-old child by her second marriage and that she did not own any property or have any income from any source.

The divorce decree provided that "both the plaintiff and defendant are bound by the terms of that certain agreement hereto attached as it related to the custody, care, control and support of the said minor children of the plaintiff and defendant as named therein." As to child custody and support, the deed of separation provided:

> 9. CHILD CUSTODY AND SUPPORT: The Wife shall have the general care, custody and control of the two minor children of the parties, LORI ANNE REGISTER AND VICKI LYNN REGISTER; subject to the right of the Husband to visit with each of these children at such times and places as are reasonable under all the circumstances.
>
> At such time as the family residence is sold, the Husband shall pay to the Wife each week, in advance, the sum of FIFTEEN DOLLARS ($15.00), for the support and maintenance of VICKI LYNN REGISTER. Such payments shall be made beginning the first Friday following the consummation of the sale of the family residence and shall continue to be made in advance on Fridays of each successive week thereafter, until each child shall reach majority or become emancipated or shall die, whichever first occurs.

Based on the record in the case, the testimony of Carol Malpass and the exhibits introduced at the support hearing, Judge Burnett made the following findings of fact:

> (1) Carol Malpass is the natural mother of Vicki Register, and the said Carol Malpass has completed one year of college. She is in good health and in good physical condition. Carol Malpass has not been employed in 1979 and has had no income from any source during 1979 and is deliberately depressing her income, and is failing to fulfill her earning capacity because of her disregard of her responsibility to provide reasonable support for her child. Carol Malpass worked temporarily in 1978 for a period of two weeks while temporarily separated from her present husband and earned during said two weeks the sum of $150. Other than that two weeks period of work, the said Carol Malpass has not been

employed for more than seven years prior to this hearing. The said Carol Malpass has no savings accounts, stocks or bonds, and no income. She has a young child at home by her present marriage who is six years of age. She testified that the $12.50 per week which she had previously been sending for the support of said Vicki Register had been paid by her husband. Upon inquiry by the Court, the said Carol Malpass testified that she was not working now because she would have nothing left after buying gas and paying someone to look after her six-year-old child. When Carol Malpass and her present husband, Dudley Malpass separated in the latter part of 1978, the two of them borrowed the sum of $15,000 on the marital home, which said $15,000 was paid to Carol Malpass by Dudley Malpass as a lump sum property settlement. Upon the resumption of those marital relations two weeks later, the said $15,000 was repaid by the said Carol Malpass to the lender who had originally loaned said sum to her and her husband. The said Carol Malpass is now living with her present husband following the reconciliation.

(2) Kenneth Register, the father of Vicki Register, is an able-bodied man, regularly and gainfully employed and earning approximately $_____ per month. Kenneth Register had agreed to pay for the support of Vicki Register the sum of $15 per week.

Judge Burnett concluded Carol Malpass had earning capacity to support her child and that $30.00 per week was needed to meet the reasonable needs of the child. Carol Malpass was ordered to pay $15.00 per week to the Jordans for the maintenance and support of Vicki Register. Kenneth Register was ordered to pay a like sum. Carol Malpass appealed to the Court of Appeals which affirmed the order of the trial court. Carol Malpass appealed to this Court as of right based on the dissent of Wells, J.

W. G. Smith and Bruce H. Jackson, Jr., Attorneys for respondent appellant.

Rufus L. Edmisten, Attorney General, by Henry H. Burgwyn, Assistant Attorney General, amicus curiae.

HUSKINS, Justice.

The respondent appellant, Carol Malpass, and the Attorney General as *amicus curiae* have argued in their briefs whether the trial court erred by entering an order requiring the mother of Vicki Register to make child support payments. Upon the facts and record of this case, the trial court erred in ordering Carol Malpass to pay $15.00 per week for the support and maintenance of her child, Vicki Register.

The controlling statutes are G.S. 50-13.4(b) and (c) which provide:

> (b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or any person, agency, organization or institution standing in loco parentis small be liable, in that order, for the support of a minor child. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. Upon proof of such circumstances the judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support.
>
> (c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case.

"Taken together, these two statutes clearly contemplate a mutuality of obligation on the part of both parents to provide material support for their minor children where circumstances preclude placing the duty of support upon the father alone. Thus, where the father cannot reasonably be expected to bear all the expenses necessary to 'meet the reasonable needs of the child[ren],' the court has both the authority and the duty to order that the mother contribute supplementary support to the degree

she is able." *Coble v. Coble*, 300 N.C. 708, 711-12, 268 S.E. 2d 185, 188 (1980); *see also Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482 (1980).

[1] In the present case, the support was divided equally between the father and mother. The statute provides that "the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, *in that order*, for the support of a minor child." (Emphasis added.) The statute places primary liability for the support of the minor child on the father. Therefore, Kenneth Register, the father of the minor child, is primarily liable for support of the child. It is his responsibility to pay the entire support of the child "[i]n the absence of pleading and proof that circumstances of the case otherwise warrant." The mother's duty is secondary. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976).

The question thus becomes whether there is a sufficient showing of circumstances that "otherwise warrant." The trial court ordered the father to pay $15.00 per week, a sum he had agreed to pay in 1968. There is no finding or showing that the father is unable to pay the full $30.00 per week required for the support of the child. The record is devoid of any evidence of the father's earning capacity. Before liability for support can be placed on any other person, including the mother, the pleadings and proof must demonstrate that the father cannot reasonably pay more than $15.00 for the support of the child.

[2, 3] The Court of Appeals felt that the "circumstances of the case otherwise warrant" because the child was removed from the mother's home pursuant to a petition filed by the Department of Social Services alleging abuse of the child. This abuse arose out of the mother's continuing marital relations with Dudley Malpass. For this reason, custody was removed from the mother and placed in the hands of the maternal grandparents. Standing alone, the decision of the mother to reconcile with her second husband is not a sufficient circumstance to "otherwise warrant." A crucial circumstance is "the relative ability of all the . . . parties to provide support or the inability of one or more of them to provide support." The order of the trial court contains no findings on this circumstance. The court has no authority under the statute to require the mother to make support payments until it has deter-

mined that (1) the father cannot reasonably make the entire payment and (2) the mother has the ability to make up the balance. The court must make a determination of the father's ability before any of the support obligation is placed on the mother.

The trial court was not bound by the amount the father agreed to pay under the terms of the 1968 divorce judgment. The court has the power to modify the amount upon a showing of changed conditions. G.S. 50-13.7(a); 2 Lee, N.C. Family Law § 151 (4th ed. 1980). Conditions certainly changed in this case from 1968 to the appealed order of equal support entered 12 December 1979. Over the years, the parties themselves had not adhered to the exact amounts specified in the separation agreement and divorce judgment. The court determined Vicki Register needed double the amount provided for in the 1968 separation agreement. The trial court did not, however, determine whether the father could pay any or all of the increased amount.

The case must, therefore, be remanded for appropriate findings by the trial court to determine the ability or inability of the father to support this minor child. If the child's needs exceed the ability of the father to pay, then the mother is required by law, to the extent of her ability, to contribute to the necessary support of the child.

For the reasons stated, the decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the Superior Court of New Hanover County for further proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ABRAHAM BATTS

No. 22

(Filed 5 May 1981)

1. Criminal Law § 87— witness's unresponsive answer—admissibility

There was no merit to defendant's contention in a second degree murder case that the trial court erred in allowing a witness to testify that, when he first observed the fight in question, the homicide victim was trying to fight off

defendant's brother, since the witness was merely describing what he saw when he first observed the fight and was not asserting that defendant's brother was the aggressor; and even if the witness's answer was unresponsive, it was nevertheless admissible, since it did not produce irrelevant, incompetent, or otherwise inadmissible information.

2. Criminal Law § 87.1— leading question

In a second degree murder case where defendant contended that he spent the entire evening of the crime in the company of his girlfriend, the trial court did not err in sustaining the State's objection to defense counsel's question asked of the girlfriend, "Was it humanly possible for [the defendant] to have been in a fight that night without your knowing it or seeing it?" since the question suggested the desired response and was therefore leading.

3. Criminal Law § 117— instruction limiting consideration of evidence

Where a witness's statements were hearsay and were admissible only for the purpose of impeachment or corroboration, the trial court did not err in instructing the jury that the witness's testimony should be considered by them only as it related to her credibility as a witness.

4. Homicide § 21.7— second degree murder—sufficiency of evidence

In a second degree murder case where the victim died from stab wounds, and the knife used in the stabbing was not introduced into evidence nor was there testimony as to its size or the length of the blade, the manner in which the victim was stabbed and the penetration of the knife into the heart and lungs were sufficient evidence of use of a deadly weapon and of malice to withstand a motion for nonsuit.

APPEAL by defendant from judgment of *Allsbrook, Judge*, imposed at the 1 July 1980 Criminal Session of Superior Court, WILSON County.

Defendant was charged in an indictment, proper in form, with the murder of Kenneth Phelps. At trial, the State announced that it would proceed on a charge of second degree murder. The jury found defendant guilty of murder in the second degree, and he was sentenced by the court to a maximum and minimum term of life in prison. He appeals to this Court as a matter of right.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Robert A. Farris for the defendant.

CARLTON, Justice.

I.

Evidence for the State tended to show that Luther Jones, a Wilson policeman, went to the 500 block of East Nash Street in Wilson shortly after 11 p.m. on 9 January 1980. Over 100 people were gathered in front of the L & J Party Pack, an "entertainment club." Officer Jones walked across the street and observed a black male, whom he recognized as Kenneth Phelps, lying on the sidewalk bleeding from wounds to his chest and hand. Phelps was conscious at that time, and Officer Jones attempted to make him comfortable. Jones inquired if anyone in the crowd had witnessed the incident, but received no specific response. He did not find any weapons at the scene.

Matthew Henderson testified that he was in the company of Kenneth Phelps on the evening of 9 January 1980. Phelps joined him as Henderson left work sometime after 7 p.m., and they went to the Pack House on East Nash Street. They left and went next door to Adam's Nook where they drank beer with two women, Gwyn and Sheila. Some fifteen or twenty minutes later the defendant arrived and told Sheila, "Every time I leave you and come back, you're with a damn nigger." Henderson and Phelps then left Adam's Nook. When they were outside Phelps gave Henderson some money and Henderson went to a wine store and bought some wine. When he came out of the store, he saw a crowd of people standing on the street. He walked through the crowd and saw defendant and his brother, Percy. Kenneth Phelps was "trying to fight Percy Batts off of him." Defendant was standing beside a telegram post at that time, and, according to Henderson, had a knife with a long blade. Percy Batts had a knife and cut Phelps' hand. Phelps pushed Percy away from him and trotted away, with defendant and Percy in pursuit. Phelps stopped with his back against a wall and sat down on the ground. Defendant cut Phelps on the leg as Phelps attempted to kick Percy Batts off him. As Phelps moved three or four inches from the wall, defendant walked behind Phelps, grabbed him by the neck and stabbed him "about two times" in the chest. Defendant then closed his knife. The police were called and defendant and Percy Batts disappeared into the crowd.

A pathologist testified that the cause of death was hemorrhage secondary to stab wounds. In his opinion, the characteristics of the wounds observed in the chest area could be consistent with the deceased being grabbed from behind about the neck and then stabbed in the chest area and the leg wound could have been inflicted while Phelps was lying on his back and attempting to kick someone in front of him.

Defendant testifies that on the evening of 9 January 1980 he went downtown with his girlfriend, Sheila, and left between 8 and 9 p.m. to go to his sister's house. He was never separated from Sheila and did not see Kenneth Phelps that night. He never stabbed Kenneth Phelps with a knife. Percy Batts testified that he saw his brother leave the downtown area about 9 or 9:30 p.m. on that night. He saw Kenneth Phelps that night but did not see any fight. He also did not see Matthew Henderson that evening.

Sheila Ward, defendant's girlfriend, testified that she was with defendant the entire evening, that defendant and Kenneth Phelps argued on the sidewalk, and that she grabbed defendant by the arm and they left. Kenneth Phelps was not injured at that time. She and defendant spent the night at defendant's sister's house.

Defendant's sister testified that defendant arrived at her house around 9:30 p.m. and spent the entire night there. She also testified that after the incident, she overheard Matthew Henderson state to a policeman that he was not coming to court because he did not know what had happened, that all he knew was what he had heard on the street.

II.

[1] Defendant first assigns as error the admission of testimony by State witness Matthew Henderson that, "When I seen him [Kenneth Phelps] he was, Kenny was trying to fight Percy Batts off of him." Henderson gave this testimony on direct examination in response to the question. "And, where was Kenny Phelps?" Defendant contends that this testimony amounts to a labelling of Percy Batts as the aggressor, a fact which Henderson could not know because, by his own testimony, he arrived on the scene *after* the fight started.

We reject defendant's contention that this testimony amounted to an assertion that Percy Batts, defendant's brother, was the aggressor. The witness was merely describing what he saw when he first observed the fight. While the witness' answer was not strictly responsive to the question, responsiveness is not the ultimate test of admissiblity. If an unresponsive answer contains pertinent facts, it is nonetheless admissible; it is only when the unresponsive answer produces irrelevant, incompetent or otherwise inadmissible information that it should be stricken. *State v. Ferguson*, 280 N.C. 95, 185 S.E. 2d 119 (1971); *State v. Staten*, 271 N.C. 600, 157 S.E. 2d 225 (1967); *In re Will of Tatum*, 233 N.C. 723, 65 S.E. 2d 351 (1951); 3 Wigmore, *Evidence* § 785 (Chadbourn rev. 1970). This assignment of error is overruled.

[2] Defendant next contends that the trial court erred in sustaining the State's objection to a question asked of defense witness Sheila Ward. Defense counsel asked Ms. Ward, "Was it humanly possible for [the defendant] to have been in a fight that night without your knowing it or seeing it?" We find no error in sustaining the objection to this question. The question was leading because it suggested the desired response, *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). Defense counsel had previously been cautioned by the trial court not to lead this witness. Whether to allow leading questions is a matter within the sound discretion of the trial court, and its ruling will not be disturbed absent an abuse of discretion. *E.g.*, *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229; 1 *Stansbury's North Carolina Evidence* § 31 (Brandis rev. 1973 & Supp. 1979). We perceive no abuse of discretion here. This assignment is overruled.

Additionally, we note that the information sought by this question was already before the jury. Ms. Ward, prior to this question, testified that she was with the defendant on the evening of the shooting and that she and defendant left the East Nash Street area where Phelps was stabbed prior to the incident and went to defendant's sister's house. According to Ms. Ward, she and defendant "never left his sister's house that night." We cannot accept defendant's contention that the failure to allow Ms. Ward to answer the contested question did irreparable damage to his alibi defense.

By this same assignment defendant also contends that the trial court erred in sustaining an objection by the State made

after defense witnesses Brenda Batts had completed her testimony and had left the witness stand. Mr. Williams, the privately retained prosecutor, said, "Your Honor, we object to this," and the objection was sustained.

We cannot determine from the record the subject matter to which the objection was directed and, thus, are unable to determine whether it was properly sustained. However, the burden is on the party assigning the error to preserve his challenge by making the record complete. *See State v. Hilton*, 271 N.C. 456, 156 S.E. 2d 833 (1967); 4 *Strong's North Carolina Index 3d*, Criminal Law § 158.1 (1976). This assignment is overruled.

[3] By his next assignment defendant contends the trial court erred in giving a limiting instruction to the jury at the end of the testimony by State's rebuttal witness Gwyndolyn Williams. During her testimony on direct, Ms. Williams stated that she had given a written statement about the events on 9 January 1980 to a police detective. The defense attorney was given an opportunity to cross-examine Ms. Williams concerning those statements. At the close of Ms. Williams' testimony, the trial court instructed the jury:

> Any statement this witness may have made as [sic] being received into evidence for the sole purpose of either impeaching the testimony of the witness or corroborating her as a witness as you so find, and is to be considered by you only as relates upon her creditiblity as a witness and for no other purpose.

The substance of this instruction is entirely correct. Ms. Williams' statements were hearsay and were admissible only for the purpose of impeachment or corroboration. We find no error in the giving of the instruction. This assignment is without merit.

Defendant next contends that the trial court erred in denying his motions for nonsuit and his motion to set aside the verdict as against the weight of the evidence because the State failed to prove malice and intent to kill.

When faced with a motion for nonsuit, the trial court must decide whether there is substantial evidence of each element of the crime charged. *E.g., State v. Allred*, 279 N.C. 398, 183 S.E. 2d 553 (1971). "Substantial evidence" is the 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). The evidence must be considered in the light most favorable to the State, and all inconsistencies and contradictions must be disregarded. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977); *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971).

To support a conviction of second degree murder, the State is required to prove, *inter alia*, that the killing was done with malice. *State v. Jones*, 287 N.C. 84, 214 S.E. 2d 24 (1975). Malice may be proven either by direct evidence or by inference from the circumstances surrounding the killing:

> Malice is not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. It may be shown by evidence of hatred, ill-will, or dislike, and it is implied in law from the killing with a deadly weapon; and a pistol or a gun is a deadly weapon.

State v. Benson, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922); *accord*, *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). A knife may be used in such a way as to make it a deadly weapon. *State v. Randolph*, 228 N.C. 228, 45 S.E. 2d 132 (1947); *State v. McCain*, 6 N.C. App. 558, 170 S.E. 2d 531 (1969). A knife can be found to be a deadly weapon if, under the circumstances of its use, it is an instrument which is likely to produce death or great bodily harm, having regard to the size and condition of the parties and the manner in which the knife is used. 1 *Strong's North Carolina Index 3d*, Assault and Battery § 5.2 (1976).

[4] Viewed in the light most favorable to the State, the evidence of malice at trial was sufficient to withstand defendant's nonsuit motion. The knife used in the stabbing was not introduced into evidence, and there was no testimony as to its size or the length of the blade, but the absence of this evidence is not fatal. The manner in which Phelps was stabbed and the penetration of the knife into the heart and lungs are sufficient evidence of use of a deadly weapon and of malice to withstand a nonsuit motion. We find that the State presented substantial evidence showing every

essential element of second degree murder and that defendant was the perpetrator of the crime. *See State v. Rogers*, 299 N.C. 597, 264 S.E. 2d 89 (1980); *State v. Jones*, 299 N.C. 103, 261 S.E. 2d 1 (1980).

Defendant also contends that the trial court erred in denying his motion, pursuant to G.S. 15A-1414(b)(2) (1978), to set aside the verdict as contrary to the weight of the evidence. This motion is addressed to the discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979); *State v. Shepherd*, 288 N.C. 346, 218 S.E. 2d 176 (1975); *State v. Watkins*, 45 N.C. App. 661, 263 S.E. 2d 846, *cert. denied*, 300 N.C. 561, 270 S.E. 2d 115 (1980). We find no abuse here. There was sufficient evidence to warrant submission of the case to the jury and to support its verdict, and the trial court acted well within its discretion in denying the motion to set aside the verdict. This assignment is without merit.

By his last assignment defendant contends that the trial court committed prejudicial error in its instructions to the jury. We have read the entire charge and find that when taken as a whole it fairly and accurately informs the members of the jury of their duties and responsibilities and that it accurately sets forth the essential elements of the crimes charged and the standard of proof required to convict. This assignment is overruled.

After careful review of the record on appeal and the arguments made by the defendant and the State, we conclude that defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. ANNIE RAY ODOM

No. 4

(Filed 5 May 1981)

1. **Constitutional Law § 43; Criminal Law § 57— gunshot residue test—no right to counsel—evidence of refusal to take test**

The administration of a gunshot residue test is not a critical stage of the criminal proceedings to which the constitutional right to counsel attaches, and defendant's right to counsel was not violated by the admission of evidence that she refused to submit to a gunshot residue test until she talked with her attorney. Sixth and Fourteenth Amendments to the U.S. Constitution; Article I, § 23 of the N. C. Constitution.

2. **Constitutional Law § 28; Criminal Law § 57— evidence of refusal to take gunshot residue test—no denial of due process**

The admission of evidence that defendant, after having been given the *Miranda* warnings, refused to take a gunshot residue test until she talked with her attorney did not violate defendant's right to due process since no constitutional right to counsel was involved and since no governmental action induced defendant to believe she had a constitutional right to have counsel present during the test.

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 49 N.C. App. 278, 271 S.E. 2d 98 (1980), one judge dissenting, ordering a new trial for defendant. The trial proceedings were held before *Judge Preston* at the 15 October 1979 Criminal Session of Superior Court, CUMBERLAND County.

The question presented by this appeal is whether the admission of evidence that defendant refused to submit to a gunshot residue test when she had been given the *Miranda* warnings and had told police officers that she would not take the test until she talked with a lawyer violated defendant's right to counsel and deprived her of due process of law.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Acie L. Ward, for the State.

Seavy A. Carroll for defendant-appellee.

CARLTON, Justice.

I.

On 16 March 1979 defendant was arrested for shooting Robert Lee Moore and was charged with assault with intent to kill, inflicting serious bodily injury. She was informed by the arresting officers of her *Miranda* rights and signed a written waiver of them. In response to the officers' questions, defendant conceded that she knew something about a fight in which she and the victim were involved earlier in the day but denied any knowledge of the shooting. At this point, she informed the officers that she wished to consult with her attorney, and the questioning was stopped.

Before defendant talked to her attorney, she was taken before a magistrate and was asked to take a gunshot residue test.[1] A crime scene technician explained to defendant that the test would show whether she had recently fired a weapon. Defendant refused to take the test until she talked with her lawyer. The technician then told her that she did not have to take the test, and the test was never administered.

At her trial in superior court, the State presented two eyewitnesses, including the victim, who testified that defendant was the person who shot Robert Lee Moore. Defendant testified that she had seen the victim on the day in question at the scene of the shooting but that no one was shot while she was there. On cross-examination, the State asked defendant whether she had refused to take a gunshot residue test. Defendant objected, and, after a lengthy *voir dire*, the trial judge overruled her objection and allowed the State to elicit from defendant her refusal to take the test until she talked to her attorney. On rebuttal, Officer Brami, the crime scene technician, testified over defendant's objection that defendant refused to take the test.

The jury returned a guilty verdict and defendant was sentenced to five to seven years.

On appeal, the Court of Appeals reversed her conviction and ordered a new trial, on the basis of *Doyle v. Ohio*, 426 U.S. 610, 96

1. The officers did not produce a nontestimonial identification order, nor did they follow the procedures set out in Article 14, Chapter 15A of our General Statutes, G.S. §§ 15A-271 to -282 (1978).

S.Ct. 2240, 49 L.Ed. 2d 91 (1976), and *State v. Lane*, 46 N.C. App. 501, 265 S.E. 2d 493, *aff'd*, 301 N.C. 382, 271 S.E. 2d 273 (1980), stating, "We find that it would be fundamentally unfair and a violation of defendant's federal and state constitutional rights to allow the State to use her request to consult with an attorney, made in reliance on the State's declaration of her right, as an implication of defendant's guilt." 49 N.C. App. at 280, 271 S.E. 2d at 100. Judge Hedrick dissented, claiming that the decision represented an unwarranted extension of *Doyle* and *Lane* and arguing that the error, if any, in admitting the testimony was harmless beyond a reasonable doubt.

II.

The issue in this case has been presented to us as one involving defendant's constitutional right to be represented by counsel in state criminal prosecutions and her right to due process of law. Stated specifically, the issue presented by the parties is whether defendant's constitutional rights were denied when, over her objection, evidence was admitted that she had refused to submit to a gunshot residue test until she talked with her attorney. For the reasons stated below, we hold that defendant's constitutional rights were not violated by the admission of such evidence and, accordingly, we reverse the Court of Appeals.

A.

[1] Our first inquiry is whether the admission of testimony concerning defendant's refusal to take the gunshot residue test violated her right to counsel, guaranteed by the sixth, by virtue of the fourteenth, amendment to the United States Constitution, *Gideon v. Wainright*, 372 U.S 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), and by Article I, Sec. 23 of the Constitution of North Carolina. Defendant urges that her right to counsel has been violated and cites in support of her contentions our recent decision in *State v. Lane*, 301 N.C. 382, 271 S.E. 2d 273 (1980).

In *Lane*, the prosecutor was allowed to question defendant about his failure to inform the police, after his arrest, of his alibi defense to a charge of selling heroin to an undercover narcotics officer. We found that this questioning violated defendant's right to remain silent and reversed his conviction. *Lane* stands for the proposition that comment by a prosecuting attorney at trial upon

defendant's *post-arrest* silence, as a general rule, is constitutionally impermissible.[2]

Although *Lane*, because it concerns the right to remain silent, does not specifically apply to this case, we think it controlling by analogy. Under the authority of *Lane*, comment upon an accused's post-arrest exercise of his or her constitutional right to counsel is, as a general rule, impermissible. Thus, if in refusing to take the gunshot residue test defendant was relying on her constitutionally guaranteed right to counsel, the admission of testimony concerning that subject was error and her conviction must be reversed.

Although a defendant is granted a general right to counsel to assist in his or her defense, that right does not attach to all events leading to trial. The right attaches only to "critical" stages of the proceedings, those proceedings where the presence of counsel is necessary to assure a meaningful defense. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967). In deciding whether a particular proceeding constitutes a critical stage, courts must focus their inquiry on "whether the presence of . . . counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id.* at 227, 87 S.Ct. at 1932, 18 L.Ed. 2d at 1157.

Although the United States Supreme Court has never considered whether a gunshot residue test is a critical stage in the proceedings, it has indicated that the gathering of evidence through the use of scientific tests and analyses, such as finger-

2. *Lane* does, however, recognize an exception to this rule: the prior inconsistent statement. This arises when defendant's silence amounts to a contradiction of his testimony at trial and occurs only when, at the time of defendant's silence, it would have been natural for him to speak and give the substance of his trial testimony. *State v. Lane*, 301 N.C. at 385-86, 271 S.E. 2d at 275-76; *cf. Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971) (use of prior inconsistent statement made prior to giving of *Miranda* warnings to impeach defendant's credibility is constitutionally permissible); 3A. Wigmore, *Evidence* § 1042 (Chadbourn rev. 1970) (when silence amounts to an inconsistent statement). Comment upon defendant's *pre-arrest* silence has been held to violate neither the fifth amendment right to remain silent nor the fourteenth amendment due process clause. *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed. 2d 86 (1980).

printing, blood tests and tests performed on the clothing and hair, are not such stages. *Id.* at 227, 87 S.Ct. at 1932-33, 18 L.Ed. 2d at 1158; *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967) (taking of handwriting samples not a critical stage of the proceedings); *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966) (sixth amendment right to counsel does not attach to giving of blood test).

> Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and presentation of the evidence of his own experts.

388 U.S. at 227-28, 87 S.Ct. at 1932-33, 18 L.Ed. 2d at 1158. We are unable to perceive any difference in the giving of a gunshot residue test that would require the presence of counsel to protect defendant's rights at trial. Thus, we hold that the administration of a gunshot residue test is not a critical stage of the criminal proceedings to which the constitutional right to counsel attaches and that defendant's right to counsel was not violated by the admission of the challenged testimony.

B.

[2] We now turn to a consideration of whether defendant's right to due process of law has been denied.

In *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976), the Supreme Court held that defendants' due process rights had been violated by the use, for impeachment purposes, of their silence at the time of arrest and after the *Miranda* warnings had been given. The rationale for this decision lay in the assurance implicit in the *Miranda* warnings that a defendant's exercise of his right to remain silent would not be used against him at trial. *Id.* at 619, 96 S.Ct. at 2245, 49 L.Ed. 2d at 98.

The importance of the giving of the *Miranda* warnings was underscored in the recent case of *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed. 2d 86. The defendant in *Jenkins* was cross-examined at trial about his pre-arrest silence concerning his

defense of self-defense. In affirming his conviction, the Supreme Court reasoned:

> [N]o government action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case. We hold that impeachment by use of prearrest silence does not violate the Fourteenth Amendment.

447 U.S. at 240, 100 S.Ct. at 2130, 65 L.Ed. 2d at 96.

In this case, defendant's refusal to submit to the gunshot residue test took place after she had received, and signed a written waiver of, her *Miranda* rights. The giving of those rights implicitly assured her that she would not be penalized for exercising her *constitutional* right to counsel. Because no *constitutional* right to counsel is involved here and because no governmental action induced defendant to believe she had a constitutional right to have counsel present during the test, we conclude that the admission of evidence of her refusal to submit to the gunshot residue test is not fundamentally unfair and is not violative of due process.[3]

III.

In conclusion, we hold that the admission of testimony concerning defendant's refusal to submit to the gunshot residue test did not violate her constitutional right to counsel and did not deprive her of due process of law. Accordingly, the decision of the Court of Appeals is reversed, and this cause is remanded to that court with instructions to remand to the Superior Court, Cumberland County, for reinstatement of the jury verdict.

Reversed and remanded.

3. We note that defendant did have a statutory right to have counsel present during the test by virtue of G.S. 15A-279(d) (1978). Neither party argued this point. While defendant's statutory right may have been violated in this case by the admission of the testimony, defendant has not met her burden of showing that the error was prejudicial in light of the very strong case against her, *i.e.*, that, absent the contested evidence, a different result would likely have ensued, *State v. Daye*, 281 N.C. 592, 597, 189 S.E. 2d 481, 483 (1972).

STATE OF NORTH CAROLINA v. ROGER THOMPSON, JR.

No. 101

(Filed 5 May 1981)

Criminal Law §§ 66.15, 66.16— pretrial photographic identification—pretrial lineup identification—in-court identification of independent origin

There was no merit to defendant's contention that the in-court identification of him by a robbery victim was tainted by impermissibly suggestive photographic and lineup procedures prior to trial, since the photographs were presented to the victim in a bundle without any suggestion or comment by police officers; although defendant was photographed in a red shirt, it was a football jersey type shirt with lettering on it, which was not the type of shirt the victim described as the shirt the perpetrator of the crime was wearing; another person in one of the photographs was pictured wearing a light red or pink tank shirt, which more nearly matched the description of the robber's clothing; the lineup to which defendant objected consisted of six black males who were dressed identically and who were of similar appearance, height, and size; defendant was represented at the lineup by the same counsel who represented him at trial and on appeal; there was no evidence that defendant was distinguished from the other members of the lineup in any manner; and even if the photographic or lineup identification procedures were impermissibly suggestive, the victim's in-court identification was of independent origin based solely on his observations at the time of the crime, as the crime scene was well lighted at the time of the robbery, the victim was standing about two feet from the perpetrator during the entire incident, the two were facing each other at all times, and there was no covering on the perpetrator's face or head which would obscure the victim's view.

APPEAL by defendant from judgment of *Thornburg, J.*, entered at the 2 September 1980 Criminal Session of Superior Court, MECKLENBURG County.

Defendant was charged in an indictment, proper in form, and found guilty of robbery with a firearm in violation of G.S. 14-87. From the trial court's judgment sentencing him to life imprisonment, defendant appeals as a matter of right pursuant to G.S. 7A-27(a).

The State's evidence tended to show the following: On 28-29 April 1980, at approximately 12:00 a.m., two black males entered Joe's Handy Grocery on Tuckaseegee Road in Charlotte, North Carolina. The store was occupied by the owner, Joe Wray, and his employee, James Ray Wilder. One black male purchased cigarettes from Mr. Wray. The second black male then entered the store carrying a sawed-off shotgun and almost immediately shot

Mr. Wray in the back. Mr. Wray fell to the floor and never saw the man who shot him. The second male, identified at trial by Mr. Wilder as the defendant, then pointed the shotgun at Mr. Wilder and demanded the money from the cash register. Mr. Wilder testified that he was standing approximately two feet from defendant at the time of the robbery. After obtaining about $400.00 from the register, the two males fled from the store.

Mr. Wilder immediately summoned the police and described the two men in detail. He described the man who shot Mr. Wray as a black male, about six feet tall, weighing 170 or 180 pounds, dressed in dark slacks and a red t-shirt or tank shirt.

At approximately 9:00 a.m. on 29 April 1980 a police officer went to Mr. Wilder's home and handed him six color photographs in a bundle. Mr. Wilder spread them on a table and identified a photograph of defendant as the man who shot Mr. Wray and robbed the store. On 5 May 1980 Mr. Wilder went to the Mecklenburg County Jail to view a police lineup and chose defendant from six black males dressed in similar clothing as the man who shot Mr. Wray. Mr. Wilder also positively identified defendant at trial.

Defendant presented no evidence at trial.

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

Assistant Public Defender Grant Smithson for defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Alfred N. Salley for the State.

COPELAND, Justice.

By his sole assignment of error, defendant contends that the trial court erred in denying his motion to suppress the in-court identification of defendant by State's witness James Ray Wilder. He argues that the in-court identification was tainted by impermissibly suggestive photographic and lineup procedures prior to trial, and was therefore admitted in violation of his constitutional due process rights. We have carefully reviewed defendant's assignment and find it without merit.

It is settled law that identification evidence must be excluded as violating the due process clause where the facts of the case reveal a pretrial identification procedure so impermissibly suggestive that there is a substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968); *State v. Wilson*, 296 N.C. 298, 250 S.E. 2d 621 (1979); *State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128, 99 S.Ct. 1046, 59 L.Ed. 2d 90 (1979). Defendant argues that the photographic identification procedure during which Mr. Wilder was shown six photographs on the morning of 29 April 1980 was impermissibly suggestive in that defendant was the only individual photographed wearing a red shirt, and Mr. Wilder had previously described the perpetrator of the crime as a man dressed in a red shirt. It is defendant's belief that by showing the witness a photograph of him in a red shirt, the police induced the witness to identify defendant. In support of his contentions, defendant cites *State v. Smith*, 278 N.C. 476, 180 S.E. 2d 7 (1971), in which the Court held evidence of an out-of-court identification procedure inadmissible where the witness was taken to a jail to view the accused in the cell with two others of dissimilar appearance, before the defendant had been advised of his constitutional rights, and before the defendant was represented by counsel. The fact that the defendant alone was dressed in clothing similar to that worn by the man the witness described as the perpetrator of the crime was only one of several factors considered by the Court in ruling the identification evidence inadmissible. In addition, we note that although the Court held the evidence of the out-of-court identification inadmissible, it went on to find the in-court identification of independent origin and therefore admissible.

In the case before us, the able and experienced trial judge conducted an extensive *voir dire* hearing on defendant's motion to suppress and concluded that the photographic identification was not so impermissibly suggestive as to give rise to an irreparable mistaken identification. The testimony at the *voir dire* indicated that the photographs were presented to the witness in a bundle without any suggestion or comment by police officers. Although defendant was photographed in a red shirt, it was a football jersey type shirt with lettering upon it, which was not the type of shirt which the witness described as the shirt the perpetrator of

the crime was wearing. Another person in one of the photographs was pictured wearing a light red or pink tank shirt, which more nearly matched the description of the robber's clothing. We find the trial court's conclusion supported by competent evidence and therefore conclusive on appeal. *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980); *State v. Carson*, 296 N.C. 31, 249 S.E. 2d 417 (1978).

We likewise find conclusive the trial court's conclusion that the lineup identification procedure was not so unnecessarily or impermissibly suggestive as to result in an irreparable misidentification. The six black males presented in the lineup were dressed identically and were of similar appearance, height, and size. Defendant was represented at the lineup by the same counsel who represented him at trial and on appeal. There is no evidence that defendant was distinguished from the other members of the lineup in any manner.

Even if the photographic or lineup identification procedures could be found impermissibly suggestive, we find adequate evidence in the record to support the trial court's decision holding the in-court identification admissible as being of independent origin, based solely on Mr. Wilder's observations at the time of the crime. An in-court identification by a witness who participated in an illegal pretrial identification procedure is nevertheless admissible if the trial judge determines from the evidence presented that the in-court identification is of independent origin, based on the witness' observations at the time and scene of the crime, and thus not tainted by the pretrial identification procedure. *State v. Wilson, supra; State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978); *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977). The factors to be considered in determining whether the in-court identification of defendant is of independent origin include the opportunity of the witness to view the accused at the time of the crime, the witness' degree of attention at the time, the accuracy of his prior description of the accused, the witness' level of certainty in identifying the accused at the time of the confrontation, and the time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972); *State v. Headen*, 295 N.C. 437, 245 S.E.2d 706 (1978). After considering the fact of this case in light of the factors delineated above, we find the trial court's decision finding Mr. Wilder's in-

court identification of independent origin supported by clear and convincing evidence and conclusive on appeal.

Extensive evidence was presented at the *voir dire* hearing concerning the lighting in the store at the time of the robbery, Mr. Wilder's opportunity to observe the perpetrator of the crime, and the certainty of his identification. The evidence presented tended to show that the store was well lit at the time of the robbery, that Mr. Wilder was standing about two feet from the perpetrator during the entire incident, and that the two were facing each other at all times. There was no covering on the perpetrator's face or head which would obscure the witness' view. The evidence further tended to show that Mr. Wilder identified defendant without hestitation after both pretrial identification procedures and at trial. The trial court's rulings on defendant's motion to suppress were supported by substantial evidence, and defendant's assignment of error is overrruled.

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

No error.

STATE OF NORTH CAROLINA v. BENJAMIN ALBERT, JR.

No. 104

(Filed 5 May 1981)

Criminal Law § 62— polygraph test—recross examination invited by direct testimony

The trial court did not err in permitting the State on recross examination to ask defendant about his taking of a polygraph test, since defendant opened the door for such evidence on direct examination, and the trial court sustained defendant's objection to the questions concerning the polygraph examination so that defendant was not prejudiced by the questions.

DEFENDANT appeals from judgment of *Hobgood (Robert H.), J.*, entered at the 12 September 1980 Session of CUMBERLAND Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with one count of first degree murder and one count of armed robbery. The State alleged that on 17 March 1979 in Cumberland County defendant murdered John Willie Cook and robbed him of $20 in money.

The State's evidence tends to show that immediately before his death, John Willie Cook was forty years of age, in good health and employed as a construction worker. On Friday, 16 March 1979, he cashed his paycheck and at 7:15 p.m., accompanied by his nephew, visited several nightclubs. The nephew, James Alfred Kelley, testified he last saw his uncle at 11:30-11:45 p.m. at a club on the Wilmington Road and that his uncle had money at that time. John Willie Cook was dressed in a light brown hat, brown pants and a brown leather jacket and was carrying a wallet.

At approximately 6:15 on the morning of 17 March 1979, John Willie Cook was discovered lying some 30 to 35 feet from Highway 87. He had been severely beaten and apparently robbed. He was taken to Cape Fear Valley Hospital where he subsequently died of injuries to the brain and a skull fracture resulting from blows to the head.

Pursuant to a plea bargain arrangement, Joey Vereen testified for the State. Vereen said he met defendant at Bellamy's Club on the evening of 16 March 1979 and later had a conversation with defendant in which defendant inquired if Vereen had "really ever hit anybody." Later that evening, as Vereen and defendant walked up Highway 87, they encountered John Willie Cook. Defendant grabbed Cook from behind and demanded his money. Defendant then pushed Cook toward an old house near the road where the victim began to run. Defendant chased the victim around the house. The chase ended when defendant picked up a "two-by-four" and struck Cook on the back of the head. After Cook fell, defendant found the victim's wallet and removed the money. Thereafter, he directed Vereen to return to the scene and remove the victim's coat. Vereen did so and delivered it to defendant's neighbor pursuant to defendant's instructions.

Moddie Bell West and her daughter testified that defendant admitted to them that he had hit a man.

Annie Sumpter Jones and her son testified they lived next door to defendant and he stayed in their home for several days

after the murder of Cook. While there, defendant admitted to each of them that he had hit a man with a stick and taken $500 from him. Both these witnesses testified that defendant was wearing a brown leather jacket after the murder, identified as State's Exhibit No. 26, which the victim was wearing on the night before the murder.

Testifying in his own behalf, defendant said he was twenty-six years of age, was living in Fayetteville on 17 March 1979, and at that time was on probation for insurance fraud. He testified that on 16 March 1979 he was employed at a used-car lot on Murchison Road in Fayetteville where he worked on the job until 6:30 or 7 p.m. on that date and then went to a friend's home, where he spent the night. On 17 March 1979, he again worked all day at his job and at approximately 8 or 8:30 p.m. that evening got into an altercation with two men. He denied killing or participating in the murder of John Willie Cook. He denied telling anyone he had robbed a man. He admitted a previous felony conviction for insurance fraud and admitted he fled Cumberland County in violation of the conditions of his probationary sentence.

The capital charge was submitted to the jury on the theory of felony murder, *i.e.*, murder committed in the perpetration of a robbery. The jury convicted defendant of first degree murder on that theory and recommended life imprisonment. Judgment was pronounced accordingly and defendant appealed.

Rufus L. Edmisten, Attorney General, by J. Michael Carpenter, Assistant Attorney General, for the State.

Owen W. Cook, attorney for defendant appellant.

HUSKINS, Justice.

Defendant's sole assignment of error is directed to the action of the trial court in denying his motion for a mistrial.

The motion for a mistrial is based on the following exchange between defendant and the prosecuting attorney during recross examination of defendant:

> Q. Mr. Albert, you answered all the questions of the officers, right?
>
> A. Yes.

Q. And you told them you would be willing to take a polygraph examination?

A. Yes, sir.

Q. In fact, you did take a polygraph examination, didn't you?

A. Yes, I did.

Q. And you failed it, didn't you?

MR. COOK [defense counsel]: Objection.

A. I don't know.

COURT: Sustained. This is on recross.

Shortly thereafter, in the absence of the jury, defendant moved for a mistrial which was denied by the trial court. This constitutes the basis for defendant's sole assignment of error.

Defendant contends the questions posed to defendant on recross examination by the prosecuting attorney concerning a polygraph examination were so highly prejudicial that, even though the trial court sustained an objection thereto, the mere asking of the questions was so prejudicial as to deprive defendant of a fair trial. On the other hand, the State contends (1) that the questions were competent because defendant had previously opened the door and (2) if found to be incompetent, the court sustained defendant's objection thereto and no prejudice has resulted.

The record reveals that defendant on *direct* examination was asked the following question by his attorney and gave the following answer:

Q. As part of the statement that you gave to the officers as you came back from Charlotte did you tell them that you would be willing to take a lie detector test?

A. Yes, I did.

It is the rule in North Carolina that the results of a polygraph examination are not admissible in evidence absent a valid stipulation by the parties. *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979); *State v. Brunson*, 287 N.C. 436, 215 S.E. 2d 94

(1975); *State v. Foye*, 254 N.C. 704, 120 S.E. 2d 169 (1961). Thus, questions concerning the results of a polygraph test that was not the subject of a pretrial stipulation are generally not permitted unless defendant himself has opened the door.

Here, defendant on direct examination had testified that he told the officers he would be willing to take a lie detector test. This testimony, unexplained, could well lead the jury to believe that the State had refused to give defendant such a test, or that defendant had taken the test with favorable results which the State had suppressed. Under such circumstances, the law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially. *State v. Patterson*, 284 N.C. 190, 200 S.E. 2d 16 (1973); *State v. Black*, 230 N.C. 448, 53 S.E. 2d 443 (1949).

The following language from *State v. Small*, 301 N.C. 407, 436, 272 S.E. 2d 128, 146 (1980), is controlling on this point:

> Here on direct examination defendant testified in such a way as to leave the false impression that the state had refused to accept his offer to submit to a polygraph examination. It was proper for the state, therefore, on cross-examination to show that, in fact, defendant had been given a polygraph. The state was not, however, required to stop there. Had it done so, the jury might have been left with the impression that the state, bearing the burden of proof, did not offer the results of the polygraph because they were unfavorable to it. Both the state and the defendant are entitled to a fair trial. Defendant by first injecting the subject of the polygraph into the trial in a manner designed to mislead the jury invited the very cross-examination of which he now complains.

The evidence the State sought to elicit concerning the polygraph examination was competent because the defense had opened the door for such evidence.

In any event, the trial court sustained defendant's objection to the questions concerning the polygraph examination. This rul-

ing was favorable to defendant and certainly results in no prejudice to him.

For the reasons stated we hold that the challenged cross-examination was not prejudicial to defendant. Evidence of defendant's guilt seems overwhelming. No prejudicial error having been shown, the verdict and judgment must be upheld.

No error.

JERRY DALE WILLIFORD v. LINDA C. WILLIFORD (FRANCIS)

No. 64

(Filed 5 May 1981)

ON discretionary review to review the decision of the Court of Appeals, reported pursuant to Rule 30(e) and filed 4 August 1980, affirming the denial by *Lyon, J.*, of defendant-wife's motion to change custody at the 3 December 1979 Civil Session of HARNETT County District Court.

On 23 July 1979 plaintiff-husband was awarded custody of the couple's two children. This action was brought three months later, on 23 October 1979, when defendant-wife filed a motion in the cause seeking a change of custody. At the 12 December 1979 hearing on the motion, defendant testified that she had overcome the physical and emotional problems which she suffered at the time of the 23 July order. She testified that she could make a good home for the children in Corpus Christi, Texas, where she lived with her husband of four months. The only showing of change of circumstances in plaintiff's care for the children was that his fiancee had begun to live with the family. Plaintiff admitted they were not married, but he said they were engaged. He explained he wanted to be more certain of his second marriage than he had been of his first. After finding facts, Judge Lyon concluded that defendant had failed to make a sufficient showing of changed circumstances to warrant change of custody, and he denied defendant's motion. Upon defendant's appeal, the Court of Appeals in an opinion by Judge Wells, Judges Parker and Hedrick concurring, affirmed the denial of defendant's motion. We allowed defendant's

petition for discretionary review pursuant to G.S. 7A-31 on 7 October 1980.

L. Randolph Doffermyre, III, for plaintiff.

Bryan, Jones & Johnson by James M. Johnson 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 petition for discretionary review was improvidently granted.

The order granting discretionary review is vacated; the order denying defendant's motion for change of custody remains undisturbed.

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

AMERICAN FOODS, INC. v. FARMS, INC.

No. 107 PC.

No. 52 (Fall Term).

Case below: 50 N.C. App. 591.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 June 1981. Motion of plaintiff to dismiss defendant's appeal as to all issues except that addressed by the dissenting opinion allowed 2 June 1981, and petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1981.

BD. OF TRANSPORTATION v. CHEWNING

No. 114 PC.

Case below: 50 N.C. App. 670.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 June 1981.

BONE INTERNATIONAL, INC. v. BROOKS

No. 125 PC.

No. 53 (Fall Term).

Case below: 51 N.C. App. 183.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 2 June 1981.

BROWN'S CABINETS v. MFG. ENTERPRISES

No. 139 PC.

Case below: 51 N.C. App. 248.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1981.

HARRIS v. HARRIS

No. 122 PC.

Case below: 51 N.C. App. 103.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1981.

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

IN RE LEAKAN

No. 149 PC.

Case below: 51 N.C. App. 464.

Petition by respondent for discretionary review under G.S. 7A-31 denied 2 June 1981.

McGEE v. INSURANCE CO.

No. 124 PC.

Case below: 51 N.C. App. 72.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1981.

MIDREX CORP. v. LYNCH, SEC. OF REVENUE

No. 113 PC.

Case below: 50 N.C. App. 611.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 June 1981. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 2 June 1981.

PIGOTT v. CITY OF WILMINGTON

No. 115 PC.

Case below: 50 N.C. App. 401.

Petition by plaintiffs for writ of certiorari to North Carolina Court of Appeals denied 2 June 1981.

ROLLINS v. ROLLINS

No. 142 PC.

Case below: 51 N.C. App. 249.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1981.

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

SHIELDS v. INSURANCE CO.

No. 135 PC.

Case below: 50 N.C. App. 355.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 2 June 1981.

STANLEY v. STANLEY

No. 144 PC.

Case below: 51 N.C. App. 172.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1981. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 2 June 1981.

STATE v. BERRY

No. 131 PC.

Case below: 51 N.C. App. 97.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1981. Motion of Attorney General to dismiss appeal for lack of public interest allowed 2 June 1981.

STATE v. DAVIS

No. 200 PC.

Case below: 52 N.C. App. 165.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 June 1981.

STATE v. DORSEY

No. 104 PC.

Case below: 50 N.C. App. 746.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1981.

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

STATE v. EASTER

No. 138 PC.

Case below: 51 N.C. App. 190.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 June 1981.

STATE v. JOHNSON

No. 178 PC.

Case below: 51 N.C. App. 248.

Application by defendant for further review denied 2 June 1981.

STATE v. REAMS

No. 143 PC.

Case below: 51 N.C. App. 249.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 June 1981.

STATE v. SOUTHERN

No. 181 PC.

Case below: 51 N.C. App. 711.

Petition by defendant, Joe Sumpter, Jr., for discretionary review under G.S. 7A-31 denied 2 June 1981.

TRUST CO. v. RUBISH

No. 141 PC.

No. 54 (Fall Term).

Case below: 50 N.C. App. 662.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 2 June 1981.

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

WHITFIELD v. WAKEFIELD

No. 132 PC.

Case below: 51 N.C. App. 124.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1981.

State v. Anderson

STATE OF NORTH CAROLINA v. ALBERT ANDERSON

No. 84

(Filed 2 June 1981)

1. Constitutional Law § 30— request for discovery—voluntary compliance

Under the statutory discovery scheme in N. C., neither the State nor defendant is required to respond voluntarily to a request for discovery, but, if either party unequivocally advises the other that it will respond voluntarily to the other's request for disclosure, that party thereby assumes the duty fully to disclose all of those items which could be obtained by court order.

2. Constitutional Law § 30— voluntary discovery—defendant's failure to pursue

Any failure of defendant to derive full benefit from the N. C. discovery statutes resulted from his own lack of diligence in pursuing the opportunities for voluntary discovery which the State offered and in failing actively to pursue his later motion to compel discovery where the State advised defendant's attorney unequivocally that it would respond voluntarily to his request for disclosure; according to the detective investigating the case, he was instructed by the district attorney to provide defendant with anything he wanted in reference to the case; the detective tried unsuccessfully on several occasions to arrange an appointment with defendant's attorney for the purpose of complying with defendant's discovery request; it was not until Thursday before the trial was to begin on Monday that defendant's attorney finally responded to the detective's overtures; the attorney indicated that he was not interested in everything to which he was entitled under a discovery order but that he was interested particularly in any pre-trial statements made by defendant; defendant's attorney apparently knew at this time or had reason to believe that the State was in possession of some letters allegedly written by defendant; two days later the detective delivered to the attorney a transcript of defendant's pre-trial statements and asked if the attorney desired anything else to which the attorney replied negatively; defendant did not file a motion to compel discovery until Thursday before the trial began on Monday; defendant never asked that the motion be ruled on; and the trial judge apparently was not even aware of the motion until the discovery issue arose at trial.

3. Criminal Law § 75.15— confession—waiver of constitutional rights—mental competency

There was no merit to defendant's contention that the State failed to demonstrate that he knowingly waived certain of his constitutional rights before making a pre-trial, in-custody, incriminating statement and that he was mentally competent to make the statement where the evidence tended to show that defendant, while under arrest in the intensive care unit of a county hospital, was fully apprised of his constitutional rights; when so advised, he was fully coherent, sitting upright and cleaning his fingernails; he responded that he understood his rights, did not want a lawyer at that time, and would answer questions; defendant was not questioned immediately because his parents arrived and wished to talk with him and because medical personnel

needed to prepare him for the trip to the Central Prison intensive care unit; approximately one hour later, after defendant had been administered some form of medication, he was put on a stretcher and placed in an ambulance; defendant asked if two police officers were going to be riding with him; when told no, defendant stated his understanding that they were going to talk with him and reiterated his willingness to make a statement; the officers were then summoned and made the trip to Raleigh with defendant; and defendant made his incriminating statement during this trip.

4. Criminal Law § 99.2— conduct of judge—no expression of opinion

There was no merit to defendant's contention that the trial judge's evidentiary rulings and other actions indicated his general hostility to defendant and his counsel and, cumulatively, precluded defendant from receiving a fair trial.

5. Criminal Law § 34.7— defendant's guilt of other offense—admissibility to show motive

In a prosecution of defendant for the first degree murder of his girlfriend with whom he had lived until two weeks prior to the shooting, the trial court did not err in allowing the State to offer evidence that sometime prior to the shooting deceased's mother had ordered defendant off of her premises, where the deceased was residing, and that the incident resulted in defendant's being successfully prosecuted for trespassing on the deceased's mother's premises, since the State's theory of the case was that defendant shot deceased because she rejected his love and attention; much of the State's evidence was offered to prove this motive; and evidence that defendant had been convicted of the trespass was highly relevant to show the broken relationship between defendant and deceased.

6. Criminal Law § 112.6; Homicide § 28.7— defendant's mental capacity—instructions

In a prosecution for first degree murder there was no merit to defendant's contention that his mental disorders prevented him from forming the specific intent to kill which is required for a conviction of first degree murder by premeditation or deliberation, and there was therefore no error in the trial court's refusal to give defendant's requested instruction that evidence of his mental disorders, while not sufficient to establish legal insanity, could be considered on the question of whether he had the capacity to deliberate or premeditate at the time the homicide was committed.

7. Criminal Law § 120— possible punishment for lesser included offense—instructions not required

In a prosecution for first degree murder the trial court did not err or abuse its discretion in failing to instruct on the range of punishment available in the event of a second degree murder conviction, since punishment in such event would have been a matter within the trial court's discretion and would not have been a matter for the jury's consideration, and the jury did not appear to be confused or uncertain regarding the consequences of its verdict; however, since the jury must ultimately determine punishment upon a first degree murder conviction, it was proper, if not required, for the trial judge to so inform it at the guilt determination stage.

State v. Anderson

8. Constitutional Law § 63; Jury § 7.11— exclusion of jurors opposed to death penalty—representative jury

There was no merit to defendant's contention that his constitutional right to a jury selected from a fair cross-section of the community was violated when the prosecutor in a capital case was allowed to inquire into a prospective juror's views as to capital punishment and when all those finally seated were committed to being able to impose the death penalty.

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

BEFORE *Judge Barefoot*, presiding at the 21 January 1980 Session of BEAUFORT Superior Court, and a jury, defendant was convicted of first degree murder. Upon the conclusion of a sentencing hearing the jury recommended and the court imposed life imprisonment. Defendant appeals of right pursuant to G.S. 7A-27(a). This case was docketed and argued as No. 33, Fall Term 1980.

Rufus L. Edmisten, Attorney General, by W. A. Raney, Jr., Special Deputy Attorney General, for the State.

James R. Vosburgh, Attorney for defendant appellant.

EXUM, Justice.

Defendant brings forward assignments of error relating to: the admission into evidence of certain items which he contends the state improperly failed to disclose before trial, failure of the trial court to suppress defendant's incriminating statement, numerous evidentiary rulings, failure of the trial court to give a requested charge, portions of the trial court's instructions to the jury, and the jury selection process. We have carefully examined each assignment and conclude that defendant's trial was free from prejudicial error.

The state's evidence tends to show the following: Defendant and the deceased, Sandra Parker, had previously lived together but were separated at the time of the incident in question. At approximately 4:40 p.m. on 9 October 1979 Sandra Parker returned to her Jeep vehicle which was parked near the Washington Square Mall in Washington, North Carolina. A green and silver pickup truck driven by defendant pulled alongside her vehicle; a gun barrel emerged from its window; a shot fired which struck

Ms. Parker in the face; and the pickup truck, after colliding with a parked car, sped off. Law enforcement officials called to the crime scene broadcast a description of the pickup truck over the Police Radio Network. At approximately 5:00 p.m. several deputies spotted a pickup truck which matched the broadcast description parked some nine miles south of Washington. Defendant, who was standing in a nearby phone booth, ran to the pickup truck, grabbed a shotgun and pointed it at the deputies. In response the deputies drew their revolvers and pointed them at defendant, whereupon defendant turned the barrel of the shotgun to his chest and shot himself. Defendant was hospitalized in Pitt County Memorial Hospital. On 22 October, while being transferred to the hospital at Central Prison, defendant made a statement to SBI Agent Young to the effect that "she [the deceased] was the one who made [me] do it." Before he shot deceased defendant had told a state's witness, "I love her [the deceased] and if I can't have her, I'm going to fix it where nobody can't."

The state also offered evidence that defendant obtained the murder weapon by taking it from a friend's truck without the friend's knowledge or permission, that defendant purchased five shotgun shells for the weapon, and that defendant obtained the truck which he used in the killing from another friend without that friend's knowledge or permission. Further, defendant, in a telephone conversation immediately after the shooting and a letter written while in Pitt County Memorial Hospital, made statements to friends that he shot the deceased. The cause of deceased's death was a shotgun wound to the head producing multiple cerebral injuries. Several spent shotgun shells, found in the chamber of the gun and on the floorboard of the truck, were fired from the shotgun taken from defendant.

Defendant's evidence, offered through witnesses other than himself, was to the effect that he had some mental disorders resulting from an automobile accident in 1972. He and the deceased had separated two weeks before the shooting. As a result he was very upset and depressed. He went to a mental health facility for help in dealing with his anger and jealousy. When his mother discussed the shooting with him, "he did not appear to know anything about it."

I

Defendant first challenges the admission of certain evidence which he claims should have been but was not disclosed to him before trial pursuant to our statutory discovery procedures.

By letter dated 29 October 1979 defendant, invoking G.S. 15A-902, requested the state to make "voluntary disclosure . . . of evidence to which the defendant is entitled prior to trial under G.S. 15A-903." On 17 January 1980, the Thursday before trial began on Monday, 21 January, defendant filed a motion to compel discovery which was never ruled on. When Detective Leon Schaeffer, the state's third witness, sought to testify as to the contents of deceased's purse, which included a letter from defendant to the deceased and deceased's driver's license, defendant objected on the ground that the contents of the purse had not been earlier disclosed to him. In the jury's absence defendant's counsel, Mr. Vosburgh, informed the court about his letter requesting voluntary discovery and his motion to compel discovery. Mr. Vosburgh stated that on 17 January Detective Schaeffer:

> "asked me what I wanted with reference to the discovery and I told him that I wanted everything I was entitled to under G.S. 15A-903, except that aerial photograph right there, which I have not objected to, except the gun, which I have not objected to or any question about the gun, except the shells that were removed from the gun or were found some other place, and the curtain, side curtain from the Jeep. They were things that I told him that I did not have to have and that I did not care to examine, but that I particularly wanted documentary evidence that would be used, anything either in oral form or in writing form from the defendant I wanted the benefit of that and he did, he reduced to writing or had reduced to writing . . . a statement made by the defendant . . . and . . . he delivered it to me last Saturday morning at my office. I met him down there to receive this, but there was no other documentation, no other statements, no other written information or no other reductions to writing of any alleged oral statements by the defendant, and I was not made aware of any documents in his handwriting that would be . . . that might possibly be used as exhibits

and I think it falls under GS 15A-903(d), and that's on that basis that I make my objection."

The following colloquy between the court and Mr. Vosburgh then occurred:

"COURT: Well how do you . . . what . . . how do you know what you are objecting to?

MR. VOSBURGH: Because I know, I have heard from other sources that there were in the hands of the State some letters allegedly written.

COURT: Did you ask for them?

MR. VOSBURGH: I told them I wanted everything that I was entitled to have under . . . .

COURT: Well, if you heard specifically about letters, then it was your duty to ask them for those letters.

MR. VOSBURGH: I asked for an order compelling them to comply and I have not received it and it's on that basis that I make my objection.

COURT: Well, what does the State say?"

Detective Schaeffer then testified on *voir dire*: He had been directed by the district attorney to provide defendant's counsel with all evidence to which he was entitled. Pursuant to this direction he had approached Mr. Vosburgh "in the hall in the courthouse maybe five or ten times asking him when did he want to get up with me to discuss discovery on this case." He was, however, unable to make an appointment with Mr. Vosburgh where "he could sit down and go over the evidence of the case . . . ." Finally, on either 17 or 18 January, Mr. Vosburgh asked him for a transcript of any statement made by defendant plus all other evidence to which defendant was entitled under G.S. 15A-903. In response to this request Detective Schaeffer on Saturday, 19 January, delivered to Mr. Vosburgh a transcript of defendant's oral statement. Detective Schaeffer asked Mr. Vosburgh at that time if any other evidence was desired. Mr. Vosburgh replied, "No, not that I know of."

At the conclusion of Detective Schaeffer's testimony the trial court overruled defendant's objection to admission of the contents

of the purse. Upon the jury's return Detective Schaeffer testified, over objection, that he found in the purse the deceased's driver's license (Exhibit No. 2) and a letter from defendant to the deceased (Exhibit No. 3). Later in the trial these exhibits were introduced. The letter consisted simply of a short message expressing defendant's love for the deceased and his distress that he had "lost my sweetheart and probably won't ever get her for mine again . . . ." Later in the trial the state also offered a court record showing defendant's conviction for trespassing on premises where, other evidence showed, the deceased lived, and an incriminating letter written by defendant from Central Prison to state's witness Wiggins, from whom defendant obtained the shotgun used in the killing. Although it is not clear from the record, defendant argues in his brief that he objected to these other documentary items on the ground of the state's failure to earlier disclose them. We will assume, for purposes of argument, that this was the basis of defendant's objection.

Our discovery statutes require the trial court to order the state to produce, upon defendant's motion, certain kinds of items under certain conditions. *See generally* G.S. 15A-903. The kinds of items include "written or recorded statements made by the defendant," "a copy of [defendant's] prior criminal record, if any, as is available to the prosecutor," certain tangible objects such as "papers, documents, photographs," etc. *Id.* Certain reciprocal disclosure obligations are placed on defendant. G.S. 15A-905. Before either the state or defendant is entitled to an order requiring the other to disclose, it or he must first "request in writing that the other party comply voluntarily with the discovery request. Upon receiving a negative or unsatisfactory response, or upon the passage of seven days following the receipt of the request without response, the party requesting discovery may file a motion for discovery . . . concerning any matter as to which voluntary discovery was not made pursuant to request." G.S. 15A-902(a).

[1] Thus under our statutory discovery scheme neither the state nor the defendant is required to respond voluntarily to a request for discovery. The request for voluntary disclosure is merely a prerequisite to the filing of a motion for an order requiring disclosure. Ordinarily one party in a criminal action may not complain of the other's failure to respond voluntarily to a request for

disclosure. The remedy for such a failure is to move for a compulsory order.

Our discovery statutes, however, are designed to encourage voluntary disclosures of items which ultimately a party may be ordered to disclose. Thus if either party unequivocally advises the other that it will respond voluntarily to the other's request for disclosure, that party thereby assumes the duty fully to disclose all of those items which could be obtained by court order. *See State v. Jones*, 296 N.C. 75, 248 S.E. 2d 858 (1978).

Further, if any party fails "to comply with [the discovery statutes] or with an order issued pursuant to [them], the court in addition to exercising its contempt powers may (1) Order the party to permit the discovery or inspection, or (2) Grant a continuance or recess, or (3) Prohibit the party from introducing evidence not disclosed, or (4) Enter other appropriate orders." G.S. 15A-910.

[2] Defendant argues that the state undertook voluntarily to comply with defendant's request for voluntary disclosure but that it failed fully to disclose all items which it ultimately offered into evidence and which defendant could have required it to disclose by moving for an appropriate order.

Although the argument is sound in the abstract, it is not supported by the record. Whatever deficiencies occurred in the state's voluntary response were due largely to the actions of Mr. Vosburgh. Apparently the state did advise Mr. Vosburgh unequivocally that it would respond voluntarily to his request for disclosure. According to Detective Schaeffer he was instructed by the district attorney to provide defendant with "anything that he wanted in reference to [the] case." Detective Schaeffer, however, unsuccessfully attempted on several occasions to arrange an appointment with Mr. Vosburgh for the purpose of complying with defendant's discovery request. It was not until Thursday before the trial was to begin on Monday that Mr. Vosburgh finally responded to Detective Schaeffer's overtures. His response, moreover, was equivocal. He indicated to Detective Schaeffer that he was not interested in everything to which he was entitled under a discovery order but that he was interested particularly in any pre-trial statements made by the defendant. Apparently Vosburgh at this time knew or had reason to believe that the

state was in possession of some letters allegedly written by defendant.

Thereafter on Saturday before the trial Detective Schaeffer delivered to Mr. Vosburgh a transcript of defendant's pre-trial statements and asked if Mr. Vosburgh desired anything else. Mr. Vosburgh replied negatively. We note, too, that at this time the state was unaware of defendant's prison letter to state's witness Wiggins. The state learned of this letter on Tuesday, the second day of the trial, when Wiggins testified. The district attorney had never seen the letter until just before he sought to offer it into evidence. The state, consequently, could not have produced this letter prior to trial because it had no knowledge of it.

This is not a case, therefore, like *State v. Jones, supra*, 296 N.C. 75, 248 S.E. 2d 858, in which the state by its responses to defendant's request for voluntary discovery lulled defendant into thinking the state had fully complied when in fact the state had possession of exculpatory evidence which it inadvertently failed to disclose. Indeed this is a case in which defendant, through counsel, failed properly to respond to the state's efforts of voluntary disclosure and then lulled the state into thinking that it had given defendant everything he wanted. Defendant may not therefore complain of whatever deficiencies that might have existed in the state's voluntary response.

Neither can defendant complain because his motion to compel discovery was not ruled on. Defendant never asked that the motion be ruled on. It was not filed until Thursday before the trial began on Monday. Apparently the trial judge was not even aware of the motion until the discovery issue arose at trial. At that time defendant simply advised the court of its existence but did not ask the court to consider the motion. We concluded under similar circumstances in *State v. Jones*, 295 N.C. 345, 356-59, 245 S.E. 2d 711, 718-19 (1978), that defendants had "waived their statutory right to have the trial court order the prosecutor to permit discovery." *Id.* at 358, 245 S.E. 2d at 719. We so conclude in the instant case.

In summary we conclude that any failure of defendant to derive full benefit from our discovery statutes resulted from his own lack of diligence in pursuing the opportunities for voluntary

discovery which the state offered and in failing actively to pursue his later motion to compel discovery.

II

[3] Defendant next challenges the admission over objection of SBI Agent Young's testimony regarding defendant's pre-trial, in-custody, incriminating statement. Defendant contends the state failed to demonstrate that he knowingly waived certain of his constitutional rights before making the statement and that he was mentally competent to make the statement. The latter contention is based essentially on the fact that defendant, before making his statement, had been given some form of medication. We find no merit in either contention.

"When the admissibility of an in-custody confession is challenged the trial judge must conduct a *voir dire* to determine whether the requirements of *Miranda* [*Miranda v. Arizona*, 384 U.S. 436 (1966)] have been met and whether the confession was in fact voluntarily made." *State v. Riddick*, 291 N.C. 399, 408, 230 S.E. 2d 506, 512 (1976). In determining whether a defendant is so under the influence of drugs as to render a confession inadmissible "the crucial fact [for inquiry on *voir dire*] is whether defendant knew what was being said and done" when his statement was made. *State v. Jackson*, 280 N.C. 563, 575, 187 S.E. 2d 27, 34 (1972). In *Jackson* the trial judge's finding after *voir dire* that defendant "was aware of the presence of officers . . . [and] that he knew and understood from what the officers told him what his constitutional rights were" was sufficient, when supported by competent evidence, to resolve the mental capacity issue against defendant.

Before admitting Agent Young's testimony, the trial court conducted a *voir dire* hearing to determine defendant's mental condition and whether his constitutional rights had been violated when he made the statement. The state's evidence tended to show as follows: Defendant, while under arrest in the intensive care unit of Pitt County Memorial Hospital, was fully apprised of his constitutional rights as per *Miranda*. When so advised he was fully coherent, sitting upright and cleaning his fingernails. He responded that he understood his rights, did not want a lawyer at that time, and would answer questions. No promises, threats, coercion, or hope of reward were made to secure a statement.

Defendant was not questioned immediately because his parents arrived and wished to talk with him and because medical personnel needed to prepare defendant for the trip to the Central Prison intensive care unit. Approximately one hour later, after defendant had been administered some form of medication, he was put on a stretcher and placed in an ambulance. Shortly thereafter in the ambulance defendant told Agent Young and Detective Schaeffer, who accompanied him, that he shot the deceased. Defendant "did not appear to be . . . under the influence of anything at that time and . . . appeared to know what was going on."

The trial court made findings, not excepted to by defendant, in accord with the above evidence. These findings were sufficient to support the trial court's conclusions that defendant before making his statement "freely, knowingly, intelligently and voluntarily" waived his constitutional rights to remain silent and to counsel and that his statement was "freely, voluntarily, and understandingly" made. The statement was, therefore, properly admitted. *See State v. Williams*, 289 N.C. 439, 222 S.E. 2d 242, *death sentence vacated*, 429 U.S. 809 (1976).

Further testimony given after the conclusion of the *voir dire* bolsters the findings and conclusions earlier made. This was that defendant, upon entering the ambulance, asked "if the other two fellows [Agent Young and Detective Schaeffer] were going to be riding with him." When told no, defendant stated his understanding that they were going to talk with him and reiterated his willingness to make a statement. Agent Young and Detective Schaeffer were then summoned and made the trip to Raleigh with defendant. Defendant made his incriminating statement during this trip.

III

[4] Defendant next argues in his brief twenty-four assignments of error relating to various evidentiary rulings and other actions of the trial judge. The thrust of defendant's brief is that the judge's actions indicate his general hostility to defendant and his counsel and, cumulatively, precluded defendant from receiving a fair trial. Specifically defendant complains, for example, that the trial judge in several instances failed to rule on defendant's objections with sufficient dispatch, addressed rulings on several defense motions to the jury, admitted opinion testimony, im-

properly admitted evidence before conducting a *voir dire*, permitted the prosecutor to make improper remarks to the court on *voir dire*, and occasionally asked defendant to state grounds for his objections but never made similar requests of the prosecutor. Defendant's brief barely touches on each incident and cites no authority to support his contention that any particular action was erroneous. He concedes, "Probably the most significant thing about the Judge's rulings . . . was not the ruling itself, but the manner in which it was done and the demonstrated hostile attitude both towards the defendant and his counsel . . . ."

We have carefully considered each action of the trial court with particular attention to defendant's contention that the court was hostile to the defense. We know, of course, that "the printed word does not capture the emphasis and the nuances that may be conveyed by tone of voice, inflection, or facial expression." *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971). In *Frazier* we awarded defendant a new trial because a series of comments by the trial judge portrayed such "an antagonistic attitude" toward the defense that they breached "the cold neutrality of the law . . . to the prejudice of [the] defendant." *Id.* at 464, 180 S.E. 2d at 132. We recognized in *Frazier* that any one of the judge's comments, standing alone, "might not be regarded as prejudicial"; but when we viewed them cumulatively, we concluded the prejudicial effect was such as to entitle defendant to a new trial. In *Frazier*, however, we were faced with three gratuitous and unnecessary remarks of the trial court which tended to disparage the defense and, in one instance, indicated that defendants might have committed similar offenses at other times and places. In two other instances the trial court made perhaps unnecessarily sharp retorts first to a defense witness and second to defense counsel.

Nothing like the trial judge's comments in *Frazier* appear in this record. In each instance complained of here the court was responding to either an objection, motion or request on the part of counsel. The judge's statements, consequently, were not gratuitous. Neither were they, at least as they appear in writing, derisive, impolite, hostile, nor antagonistic. Defendant, for example, points to the following colloquies which, he says, demonstrate the trial court's hostile attitude: After the trial court had dictated its findings on the admissibility of defendant's out-of-court confession this colloquy occurred:

"MR. VOSBURGH: Your Honor, may I make a request for some further findings of fact for purposes of the record?

COURT: All right.

MR. VOSBURGH: Your Honor, the defendant would request that the Court finds as a fact that at the time this was done the defendant was in an intensive care unit at the Pitt County Memorial Hospital as a result . . . .

COURT: All right, put that in there.

MR. VOSBURGH: . . . of a gunshot wound . . . .

COURT: Well, all of it arises from this case.

MR. VOSBURGH: I understand that, your Honor.

COURT: Also put in the record that the self-in . . . well, the cause of his being in the Pitt Memorial Hospital was the result of a gunshot wound on the 9th day of October, and this was thirteen days later that the interrogation took place on the 22nd day of October, and that prior to that the defendant was in the process of being transferred from Pitt Memorial Hospital to Central Prison in Raleigh.

MR. VOSBURGH: Your Honor, I'd like to add that he was transferred from the Intensive Care Unit at the Pitt County Memorial Hospital to the Intensive Care Unit at Central Prison.

COURT: All right, put that . . . well, I don't know that.

VOSBURGH: Well, his mother testified that's where she visited him.

COURT: All right, well, put that in there as a finding of fact. Anything else?

MR. VOSBURGH: Yes sir, I'd like for you to find as a fact that because of his condition he was only permitted to receive visitors ten minutes at a time in the . . . .

COURT: I'm not going to put that in there because I don't know that. That might be just a rule of the hospital. They might let them in there any time.

MR. VOSBURGH: All right.

COURT: No, I'm not going to put that in there.

MR. VOSBURGH: Well, I can't get it in the record, your Honor, unless I request it.

COURT: All right. Call the jury back, Sheriff.

JURY RETURNED TO COURTROOM.

MR. VOSBURGH: Be sure to note my exception to that ruling.

EXCEPTION # 17."

When Mr. Vosburgh objected to the state's passing among the jury the record of defendant's conviction for trespass the following colloquy occurred:

"MR. VOSBURGH: I want to lodge an objection to that on the grounds that it is incompetent and it is an attempt to do by the District Attorney by indirection what he cannot do by direction.

COURT: No it isn't, no it isn't. All right, your objection is overruled.

EXCEPTION #42."

Finally, Mr. Vosburgh requested the court's permission to excuse the physicians. The record reveals the incident as follows:

"MR. VOSBURGH: Your Honor, if I may, may I ask someone from the Clerk's office to reproduce copies for purposes of the Court record of these documents so that they can be returned to Dr. Robbins and Dr. Williams and that they can leave.

COURT: I don't think I need the doctor, sure.

MR. VOSBURGH: I asked if these documents could be reproduced.

COURT: I've already told you to do that. I mean when you had the other one up there, I thought maybe you were going ahead and make copies so the man could go back to his duties.

MR. VOSBURGH: I'd like to note my exception for the records to the comments of the Court.

EXCEPTION #56.

COURT: About what?

MR. VOSBURGH: About the necessity of the doctor for you, your Honor.

COURT: He can be excused. All right, make a note of that in the record.

EXCEPTION #57."

There is simply nothing, so far as the printed word reveals, which indicates judicial hostility toward the defense. Nothing in the content of the statements could possibly have prejudiced defendant's case.

IV

[5] Defendant next contends that the state should not have been permitted to offer evidence that sometime prior to the shooting the deceased's mother had ordered him off of her premises, where the deceased was residing, and that the incident resulted in defendant's being successfully prosecuted for trespassing on the deceased's mother's premises.

This evidence was admissible. "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." *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). *Accord, State v. Adcox*, 303 N.C. 133, 277 S.E. 2d 398 (1981). The state's theory is obviously that defendant shot the deceased because she rejected his love and attention. Much of the state's evidence was offered to prove this motive. This evidence consisted of defendant's statement to officers that the deceased "made him do it"; his statement to one of the state's witnesses that, "I love her and if I can't have her, I'm going to fix it where nobody can't"; and defendant's letter written from prison to the state's witness Wiggins from whom he obtained the shotgun. Evidence of defendant's trespass at deceased's mother's home, where deceased was then living, is simply further evidence of the fact that deceased had indeed rejected defendant before he

shot her. We note, further, that the offense of trespass is a minor misdemeanor. The conviction itself did not, in the jury's eyes, brand the defendant as a criminal so as to thereby reflect unfavorably on his character. The whole thrust of the evidence was to show the broken relationship between defendant and deceased. For this purpose it was highly relevant. Its relevance, consequently, far outweighed the negligibly disparaging fact of the conviction itself. Its admissibility is strongly supported by *State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), *death sentence vacated*, 428 U.S. 904 (1976); *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. Adams*, 245 N.C. 344, 95 S.E. 2d 902 (1957); *State v. Birchfield*, 235 N.C. 410, 70 S.E. 2d 5 (1952); *State v. Ray*, 212 N.C. 725, 194 S.E. 482 (1938).

V

[6] Defendant assigns as error the trial court's refusal to give his requested instruction that evidence of defendant's mental disorders, while not sufficient to establish legal insanity, may be considered on the question of whether he had the capacity to deliberate or premeditate at the time the homicide was committed. Defendant contends that his mental disorders prevented him from forming the specific intent to kill which is required for a conviction of first degree murder by premeditation or deliberation. This Court has consistently rejected this kind of defense to first degree murder. *See State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980); *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976); *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976); *State v. Shepperd*, 288 N.C. 346, 218 S.E. 2d 176 (1975); *State v. Wetmore*, 287 N.C. 344, 215 S.E. 2d 51 (1975), *death sentence vacated*, 428 U.S. 905 (1976); *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975). This assignment of error is overruled.

VI

Defendant, without citation of authority, assigns as error several portions of the trial court's final charge to the jury. We have carefully examined each of the challenged instructions and find them all to be without merit. Lengthy repetition of well-settled principles of law in refutation of frivolous contentions would serve no useful purpose. Suffice it to say the trial court provided an accurate summation of the facts and the law ap-

plicable thereto. Thus we overrule without discussion these assignments.

VII

[7] Defendant assigns as error the following instruction:

> "In the event that the defendant is convicted of murder in the first degree, the Court will conduct a separate hearing or separate sentencing hearing, to determine whether the defendant should be sentenced to death or life imprisonment. This proceeding may be conducted before you or another jury. It will be conducted, if necessary, as soon as practical after your . . . after any verdict of guilty of first degree murder is returned. If that time comes, you will receive separate sentencing instructions. However, at this time, your only concern is to determine whether the defendant is guilty of the crime charged, or any lesser included offense, about which you are instructed."

Defendant contends this instruction is inadequate since it fails to inform the jury of the possible punishments under a finding of guilty of murder in the second degree.

We disagree. The judge should not ordinarily instruct the jury with regard to possible punishments for lesser included offenses of the capital crime for which defendant is being tried, at least when punishment for such offenses is not mandatory but subject to the exercise of the judge's discretion. *State v. Rhodes*, 275 N.C. 584, 169 S.E. 2d 846 (1969). In cases where the jury's verdict will result in a mandatory sentence the judge may or may not, in his discretion, so advise the jury. *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978) (no error when such advice was given); *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977) (no error when such advice was not given). *See also State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979) where we held advice as to punishment where armed robbery (involving punishment in the judge's discretion, G.S. 14-87) and first degree burglary charges were jointly tried and jointly submitted "may be given or withheld in the court's discretion . . . ." If, however, "in a capital case if the jury appears to be confused or uncertain [regarding the consequences of possible verdicts], the trial judge should act to alleviate such uncertainty or confusion." *State v. Britt*, 285 N.C. 256, 272, 204 S.E. 2d 817, 828 (1974).

We find neither error nor abuse of discretion in the trial judge's not instructing here on the range of punishment available in the event of a second degree murder conviction. Punishment in such event would have been a matter within the trial court's discretion. It would not have been a matter for the jury's consideration. The jury did not appear to be confused or uncertain regarding the consequences of its verdict.

Since, however, the jury must ultimately determine punishment upon a first degree murder conviction, G.S. 15A-2000, it was proper, if not required, for the trial judge to so inform it at the guilt determination stage. *See* G.S. 15-176.4; *see also State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976).

VIII

[8] Defendant finally contends, as we understand his argument, that his constitutional right to a jury selected from a fair cross-section of the community is violated when the prosecutor in a capital case is allowed to inquire into a prospective juror's views as to capital punishment and when all those finally seated are committed to being able to impose the death penalty. A majority of this Court, after full consideration, rejected such an argument in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980). It is rejected here.

We find, therefore, in defendant's trial

No error.

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

THE FIRST NATIONAL BANK OF ANSON COUNTY, ADMINISTRATOR OF THE ESTATE OF JOHN GATEWOOD, DECEASED, PLAINTIFF AND BRIGHT M. GATEWOOD, ADDITIONAL PLAINTIFF v. NATIONWIDE INSURANCE COMPANY AND HORNWOOD, INC., DEFENDANTS

No. 70

(Filed 2 June 1981)

1. **Insurance § 42— group insurance policy—notice of disability—employer not agent of insurer**

The employer in a group insurance policy is not ordinarily the agent of the insurance company, and notice to the employer of a disability is not notice to the insurer.

2. **Insurance § 15.4— group life insurance—waiver of premiums for disability—termination of coverage upon termination of employment**

Even if timely notice of decedent's total disability had been given to defendant insurer, decedent's coverage under a group life insurance policy by reason of a provision for waiver of premiums in the event of total disability ended on the date he was discharged from employment, since that was the date of "his termination of membership in the classes eligible for coverage"; therefore, decedent's beneficiaries of the group policy had no claim for benefits against the insurer where there was no conversion of the group coverage on decedent to single life insurance within the time permitted by the policy.

ON discretionary review of decision of the Court of Appeals, 49 N.C. App. 365, 271 S.E. 2d 528 (1980), which affirmed the judgment of *Honeycutt, J.*, entered 4 October 1979 in ANSON District Court.

This is an action to recover death benefits on a group life insurance policy. The action was brought by plaintiff, First National Bank, as administrator of the estate of John Gatewood, against defendant Nationwide, the insurer of the group policy. Gatewood's employer, Hornwood, was subsequently joined as a defendant. Gatewood's widow, Bright M. Gatewood, was subsequently joined as plaintiff. The basic points in litigation were (1) whether the group policy was in full force and effect by operation of a Waiver of Premium Clause on the date Gatewood died and (2) if so, whether the proceeds were payable to the administrator of Gatewood's estate or to his wife.

By stipulation of the parties, the case was heard by the trial judge without a jury. The trial judge determined that the group policy was in effect and that the widow was entitled to the pro-

ceeds. Judgment in favor of the additional plaintiff Bright M. Gatewood in the amount of $7,000 was entered. The plaintiff administrator and both defendants appealed. The judgment was affirmed by the Court of Appeals and we allowed defendants' petition for discretionary review.

Henry T. Drake, attorney for plaintiff appellee.

E. A. Hightower, attorney for additional plaintiff appellee.

Taylor and Bower by George C. Bower, Jr., attorneys for defendant appellants.

HUSKINS, Justice.

The only issue we need address is whether the group insurance policy was in effect as of the date of John Gatewood's death. We have concluded that it was not in effect and the Court of Appeals erred in holding to the contrary. Because the group policy was not in effect, we do not reach the issue whether the widow or the administrator was entitled to the proceeds of the policy. We first examine the facts of the case and the relevant language in the policy and then apply the appropriate rules of law.

I.

On 30 April 1971 decedent John Gatewood was employed as a custodian by defendant Hornwood, Inc. which operates a textile plant in Anson County. Hornwood was policyholder of a group insurance policy issued to it by defendant Nationwide for the benefit of Hornwood employees. At the time he applied for the job, decedent enrolled as a certificateholder for life insurance coverage under the group policy and designated his wife, Bright M. Gatewood, as beneficiary on enrollment and register cards. The policy was effective 30 June 1971. Nationwide canceled the original group policy and issued another group insurance policy to Hornwood on 1 June 1972 which remained in effect with Hornwood through the date of Gatewood's death. The new policy was the same as the original except it added dependent coverage. No enrollment or beneficiary card was entered on the new policy by Gatewood. Gatewood and his employer both contributed to the payment of premiums. Gatewood's contribution was deducted from his paycheck. Hornwood, as policyholder, forwarded the

premium for all its employees to Nationwide each month and also notified Nationwide each month of the names and changes in status of its employees. Hornwood handled all the paperwork related to the policy while it was in effect.

On 13 November 1973, Gatewood suffered an injury by accident arising out of and in the course of his employment. The injury was to his right wrist and so disabling that he could not lift heavy objects thereby precluding his working as a janitor. The accident rendered him totally unable to earn wages. He received worker's compensation benefits from 14 November 1973 until his death on 9 December 1975. He continued to come to work until 30 January 1974 but did not return to work at Hornwood after that date.

Decedent's employment with Hornwood was terminated on 7 August 1974. The reason given for the termination was an employment cutback for economic reasons. The separation notice gave "no work available" as the reason for termination.

Until Gatewood's termination of employment in August 1974, Hornwood had continued to pay premiums for decedent's coverage under the group insurance policy. Gatewood continued to contribute to the coverage while receiving worker's compensation benefits. The Hornwood personnel manager testified:

> During the time he was paid compensation, John Gatewood contributed toward the payment of the premium of the policy. He was supposed to pay it weekly. He brought the premium by. I don't know of any record of premium payments made during disability. We don't have any records concerning this that I know of.

(Testimony to the same effect by another Hornwood employee in the personnel office was subsequently excluded by the trial court.) No premiums were paid after 1 August 1974. The policy had a provision for waiver of premiums in the event of total disability. The personnel manager, whose office was responsible for preparing the monthly report to Nationwide, was aware of Gatewood's injury and his receipt of worker's compensation benefits. No waiver of premium claim or notice of disability claim was filed with Nationwide. In its monthly status report to Nationwide for August, Hornwood listed Gatewood as terminated rather than disabled.

On 9 December 1975, Gatewood died of stab wounds. In January 1976, at the request of decedent's administrator, Hornwood sent Nationwide notice of Gatewood's death and earlier disability. The administrator contended the policy was in full force and effect by operation of the clause in the policy for waiver of premium in the event the certificateholder was disabled. No claim for waiver of premium had been filed with Nationwide until this time. Nationwide refused to pay under the group policy and this suit was instituted.

II.

The insurance contract under which Gatewood's widow and the administrator of his estate claim benefits is a group insurance policy. The portions of the policy dealing with payment or waiver of premiums, termination and conversion are the provisions important to this case and therefore the ones which we will examine in detail.

There are two documents in group insurance contracts: the policy and the certificate of insurance. The policy was issued by Nationwide (insurer) to Hornwood, Inc. (policyholder) "to insure certain employees of the policyholder and its subsidiaries." The Certificate of Insurance, which was issued to each insured employee (certificateholder), summarizes certain provisions of the master policy. The Certificate of Insurance refers the certificateholder to the "Policy, which alone constitutes the agreement under which payments are made." We, therefore, look first to the master policy. *See Smith v. Assurance Society*, 205 N.C. 387, 171 S.E. 346 (1933); *see generally*, 1 Appleman, Insurance Law § 46.

The insurance became effective for what the policy defines as an "Eligible Person" on the latest of the following dates:

(1) the date he becomes an Eligible Person if he enrolls on or before that date;

(2) the date he enrolls, if he enrolls within 31 days after he becomes an Eligible Person;

(3) the date of approval of his application by the Company if he enrolls more than 31 days after he becomes an Eligible Person.

The policy defines "Eligible Person" as "any person who (1) on the effective date of this Policy, is regularly employed by the Policyholder; or (2) subsequent to the effective date of this Policy, has been regularly employed by the Policyholder not less than 2 months." The policy contains the following provision concerning the termination of insurance for an individual certificateholder:

> A Certificateholder's coverage under any benefit provision of the Policy terminates upon the first occurrence of the following:
>
> (1) . . .
>
> (2) . . .
>
> (3) . . .
>
> (4) his termination of membership in the classes eligible for coverage under that benefit provision, but membership in the classes eligible for coverage under any benefit provision set forth in the Schedule of Maximum Continuation Periods below will not be deemed to terminate solely because of the Certificateholder's disability until contributions for his coverage are discontinued or until expiration of the applicable Maximum Continuation Period set forth in that Schedule, whichever is earlier.

Schedule of Maximum Continuation Periods

Benefit Provision	Reason for Termination	Maximum Continuation Period
All Coverages except Weekly Indemnity Benefits	Disability	Until terminated by Policyholder

The policy provides a conversion privilege in the event of termination. The policy clause on this matter reads as follows:

> CONVERSION PRIVILEGE. If a Certificateholder's insurance hereunder ceases because of termination of membership in the classes eligible for insurance or any part of it ceases because of retirement, age, or change in classification, the Certificateholder will be entitled to convert all or part of the terminated insurance, without evidence of insurability, to an

individual policy of life insurance, provided written application and the first premium payment are made to the Company within thirty-one days from the date of termination. The individual policy will be upon any one of the forms then customarily issued by the Company, except term insurance or any policy containing disability benefits, and, at the option of the Certificateholder, may be preceded by single premium preliminary term insurance for a period not to exceed one year from the date of termination of his insurance. The premium payable for the individual policy will be based upon the Company's rate applicable to the class of risks to which the Certificateholder belongs and to the form and amount of the policy at the Certificateholder's attained age on the effective date of the individual policy.

. . . .

Any individual policy issued in accordance with the provisions of this section will become effective at the end of the thirty-one day period during which application for it may be made and will be in place of all the terminated insurance under the Policy.

A Certificateholder's insurance will continue during the thirty-one days within which he is eligible to exercise the Conversion Privilege, whether or not he has applied for conversion. If he dies during this period, the Company will pay as a death benefit the maximum amount he was eligible to convert.

Premium payments are governed by the following two clauses in the policy:

(1) Premiums are payable by the Policyholder in amounts determined as herein provided. The first premium is due on the Effective Date, and subsequent premiums are due monthly on the first day of each month thereafter.

(2) PAYMENT OF PREMIUMS—GRACE PERIOD. All premiums due by the terms of the Policy including adjustment thereof, if any, are payable by the Policyholder at the Home Office of the Company in Columbus, Ohio, on or before the date upon which they fall due as specified on the first page of the Policy. The payment of any premium

> will not maintain the insurance in force beyond the day immediately preceding the next due date except as otherwise herein provided. Upon written request by the Policyholder, approved by the Company, the method of premium payment may be changed to provide for payment annually, semi-annually, quarterly, or monthly.
>
> If, prior to the due date of any premium, the Policyholder has not given written notice to the Company that the Policy is to be terminated as of the due date of the premium, a grace period of thirty-one days, without interest, is allowed the Policyholder for payment of any premium due after the first, during which time the Policy will continue in force. If any premium is not paid prior to the expiration of the grace period, the Policy will terminate on the last day of the grace period and the Policyholder will be liable to the Company for the payment of all premiums then due and unpaid, including the premium for the grace period. If written notice is given by the Policyholder to the Company during the grace period that the Policy is to be terminated before the expiration of the grace period, the Policy will terminate on the date the notice is received by the Company or the date specified by the Policyholder for termination, whichever is later, and the Policyholder will be liable to the Company for the payment of the pro rata premium for the time the Policy was in force during the grace period.

The policy also contains a clause entitled "WAIVER OF PREMIUM IN THE EVENT OF TOTAL DISABILITY" which reads:

> If a Certificateholder becomes totally disabled prior to his 60th birthday and satisfactory proof is furnished within one year after he becomes totally disabled and while the Policy is in force, that his total disability has continued uninterruptedly for a period of at least six months and to the date that proof is furnished, the Company will continue the Life Insurance on the Certificateholder without payment of premium during the further uninterrupted continuance of his total disability. If the Certificateholder dies during such a period of total disability but prior to the date that satisfactory proof of total disability is furnished, the Company will

pay an amount equal to that which would have been continued if satisfactory proof of his total disability had been furnished. The amount of insurance continued or paid will be the amount for which he was insured on the date he became totally disabled, subject to any reduction at a specified age or other specified time as stated in the Schedule of Benefits.

If a Certificateholder dies while insurance is being continued in accordance with this provision, the Company will pay the amount then being continued on his life, provided notice of his death is given to the Company's home office within one year after the date of his death.

Proof of the continuance of total disability satisfactory to the Company must be submitted to the Company's home office on request, but not more often than once a year after total disability has continued for two years. The Company may, at its own expense, examine the Certificateholder when and so often as it may reasonably require, but not more often than once a year after disability has continued for two years.

If the Certificateholder ceases to be totally disabled or if he fails to submit to the Company, within a reasonable time after request therefor by the Company, satisfactory proof of the continuance of his total disability or if he refuses to be examined as above required by the Company, all insurance of the Certificateholder under this provision shall immediately terminate and the Certificateholder will be entitled to exercise the Conversion Privilege set forth in this Policy as though his eligibility had then terminated, unless he again becomes eligible for insurance under this Policy and becomes insured hereunder within 31 days after termination. If his Life Insurance is discontinued by reason of termination of the Policy or amendment of the Policy to terminate the Life Insurance on the class of Certificateholders of which he is a member, the Certificateholder will be entitled to exercise the applicable Conversion Privilege set forth in the Policy.

Exercise of the Conversion Privilege set forth in the Policy by the Certificateholder will automatically terminate the continuation of death benefit under this provision with respect to an amount equal to the face amount of the individual policy, unless it is surrendered to the Company for cancella-

tion, without claim, during the Certificateholder's lifetime and while this Policy is in force in which event premiums paid on account of the individual policy less dividends will be refunded by the Company. The beneficiary designation of an individual policy issued or applied for pursuant to the Conversion Privilege will be considered notice of change of beneficiary with respect to this Policy, notwithstanding any other provision in this Policy.

The policy in the definitions section states:

"Totally Disabled" and "Total Disability", unless otherwise specifically defined, refer to disability resulting solely from a sickness or accidental bodily injury which prevents a Certificateholder from engaging in any occupation or employment for compensation or profit.

Finally, the policy contains the following relevant provision for keeping records:

RECORDS AND REPORTS. The Policyholder will keep a record which will show at all times the names of the Certificateholders and the essential particulars of each Certificateholder's insurance. The Policyholder will periodically furnish the Company, on forms satisfactory to the Company, such information concerning the persons in the classes eligible for the insurance under the Policy as may be considered reasonably pertinent to the determination of the premium rates and the efficient administration of the insurance. The Company will be permitted the opportunity at all reasonable times to inspect the Policyholder's records to the extent that they have a bearing on the insurance.

If an Eligible Person has made written request to the Policyholder, on a form furnished by the Company, to participate in the insurance under the Policy and has made the required contributions, his insurance will not be invalidated by the failure of the Policyholder, due to clerical error, to record or report him for insurance. Failure to report the termination of insurance of any Certificateholder will not cause his insurance to be continued beyond the date of termination determined in accordance with the provisions hereof.

The Certificate of Insurance issued to Gatewood was introduced into evidence at trial. It contains verbatim the effective date, definition, termination, conversion and waiver of premium clauses quoted above. It does not contain the payment of premium and records and reports clauses quoted above. The insured is charged with notice of the provisions in the certificate of insurance. *Rivers v. Insurance Co.*, 245 N.C. 461, 96 S.E. 2d 431 (1957).

III.

The policy specifies the contract is governed by the laws of North Carolina. The policy also specifies that "any provision . . . which . . . is in conflict with the statutes of the state . . . is hereby amended to conform to the minimum requirements of those statutes." Some of the legislation applicable to Group Life Insurance was amended in 1977, since the time the policy in question was issued and since Gatewood's death. 1977 N.C. Sess. Laws c. 192 §§ 1-4, c. 835. This discussion is limited to the statutes as they existed before amendment.

Group life insurance policies are allowed in this State subject to the approval of the Commissioner of Insurance. G.S. 58-30.2. The type of group life insurance involved in this case is defined in G.S. 58-210(1). Standard provisions for group life insurance are contained in G.S. 58-211. The standard provisions relevant to this suit are those dealing with termination of group life insurance, conversion to individual life insurance and payment of premiums. Those provisions within G.S. 58-211 read as follows:

> No policy of group life insurance shall be delivered in this State unless it contains in substance the following provisions, or provisions which in the opinion of the Commissioner are more favorable to the persons insured, or at least as favorable to the persons insured and more favorable to the policyholder, provided, however, (i) that subdivisions (6) to (10) inclusive shall not apply to policies issued to a creditor to insure debtors of such creditor; (ii) that the standard provisions required for individual life insurance policies shall not apply to group life insurance policies; and (iii) that if the group life insurance policy is on a plan of insurance other than the term plan, it shall contain a nonforfeiture provision or provisions which in the opinion of the Commissioner is or

are equitable to the insured persons and to the policyholder, but nothing herein shall be construed to require that group life insurance policies contain the same nonforfeiture provisions as are required for individual life insurance policies:

(1) A provision that the policyholder is entitled to a grace period of 31 days for the payment of any premium due except the first, during which grace period the death benefit coverage shall continue in force, unless the policyholder shall have given the insurer written notice of discontinuance in advance of the date of discontinuance and in accordance with the terms of the policy. The policy may provide that the policyholder shall be liable to the insurer for the payment of a pro rata premium for the time the policy was in force during such grace period.

. . . .

(7) A provision that the insurer will issue to the policyholder for delivery to each person insured an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom the insurance benefits are payable, and the rights and conditions set forth in (8), (9) and (10) following.

(8) A provision that if the insurance, or any portion of it, on a person covered under the policy ceases because of termination of employment or of membership in the class or classes eligible for coverage under the policy, such person shall be entitled to have issued to him by the insurer, without evidence of insurability, an individual policy of life insurance without disability or other supplementary benefits, provided application for the individual policy shall be made, and the first premium paid to the insurer, within 31 days after such termination, and provided further that,

a. The individual policy shall, at the option of such person, be on any one of the forms, except term insurance, then customarily issued by the insurer at the age and for the amount applied for;

b. The individual policy shall be in an amount not in excess of the amount of life insurance which ceases because of such termination, provided that any amount of insurance which shall have matured on or before the date of such termination as an endowment payable to the person insured, whether in one sum or in installments or in the form of an annuity, shall not, for the purposes of this provision, be included in the amount which is considered to cease because of such termination; and

c. The premium on the individual policy shall be at the insurer's then customary rate applicable to the form and amount of the individual policy, to the class of risk to which such person then belongs, and to his age attained on the effective date of the individual policy.

. . . .

(10) A provision that if a person insured under the group policy dies during the period within which he would have been entitled to have an individual policy issued to him in accordance with (8) or (9) above and before such an individual policy shall have become effective, the amount of life insurance which he would have been entitled to have issued to him under such individual policy shall be payable as a claim under the group policy, whether or not application for the individual policy or the payment of the first premium therefor has been made.

On review, the policy comports with all these statutory provisions.

[1] The case law in this jurisdiction clearly establishes that the employer-master policyholder is not ordinarily the agent of the insurer. Rather, he is the agent of the employee-certificateholder. *Rivers v. Insurance Co.*, 245 N.C. 461, 96 S.E. 2d 431 (1957); *Haneline v. Casket Co.*, 238 N.C. 127, 76 S.E. 2d 372 (1953); *Dewease v. Insurance Co.*, 208 N.C. 732, 182 S.E. 447 (1935); *Ammons v. Assurance Society*, 205 N.C. 23, 169 S.E. 807 (1933). There is contrary authority in other jurisdictions. *See* 1 Appleman, In-

surance Law § 43; 19 Couch on Insurance 2d § 82:55. The rationale behind our rule, that the employer in a group insurance policy is not ordinarily the agent of the insurance company, is best summarized in *Boseman v. Insurance Co.*, 301 U.S. 196, 81 L.Ed. 1036, 57 S.Ct. 686 (1937), which has been quoted in several of our cases:

> Employers regard group insurance not only as protection at low cost for their employees but also as advantageous to themselves in that it makes for loyalty, lessens turn-over and the like. When procuring the policy, obtaining applications of employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums and generally in doing whatever may serve to obtain and keep the insurance in force, employers act not as agents of the insurer but for their employees or for themselves.

301 U.S. at 204-05, 81 L.Ed. at 1041, 57 S.Ct. at 690. A corollary of this rule is that notice to the employer of a disability is not notice to the insurer. *Dewease v. Insurance Co.*, supra.

The defendant insurer argues this rule of agency exempts it from liability. Nationwide had no notice of disability or claim of premiums waiver filed with it until after Gatewood's death. Premiums were paid in behalf of Gatewood through 1 August 1974. The Change Report filed by Hornwood for the month of August reported to Nationwide that employee Gatewood was terminated on 1 August 1974. The Change Report has an adjustment code which provides the following codes:

> * Adjustment Codes:
>
> 1 —Addition
> 2 —Cancellation (Give Reason, i.e.)
> 2A—Cancellation requested
> 2B—Termination of Employment
> 2C—Temporary lay-off or leave-of-absence
> 2D—Sickness or injury
> 2E—Retirement
> 2F—Death
> 3 —Dependent Addition
> 4 —Dependent Cancellation
> 5 —Change in Class
> 6 —Reinstatement

Gatewood was given a 2B adjustment code. Nationwide's only information on Gatewood was (1) that he was a covered employee whose premiums had been paid through 1 August 1974 and (2) he was no longer a covered employee after 1 August 1974 because his employment had been terminated. Its only notice came in January 1976 after the death of Gatewood. There is merit in the insurer's defense, and we do not choose to overrule our case law on the agency relationship of the employer-master policyholder. However, there is a more fundamental flaw in the right of any beneficiary of Gatewood to recover under this group insurance policy.

Both the trial court and the Court of Appeals resolved this case by examining only the waiver of premium clause. They determined the clause was ambiguous because it did not explicitly state whether the employee or the employer was to notify the insurer of the disability which Gatewood had and which would result in a waiver of premium payments. The Court of Appeals relied on the principle of law that when there is an ambiguity and the policy provisions are susceptible to two interpretations, one of which imposes liability on the company and the other does not, the provisions will be construed in favor of coverage and against the insurer. *See, e.g., Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102 (1967). This principle is applicable, however, only when there is an ambiguity. The problem in this case is that the ambiguity arises only when the waiver clause is read out of context. It must be read and interpreted in context and in conjunction with the termination clause and the conversion privilege clause. When this is done, there is no ambiguity in the policy.

[2] The policy termination provision applicable to Gatewood provided his benefits terminated upon

> his termination of membership in the classes eligible for coverage under that benefit provision, but membership in the classes eligible for coverage under any benefit provision set forth in the Schedule of Maximum Continuation Periods below will not be deemed to terminate solely because of the Certificateholder's disability until contributions for his coverage are discontinued or until expiration of the applicable Maximum Continuation Period set forth in that Schedule, whichever is earlier.

Schedule of Maximum Continuation Periods

Benefit Provision	Reason for Termination	Maximum Continuation Period
All Coverages except Weekly Indemnity Benefits	Disability	Until terminated by Policyholder

Quite simply, Gatewood's coverage under the group policy ended on 7 August 1974, the date he was discharged from employment. That was the date of "his termination of membership in the classes eligible for coverage." And even if we look to the continuation period, his coverage was terminated on 7 August 1974. Even though Gatewood was disabled and even if we assume error in not reporting disability which was imputable to Nationwide, the coverage remained in effect until the earlier of (1) "until contributions for his coverage are discontinued" or (2) "until expiration of the applicable Maximum Continuation Period" which was "[u]ntil terminated by Policyholder." If the policyholder had notified Nationwide of the certificateholder's disability, upon termination of the certificateholder, the group policy coverage for the disabled certificateholder would have ended in any event. Hornwood, the master-policyholder, terminated Gatewood on 7 August 1974. Gatewood's group insurance coverage ended that day. Group insurance coverage lasts only as long as membership in the group is maintained or as long as extended once membership in the group ends. Group coverage must then be timely converted to individual coverage.

By the terms of the policy, which is in compliance with G.S. 58-211(8), Gatewood had thirty-one days from and after 7 August 1974 to convert his group life insurance coverage to single life coverage. Gatewood never exercised this conversion privilege. Thus, when he died on 5 December 1975, the coverage under the group policy had long ago terminated and the conversion privilege had never been timely exercised. *See generally*, 1 Appleman, Insurance Law § 125; 19 Couch on Insurance 2d § 82:29.

This reasoning is consistent with that applied in *Love v. Assurance Co.*, 251 N.C. 85, 110 S.E. 2d 603 (1959). In that case, the beneficiary under a group life insurance policy instituted an

action to recover death benefits under a policy which had been issued by the defendant. John H. Love, Sr. was a member of a musician's association which had a noncontributory group life insurance policy with the defendant. Love was a certificateholder under the policy. Love's membership in the musician's association terminated on 15 August 1956. Plaintiff introduced evidence that Love was disabled as early as 24 April 1956. No notice of this disability was given to defendant insurer until after Love's death on 15 January 1957. The group policy did contain a conversion privilege which was not exercised. The Court affirmed judgment of nonsuit for the defendant insurer. The Court held that upon termination of the insured's membership in the association holding the group policy, the insured's coverage terminates unless he avails himself of the conversion privilege in the policy or his termination from membership is shown to be wrongful or fraudulent.

> [T]he insured could not retain his insurance under the group policy separate and apart from membership in the Association. Consequently, when his membership in the Association was terminated, his rights were then relegated to the conversion privilege as set out in his certificate of insurance—a privilege which he never asserted.

251 N.C. at 87, 110 S.E. 2d at 605. *See also Pearson v. Assurance Society*, 212 N.C. 731, 194 S.E. 661 (1938). The insurance policy in the *Love* case also contained a waiver of premiums upon disability provision. The Court rejected an argument that this waiver clause extended the life of the group policy. The Court said:

> Conceding, but not deciding, that the insured became totally disabled within the meaning of the provisions of the policy from and after 24 April 1956 until his death, since notice of such disability was never communicated to the defendant until after the insured's death, the plaintiff is not entitled to recover on the policy pursuant to the provisions for waiver of premiums.

251 N.C. at 87, 110 S.E. 2d at 605.

In light of the termination and conversion clause, the waiver of premium clause in the present case is not ambiguous. Premiums are waived for a totally disabled *certificateholder.*

After 7 August 1974, Gatewood was no longer a certificateholder. The waiver clause makes reference to the conversion privilege and the consequence of its exercise:

> If his Life Insurance is discontinued by reason of termination of the Policy or amendment of the Policy to terminate the Life Insurance on the class of Certificateholders of which he is a member, the Certificateholder will be entitled to exercise the applicable Conversion Privilege set forth in the Policy.
>
> Exercise of the Conversion Privilege set forth in the Policy by the Certificateholder will automatically terminate the continuation of death benefit under this provision with respect to an amount equal to the face amount of the individual policy, unless it is surrendered to the Company for cancellation, without claim, during the Certificateholder's lifetime and while this Policy is in force in which event premiums paid on account of the individual policy less dividends will be refunded by the Company.

The trial court award was only against the insurer. The trial court did find the employer-master policyholder negligently failed to keep records and make reports as it was required to do under the terms of the policy, and it negligently reported Gatewood as terminated when it should have reported him disabled. The trial court entered no judgment against the employer. This negligence is, however, of no consequence. Even if disability notice had been given to Nationwide, the policy coverage by waiver of premiums ended with the termination of Gatewood's employment. Evidence in the record indicates Gatewood and his employer continued to pay the premiums until Gatewood's discharge from employment. No waiver of premium was sought while the policy was in effect. If this constituted negligence, the negligence was superseded and insulated by Gatewood's failure to convert his coverage.

Accordingly, we hold that when group life insurance coverage is terminated and there is no conversion of that coverage to single life insurance, the beneficiaries of the group policy have no claim for benefits from the insurer.

The Court of Appeals opinion affirming the trial court's determination that the group insurance policy was in effect by operation of the waiver of premium clause at Gatewood's death is

reversed. The case is remanded to the Court of Appeals for further remand to the trial court for entry of judgment in favor of both defendants.

Reversed and remanded.

IN RE: ANNEXATION ORDINANCE #D-21927 ADOPTED BY CITY OF WINSTON-SALEM, N. C., DECEMBER 17, 1979—AREA I

IN RE: ANNEXATION ORDINANCE #D-21927 ADOPTED BY CITY OF WINSTON-SALEM, N. C., DECEMBER 17, 1979—AREA II

IN RE: ANNEXATION ORDINANCE #D-21927 ADOPTED BY CITY OF WINSTON-SALEM, N. C., DECEMBER 17, 1979—AREA 6-A

IN RE: ANNEXATION ORDINANCE #D-21927 ADOPTED BY CITY OF WINSTON-SALEM, N. C., DECEMBER 17, 1979—AREA 6-B-1

IN RE: ANNEXATION ORDINANCE #D-21927 ADOPTED BY CITY OF WINSTON-SALEM, N. C., DECEMBER 17, 1979—AREA 8

No. 47

(Filed 2 June 1981)

1. Municipal Corporations § 2— annexation statutes—no unconstitutional delegation of authority

Statutes governing annexation by municipalities having a population of 5,000 or more, G.S. 160A-45 *et seq.*, do not unconstitutionally delegate authority to the governing boards of the municipalities without adequate standards and guidelines because (1) there is no definition of the terms "major trunk water mains and sewer outfall lines" and (2) the statutes require that the annexation report set forth plans for providing municipal services to the areas to be annexed on the date of annexation on "substantially" the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

2. Municipal Corporations § 2— annexation without consent—due process and equal protection

Annexation without a vote of the residents in the areas to be annexed does not violate due process and equal protection rights of such residents.

3. Municipal Corporations § 2.6— maintenance of unpaved streets in area to be annexed

There is no merit to petitioners' contention that their rights to due process and equal protection are violated on the ground that they have no adequate remedy at law because their time for appealing any failure by the city to provide city services will have expired before the time the annexation plans call for the city to begin paving unpaved streets since the annexation statutes do not require that the unpaved streets in the area to be annexed be paved, and there is nothing in the record to indicate that the unpaved streets will not be paved in the same manner and on a comparable schedule as those unpaved streets existing within the corporate limits of the city prior to annexation; furthermore, petitioners in fact have an adequate remedy at law since the annexation plan and the provision for services thereunder, when approved by the court, become a court-ordered plan, and any failure to comply therewith can be remedied by the court. G.S. 160A-50(h).

4. Constitutional Law § 23.3; Municipal Corporations § 2— annexation statutes— taxation without vote

Annexation statutes are not unconstitutional because they subject the property annexed to taxation when the property owners do not have the right to vote on the members of the annexing city's governing board which adopts the annexation ordinance.

5. Constitutional Law § 24.9; Municipal Corporations § 2— annexation statutes— superior court review without jury

Annexation statutes are not unconstitutional because they provide that the review by the superior court is without a jury.

6. Municipal Corporations § 2— annexation statutes—statement of policy—test of reasonableness

The statement of State policy with regard to annexation set forth in G.S. 160A-45 is not part of the "procedure" of annexation under G.S. 160A-50(a) and G.S. 160A-50(f)(1), and there is no test of "reasonableness" which must be considered upon judicial review of an annexation proceeding.

7. Municipal Corporations § 2.6— extension of services to annexed territory

The evidence supported the trial court's determination that a city's plans for the extension of police protection, fire protection, water and sewer services, street maintenance and recreational services to an area to be annexed provided for furnishing such services on substantially the same basis and in the same manner as such services were provided within the corporate limits of the city prior to annexation. G.S. 160A-47(3)(a).

8. Municipal Corporations § 2.1— annexation ordinance—reliance on studies by staffs of city departments

An annexation ordinance was not invalid because the city governing board and several city department heads relied upon studies, investigations, reports, and accountings conducted by the staffs of the various city departments.

9. Municipal Corporations § 2.4— appeal of annexation ordinance—burden of proof

The burden was on the petitioners, who appealed from an annexation ordinance, to show by competent evidence that the city in fact failed to meet the statutory requirements or that there was irregularity in the proceedings which materially prejudiced their substantive rights.

10. Municipal Corporations § 2.5— effective date of annexation

Where annexation ordinances were the subject of an appeal to the Supreme Court on the effective date of the ordinances, the effective date of the ordinances was postponed until the final judgment of the Supreme Court is certified to the clerk of superior court. G.S. 160A-50(i).

APPEAL by petitioners pursuant to G.S. 160A-50(h) from a judgment by *Lamm, J.*, declaring the annexation ordinances in question valid, entered on 6 June 1980 out of term and out of county by stipulation of the parties. The matter was heard without a jury at the 19 May 1980 Civil Session of Superior Court, FORSYTH County.

The genesis of this appeal is an ordinance of the Board of Aldermen of the City of Winston-Salem annexing to the City of Winston-Salem five (5) areas containing a total of 4.9 square miles of land having 8,502 residents.[1]

It is stipulated in the record on appeal that in its annexation proceedings the City of Winston-Salem duly adopted the ordinance of annexation on 17 December 1979, that all required notices were given, that public hearings required by statute were duly held, that all parties were properly before the court and that the court had jurisdiction of the parties and the subject matter.

In the early part of 1979 at the request of the city manager, the assistant city manager, Joe Berrier, requested that the planning department of the City of Winston-Salem prepare maps and population data for all urban areas eligible for annexation. Staff personnel analyzed the population characteristics of these areas and the city's ability to provide various city services to the areas.

1. For the sake of convenience we refer to the annexation ordinances as a single ordinance. Actually there are five separate ordinances, each corresponding to a separately numbered area. All five ordinances were adopted at the same meeting of the Board of Aldermen in consecutive order by numbered area. All five ordinances bear the same ordinance number (D-21927) and are the same in all respects except for the description of the territory annexed.

Costs of providing water and sewer services, police and fire protection and other city services were all considered by Mr. Berrier and various department and division heads. On 13 September 1979 Mr. Berrier sent a letter to all members of the Board of Aldermen requesting that they come by his office to review the maps and discuss proposed plans for annexation. Meetings of a special annexation committee of the city staff personnel were held in October, 1979, to discuss the costs of annexing certain areas. On 4 October 1979 maps of ten areas being considered for annexation, including the five areas eventually approved for annexation, were sent to the public works committee and the finance committee of the Board of Aldermen. On 8 and 9 October 1979, city staff members discussed with the public works and finance committees of the Board the preliminary cost estimates and a time schedule for annexation. All of the foregoing steps were taken prior to the Board of Aldermen's first formal consideration of the annexation, which occurred on 15 October 1979 when the Board adopted a resolution declaring its intent to annex and setting the date for the public hearing. On 12 November 1979, the Board of Aldermen held a duly-advertised special meeting and received and approved the annexation study report which proposed annexation of the five areas into the city. A public hearing was held on 3 December 1979 at which time interested persons were given an opportunity to be heard with respect to the proposed annexation. On 17 December 1979, the Board adopted the annexation ordinance in question.

Petitioners filed their petition in the Superior Court, Forsyth County in apt time in accordance with G.S. 160A-50. The city filed a response and forwarded documents to the court and served copies of the same on the petitioners.

Beginning 19 May 1980, Judge Lamm heard over six days of testimony from thirty witnesses, including the petitioners, the mayor, every member of the Winston-Salem Board of Aldermen and eleven city employees (including eight department or division heads). Judge Lamm made findings of fact and conclusions of law and entered his judgment on 6 June 1980, holding the City of Winston-Salem's annexation of the five areas valid and in conformity with the laws of North Carolina. From that judgment plaintiffs appealed.

Doughton, Moore, and Newton, by Thomas W. Moore, Jr., George E. Doughton, Jr. and Richmond W. Rucker, attorneys for petitioner appellants.

Womble, Carlyle, Sandridge, and Rice, by Roddey M. Ligon, Jr.; and Ronald G. Seeber and Ralph D. Karpinos, attorneys for respondent appellee.

MEYER, Justice.

As the City of Winston-Salem is a municipality having a population of more than five thousand according to the 1980 federal decennial census, annexation by the city is governed by Chapter 160A, Article 4A, Part 3, of the General Statutes. The guiding standards and requirements of that Act are set forth in great detail and the governing body must conform to the procedures and meet the requirements set forth in the Act as a condition precedent to the right to annex. *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E. 2d 795 (1961). *Prima facie* complete and substantial compliance with the applicable statutes is likewise a condition precedent to annexation. *In re Annexation Ordinance*, 296 N.C. 1, 249 S.E. 2d 698 (1978).

Petitioners are ten in number, being a husband and wife from each of the five annexed areas. They bring forward numerous assignments of error grouped under eight "Questions Presented." We set forth below *seriatim* the petitioners' contentions as to each question presented and our conclusion with respect thereto.

Questions I, II, III and IV challenge the constitutionality of the annexation statute and the city's annexation of the five areas pursuant thereto.

I

[1] Petitioners contend that the annexation statute (G.S. 160A-45, *et seq.*) is an unconstitutional delegation of authority to the governing boards of the municipalities without adequate standards and guidelines. Petitioners say that there is an unconstitutional delegation because (1) there is no definition of the terms "major trunk water mains and sewer outfall lines" and (2) the statute requires that the annexation report set forth plans for providing other municipal services such as police protection, fire protection, garbage collection and street maintenance services to

the areas to be annexed on the date of annexation on "substantially" the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

The ordinary restrictions with respect to the delegation of power to a state agency which exercises no function of government do not apply to cities, towns or counties. The legislature has the right, unhampered by constitutional restrictions, to grant the power given in the annexation statute under consideration to municipalities having a population of five thousand or more since the power is incidental to municipal government in matters of purely local concern. *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E. 2d 795 (1961); *see Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E. 2d 204 (1972); *Williams v. Town of Grifton*, 19 N.C. App. 462, 199 S.E. 2d 288 (1973).

G.S. 160A-47(3)(b) requires that the plans of the municipality include extension of "major trunk water mains and sewer outfall lines" into the area to be annexed so that when such lines are constructed, "property owners in the area to be annexed will be able to secure public water and sewer service, according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions." The very wording of the statute establishes the standard or guideline for "major trunk water mains and sewer outfall lines" as being those which, when constructed, will allow public water and sewer service to be provided to individual lots and subdivisions in the annexed area in the same manner that such services are provided within the existing corporate limits. It is obvious that the characterization of the size of water mains and sewer outfall lines as "major" mains and lines depends largely upon the size of the municipality or even the number of users within a particular subdivision. Reason and common understanding dictate that the characterization of a main or line as a "major" main or line would not be the same for the town of Brevard with a population of 5,286 as it would be for the city of Charlotte with a population of 310,799 (1980 census figures). The legislature wisely selected terminology with sufficient flexibility to be applied in such diverse situations.

The use of the word "substantially" in G.S. 160A-47(3)(a) does not render the statute vague and ambiguous. Whether a city can provide services to the newly annexed areas "on substantially the

same basis" as those services are provided within the corporate limits of the municipality prior to annexation is usually the subject of much debate in controversies involving annexation. In the case before us Judge Lamm heard literally days of testimony on this very issue and concluded with respect to each major municipal service that such services could be provided by the City of Winston-Salem on substantially the same basis and in the same manner as such services were provided within the city prior to annexation. Pursuant to G.S. 160A-50(f), it is the role of the court to determine whether the provisions of G.S. 160A-47 were met. Pursuant to G.S. 160A-50(h), the appeal from the final judgment of the superior court is directly to the Supreme Court, which reviews the determination made by the trial judge as to whether there was "substantial" compliance with the statute. We find ample and convincing evidence in the record to support his conclusions in that regard.

The assignments of error grouped under petitioners' Question Presented I are without merit and are overruled.

II

[2] The petitioners contend that their rights to due process and equal protection were violated because the residents of the annexed areas had no vote on the question of annexation.

It is well settled that annexation without the consent of the residents of the area being annexed does not conflict with the principles of due process. *Hunter v. Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907); *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E. 2d 795 (1961); *Lutterloh v. Fayetteville*, 149 N.C. 65, 62 S.E. 758 (1908); *Manly v. City of Raleigh*, 57 N.C. 370 (1859).

The courts have likewise upheld annexation without consent as not violative of the equal protection clause of the United States Constitution. *Clark v. Kansas City*, 176 U.S. 114, 20 S.Ct. 284, 44 L.Ed. 392 (1900); *Wilkerson v. City of Coralville*, 478 F. 2d 709 (8th Cir. 1973); *Garren v. City of Winston-Salem*, 463 F. 2d 54 (4th Cir.), *cert. denied*, 409 U.S. 1039 (1972); *Thompson v. Whitley*, 344 F. Supp. 480 (E.D.N.C. 1972). *See Rexham Corp. v. Town of Pineville*, 26 N.C. App. 349, 216 S.E. 2d 445 (1975); *see also* Annot., 64 A.L.R. 1335, 1364-65 (1929).

[3] Petitioners also contend that their constitutional rights to due process and equal protection are violated because they have no adequate remedy at law since their time for appealing any failure by the city to provide city services will have already expired before the time the annexation plans call for the city to begin paving unpaved streets. Pursuant to the annexation plan, the city does not plan to begin paving unpaved streets until 15 months after annexation, but all such unpaved streets are scheduled to be paved within approximately two years of the effective date of the annexation period. G.S. 160A-47(3)(a) requires that the plan provide for "street maintenance services" to the area to be annexed on substantially the same basis and in the same manner as services are provided within the rest of the municipality prior to annexation. Under the statute the city is obligated to maintain the streets in the annexed area, whether paved or unpaved, on substantially the same basis and in the same manner as within the city prior to annexation. Upon annexation the city becomes responsible for the maintenance of these unpaved streets, but the statute does not require that they be paved. The statute demands only that they be treated substantially on the same basis and in the same manner as the streets within the corporate limits prior to annexation. The paving program was included in the annexation plan. There is nothing in the record before us to indicate that the unpaved streets within the annexation area will not be paved in the same manner and on a comparable schedule as those unpaved streets existing within the corporate limits of the City of Winston-Salem prior to annexation. In any event, we believe that the petitioners in fact have an adequate remedy at law. When approved by the court, the annexation plan and the provision for services thereunder become a court-ordered plan and any failure to comply can be remedied by the court. G.S. 160A-50(h). We note that G.S. 160A-50(h), while an exclusive remedial provision insofar as it covers services which must be provided within the time period set forth in G.S. 160A-47(3), does not exclude from judicial review plans for paving or other municipal services consistent with policies of the city not required to be provided within one year. It is unnecessary for us to determine whether petitioners have standing to make this argument. We simply note that the city has not yet failed to provide any of the services for which the statute allows a writ of mandamus.

The assignments of error grouped under petitioners' Question Presented II are overruled.

III

[4] Petitioners contend that the annexation statute is unconstitutional because it subjects the property annexed to taxation when the property owners do not have the right to vote on the members of the city's governing board which adopts the annexation ordinance. This, they contend, constitutes taxation without representation and deprivation of property without due process of law. There is no merit in this assignment.

We held in *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E. 2d 795 (1961), that "the fact that the property of residents in the annexation area will thereby become subject to city taxes levied in the future, does not constitute a violation of the due process clause of the State and Federal Constitutions." *Id.* at 651-52, 117 S.E. 2d at 805.

The United States Supreme Court held in *Hunter v. Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907), that involuntary annexation of an area into a municipality, even where the voters of the area to be annexed were entitled to vote and voted not to join, but were outvoted by the voters in the city, did not deprive those voters and residents of the annexation area their right to due process. This was so, the Court said, even though the property in the annexation area may be lessened in value by the burden of the increased taxation or because inhabitants of that area would suffer inconvenience for any other reason. *Id.* at 177-79, 28 S.Ct. at 46-47, 51 L.Ed. at 158-59.

The assignments of error grouped under petitioners' Question Presented III are overruled.

IV

[5] The petitioners contend that the annexation statute is unconstitutional because it provides that the review by the superior court is without a jury.

This Court said in *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E. 2d 795 (1961):

> The procedure and requirements contained in the Act under consideration being solely a legislative matter, the

> right of trial by jury is not guaranteed, and the fact that the General Assembly did not see fit to provide for trial by jury in cases arising under the Act, does not render the Act unconstitutional.

Id. at 649, 117 S.E. 2d at 804. *See also Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E. 2d 265 (1980); *In re Annexation Ordinance*, 284 N.C. 442, 202 S.E. 2d 143 (1974).

The assignments of error grouped under petitioners' Question Presented IV are overruled.

V and VI

[6] Petitioners contend in their Questions Presented V and VI that the matters set forth in G.S. 160A-45 concerning the statement of state policy with regard to annexation should be treated as a part of the "procedure" under G.S. 160A-50(a) and G.S. 160A-50(f)(1). Thus, they contend, even if the court fails to treat the statements of state policy as a part of the "procedure" of annexation, there is nevertheless a separate test of "reasonableness" of the viability of an annexation proceeding which must be considered upon judicial review in order to protect the residents of a municipality and residents of the annexation area from an ill-conceived annexation by the governing body of the municipality.

In *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980), this Court held:

> [T]he provisions of G.S. 160A-45 are merely statements of policy. No procedural steps, substantive rights, or annexation requirements are contained in that statute. The policies enumerated there are aids for statutory interpretation when other sections of part 3 of Chapter 160A are in need of clarification, definition, and interpretation.

Id. at 189, 265 S.E. 2d at 191.

The superior court's review of the annexation ordinance of a municipal governing body is limited by statute. *Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E. 2d 265 (1980). Upon review the judge may examine the annexation proceedings to determine only whether the municipal governing board substantially complied with the requirements of the applicable annexation statutes. *Id.*; *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189

(1980); *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 265 S.E. 2d 123 (1980).

G.S. 160A-50(f) provides in effect that on judicial review the court may hear oral arguments, receive written briefs, and may take evidence intended to show:

(1) that the statutory procedure was not followed, or

(2) that the provisions of G.S. 160A-47 were not met, or

(3) that the provisions of G.S. 160A-48 have not been met. This section clearly specifies the inquiries to which the court is limited. *In re Annexation Ordinance*, 284 N.C. 442, 202 S.E. 2d 143 (1974).

This Court described the limitations of a court's review of an annexation ordinance in *In re Annexation Ordinance*, 278 N.C. 641, 180 S.E. 2d 851 (1971). There the Court said:

> Thus, the court's review is limited to these inquiries: (1) Did the municipality comply with the statutory procedures? (2) If not, will the petitioners "suffer material injury" by reason of the municipality's failure to comply? (3) Does the character of the area specified for annexation meet the requirement of G.S. 160-453.16 as applied to petitioners' property? G.S. 160-453.18(a) and (f).

Id. at 646-47, 180 S.E. 2d at 855.

We conclude that the provisions of G.S. 160A-45 are statements of policy and should not be treated as part of the procedure under G.S. 160A-50(a) and G.S. 160A-50(f)(1). Nor do we find a separate test of "reasonableness" within the limited scope of judicial review permitted in annexation cases.

The assignments of error grouped under petitioners' Questions Presented V and VI are overruled.

VII

[7] In an annexation report the city must include a statement setting forth the plans of the municipality for extending certain enumerated municipal services to the area to be annexed on the date of annexation "on substantially the same basis and in the same manner as such services are provided within the rest of

the municipality prior to annexation." G.S. 160A-47(3)(a). In their Question Presented VII, petitioners contend that the trial court erred in concluding that the plan submitted by the City of Winston-Salem for extending police protection, fire protection, water and sewer service, street maintenance services and recreational services complied with the requirements of G.S. 160A-47(3)(a). On appeal, the findings made by the Court below are binding on this Court if supported by competent evidence, even though there is evidence to the contrary. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 123 (1980); *In re Annexation Ordinance*, 296 N.C. 1, 249 S.E. 2d 698 (1978).

The petitioners had the burden of showing by competent and substantial evidence a failure to meet statutory requirements or an irregularity in the proceedings which materially prejudiced their substantive rights. *Food Town Stores v. City of Salisbury*, 300 N.C. at 25, 265 S.E. 2d at 126; *Dunn v. City of Charlotte*, 284 N.C. 542, 201 S.E. 2d 873 (1974); *In re Annexation Ordinance*, 278 N.C. 641, 180 S.E. 2d 851 (1971); *Huntley v. Potter*, 255 N.C. 619, 122 S.E. 2d 681 (1961). Petitioners have failed to carry that burden. Even if there were slight irregularities in the report or procedures, which in fact the appellee denies, this would not invalidate the ordinance provided there has been substantial compliance with all essential provisions of the law. *In re Annexation Ordinance*, 278 N.C. at 648, 189 S.E. 2d at 856. It would serve only to clutter the pages of our reports if we undertook to summarize those portions of the over two hundred pages of recorded testimony of witnesses which support Judge Lamm's findings that the city's plans will provide the various city services to the annexed area in accordance with the standards and guidelines of the annexation statute. As to this contention, it is sufficient to say that we find ample competent evidence in the record to support the findings of the court below. Our comprehensive review of the annexation documents and proceedings compels the conclusion that the annexation of the five areas was accomplished in full compliance with the requirements of G.S. 160A-47(3)(a). The plans for the extension of police protection, fire protection, water and sewer services, street maintenance and recreational services to the annexed area provide for furnishing such services on substantially the same basis and in the same manner as such services are provided within the corporate limits of the City of Winston-Salem prior to annexation.

The assignments of error grouped under petitioners' Question Presented VII are overruled.

VIII

[8] In their Question Presented VIII, petitioners contend that the annexation ordinance is invalid because the Board of Aldermen and several city department heads were guilty of "gross misuse of discretion and the abrogation of responsibility" in relying upon the staff of the various city departments to conduct studies, make investigations, produce reports, and do accountings upon which the department heads and Board members relied. We find no merit in this contention. We know of no statute or legal precedent which prohibits members of the governing bodies and department heads of municipalities from relying upon studies, investigations, reports, accountings, etc., conducted by city staff members. This is true whether such studies, reports, etc., were made at the specific request and authorization of the governing body or department head or in the ordinary course of municipal affairs.

Under the annexation statute, "the only discretion given to the governing boards of such municipalities is the permissive or discretionary right to use this new method of annexation provided such boards conform to the procedure and meet the requirements set out in the Act . . . ." *In re Annexation Ordinances*, 253 N.C. at 647, 117 S.E. 2d at 802. The record shows that the city staff made an extensive study and that all members of the Board of Aldermen had the opportunity to review those studies and the annexation maps, and to discuss with city staff all aspects of the proposed annexation; that the Board then received and approved the annexation study report on 12 November 1979, after two of its committees had discussed the costs and time schedule for annexation; and that the Board held a public hearing on the proposed annexation on 3 December 1979, at which time all interested persons spoke regarding the proposed annexation.

> It certainly cannot be considered a mere shell or ritual of conformity when the governing body of a municipality, in good faith, obtains all the information required by the Act, with respect to the character of the area or areas to be annexed, the density of the resident population therein, the extreme boundaries thereof, and the percentage of such

boundaries which are adjacent or contiguous to the municipality's boundaries, which must be at least one-eighth; and further provides or makes provision to extend all the governmental services to the newly annexed area or areas, comparable to the services provided for the residents within the city prior to annexation of the new area or areas.

In re Annexation Ordinances, 253 N.C. at 647, 117 S.E. 2d at 802.

The assignments of error grouped under petitioners' Question Presented VIII are overruled.

CONCLUSION

[9] The burden was on the petitioners, who appealed from the annexation ordinance, to show by competent evidence that the city in fact failed to meet the statutory requirements or that there was irregularity in the proceedings which materially prejudiced their substantive rights. *Food Town Stores v. Salisbury*, 300 N.C. 21, 265 S.E. 2d 123 (1980); *In re Annexation Ordinance*, 278 N.C. 641, 189 S.E. 2d 851 (1971); *Huntley v. Potter*, 255 N.C. 619, 122 S.E. 2d 681 (1961). *See generally* G.S. 160A-50(f) and (g). The petitioners have failed to meet their burden.

To suggest, as the petitioners have done in their brief, that "inequality and injustice . . . is *inherent* in the concept of forced annexation" [emphasis added] is to ignore reality. Annexation does not bring the burden of taxation without accompanying benefits. Urban level city services of all kinds which come to an annexed area for the first time constitute very substantial benefits, particularly with regard to police and fire protection and water, sewer and garbage collection services.

It is common knowledge and experience that residents of areas adjacent to our cities and towns which are subject to annexation under the laws of our State enjoy a great many city services financed by city taxpayers without paying city property taxes themselves. Most of those outside residents work in the city, shop in the city, use all manner of office facilities in the city, use in-city health care facilities, park and recreational facilities and programs and while doing so use city streets, city law enforcement and fire protection services, city garbage and refuse collection services, city parking facilities and city water and sewer services. They also receive planning, zoning and inspection

services from the city. With the possible exception of parking fees, inspection fees, and in some instances fees for the use of recreational facilities and perhaps some other isolated costs, these outside residents pay nothing for these services financed by taxes paid by residents of our cities. Fairness dictates that there comes a time when these residents must join in bearing the costs of those services.

In some instances certain city services such as water and sewer services are furnished to residents of areas outside the city at rates higher than those paid by city residents. In such cases annexation automatically reduces these rates to the same rates paid by city residents.

Annexation brings forth a higher level of debate than perhaps any other activity of municipal government. By the imposition of stringent standards and guidelines and procedural safeguards, the legislature has attempted to ensure fairness in balancing the benefits of city services with the burden of paying for them.

[10] Finally, we address the question of the effective date of the annexation ordinances. All five of the annexation ordinances (all bearing the single ordinance number D-21927) were adopted on 17 December 1979, to become effective at 11:59 p.m. 30 June 1980. The petition was filed on 15 January 1980 which was within thirty (30) days after the passage of the ordinance as required by G.S. 160A-50(a). Judge Lamm's judgment upholding the annexation ordinances was filed on 6 June 1980. Also on 6 June 1980 Judge Lamm entered an order staying the effective date of the annexation ordinances as to all five areas, paragraph 1 of which provides in part that the effective date of the ordinances shall be stayed "until final adjudication by any and all appellate courts of this State and so long as any appeal or motion is still pending before any such court." Paragraph 2 of the same order provides: "That this order shall remain in effect as set forth in paragraph 1 or until this order is dissolved by a Court of higher authority." Petitioners gave notice of appeal and their Appeal Entries were also filed on 6 June 1980. Therefore, the area annexed was the subject of an appeal to the superior or Supreme Court on the effective date of the ordinances. Pursuant to G.S. 160A-50(i), the effective date of the annexation ordinances in question is the date on which

the final judgment of this Court is certified to the Clerk of Superior Court, Forsyth County. *See Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E. 2d 265 (1980).

For the reasons stated, the judgment of the superior court upholding the annexation is

Affirmed.

STATE OF NORTH CAROLINA v. JAMES BRANTLEY OXENDINE

No. 16

(Filed 2 June 1981)

1. Criminal law § 92.4— two charges against one defendant—consolidation proper

The trial court did not abuse its discretion in granting the State's motion to consolidate murder and assault charges for trial where evidence tended to show that both offenses were committed within a short interval of time; the murder victim was killed between 8:00 p.m. and 10:00 p.m. on 30 August 1979 and the assault victim was assaulted at approximately 4:00 a.m. on 31 August 1979; the offenses were similar in nature in that each involved the shooting of a person with the intent to kill; it appeared from the evidence that defendant committed both offenses after consuming a considerable amount of alcohol and drugs, indicating that the offenses were part of a series of transactions undertaken by defendant while under the influence of intoxicating substances; defendant confessed to the commission of both offenses in the same interview with law enforcement officers; the witnesses presented in both trials were substantially the same; and it would have been impractical and nearly impossible to present evidence of the events surrounding one offense without also presenting evidence tending to prove the other offense.

2. Criminal Law § 85.2; Homicide § 15— firearms transaction record—no impeachment of defendant's character—admissibility of evidence

There was no merit to defendant's contention that the trial court erred in allowing a State's witness to relate defendant's answers to questions listed on a firearms transaction record which defendant was required to fill out before purchasing a .22 caliber rifle, since the firearms transaction record which defendant filled out was relevant evidence to prove that defendant owned the weapon used to kill the murder victim, and the evidence did not tend to impeach defendant's character before defendant testified in his own behalf or introduced evidence of his good character as part of his defense.

3. Criminal Law § 90— no impeachment of State's own witness

In a prosecution of defendant for homicide and assault the trial court did not err in allowing a State's witness to answer the district attorney's ques-

tions concerning his prior convictions of bootlegging, and by these questions the State did not impeach its own witness, since the witness's testimony revealing his five prior convictions of bootlegging was not evidence tending to impeach his credibility, but was instead evidence corroborating his statement that defendant came to his home on the morning of the crimes to purchase beer because he knew the witness was involved in the illegal sale of alcoholic beverages, and the witness's statements were thus admissible as relevant evidence tending to prove the events which transpired on the day of the crimes.

4. **Criminal Law § 75.15— confession—waiver of constitutional rights—effect of intoxication**

There was no merit to defendant's position that, because he was intoxicated from the consumption of alcohol and under the influence of drugs at the time of his statements, he was unable to comprehend the reading of his constitutional rights and incapable of intelligently waiving those rights, thus rendering subsequent statements inadmissible, since the only evidence tending to prove the quantity of alcohol and drugs which defendant had consumed was defendant's own testimony; defendant stated that, despite his condition, he was able to understand his constitutional rights as they were read to him before he made his first statement, except for his right to stop talking during the course of the interview and to request the presence of counsel; defendant was able to relate all the events which took place on the day of the statements in a degree of detail that was inconsistent with his contention that he was too intoxicated to make a knowing and intelligent waiver of his rights; it was uncontroverted that defendant consumed no alcohol or drugs for at least two hours prior to making his first statement and for at least six hours prior to his second statement; and all of the witnesses who observed defendant prior to and after his arrest stated that he was able to walk and carry on a normal conversation.

5. **Criminal Law § 86— prior conviction of common law robbery—cross-examination proper**

In a prosecution of defendant for homicide and assault where defendant allegedly used a rifle to accomplish both crimes, the trial court did not err in allowing the district attorney to question defendant concerning his use of a screwdriver to threaten the victims of a previous robbery, since the questions were apparently designed to indicate to the jury that defendant was a person with a propensity to use a weapon; defendant eventually admitted that he had threatened his victims with a long screwdriver; and it thus appeared from the record that the questions were based on information properly submitted to the district attorney.

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

Evidence was sufficient to be submitted to the jury in a first degree murder prosecution where it tended to show that defendant shot his victim with a .22 caliber rifle; four days later defendant called the police and told them that the body of the victim could be found at the victim's mobile home; a police officer went to the designated trailer and discovered the victim's body; and on that same afternoon defendant was informed of his constitutional rights, signed a written waiver, and twice confessed to the murder.

7. Grand Jury § 3.5— grand juror brother of murder victim—motion to quash indictment properly denied

In a prosecution of defendant for first degree murder the trial court did not err in denying defendant's motions to quash the indictment against him and to declare a mistrial on the ground that one of the members of the grand jury which returned the indictments against him was the brother of the murder victim and a witness for the prosecution at defendant's trial, since, ordinarily, any interest in a particular prosecution other than a direct pecuniary interest will not disqualify a grand juror or justify an objection to an indictment in which he participates, and there was no evidence that the grand jury acted with malice, hatred, or fraud in returning the indictments against defendant.

DEFENDANT appeals from judgment of *McKinnon, J.*, entered at the 18 February 1980 Session of Superior Court, ROBESON County.

Defendant was tried upon indictments, proper in form, charging him with first degree murder and with felonious assault with a deadly weapon, with the intent to kill, inflicting serious injuries not resulting in death. The jury found defendant guilty of both offenses. Since the jury could not unanimously agree within a reasonable time whether to impose the death penalty or a sentence of life imprisonment for defendant's first degree murder conviction, the trial judge imposed a sentence of life imprisonment pursuant to G.S. 15A-2000(b). Defendant was also sentenced to imprisonment for a minimum of fifteen years and a maximum of twenty years for his conviction of felonious assault under G.S. 14-32(a), to be served concurrently with his life imprisonment sentence. Defendant appeals from the trial court's judgment sentencing him to life imprisonment for first degree murder 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 felonious assault charge on 10 December 1980.

The State's evidence tended to show the following: At approximately 3:30 p.m. on 30 August 1979, defendant met Anthony Oxendine and the two spent the afternoon and evening hours of that day together, driving in Anthony Oxendine's automobile and consuming a substantial amount of beer. Defendant purchased a .22 caliber rifle from a Lumberton merchant at about 6:30 p.m. on that day. Defendant and Anthony Oxendine then went to Anthony's mobile home, where they drank more beer until Anthony decided to go to bed. After Anthony was asleep, defendant

retrieved his .22 rifle from the back seat of Anthony's car, returned to the trailer, and shot Anthony twice. Dr. Larry Tate, a pathologist in the Chief Medical Examiner's office, examined the body and testified that Anthony was killed by one or both of the .22 caliber bullets found in the body.

After shooting Anthony, defendant took Anthony's car and drove to a convenience store, arriving at approximately 10:00 p.m. that night. Defendant argued with several individuals outside the convenience store and an altercation developed, during which the .22 caliber rifle was taken from him and destroyed. Defendant left the store area without the broken rifle.

Bunyan Lowery testified for the State that defendant awakened him at his home at about 4:00 a.m. on 31 August 1979 and asked to purchase beer. Defendant was carrying a twelve gauge pump shotgun at that time. After paying for the beer, defendant shot Mr. Lowery twice, hitting him in the back and in the right arm, inflicting serious injuries.

Between 12:10 and 12:15 p.m. on 2 September 1979, defendant called the Pembroke Police Station and talked to Sergeant Ray Strickland of the Robeson County Sheriff's Department. Sergeant Strickland testified that defendant asked if a warrant for his arrest had been issued for the shooting of Bunyan Lowery. When Sergeant Strickland informed him that such a warrant had been issued, defendant stated that he wished to "turn himself in" and gave directions as to his whereabouts. He further stated that the body of Anthony Oxendine could be found at Anthony's mobile home in the Harris Trailer Park. Sergeant Strickland went to the designated trailer and discovered Anthony's body in a deteriorated and putrified condition.

Defendant was apprehended and taken to the Robeson County Sheriff's Department at approximately 2:00 p.m. on 2 September 1979, at which time he was informed of his constitutional rights and signed a written waiver stating that he understood these rights and agreed to waive them. He was then interviewed by Detective Luther H. Sanderson, during which he gave a written and verbal statement admitting that he killed Anthony Oxendine on 30 August 1979 and shot Bunyan Lowery on 31 August 1979. Defendant was interviewed by Detective Jimmy Maynor at about 6:00 p.m. on 2 September 1979, at which time he

again signed a written waiver of his constitutional rights and confessed to both offenses.

Defendant testified in his own behalf, admitting that he was with Anthony Oxendine during the afternoon and evening of 30 August 1979 and that he purchased a .22 caliber rifle on that day, but denying any participation in or knowledge of the killing of Anthony Oxendine. He stated that he took Anthony's car after Anthony went to sleep in order to drive to a store and purchase more beer. After arguing with several individuals at a convenience store, during which his rifle was smashed and destroyed, defendant stated that he was afraid of being harmed and drove to his father's house to borrow a shotgun. He obtained the shotgun and went to Bunyan Lowery's residence to buy beer. He claimed that when he attempted to carry the beer and the shotgun to Anthony's car, the shotgun slipped from his arms and struck the ground, accidentally discharging and injuring Mr. Lowery. He fled from the scene because Mr. Lowery had calld for assistance and he was afraid that someone would hurt him.

After fleeing from the Lowery residence on 31 August 1979, defendant testified that he spent the next two days traveling in Anthony Oxendine's automobile in the southeastern area of North Carolina, continually consuming a large quantity of alcohol and drugs, until he phoned the Pembroke Police Station shortly after noon on 2 September 1979. He stated that he was under the influence of alcohol and drugs when he called the police station and when he was interviewed by detectives at 2:00 p.m. and 6:00 p.m. on that day, to the point that he did not remember making any statements concerning his involvement in the two offenses. He admitted going to Anthony Oxendine's mobile home on 1 September 1979 and discovering his body in a decomposed condition, and thus he was able to tell law enforcement officers where to find the body when he called the police station on 2 September 1979. Defendant presented several witnesses who testified to his whereabouts during the entire time period between 30 August and 2 September 1979. He also presented evidence of his intoxicated condition at the time he called the Pembroke Police Station on 2 September 1979.

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

John Wishart Campbell for defendant.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General W. A. Raney, Jr., 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 two charges against him for trial. G.S. 15A-926(a) authorizes the consolidation of offenses and provides in pertinent part:

> "Two or more offenses may be joined . . . for trial when the offenses . . . 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."

This Court has held that in deciding whether two or more offenses should be joined for trial, the trial court must determine whether the offenses are *"so separate in time and place* and *so distinct in circumstances* as to render the consolidation unjust and prejudicial to defendant." *State v. Johnson*, 280 N.C. 700, 704, 187 S.E. 2d 98, 101 (1972). Thus, there must be some type of "transactional connection" between the offenses before they may be consolidated for trial. *State v. Powell*, 297 N.C. 419, 255 S.E. 2d 154 (1979); *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978). In addition, the trial judge's exercise of discretion in consolidating charges will not be disturbed on appeal absent a showing that the defendant has been denied a fair trial by the order of consolidation. *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976), *cert. denied.*, 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed. 2d 573 (1977); *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976).

We find the murder and assault charges involved in the present action sufficiently similar in time and circumstances to justify the trial judge's order consolidating them for trial. The State's evidence tended to show that both offenses were committed within a short interval of time; Anthony Oxendine was killed between 8:00 p.m. and 10:00 p.m. on 30 August 1979 and Bunyan

Lowery was assaulted at approximately 4:00 a.m. on 31 August 1979. The offenses were similar in nature, in that each involved the shooting of a person with the intent to kill. It appeared from the evidence that defendant committed both offenses after consuming a considerable amount of alcohol and drugs, indicating that the offenses were part of a series of transactions undertaken by defendant while under the influence of intoxicating substances. Defendant confessed to the commission of both offenses in the same interview with law enforcement officers. The witnesses to be presented in both trials were substantially the same. It would have been impractical and nearly impossible to present evidence of the events surrounding one offense without also presenting evidence tending to prove the other offense. Defendant has failed to show that the consolidation unjustly hindered him or deprived him of his ability to present a defense on either charge. Consequently, we hold that the trial court did not abuse its discretion in granting the State's motion to consolidate the murder and assault charges for trial and defendant's assignment of error is overruled.

[2] By his second assignment of error, defendant contests the trial court's admission, over his objection, of several unrelated elements of evidence. He first argues that the trial court erred in allowing State's witness Luther Thorndyke to relate defendant's answers to questions listed on the firearms transaction record which defendant was required to fill out before purchasing a .22 caliber rifle on 30 August 1979. Defendant contended that he purchased the rifle as a birthday gift for his son. Mr. Thorndyke was the manager on duty at the time defendant bought the weapon. It is defendant's belief that by admitting this testimony, the trial court permitted the prosecution to introduce evidence tending to impeach defendant's character before defendant testified in his own behalf or introduced evidence of his good character as part of his defense.

Evidence of an accused's character is not admissible for any purpose if the accused has neither testified nor introduced evidence of his character in his own behalf. *State v. Sanders*, 295 N.C. 361, 245 S.E. 2d 674 (1978); *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). However, the State may produce evidence relevant for some other purpose which incidentally bears upon the character of the accused. *State v. Jones*, 229 N.C. 276, 49 S.E.

2d 463 (1948); 1 Stansbury's North Carolina Evidence § 104 (Brandis Rev. 1973). The firearms transaction record which defendant filled out upon purchasing a .22 caliber rifle was relevant evidence to prove defendant owned the weapon used to kill Anthony Oxendine. Furthermore, we fail to understand how defendant was prejudiced by the witness' recitation of the questions on the form and defendant's answers thereto. The questions required that defendant reveal any prior criminal convictions, addictions to alcohol or drugs, or history of mental illness. Defendant gave no answer which could be interpreted by the jury as reflecting adversely on his character; in fact, his answers tended to prove his good character. Therefore, any technical incompetency in Mr. Thorndyke's testimony was favorable to defendant, and the admission of the testimony is not reversible error. *State v. Clark*, 298 N.C. 529, 259 S.E. 2d 271 (1979); *State v. Logner*, 297 N.C. 539, 256 S.E. 2d 166 (1979).

[3] Defendant next argues that the trial court erred in allowing State's witness Bunyan Lowery to answer the district attorney's questions concerning his prior convictions of bootlegging. Defendant complains that by these questions the State was permitted to impeach its own witness, which practice is, as a general rule, prohibited in this jurisdiction. *State v. Garrison*, 294 N.C. 270, 240 S.E. 2d 377 (1978); *State v. Scott*, 289 N.C. 712, 224 S.E. 2d 185 (1976); *State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897 (1968). We find that Mr. Lowery's testimony revealing his five prior convictions of bootlegging was not evidence tending to impeach his credibility, but evidence corroborating his statement that defendant came to his home at 4:00 a.m. on 31 August 1979 to purchase beer because he knew Mr. Lowery was involved in the illegal sale of alcoholic beverages. Mr. Lowery's statements were thus admissible as relevant evidence tending to prove the events which transpired on 31 August 1979, and defendant's contentions to the contrary are without merit and overruled.

[4] Defendant further maintains that the trial court erred in denying his motion to suppress his written and verbal statements made to law enforcement officers subsequent to his arrest on 2 September 1979. It is his position that, because he was intoxicated from the consumption of alcohol and under the influence of drugs at the time of his statements, he was unable to comprehend the reading of his constitutional rights and incapable of in-

telligently waiving these rights, rendering his subsequent statements inadmissible under the holding in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

When the State offers a defendant's confession into evidence and defendant objects, the trial court must conduct a *voir dire* hearing to determine its admissibility. *State v. Jones*, 294 N.C. 642, 243 S.E. 2d 118 (1978). The trial judge's finding of fact that an inculpatory statement was freely and voluntarily given is conclusive on appeal when supported by competent evidence presented at the *voir dire* hearing. *State v. Horton*, 299 N.C. 690, 263 S.E. 2d 745 (1980); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). The fact that defendant was intoxicated at the time of his confession does not preclude the conclusion that defendant's statements were freely and voluntarily given. An inculpatory statement is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words. *State v. McClure*, 280 N.C. 288, 185 S.E. 2d 693 (1972); *State v. Logner*, 266 N.C. 238, 145 S.E. 2d 867, *cert. denied*, 384 U.S. 1013, 86 S.Ct. 1983, 16 L.Ed. 2d 1032 (1966).

In the present case, the trial judge conducted a hearing and found no evidence that defendant was unconscious or exhibiting conduct amounting to a mania at the time of his statements to Detectives Sanderson and Maynor at 2:00 p.m. and 6:00 p.m. on 2 September 1979. The court therefore concluded that defendant's statements were voluntarily made. We find the trial court's conclusion supported by competent evidence presented on *voir dire*. The only evidence tending to prove the quantity of alcohol and drugs which defendant had consumed was defendant's own testimony. Defendant further stated that despite his condition, he was able to understand his constitutional rights as they were read to him before he made his first statement at 2:00 p.m., except for his right to stop talking during the course of the interview and request the presence of counsel. Defendant was able to relate all the events which took place on 2 September 1979 in a degree of detail that is inconsistent with his contention that he was too intoxicated to make a knowing and intelligent waiver of his rights. It is uncontroverted that defendant consumed no alcohol or drugs for at least two hours prior to making his first statement and for at least six hours prior to his second statement. All of the witnesses who observed defendant prior to and after

his arrest stated that he was able to walk and carry on a normal conversation. After considering all the evidence presented at the hearing we find that the trial judge properly found a free, voluntary waiver of defendant's rights consistent with the requirements set forth in *Miranda v. Arizona, supra*, as reiterated by this Court in *State v. Connley*, 297 N.C. 584, 256 S.E. 2d 234, *cert. denied*, 444 U.S. 954, 100 S.Ct. 433, 62 L.Ed. 2d 327 (1979), and correctly denied defendant's motion to suppress.

[5] Defendant next argues that the trial court erred in allowing the district attorney, over defendant's objection, to question defendant on cross-examination about the details of his prior conviction of common law robbery. When the defendant in a criminal action elects to testify in his own behalf, this Court has consistently held that he may be questioned on cross-examination, for impeachment purposes, about prior specific criminal actions or degrading conduct, provided that the questions are asked in good faith. *State v. Royal*, 300 N.C. 515, 268 S.E. 2d 517 (1980); *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979); *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978). Defendant contends that the questions asked in this case concerning defendant's use of a screwdriver to threaten the victims of a previous robbery were not in good faith and should have been excluded by the trial judge. We disagree. The questions were apparently designed to indicate to the jury that defendant was a person with a propensity to use a weapon. Defendant eventually admitted that he had threatened his victims with a long screwdriver, thus it appears from the record that the questions were based on information properly submitted to the district attorney. It is a matter within the sound discretion of the trial judge to determine whether cross-examination by the State is unfair or in bad faith, and his decision will not be disturbed on appeal absent an abuse of that discretion. *State v. Herbin, supra; State v. Mayhand*, 298 N.C. 418, 259 S.E. 2d 231 (1979); *State v. Currie*, 293 N.C. 523, 238 S.E. 2d 477 (1977). We find no abuse of discretion in the trial judge's decision to overrule defendant's objection to the district attorney's questions concerning his prior robbery offense, and defendant's assignment of error is overruled.

[6] By his third assignment, defendant contends that the trial court erred in denying his motion to dismiss the first degree murder charge on the grounds that the evidence was insufficient

to sustain a conviction on that charge. Defendant argues that his confessions to law enforcement officers on 2 September 1979 were improperly admitted, and without these statements there was not enough evidence of first degree murder for the charge to be submitted to the jury. Since we have held that defendant's statements were freely and voluntarily given, and therefore correctly admitted, we likewise find defendant's third assignment of error without merit and overruled.

[7] Defendant argues under his final assignment that the trial court erred in denying his motions to quash the indictments against him and to declare a mistrial on the ground that one of the members of the grand jury which returned the indictments against him was the brother of Anthony Oxendine, the murder victim, and a witness for the prosecution at defendant's trial. As a general rule, the fact that a member of the grand jury who actively participated in returning a bill of indictment against defendant was related to the victim of the crime charged does not disqualify that person from serving as a grand juror. *State v. Sharp*, 110 N.C. 604, 14 S.E. 504 (1892). *See also Southward v. State*, 293 So. 2d 343 (Miss. 1974); *Lascelles v. State*, 90 Ga. 347, 16 S.E. 945 (1892), *aff'd* 148 U.S. 537, 13 S.Ct. 687, 37 L.Ed. 549 (1893). Nor is a bill of indictment rendered objectionable when one of the members of the grand jury subsequently testifies at trial for the prosecution. *State v. McDonald*, 73 N.C. 346 (1875); *State v. Pitt*, 166 N.C. 268, 80 S.E. 1060 (1914). Ordinarily, any interest in a particular prosecution other than a direct pecuniary interest will not disqualify a grand juror or justify an objection to an indictment in which he participates. *State v. Brewer*, 180 N.C. 716, 104 S.E. 655 (1920); *State v. Pitt, supra;* 38 Am. Jr. 2d *Grand Jury* § 7 (1968). Consequently, the fact that grand juror James Lee Oxendine was the brother of the murder victim and a witness for the prosecution at trial in the case *sub judice* does not compel a finding that the indictment should have been quashed. There is no evidence that the grand jury acted with malice, hatred, or fraud in returning the indictments against defendant. We hold that the trial court acted properly in denying defendant's motions to quash the indictments and for a mistrial.

Defendant received a fair trial free from prejudicial error. The defendant was indeed fortunate to have been the beneficiary of a jury that voted eleven to one to inflict capital punishment.

No error.

STATE OF NORTH CAROLINA v. THURMAN MARTIN

No. 36

(Filed 2 June 1981)

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

The State's evidence tending to show that defendant twice told his wife he was going to kill her and that he did kill his wife some six months later in a most brutal manner was sufficient to be submitted to the jury on the issue of defendant's guilt of first degree murder.

2. **Criminal Law § 135.4— first degree murder—aggravating circumstance—especially heinous, atrocious, or cruel crime—sufficiency of evidence**

The evidence was sufficient to support a finding that defendant's first degree murder of his estranged wife was especially heinous, atrocious, or cruel within the contemplation of G.S. 15A-2000(e)(9) where it tended to show that immediately after the wife entered a neighbor's apartment, defendant ran into the apartment and fired two shots at the wife, who slumped down and fell to her knees; defendant told his wife to get up, but she told defendant she could not move her legs; defendant then dragged her across the room into a small hallway, held her up with his left hand and hit her four or five times with the pistol, and thereafter slung her against the wall and hit her several times in her face with the pistol; defendant then told his wife he ought to kill her and she begged him not to hit her anymore; defendant then slung his wife against the wall in the hall and hit her on the head five or six times with his fists; while defendant was beating his wife in the hall, two shots were fired, but they did not appear to strike the wife; thereafter, while his wife was on the floor, defendant fired another shot down toward the floor; the couple's four-year-old child came into the room calling for his mother, defendant fired another round at his wife in the presence of the child, his wife told the child to leave, and the youngster fled from the room crying; defendant's wife continued to plead for her life throughout the episode and asked that someone be allowed to call an ambulance because she was dying; defendant then fired three more shots at his wife and "clicked" the gun five more times at her and thereafter laid the gun on a table; approximately twenty to twenty-five minutes elapsed between the time defendant's wife entered the apartment and defendant laid the gun on the table; a post-mortem examination revealed that defendant's wife received six gunshot wounds, three to her head, two to her body, and one to her elbow; and it was the opinion of the pathologist that one of the first bullets that wounded defendant's wife severed her spinal cord and caused immediate paralysis and that either of the two bullets which entered her head would have caused instant death.

3. **Criminal Law § 135.4— especially heinous, atrocious, or cruel murder—statute not unconstitutionally vague**

The aggravating circumstance of an "especially heinous, atrocious or cruel" murder set forth in G.S. 15A-2000(e)(9) is not unconstitutionally vague

when interpreted to permit the imposition of the death penalty based on such factor only in those situations where the evidence showed that the murder was committed in such a way as to amount to a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

4. Criminal Law § 135.4—death penalty not excessive or disproportionate

Sentence of death imposed upon defendant for the first degree murder of his estranged wife will not be set aside where the evidence supported a jury finding that the murder was especially heinous, atrocious, or cruel, the record does not indicate that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence of death is not excessive or disproportionate considering both the crime and the defendant.

APPEAL by defendant from judgment of *Rouse, J.*, entered at the 11 February 1980 Criminal Session of SCOTLAND Superior Court.

By an indictment proper in form, defendant was charged with the first-degree murder of his wife, Peggy Lupo Martin. He entered a plea of not guilty, and the state presented evidence summarized in pertinent part as follows:

On 5 July 1979, the date of the alleged murder, defendant and Peggy Lupo Martin were husband and wife, but they had been living separate and apart since August 1978. The couple's two small children lived with Mrs. Martin in an apartment in Laurinburg, North Carolina.

On 6 January 1979, defendant went to Mrs. Martin's residence and tampered with her automobile. Pursuant to a telephone call from Mrs. Martin, her friend Mrs. Gladys Grant and her husband went to the apartment to take Mrs. Martin and her children to her parent's home. While the Grants were trying to get Mrs. Martin and the children away from the apartment, defendant told Mrs. Martin: "Peggy, I'm going to kill you . . . I mean it. I'm going to kill you."

Prior to 4 July 1979, Mrs. Martin had dated Michael Bridges, a Scotland County deputy sheriff, three times. Deputy Bridges was divorced. They dated on 4 July 1979, and Deputy Bridges took Mrs. Martin home around midnight. After her companion left, Mrs. Martin drove to another part of Laurinburg to pick up her children at the home of a babysitter.

On 4 July 1979, Jackie Hulon lived in an apartment next door to that occupied by Mrs. Martin. Between 11:30 and 12:00 on that night he saw someone trying to enter a window of the Martin apartment. At about 12:15 a.m. he saw Mrs. Martin return to her apartment with her children. Several minutes later she ran up to the door of the Hulon apartment and sought entry. As Mr. Hulon admitted her, she stated that someone had been in her apartment and that her gun was missing.

Within a few moments, defendant, with a pistol in his hand, ran into the apartment. He fired two shots and Mrs. Martin fell to the floor. Defendant then ordered Hulon to sit down on the sofa. Thereafter, defendant struck Mrs. Martin several times with his hand, as well as the pistol, and shot her three more times. She died as a result of two shots that entered her head. (Additional details of the killing are hereinafter set out in the opinion.)

After emptying the pistol, defendant walked over to a coffee table, laid the gun down and said, "Well, I've done it." Meanwhile, police had arrived at the scene, and as defendant walked out the front door of the apartment, unarmed, officers arrested him.

Defendant offered no evidence at the guilt phase of the trial. The court charged the jury on possible verdicts of first-degree murder, second-degree murder, voluntary manslaughter and not guilty. The jury returned a verdict finding defendant guilty of murder in the first-degree.

At the sentencing phase of the trial, the state offered no additional evidence. The only evidence defendant presented was the testimony of his mother. She testified that defendant was one of ten children; that although he went to several schools, he was not able to learn; that he was unable to read or write; that he was a nervous person and "if he would get upset, . . . he (would) just go all to pieces"; and that when he was a young boy, he tried to cut himself on several occasions during times of emotional distress.

The court submitted for consideration of the jury only one of the aggravating circumstances enumerated by G.S. § 15A-2000(e) (Cum. Supp. 1979): whether the murder was especially heinous, atrocious, or cruel. The jury found that the murder was especially heinous, atrocious, or cruel. With respect to mitigating circumstances, the jury found that the murder was not committed while

defendant was under the influence of mental or emotional disturbance; that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was not impaired; and that there were no other circumstances which the jury deemed to have mitigating value.

The jury also found beyond a reasonable doubt that the aggravating circumstance found by them outweighed the mitigating circumstances; and that the aggravating circumstance was sufficiently substantial to call for the imposition of the death penalty. They unanimously recommended to the court that the defendant be sentenced to death.

Pursuant to the verdict and the sentence recommendation of the jury, the court entered judgment imposing the death penalty. Defendant appealed to this court pursuant to G.S. § 7A-27(a) (1969).

Attorney General Rufus L. Edmisten, by Assistant Attorney General Donald W. Stephens and Assistant Attorney General James C. Gulick, for the state.

Bruce W. Huggins for defendant-appellant.

BRITT, Justice.

PHASE I — GUILT DETERMINATION

[1] Although defendant has assigned no error to this phase of his trial, due to the seriousness of the offense and the severity of the punishment, we have carefully reviewed the record of the pretrial, as well as the trial, proceedings.[1]

1. The record reveals that on 12 September 1979 the court ordered that defendant be committed to Dorothea Dix Hospital at Raleigh for a determination with respect to his mental condition. On 2 October 1979, a report (dated 26 September 1979) from Dr. Bob Rollins, forensic psychiatrist, was filed with the court. In his report, based on interviews with defendant, observations of his ward behavior, and contacts with his attorney and the arresting officer, Dr. Rollins concluded that although defendant scored only 73 on the Slossen Intelligence Test, "clinically he appears to function in the average range of intelligence"; that his reading is at the 3.9 grade level; that his relatively low I.Q. score is the result of social and educational deprivation; and that "Mr. Martin is capable of proceeding to trial in that he

Murder in the first-degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. § 14-17 (Cum. Supp. 1979); *e.g.*, *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). Apropos to this case is the following statement by Justice (later Chief Justice) Sharp in *State v. Moore*, 275 N.C. 198, 206, 166 S.E. 2d 652, 657 (1969):

> If defendant resolved in his mind a fixed purpose to kill his wife and thereafter, because of that previously formed intention, and not because of any legal provocation on her part, he deliberately and intentionally shot her, the three essential elements of murder in the first-degree—premeditation, deliberation, and malice—concurred.

The evidence presented by the state in the case *sub judice* is more than sufficient to support the jury's verdict of first-degree murder. The statements made by defendant to his wife in January prior to the killing in July are of particular importance. At that time he told her twice that he was going to kill her and that "I mean it". The evidence showed that he carried out that determination some six months later in a most brutal manner.

We conclude that there was no error in the guilt determination phase of defendant's trial.

PHASE II — SENTENCE DETERMINATION

By his only assignment of error, defendant contends that the trial court erred in instructing the jury that if they found the murder of Mrs. Martin to be especially heinous, atrocious or cruel that this would be an aggravating circumstance which would permit them to recommend the imposition of the death penalty. We find no merit in the assigment.

A.

[2] First, defendant argues that the evidence in this case was insufficient to establish that the murder was especially heinous, atrocious, or cruel within the contemplation of G.S. § 15A-2000(e)

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has an understanding of his legal situation and is able to cooperate with his attorney. At the time of the alleged crime he may have been intoxicated to some degree."

(9) as interpreted by previous decisions of this court, and he cites *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979).

In *State v. Goodman, supra*, the first of our cases to be decided under our new capital sentencing procedure, this court said:

> G.S. 15A-2000(e) (9) states that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the 'capital felony was especially heinous, atrocious, or cruel.' While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word 'especially' the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. *State v. Stewart, supra; State v. Rust, supra; State v. Simants*, 197 Neb. 549, 250 N.W. 2d 881, *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed. 2d 158 (1977).
>
> The Florida provision concerning this aggravating factor is identical to ours. Florida's Supreme Court has said that this provision is directed at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974); *see also, State v. Alford*, 307 So. 2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed. 2d 1221 (1976). Nebraska has also adopted the Florida construction of this subsection. Both Florida and Nebraska have limited the application of this subsection to acts done to the victim during the commission of the capital felony itself. *State v. Rust, supra; Riley v. State*, 366 So. 2d 19 (Fla. 1979). We too believe that this is an appropriate construction of the language of this provision. Under this construction, subsection (e) (9) will not become a 'catch all' provision which can always be employed in cases where there is no evidence of other aggravating circumstances. *Harris v. State*, 237 Ga. 718, 230 S.E. 2d 1 (1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed. 2d 251 (1977).

298 N.C. at 24-25, 257 S.E. 2d at 585.

We now turn to a brief review of the evidence which relates to the details of the killing at hand. An eyewitness, Jackie Hulon, testified that immediately after defendant ran into the Hulon apartment, he fired two shots and Mrs. Martin "slumped down and fell" to her knees; that defendant told her get up; that she told defendant she could not walk; that she could not move her legs; that defendant then went to her, placed his right hand around her waist and dragged her across the room into a small hallway; that he then held her up with his left hand and hit her four or five times with the pistol; that he thereafter slung her against the wall and hit her several times in her face with the pistol; that he told her he ought to kill her and she begged him not to hit her anymore; that he then slung her against the wall in the hall and hit her on her head five or six times with his fist; that while he was beating her in the hall, two shots were fired but they did not appear to strike Mrs. Martin; that thereafter, while she was down on the floor, defendant fired another shot down toward the floor; that her small son then entered the apartment, calling his "Mama" at which time defendant fired another shot toward the floor; that she told the little boy to leave and he left the apartment crying; that she continued to plead for her life and asking defendant to forgive her; that she asked that someone call an ambulance because she was dying; that defendant then said, "I hope he does, I'll blow his g.d. brains out"; that defendant then fired three more shots at Mrs. Martin and "clicked" the gun five more times at her; and that thereafter he laid the gun on a table and said, "Well, I've done it". Approximately twenty to twenty-five minutes elapsed between the time Mrs. Martin entered the Hulon apartment and defendant laid the gun on the table.

A post-mortem examination revealed that Mrs. Martin received six gunshot wounds, three to her head, two to her body, and one to her elbow. It was the opinion of the pathologist that one of the first bullets that wounded Mrs. Martin severed her spinal cord and caused immediate paralysis and that either of the two bullets which entered her head would have caused instant death.

Clearly, the evidence for the state tends to show that the brutality of the manner in which defendant murdered his wife exceeded that which is normally present in any killing in that it was unnecessarily tortuous to her, not only from a physical stand-

point, but also from a psychological one as well. Defendant did not murder his wife in a quick and efficient manner. Instead, he repeatedly shot her over a twenty-five minute period. Not until one of the final two shots were fired was she killed. Until that moment, she was physically abused by him in that she was dragged across the apartment of a neighbor in a state of helpless paralysis only to receive further physical abuse in the form of being beaten by defendant, not only with his fists but also with the murder weapon. Throughout the episode, defendant's wife begged for her life, knowing that she could not escape because of her initial wounds. At one point, the couple's four-year-old child came into the room calling for his mother. Defendant fired another round at his wife in the presence of the child. At that point, Mrs. Martin told the child to leave, and the youngster fled out the front door crying. It cannot be argued that this evidence fails to establish a conscienceless or pitiless crime which was committed in disregard for the life of another. *Compare State v. Oliver and Moore*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980).

B.

[3] Second, defendant contends that G.S. § 15A-2000(e) (9) is unconstitutionally vague in that it fails to guide the discretion of the jury at the sentencing phase of the trial. We disagree with this contention.

While it is settled that capital punishment is not invariably cruel and unusual punishment within the meaning of the eighth amendment, *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859, 96 S.Ct. 2909 (1976); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, --- U.S. --- (1980), it remains the law that those states which choose to extract the penalty of death for specified offenses must not impose the ultimate sanction under sentencing procedures which create a substantial risk that it will be imposed in an arbitrary and capricious manner. *Furman v. Georgia*, 408 U.S. 238, 253, 33 L.Ed. 2d 346, 357, 92 S.Ct. 2726, 2734 (1972) (Douglas, J., concurring); *compare Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed. 2d 398, 100 S.Ct. 1759 (1980); *Gregg v. Georgia*, 428 U.S. at 189, 49 L.Ed. 2d at 883, 96 S.Ct. at 2932. In other words, because the nature of a sentence of death is qualitatively different from that of any other punishment option

which is available to the state, due process requires that the procedure under which such punishment is pronounced must provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. at 313, 33 L.Ed. 2d at 392, 92 S.Ct. at 2764 (White, J., concurring).

While a jury is not likely to be skilled as a body in handling the information which is brought before it at the sentencing phase of the procedure which is contemplated by North Carolina's scheme for trial of capital offenses, its lack of expertise can be overcome if the jury is given sufficient guidance concerning the relevant factors about the defendant and the crime which he was found to have committed. *State v. Barfield*, 298 N.C. at 352-53, 259 S.E. 2d at 543. Such guidance allows the jury which is impaneled to consider on the basis of all the relevant evidence not only why the death penalty should be imposed in a given case but also why it should not be imposed. *Id.*

Sentencing standards are, by necessity, somewhat general in nature. As we noted in *Barfield*, "while they must be particular enough to afford fair warning to a defendant of the probable penalty which would attach upon a finding of guilt, they must also be general enough to allow the courts to respond to the various mutations of conduct which society has judged to warrant the application of the criminal sanction." *Id.* It was our conclusion in *Barfield* that the issues which are posed to a jury at the sentencing phase of North Carolina's bifurcated proceeding have a common sense core of meaning which jurors sitting in a criminal trial ought to be capable of understanding and applying when they are given suitable instructions by the trial judge.

On its face, G.S. § 15A-2000(e) (9) is clearly general in nature. However, it is not impermissibly so when it is applied in light of the construction which this court has applied to it in *State v. Goodman, supra.* As we noted earlier, in *Goodman* we held that the aggravating circumstance of "especially heinous, atrocious, or cruel" requires that there be evidence that the murder in question involved brutality in excess of that which is normally present in any killing. In so holding we foreclosed any suggestion that G.S. § 15A-2000(e) (9) could be employed as a "catchall" provision which could be submitted when there is no evidence of other ag-

gravating circumstances. In *Goodman*, we did not rely upon the canons of statutory construction alone. Instead, we also drew upon the decisions of the Florida Supreme Court in construing a provision of that state's capital punishment statutes whose language is identical to that of G.S. § 15A-2000(e) (9). In *State v. Dixon*, 283 So. 2d 1 (1973), the Florida Supreme Court interpreted the intent of its legislature in the words "especially heinous, atrocious, or cruel" to authorize the imposition of the death penalty based upon this factor only in those situations where the evidence showed that the murder was committed in such a way as to amount to a conscienceless or pitiless crime which is unnecessarily torturous to the victim. That construction was singled out for consideration by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed. 2d 913, 96 S.Ct. 2960 (1976), wherein it upheld the constitutionality of the procedure by which the Florida courts imposed the death penalty. In his opinion, Mr. Justice Powell observed that, "[W]e cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." 428 U.S. at 255-56, 49 L.Ed. 2d at 925, 96 S.Ct. at 2968. Because of the identical language which is utilized in the North Carolina and Florida statutes, as well as the similar construction placed upon that language by this court, as well as by the Florida Supreme Court, we hold that the aggravating circumstance embodied in G.S. § 15A-2000(e) (9) is not unconstitutionally vague.

C.

[4] As a check against the capricious or random imposition of the death penalty, G.S. § 15A-2000(d) directs this court to review the record in a capital case to determine whether the record supports the jury's finding of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *See State v. McDowell, supra; State v. Barfield, supra.*

Our review function in this regard should be employed only in those instances where both phases of the trial of a defendant in a capital case have been found to be without error. *State v. Goodman*, 298 N.C. at 35, 257 S.E. 2d at 590-91. In exercising our role

in the statutory scheme, we must be sensitive not only to the mandate of the legislature but also to the constitutional dimensions of our review. *See Gregg v. Georgia*, 428 U.S. at 204-06, 49 L.Ed. 2d at 892-93, 96 S.Ct. at 2939-40; *Proffitt v. Florida*, 428 U.S. at 258-59, 49 L.Ed. 2d at 926-927, 96 S.Ct. at 2969-70.

We repeat what we said in *Barfield:* "We do not take lightly the responsibility imposed on us by G.S. § 15A-2000(d) (2)." 298 N.C. at 354, 259 S.E. 2d at 544. Consequently, we have meticulously reviewed the record in this case. We have carefully considered the briefs and arguments which have been presented to us.

After full deliberation, we conclude that there is sufficient evidence in the record to support the jury's finding as to the aggravating circumstance which was submitted to it. We find nothing in the record which would indicate that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

The brutal manner in which death was inflicted, which followed defendant's declaration approximately six months previously that he was going to kill his wife, leads us to conclude that the sentence of death is not excessive or disproportionate, considering both the crime and the defendant. We, therefore, decline to exercise our discretion to set aside the sentence imposed.

No Error.

CASSAUNDRA SPINKS v. JOHN R. TAYLOR, JR., TRADING AS TAYLOR REALTY

DOROTHY L. RICHARDSON v. JOHN R. TAYLOR COMPANY, INC.

No. 61

(Filed 2 June 1981)

1. Landlord and Tenant § 18— failure to pay rent—landlord's exercise of self-help

While a landlord is permitted to use peaceful means to reenter and take possession of leased premises subject to forfeiture, he may not do so against the will of the tenant; an objection by the tenant elevates the reentry to a forceful one, and the landlord's sole lawful recourse at that time is to the courts.

2. Landlord and Tenant § 18— non-payment of rent—reentry by landlord—forceful taking as jury question

Where a landlord padlocks premises for failure of a tenant to pay rent, a refusal by the landlord to permit a tenant to enter the premises, for whatever purposes, elevates the landlord's taking to a forceful taking and subjects him to damages, and whether there was such a refusal in this case was a material issue of fact for the jury so that entry of summary judgment for defendant landlord was improper.

3. Trover and Conversion § 2— landlord's conversion of tenant's property—jury question

The defendant landlord's actions in denying plaintiff tenant access to her personal goods, if believed by a jury, would constitute a conversion of those goods for which plaintiff would be entitled to recover at least nominal damages, and summary judgment was therefore improperly entered for defendant on the issue of conversion.

4. Unfair Competition § 1— non-payment of rent—landlord's padlocking of premises—no unfair trade practices

The practices of defendant landlord in padlocking premises when tenants failed to pay rent did not constitute unfair trade practices under G.S. 75-1.1 *et seq.*

5. Landlord and Tenant § 18— notice to tenant of padlocked premises—no simulation of court document

A padlocking notice posted by defendant landlord on the doors of tenants who were late paying their rent did not simulate legal process in violation of G.S. 75-54(5), since the notice in question contained no signatures, no seal, no mention of an official or of a court, no date, and no reference to an amount due.

ON discretionary review to review the decision of the Court of Appeals, 47 N.C. App. 68, 266 S.E. 2d 857 (1980), affirming entry of summary judgment for defendant by *Cecil, J.*, at 6 August 1979 Session of GUILFORD County District Court.

Plaintiffs filed these actions to recover damages allegedly incurred as a result of defendant's wrongful padlocking of leased premises. Each complaint alleged that plaintiff and defendant had entered into a lease agreement for the rental of an apartment in Greensboro, North Carolina. Upon the failure of each plaintiff to pay rent, she was warned that unless payment were forthcoming, the leased premises would be padlocked. Both plaintiffs alleged that their apartments were in fact padlocked while they were absent from the premises. In both instances, the padlocks were removed upon plaintiffs' tender of the amounts due. Among other

things, plaintiffs claimed damages for trespass to real and personal property, for breach of the covenant of quiet enjoyment, for conversion of personal property, and for violation of the Unfair and Deceptive Trade Practice Act, G.S. 75-1.1 *et seq.*

Defendant answered, admitting the existence of the lease agreements and further admitting that, upon failure of plaintiffs to pay rent, both were warned that the premises would be padlocked. Defendant also admitted that the apartments ultimately were padlocked. The lease agreement, attached to and incorporated by reference in defendant's answer, included the following provision:

> TERMINATION BY AGENT (DEFAULT, OBJECTIONABLE CONDUCT, RE-ENTRY): If the Resident defaults in the payment of rent after the same becomes due, or if the Resident violates the covenant of this Lease, or if the Agent at any time shall deem the conduct of the Resident or Visitors of the Resident objectionable or improper, the Agent may give the Resident five (5) days written notice of the Agent's intention to terminate this Lease, and this Lease shall terminate at the expiration of such five-day period, anything to the contrary herein notwithstanding. At such time, the Agent shall have the right to re-enter and take possession of the leased premises, without process or by legal process from the Court having jurisdiction over the premises.

The cases were ordered consolidated on 9 August 1979.

Each plaintiff moved for summary judgment on the ground that there was no genuine issue of material fact and she was entitled to judgment as a matter of law.

Defendant likewise filed a motion for summary judgment and submitted the affidavits of John R. Taylor and R. Walton McNairy in support of his motion. All parties then submitted the following stipulated facts and agreed that the motions for summary judgment could be rendered upon these facts:

A. Facts pertinent to the Spinks action.

1. On November 1, 1976, plaintiff Spinks entered into a lease agreement with defendant Taylor for the rental of an apartment at 1835-C Merritt Drive, Greensboro, North

Carolina. Ms. Spinks occupied the apartment as a tenant of Taylor until August 1, 1977.

2. On May 16, 1977, Taylor padlocked the apartment without resort to judicial process.

3. Ms. Spinks subsequently paid the past-due rent, and Taylor removed the padlock.

4. On July 15, 1977, Taylor again padlocked Ms. Spinks' apartment without resort to judicial process.

5. After the padlocking, Taylor placed a card marked "LEGAL NOTICE" on the apartment door.

6. At the time of each padlocking incident, Ms. Spinks was in default in her payment of rent. Before each such incident, Taylor had given notice of default and demand for payment which Ms. Spinks had received at least ten (10) days before the padlocking.

B. Facts pertinent to the Richardson action.

1. Sometime in February, 1977, plaintiff Richardson entered into a lease agreement with defendant Taylor for the rental of an apartment at 3304-E Trent Street, Greensboro, North Carolina. The plaintiff occupied the apartment as a tenant of Taylor until sometime in April, 1978.

2. In January, 1978, Taylor padlocked the apartment without resort to judicial process.

3. On February 21, 1978, Ms. Richardson paid the past-due rent, and Taylor removed the padlock.

4. After the padlocking, Taylor placed a card marked "LEGAL NOTICE" on the apartment door.

5. At the time of the padlocking, Ms. Richardson was in default in her payment of rent. Before the incident, Taylor had given notice of default and demand for payment which Ms. Richardson had received at least ten (10) days before the padlocking.

On 14 August 1979, the trial court entered judgments denying plaintiffs' motions for summary judgments and granting sum-

mary judgment in favor of defendant. The Court of Appeals, in an opinion by Judge Martin (Harry C.), concurred in by Judges Vaughn and Clark, affirmed. We allowed plaintiffs' petition for discretionary review on 7 October 1980.

Legal Services of Southern Piedmont, Inc., by Theodore O. Fillette, III, and Leslie J. Winner; Central Carolina Legal Services by Robert S. Payne; Ling & Farran, by Jeffrey P. Farran; and George V. Hanna, for plaintiffs.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General; James C. Gulick, Assistant Attorney General; and Rebecca R. Bevacqua, Assistant Attorney General, for the State of North Carolina, Amicus Curiae.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter and Suzanne Reynolds, for defendant.

BRANCH, Chief Justice.

Plaintiffs first contend that the trial court erred in granting summary judgment for defendant since North Carolina law does not recognize a landlord's right to use peaceful self-help to evict tenants who are subject to forfeiture for non-payment of rent. Defendant maintains on the other hand that at common law a landlord had the right to reenter peacefully and take possession of leased premises subject to forfeiture, and that nothing in the statutory or case law of this state abrogates that common law right.

At early common law, a lessor was permitted to reenter leases premises and use necessary force, not amounting to death or bodily harm, to take possession. *Annot.*, 6 A.L.R. 3d 177, § 2 (1966). In 1381, however, Parliament enacted the statute of Forcible Entry, 5 Richard II stat. 1, c. 8, making forcible entry without legal process a crime. That statute provided:

> That none from henceforth make any entry into any lands and tenements but in case where entry is given by the law; and in such case, not with strong hand nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will.

2 *Bishop on Criminal Law* § 492 (9th Ed. 1923). In England it was held that, while the use of necessary force may be a crime under the forcible entry statute, a dispossessed tenant still had no civil remedy in the absence of excess force. *Annot.*, 6 A.L.R. 3d 177 § 2. In numerous jurisdictions in this country, including North Carolina, statutes similar to that of 5 Richard II were enacted, and the various constructions placed upon the statutes in the states have produced at least three distinct approaches to the question of self-help evictions.

First, a number of states adhere to the English rule that a landlord may use necessary and reasonable force to expel a tenant and may do so without resort to legal process. *E.g., Virginia Iron, Coal & Coke Co. v. Dickenson*, 143 Va. 250, 129 S.E. 228 (1925); *see generally, Annot.*, 6 A.L.R. 3d 177 § 3(b). A second line of authority holds that a landlord must in any case resort to the remedy provided by law, usually summary ejectment proceedings, in order to evict an overstaying tenant. *E.g., Reader v. Purdy*, 41 Ill. 279 (1866). Finally, a third line of cases, and one which tends to overlap the second line, holds that a landlord entitled to immediate possession may "gain possession of the leased premises by peaceable means, and necessity for recourse to legal process exists only where peaceable means fail and force would otherwise be necessary." *Annot.*, 6 A.L.R. 3d 177, § 6. Within this third category are cases which hold that, while peaceful means technically may be used, *any* retaking which is against the will of the tenant constitutes a forceful retaking and thus is not permitted. *E.g., Reader v. Purdy, supra.*

Turning now to the law of North Carolina, we find that our forcible entry statute reads substantially as did the old English statute and that *Mosseller v. Deaver*, 106 N.C. 494, 11 S.E. 529 (1890), is the pivotal case dealing with the issue before us. In *Mosseller* the landlord entered the tenant's house while the tenant was present and did so "under such circumstances as to constitute a forcible entry under the [forcible entry] statute . . . ." The trial judge instructed the jury that the landlord " 'had the right to go there and put him out by force, if no more force was used than was necessary for that purpose.' " *Id.* at 495, 11 S.E. at 530. This Court disapproved such an instruction, relying on *Reader v. Purdy, supra*, and noted that public policy required "the owner *to use peaceful means or resort to the courts* in order

to regain his possession . . . ." *Id.* [Emphasis added.] It seems clear to us, then, that this state recognizes the right of a lessor to enter peacefully and repossess leased premises which are subject to forfeiture due to nonpayment of rent.

Even so, plaintiffs urge that the existence of statutory summary ejectment procedures precludes the use of self-help measures in evicting a tenant in default of rental payments. We are not inadvertent to the fact that some jurisdictions view the statutory remedies as exclusive and as precluding self-help. *E.g., Malcolm v. Little*, 295 A. 2d 711 (Del. 1972). However, nothing in our summary ejectment statutes indicates a legislative intent to make those remedies exclusive. G.S. 42-26 *et seq.* Furthermore, despite the widespread existence of summary statutory remedies, the majority view still recognizes some degree of self-help. *Annot.*, 6 A.L.R. 3d 177; *Restatement of the Law of Property* 2d § 14.2, Reporter's Note (1977); *e.g., Shorter v. Shelton*, 183 Va. 819, 33 S.E. 2d 643 (1945).

Having determined that the law of this state permits a landlord to employ peaceable self-help measures in repossessing leased premises, we turn now to an inquiry into what acts constitute acts of force which would subject a landlord to civil liability for the reentry.

[1] In *Reader v. Purdy, supra*, relied upon by this Court in *Mosseller*, the court examined the prohibition against the use of force:

> It is urged that the owner of real estate has a right to enter upon and enjoy his own property. Undoubtedly, if he can do so without a forcible disturbance of the possession of another; but the peace and good order of society require that he shall not be permitted to enter against the will of the occupant . . . . He may be wrongfully kept out of possession, but he cannot be permitted to take the law into his own hands and redress his own wrongs. The remedy must be sought through those peaceful agencies which a civilized community provides for all its members. A contrary rule befits only that condition of society in which the principle is recognized that
>
> He may take who has the power,
> And he may keep who can.

> If the right to use force be once admitted, it must necessarily follow as a logical sequence, that so much may be used as shall be necessary to overcome resistance, even to the taking of human life.

Id. at 285. The Illinois court concluded, "In this State, it has been constantly held that *any entry is forcible*, within the meaning of this law, *that is made against the will of the occupant.*" *Id.* at 286. [Emphasis added.] *See Annot.*, 6 A.L.R. 3d 177 § 5 and cases cited therein. We find the reasoning of *Reader* persuasive and perceive no reason for departing from its rule. We therefore hold that while a landlord is permitted to use peaceful means to reenter and take possession of leased premises subject to forfeiture, he may not do so against the will of the tenant; an objection by the tenant elevates the reentry to a forceful one, and the landlord's sole lawful recourse at that time is to the courts.

In the instant case, defendant submitted affidavits in support of his motion for summary judgment which averred, *inter alia*, that: Tenants were given several days' notice of the padlocking. On that day scheduled for the padlocking, the apartment manager would go and knock loudly, announcing the purpose of the visit. If the tenant pays the rent, the procedure ceases; likewise, if the tenant protests, the manager ceases padlocking and tells the tenant that court proceedings will be begun. If the tenant is not at home, the manager checks the apartment to make sure no children or pets are present, and then proceeds to padlock the door. Notice of the padlocking is posted and the manager attempts to notify the tenant personally. According to defendant's affidavit, if the tenant requests personal property from the apartment, he is permitted to enter and remove the property. At any time a tenant objects to the padlocking, the self-help procedures cease and resort is made to the courts.

Notably, neither plaintiff submitted affidavits to dispute or contradict the assertions of defendant. As a general rule, upon a motion for summary judgment, supported by affidavits, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." G.S.

1A-1, Rule 56(e). Ordinarily, then, the trial court's entry of summary judgment against plaintiffs would have been proper for the simple reason that they failed to carry the burden placed upon them by Rule 56(e). As to plaintiff Richardson, we affirm the granting of summary judgment in favor of defendant on the grounds that she failed to submit affidavits showing a genuine issue of material fact and elected to rest upon her unverified complaint.

[2] Plaintiff Spinks, however, had filed a verified complaint. This Court has had occasion to consider the status of a verified pleading in light of the mandates of Rule 56(e). In *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972), we stated, "A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Id.* at 705, 190 S.E. 2d at 194. And in *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972), we noted that, "Rule 56(e) does not deny that a properly verified pleading which meets all the requirements for affidavits may effectively 'set forth specific facts showing that there is a genuine issue for trial.' " *Id.* at 612, 189 S.E. 2d at 212-13. Plaintiff Spinks' verified complaint is sufficient to meet the requirements of Rule 56(e), and in it she alleges that she requested access to the apartment to get certain items of clothing but was denied admission. This allegation contradicts the assertion by defendant that if an ousted tenant requested entrance to the apartment to obtain personal property, he would be allowed to enter. A refusal by the landlord to permit a tenant to enter the premises, for whatever purposes, would elevate the taking to a forceful taking and subject the landlord to damages. *Reader v. Purdy, supra.* Whether in this case there was such a refusal is a material issue of fact to be decided by a jury. That being so, entry of summary judgment for defendant as to plaintiff Spinks was improper.

[3] Likewise, we hold that summary judgment was improperly rendered for defendant on the issue of conversion of plaintiff Spinks' personal property. In this state, conversion is defined as

> an authorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition *or the exclusion of an owner's rights.*

Peed v. Burleson, Inc., 244 N.C. 437, 439, 94 S.E. 2d 351, 353 (1956) [emphasis added.]. The landlord's actions in denying plaintiff access to her personal goods, if believed by a jury, would constitute a conversion of those goods, and plaintiff would be permitted to recover at least nominal damages.

[4] Plaintiff next contends that defendant's padlocking practices constitute unfair trade practices under G.S. 75-1.1 *et seq.* The Court of Appeals found no merit in plaintiff's contentions and distinguished this case from *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). We agree with the Court of Appeals and hold that G.S. 75-1.1 is inapplicable to the facts of the case before us. We cannot say that defendant's padlocking procedures offend "established public policy" or constitute a practice which is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E. 2d 610, 621 (1980).

[5] Plaintiff next contends that defendant's posted notices of the padlocking simulated legal process in violation of G.S. 75-54(5). That statute provides, *inter alia*:

> No debt collector shall collect or attempt to collect a debt or obtain information concerning a consumer by any fraudulent, deceptive or misleading representation. Such representations include, but are not limited to, the following:
>
> . . . .
>
> (5) Using or distributing or selling any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by a court, an official, or any other legally constituted or authorized authority, or which creates a false impression about its source.

G.S. 75-50(3) defines a "debt collector" as "any person engaging, directly or indirectly, in debt collection from a consumer . . . ."

Defendant in the instant case, after padlocking an apartment, would cause the following notice to be posted:

GUILFORD COUNTY
NORTH CAROLINA

PADLOCKED APARTMENT
LEGAL NOTICE

This apartment has been padlocked for nonpayment of rent. ANYONE ENTERING THE APARTMENT IS A TRESPASSER AND WILL BE PROSECUTED.

The previous resident may regain legal possession of the apartment by immediately paying the past due rent.

The previous resident can recover any personal property left in the apartment by immediately contacting the resident manager.

Assuming, without deciding, that defendant is a "debt collector" within the meaning of the statute, we agree with the Court of Appeals that the notice does not constitute a "communication which simulates . . . a document authorized, issued, or approved by a court . . . or any other legally constituted or authorized authority . . . ." The notice contains no signatures, no seal, no mention of an official or of a court, no date, and no reference to an amount due. We do not think the notice "creates a false impression about its source." This assignment is overruled.

In Case No. 78CvD2849, *Richardson v. Taylor*, the decision of the Court of Appeals affirming the entry of summary judgment is modified and affirmed.

In Case No. 78CvD2629, *Spinks v. Taylor*, that portion of the Court of Appeals' decision which affirms the entry of summary judgment for defendant on the issues of reentry of leased premises and conversion of personal property is reversed; the portion affirming summary judgment on grounds that there was no violation of G.S. 75-1.1 or of 75-54(5) is affirmed. The case is remanded to the Court of Appeals for further remand to Guilford County District Court for proceedings in accordance with this opinion.

Case No. 78CvD2849 is modified and affirmed.

Case No. 78CvD2629 is affirmed in part; reversed in part; and remanded.

STATE OF NORTH CAROLINA v. DANNY RAY BASS

No. 35

(Filed 2 June 1981)

1. **Criminal Law § 60.5— sufficiency of fingerprint evidence**

When the State relies on fingerprints found at the scene of the crime, in order to withstand motion for nonsuit, there must be substantial evidence of circumstances from which the jury can find that the fingerprints could have been impressed only at the time the crime was committed.

2. **Burglary and Unlawful Breakings § 5.1; Criminal Law § 60.5— insufficient fingerprint evidence**

In a prosecution for first degree burglary, second degree rape and felonious larceny in which the State relied on fingerprint evidence, the State failed to offer substantial evidence that defendant's fingerprints could have only been imprinted at the time the crimes charged were committed, and defendant's motion for nonsuit should have been allowed, where the State's evidence established only that four latent prints found on a window screen of the house in which the crimes charged were committed had eleven points of similarity with known inked impressions of defendant's prints, no prints of defendant were found inside the house, and when informed of the presence of his fingerprints at the scene and asked why they were there and if he entered the house, defendant responded that he was not going to say he did and he was not going to say he didn't; defendant explained the presence of the prints and clarified his ambiguous statement to the officers by testifying that he broke and entered the home and committed a larceny therein three or four weeks before the crimes charged were committed, and the victim and an officer verified that such a break-in had occurred; and the State offered no explanation of its own for the presence of defendant's prints and no additional evidence which connected defendant to the crimes.

APPEAL by defendant pursuant to G.S. 7A-27(a) and 7A-31(b)(4) from judgments entered by *Martin (John C.), J.*, at the 3 October 1980 Session of DURHAM Superior Court.

At the 29 October 1979 Session of Durham Superior Court presided over by Farmer, J., defendant was convicted of first degree burglary, second degree rape and felonious larceny. Defendant failed to appear for sentencing after the verdicts were returned. Prayer for judgment was continued until such time as he could be apprehended and brought before the presiding judge of Durham Superior Court for sentencing. This was accomplished almost a year later. Defendant was sentenced by the then presiding judge to life imprisonment for the first degree burglary,

twenty to forty years imprisonment for the second degree rape and ten years imprisonment for the felonious larceny. Defendant appealed the burglary conviction to this Court, and his motion to bypass the Court of Appeals in the larceny and rape convictions was allowed.

Evidence for the State tends to show the following facts:

About 11 p.m. on 23 June 1979, Linda Stephens returned to her home at 304 Walton Street in Durham. She turned on the radio, lay down on her bed and went to sleep, leaving the lights on and the windows open because of the heat. Later, she was awakened by a man on top of her having intercourse with her. The lights were off and the radio volume was turned up. According to the corroborating testimony of an investigating officer, Stephens "stated that first she thought it may have been her boyfriend but then she began to realize the subject was more muscular than her boyfriend." The couple rolled off the bed and the man ran out the bedroom door and out of the house. Stephens watched him run down the driveway and across the front lawn. She called her boyfriend who advised her to call the police, which she did. The police arrived at approximately 4 a.m. and in their investigation discovered $10 was missing from her purse. She described her assailant as a black male in his twenties with a beard, soft Afro, muscular shoulders, five feet six inches to five feet eight inches tall and weighing 160 to 165 pounds. The police took the bed sheets and a nightgown which had stains on it. A pelvic examination of Stephens the next morning revealed the presence of sperm. Blood and pubic hair samples and fingernail clippings were taken from Stephens.

A forensic serologist tested blood samples provided by defendant and Stephens and tested stains from Stephens' nightgown. The serology tests revealed Stephens and Bass were blood group O secretors and the stains on the nightgown consisted of vaginal and seminal secretions which were from a group O secretor. On cross-examination, the serologist testified these tests were inconclusive and that while the stain on the nightgown could have come from Stephens and defendant, it was not limited to that combination but in fact could have come from the entire population. The serologist also examined the fingernail clippings and the bed sheets. These items failed to reveal anything of significance.

In the course of investigating the crime the next day, an officer taking photographs of the outside of the house noticed a window partly open on the left side of the house and a screen hanging from the window. A latent print search revealed one print on the outside portion of the screen frame and three prints on the inside of the frame. No prints were found inside the house on any items known to have been touched by the assailant. An expert in the field of fingerprint analysis found eleven points of similarity between the latent print on the screen and the known inked impressions of defendant's prints. The State's witnesses testified that fingerprints can last for months or even years.

Defendant was arrested on 26 June 1979 and, after being advised of his *Miranda* rights, was questioned about the crimes committed at 304 Walton Street on 23 June. He denied committing the break-in, rape and larceny. Defendant told the officers he had been to two parties on the night in question and had not been at the crime scene or with the prosecuting witness. When advised that his fingerprints were found on a window screen at the crime scene, he couldn't explain why they were there. When asked if he had gone in the house, he stated, "I don't know. I am not going to say I did and I am not going to say I didn't."

At the close of the State's evidence, defendant's motion for dismissal of all charges by way of nonsuit was denied. Defendant then took the stand and testified in his own behalf as follows:

He broke into the house at 304 Walton Street three or four weeks before 23 June 1979 and took a CB radio and tape recorder. At the time of that break-in, he attempted to gain entry through the window on the left side of the house where his fingerprints were found. He removed the screen and found the window locked. He then replaced the screen and went to the back of the house and broke out a kitchen window through which he entered by climbing up on a trash can. He denied ever returning to the Stephens home again and stated that on the night in question he was at a party with friends. Defendant is five feet ten inches tall, nineteen years old, and weighs 185 pounds. At the time of his arrest he had a goatee and mustache. He admitted committing several breakings and enterings while he was a juvenile.

Defendant rested his case and renewed his nonsuit motion which was again denied. The State presented the following rebuttal evidence:

A police officer, who investigated a break-in on 23 May 1979 at 304 Walton Street, testified he observed a broken window on the rear side of the house with a garbage can beneath the window on the outside. Shoe prints, smaller than a size eight, were found on the ground and on top of the garbage can. He checked all the windows in the house and saw no visible evidence of any other mode of entry. As of the date of defendant's trial, no one had been prosecuted for the 23 May break-in.

Stephens testified that on 23 May 1979 she observed the back window broken and the screen of the back door torn. A jar of sea monkies kept in the window was outside on the ground. She observed child size prints on the ground. All other windows and doors were locked. A tape player and a CB radio were missing, as was $15 of her child's money.

Defendant again renewed his motion for nonsuit which was denied. The case was submitted to the jury which found defendant guilty of the crimes charged. Sentences were ultimately imposed and defendant appealed.

Rufus L. Edmisten, Attorney General, by William W. Melvin, Deputy Attorney General; Jane P. Gray, Associate Attorney, and William B. Ray, Assistant Attorney General, for the State.

Samuel Roberti, attorney for defendant appellant.

HUSKINS, Justice.

The controlling question on this appeal is whether the trial court erred in overruling defendant's motion for judgment as of nonsuit. We hold the evidence insufficient to withstand defendant's motion for nonsuit.

A motion to nonsuit requires the trial court to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find the offense charged has been committed and that

defendant committed it, the motion for nonsuit should be denied. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975); *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968). Evidence offered by the defendant is considered only to the extent it is favorable to the State or for the purpose of explaining or making clear the State's evidence, insofar as it is not in conflict therewith. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971); *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971).

Defendant challenges the sufficiency of the identification evidence to withstand his motion for nonsuit and carry the case to the jury. The only evidence tending to show defendant was ever at the scene of the crime is four fingerprints found on the frame of a window screen on the Stephens home and identified as belonging to defendant. The State produced no evidence tending to show when they were put there, and testimony by State's witnesses was to the effect that fingerprints can last for months or even years. Defendant offered an incriminating explanation of how the prints came to be there. No other evidence connected him with the crime or its scene. The victim was unable to identify defendant as her assailant. She described her assailant as a black male, in his twenties, five feet five inches to five feet eight inches tall with a beard, soft Afro, muscular shoulders and weighing 160 to 165 pounds. Defendant was described in the record as nineteen years of age, five feet ten inches tall, with a goatee and mustache and weighing 185 pounds. The physical and scientific evidence presented, other than the fingerprints, fails to connect defendant with the crime. Blood tests were inconclusive. No hair samples could be matched. No fingerprints were found inside the house and, in particular, no fingerprints were found on objects inside the house which the assailant was known to have touched, such as the light switch and door knob. Our inquiry thus becomes whether the fingerprint evidence in this case, taken in a light most favorable to the State, is sufficient to take the case to the jury.

[1] This Court has considered the sufficiency of fingerprint evidence to withstand a motion of nonsuit in a number of cases. *See, e.g., State v. Scott*, 296 N.C. 519, 251 S.E. 2d 414 (1979); *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975); *State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973); *State v. Foster*, 282 N.C. 189, 192 S.E. 2d 320

(1972); *State v. Smith*, 274 N.C. 159, 161 S.E. 2d 449 (1968); *State v. Tew*, 234 N.C. 612, 68 S.E. 2d 291 (1951); *State v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572 (1951); *State v. Reid*, 230 N.C. 561, 53 S.E. 2d 849, *cert. denied* 338 U.S. 876, 94 L.Ed. 537, 70 S.Ct. 138 (1949); *State v. Minton*, 228 N.C. 518, 46 S.E. 2d 296 (1948); *State v. Helms*, 218 N.C. 592, 12 S.E. 2d 243 (1940); *State v. Huffman*, 209 N.C. 10, 182 S.E. 705 (1935); *State v. Combs*, 200 N.C. 671, 158 S.E. 252 (1931). These cases establish that when the State relies on fingerprints found at the scene of the crime, in order to withstand motion for nonsuit, there must be substantial evidence of circumstances from which the jury can find that the fingerprints could have been impressed only at the time the crime was committed. As stated in *State v. Miller, supra*, and quoted in *State v. Scott, supra*:

> These cases establish the rule that testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury. The soundness of the rule lies in the fact that such evidence logically tends to show that the accused was present and participated in the commission of the crime.
>
> What constitutes substantial evidence is a question of law for the court. What the evidence proves or fails to prove is a question of fact for the jury.

289 N.C. at 4, 220 S.E. 2d at 574, *quoted in*, 296 N.C. at 523, 251 S.E. 2d at 417.

[2] An analysis of the evidence in the present case in light of the foregoing principles reveals that the State did not offer substantial evidence that the prints could only have been placed on the window screen frame at the time of the 23 June break-in, larceny and rape. The State's evidence establishes only these facts and circumstances: (1) four latent prints found on a window screen of the house in which the crimes charged were committed had eleven points of similarity with known inked impressions of defendant's prints; (2) no prints of defendant were found inside the house and (3) when informed of the presence of his fingerprints at

the scene and asked why they were there and if he entered the house, defendant responded, "I can't say that I did. I don't know. I am not going to say I did and I am not going to say I didn't." This evidence does not constitute "substantial evidence" that defendant's prints could only have been imprinted at the time the crimes charged were committed. The burden is not upon defendant to explain the presence of his prints but upon the State to prove his guilt. *State v. Scott, supra.* Defendant's evidence at trial does, however, tend to explain the presence of the prints and clarifies the ambiguous statement to the investigating officers in this way: He was on the premises three or four weeks before and he, at that time, broke and entered the home and committed a larceny. Stephens and an officer verified a 23 May 1979 break-in which closely followed in detail the break-in defendant admitted committing. Defendant offered an explanation for the presence of the prints which, if true, exculpated him of the 23 June offenses. The State has offered no explanation of its own for the presence of the prints and no additional evidence which connects defendant to the crime.

This case should be contrasted with *State v. Miller, supra,* where fingerprint evidence was held sufficient to withstand a nonsuit motion. In that case, defendant's thumbprint was found on a vending machine lock at a crime scene. No other fingerprints were found at the scene. When informed of the presence of his fingerprint, *he denied ever being on the crime scene.* In the present case, defendant admits to a specific time when he was in the building which explains the presence of the prints and destroys the State's case absent some evidence tending to show that the prints could only have been impressed at the time the crimes charged were committed, thus raising a question for the jury.

The present case is more analogous to *State v. Scott, supra,* wherein this Court reversed the denial of a nonsuit motion. In that case, the only evidence tending to show defendant was ever in the home where an attempted robbery and murder occurred was a thumbprint on a metal box found in the den on the day the crimes were committed. The defendant had never been seen in the home and only family members handled the metal box. We held this did not constitute substantial evidence that defendant's thumbprint could only have been imprinted on the box during the course of the crimes, since the State's only witness who resided

at the scene of the crime testified she worked in a nearby city five days each week and did not have an opportunity to observe during the weekdays who came to visit or do business with the deceased. The Court concluded this evidence was sufficient to raise a strong suspicion of defendant's guilt but insufficient to remove the issue from the realm of suspicion and conjecture. The circumstantial evidence in the present case is even less substantial than the evidence offered in *Scott.*

Defendant's motion to nonsuit should have been allowed. The case is remanded to the Superior Court of Durham County for entry of a judgment of nonsuit. Of course, if the State so elects, defendant may be tried for the felonies he testified on oath he committed on 23 May 1979 at the Stephens home.

Reversed.

JOYCE J. MACON AND GRADY S. MACON v. HELEN R. EDINGER AND CLYDE C. EDINGER

No. 117

(Filed 2 June 1981)

1. **Partition § 7.1; Rules of Civil Procedure § 5— partition—report of commissioners—necessity for service on parties**

The Court of Appeals erred in concluding that unless the trial court finds as a fact that respondents in a partition proceeding had actual notice of the filing of the report of commissioners, the trial court should set aside the decree of confirmation and remand the cause to the clerk for a hearing on respondents' exceptions to the report.

2. **Partition § 7.1; Rules of Civil Procedure § 5— partition—report of commissioners—necessity for service on parties**

The report of the commissioners in a partition proceeding is a "similar paper" within the contemplation of G.S. 1A-1, Rule 5(a) which must be served upon each of the interested parties.

3. **Partition § 7.1; Rules of Civil Procedure § 5— partition—report of commissioners—necessity for service on parties**

Sufficient notice of the filing of a report of commissioners is given to a party to a partition proceeding when a copy of the report is duly mailed as provided by G.S. 1A-1, Rule 5(b), and the record in this case established that there was sufficient compliance with Rule 5(b) where the clerk found as a fact

that on the same day the commissioners' report was filed, a copy of the report was mailed by the clerk to respondents at the same address at which they admitted receiving a copy of the decree of confirmation which was mailed to them approximately two weeks later.

ON discretionary review of the decision of the Court of Appeals reported in 49 N.C. App. 620, 272 S.E. 2d 411 (1980) reversing judgment of *Brewer, J.*, entered at the 5 November 1979 Session of FRANKLIN Superior Court.

This is a special proceeding for the partition of land.

On 19 September 1977 petitioners filed a petition alleging that the femme petitioner and the femme respondent were tenants in common of a described tract of land located in Youngsville Township, Franklin County, containing 74 acres; that said petitioner and said respondent each owned a one-half undivided interest in said land; and that said petitioner desired to hold her share in severalty. Petitioners asked the court to appoint three commissioners to divide the land into two equal shares, to allot a share to each of said owners, and if an equal division could not otherwise be made, to charge the more valuable dividend with a sum of money payable to the dividend of less value that would make an equitable partition of the property.

A summons and copy of the petition were duly served on each of the respondents on 23 September 1977. Neither of respondents filed a response to the petition. On 5 May 1978 the Clerk of the Superior Court of Franklin County entered an order finding the allegations of the petition to be true and appointing commissioners to divide the land as requested in the petition.

The commissioners were notified and they took their oaths on 9 May 1978. On 6 July 1978, the clerk entered an order extending the time for the commissioners to file their report until 5 September 1978. On 8 September 1978 the commissioners filed their report in which they allotted each tenant the same acreage, 40.25 acres, but charged petitioner's share with owelty in the amount of $8,652.30, to be paid to respondents. No exceptions having been filed to the report, the clerk, on 20 September 1978, entered a decree of confirmation.

On 10 November 1978 respondents filed a petition pursuant to G.S. § 46-19 (1976) asking the court to set aside the decree of

confirmation. They alleged that (1) the report of commissioners was not timely filed; (2) a copy of the report was not served on them; and (3) the partition was not just and fair.

On 9 January 1979, following a hearing, the clerk entered an order finding as facts (1) that the late filing of the report was not prejudicial to respondents; (2) that on the day it was filed the clerk mailed a copy of the report to respondents at the same address where they acknowledge they later received a copy of the decree of confirmation; and (3) that respondents failed to present any evidence of fraud, mistake or collusion. The clerk made conclusions of law consistent with the facts found and dismissed the petition filed by respondents.

Respondents appealed to the judge. Following a hearing *de novo*, Judge Brewer entered a judgment in which he found that respondents had offered no evidence which tended to show mistake, fraud or collusion. Judge Brewer concluded that respondents were not entitled to have the decree of confirmation impeached or set aside pursuant to G.S. § 46-19, and he affirmed the order of the clerk dismissing respondents' petition.

Respondents appealed. The Court of Appeals reversed the judgment and remanded the cause for further proceedings. We allowed petitioners' petition for discretionary review on 4 March 1981.

Additional facts pertinent to our decision will be set forth in the opinion.

Harris & Harris, by Jane P. Harris, for petitioner-appellants.

Robert E. Monroe and Norman L. Sloan for respondent-appellees.

BRITT, Justice.

The Court of Appeals perceived that the question presented to it was whether the trial court erred in ruling that respondents offered no evidence of "mistake" within the meaning of G.S. § 46-19. This statute provides in pertinent part as follows:

> If no exception to the report of commissioners is filed within 10 days, the same shall be confirmed. Any party after confir-

mation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause: . . . .

In their petition to set aside the report of commissioners, respondents allege three mistakes: (1) the failure of the commissioners to file their report within the required time; (2) the division of the property was unjust; and (3) the failure to give respondents notice of the filing of the report of commissioners. The Court of Appeals held that the first two claims related to ordinary errors which were deemed waived when respondents failed to file exceptions to the report within 10 days after it was filed, citing *Roberts v. Roberts*, 143 N.C. 309, 55 S.E. 721 (1906); *Ex parte White*, 82 N.C. 377 (1880); *Hewett v. Hewett*, 38 N.C. App. 37, 247 S.E. 2d 23, *disc. rev. denied*, 295 N.C. 733, 248 S.E. 2d 863 (1978). The court then held that the only question raised by the appeal was whether the failure to give respondents notice of the entry of the report of commissioners was a "mistake" which would entitle them to relief under G.S. § 46-19. "If so, the clerk and the superior court erred in ruling that they had offered no evidence of mistake and in confirming the report of commissioners."

In concluding that the clerk and the superior court erred, the Court of Appeals held that respondents' evidence that they had no actual notice of the filing of the report of commissioners was evidence of a mistake, both under G.S. § 46-19 and G.S. § 1A-1, Rule 60(b); and that if respondents were foreclosed from their right to be heard, either by the failure of the clerk to mail the report to them as required by G.S. § 1A-1, Rule 5(b), "or because of neglect or some other cause mail delivery was not made to them", respondents are entitled to relief under G.S. § 46-19. The court remanded the cause for the trial court "to make a determination and finding of fact as to whether respondents had actual notice" of the filing of the report.

[1] We hold that the Court of Appeals erred in concluding that unless the trial court finds as a fact that respondents had *actual* notice of the filing of the report of commissioners, the trial court should set aside the decree of confirmation and remand the cause to the clerk for a hearing on respondents' exceptions to the report. We do not think the principle of due process and the provisions of applicable statutes afford respondents that right.

The decision of this court in *Floyd v. Rook*, 128 N.C. 10, 38 S.E. 33 (1901), is instructive concerning the case *sub judice*. In that case, on a date more than 20 days[1] after the report of commissioners was filed, all of the petitioners except one filed exceptions to the report. The clerk overruled the exceptions and the petitioners appealed to the judge. The judge refused to hear the exceptions on the ground that they had been filed more than 20 days after the commissioners' report had been filed, concluding that he had "no power in law" to hear the exceptions due to their late filing.

In affirming the trial court, this court held that Section 1896 of the North Carolina Code of 1883 (predecessor to G.S. § 46-19) mandated that if no exceptions to a report of commissioners were filed within 20 days after the filing of the report, "the same shall be confirmed." The court reasoned as follows:

> The proceedings can only be impeached for mistake, fraud or collusion. That language of The Code is peremptory, and cannot be explained or altered by judicial decree. Great inconveniences had arisen in the past, before the enactment of that section of The Code, in reference of the giving of proper notice to the often numerous parties interested in the partition of lands, of the report of the commissioners. (Citation omitted.) And to make those matters certain both as to the parties themselves and to subsequent purchasers for value, conclusive notice was to be presumed that all persons interested in partition proceedings had received notice of the particulars of the partition from the filing of the report of the commissioners, and that 20 days only after that time would be allowed in which to file exceptions to the report. The requirement of The Code in that respect is not a rule of practice, nor is the report of commissioners a pleading in the cause. The report is an act done by the representatives of the parties as well as of the Court, and of that act all parties interested must take notice. 128 N.C. at 11-12, 38 S.E. at 33.

Although the Court of Appeals took note of the decision of this court in *Floyd v. Rook, supra*, it found that the basis for the

1. The applicable statute, G.S. § 46-19, now requires that exceptions be filed within 10 days after the report of commissioners is filed.

ruling in that case has been changed by modern conceptions of due process and fairness as reflected in the notice requirements of the present Rules of Civil Procedure, G.S. § 1A-1, which apply to special proceedings. We now proceed to examine that finding.

We agree with the Court of Appeals that the Rules of Civil Procedure apply to special proceedings "except when a differing procedure is prescribed by statute." G.S. § 1A-1, Rule 1. We also agree that in addition to G.S. § 46-19, G.S. § 1A-1, Rule 60(b)(1) also authorizes relief from a "final judgment, order or proceeding" for mistake, inadvertence, surprise or excusable neglect. Our disagreement with the Court of Appeals is in the type of notice that is required when a report of commissioners is filed.

G.S. § 1A-1, Rule 5(a) provides:

> *Service—when required.*—Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

[2] We agree with the Court of Appeals that a report of commissioners is a "similar paper" within the contemplation of Rule 5(a) and must be "served" upon each of the interested parties. The question then arises, was there sufficient service in the case at hand?

Rule 5(b) provides in pertinent part:

> *Service—how made.*—. . . With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party

or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or *by mailing it to him at his last known address* or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party; or leaving it at the attorney's office with a partner or employee. *Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.* (Emphasis added.)

[3] It is our opinion, and we so hold, that sufficient notice of the filing of a report of commissioners is given to a party to a partition proceeding when a copy of the report is duly mailed as provided by G.S. § 1A-1, Rule 5(b). The question then arises, does the record in this case establish that there was sufficient compliance with Rule 5(b)?

In his order filed 9 January 1979 the clerk found as a fact that on 8 September 1978 (the same day the report was filed), a copy of the report was mailed by him to respondents at the same address at which they admitted receiving a copy of the decree of confirmation which was mailed to them approximately two weeks later. It would have been better if the clerk had tracked the statute and found that the copy was mailed to respondents at "their last known address", and that he deposited the copy of the report "enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service." However, under the circumstances of this case, we think substantial compliance with the statute is implied from the finding which the clerk made.[2]

2. While the point is not pertinent to a decision in this case, we feel impelled to note that respondents failed to give this litigation such attention "as a man of ordinary prudence usually bestows upon his important business." *See Sutherland v. McLean*, 199 N.C. 345, 154 S.E. 662 (1930). The record indicates that respondents are educated people; and that although the initial process was served on them on 23 September 1977, they made no contact with the court before 10 November 1978 when they filed their petition asking that the decree of confirmation be set aside. It appears that respondents resided in another county, some 125 miles from Franklin

For the reasons stated, the decision of the Court of Appeals reversing the judgment of the superior court is

Reversed.

MARY M. WILHITE, WIDOW OF EARNEST WILHITE, DECEASED, PLAINTIFF v. LIBERTY VENEER COMPANY, DEFENDANT-EMPLOYER AND LUMBERMENS MUTUAL CASUALTY COMPANY, DEFENDANT-INSURANCE CARRIER

No. 53

(Filed 2 June 1981)

1. **Master and Servant § 74— workers' compensation—disfigurement—postmortem award to dependents**

When an employee suffers serious bodily disfigurement due to an accident covered by the Workers' Compensation Act and dies from unrelated causes while drawing compensation for temporary total disability, his dependents are entitled to a postmortem award for serious bodily disfigurement. There was sufficient evidence of record in this proceeding to support an award for disfigurement under G.S. 97-31(22) and the dependents of the deceased were entitled to the proceeds of that award since the deceased worker's claim was pending at the time of his death and encompassed his entitlement to any discretionary compensation that might be awarded for serious bodily disfigurement; the deceased employee had second and third degree burns over 30 percent of his body which left scars extending from below the elbow, over the shoulder and over the front of the chest and armpit on the right side; the burns were so serious that skin grafts were required; there was considerable scarring, roughness and discoloration of the skin and some limitation of motion in the shoulder; and it was apparent that the disfigurement resulting from the burns marred and adversely affected the appearance of the injured employee to such extent that the Industrial Commission could reasonably presume that his opportunities for remunerative employment were lessened and his future earning power diminished.

2. **Master and Servant § 69— workers' compensation—claim for serious bodily disfigurement—filing of additional claim unnecessary**

An employee is required to file but a single claim for workers' compensation, and the amount of compensation payable is predicated on the extent of the disability resulting from the accident; thus, it was not necessary for plaintiff's decedent to file an additional claim for serious bodily disfigurement, since

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County. Even so, an occasional telephone call to the office of the Clerk of the Superior Court of Franklin County no doubt would have resulted in their being informed as to the status of their case.

his claim based on serious bodily disfigurement was encompassed by defendants' admission of liability and payment of temporary total disability benefits to the date of his death.

ON discretionary review of decision of the Court of Appeals, 47 N.C. App. 434, 267 S.E. 2d 566 (1980).

Plaintiff instituted this proceeding before the North Carolina Industrial Commission to recover compensation benefits on account of the death of her husband Earnest Wilhite.

On 20 June 1975 Mr. Wilhite, then 56 years old, was operating a tractor for his employer when the radiator of the tractor exploded and sprayed him with boiling hot water. He was treated at the Burn Center at Memorial Hospital in Chapel Hill from the date of the accident until he was discharged on 2 August 1975. He was diagnosed as having second- and third-degree burns over 30 percent of his body. His treatment included among other things skin grafts to three areas: the right arm, right leg and penis. He was given physical therapy treatments intended to improve the movement of the right shoulder and right upper extremity. The severe second- and third-degree burns left scars extending from below the elbow, over the shoulder and over the front of the chest and armpit on the right side. There was considerable scarring, roughness and discoloration of the skin. There was also some limitation of motion in the shoulder.

On 25 August 1975 Mr. Wilhite suffered a heart attack, was seen by Dr. L. W. Query and was admitted to a local hospital from which he was discharged on 8 September 1975. He was readmitted on 21 September 1975 and died from the heart attack on 23 September 1975. Plaintiff instituted this proceeding to recover compensation benefits on account of the death of her husband, Earnest Wilhite, contending that he died as a result of heart attacks that were causally related to his injury by accident on 20 June 1975. Based on evidence adduced at various hearings, including the testimony of two medical doctors, both the hearing commissioner and the Full Commission concluded there was no causal connection between decedent's heart attacks and the injury by accident on 20 June 1975 when the tractor radiator exploded. Consequently, compensation for the death pursuant to G.S. 97-38 was denied. The hearing commissioner further conclud-

ed decedent's dependents were not entitled to compensation for decedent's serious bodily disfigurement because the employee, being deceased, had not suffered any diminution of his future earning power or his ability to seek and obtain gainful employment.

On appeal, the Full Commission found as a fact that decedent had sustained serious bodily disfigurement; that such disfigurement could be "reasonably presumed" to lessen his opportunity for remunerative employment and so reduce his future earning capacity; and that decedent's dependents were entitled to compensation for such serious bodily disfigurement in the amount of $2250. An award was made accordingly. Defendants appealed to the Court of Appeals.

The Court of Appeals held that plaintiff's dependents were entitled to an award for decedent's serious bodily disfigurement but found the record insufficient to reflect the necessary facts upon which such an award should be based. Accordingly, the court vacated the award and remanded the case to the Industrial Commission for additional findings of fact concerning the state of decedent's recovery at the time of his death, the best possible medical estimate as to the probable residual disability that would have remained had the decedent lived, and a determination of the effect of such disability on the capacity of the decedent to earn a living. We allowed defendants' petition for discretionary review of that decision.

Sammie Chess, Jr., attorney for plaintiff appellee.

Tuggle, Duggins, Meschan, Thornton & Elrod, P.A., by Joseph E. Elrod III and Joseph F. Brotherton, attorneys for defendant appellants.

HUSKINS, Justice.

[1] When an employee suffers serious bodily disfigurement due to an accident covered by the Workers' Compensation Act and dies from unrelated causes while drawing compensation for temporary total disability, are his dependents entitled to a post-mortem award for serious bodily disfigurement? That is the determinative question posed by this appeal.

As of 20 June 1975 when Mr. Wilhite was injured, G.S. 97-31 (22) read as follows:

> In case of serious bodily disfigurement for which no compensation is payable under any other subdivision of this section, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the schedule contained in this section, the Industrial Commission may award proper and equitable compensation not to exceed seven thousand five hundred dollars ($7,500.00).

Where serious bodily disfigurement is involved, an award of compensation therefor is not *required* by the statute but may be allowed in the discretion of the Industrial Commission. *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865 (1943); *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E. 2d 570 (1942).

[2] Although it is not entirely clear from the record, we assume that defendants admitted liability under the Workers' Compensation Act and plaintiff's decedent was paid compensation for temporary total disability from the date of his injury to the date of his death. In such case, had the injured employee lived he would have been entitled to an award which encompassed all injuries received in the accident. His claim was properly pending before the Industrial Commission for that purpose. The employee is required to file but a single claim, and the amount of compensation payable is predicated on the extent of the disability resulting from the accident. *Smith v. Red Cross*, 245 N.C. 116, 95 S.E. 2d 559 (1956). Thus it was not necessary for Earnest Wilhite to file an additional claim for serious bodily disfigurement. His claim based on serious bodily disfigurement was encompassed by defendants' admission of liability and payment of temporary total disability benefits to date of his death. "Until all of an injured employee's compensable injuries and disabilities have been considered and adjudicated by the Commission, the proceeding pends for the purpose of evaluation, absent laches or some statutory time limitation." *Hall v. Chevrolet Co.*, 263 N.C. 569, 578, 139 S.E. 2d 857, 863 (1965). *Accord, Giles v. Tri-State Erectors*, 287 N.C. 219, 214 S.E. 2d 107 (1975).

We have held that "there is a serious disfigurement in law only when there is a serious disfigurement in fact. A serious disfigurement in fact is a disfigurement that mars and hence adversely affects the appearance of the injured employee to such

extent that it may be reasonably presumed to lessen his opportunities for remunerative employment and so reduce his future earning power. True, *no present loss of wages* need be established; but to be *serious*, the disfigurement must be of such nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power." *Davis v. Construction Co.*, 247 N.C. 332, 336, 101 S.E. 2d 40, 43 (1957) (emphasis original).

In *Stanley v. Hyman-Michaels Co.*, supra, we said:

> In awarding compensation for serious disfigurement, we think the Commission, in arriving at the diminution of earning power from disfigurement and making its award, should take into consideration the natural physical handicap resulting from the disfigurement, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment. What is reasonable compensation for serious disfigurement is for the determination of the Commission in each case in the light of the facts established by competent evidence.

222 N.C. at 266, 22 S.E. 2d at 576.

G.S. 97-37 in pertinent part provides:

> When an employee receives *or is entitled to* compensation under this Article for an injury covered by G.S. 97-31 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made: First, to the surviving whole dependents; second, to partial dependents, and, if no dependents, to the next of kin as defined in the Article; if there are no whole or partial dependents or next of kin as defined in the Article, then to the personal representative, in lieu of the compensation the employee *would have been entitled* to had he lived. (Emphasis added.)

[1] Guided by the foregoing legal principles, we hold (1) that there is sufficient evidence of record to support an award for disfigurement under G.S. 97-31(22); and (2) the dependents of the deceased worker are entitled to the proceeds of that award. We reach these conclusions because the deceased worker's claim was pending at the time of his death and encompassed his entitlement

to any discretionary compensation that might be awarded for serious bodily disfigurement. Moreover, the record shows that the deceased employee had second- and third-degree burns over 30 percent of his body which left scars extending from below the elbow, over the shoulder and over the front of the chest and armpit on the right side. The burns were so serious that skin grafts were required on the right arm, right leg and penis. There was considerable scarring, roughness and discoloration of the skin and some limitation of motion in the shoulder. It is quite apparent that the disfigurement resulting from the burns marred and adversely affected the appearance of the injured employee to such extent that the Industrial Commission could *reasonably presume* that his opportunities for remunerative employment were lessened and his future earning power diminished. Stated somewhat differently, the disfigurement was of such nature that the Industrial Commission could *fairly presume* that the injured employee had suffered a diminution of his future earning power. This constitutes serious bodily disfigurement within the meaning of the law.

The Full Commission's findings of fact support the conclusions of law and the award based thereon without additional findings as ordered by the Court of Appeals. The amount of the award, $2,250, rested in the sound discretion of the Industrial Commission. We think this result is consonant with the provisions of G.S. 97-31(22) and G.S. 97-37 construed together. Had Earnest Wilhite lived, he would have been entitled to compensation under G.S. 97-31(22) for serious bodily disfigurement. Since he died from other unrelated causes, the compensation for serious bodily disfigurement must be paid to his surviving whole dependents "in lieu of the compensation the employee would have been entitled to had he lived." G.S. 97-37. Our holding is consistent with a liberal construction of the statutes and with the legislative intent.

For the reasons stated the decision and award of the Industrial Commission must be reinstated. The case is remanded to the Court of Appeals for further remand to the Industrial Commission for further proceedings consistent with this opinion.

Affirmed in part; reversed in part, and remanded.

Ingram, Comr. of Insurance v. Insurance Agency

STATE OF NORTH CAROLINA, EX REL. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE v. NORTH CAROLINA FARM BUREAU INSURANCE AGENCY, INC.

No. 110

(Filed 2 June 1981)

1. **Insurance § 1— procurement of errors and omissions insurance—insurer not licensed in N. C.—liability for premium tax**

The Court of Appeals properly determined that defendant insurance agency "procured" errors and omissions insurance written by an insurer not licensed to do business in N. C. for various insurance agents in this State and was therefore liable for the premium tax imposed by G.S. 58-53.3.

2. **Rules of Civil Procedure § 43; Witnesses § 7.1— leading questions—witnesses who were agents for opposing party**

Plaintiff had a right to ask leading questions of two witnesses called by plaintiff who were agents or employees of defendant. G.S. 1A-1, Rule 43(b).

3. **Evidence § 31— best evidence rule—admission of auditor's summary**

The trial court erred in excluding an auditor's summary of an examination of defendant corporation's records on the ground that the records themselves were the best evidence of defendant's business transactions where plaintiff showed that the auditor was a qualified witness who had examined defendant's records and that the records were so voluminous that their production was impracticable.

APPEAL by defendant from the decision of the Court of Appeals reported in 50 N.C. App. 510, 274 S.E. 2d 497, reversing *Judge Herring's* involuntary dismissal of plaintiff's action at the 4 February 1980 Session of WAKE Superior Court.

The Commissioner of Insurance brought this civil action on behalf of the State to collect a five percent tax imposed by G.S. 58-53.3 on premiums collected by defendant for errors and omissions insurance written for various insurance agents in North Carolina by an insurance company not licensed to do business in North Carolina.

G.S. 58-53.3 provides in pertinent part:

When any person *procures* insurance on any risk located in this State with an insurance company not licensed to do business in this State, it shall be the duty of such person to deduct from the premium charged on the policy or policies

issued for such insurance five per centum (5%) of the premium and remit the same to the Commissioner of Insurance of the State. . . . [Emphasis added.]

At the conclusion of the State's evidence, defendant moved for an involuntary dismissal under Rule 41 of the Rules of Civil Procedure. The trial judge allowed the motion after finding facts and concluding as follows:

1. The plaintiff, John Randolph Ingram, is the duly elected Commissioner of Insurance for the State of North Carolina, and, pursuant to authority of N.C. G.S. § 58-9(5), is authorized and empowered, through the Attorney General of North Carolina, to institute civil actions for a violation of Chapter 58, North Carolina General Statutes.

2. The defendant, North Carolina Farm Bureau Insurance Agency, Inc., is a corporation organized and existing under and by virtue of the laws of the State of North Carolina.

3. Prior to 1972 Sequoia Insurance Company issued to American Agricultural Insurance Company, Inc. an "Errors and Omissions" master group insurance policy number EL-20-10-11.

4. Neither the Sequoia Insurance Company or the American Agricultural Insurance Agency, Inc. are licensed to do business in North Carolina.

5. During the period January 1, 1972, to December 31, 1978, and prior thereto, either Charles Houck or Paul Lancaster, both employees of the North Carolina Farm Bureau Mutual Insurance Company, Inc. (not a party to this action) received inquiries from sales agents of the North Carolina Farm Bureau Mutual Insurance Company, Inc., regarding the availability of errors and omissions insurance coverage for their agencies located in various parts of North Carolina.

6. Upon receiving the inquiries from the sales agents either Mr. Houck or Mr. Lancaster would, upon request, forward to said sales agents information regarding errors and omissions insurance coverage available from American Agricultural Insurance Agency, Inc.

7. During the period of time from January 1, 1972, to December 31, 1978, the defendant had no paid employees, salespersons or claim adjusters nor was there any evidence that anyone involved with the defendant was a licensed agent for the defendant, Sequoia Insurance Company, or American Agricultural Insurance Agency, Inc.

8. During the period of time from January 1, 1972, to December 31, 1978, neither the defendant nor anyone involved with defendant had the power or authority to bind coverage or countersign policies of errors and omissions insurance on behalf of American Agricultural Insurance Agency, Inc. or Sequoia Insurance Company under policy number EL-20-10-11.

9. During the period of time from January 1, 1972, to December 31, 1978, the defendant did not adjust any claims under errors and omissions insurance policy number EL-20-10-11.

10. During the period of time from January 1, 1972, to December 31, 1978, the defendant did not receive written applications for insurance under errors and omissions policy number EL-20-10-11.

11. During the period of time from January 1, 1972, to December 31, 1978, the defendant was not selling, binding coverage, or attempting to solicit the purchase of errors and omissions coverage under policy number EL-20-10-11.

12. While the defendant, through a manager or administrator, transmitted premiums and other data concerning the errors and omissions coverage between sales agents of the North Carolina Farm Bureau Mutual Insurance Company, Inc. and American Agricultural Insurance Agency, Inc., defendant's role was administrative or ministerial in nature.

Based on the above findings of facts the court makes the following conclusions of law:

1. During the period of time of January 1, 1972, to December 31, 1978, the defendant did not procure insurance, under policy number EL-20-10-11 on any risk located in North Carolina with an insurance company not licensed to do business in North Carolina.

2. The defendant is not liable for the premium tax imposed by N.C. G.S. § 58-53.3 for any premiums which might have been paid for errors and omissions insurance coverage under policy number EL-20-10-11.

The Court of Appeals in a majority decision by Judge Hill concurred in by Judge Wells reversed the trial court. The court held that the actions of defendant amounted to "procuring" and, therefore, the statutory tax applied. Judge Arnold dissented. Defendant appealed to this Court pursuant to G.S. 7A-30(2).

Broughton, Wilkins & Crampton, P.A., by Robert B. Broughton and William S. Aldridge for defendant appellant.

Rufus L. Edmisten, Attorney General, by Richard L. Griffin, Assistant Attorney General for plaintiff appellee.

BRANCH, Chief Justice.

[1] By its first assignment of error, defendant contends that the Court of Appeals erred in reversing the trial court's allowance of defendant's motion for involuntary dismissal. Defendant maintains that it did not "procure" insurance under G.S. 58-53.3.

We have carefully examined the majority opinion of the Court of Appeals as it relates to this assignment of error. We conclude that the authorities cited, the principles of law enunciated, and the reasoning of the majority opinion are correct and fully support the result reached on the question of law presented by this assignment of error. We therefore approve and adopt the majority decision which reversed the involuntary dismissal.

We turn now to the State's two assignments of error relating to evidentiary rulings of the trial judge. Although not necessary to decision, we elect to address the assignments of error not considered by the Court of Appeals because of the possibility they may arise in further proceedings in this matter.

[2] The State contends that the trial judge erred by ruling that the State could not ask leading questions of witnesses Paul J. Lancaster and Charles E. Houck who were called by the State. The State contends that under Rule 43(b) of the Rules of Civil Procedure if one party calls a witness who is an employee or agent of an adverse party, the party who calls the witness has a right to ask leading questions on direct examination.

Since this action is civil in nature and the statutes provide for no other procedure, the Rules of Civil Procedure govern this action. G.S. 1A-1, Rule 1. Rule 43(b) states:

> A party may interrogate any unwilling or hostile witness by leading questions and may contradict and impeach him in all respects as if he had been called by the adverse party. A party may call an adverse party or an agent or employee of an adverse party, or an officer, director, or employee of a public or private corporation or of a partnership or association which is an adverse party . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party.

This language clearly gives the calling party a right to ask leading questions when it calls an agent or employee of an adversary party.

In this case the record shows the witnesses Lancaster and Houck were either agents or employees of defendant. Both admitted they acted as manager of defendant. Lancaster executed the verification of defendant's answers to the State's interrogatories. Whether denominated as agents or employees of defendant, we hold that the two witnesses come within the provisions of Rule 43(b), and the State had a right to ask leading questions of them on direct examination.

Defendant's citation of a criminal case for the proposition that the judge has discretion in permitting leading questions is inapposite since Rule 43(b) does not apply to criminal cases. *State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973).

[3] The State next contends that the trial judge erred by excluding a summary of a State auditor's examination of defendant-corporation's books. The trial judge ruled that the best evidence rule prohibited the State from offering the auditor's summary because the records themselves are the best evidence of defendant's business transactions. The State contends that the summary should have been admitted into evidence because an exception to the best evidence rule permits such an abridgement where the evidence is voluminous and examination difficult.

The best evidence rule, simply stated, is that "a writing is the best evidence of its own contents," and it requires "a party to

produce the writing itself, unless its nonproduction is excused, whenever its contents are to be proved." 2 Stansbury, North Carolina Evidence, § 190 (Brandis rev. 1973). In this case, to determine the amount of tax which defendant must pay, the State must show the total amount of premiums defendant collected for insurance it procured. G.S. 58-53.3. Since this amount can only be determined from an examination of defendant's business records, the best evidence rule requires production of those records unless an exception applies.

In a number of cases, this Court has applied the well-recognized exception to the best evidence rule where the records to be produced are voluminous. *State v. Franks*, 262 N.C. 94, 136 S.E. 2d 623 (1964); *State v. Rhodes*, 202 N.C. 101, 161 S.E. 722 (1932); 2 Stansbury, North Carolina Evidence, § 192 (Brandis rev. 1973). In the leading case of *State v. Rhodes, supra*, this Court said:

> [The exception] is founded on considerations of policy and convenience, if not of necessity . . . . Where a fact can be ascertained only by the inspection of a large number of documents made up of many detailed statements it would be practically out of the question to require the entire mass of documents and entries to be read by or in the presence of the jury. As such examination cannot conveniently be made in court the results may be shown by the person who made the examination. [Citations omitted.] The production of the documents and the privilege of cross examination and of the introduction of evidence afford ample protection of the defendant's rights.

Id. at 104, 161 S.E. at 723. To lay a proper foundation for this evidence, the cases require (1) a qualified witness who has examined the records and (2) a showing that "the documents are so voluminous that it would be impracticable to produce and examine them in court." 2 Stansbury North Carolina Evidence § 192 (Brandis rev. 1973).

In this case the State has shown sufficient foundation to invoke this exception. The witness, Richard B. Fields, identified himself as a Deputy Commissioner of Insurance, Field Audit Division, and he testified that in September, 1977, he audited defendant corporation's books. He testified that he examined checks,

premium notices and invoices among other papers. He said that he did not make copies of all the documents because "[i]n a normal audit of records of this type you would not make copies of every paper or every sheet that you review because of the volume of paper involved." Thus, the State met both foundation requirements; Fields was a qualified witness who had examined the defendant's records, and production of the records was impracticable. We therefore hold that the trial judge erred by failing to permit the auditor to testify to his findings. Defendant is sufficiently protected from any inaccuracy by its ability to cross-examine the auditor, to introduce the records which are in its custody, and to call its own qualified witness to testify to his findings.

The decision of the Court of Appeals as amended is

Affirmed.

STATE OF NORTH CAROLINA v. ERNEST THOMAS "PETE" CORN

No. 46

(Filed 2 June 1981)

1. **Homicide § 4— elements of first degree murder**

In order for the trial court to submit a charge of first degree murder to the jury, there must have been substantial evidence presented from which a jury could determine that the defendant intentionally shot and killed the victim with malice, premeditation and deliberation.

2. **Homicide § 4.3— premeditation defined**

Premeditation is thought beforehand for some length of time, however short, but no particular length of time is required, it being sufficient if the process of premeditation occurred at any point prior to the killing.

3. **Homicide § 4.3— deliberation defined**

An unlawful killing is committed with deliberation if it is done in a "cool state of blood," without legal provocation, and in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose.

4. **Homicide § 4.4— specific intent to kill**

The intent to kill must arise from a fixed determination previously formed after weighing the matter.

5. Homicide § 18— proof of premeditation and deliberation

Since premeditation and deliberation are processes of the mind, they are not susceptible to direct proof and must almost always be proved by circumstantial evidence. Among the circumstances which may be considered as tending to prove premeditation and deliberation are lack of provocation by the deceased, defendant's acts and comments before and after the killing, the use of grossly excessive force or the infliction of lethal blows after the deceased has been felled, and any history of altercations or ill will between the parties.

6. Homicide § 21.5— first degree murder case—insufficient evidence of premeditation and deliberation

There was insufficient evidence of premeditation and deliberation to sustain defendant's conviction of first degree murder where the evidence was uncontroverted that deceased entered defendant's home in a highly intoxicated state, approached the sofa on which defendant was lying, quarreled with defendant, and accused defendant of being a homosexual, and that defendant replied, "You son-of-a-bitch, don't accuse me of that," immediately jumped from the sofa, grabbed a .22 caliber rifle which he normally kept near the sofa, and shot deceased several times in the chest; there was no evidence that defendant acted in accordance with a fixed design or that he had sufficient time to weigh the consequences of his actions; there was no evidence that defendant threatened deceased before the incident or exhibited any conduct which would indicate that he formed any intention to kill him prior to the incident in question; there was no significant history of arguments or ill will between the parties; and although defendant shot deceased several times, there was no evidence that any shots were fired after deceased fell or that defendant dealt any blows to the body once the shooting ended.

DEFENDANT appeals from judgment of *Howell, J.*, entered at the 24 March 1980 Special Criminal Session of Superior Court, TRANSYLVANIA County.

Defendant was tried upon an indictment, proper in form, charging him with first degree murder of Lloyd F. Melton on 20 November 1979. 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 him to life imprisonment, defendant appeals as a matter of right pursuant to G.S. 7A-27(a).

The State's evidence tended to show that Lloyd F. Melton arrived at defendant's house between 11:00 and 11:30 on the morning of 20 November 1979. Defendant and Roy Ward were present at the house when Melton arrived. Shortly thereafter Melton and Ward left in Ward's truck and bought a fifth of vodka and some grapefruit juice. They returned to defendant's house and drank

some of the vodka and grapefruit juice. Defendant did not drink any alcoholic beverages during this time. Melton and Ward then left defendant's house and drove around Transylvania County for several hours, continuing to drink alcoholic beverages as they traveled.

At approximately 5:00 that afternoon they returned to defendant's home. Ward testified that defendant opened the window and looked out as they arrived. When Ward and Melton entered the house, defendant was lying on a sofa in the living room with his hands behind his head. Melton went over to the couch, sat beside defendant, and began to argue with him. During the argument defendant jumped up, pulled a .22 caliber rifle from a crack between the sofa cushion and the back of the sofa, and shot Melton eight to ten times across the chest, killing him instantly. Ward left defendant's house immediately after the shooting and contacted law enforcement officers at the Brevard Police Department and at the Transylvania County Sheriff's Department. Several officers testified that upon arriving at defendant's house to investigate the shooting, they found defendant in the yard, repeatedly stating that he "killed the son-of-a-bitch." Melton was found dead on the floor beside the sofa in the living room.

Defendant testified in his own behalf, claiming that he shot Melton in self defense. He stated that when Melton and Ward arrived at his home at about 5:00 p.m. on 20 November 1979, Melton walked over to the couch on which defendant was lying, grabbed defendant, and began slinging him around and attempting to hit him. At some point during the altercation, Melton apparently accused defendant of being a homosexual. Defendant replied by stating "you son-of-a-bitch, don't accuse me of that." Ward, who had entered the house just before Melton, arose from the chair in which he was sitting and moved toward defendant with a clenched fist. Defendant reached under the sofa and grabbed the .22 caliber rifle which he normally kept in that location. He shot at Melton's leg, and when Melton kept moving toward him, he shot him several times in the chest. After the shooting defendant walked across the street to his sister's house and called the Brevard Police Department. He then returned to his home and waited for law enforcement officers to arrive. Several officers testified that defendant was calm and cooperative during their investigation of the incident.

Defendant's evidence further tended to show that he was five feet seven inches tall and weighed approximately 140 pounds. Melton was five feet ten inches tall and weighed from 180 to 200 pounds. The evidence indicated that Melton had a propensity to commit violent acts after drinking alcoholic beverages and that defendant was aware of this tendency. Roy Ward testified that he was six feet two inches tall and weighed 247 pounds. Defendant stated that he knew Ward had been trained in karate during his service in the military.

The trial judge instructed the jury that they could find defendant guilty of first degree murder, guilty of second degree murder, guilty of voluntary manslaughter, or not guilty. During deliberations the jury returned to the courtroom several times for a repetition of the instructions on first and second degree murder and voluntary manslaughter. Defendant was found guilty of first degree murder.

John R. Hudson, Jr. for defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Douglas A. Johnston for the State.

COPELAND, Justice.

Defendant presents seven assignments of error for our consideration on appeal. We find merit in defendant's third assignment and remand the case to the trial court for a new trial.

Defendant assigns as error the trial court's denial of his motion to dismiss the first degree murder charge. He maintains that the State presented insufficient evidence of premeditation and deliberation to sustain a conviction of first degree murder.

[1] In order for the trial court to submit a charge of first degree murder to the jury, there must have been substantial evidence presented from which a jury could determine that the defendant intentionally shot and killed the victim with malice, premeditation and deliberation. *State v. Horton*, 299 N.C. 690, 263 S.E. 2d 745 (1980); *State v. Heavener*, 298 N.C. 541, 259 S.E. 2d 227 (1979); *State v. Baggett*, 293 N.C. 307, 237 S.E. 2d 827 (1977). "Substantial evidence" is that amount of relevant evidence that a reasonable mind might accept as sufficient 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 motion to dismiss on the grounds of insufficient evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Fletcher*, 301 N.C. 709, 272 S.E. 2d 859 (1981); *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980).

[2-4] Premeditation has been defined by this Court as thought beforehand for some length of time, however short. No particular length of time is required; it is sufficient if the process of premeditation occurred at any point prior to the killing. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980); *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970); *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969). An unlawful killing is committed with deliberation if it is done in a "cool state of blood," without legal provocation, and in furtherance of a "fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose." *State v. Faust*, 254 N.C. 101, 106-07, 118 S.E. 2d 769, 772 (1961). The intent to kill must arise from "a fixed determination previously formed after weighing the matter." *State v. Exum*, 138 N.C. 599, 618, 50 S.E. 283, 289 (1905). *See also State v. Baggett, supra; State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974).

[5] Since premeditation and deliberation are processes of the mind, they are not susceptible to direct proof and must almost always be proved by circumstantial evidence. Among the circumstances which may be considered as tending to prove premeditation and deliberation are: lack of provocation by the deceased; defendant's acts and comments before and after the killing; the use of grossly excessive force or the infliction of lethal blows after the deceased has been felled; and any history of altercations or ill will between the parties. *State v. Myers, supra; State v. Baggett, supra; State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973).

[6] After carefully considering the evidence presented in the case *sub judice* in the light most favorable to the State, we find that the State has failed to show by substantial evidence that defendant killed Lloyd F. Melton with premeditation and deliberation. The shooting was a sudden event, apparently brought on by some provocation on the part of the deceased. The evidence is uncontroverted that Melton entered defendant's home in a highly in-

toxicated state, approached the sofa on which defendant was lying, and insulted defendant by a statement which caused defendant to reply "you son-of-a-bitch, don't accuse me of that." Defendant immediately jumped from the sofa, grabbing the .22 caliber rifle which he normally kept near the sofa, and shot Melton several times in the chest. The entire incident lasted only a few moments.

There is no evidence that defendant acted in accordance with a fixed design or that he had sufficient time to weigh the consequences of his actions. Defendant did not threaten Melton before the incident or exhibit any conduct which would indicate that he formed any intention to kill him prior to the incident in question. There was no significant history of arguments or ill will between the parties. Although defendant shot deceased several times, there is no evidence that any shots were fired after he fell or that defendant dealt any blows to the body once the shooting ended.

All the evidence tends to show that defendant shot Melton after a quarrel, in a state of passion, without aforethought or calm consideration. Since the evidence is insufficient to show premeditation and deliberation, we find that the trial court erred in instructing the jury that they could find defendant guilty of first degree murder and defendant is awarded a new trial for a determination of whether or not defendant is guilty of second degree murder, voluntary manslaughter or not guilty.

Defendant's remaining assignments of error are unlikely to recur at retrial, therefore we deem it unnecessary to discuss them at this time.

For the reasons stated above, this case is remanded to the Superior Court, Transylvania County, for a

New trial.

STATE OF NORTH CAROLINA v. WILLIAM HOWARD FREEMAN

No. 17

(Filed 2 June 1981)

Criminal Law § 34.5; Rape § 4.1— prior sexual misconduct—admission as substantive evidence proper

In a prosecution of defendant for first degree rape, a sexual offense in the first degree, and first degree burglary where the evidence tended to show that the victim discovered defendant standing naked in her bathroom, defendant told the victim that he had previously made obscene phone calls to her and that he was sick, defendant committed oral sex upon the victim, raped her, again committed oral sex, masturbated in front of her, and requested that she urinate upon him, but defendant offered evidence of alibi, the question of whether defendant was indeed the perpetrator was raised, and there was therefore no error in admitting as substantive evidence a witness's testimony that defendant lived in the house behind her and that she had seen him standing nude, outside, directly behind her house on forty or fifty occasions, that defendant would sometimes abuse himself, and that he had used much profane language, since the unusually bizarre nature of defendant's activity observed by both the neighbor and the victim coupled with the similarity of the incidents both observed provided the basis for a reasonable inference that the man who appeared on the neighbor's premises was the same man who appeared on the premises of and ultimately raped the victim.

BEFORE *Judge Canaday*, presiding at the 16 June 1980 Criminal Session of CUMBERLAND Superior Court, and a jury, defendant was tried on indictments consolidated for trial charging him with: (1) first degree rape; (2) "a sexual offense in the first degree . . . to wit: oral sex, by force and against her will and with the use of a deadly weapon, to wit: a pistol . . . ."; and (3) first degree burglary. Defendant was convicted as charged and sentenced to life imprisonment in the rape case, not less than forty nor more than fifty years in the sexual offense case, and not less than thirty nor more than forty years in the burglary case, all sentences to run consecutively. Defendant appeals the rape case pursuant to G.S. 7A-27(a). We allowed defendant's motion to bypass the Court of Appeals in the sexual offense and burglary cases on 26 November 1980.

Rufus L. Edmisten, Attorney General, by Myron C. Banks, Special Deputy Attorney General, for the State.

Gregory A. Weeks, Assistant Public Defender, for the defendant.

EXUM, Justice.

The sole question presented by this appeal is whether the admission of evidence regarding defendant's prior sexual misconduct was properly admitted as substantive evidence tending to prove defendant's guilt of the crimes charged against him. We conclude that it was and find no error in defendant's trial.

The state's evidence tended to show the following: At approximately 1:00 a.m. on 5 February 1980 the prosecuting witness, Betty Whitman, finished watching television and went to bed. A few minutes later she heard and arose to investigate a noise, whereupon she discovered defendant, standing naked, in her bathroom. She led defendant into her living room where, under a pillow on the couch, she had hidden a pistol. She drew the pistol and ordered defendant to leave. Defendant knocked the pistol to the floor, and Ms. Whitman fled the house. After retrieving the pistol, defendant ran after her. After catching her he knocked her to the ground, stuck the pistol against her side, and ordered her back into the house.

Shortly thereafter defendant informed her that it was he who had made obscene telephone calls which she had received during the previous three months, and that it was he whom she had seen in her backyard on a previous Saturday night. Defendant "kept saying that he was sick, that he needed help, and that he couldn't get help because he was black." Defendant then committed oral sex upon the prosecuting witness, after which he raped her, again committed oral sex, masturbated in front of her, and requested that she urinate upon him. He promised to return the following night and left.

The prosecuting witness positively identified defendant both at a pre-trial lineup and at trial as being her assailant.

Defendant offered several witnesses tending to establish an alibi for the evening and early morning hours on 4-5 February 1980. Defendant testified that he had never been in the prosecuting witness' home and had not committed rape or oral sex upon her. On cross-examination defendant testified that he lived with his sister whose house was located next to that of "the Walters." He was then asked, "Isn't it a fact that you appeared nude in their [the Walters'] backyard over forty times?" He responded, "No sir, it's not."

In rebuttal the state offered the testimony of Patricia Walters. She testified that defendant "lived behind us," that she had known him since he was a young boy, and that his "reputation and character . . . in the community . . . is certainly not good." She then testified, over defendant's objection, that she had seen him standing nude, outside, "directly behind my house" on forty or fifty occasions. Ms. Walters further testified that when defendant, standing nude, realized that she was watching him he would "sometimes . . . just ignore me, and sometimes I would ignore him. Sometimes he would abuse himself, and on more than one occasion, he has used much profane language."

Defendant assigns as error the admission of Patricia Walters' testimony on rebuttal. Defendant contends that this was evidence of unrelated prior misconduct which the state was improperly allowed to use in proving the commission of the offenses charged. We disagree.

We note first that we need not decide whether defendant's conduct in the presence of Ms. Walters would have subjected him to criminal prosecution under, for example, G.S. 14-190.9 (indecent exposure) or G.S. 14-134 (trespass). This conduct was, in any event, morally reprehensible and unacceptable to society generally. The principles governing its admissibility are, therefore, the same as those governing the admissibility of conduct which is clearly criminal. We have applied these principles in our resolution of the question presented.

"The general rule is that '[e]vidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime.' 1 Stansbury's North Carolina Evidence, § 91, pp. 289-290 (Brandis rev. 1973)." *State v. Keller*, 297 N.C. 674, 679, 256 S.E. 2d 710, 714 (1979). If consequently, the evidence tends to identify the accused as the perpetrator of the crime charged it is admissible notwithstanding that it also shows defendant to be guilty of another criminal offense. "Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed

by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged." *State v. McClain*, 240 N.C. 171, 175, 81 S.E. 2d 364, 367 (1954); *accord, State v. Perry*, 275 N.C. 565, 571, 169 S.E. 2d 839, 834 (1969).

The principal issue in this case was that of identification of defendant. Although Ms. Whitman positively identified defendant as her assailant, defendant's evidence of alibi made the question of whether defendant was, indeed, the perpetrator the very heart of the case. It was, therefore, proper for the state, in rebuttal, to offer evidence probative of this question.

We think the testimony of Ms. Walters was probative of this question. It did tend to identify defendant as the perpetrator of the crimes against Ms. Whitman. This is so because the circumstances of the crimes charged and those of the offenses observed by Ms. Walters tend to show that both were committed by the same person. The victim, Ms. Whitman, testified that when she first observed her assailant he was standing naked in her bathroom. After he raped her he masturbated in her presence. Ms. Walters testified that she had on numerous occasions observed defendant on her premises in her presence standing naked and that on some of these occasions defendant would masturbate.

The unusually bizarre nature of defendant's activity observed by both Ms. Walters and Ms. Whitman coupled with the similarity of the incidents both observed provide the basis for a reasonable inference that the man who appeared on Ms. Walters' premises was the same man who appeared on the premises of and ultimately raped Ms. Whitman. We note further that Ms. Whitman's assailant acknowledged himself to be sick and in need of help. Ms. Walters' description of defendant's activities in her presence point not only to the fact that defendant was, indeed, sick, but also to the fact that his sexual aberrations were of such long-standing and so bizarre that his sickness would likely have become self-apparent.

We conclude, therefore, that there was no error in the admission of Ms. Walters' testimony as substantive evidence of defendant's guilt. A number of our cases as well as cases from other jurisdictions support this conclusion. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978); *State v. Thompson*, 290 N.C. 431, 226

S.E. 2d 487 (1976); *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972); *Corpus v. Estelle*, 571 F. 2d 1378, *reh. denied*, 575 F. 2d 881 (5th Cir. 1978); *Commonwealth v. Kline*, 361 Pa. 434, 65 A. 2d 348 (1949); *Sanford v. State*, 76 Wis. 2d 72, 250 N.W. 2d 348 (1977); *Hough v. State*, 70 Wis. 2d 807, 235 N.W. 2d 534 (1975); *Lingerfelt v. State*, 147 Ga. App. 371, 249 S.E. 2d 100 (1978). *But see State v. Gammons*, 258 N.C. 522, 128 S.E. 2d 860 (1963). *See generally* Annot., "Admissibility, In Prosecution for Sexual Offense, of Evidence of Other Similar Offenses," 77 A.L.R. 2d 841 (1961), and Later Case Service (1975, 1981).

In defendant's trial we find

No error.

RUTH W. EASTER, ADMINISTRATRIX OF THE ESTATE OF BOBBY LEE EASTER, DECEASED v. LEXINGTON MEMORIAL HOSPITAL, INC.; DR. JAMES A. CLINE; DR. LLOYD D. LOHR; DR. C. F. MEADE; LEXINGTON CLINIC FOR WOMEN, P.A.; AND NORTH CAROLINA BAPTIST HOSPITALS, INC.

No. 116

(Filed 2 June 1981)

Physicians, Surgeons, and Allied Professions § 16.1 — doctor-patient relationship — negligence in assigning obstetrician-gynecologist to treat burn patient — genuine issues of material fact

In a medical malpractice action to recover for the death of plaintiff's intestate from tetanus in conjunction with other injuries, the evidence on motion for summary judgment presented a genuine issue of material fact as to whether a doctor-patient relationship ever existed between defendant physician and plaintiff's intestate where plaintiff's evidence tended to show that the intestate was brought to a hospital emergency room for injuries sustained in a hotel fire, defendant was the physician on duty in the emergency room, hospital records indicated that defendant saw the patient initially in the emergency room, and it was the policy of the hospital to keep complete and accurate records of patient care, and where defendant's evidence tended to show that he never treated or saw plaintiff's intestate and that the hospital records were in error because of mistaken assumptions regarding the night in question. Furthermore, the evidence presented a genuine issue of material fact as to the negligence of defendant in assigning or permitting an obstetrician-gynecologist, arguably untrained in the area of major burns, to treat an emergency burn patient such as plaintiff's intestate.

Justice CARLTON dissents.

ON discretionary review to review the decision of the Court of Appeals, 49 N.C. App. 398, 271 S.E. 2d 545 (1980), affirming the entry of summary judgment for defendant Dr. James A. Cline by *Washington, J.*, at the 12 November 1979 Session of DAVIDSON Superior Court.

Plaintiff filed this wrongful death action seeking damages for the death of plaintiff's intestate allegedly caused by the negligence of the several defendants. The undisputed evidence in the case tends to show that plaintiff's intestate was one of several people injured on 16 November 1976 in a hotel fire in Lexington, North Carolina, and admitted to the emergency room at Lexington Memorial Hospital for treatment. The physician in charge of the emergency room at that time was defendant Dr. Cline. Plaintiff's intestate was examined and treated in the emergency room by defendant Dr. Lohr, an obstetrician-gynecologist who happened to be at the hospital and volunteered his services. Plaintiff's intestate was suffering second and third degree burns, lacerations and abrasions, and a broken arm. Five days later, plaintiff's intestate developed tetanus and was transferred to North Carolina Baptist Hospital in Winston-Salem, North Carolina. He died on 19 December 1976.

Plaintiff alleged that defendants were negligent in diagnosing and treating plaintiff's intestate, and specifically alleged that Dr. Cline was negligent in diagnosing and treating the intestate and in failing to examine him properly. Defendants denied negligence. Defendant Cline filed a motion for summary judgment, which was allowed. The action remains pending against all other defendants. The trial court found no just cause for delay and certified the case for immediate appeal to the Court of Appeals. That court, in an opinion by Judge Hill, Judges Arnold and Martin (Harry C.) concurring, affirmed entry of summary judgment in favor of Dr. Cline. We allowed plaintiff's petition for discretionary review on 4 March 1981.

Michael J. Lewis and Teresa G. Bowden, attorneys for plaintiff.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by J. Robert Elster and Jackson N. Steele, attorneys for defendant Cline.

BRANCH, Chief Justice.

The sole question presented for review is whether the trial court erred in granting summary judgment in favor of defendant Dr. Cline. The Court of Appeals held that all of the evidence at the hearing on the motion for summary judgment tended to show that Dr. Cline never saw or treated plaintiff's intestate at all. The court stated: "We find no evidence in rebuttal." *Easter v. Hospital*, 49 N.C. App. at 402, 271 S.E. 2d at 547. The court further noted that "[n]o act or omission to act by Dr. Cline was the proximate cause of Mr. Easter's developing tetanus." *Id.* at 402, 271 S.E. 2d at 547. Finally, the court found "no evidence that a doctor-patient relationship ever existed between Dr. Cline and Mr. Easter." *Id.* at 401, 271 S.E. 2d at 547.

It is well settled that "Rule 56, Rules of Civil Procedure, authorizes the rendition of summary judgment upon a showing by the movant that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980). We have observed that the purpose of summary judgment is "to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed." *Id.* Finally, it is a general rule that,

> issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant "but should be resolved by trial in the ordinary manner." 6 Pt. 2 Moore's Federal Practice, § 56.17 [42] at 946 (2d ed. 1980). Hence it is only in exceptional negligence cases that summary judgment is appropriate because the . . . applicable standard of care must be applied, and ordinarily the jury should apply it under appropriate instructions from the court.

Id. at 73, 269 S.E. 2d at 140.

In the instant case, as the Court of Appeals noted, defendant Cline's evidence tended to show that he never treated or saw plaintiff's intestate and thus the physician-patient relationship never arose. It is well settled that the relationship of physician to patient must be established as a prerequisite to an actionable

claim for medical malpractice. *Childers v. Frye*, 201 N.C. 42, 158 S.E. 744 (1931). There is also evidence in the record, as testified to by Charles Thomas Frock, President of Lexington Memorial Hospital, upon deposition, that the hospital records indicated that Dr. Cline saw the patient initially in the emergency room. Mr. Frock also stated that the discharge summary recited that "Dr. Cline saw the patient in the emergency room." Frock further noted that "[i]t was the policy of the hospital . . . to keep complete and accurate records of the patient care."

We recognize that Dr. Cline's evidence included the affidavit of Dr. Meade, who made the hospital records testified to by Mr. Frock, averring that the hospital records were in error due to his own mistaken assumptions regarding the night in question. Nevertheless, Mr. Frock's testimony directly contradicts the evidence presented by Dr. Cline that he never saw plaintiff's intestate. Such a contradiction raises an issue of material fact to be decided by a jury with the credibility of the witnesses likewise to be determined by a jury. We further note that there is evidence that Dr. Cline also took charge of plaintiff's treatment at least insofar as assigning him to the care of Dr. Lohr initially, and later admitting him to the care of defendant Dr. Meade.

Should a jury determine that the physician-patient relationship existed, there are additional issues of fact concerning the question of Dr. Cline's negligence, if any, in treating or failing to treat plaintiff's intestate. There is evidence tending to show that Dr. Cline was the physician in charge of the emergency room on 16 November 1976, and that upon Dr. Lohr's offer to assist in treating the burn victims, Dr. Cline pointed in the direction of plaintiff's intestate and said, "Why don't you see that one over there?" There is evidence in the record that Dr. Lohr was an obstetrician-gynecologist and had never treated major burns. Dr. Lohr stated in his deposition that the

> type of training I had at the School of Aviation and Medicine in burn treatment was the general flight surgeon program. The curriculum included taking care of acutely burned people at the scene of crashes and in triage areas. We did not actually do treatment. It was a lecture course . . . . It was not a specific course in itself, but it was covered in courses of air-sea rescue, general crash investigation, this sort of thing.

There was not a specific course in burn care. I did not actually treat the burn patients myself at that time, it was a training course.

Dr. Lohr also testified that, while he had worked in the emergency room between 1970 and 1974, he had not had an "occasion to treat any major burn patients."

We are of the opinion that the evidence raises issues of material fact as to the negligence of Dr. Cline in assigning or permitting an obstetrician-gynecologist, arguably untrained in the area of major burns, to treat an emergency burn patient such as plaintiff's intestate. There is certainly an issue of fact as to whether, assuming the existence of the physician-patient relationship, defendant Cline exercised "that degree of knowledge and skill ordinarily possessed by others of his profession," *Nash v. Royster*, 189 N.C. 408, 414, 127 S.E. 356, 359 (1925), and whether he used "his best judgment in the treatment of the case." *Id.*

The decision of the Court of Appeals affirming entry of summary judgment in favor of defendant Dr. Cline is reversed and the case is remanded to that court for further remand to the Davidson Superior Court for proceedings in accordance with this opinion.

Reversed and remanded.

Justice CARLTON dissents.

JANET CAROLYN R. CROMER (HERMAN) v. JACK S. CROMER

No. 114

(Filed 2 June 1981)

Army and Navy § 1; Divorce and Alimony § 24.5— order to increase child support —motion to stay hearing pursuant to Soldiers' and Sailors' Civil Relief Act— reconsideration required

Orders of the trial court increasing the amount of child support, ordering defendant's arrest, and garnishing defendant's earnings are vacated, and the matter is remanded for a new hearing on plaintiff's motion in the cause for increased child support and reasonable counsel fees so that defendant, who was

stationed with the U.S. Navy in Hawaii and who attempted to obtain a stay of the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940, may be given proper notice and may be afforded a reasonable opportunity to be heard.

ON petition for discretionary review pursuant to G.S. 7A-31 of the decision of the Court of Appeals, 49 N.C. App. 403, 271 S.E. 2d 541 (1980), allowed by this Court on 3 March 1981. The decision of the Court of Appeals affirmed an order entered by *Parker, J.*, in District Court, WAKE County, on 5 March 1980, ordering the United States Navy to garnish the defendant's wages each month in an amount equal to forty per cent of defendant's net disposable earnings. The garnished wages were to be sent to the plaintiff as child support. The order of garnishment was an extension of an earlier order of the court dated 27 November 1979, which, among other things, increased the defendant's payments for child support from $250.00 per month under an earlier confession of judgment to $525.00 per month, ordered his arrest and authorized his release upon the posting of a $10,000.00 bond.

Hatch, Little, Bunn, Jones, Few & Berry, by John B. Ross, attorneys for the defendant appellant.

Tharrington, Smith & Hargrove, by J. Harold Tharrington and Carlyn G. Poole, attorneys for the plaintiff appellee.

PER CURIAM.

Defendant is a chief petty officer and is "Chief of the Boat" of the nuclear submarine USS Skate, homeported in Hawaii. Prior to the entry of the order of 6 November 1979, defendant attempted to obtain a stay of the proceedings under § 521 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-91 (1976). The Court of Appeals affirmed the trial court's denial of defendant's application on the basis that defendant's military service did not materially affect his ability to conduct his defense. It appeared to the Court of Appeals "that defendant's use of the Act was dictated by strategy rather than the necessities of military service." 49 N.C. App. at 408, 271 S.E. 2d at 544.

Attached to the defendant's petition for discretionary review to this Court was a letter from the defendant's commanding of-

ficer dated 14 November 1979 and addressed to the presiding judge. To that letter is attached an affidavit. Both of these documents appear in the defendant's petition for discretionary review and are mentioned in the briefs of both parties before this Court. That letter and the attached affidavit read as follows:

SSN578/GJR:bsm
1300
Ser: 524-79
14 NOV 79

From: Commanding Officer, USS SKATE (SSN 578)
To: Presiding Judge, District Court, Wake County, North Carolina

Subj: ETCS(SS) Jack S. CROMER, USN, 521-44-6872

Ref: (a) Wake County District Court Order 79 CVD5719

1. Reference (a) directs ETCS(SS) Jack S. CROMER, USN to report to Wake County District Court on 21 November 1979 in response to a request by his ex-wife for an increase in child support payments.

2. Due to operational commitments during the next month and reduced manning during the holiday leave period, it is not possible to grant ETCS(SS) CROMER leave at this time. The earliest foreseeable time for ETCS(SS) CROMER to be granted leave would be after 1 January 1980.

G. R. FISTER

Enclosure (1) to
Affidavit of George R. Fister

DEPARTMENT OF THE NAVY
SUBMARINE SQUADRON ONE
FPO SAN FRANCISCO 96601

AFFIDAVIT

Comes now Commander GEORGE R. FISTER, U.S. Navy, being first duly sworn deposes and says:

1. I am the Commanding Officer of USS SKATE (SSN 578) which is homeported at Pearl Harbor, Hawaii;

2. ETCS Jack S. CROMER, U.S. Navy, is an enlisted member of my crew who is serving in the position of Chief of the Boat;

3. There is only one (1) Chief of the Boat in each submarine and that person serves as the primary interface between officer and enlisted personnel;

4. ETCS Cromer is an indispensable member of the crew and is not permitted to take leave except during those periods the ship is not at sea;

5. On November 14, 1979, ETCS Cromer showed me various papers from District Court in Wake County, North Carolina, wherein it was stated that he was required to appear in court on November 21, 1979;

6. USS SKATE (SSN 578) was scheduled for operations at sea during the last two weeks of November and I advised ETCS Cromer, he would not be permitted to take leave;

7. On November 14, 1979, I addressed a letter to the Presiding Judge, Wake County District Court, Raleigh, North Carolina, in which I stated that ETCS Cromer could not be present on November 21, 1979, due to operational commitments of the ship. Enclosure (1) is a copy of my letter which was mailed in a U.S. Government franked envelope deposited in the U.S. Mail in Honolulu, Hawaii.

8. On November 14, 1979, I directed ETCS Cromer to write a letter to the Presiding Judge pointing out the inaccuracies in the court documents he received.

Further affiant sayeth not.

Done this 31st day of March, 1980, in Pearl Harbor, Hawaii.

s / GEORGE R. FISTER

Subscribed and sworn to before
me this 31st day of March, 1980.

s / JAMES N. HAUSLER (SEAL)
Notary Public, State of Hawaii
My commission expires: November 16, 1982

The foregoing letter and affidavit are a part of the petition for discretionary review and were discussed in the briefs filed with this Court but were not a part of the record on appeal. Apparently the letter and affidavit do not appear in any lower court file. This omission is not explained in the record before us. On oral argument before this Court, defendant's counsel explained that he was unaware of these documents at the time the order was entered. He became aware of them and made their existence known to the judge of the district court after the hearing, and before the record on appeal was settled. We believe the trial court might have proceeded in another manner had it been aware of these documents. We believe that the trial court should reconsider the matter with the benefit of the foregoing letter and affidavit. In our supervisory capacity and in the interest of justice, we find it necessary to reverse the Court of Appeals.

The decision of the Court of Appeals is reversed. The order of Parker, J., dated 27 November 1979 increasing the amount of child support and ordering defendant's arrest and his order dated 5 March 1980 garnishing defendant's earnings are vacated. This matter is remanded to the Court of Appeals with instructions that it be further remanded to the District Court, Wake County for a new hearing on plaintiff's motion in the cause for increased child support and reasonable counsel fees. The District Court will ensure proper notice to the defendant and afford him a reasonable opportunity to be heard.

Reversed and remanded.

GUILFORD COUNTY AND CITY OF HIGH POINT v. CLARENCE C. BOYAN AND WIFE, MARGARET W. BOYAN; LEE F. STACKHOUSE, TRUSTEE FOR CLARENCE C. BOYAN AND WIFE, MARGARET W. BOYAN; JIMMY D. RIDGE; AND PIEDMONT HARDWOOD LUMBER COMPANY

No. 115

(Filed 2 June 1981)

ON discretionary review of the decision of the Court of Appeals reported at 49 N.C. App. 430, 272 S.E. 2d 1 (1980), affirming judgment for defendants entered by *Pfaff, Judge*, at the 26

November 1979 Civil Non-Jury Session of District Court, GUILFORD County.

Plaintiffs filed this action on 24 January 1975 to foreclose liens for ad valorem taxes (owed to both plaintiffs) and water and sewer assessments (owed to plaintiff City of High Point) on property located at 701 Oakview Road in High Point. At the time the taxes and assessments here involved became due the defendants Boyan owned the subject property. The Boyans conveyed their interest in the property to defendant Ridge by a warranty deed recorded 31 December 1974, prior to the institution of this action.

In their answers, defendants pled *res judicata* as a bar to the claim for water and sewer assessments, alleging that those assessments were the subject of an earlier foreclosure action in 1970 brought by the same plaintiffs in which both plaintiffs entered a voluntary dismissal with prejudice on 5 October 1971.

On 13 September 1976 plaintiffs made a motion in the District Court of Guilford County to amend the dismissal in the earlier action to read that it was without prejudice. Judge Kuykendall granted this motion on 5 October 1976.

On 12 October 1979 plaintiffs moved for summary judgment. Without ruling on this motion, the trial court proceeded to try the case without a jury. At the close of all the evidence the court found as a fact that defendant Ridge was a bona fide purchaser for value. Because at the time Ridge purchased the property the voluntary dismissal with prejudice was a final judgment, the court concluded that Ridge took the property free and clear of the lien and that plaintiff City was barred from asserting any claim of lien against the real property. The trial court also dismissed the assessment claims against the Boyans because the foreclosure of such is an action in rem and, as such, can be enforced only against the property.

The plaintiff City of High Point appealed to the Court of Appeals. That court affirmed the trial court's judgment on 4 November 1980.

We granted plaintiff City of High Point's petition for discretionary review on 4 March 1981.

Hugh C. Bennett, Jr., for plaintiff-appellant City of High Point.

Boyan and Nix, by Kathleen E. Nix, for defendant-appellees Clarence C. and Margaret W. Boyan.

Stephen E. Lawing for defendant-appellee Ridge.

PER CURIAM.

Upon review of the record, the briefs and oral arguments of counsel and the authorities there cited, we conclude that the petition for discretionary review was improvidently allowed.

The order allowing plaintiff's petition for discretionary review is vacated; the decision of the Court of Appeals affirming judgment for defendants remains undisturbed.

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

BRYANT v. LOWERY

No. 152 PC.

Case below: 51 N.C. App. 710.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 July 1981.

BURROW v. JONES

No. 194 PC.

Case below: 51 N.C. App. 549.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 July 1981.

FUNGAROLI v. FUNGAROLI

No. 155 PC.

Case below: 51 N.C. App. 363.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 July 1981.

GREEN v. POWER CO.

No. 105 PC.

No. 78 (Fall Term).

Case below: 50 N.C. App. 646.

Petition by Power Company for discretionary review under G.S. 7A-31 allowed 8 July 1981.

IN RE PLUSHBOTTOM AND PEABODY

No. 160 PC.

Case below: 51 N.C. App. 285.

Petition by Plushbottom and Peabody for discretionary review under G.S. 7A-31 denied 8 July 1981.

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

INSURANCE CO. v. ALLISON

No. 203 PC.

Case below: 51 N.C. App. 654.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 July 1981.

NOELL v. WINSTON

No. 159 PC.

Case below: 51 N.C. App. 455.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 July 1981.

N. C. GRANGE INS. CO. v. JOHNSON

No. 145 PC.

No. 79 (Fall Term).

Case below: 51 N.C. App. 447.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 8 July 1981.

POTTER v. POTTER

No. 158 PC.

Case below: 51 N.C. App. 464.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 July 1981.

STATE v. ARTHUR

No. 183 PC.

Case below: 51 N.C. App. 464.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 8 July 1981.

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

STATE v. BYRD

No. 137 PC.

Case below: 50 N.C. App. 736.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 July 1981.

STATE v. DUNCAN

No. 180 PC.

Case below: 51 N.C. App. 710.

Petition by defendants for discretionary review under G.S. 7A-31 denied 8 July 1981.

STATE v. FENNELL

No. 177 PC.

Case below: 51 N.C. App. 460.

Application by defendant for further review denied 8 July 1981.

STATE v. HARRIS

No. 202 PC.

Case below: 52 N.C. App. 165.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 July 1981.

STATE v. HAYES

No. 220 PC.

Case below: 46 N.C. App. 607.

Application by defendant for further review denied 8 July 1981.

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

STATE v. HILL

No. 54 PC.

Case below: 50 N.C. App. 212.

Application by defendant for further review denied 8 July 1981.

STATE v. HILL

No. 164 PC.

Case below: 49 N.C. App. 692.

Application by defendant for further review denied 8 July 1981.

STATE v. LEDNUM

No. 150 PC.

Case below: 51 N.C. App. 387.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 July 1981.

STATE v. LITTLE

No. 96 PC.

Case below: 50 N.C. App. 212.

Application by defendant for further review denied 8 July 1981.

STATE v. MARTIN

No. 224 PC.

Case below: 52 N.C. App. 326.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 June 1981.

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

STATE v. MOSES

No. 254 PC.

Case below: 52 N.C. App. 412.

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 July 1981.

STATE v. PARKER

No. 196 PC.

Case below: 51 N.C. App. 711.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 July 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 July 1981.

STATE v. ROBERTS

No. 176 PC.

Case below: 51 N.C. App. 221.

Application by defendant for further review denied 8 July 1981.

STATE v. SMITH

No. 190 PC.

Case below: 49 N.C. App. 546.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 8 July 1981.

STATE v. SNOWDEN

No. 186 PC.

Case below: 51 N.C. App. 511.

Petition by defendant Boggs for discretionary review under G.S. 7A-31 denied 8 July 1981.

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

STATE v. VAUGHAN

No. 214 PC.

No. 81 (Fall Term).

Case below: 51 N.C. App. 408.

Petition by Attorney General for writ of certiorari to North Carolina Court of Appeals allowed 8 July 1981.

STATE v. WILLIAMS

No. 156 PC.

Case below: 51 N.C. App. 397.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 8 July 1981.

STATE v. WRIGHT

No. 241 PC.

Case below: 52 N.C. App. 166.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 July 1981.

STATE BAR v. DuMONT

No. 205 PC.

No. 80 (Fall Term).

Case below: 52 N.C. App. 1.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 8 July 1981.

TOWN OF SYLVA v. GIBSON

No. 50.

Case below: 51 N.C. App. 545.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 July 1981. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 8 July 1981.

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

TRUCKING CO. v. PHILLIPS

No. 134 PC.

Case below: 51 N.C. App. 85.

Petition by defendants for discretionary review under G.S. 7A-31 denied 8 July 1981.

WALTERS v. TIRE SALES & SERVICE

No. 148 PC.

Case below: 51 N.C. App. 378.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 July 1981.

YATES MOTOR CO. v. SIMMONS

No. 161 PC.

Case below: 51 N.C. App. 339.

Petition by defendants Noells for discretionary review under G.S. 7A-31 denied 8 July 1981.

PETITIONS TO REHEAR

SUPPLY COMPANY v. VICK

No. 11.

No. 77 (Fall Term).

Reported: 304 N.C. ---.

Petition by plaintiff to rehear allowed 8 July 1981.

STATE OF NORTH CAROLINA v. JAMES W. HUTCHINS

No. 80

(Filed 8 July 1981)

1. **Constitutional Law § 48— effective assistance of counsel**

The competency of a criminal defendant's counsel does not amount to a denial of the constitutional right to counsel unless it is established that the attorney's representation was so ineffective that it rendered the trial a farce and a mockery of justice.

2. **Constitutional Law § 46— indigent defendant—appointment of replacement counsel**

In the absence of any substantial reason for the appointment of replacement counsel, an indigent defendant must accept counsel appointed by the court, unless he wishes to present his own defense.

3. **Constitutional Law § 46— indigent defendant—replacement counsel—disagreement over tactics—dissatisfaction with counsel**

A disagreement over trial tactics does not, by itself, entitle a defendant to the appointment of new counsel; nor does a defendant have the right to insist that new counsel be appointed merely because he has become dissatisfied with the attorney's services.

4. **Constitutional Law § 48— effective assistance of counsel—time spent with accused**

The effectiveness of representation cannot be gauged by the amount of time counsel spends with the accused, but such a factor is one consideration to be weighed in evaluating the effectivenes of counsel.

5. **Constitutional Law § 46— indigent defendant—refusal to replace counsel—effective assistance of counsel—alleged failure to visit defendant often enough**

In this prosecution of defendant upon three charges of first degree murder, defendant was not denied the effective assistance of counsel by the trial court's denial of defendant's motion for removal of his court appointed attorneys and appointment of substitute counsel where the only reason defendant articulated for wishing to have his attorneys discharged was because of his stated belief that they had not visited him enough to discuss the case with him; the record indicates that defense counsel had been diligent in all respects regarding their preparation for trial; there was no indication that the frequency of contact with defendant resulted in defendant being misinformed about the progress of the case; there was no suggestion that the level of contact affected adversely the attorneys' preparation for trial; and there was no evidence that defense counsel were unable to mount a defense which would be consistent with the concept of effective representation.

6. **Constitutional Law § 45— warning of right to appear pro se not required**

The trial court had no obligation under the Sixth Amendment of the U.S. Constitution to inform defendant of his right to proceed *pro se* when defendant

expressed a desire that his court-appointed attorneys be replaced; nor did the trial court err in failing to question defendant in accordance with G.S. 15A-1242 where there was no indication that defendant desired to represent himself.

7. Constitutional Law § 32— waiver of public hearing on motion

Defendant waived his constitutional right to a public hearing on his motion to discharge his court-appointed attorneys, and defendant's constitutional right to a public hearing was not violated by a hearing on the motion in chambers, where the trial judge specifically asked defendant if he wanted the matter heard in closed court or open court; defendant unequivocably responded on three occasions that he preferred to proceed with the court being closed; and defendant stated that he was waiving the provisions of the State and Federal Constitutions which require that courts be open to the public. Sixth Amendment to the U.S. Constitution; Art. I, §§ 18 and 24 of the N.C. Constitution.

8. Criminal Law § 91.6— denial of continuance—effective assistance of counsel

In this prosecution of defendant upon three charges of first degree murder, defendant was not denied the effective assistance of counsel by the trial court's denial of his motion for continuance made on the ground that defendant was in Dorothea Dix Hospital in Raleigh for some eight days and was returned to the county of trial only three days before the trial began since defendant waived his absence in Raleigh as a ground for continuance by failing to object to the court's allowance of the State's motion that he be committed to Dorothea Dix for observation, and since that action could not have prejudiced defendant because it was consistent with his notice of the possibility of an insanity defense; nor was defendant denied the effective assistance of counsel by the trial court's refusal to grant him a continuance because the district attorney informed defense counsel shortly before trial that he intended to rely upon a theory of lying in wait as to two of the killings where such notice was not based upon any evidence that had not been furnished through the discovery process, and the trial court did not instruct the jury on the theory of lying in wait.

9. Homicide § 21.5— first degree murders—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for the first degree murders of two deputy sheriffs and a highway patrolman by shooting them with a shotgun or a rifle.

10. Homicide § 25.1— felony murder—killing of another as underlying felony

The trial court did not err in charging on theories of felony murder as to the death of a deputy sheriff based on the underlying felony of the prior killing of another deputy and as the death of a highway patrolman based on the underlying felony of the killing of either of the two deputies where there was no break in the chain of events which began with the killing of one deputy and culminated in the killing of the highway patrolman, and the shootings of the second deputy and the highway patrolman tended to exhibit the attribute that they were perpetrated so that defendant could avoid identification and arrest for shooting and killing the first deputy.

11. Homicide § 26— second degree murder—erroneous instruction on "without malice"—harmless error

Defendant was not prejudiced by the trial court's erroneous instruction permitting the jury to find defendant guilty of second degree murder if it found the killing was "without malice" where the trial court correctly instructed the jury on the elements of second degree murder at least six times in other portions of the charge.

12. Homicide § 24.1—intentional killing with deadly weapon—inference of malice—erroneous instruction—harmless error

The trial court's error in one instance in failing to charge the jury that the inference of malice from evidence of an intentional killing with a deadly weapon was a permissible one and that the jury was not compelled to infer malice from such evidence was not prejudicial to defendant where the trial court on five other occasions correctly instructed the jury on the nature of the inference.

13. Constitutional Law § 80; Homicide § 31.3— constitutionality of death penalty

The North Carolina death penalty is not unconstitutional.

14. Criminal Law § 85.1— character evidence—refusal to permit witnesses to elaborate

The trial court did not err in sustaining the objections of the district attorney which prevented defendant's character witnesses from elaborating upon their testimony during the sentencing phase of a first degree murder trial where the record indicates that the answers would have been irrelevant or unresponsive in those instances in which objections were sustained, and there could have been no prejudice to defendant because in each instance the witness had already detailed his knowledge of defendant's reputation.

15. Criminal Law § 117— sentencing hearing—character evidence—erroneous instruction—harmless error

Defendant was not prejudiced by the trial court's erroneous instruction at the close of the sentencing hearing in a first degree murder case that the State had offered evidence at the guilt phase of the trial which tended to show that defendant had a bad character and reputation when in fact the State offered no character evidence at the guilt phase but only offered such evidence at the sentencing phase.

16. Criminal Law § 135.4— first degree murder case—sentencing phase—jury instructions

The trial court's instructions in the sentencing phase of a first degree murder case did not allow or encourage the jury to exercise unbridled discretion but properly defined aggravating and mitigating circumstances and properly laid the foundation for the jury to determine whether defendant's crimes could be appropriately punished by the imposition of capital punishment.

17. Criminal Law § 135.4— first degree murder case—sentencing phase—form of issues

The trial court did not err in framing the issues for the jury during the sentencing phase of a first degree murder prosecution where the court submit-

ted a verdict form which set out mitigating and aggravating circumstances as issues one and three, respectively; issue two inquired as to whether any aggravating circumstances which the jury found were sufficiently substantial to call for the imposition of the death penalty; issue four asked the jury if it found unanimously that the mitigating circumstances were insufficient to outweigh the aggravating circumstances; and the form went on to provide that if the jury answered issue four "no" it was to indicate that its punishment recommendation was life imprisonment, and if the jury answered the issue "yes" it was to indicate that its punishment recommendation was death.

18. Criminal Law § 135.4— first degree murder case—failure to agree on sentence within reasonable time—life imprisonment imposed—refusal to instruct

The trial court did not err in refusing during the sentencing phase of a first degree murder trial to instruct the jury that its failure to agree unanimously on the sentence within a reasonable time would result in the imposition of a sentence of life imprisonment.

19. Criminal Law § 135.4— first degree murder—purpose of avoiding arrest—reliance on conduct in both guilt and sentencing phases

While the State's theory in the guilt phase of a trial of defendant upon three charges of first degree murder was that the second and third murders were committed for the purpose of avoiding or preventing a lawful arrest for the first murder, the State was not barred from relying on that same conduct as an aggravating circumstance in the sentencing phase of the trial.

20. Criminal Law § 135.4— first degree murder—sentencing phase—aggravating circumstances—resisting arrest—murder against law officer

The trial court in a first degree murder prosecution did not err in submitting to the jury during the sentencing phase the aggravating circumstances that the murder was committed for the purpose of resisting a lawful arrest and that the murder was committed against a law officer who was engaged in the performance of his lawful duties, since the aggravating circumstance that the murder was for the purpose of avoiding or preventing a lawful arrest required the jury to weigh defendant's motivation in pursuing his course of conduct, and the aggravating circumstance that the murder was committed against an officer engaged in the performance of his lawful duties involved the consideration of the factual circumstances of defendant's crime.

21. Criminal Law § 135.4— first degree murder case—sentencing phase—mitigating circumstance—no history of prior criminal activity

The trial court had no duty to instruct the jury during the sentencing phase of a first degree murder case on the mitigating circumstance that defendant did not have a significant history of prior criminal activity where defendant presented evidence tending to show only that he had a good reputation in the community in which he lived but failed to go forward with any evidence that he did not have a significant history of prior criminal activity.

22. Criminal Law § 135.4— finding of mitigating circumstance—imposition of death penalty

The trial court did not err in entering judgments imposing the death penalty for two first degree murders because the jury found the mitigating cir-

cumstance that defendant committed the murders while he was under the influence of mental or emotional disturbance where the jury also found that three aggravating circumstances existed beyond a reasonable doubt, that they were sufficiently substantial to call for the imposition of the death penalty, and that the mitigating circumstance was insufficient to outweigh the aggravating circumstances.

23. Criminal Law § 135.4; Homicide § 31.1— death penalty for first degree murders

Sentences of death imposed on defendant for the first degree murders of a deputy sheriff and a highway patrolman were not disproportionate or excessive considering both the crime and the defendant where the record clearly established a course of conduct on the part of defendant which amounted to a wanton disregard for the value of human life and for the enforcement of law by duly appointed authorities.

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

Justice EXUM dissenting.

Justice CARLTON dissenting.

APPEAL by defendant from judgments of *Smith (Donald L.), S.J.*, entered at the 17 September 1979 Criminal Session of McDowell Superior Court sentencing defendant to life imprisonment following his conviction of the crime of second-degree murder, and imposing two sentences of death following his conviction of two counts of first-degree murder. This case was docketed and argued as No. 5, Fall Term 1980.

Upon pleas of not guilty, defendant was tried upon bills of indictment proper in form which charged him with three counts of first-degree murder.

At trial, the state presented evidence which tended to show that:

Defendant was married and the father of three children: two daughters, Charlotte and Lisa; and one son, Jaime. The family lived near Rutherfordton, North Carolina. On 31 May 1979, defendant took a day off from his job with a local tree company. His older daughter, Charlotte, was to graduate from high school that evening, and he wanted to help her prepare for the festivities.

On the morning of said date, defendant drove to Chesnee, South Carolina, with Charlotte where he purchased vodka, as well as two six-packs of beer. The liquor was to be used by Charlotte

in making punch which was to be served at a party that several of her classmates were staging that evening following the graduation ceremonies. Charlotte had volunteered to make the party beverage even though she was not planning to attend the gathering herself. As he drove back to Rutherford County with his daughter, defendant began drinking the beer which he purchased. The couple arrived at their home at approximately noon. Shortly thereafter, Charlotte mixed the punch. In doing so, she used the entire fifth of vodka that her father had purchased, as well as several kinds of fruit juices. After she finished her task, Charlotte left the house for several hours and went shopping with her boyfriend, Steve Owens.

When Charlotte returned home at approximately 5:00 p.m., she found her father to be agitated and angry. Defendant had drunk some of the punch while Charlotte was gone. He argued that the punch was too strong for the teenager's friends to drink. Charlotte disagreed and told her father that the punch belonged to her friends because they had paid for it.

The disagreement with his daughter made the defendant more angry than he was already, and he began to insist that Charlotte give him half of the mixture. She refused and poured it out completely. Upon doing so, Charlotte filled the container with water and gave it to her father saying that it was no longer too strong. Defendant continued to press the issue by saying that he was going to return to Chesnee for more liquor so that he could make his own punch. As Charlotte pleaded with defendant not to ruin her graduation, he began beating her about her face and chest with his fists.

During her afternoon shopping trip, Charlotte had purchased several house plants and macrame basket holders. After she returned home, she began decorating her room with her purchases. The argument between defendant and his daughter began when she went into the kitchen trying to find some nails to use in her project. When she entered the kitchen, Charlotte was carrying a hammer. As he was beating upon her, defendant sought to wrestle the hammer away from his daughter. In so doing, defendant began choking Charlotte.

The commotion in the kitchen caused defendant's wife and their two other children to go into the room to investigate the

situation. Upon seeing the scuffle, they joined the affray and pulled the combatants apart. Thus freed from the violent grip of her father, Charlotte fled the house and ran across the highway to the home of Mr. and Mrs. Hicks Lewis where she sought refuge.

As she entered the Lewis home, Charlotte told Mrs. Lewis that her father was drunk and beating upon her, as well as upon other members of the family. Mrs. Lewis directed Charlotte to a bedroom at the rear of the house and told her to hide under the bed. Charlotte did not remain hidden very long. Instead, she got up, obtained a telephone directory and called the Rutherford County Sheriff's Department. As a result of Charlotte's call, and her relating what had happened, Deputy Sheriff Roy Huskey and another deputy were dispatched to the scene.

The first patrol car on the scene was that driven by Deputy Huskey, who drove his vehicle into defendant's driveway and stopped near the front door. A second patrol car arrived almost immediately. It was occupied by Deputy Sheriff Owen Messersmith. The second cruiser parked partially in the driveway and partially on the highway. Upon seeing the officers, defendant announced that he was armed and ordered them to leave. Shortly thereafter, defendant fired four shots. Both officers were fatally wounded. Thereupon, defendant left the house and drove away in his automobile, a white Ford. At the time he left, defendant was armed with a shotgun, as well as a 30.06 rifle.

Between five and seven minutes after the shots were fired, Steve Owens, Charlotte's boyfriend, arrived at the Lewis' residence, having been called by Charlotte and asked to come get her. When he went into the house, Owens attended to Charlotte's injuries by putting ice upon her bruised and swollen face. As Owens did so, Charlotte told him that four shots had been fired, and she asked him to go across the road to investigate. One could not see the Hutchins' residence from the Lewis' home.

Owens drove across the highway and parked in the driveway. He got out of his car and ran to the second cruiser where he found the dead body of Officer Messersmith sprawled beside the car. The young man picked up the microphone in the patrol car, and he transmitted a message to the sheriff's office that an officer had been shot. Owens also informed the authorities that defend-

ant had fled the scene in the family automobile and that he was armed. The young man did not approach the first vehicle. Mrs. Hutchins and the other two children came out of the house unharmed. They, as well as Charlotte, left with Owens who took them to the Rutherford County Jail for their own safety.

Within a few minutes, Deputy Sheriff Junior Boone, who had heard the radio transmission, arrived on the scene. The officer found Deputy Messersmith on the ground and without any pulse. Deputy Messersmith's revolver had not been drawn. The officer also found Deputy Huskey fatally wounded in the head and slumped in the front seat of his cruiser. The windshield of the cruiser was shattered. Huskey's revolver was in the backseat of the patrol car.

Two members of the North Carolina Highway Patrol, Officer Wayne Spears and Officer Gary Sorrells, were on patrol in Rutherford County. Both of them were in cruisers which were equipped with scanners which enabled them to pick up transmissions from the Rutherford County Sheriff's Department. Upon hearing the transmission from Owens, Patrolman Sorrells contacted the Highway Patrol dispatcher in Asheville and conveyed the substance of the call, including a description of defendant's automobile. Patrolman R. L. Peterson did not have a scanner in his cruiser, but he did overhear the conversation between Officer Spears and Sorrells concerning the incident Owens had reported. Shortly before he overheard the conversation, Officer Peterson had met Officer Robert Kiser, another Highway Patrolman at the Rutherford County and McDowell County line on U.S. Highway 221. At approximately 5:50 p.m., Trooper Peterson told Trooper Kiser to remain at that location while he traveled south toward Rutherfordton on the highway. Several minutes after his companion pulled away, Officer Kiser was driving south. As he drove along, Officer Kiser heard Officer Peterson radio that he had seen a car matching Owens' description going behind a lumber company and that he was in pursuit. Officers Sorrells, Spears and Kiser all closed in upon the area after the transmission.

As Trooper Peterson gave chase, he continued to transmit information as to his location. The last transmission that the officer made was that the white Ford had stopped and that its driver was headed for the woods. Within a matter of minutes, Officer

Spears arrived at the scene and found Officer Peterson dead of a head wound. The trooper's body was in the front seat. His gun had been fired and was lying on the floor beneath the steering wheel. There were bullet holes in the windshield, as well as in one of the cruiser's fenders. Defendant's car was found abandoned on a dirt road approximately a half mile away.

Once defendant's vehicle was discovered, additional law enforcement officers, as well as bloodhounds, were brought to the area. At approximately 11:15 p.m., several searchers made the initial contact with defendant. After identifying himself, defendant refused to surrender and threatened to kill anybody who approached his position. After inquiring about the condition of the trooper and deputies, and after saying that he had been beaten by the deputies with blackjacks, defendant admitted killing both of them. When one of the officers stated that he thought the state trooper would be all right, defendant replied that "I know better than that. I blowed his g-- d--- head off." At approximately midnight, defendant broke off contact with the search party.

The officers heard movement around their position throughout the night, but they made no effort to change their location. Defendant spoke with the officers again at approximately 5:15 a.m. on 1 June. After he vocally challenged the searchers, defendant opened fire briefly. Four more bloodhounds joined the manhunt at 7:00 a.m. Not long after the fresh dogs were released, contact with defendant was made again. Defendant responded to the officer's calls by asking that the dogs be called off. Very shortly thereafter, he surrendered to the authorities.

Defendant presented no evidence.

Defendant was found guilty of the second-degree murder of Deputy Huskey and the first-degree murders of Deputy Messersmith and Trooper Peterson.

Attorney General Rufus L. Edmisten, by Deputy Attorney General Jean A. Benoy, for the State.

Wade M. Smith and Roger W. Smith for defendant-appellant.

BRITT, Justice.

I

In the early morning hours of 1 June 1979, defendant was arrested in a rural area of Rutherford County and charged with three counts of first-degree murder. Later that same day, defendant was found to be an indigent, and Mr. David K. Fox, a member of the Henderson County Bar, was appointed to represent him. Shortly thereafter, Mr. Ronald G. Blanchard, who was also a member of the Henderson County Bar, began to assist Mr. Fox in the preparation of defendant's case.[1] During the months of June, July and August 1979, the attorneys filed numerous pretrial motions, including motions for a change of venue, suppression of certain evidence, and a psychiatric evaluation of defendant. Following hearings on these motions, the cases were removed to McDowell County for trial, and the motion to suppress was overruled. Psychiatric evaluations of defendant were conducted. At all times prior to trial, defendant was incarcerated in the Buncombe County Jail in Asheville.

On 16 August, defendant made a motion through defense counsel that his court appointed attorneys be discharged "for good and sufficient reasons." A hearing was held, and Superior Court Judge Robert D. Lewis denied the motion.[2]

On 4 September 1979, Mr. Fox received a letter from defendant who was then confined in the Buncombe County Jail in Asheville. Dated 31 August 1979, the letter read as follows:

> I am fire you from my case. I'll not to court with you as my lawyer. You have lie to my (illegible) in other words I don't need you any more at all. That is that. Good-bye.

1. At an early state of the proceedings, the Honorable Hollis M. Owens, Jr., then a District Court judge, informed Mr. Fox that an additional attorney could be appointed to assist him in representing defendant. Mr. Fox thereupon requested the appointment of Mr. Blanchard as co-counsel. For reasons which do not appear in the record, an order confirming the appointment was never entered. On 20 September 1979, Judge Smith entered an order appointing Mr. Blanchard, *nunc pro tunc.*

2. The record does not contain a transcript of the proceedings concerning the motion of 16 August 1979. Upon inquiry from the clerk of this court, the McDowell County Clerk of Superior Court advised that there is no transcript of those proceedings in that office.

Mr. Fox responded to the letter from defendant by filing a motion in which he asked that the court dismiss him as defendant's attorney of record because "no meaningful communication" was possible between himself and defendant. According to the motion, since the attorney's initial conference with defendant, he had met with a "stiffening personal resistance . . . which soon thereafter involved [sic] into a personal antagonism on the part of defendant" toward the attorney.

A special session of McDowell Superior Court was scheduled for 17 September 1979, and Judge Smith was assigned to preside. Defendant's case was calendared for that session of court. On 5 September 1979, Judge Smith was presiding over a session of Henderson Superior Court. At that time, defendant's attorneys presented the letter to Judge Smith, and he proceeded to conduct an informal hearing in the presence of defendant, defense counsel, the district attorney, and a court reporter.[3]

Throughout the day of 5 September and into the next, the court closely questioned defense counsel about the nature of their relationship to defendant. Defendant was examined by the court in order to determine the nature of the problem between him and his court appointed attorneys. During the early part of the hearing, defendant told the court, "I know Mr. Fox is a good lawyer." Upon further inquiry by the court, the following exchange took place:

> MR. HUTCHINS: Well, they promised this and promised that, and none of them have come through. The one that had the hearing down at Columbia promised me they'd call my wife; had me brought to the court. She got on the news what the verdict was. Neither one—seen neither one since; nor heard from neither one.
>
> COURT: Hadn't you rather they be spending time preparing your case for trial, than running back and forth seeing you every day?

3. All of the parties agreed for Judge Smith to hear defendant's motion for removal of his court appointed lawyers out of term and outside of McDowell County.

MR. HUTCHINS: Yes sir, I had; but they told me they'd come on down and we'd go through with it. We ain't talked over the case at all.

COURT: Is that true, gentlemen?

MR. FOX: Your Honor, on my behalf, I would indicate to your Honor I have gone through with Mr. Hutchins the fact pattern once or twice, probably no longer than an hour's time each time. I ran across difficulty in the conversations, and I was waiting until the transcript of the matter returned, by that time we had reached such an impasse that --

COURT: So, you were waiting for the court transcript?

MR. FOX: I did speak to him at some length at several different occasions, all in custody, mostly in Asheville, in the county jail, Buncombe County Jail. But we had a preliminary hearing at some length involving the alleged statements made by Mr. Hutchins and other matters. And, as I informed Mr. Hutchins and before we went into a two or three hour single discussion, I did want to get that transcript back. In the meantime, things had degenerated.

MR. HUTCHINS: You said that would be back the 29th day of June. You didn't have it at that time.

MR. FOX: Your Honor, I don't think we had the preliminary hearing until around the 12th of June. I think your Honor can take notice that no one can promise a transcript by the 29th.

COURT: You can't control when the court reporter gets the transcript typed.

MR. HUTCHINS: If I can't trust them now, I can't trust them any more.

COURT: What makes you think ---

MR. HUTCHINS: They could let me know what's going on.

COURT: Well, nothing has been going on, except they're getting ready for trial, and doing research and that kind of thing.

MR. BLANCHARD: That is correct, your Honor.

COURT: Well, what do you expect to be going on. There's nothing going on.

MR. HUTCHINS: Well, they could let me know what the outcome of the hearing was, before it got on the news, and they promised to come over there every week.

COURT: Let me tell you something. It may have gotten on the news before they even knew it.

MR. HUTCHINS: It shouldn't have. They should have been told before it--

COURT: What should happen doesn't always happen.

At a later point in the proceedings, after the court asked defendant who he expected would be ready for trial on 17 September, defendant answered, ". . . just like I said, Mr. Fox there, I know he's a good lawyer here in town, but he ain't come through with nothin' [sic]." Thereupon, the court and defendant had the following exchange:

COURT: What do you expect him to come through with at this point?

MR. HUTCHINS: He should let me know what he's doing. He should let me know what the outcome was. He should, at least discuss the case over.

COURT: Let me tell you something. You're in a mess. I hope you understand what a mess you are in. There is no way these lawyers or any other lawyers can represent you unless you cooperate with them.

MR. HUTCHINS: They haven't talked to me any.

COURT: But, let me tell you; unless you cooperate with them. Now, this is the second time you have tried to discharge your attorneys. From what they have said, and I don't know what the truth of the matter is, but from what they have said, you haven't done anything to cooperate with them, either.

MR. HUTCHINS: I've been in jail. They haven't been up there to see me. Mr. Fox has been up there five minutes twice.

COURT: How often do you think they're supposed to go see you? Every day?

MR. HUTCHINS: No, come and discuss the case and go over it with me.

COURT: It's not at trial yet. I can assure you that they will, many time; many, many times. More times, probably, than they would like to admit.

When the hearing reconvened on 6 September 1979, Mr. Dennis Winner of Asheville was present. Mr. Winner had been approached by several members of the bar concerning the situation between defendant and his appointed attorneys. The inquiry was directed at the possibility that Mr. Winner would be in a position to assume responsibility for defendant's case. Mr. Winner stated that he was willing to enter the case only if Mr. Fox would remain as chief counsel. The attorney also went on to inform the court that there were several obstacles in the path of his entry into the case, including conflicting court calendars and impending religious holidays.

Following the hearing, the court entered an order making findings of fact that defendant had made no showing which would amount to legal justification for removing either or both of his court appointed attorneys; that the only reason defendant had articulated for wishing to have his attorneys discharged was because of his stated belief that they had not visited him enough to discuss the case; and that there had been no showing that defendant's attorneys were failing to prepare themselves for trial. The court then ordered that defendant's motion for removal of his attorneys and appointment of substitute counsel be denied.

It is defendant's contention on appeal[4] that "the attorney-client relationship here at issue was clearly a marriage of convenience (for the State)" and that the trial court committed prejudicial error in requiring that he and his attorneys proceed to trial when none of them wanted to continue the relationship. Our deliberations have led us to conclude that there was no error.

There are two prongs to our analysis: First, the implications of an alleged conflict between an indigent defendant and his

4. It will be noted that defendant has been assigned new counsel on appeal.

court-appointed attorney; and, second, the obligation of a court to inform a defendant of his right to proceed *pro se.*

A.

[1-4] A cardinal principle of the criminal law is that the sixth amendment to the United States Constitution requires that in a serious criminal prosecution the accused shall have the right to have the assistance of counsel for his defense. *Argersinger v. Hamlin,* 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972); *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963); *see generally* J. Cook, *Constitutional Rights of the Accused: Trial Rights,* § 22 (1974). The competency of a criminal defendant's counsel does not amount to a denial of the constitutional right to counsel unless it is established that the attorney's representation was so ineffective that it renders the trial a farce and a mockery of justice. *State v. Sneed,* 284 N.C. 606, 201 S.E. 2d 867 (1974). In the absence of any substantial reason for the appointment of replacement counsel, an indigent defendant must accept counsel appointed by the court, unless he wishes to present his own defense. *E.g., State v. Robinson,* 290 N.C. 56, 224 S.E. 2d 174 (1976). A disagreement over trial tactics does not, by itself, entitle a defendant to the appointment of new counsel. *State v. Thacker,* 301 N.C. 348, 271 S.E. 2d 252 (1980); *State v. Robinson, supra.* Nor does a defendant have the right to insist that new counsel be appointed merely because he has become dissatisfied with the attorney's services. *State v. Sweezy,* 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. Robinson, supra.* Similarly, the effectiveness of representation cannot be gauged by the amount of time counsel spends with the accused; such a factor is but one consideration to be weighed in the balance. *E.g., Missouri v. Turley,* 443 F. 2d 1313 (8th Cir.), *cert. denied,* 404 U.S. 965 (1971); *O'Neal v. Smith,* 431 F. 2d 646 (5th Cir. 1970).

The hearing which was conducted by Judge Smith fulfilled the obligation of the court to inquire into defendant's reasons for wanting to discharge his attorneys and to determine whether those reasons were legally sufficient to require the discharge of counsel. At the close of that hearing, the court made findings of fact which are conclusive on appeal if they are supported by any competent evidence. *E.g., Gaston-Lincoln Transit, Inc. v. Maryland Casualty Co.,* 285 N.C. 541, 206 S.E. 2d 155 (1974). Judge

Smith found as facts that defendant had made no showing that would amount to legal justification for removing either or both of his court-appointed counsel; that the only reason defendant had articulated for wishing to have his attorneys discharged was because of his stated belief that they had not visited him enough to discuss the case with him; and that there was nothing to show that defendant's attorneys were failing to prepare themselves for trial. These findings are fully supported by the evidence.

The concerns expressed by defendant relating to the frequency he received visits from his attorneys are untenable. While it is no doubt true that the effective assistance of counsel includes the development and nurturing of an attorney-client relationship, we conclude that repeated visits to a defendant's jail cell at a particular level of frequency are not necessarily incident to that development. An attorney is obligated to consult with his client whenever the need arises. Furthermore, an attorney ought to keep his client informed of the status of his case. These duties are clear and hardly open to question. The issue, however, which is posed by this assignment is not whether these duties exist but whether defense counsel failed to so conduct themselves and thereby denied defendant his sixth amendment right to the effective assistance of counsel.

It is manifest that there are no hard and fast rules that can be employed to determine whether a defendant has been denied the effective assistance of counsel. *State v. Hensley*, 294 N.C. 231, 240 S.E. 2d 332 (1978); *State v. Sneed*, *supra*. Instead, each case must be examined on an individual basis so that the totality of its circumstances are considered. *Id.* Absent a showing of a sixth amendment violation, the decision of whether appointed counsel shall be replaced is a matter committed to the sound discretion of the trial court. *State v. Sweezy*, *supra*.

[5] While the frequency of contact between an attorney and his client is one factor to be weighed in evaluating the effectiveness of counsel, appointed counsel need not make perfunctory visits to the jail in order to render effective assistance. At no place in the record is there any evidence which would tend to show that defense counsel were unable to mount a defense which would be consistent with the concept of effective representation. The record indicates that defense counsel had been diligent in all

respects regarding their preparation for trial. There is no question that they engaged in spirited motions practice and discovery, as well as the research which is necessarily incident to cases of this nature. While it is true that defendant insisted that his attorneys had not visited him often enough, there is no indication that the frequency of contact resulted in defendant being misinformed about the progress of the case. Nor is there any suggestion that the level of contact affected adversely the attorneys' preparation for trial. It must be noted that defendant was incarcerated in a county different from that in which his attorneys lived and practiced. The time which would have been required for frequent commuting between Asheville and Hendersonville could have been better utilized in pre-trial preparation. Because of the potential these challenges have for disrupting the efficient dispensing of justice, appellate courts ought to be reluctant to overturn the action of the trial judge in disposing of the matter. Such deference recognizes the superior viewpoint one who is on the scene has as compared with the reviewer of a cold record. All of these considerations lead us to conclude that Judge Smith did not err in denying defendant's motion.

B.

[6] A criminal defendant has the right under the sixth amendment to refuse representation by an attorney and to conduct his own defense. *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562, 95 S.Ct. 2525 (1975); *State v. Thacker, supra; see generally* J. Cook, *Constitutional Rights of the Accused: Trial Rights*, § 37 (1974 Cum. Supp. 1980). Recognition of that right does not, however, resolve the issue posed by defendant before this court: whether a court has the constitutional obligation to inform a criminal defendant of his right to proceed *pro se*. It is the opinion of this court that the sixth amendment imposes no such requirement.

In the six years since *Faretta* became the law of the land, the courts of this state, as well as those of the other states, have had numerous opportunities to construe its meaning and parameters. One of the persistent concerns of these cases has been whether *Faretta* requires that appropriate warnings be made to safeguard the right of self-representation. Without exception, the courts which have passed upon the question have concluded that *Faretta*

does not impose such a requirement. Our own court had the opportunity to address this very issue within a matter of months of the Faretta decision in *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495, *cert. denied*, 433 U.S. 907 (1977). In that decision, we too indicated that *Faretta* did not carry with its recognition of the right of self-representation a concurrent recognition of the right to be warned of its existence.

In *Branch*, at the time of his arraignment, co-defendant Sullivan made a motion for a continuance, indicating that he was dissatisfied with his retained counsel and that he wished to employ another attorney. The motion was denied, and the case proceeded to trial. On appeal, this court rejected the argument that Sullivan had been denied the right of self-representation because the trial judge had not informed him of that right. Holding that such was not mandated by *Faretta*, Justice Copeland correctly observed that:

> The defendant cites *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562, 95 S.Ct. 2525 (1975), as authority for his position that the court should have advised defendant of his right to proceed without counsel. This case stands for the proposition that a defendant has the right to proceed without a lawyer and not have counsel forced upon him against his wishes. Such is not the situation here.

State v. Branch, 288 N.C. at 548, 220 S.E. 2d at 518.

We find *Branch* to be controlling here and we reaffirm its viability because of the striking similarity between the case *sub judice* and it. In both cases, while there was an expression of some dissatisfaction with counsel by criminal defendants, neither defendant suggested any desire to represent himself. In both cases, while the trial court denied the appropriate motions, neither defendant was forced to accept the assistance of counsel generally. Rather, the trial court in both instances refused to be governed by the expressed dissatisfaction with particular attorneys. Unless an accused makes *some* form of an affirmative statement which would amount to a manifestation of a desire to proceed *pro se*, it cannot be reasonably argued that an accused has been forced to accept representation at trial. It is that concern to which *Faretta* was addressed. *See* United States *ex rel. Maldonado v. Denno*, 348 F. 2d 12 (2d Cir. 1965); *People v. Enciso*,

25 Cal. App. 3d 49, 101 Cal. Rptr. 590 (1972); *Russell v. State*, 383 N.E. 2d 309 (Ind. 1978); *State v. Garcia*, 92 Wash. 2d 647, 600 P. 2d 1010 (1979).

At no place in the record is there any suggestion that defendant manifested any desire to represent himself. At the close of the first day's hearing on the motion to withdraw, upon questioning by the court, defendant indicated that it was his desire that his attorneys be removed.[5] The next day, defendant indicated that it was his desire that new counsel be appointed.[6] Such conduct negates any inference that defendant was voluntarily electing to represent himself. *See Tuckson v. United States*, 364 A. 2d 138 (1976). Statements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself. *Payne v. State*, 367 A. 2d 1010 (Del. 1976); *Perry v. United States*, 364 A. 2d 617 (D.C. App. 1976); *State v. Garcia*, 92 Wash. 2d at 655, 600 P. 2d at 1015. At most, defendant's statements amounted to an expression of the desire that his court-appointed lawyers be replaced. Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention. *See State v. Stokes*, 274 N.C. 409, 163 S.E. 2d 770 (1968); *State v. Covington*, 258 N.C. 501, 128 S.E. 2d 827 (1963). The personal autonomy to which *Faretta* is addressed, *see Faretta v. California*, 422 U.S. at 814-17, 45 L.Ed. 2d at 570-72, 95 S.Ct. 2531-32, is not invaded absent such a declaration.

Nor do we perceive that the procedure approved in *State v. Thacker, supra*, has been violated. G.S. § 15A-1242 (1978) provides that:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only

5. COURT: Mr. Hutchins, are you asking now that Mr. Fox be discharged, or that both Mr. Fox and Mr. Blanchard (be discharged)?

MR. HUTCHINS: Both of them.

6. COURT: . . . I asked you a very simple question. I said you were not going to select your attorneys. I asked you whether, if the court were inclined to make some change, whether you had rather have Mr. Blanchard or Mr. Fox; or Mr. Fox and Mr. Winner?

MR. HUTCHINS: Mr. Winner and Mr. Fox.

after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of his decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

In *Thacker*, the trial judge questioned the defendant specifically in accordance with the statute. The answers which defendant gave indicated that he had been advised of the right to counsel; that he was aware of the consequences of his decision to represent himself; and that he understood the nature of the charges against him, the range of permissible punishments, and the trial proceedings which were to follow.

In *Thacker*, the defendant explicitly requested the permission of the court to proceed *pro se*. In the present case, there is no evidence in the record which would tend to show or even to suggest that defendant wished to represent himself. That being the case, the fact that the trial judge in Hendersonville did not make a systematic examination of defendant consistent with the mandate of the statute is irrelevant. Assuming, *arguendo*, however, that there *may* have been a desire on the part of defendant to represent himself which was not expressed to the court, it is our conclusion that the trial judge conducted himself in an exemplary manner to the end that defendant was fully informed in all respects concerning the situation which he faced. There can be no doubt that Judge Smith apprised defendant that he had the right to the effective assistance of counsel and that he was aware of the charges which he then faced, as well as the probable punishments which would attach upon a conviction.

II.

[7] Shortly after the hearing on the motion to discharge counsel convened, the district attorney moved that the hearing be closed. Thereupon, the following exchange occurred:

COURT: Just a minute. I'm going to go into that. Now, I want to ask this, Mr. Hutchins. Mr. Blanchard told me he had discussed it with you. Do you want these matters heard in open court?

DEFENDANT: Closed court, if you please.

COURT: Or closed court. Which do you prefer?

DEFENDANT: Closed court.

COURT: Now, let the record show that I have been informed, and you all correct me if I'm wrong, that prior hearings in this matter, the orders and/or transcripts have been sealed by Judge Lewis.

MR. LOWE: Yes sir.

COURT: With regard to a closed court, Mr. Hutchins, do you waive all the provisions of both the State and Federal Constitutions that require courts to be open and public?

DEFENDANT: Yes sir.

The proceeding was then removed to the judge's chambers. By his second assignment of error, defendant argues that the trial court erred in granting the motion for closure. We find no merit in this contention.

The sixth amendment to 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, ..." *See generally* J. Cook, *Constitutional Rights of the Accused: Trial Rights*, §§ 100-02 (1974 & Cum. Supp. 1980). Section 18 of Article I of the North Carolina Constitution echoes this mandate by requiring that "[a]ll courts be open." Similarly, Section 24 of the same article of the state constitution provides that "[n]o person shall be convicted of any crime but by unanimous verdict of a jury in open court. . . ." These guarantees are not absolute. *State v. Burney*, 302 N.C. 529, 276 S.E. 2d 693 (1981); *State v. Yoes*, 271 N.C. 616, 157 S.E. 2d 386 (1967); *see generally* Annot., 61 L.Ed. 2d 1018 (1980). While every reasonable presumption will be indulged against a waiver of fundamental constitutional rights by a defendant in a criminal prosecution, *e.g.*, *State v. Stokes*, *supra*, a defendant may waive the benefit of constitutional guarantees by

express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *E.g., State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970).

Defendant argues that the hearing on the motion to discharge counsel "was little more than an effort to intimidate and placate" him so that he would be satisfied with his attorneys. Defendant reasons that "[i]t is hard to imagine that the proceeding would have been the same had it been held in open court." The face of the record belies this argument by it showing that the judge dealt with defendant in a patient and solicitous manner. In so doing, Judge Smith began the inquiry by specifically asking defendant if he wanted the matter heard in closed court or open court. Defendant unequivocably responded on three occasions that he preferred to proceed with the court being closed. In the last instance, defendant was responding to the judge's question concerning whether he was waiving the provisions of the state and federal constitutions which require that courts be open to the public. Defendant will not now be heard to complain that his right to a public trial was violated when he expressly waived the benefit of its provisions.[7]

III.

[8] On 6 September 1979, after defense counsel received a report which had been prepared by a psychiatrist who had examined defendant in the Buncombe County Jail, counsel informed the trial court of the possibility of an insanity defense. The district attorney thereupon moved to transfer defendant to Dorothea Dix Hospital for examination. On 14 September, defendant was

7. In his brief, defendant cites this court to the decision of the United States Supreme Court in *Richmond Newspapers, Inc. v. Virginia*, --- U.S. --- , 65 L.Ed. 2d 973, 100 S.Ct. 2814 (1980). Defendant argues that *Richmond Newspapers* controls the case *sub judice* by pointing to the words of Mr. Chief Justice Burger who observed 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. 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. *United States v. Payner*, --- U.S. --- , 65 L.Ed. 2d 468, 100 S.Ct. 2439 (1980); *State v. Burney, supra. Richmond Newspapers* does not speak to a defendant's sixth amendment right to a public trial. Instead, it is grounded upon the right of access of the public and the press to criminal trials which is guaranteed by the first amendment.

returned to the McDowell County Jail. Two days later, the psychiatrist went to the jail to talk with defendant and observe his behavior. Defendant refused to talk with the doctor and ordered him out of the cell.

The next day, 17 September, defendant's case was called for trial. Before trial, the district attorney informed defense counsel that he intended to rely upon a theory of premeditation and deliberation as to the killing of Deputy Sheriff Huskey and that he intended to rely upon a theory of lying in wait as to the killing of the other two officers. Following receipt of this notice, defense counsel sought a continuance on the ground that defendant was not in any condition to proceed and that preparation for trial was impossible. The motion was denied. We perceive no error in this action.

A motion for a continuance is addressed to the discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion; however, if the motion is based upon a right which is guaranteed by the federal and state constitutions, the question presented is one of law and not of discretion, and the ruling of the trial court is reviewable on appeal. *E.g., State v. Thomas,* 294 N.C. 105, 240 S.E. 2d 426 (1978). Defendant now argues that the denial of his motion by the trial court denied to him his right to the effective assistance of counsel. The record offers no support for this argument.

First, defendant did not object to the trial court's action in granting the motion of the state that he be committed to Dorothea Dix for observation. That action could not have prejudiced defendant because it was consistent with the possibility that an insanity defense could be mounted. In any event, by failing to object, defendant has waived his absence in Raleigh as ground upon which he may rely. Second, the notice that the state gave defense counsel of its theory of the case could not have adversely affected defendant's position. Defense counsel did not challenge the statement of the district attorney that the notice was not based upon any evidence that had not yet been furnished through the discovery process. Furthermore, the trial court did not instruct the jury on theories of lying in wait. It follows, therefore, that the preparation of defense counsel could not have been prejudiced by the denial of the motion to continue.

IV.

A.

[9] Defendant next contends that the trial court erred in denying his motions to dismiss as to first-degree murder, arguing that the only evidence presented by the state was that of encounters between defendant and each of the three officers and the subsequent death of each officer by a gunshot wound. It is defendant's argument that there is no evidence that any of the deaths were perpetrated upon premeditation and deliberation.

Murder in the first-degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *E.g., State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296, *death sentence vacated*, 429 U.S. 809 (1976); *see generally* W. LaFave & A. Scott, *Handbook on Criminal Law*, § 73 (1972). No fixed length of time is required for the mental processes of premeditation and deliberation constituting first-degree murder. *E.g., State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487 (1970). Premeditation means thought beforehand for some length of time however short. *E.g., State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975); *State v. Johnson*, 278 N.C. 252, 179 S.E. 2d 429 (1971). Deliberation does not require brooding or reflection for any applicable length of time but connotes the execution of an intent to kill in a cool state of blood without legal provocation in furtherance of a fixed design. *State v. Davis, supra; State v. Britt, supra; State v. Johnson, supra.* Premeditation and deliberation are seldom susceptible of direct proof, but they may be inferred from circumstantial evidence. *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied*, 404 U.S. 840 (1971); *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970). In passing upon a motion to dismiss pursuant to G.S. § 15A-1227, all of the evidence admitted, whether competent or incompetent, is viewed in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom. *E.g., State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). In considering a motion to dismiss, it is the duty of the court to ascertain if there is substantial evidence of each essential element of the offense charged. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). Upon application of this standard, it is our conclusion that the evidence for the state was sufficient to enable it to go to the jury on the question of defendant's guilt or innocence of first-degree murder in all three cases.

[10] We also hold that it was not error for the trial court to have charged the jury on theories of felony murder as to the deaths of Deputy Sheriff Messersmith and Trooper Peterson. A homicide which is committed in the perpetration or attempted perpetration of a felony is murder in the first-degree, irrespective of premeditation and deliberation. *E.g., State v. Hairston,* 280 N.C. 220, 185 S.E. 2d 633 (1972). In such cases, the law presumes premeditation and deliberation and the state is not put to further proof of either. *State v. Woodson,* 287 N.C. 578, 215 S.E. 2d 607 (1975), *death sentence vacated,* 428 U.S. 280 (1976); *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735 (1972). A killing is committed in the perpetration or attempted perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction. *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1972). A felony comes within the purview of the felony murder rule if its commission or attempted commission creates a substantial foreseeable risk to human life and actually results in the loss of life. *Id.*

In the case *sub judice*, the trial court charged the jury on theories of felony murder as to the deaths of Deputy Sheriff Messersmith and Trooper Peterson. The underlying felony as to the killing of Messersmith was the killing of Deputy Sheriff Huskey. The underlying felony as to the killing of Peterson was the killing of either Huskey or Messersmith. While our research has failed to reveal any case in which the killing of one individual serves as the underlying felony for the conviction of a defendant for the murder of yet another person, we perceive no inherent bar to such a theory, provided that the other requirements of the felony murder doctrine are met. The evidence does not suggest a break in the chain of events which began with the killing of Deputy Huskey and which culminated in the killing of Trooper Peterson. The shootings of Messersmith and Peterson tended to exhibit the attribute that they were perpetrated so that defendant could avoid identification and arrest for shooting and killing Deputy Huskey.

B.

[11] Defendant also contends that the trial court erred by instructing the jury that:

> . . . if you were to find from the evidence beyond a reasonable doubt that on or about the 31st day of May last, James Hutchins intentionally and without malice and without justification or excuse shot Roy Huskey with a rifle or shotgun, thereby proximately causing Roy Huskey's death, then it would be your duty to return a verdict of guilty of second degree murder. . . .

Clearly, this instruction was erroneous. Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *E.g., State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971). However, it is fundamental that the charge of the court will be construed contextually, and isolated portions will not be held to constitute prejudicial error when the charge as a whole is free from objection. *E.g., State v. Bailey,* 280 N.C. 264, 185 S.E. 2d 683 (1972). A mere slip of the tongue which is not called to the attention of the court at the time it is made will not be held to constitute prejudicial error when it is apparent from the record that the jury could not have been misled thereby. *E.g., State v. Sanders,* 280 N.C. 81, 185 S.E. 2d 158 (1971). While it is true that the instruction set out above is erroneous, we hold that it could not have been prejudicial because Judge Smith correctly instructed on the law of second-degree murder at least six times in his charge.

[12] Similarly, we reject defendant's contention that he was prejudiced by the following portion of the judge's charge:

> If the State were to prove to you beyond a reasonable doubt or if it was admitted that the defendant intentionally killed R. L. Peterson with a deadly weapon or intentionally inflicted a wound upon R. L. Peterson with a deadly weapon which proximately caused his death, then the law implies, first: The killing was unlawful, and second, that it was done with malice.

Upon a showing that there has been an intentional killing with a deadly weapon, the law permits the jury to infer that the homicide was committed with malice. *State v. Patterson,* 297 N.C. 247, 254 S.E. 2d 604 (1979); *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds,* 432 U.S. 233 (1977). It is error for a court to fail to charge the jury that it is not compelled to nor need necessarily infer malice. *State v. Patterson, supra.*

We hold, however, that defendant could not have been prejudiced by Judge Smith's failure to instruct the jury that the inference was a permissible one because on five other occasions he correctly instructed the jury upon the nature of the inference.

V.

After defendant was found guilty of one count of second-degree murder and two counts of first-degree murder, Judge Smith convened a sentencing hearing before the same jury pursuant to G.S. § 15A-2000, *et seq.*, (1978 & Cum. Supp. 1980). Sentencing on the second-degree murder conviction was delayed pending the outcome of the hearing.

The state attempted to introduce evidence, including statements defendant made to law enforcement officers, concerning a prior shooting in which defendant had been engaged. However, after conducting a voir dire, the trial court ordered that the statements be suppressed. The state thereupon rested. Defendant offered the testimony of several witnesses which tended to show that defendant had a good reputation in the community. The state offered rebuttal witnesses whose testimony was to the contrary.

The following aggravating circumstances were submitted as to both first-degree murder convictions:[8]

1. Was the murder of Owen Messersmith (R.L. Peterson) committed for the purpose of avoiding or preventing a lawful arrest?

2. Was the murder of Owen Messersmith (R.L. Peterson) committed against a Deputy Sheriff (N.C. State Trooper) while engaged in the performance of his official duties?

3. Was the murder of Owen Messersmith (R.L. Peterson) part of a course of conduct in which defendant was engaged and which included the commission by defendant of other crimes of violence against another person or persons?

The jury found each of these aggravating circumstances to exist beyond a reasonable doubt.

8. Issue sheets were submitted in each case.

The following mitigating circumstances were submitted as to both first-degree murder convictions:[9]

1. Was the murder of Owen Messersmith (R.L. Peterson) committed while James Hutchins was under the influence of mental or emotional disturbance?

2. Was the capacity of James Hutchins to appreciate the criminality of his conduct impaired in the murder of Owen Messersmith (R.L. Peterson)?

3. Was the capacity of James Hutchins to conform his conduct to the requirements of the law impaired in the murder of Owen Messersmith (R.L. Peterson)?

4. Was there any *other* circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value?

As to both murders, the jury found only one mitigating circumstance: That the murder was committed while defendant was under the influence of mental or emotional disturbance.

Upon finding, as to both murders, that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, and upon the unanimous recommendation of the jury, Judge Smith pronounced judgments which called for the imposition of two death sentences. Judge Smith also sentenced defendant to life imprisonment for second-degree murder.

A.

[13] Defendant initially challenges the sentencing phase of his trial by challenging the constitutionality of the North Carolina death penalty. A similar challenge was rejected by this court in *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510, (1979), *cert. denied*, 448 U.S. 907, *reh. den.*, 448 U.S. 918 (1980); *see generally Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859, 96 S.Ct. 2909 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976); *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d

9. Issue sheets were submitted in each case.

346, 92 S.Ct. 2726 (1972). *Barfield* controls this assignment of error, and today we reaffirm its validity.

B.

[14] Defendant next contends that the trial court erred by sustaining the objections of the district attorney which prevented his character witnesses from elaborating upon their testimony. This contention is without merit.

While it is the general rule that a party calling a character witness can only inquire as to the general reputation of the person about whom the questions are asked, the witenss may, on his own, say in what respect it is good or bad. *See generally* 1 Stansbury's North Carolina Evidence § 114 (Brandis Rev. 1973). At the sentencing phase of trial, defendant offered the testimony of five character witnesses, each of whom testified that they knew the character and reputation of defendant in the community in which he lived and that it was good. Each of the character witnesses proceeded to elaborate upon his answers. On six occasions, the trial court sustained the objections of the district attorney. The record indicates that in those instances where objections were sustained, the answers would have been irrelevant to the inquiry or unresponsive. In any event, there could have been no prejudice because in each instance, the witness had already detailed his knowledge of defendant's reputation.[10]

Defendant next brings forward three challenges to the legal sufficiency of Judge Smith's charge to the jury at the close of the evidence at the sentencing hearing. We find no error in the charge.

[15] Initially, defendant contends that the trial court erred in instructing the jury that the state offered evidence at the guilt phase of trial which tended to show that defendant had "a bad character and reputation." The record indicates that the state of-

10. The state relies upon *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971), to argue that an exception to the exclusion of evidence cannot be sustained when the record fails to show what the witness would have testified had he been permitted to answer. As a general rule, that is correct. However, this court has traditionally given close scrutiny to capital cases. *E.g., State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). Therefore, it follows necessarily that the *Fletcher* rule does not foreclose our review.

fered no character evidence at the guilt phase of trial. To have done so would have been improper because defendant had not put his character in issue. *E.g., State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *see generally* 1 Stansbury's North Carolina Evidence § 104 (Brandis Rev. 1973).[11] On rebuttal at the sentencing phase of trial, the state offered the testimony of two witnesses who stated that they knew defendant's general character and reputation in the community to be bad. Defendant could not have been prejudiced by the trial judge inadvertently stating that certain evidence was received at a phase of the trial different from that which was actually the case.[12] Furthermore, it is established that the use of the phrase "tends to show" does not amount to an expression of opinion. *E.g., State v. Huggins*, 269 N.C. 752, 153 S.E. 2d 475 (1967).

[16] Second, defendant argues that the trial court erred by instructing "the jury in such a way as to permit it to use its discretion in determining punishment." There was no error.

While it is true that the North Carolina capital sentencing procedure contemplates the exercise of discretion by a jury at the sentencing phase of trial, that discretion is not constitutionally impermissible. Any scheme for the imposition of the death penalty which permits either the judge or the jury to impose that sentence as a matter of unbridled discretion is unconstitutional. *Furman v. Georgia*, 408 U.S. at 253, 33 L.Ed. 2d at 357, 92 S.Ct. at 2734 (Douglas, J., concurring); *State v. Barfield, supra; State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973). On the other hand, any method by which a state chooses to implement capital punishment must allow for the particularized consideration of relevant aspects of the character and record of each convicted defendant before the death penalty may be imposed upon him. *Woodson v. North Carolina, supra; State v. Barfield, supra; State v. Goodman,*

11. However, it is not error for a court to receive evidence, relevant for some purpose other than proving character, which incidentially bears upon character. *See State v. Foster*, 185 N.C. 674, 116 S.E. 561 (1923). Arguably, elements of the state's evidence at the guilt phase of trial reflected upon defendant's character. None of this was brought to the jury's attention, however, by Judge Smith recapitulating the evidence.

12. In any event, the state was entitled to rely upon the evidence which it produced at the guilt phase of trial at the sentencing hearing. G.S. § 15A-2000(a)(3) (1978).

298 N.C. 1, 257 S.E. 2d 569 (1979). Through the exercise of guided discretion, juries in North Carolina are required to assess the appropriateness of imposing the death penalty upon a particular defendant for the commission of a particular crime. *State v. Barfield, supra; State v. Goodman, supra.* It is not the exercise of discretion but the exercise of unbridled discretion which is unconstitutional. *Gregg v. Georgia, supra; State v. Barfield, supra.*[13]

We find defendant's argument to be unpersuasive because he has failed to demonstrate in any manner that the conduct of Judge Smith allowed or encouraged the jury to exercise unbridled discretion.

Judge Smith instructed the jury that:

> . . . an aggravating circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law, which of course, is the death penalty.

Correspondingly, he instructed the jury that:

> . . . a mitigating circumstance is a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of the extreme punishment than other first degree murders.

There was no error in these instructions. Because the sentence of death is a qualitatively different punishment option, *see Woodson v. North Carolina, supra; Furman v. Georgia,* 408 U.S. at 286-95, 33 L.Ed. 2d at 376-80, 92 S.Ct. at 2750-55 (Brennan, J. concurring), any method by which a state seeks to impose capital punishment must differentiate in some rational manner between those crimes which warrant the application of the ultimate sanction and those which do not. *State v. Barfield, supra.* By delineating various aggravating and mitigating circumstances, the North Carolina procedure equips a jury with the tools it will require if it is to ex-

13. It is clear that a scheme for the imposition of capital punishment which permits no exercise of discretion is unconstitutional. *Woodson v. North Carolina, supra.*

ercise the guided discretion which is constitutionally mandated. By the instructions which he gave, Judge Smith was laying the foundation for the jury to go about its task in considering whether defendant's crimes could be appropriately punished by the imposition of capital punishment.

[17] Similarly, we find defendant's remaining challenges to Judge Smith's charge, as well as his challenges to the form upon which the jury was to record its sentencing decisions, to be without merit. As to both the murder of Deputy Messersmith and Trooper Peterson, the court submitted virtually identical verdict forms which set out mitigating and aggravating circumstances as issues one and three, respectively. Issue two inquired as to whether any aggravating circumstances which the jury found were sufficiently substantial to call for the imposition of the death penalty. Issue four asked the jury

> Do you unanimously find that the mitigating circumstances are insufficient to outweight the aggravating circumstances in the murder of Owen Messersmith (R. L. Peterson)?

The form went on to provide that if the jury answered Issue Number Four "No" it was to indicate that its punishment recommendation was life imprisonment; if the jury answered the issue "Yes", it was to indicate that its punishment recommendation was death. Judge Smith so instructed the jury by charging it in the following manner:

> If you answer the issue 4 Yes, you would then further deliberate upon your sentence recommendation with regard to the case that you so find from the evidence beyond a reasonable doubt.
>
> * * *
>
> . . . however, if having answered Issues 1, 2 and 4 yes, you are, after further deliberation, satisfied beyond a reasonable doubt that the only just punishment for this defendant is the death penalty in a given case, you may unanimously so recommend.

There was no error either in the framing of the issues or in the corresponding instructions of the judge. Since we have already

held that the statute is constitutional, *State v. Barfield, supra*, the only basis upon which defendant can challenge this portion of the trial is that it did not comply with the dictates of the statute. The procedure so set out for the jury is precisely that contemplated by G.S. § 15A-2000.

[18] Lastly, defendant challenges the failure of the trial court to instruct the jury that a sentence of life imprisonment would be imposed in the event that it failed to reach unanimous agreement on the proper sentence. There was no error. We have previously held that such an instruction is improper because not only would it be of no assistance to the jury, it would also permit the jury to escape its responsibility to recommend the sentence to be imposed. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

D.

Defendant also brings forward three assignments of error which challenge the particular aggravating and mitigating circumstances which were submitted to the jury. None of these contentions have merit.

[19] Initially, defendant contends that the trial court erred in submitting as an aggravating circumstance that the murder of Deputy Sheriff Messersmith, as well as that of Trooper Peterson, was committed for the purpose of avoiding or preventing a lawful arrest. In support of his argument, defendant relies upon the decision of this court in *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979). Defendant's reliance is misplaced.

In *Cherry*, we held that when a defendant is found guilty of first-degree murder on a theory of felony murder, the trial court may not submit to the jury at the sentencing phase of trial as an aggravating circumstance that the murder was committed during the commission of the underlying felony. Defendant argues that *Cherry* controls the case *sub judice* to the extent that since the state's theory at the guilt phase was that he was resisting arrest, the state ought to be barred from relying upon that aggravating circumstance at the sentencing phase of trial. *Cherry* is grounded upon the criminal law concept that when the state uses evidence that a killing occurred in the perpetration of another felony so as to establish that the homicide was first-degree murder, the underlying felony becomes part of the murder conviction to the

extent that further prosecution or punishment for it is barred. *State v. Cherry*, 298 N.C. at 113-14, 257 S.E. 2d at 567-68. That defendant was resisting lawful arrest in the course of committing a series of homicides does not, by itself, present the problem of merger to which the opinion in *Cherry* was addressed. While that was the state's theory of the case at the guilt phase of trial, it did not constitute an underlying felony on a felony murder theory.

[20] Second, defendant contends that the trial court erred by submitting two aggravating circumstances which were based upon the same evidence as to both first-degree murder convictions: that the murder was committed for the purpose of resisting a lawful arrest and that the murder was committed against a law enforcement officer who was engaged in the performance of his lawful duties. There was no error.

It is error to charge the jury at the sentencing phase of a capital case on multiple aggravating circumstances which are supported by precisely the same evidence. *State v. Goodman*, *supra*. In *Goodman*, we held that it was error for the trial court to have submitted as aggravating circumstances that the first-degree murder was committed for the purpose of avoiding or preventing a lawful arrest[14] and that the murder had been committed to disrupt or hinder the exercise of any governmental function or the enforcement of the laws.[15] *Goodman* was based upon the premise that such an action amounted to an unnecessary duplication of the statutorily enumerated aggravating circumstances which would lead to an automatic cumulation of aggravating circumstances. *State v. Goodman*, 298 N.C. at 28-30, 257 S.E. 2d at 586-88. However, there is no error in submitting multiple aggravating circumstances provided that the inquiry prompted by their submission is directed at distinct aspects of the defendant's character or the crime for which he is to be punished. *State v. Oliver & Moore*, 302 N.C. 28, 274 S.E. 2d 183 (1981).

In *Oliver & Moore*, the defendants had been convicted of two counts of first-degree murder on felony murder theories. In the course of robbing a convenience store, the defendants had killed the storekeeper and a customer. At the sentencing hearing at

14. G.S. § 15A-2000(e)(4) (Cum. Supp. 1979).

15. G.S. § 15A-2000(e)(8) (Cum. Supp. 1979).

which the defendants were sentenced to death, several aggravating circumstances were submitted to the jury for its consideration. Among other aggravating circumstances, the trial court submitted, as to both murders, the aggravating circumstances that the murder was committed during the commission of an armed robbery and that the murder was committed for pecuniary gain. While we remanded the case for a new sentencing hearing because of a violation of the *Cherry* rule,[16] we went on to hold that there had been no error in submitting the circumstance that the capital felony had been committed for pecuniary gain. We observed that this circumstance examines the defendant's motive for committing the capital crime rather than his acts, as would be the case if the aggravating circumstance of the underlying felony were to be placed before the jury. The latter circumstance prompts the jury's consideration of the underlying factual basis of the crime as opposed to a defendant's subjective motivation. Such is the case here. Of the two aggravating circumstances challenged by defendant here as purportedly being based upon the same evidence, one of the aggravating circumstances looks to the underlying factual basis of defendant's crime, the other to defendant's subjective motivation for his act. The aggravating circumstance that the murder was committed against an officer engaged in the performance of his lawful duties involved the consideration of the factual circumstances of defendant's crime. The aggravating circumstance that the murder was for the purpose of avoiding or preventing a lawful arrest forced the jury to weigh in the balance defendant's motivation in pursuing his course of conduct. There was no error in submitting both of these aggravating circumstances to the jury.

[21] The last challenge that defendant makes to the sentencing phase of his trial is that the trial court erred in failing to submit the mitigating circumstance that defendant did not have a significant history of prior criminal activity. It is fundamental that the trial judge must declare and explain the law that arises upon the evidence. *E.g., State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875 (1971). The state does not have the burden of proof that in a given

16. When the defendant is convicted of first-degree murder on a theory of felony murder, 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. *State v. Cherry, supra.*

capital case no mitigating circumstances exist. *State v. Barfield, supra.* It is the responsibility of the defendant to go forward with evidence that tends to show the existence of a given mitigating circumstance and to prove its existence to the satisfaction of the jury. In the case *sub judice*, while defendant presented evidence which tended to show that he had a good reputation in the community in which he lived, that does not, by itself, tend to show that defendant did not have a significant history of prior criminal activity. Since defendant did not go forward with evidence in this regard, nor was there any evidence introduced by the state on this point, the trial court was not obligated to instruct the jury on this mitigating circumstance on its own motion.

E.

[22] By his final assignment of error, defendant argues that the trial court erred in entering judgments imposing the death penalty in light of the fact that the jury found a mitigating circumstance. The jury found that each of the murders was committed while defendant was under the influence of mental or emotional disturbance. It did not find that defendant's capacity to appreciate the criminality of his conduct was impaired; that defendant's capacity to conform his conduct to the requirements of the law was impaired; or that there were any other circumstances which the jury deemed to have mitigating value. It is defendant's position that since the jury found the mitigating circumstance that defendant committed the murders while he was under the influence of mental or emotional disturbance, the trial court should have sentenced defendant to life imprisonment rather than death. We disagree. Upon proper instructions, the issues presented to a jury at the sentencing phase of a capital case call for that body to answer questions of fact. The jury found in each murder that three aggravating circumstances existed beyond a reasonable doubt; that they were sufficiently substantial to call for the imposition of the death penalty; and that the mitigating circumstances were insufficient to outweigh the aggravating circumstances. That being the case, the trial court was obligated to enter judgments consistent with the jury's unanimous recommendation that defendant be sentenced to death. The jury weighed the circumstances submitted to it and resolved them adversely to defendant's position. Absent a showing of legal error, the trial court was required by statute to enter appropriate judgments

notwithstanding the jury's finding of one mitigating circumstance. There was no error.

F.

[23] G.S. § 15A-2000(d) directs this court to review the record in a capital case to determine whether the record supports the jury's finding of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *State v. Martin*, No. 36, Spring Term 1981, Filed 2 June 1981); *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025 (1981); *State v. Barfield*, *supra*. This mandate serves as a check against the capricious or random imposition of the death penalty. *Id.* Our review function in this regard is limited to those instances where both phases of the trial of the defendant in a capital case have been found to be free from prejudicial error. *State v. Goodman*, 298 N.C. at 35, 257 S.E. 2d at 590-91.

We have scrutinized the record in the present case. We have carefully scrutinized the briefs and arguments which have been presented to us on behalf of defendant. After complete deliberation, we conclude that there is sufficient evidence in the record to support the jury's findings concerning the aggravating circumstances which were presented to it. There is nothing in the record which would indicate that the sentences of death were imposed under the influence of passion, prejudice or any other arbitrary factor.

The present case does not present the situation in which a victim was brutally murdered in such a way that the episode could be characterized as being a torture slaying. *Compare State v. Martin*, *supra*; *State v. McDowell*, *supra*. Nor can it be said that defendant inflicted death in an exotic manner and stood silent as his victim was ministered to by competent medical personnel. *Compare State v. Barfield*, *supra*. However, the record clearly establishes a course of conduct on the part of defendant which amounts to a wanton disregard for the value of human life and for the enforcement of the law by duly appointed authorities. These factors lead us to conclude that the sentence of death is not disproportionate or excessive, considering both the crime and the

defendant. We, therefore, decline to exercise our discretion to set aside the sentences imposed.

No error.

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

Justice EXUM dissenting.

All the evidence presented on the question demonstrates to me that the relationship between defendant and his court-appointed counsel had so deteriorated that counsel was unable to provide defendant the effective assistance which the Sixth Amendment requires. I must, therefore, respectively dissent from the majority's position on this issue and, for this reason, I cannot join in the majority's conclusion that no error was committed in this proceeding leading to imposition of the death penalty upon the defendant.

In *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980), the principal issue was whether defendant had "the constitutional right to have substitute counsel appointed to represent him." The Court, after a thorough, well researched discussion of the problem in an opinion by Justice Carlton, properly on the record before it viewed the situation as a mere dispute between defendant and counsel over trial tactics because of which *defendant* complained that he had difficulty communicating with his counsel. Significantly, in *Thacker* counsel never alluded to any communication problem. *Thacker*, however, recognized the principle that the appointment of substitute counsel is required when "the nature of the conflict between defendant and counsel is . . . such as would render counsel incompetent or ineffective to represent *that* defendant" or when "the relationship between [defendant and counsel has] deteriorated to such an extent that the presentation of his defense would be prejudiced." 301 N.C. at 352, 353, 271 S.E. 2d at 255. (Emphasis original.) Concluding that there was no such break down in the relationship in *Thacker*, this Court found no error in the denial of defendant's motion for substitute counsel.

The principle that when the lawyer-client relationship has so deteriorated that effective representation is no longer possible

substitute counsel must be appointed was also recognized in *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977) and *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976). The principle was not applied in *Gray*, however, because "[w]hether defendant may have been peeved with his attorney for personal reasons, the court had no reason to doubt that attorney's effectiveness and capability as an advocate or to suspect the relationship between defendant and his counsel to have deteriorated so as to prejudice the presentation of his defense." 292 N.C. at 282, 233 S.E. 2d at 913. Neither was the principle applied in *Sweezy* because "[n]o irreconcilable conflict or breakdown in communication between defendant and his counsel has been demonstrated." 291 N.C. at 373, 230 S.E. 2d at 529.

Thus this Court, while acknowledging that deterioration of the lawyer-client relationship to such an extent that effective representation is no longer possible mandates the appointment of substitute counsel, has in past cases properly refused to apply this principle because the record simply did not call for its application.

If this principle has any vitality, however, and I believe that it does, this case demands its application. If it is not to be applied here, I cannot imagine a case in which it would be.

I agree with the majority that motions for substitute counsel should be allowed only for substantial reasons. Mere disagreement over trial tactics, mere dissatisfaction with counsel's services, or general complaints about the infrequency of counsel's jail visits and other communications are not generally, in themselves, reason enough to substitute counsel. The majority seems to view this case as one involving only defendant's complaints that counsel did not visit him often enough in jail or otherwise sufficiently communicate with him about his case. It decides the issue as if this were the only support in the record for defendant's motion. If it were, I would agree with the majority's conclusion on the issue.

I submit, however, that the record contains far more than is alluded to in the majority's discussion of the issue. A fair reading of the record shows that not only did *defendant* desire to have substitute counsel appointed for reasons which admittedly he could but poorly articulate, but that *defendant's counsel*, begin-

ning on 16 August and repeatedly thereafter, urged the trial court to relieve them. Nowhere does the record indicate that counsel's pleas to be relieved were based on mere unwillingness to handle a difficult and undoubtedly unpopular case. Rather counsel consistently and eloquently advised the trial court that they simply could not effectively represent defendant because he had so lost confidence in them and harbored such animosity against them that communication between counsel and client essential to proper trial preparation was impossible.

The motion for substitute counsel was first made more than one month before trial was to begin. It was obviously not made for dilatory purposes. The motion was supported by statements of both defendant and his court-appointed lawyers. Judge Smith conducted a full inquiry into the matter almost two weeks before trial was to begin. This inquiry revealed as severe a breakdown in communication between counsel and client as can be portrayed on a written record.

On 31 August defendant wrote Mr. Fox, his court-appointed lawyer:

"Mr. Fox,

> I am fire you from my case. I'll not to court with you as my Lawyer. You have lie to my mother in other worlds I don't need you any more at all. that is that. good bye."

At the hearing before Judge Smith Mr. Hutchins complained that his lawyers had "promised this and promised that, and none of them have come through." He said, "We ain't talked over the case at all." "If I can't trust them now," Mr. Hutchins said, "I can't trust them anymore." Mr. Hutchins complained that his lawyers had not let him know what they were doing, had not visited him in jail, and had not kept him informed about the outcome of various pre-trial proceedings.

More compelling, however, were the better articulated urgings of both Mr. Fox and Mr. Blanchard, court-appointed counsel, that they be relieved from the case. Mr. Fox said:

> "*Mr. Hutchins and I have reached a state where we have an absolute lack of communication.* That he has personal—a feeling personal against me as opposed to all other persons in his

acquaintance; a lack of trust. He doesn't feel he can place trust of his situation, his case in my hands. As a result, *that has put me in a position where—with the lack of communication am unable to prepare effectively for the defense of this case.*

. . . .

"We have gotten psychiatric consultation with Mr. Hutchins, which has been ongoing. We have arranged for the retention of certain records and documents from other jurisdictions, which may be germane to the case; and otherwise made those preparations leading to a defense of this matter. We are now to a point where it is vitally necessary, in my opinion, that I'm able to communicate intimately with Mr. Hutchins and he with me; especially the latter. *On talking about potential defenses based on mental attitudes, mental status, getting inside Mr. Hutchins' mind, and I'm not able to communicate with him, whatsoever, it makes it, at this point, a physical impossibility, as well as a legal impossibility, in my opinion, to adequately prepare a defense on behalf of Mr. Hutchins, as his attorney, to a charge of first degree murder.* As part and parcel with that, being put in this position; I have found in a case of importance, like this, it's necessary for the defense attorney to be in a relaxed and—attitude where input can flow and ideas can flow out; and I have been put on the mental defensive myself. I find myself in a very hesitant, resistant position at this time also. It's very difficult to approach the case mentally." (Emphasis supplied.)

Mr. Blanchard pleaded with the court as follows:

"Mr. Hutchins, each time I talked with him, is stronger and more opposed to Mr. Fox; for matters he feels that he's not been told enough about what's going on. My dealings with him are colored by the fact that he is—*the animosity is great enough for Mr. Fox. He doesn't feel like he can deal with Mr. Fox. In talking with him for a few moments today, he says he doesn't feel like he can trust me. And the animosity is now getting to the place where I think it will interfere with anything Mr. Hutchins and I could accomplish. It would be an unusual case, in that the feeling of animosity, I think, would be picked up by the jury at the table. I think it would work*

to Mr. Hutchins' detriment. I realize he does not have the right to fire and pick and choose; but we are dealing with three counts of first degree murder. In something of this nature, I think that *Mr. Hutchins deserves or at least needs* in his own mind *counsel which he can feel comfortable with; that he can believe* what they're going to say; *that he has respect for* their ability. *It is my feeling Mr. Hutchins has none of those for Mr. Fox nor I.*" (Emphasis supplied.)

Later Mr. Blanchard stated:

"Your Honor, earlier this morning, Mr. Fox and I had breakfast together and discussed the matter. At that time, our feeling was that Mr. Hutchins' disagreement with me was, perhaps, not as great as I now realize it is; and discussed the possibility of me staying in with another lawyer appointed. After talking with Mr. Hutchins this afternoon, I would tend to have a difficult time staying in . . . ."

During the hearing Mr. Dennis Winner, a member of the Asheville Bar, appeared. The court inquired whether Mr. Winner could prepare himself for trial of Mr. Hutchins' case by 17 September, the date upon which it was scheduled. Mr. Winner expressd doubts that he could be ready by then. Whereupon Mr. Lowe, the district attorney, argued at length that he was adamantly opposed to any continuance and to appointing substitute counsel if this would work a continuance in the case. Judge Smith then, after finding that defendant had shown no justification for substituting counsel, that his "only reason for wishing to discharge his attorneys is . . . his . . . belief that they have not visited him enough to discuss the case," and that there was no showing that the attorneys were failing to prepare, denied defendant's motion.

The record does not support these findings. All the evidence demonstrates, as I have noted, that the relationship between defendant and his court-appointed lawyers at the time of the hearing before Judge Smith had deteriorated to such an extent that the presentation of his defense would be prejudiced. Indeed Judge Smith never really addressed the question whether under the circumstances counsel could render effective assistance. We indicated in *Thacker* that a finding on this issue should be made. We said, "when faced with a claim of conflict and a request for ap-

pointment of substitute counsel, the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective. The United States Constitution requires no more." 301 N.C. at 353, 271 S.E. 2d at 256. The Constitution does, however, require a record which supports the trial judge's conclusion, if made, that the conflict between defendant and counsel is not such as to render counsel's assistance ineffective. Not only was no such conclusion made here, there is nothing in the record which would have supported it.

The conflict between defendant and his lawyers had not ameliorated when the case came on for trial on 17 September. At that point Mr. Fox renewed "the motion of the defendant *and attorneys for the defendant* in regard to dismissal of counsel." When asked if he had anything to present on the motion, Mr. Fox referred to the evidence which had already been heard and then said, "The only other additional evidence that I would place before Your Honor would be that I have since come to the understanding that Mr. Hutchins expressed the feeling to law enforcement officers that I and Mr. Lowe were in company in opening his mail. He shows a sense of distrust in his attorney." Although the real reason for Mr. Hutchins' distrust of his court-appointed lawyers is somewhat obscure, the fact of it is undisputed.[1]

On the day of trial defendant moved for a continuance of the case on the grounds: (1) The defense had not been able adequately to explore Hutchins' mental condition. (2) Mr. Hutchins, himself, was unstable mentally. Mr. Fox told the court:

> "We have just begun to explore the situation in regard to Mr. Hutchins' mental condition. *He has not cooperated with the psychiatrist which may be in a position to present evidence necessary to save his very life.* With the very brief amount of opportunity that the psychiatrist has had to visit with him and the resistance he has met may or may not be necessary to the defense with the psychiatrist to have a

1. I note that according to records in the Administrative Office of the Courts, Mr. Fox from 3 June 1974 to 15 October 1976 was an assistant district attorney employed by Mr. Lowe. In view of Mr. Fox's remarks on the day of trial, it is possible that this fact played some part in Mr. Hutchins' attitude toward Mr. Fox.

greater opportunity than he has heretofore had to consult with and treat Mr. Hutchins.

. . . .

"Mr. Hutchins' mental condition is of a delicate one. As a result of this, *as late as yesterday evening, he expressed his desire and intent to do what he had last spoken to us seven days before what he was diametrically opposed to doing. He is swinging so intensely from one to another pole in this matter* that it is difficult, if not impossible, for the attorneys to anticipate where he is going to be on any given time. I think this is a serious matter, due to the great degree of mental flux and change he has put to in the last several days. I indicated not only in his psychiatrist out of Asheville to be able to see him, but also for him to be able to have an opportunity to rest and be in a situation for a few days or weeks, at least, or a calm nature before he can decide in his own mind calmly and passionately what he wants to do with the procedure."

Defendant presented no evidence during the guilt phase of his trial. He himself did not testify during the sentencing phase. At the sentencing hearing, psychiatric testimony indicated that Hutchins was a paranoid psychotic who felt that law enforcement agencies were persecuting him. The psychiatrist testifed that such persons "may function well as a neighbor or parent or a husband, but still have this very bizarre delusional system that eventually usually ends up controlling their lives. They are potential for violence because . . . the persecution feelings that they have is terrific and predictable." During this phase, other than the psychiatrist's testimony, defendant simply offered several witnesses who testified that defendant had a reputation for good character in his community, was a good neighbor, and a good father.

The jury found after the sentencing hearing that the first degree murders of Owen Messersmith and R. L. Peterson were committed while the defendant "was under the influence of mental or emotional disturbance." The jury found, however, that defendant's capacity "to appreciate the criminality of his conduct" was not impaired.

This state of the record precludes me from concluding that there was no prejudice in failing to substitute counsel. Prejudice

in such cases rarely arises from what competent counsel does affirmatively. Prejudice more often occurs because of things left undone which should and would have been done had a proper attorney-client relationship existed. An appellate court looking at a cold record can never say with certainty what these things might have been.

Defendant was apparently a paranoid psychotic who believed even before the tragedy that he was being persecuted by law enforcement agencies. Mr. Fox persistently referred to counsel's inability because of the breakdown in the attorney-client relationship properly to delve into defendant's mental condition prior to trial. It is, therefore, probable on this record that had a better relationship existed between defendant and his counsel, an insanity defense could have been more adequately prepared and successfully presented. Therefore I cannot say the state has demonstrated beyond a reasonable doubt[2] that failure to provide substitute counsel was not prejudicial on the guilt phase of the trial.

Even if I were totally satisfied that with the best possible representation arising from an appropriate attorney-client relationship defendant would, in any event, have been convicted of at least two counts of first degree murder, I could not vote to find no error in the sentencing proceeding resulting in the imposition of the death penalty. At this stage of the trial, as delicate as it is crucial, a defendant is entitled to all the skills of advocacy his counsel can muster. There can be no doubt that because of the gross deterioration in the attorney-client relationship these skills were sorely dampened in this case.

I must, therefore, vote for both a new trial and a new sentencing hearing.

My conclusion is supported by the holdings in *United States v. Williams*, 594 F. 2d 1258 (9th Cir. 1979), and *Brown v. Craven*, 424 F. 2d 1166 (9th Cir. 1970). In both of these cases new trials were ordered by the Ninth Circuit Court of Appeals because of

2. G.S. 15A-1443(b) provides: "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless."

the severity of the conflict which had developed before trial between defendant and his court-appointed lawyer. In *Brown* the court noted, 424 F. 2d at 1169-70, that defendant was:

> "[F]orced into a trial with the assistance of a particular lawyer with whom he was dissatisfied, with whom he would not cooperate, and with whom he would not, in any manner whatsoever, communicate . . . .
>
> . . . .
>
> "We think, however, that to compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever."

So, I believe, it was here.

It may, of course, be argued that this defendant would not have cooperated with any lawyer. The record indicates, however, that he would have cooperated with Mr. Winner had Mr. Winner been appointed. Mr. Winner advised the court that he would not want to accept appointment unless:

> "[T]he defendant wanted me to represent him. And so we had a conference in the Buncombe County Jail this morning for 45 minutes or so, maybe an hour; in which we discussed the case and talked about other things that are irrelevant to this conversation. And finally, at the end of it, I asked the defendant if he wanted me to represent him. Without breaking any confidential relationship, what he—I will not say what he said, but he did not give an answer which I could consider answered that question. And I told him that I was—that I did not want to try this case; but that I was willing to do so. And that I would give my best efforts if I got into it, as I do in every case that I get into. And that I would do that, if he wanted me to do it. And when he could not give me an answer that I thought answered the question, I suggested to him that he think about it until now. That we would both be over here at 2:00; and that he could then give the answer whether he wanted me to defend him or not."

The following colloquy then occurred:

> "COURT: O.K., what's your answer, Mr. Hutchins?
>
> MR. HUTCHINS: Yes, I'll accept him."

We cannot know, of course, whether substitute counsel would have ultimately enjoyed an appropriate attorney-client relationship with Mr. Hutchins. The trial court's duty on the record before us was not dependent on such foreknowledge. The trial court's duty was at least to relieve Mr. Fox and Mr. Blanchard and to make a reasonable effort to secure counsel whose relations with defendant would not preclude counsel's effective assistance. For failure to do this, I believe defendant is entitled to a new trial.

Justice CARLTON dissenting.

I agree with that portion of Justice Exum's dissent which relies on the principles enunciated by this Court in *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980). However, I do not reach the question whether defendant received fair representation at the sentencing hearing. I believe this is unnecessary because defendant was denied his constitutional right to counsel from the time the trial court denied his request for substitute counsel. I think defendant's lawyers did the best they could under the most trying of circumstances.

I prefer that this Court voluntarily apply principles it has already established instead of being ordered to do so by higher authority. The State has presented strong evidence of this defendant's guilt. It is simply incumbent upon the State to give him a fair trial before imposing the appropriate punishment.

MICHAEL ROLAND LYNCH v. JEAN T. LYNCH

No. 137

(Filed 8 July 1981)

1. Rules of Civil Procedure § 4— service of process—registered or certified mail —necessity for affidavits

A party may properly be served by registered or certified mail pursuant to G.S. 1A-1, Rule 4(j)(9)b without the filing of any affidavits; however, the affidavits described in the statute must be filed (1) before judgment by default may be had on such service and (2) when the party served appears in the action and challenges such service upon him.

2. **Divorce and Alimony § 23.4; Rules of Civil Procedure § 4— child support order—default judgment—service by certified mail—necessity for affidavits**

A child support order was a nullity as to the nonresident defendant who was purportedly served by certified mail where it was a default judgment and was entered before the affidavits required by G.S. 1A-1, Rule 4(j)(9)b were filed.

3. **Divorce and Alimony § 26.1— temporary child custody order—no full faith and credit**

A temporary child custody order is not entitled to full faith and credit and has no effect on defendant's ability to seek full faith and credit of a final custody judgment subsequently rendered in another state.

4. **Appearance § 1; Rules of Civil Procedure § 12— abolition of special appearance**

By the enactment of Rule 12 of the Rules of Civil Procedure, the Legislature abolished the special appearance in this jurisdiction.

5. **Appearance § 1.1; Divorce and Alimony § 23.4; Infants § 5.1— child custody proceeding—nonresident defendant—waiver of objection to personal jurisdiction—full faith and credit motion as general appearance**

The nonresident defendant's motions in a child custody proceeding challenged only subject matter jurisdiction and not personal jurisdiction. Furthermore, defendant made a general appearance under G.S. 1-75.1 by requesting the court to give full faith and credit to a foreign judgment awarding custody to her, and since defendant made the general appearance before filing a motion contesting personal jurisdiction, she waived her right to challenge the court's exercise of personal jurisdiction over her from the date of such appearance, and the court was authorized to grant her full faith and credit motion.

6. **Divorce and Alimony § 26.1; Infants § 5.1— child custody—general appearance by nonresident defendant—full faith and credit to foreign decree—termination of jurisdiction**

In a child custody proceeding in which the nonresident defendant made a general appearance by moving that an Illinois custody decree be given full faith and credit, the trial court's jurisdiction over defendant terminated when the court found that the Illinois decree was entitled to full faith and credit where the law of Illinois prohibited plaintiff from filing a motion to modify the Illinois decree on the basis of changed circumstances until two years after the decree was entered, and plaintiff's custody action was instituted before those two years had passed.

Justice CARLTON dissenting.

Justice MEYER dissenting.

Justice HUSKINS joins in this dissent.

ON REHEARING.

DEFENDANT'S petition for a rehearing of our decision filed 2 February 1981, reported at 302 N.C. 189, 274 S.E. 2d 212 (1981),

was allowed for a limited purpose on 7 April 1981. No additional oral argument was permitted and no additional briefs were required or filed.

The facts of this case were adequately summarized in our previous opinion.

Hicks, Harris & Sterrett by Richard F. Harris, III, for defendant appellant.

No counsel for plaintiff appellee.

COPELAND, Justice.

We readopt our prior opinion, reported at 302 N.C. 189, 274 S.E. 2d 212 (1981), except as hereinafter modified.

We previously held that the orders entered in North Carolina on 6 April 1978 and 1 June 1978, awarding plaintiff temporary custody and permanent custody, respectively, were not binding on defendant because she was never properly served with summons pursuant to G.S. 1A-1, Rule 4(j)(9). Rule 4(j)(9) provides that any person who is not an inhabitant of the State or found within the State may be served with process in the following manner:

> ". . . 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 summons 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 con-

stitute 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. Plaintiff did not file the affidavit setting forth the circumstances warranting the use of service by certified mail until 19 January 1979. No affidavit stating that copies of the summons, complaint, and order were deposited in the post office for delivery by registered or certified mail was ever filed. Consequently, we held that "[s]ince 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." --- N.C. at ---, 274 S.E. 2d at 218. We therefore found that the North Carolina orders of 6 April 1978 and 1 June 1978 were nullities as to defendant.

[1] Reconsideration of the language of Rule 4(j)(9)b compels us to adjust the rationale by which we reached this conclusion. The statute specifies two circumstances under which the affidavits described therein must be filed; first, before judgment by default may be had on such service, and second, when the party served appears in the action and challenges such service upon him. Thus, a party may be properly served by registered or certified mail without filing any affidavits, and such process shall be complete on the day the summons and complaint are delivered to the address thereon. *See, e.g., Hassell v. Wilson*, 301 N.C. 307, 272 S.E. 2d 77 (1980); *Guthrie v. Ray*, 293 N.C. 67, 235 S.E. 2d 146 (1977).

[2] Applying this interpretation of Rule 4(j)(9)b to the facts of the case *sub judice*, we find the 1 June 1978 order a nullity as to

defendant because it was a default judgment, entered before the requisite affidavits were filed, which is expressly prohibited by the language of the statute. Thus, we reaffirm the conclusion in our prior opinion that the 1 June 1978 order was not binding on defendant.

[3] Whether the temporary custody order of 6 April 1978 was binding on defendant is immaterial to the decision in this case. The temporary order was, according to its own terms, superseded by the entry of a permanent order on 1 June 1978. The version of G.S. 50-13.5(d)(2) in effect at the time of the 6 April 1978 order expressly provided that, upon gaining jurisdiction over the minor child, the court was authorized to enter orders for the temporary custody of the child pending the service of process. The temporary order thus had no bearing upon whether the North Carolina court had personal jurisdiction over defendant. In addition, a temporary custody judgment is not entitled to full faith and credit and has no effect on defendant's ability to seek full faith and credit of a final custody judgment subsequently rendered in another state. *In re Craigo*, 266 N.C. 92, 145 S.E. 2d 376 (1965). *See also 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). We therefore find it unnecessary to determine whether the 6 April 1978 order was binding on defendant.

In our previous opinion, we interpreted defendant's motions of 30 November 1978 as motions filed under G.S. 1A-1, Rule 12, and found that none of these motions constituted a Rule 12(b) motion contesting personal jurisdiction. We further found that defendant made a general appearance under G.S. 1-75.7 by requesting the court to give full faith and credit to the Illinois judgment awarding custody to her, filed 17 July 1978. We reasoned that since defendant made a general appearance before filing a motion contesting personal jurisdiction, she waived her right to challenge the court's exercise of personal jurisdiction over her from that date forward. In conclusion, we stated that once the trial court asserted jurisdiction over defendant, it should have granted her motion seeking full faith and credit of her Illinois judgment.

In her petition for rehearing, defendant contested that portion of the opinion which held that since defendant waived her

right to challenge personal jurisdiction under Rule 12, the court properly exercised jurisdiction over her after 30 November 1978. It is defendant's contention that her motions did include a Rule 12(b) motion contesting personal jurisdiction.

[4] After careful reconsideration of the motions as a whole, it becomes clear that what defendant attempted to accomplish by this document was a special appearance, subjecting herself to the jurisdiction of the court for the limited purpose of having our court accord full faith and credit to the Illinois judgment of 17 July 1978. Indeed, defendant prefaced her motions by the following statement: "The defendant, Jean T. Lynch, makes this special appearance, and shows unto the Court that. . . ." Defendant erred in entering her motions in the form of a special appearance, in that this Court has held that by the enactment of Rule 12 of the Rules of Civil Procedure, the Legislature abolished the special appearance in this jurisdiction. *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E. 2d 769 (1974). Further evidence of defendant's error is found in her failure to state anywhere in the document that her motions were made under the provisions of Rule 12. The form and content of the motions are very confusing, lending themselves to a number of interpretations.

[5] In attempting to construe defendant's motions, we are guided by the fact that her apparent purpose in filing the document was to obtain enforcement of the Illinois judgment awarding her custody of the minor child. We therefore construe the ambiguity in the document, where possible, in the direction of allowing defendant to achieve her ultimate purpose. Before stating her six actual motions in the document, defendant sets forth twenty-four statements of fact, including the following:

> "13. North Carolina had no grounds for personal jurisdiction over the defendant in that the defendant was not served with process within North Carolina and has had no contacts with North Carolina justifying or allowing service outside the state, as set out in G.S. 1-75.4.
>
> 14. The courts of North Carolina where the defendant mother is neither domiciled, resident or present may not cut off her immediate right to the care, custody, management and companionship of her minor child without having jurisdiction over her in personam.

15. The defendant has not made a general appearance herein and jurisdiction has not been conferred by G.S. 1-75.7. . . .

18. Proof of jurisdiction in accordance with G.S. 1-75.11 was not made and the plaintiff can show no grounds for personal jurisdiction over the defendant because no such grounds exist.

19. Personal jurisdiction was not obtained on the defendant herein."

We interpret these as statements specifying the reasons that the North Carolina order of 1 June 1978 was not binding on defendant, and not as motions challenging personal jurisdiction at the time the document was filed. Defendant was required to show that the North Carolina order was not binding upon her before she could obtain full faith and credit of the subsequent Illinois judgment.

The only one of defendant's six actual "motions" which could be construed as a motion challenging personal jurisdiction reads as follows:

> "3. To dismiss the custody action on the ground that the Orders entered and G.S. 50-13.5(c)(2)a, as applied to the facts of this case, are unconstitutional and the Court has no personal jurisdiction over the defendant."

G.S. 50-13.5(c)(2)a is a provision involving subject matter jurisdiction and does not concern personal jurisdiction in any manner. From the language of the motion it is unclear whether defendant intended to challenge subject matter jurisdiction alone or both subject matter and personal jurisdiction. Since the courts of North Carolina must assert personal jurisdiction over defendant in order to grant her request for full faith and credit, we interpret the ambiguous motion as a motion contesting subject matter jurisdiction only. We therefore readopt that portion of our prior decision which held that since defendant made a general appearance in the action by requesting the court to enforce the Illinois judgment, which appearance was entered before a motion contesting the court's exercise of personal jurisdiction over her, then defendant waived her right to challenge personal jurisdiction

and the court was authorized to grant her full faith and credit motion.

We disagree with defendant's contention that once the North Carolina courts assert jurisdiction over her to determine whether the Illinois judgment is entitled to full faith and credit, they likewise retain jurisdiction over her in the event that plaintiff files a motion seeking a new determination of custody on the basis of a substantial change in circumstances.

As a general rule, once a court in this state properly asserts jurisdiction to determine the rights of the parties to custody of a minor child, that court retains jurisdiction to modify its custody decree upon a showing of a substantial change of circumstances. *Robbins v. Robbins*, 229 N.C. 430, 50 S.E. 2d 183 (1948); *Phipps v. Vannoy*, 229 N.C. 629, 50 S.E. 2d 906 (1948); Weintraub, Commentary on the Conflict of Laws § 5.3A (2d ed. 1980). In addition, we have held that when a court in this state asserts jurisdiction in a habeas corpus proceeding to enforce a custody decree of another state, the court retains jurisdiction to modify the sister state's decree upon a showing of a substantial change in circumstances since the date the foreign decree was entered. *In re Marlowe*, 268 N.C. 197, 150 S.E. 2d 204 (1966); *Richter v. Harmon*, 243 N.C. 373, 90 S.E. 2d 744 (1956). It has been held, however, that when a court asserts jurisdiction to enforce a custody judgment of another state and no showing of a substantial change of circumstances is made, its jurisdiction terminates upon a final judgment awarding full faith and credit to the sister state's decree. *Crane v. Hayes*, 253 So. 2d 435 (Fla. 1971). In a proceeding to determine whether a custody judgment is entitled to full faith and credit, the court's inquiry is first confined to whether the judgment sought to be enforced was a final judgment rendered by a court with competent jurisdiction. If the court determines that the foreign judgment was final and rendered by a court with proper jurisdiction, then the judgment is entitled to full faith and credit and the court never reaches the merits of the custody action unless one of the parties asserts that the judgment should be modified due to a substantial change in circumstances. *Spence v. Durham, supra; Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E. 2d 397 (1966). In this type of proceeding, wherein the merits of the custody action are never reached, the court's jurisdiction terminates upon a final judgment, and any action to

modify custody filed thereafter must be based on a new determination of jurisdiction at the time the action is filed.

We reaffirm that portion of our prior opinion which held that the 17 July 1978 Illinois judgment awarding custody to defendant was a final judgment rendered by a court with competent jurisdiction, and therefore entitled to full faith and credit. We also readopt our finding that under the law of Illinois, which we are compelled to follow in this case, plaintiff was prohibited from filing a motion to modify the Illinois custody decree until 17 July 1980. It thus follows that the proceeding in the case *sub judice* is one in which the court's jurisdiction terminates at the entry of judgment awarding full faith and credit to the Illinois decree. The trial court should never have reached the merits of the custody dispute. Plaintiff has not entered a valid motion seeking a modification of the custody decree, therefore any such motion which plaintiff may file hereafter must be brought as a new action, establishing jurisdiction anew as of the date the action is filed.

Should plaintiff now file an action in North Carolina seeking modification of the Illinois custody decree, his action would be subject to the provisions of the Uniform Child Custody Jurisdiction Act, G.S. 50A-1 *et seq.*, effective 1 July 1979.

G.S. 50A-8(b) provides as follows:

> "Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances."

Since we have held that the 17 July 1978 Illinois judgment awarding custody to defendant was entitled to full faith and credit, it follows that plaintiff wrongfully removed the child from the custody of defendant and wrongfully retained such custody, and G.S. 50A-8(b) prevents the courts of this state from asserting jurisdiction to modify the Illinois custody decree.

For the reasons stated above, we readopt our prior opinion except as herein modified and again remand the case to the Court of Appeals for remand to the District Court, Cleveland County, for entry of judgment awarding full faith and credit to the 17 July 1978 Illinois judgment.

Modified and affirmed.

Justice CARLTON dissenting.

I respectfully dissent for the following reasons:

(1) Clearly, North Carolina had no personal jurisdiction over this defendant and, contrary to the majority holding, defendant properly raised this issue.

(2) The motion by defendant to accord the Illinois decree full faith and credit does *not*, in my view, constitute a general appearance in plaintiff's action.

(3) Assuming *arguendo* that the motion for full faith and credit did constitute a general appearance, then contrary to the majority's conclusion, our jurisdiction does not terminate upon the granting of the full faith and credit motion. In a child custody action, the law of this state is clear that jurisdiction continues to inquire into changed circumstances.

(4) While the result reached by the majority in this particular action is acceptable, the law created to reach that result will, I fear, cause dire consequences in future actions of this nature—and other cases in which full faith and credit is sought as well. On rehearing, this Court has further confused the very issues which it presumably sought to clarify. In fact, I can agree with none of the statements of law in the majority opinion except that relating to service of process.

A.

1.

I concur fully in Justice Meyer's dissent. Like him, I believe that the proper disposition of this action *must* begin with the dismissal of the husband's action. It is beyond question that Mrs. Lynch challenged personal jurisdiction, and it is our constitutional duty to dismiss the action.

As stated in the majority opinion, in her "Motions" of 30 November 1978 Mrs. Lynch included in her verified statements of fact the following:

> 13. North Carolina had *no grounds for personal jurisdiction* over the defendant in that the defendant was not served with process within North Carolina and *has had no contacts with North Carolina* justifying or allowing service outside the state, as set out in G.S. 1-75.4.
>
> 14. The courts of North Carolina where the defendant mother is neither domiciled, resident, or present may not cut off her immediate right to the care, custody, management, and companionship of her minor child without having jurisdiction over her in personam.
>
> 15. The defendant has not made a general appearance herein and jurisdiction has not been conferred by G.S. 1-75.7.
>
> . . . .
>
> 18. Proof of jurisdiction in accordance with G.S. 1-75.11 was not made and the *plaintiff can show no grounds for personal jurisdiction over the defendant because no such grounds exist.*
>
> 19. *Personal jurisdiction was not obtained on the defendant herein.*

(Emphases added.) The majority interprets these "statements of fact" as challenging the custody order of 1 June 1978 and "not as motions challenging personal jurisdiction at the time the document was filed." While it is true that these statements are not motions, I disagree with the majority's conclusion that the statements challenge only the custody order. These statements are nowhere limited as to time, *i.e.*, events before the motions were filed or to certain proceedings within the husband's action. These statements are, without qualification or limitation, directed toward the issue of this state's jurisdiction over the person of the defendant, and, in my opinion, can be "interpreted" no other way.

Plaintiff's actual motions included the following:

> 3. To dismiss the custody action on the ground that the Orders entered and G.S. 50-13.5(c)(2)a, as applied to the facts

> of this case, are unconstitutional *and* the Court has no personal jurisdiction over the defendant.

(Emphasis added.) According to the majority "it is unclear whether [by motion number 3] defendant intended to challenge subject matter jurisdiction alone or both subject matter and personal jurisdiction." The use of the conjunction "and" makes it perfectly clear that she intended to challenge both. Additionally, I would argue that this motion, when construed in light of her statements of fact, shows beyond any doubt that defendant intended to contest personal jurisdiction. Because this state has no contacts with defendant which would support personal jurisdiction absent a voluntary general appearance—which at the time of her motions to dismiss she had not made—defendant's motion to dismiss for lack of personal jurisdiction should have been granted.

2.

I disagree with the majority's characterization of defendant's request for full faith and credit as a general appearance in her husband's action. By holding that defendant has made a general appearance, the majority has put an enormous price tag on defendant's right to enforce the Illinois judgment. Contrary to the majority's conclusion, the effect of a *general appearance* in a *child custody action* in which the court has jurisdiction over the other parent and the subject child is to vest the court with jurisdiction over the parties and the matter until the child reaches majority. As the defendant fears, the plaintiff can make a motion in the cause for change of custody and defendant will be forced to return to North Carolina to litigate the matter.

To speak in terms of a "general appearance" is misleading in a case such as this. When a party comes into this state seeking enforcement of a sister state's decree by way of full faith and credit, our jurisdiction over that party and over the subject matter of the prior litigation is, in my opinion, limited to inquiring whether the sister state had jurisdiction over the party against whom enforcement is sought and whether that party had notice of the litigation and an opportunity to be heard. The sole exception to this rule arises in child custody cases when a court may inquire into changed circumstances if the sister state would do so. The reason for this exception is obvious—the state has a duty to protect the interests of the minor child.

However characterized, the "appearance" of the party seeking enforcement of the decree gives the courts of this state jurisdiction to inquire only into the matters listed above. No other defense may be asserted by the party against whom enforcement is sought either by way of a defense to the original claim or by way of set-off. That this is the correct result becomes clear when it is remembered that this state has a *constitutional* duty to give the foreign decree the *same effect* it would have in the original jurisdiction. The only defenses to a final judgment in the state rendering the decree are lack of jurisdiction and notice; it must be the same when enforcement is sought in this state.

When defendant requested that the Illinois judgment be accorded full faith and credit the only "adjudication" she was seeking and which was necessary was an inquiry into jurisdiction and notice. She sought no "affirmative relief" because that had already been granted by the Illinois court. Had a defendant sued in this state raised these issues and these issues only as a "defense" to the suit, he would not be deemed to have made a general appearance. *In re Blalock*, 233 N.C. 493, 503, 64 S.E. 2d 848, 855 (1951). Interestingly, *Blalock* is the same authority cited in this Court's original opinion for the proposition that defendant has made a general appearance.

By its holding that our jurisdiction terminates once the full faith and credit issue has been decided, the majority has attempted to reach the same result as I would, in spite of its insistence that defendant has made a general appearance. Were the *result* of this case our sole consideration, I would voice no objection. But the way the result is reached is more important than the result in this case because the majority has created precedent which will be applied to future litigation. Contrary to the belief of the majority, if a defendant makes a general appearance, our jurisdiction cannot terminate upon a finding that the foreign decree is entitled to full faith and credit. Our jurisdiction *must* and *does* continue until all matters arising in the litigation have been finally determined.

I vote to hold that when enforcement of a foreign decree is sought, the courts of this state acquire jurisdiction to inquire only into the jurisdiction of the foreign court and notice. The scope of our jurisdiction is only as broad as the adjudication sought. When

full faith and credit is sought, the scope of our jurisdiction over the party who seeks full faith and credit is not so broad as to enable this state to require that he or she defend all claims that the opposing party may raise. In other words, a request for full faith does not constitute a "general appearance."

3.

I am confused by the majority's holding that while defendant has made a general appearance in her husband's suit for divorce and custody our jurisdiction over her terminates upon a finding that the Illinois judgment is entitled to full faith and credit. Under our prior case law our jurisdiction to inquire into any change of circumstances arising subsequent to the sister state's decree does not evaporate but *continues* after a finding that full faith and credit should be given that decree. *In re Marlowe*, 268 N.C. 197, 150 S.E. 2d 204 (1966); *Richter v. Harmon*, 243 N.C. 373, 90 S.E. 2d 744 (1956). As of this date the husband had not entered a valid motion seeking modification of the Illinois decree, but this is irrelevant on the issue of continued jurisdiction. It should be obvious that there is no need for the husband to make such a motion unless and until the full faith and credit issue has been decided against him. It is equally obvious, I think, that the evidence offered at the hearing of this matter in North Carolina concerned fitness of the parents as of that time and implicitly included any changes in circumstances which had arisen since the entry of the Illinois decree. Now that the majority has determined that the Illinois judgment should be given full faith and credit, the husband should have the opportunity to allege changed circumstances. While, as a practical matter, his motion may be of no avail, this result is entirely separate from the question of whether our jurisdiction continues after the full faith and credit determination has been made.

4.

The majority's holding that defendant wife has entered a general appearance by requesting full faith and credit may be of little consequence in the present action because the Illinois judgment covers both claims for relief contained in the plaintiff husband's complaint. In other actions, however, the precedent created by the majority could produce dire results. Suppose, for example, the husband had sued for divorce, custody and for per-

sonal injuries sustained as a result of a tort allegedly committed by the wife. Under the majority's reasoning, the only way the wife could enforce the foreign decree and obtain the child would be to submit herself to her husband's tort suit in a jurisdiction with which she has no contacts and in which she could not otherwise be required to appear. Such a result does not, in my opinion, comport with the notions of fair play inherent in due process.

B.

Like Justice Meyer, I would dispose of this case by granting full faith and credit and remanding to the trial court to allow the husband to allege changed circumstances. In all likelihood, however, his claim will not be heard, because the Uniform Child Custody Act which is now the law in this state, provides that the courts of this state shall not exercise jurisdiction to modify the decree of a sister state in child-snatching cases unless required in the interest of the child. In my opinion, this provision allows the courts of this state to exercise jurisdiction in a case such as this only under the most extraordinary of circumstances.

In summary, I vote to:

(1) Dismiss the husband's suit for lack of personal jurisdiction over the defendant wife pursuant to Rule 12(b)(2) of the Rules of Civil Procedure,

(2) Grant the wife's motion for full faith and credit,

(3) Hold that our jurisdiction over the matter continues to inquire into changed circumstances, and

(4) Enter a judgment granting the Illinois judgment full faith and credit and remanding the cause to the Court of Appeals with instructions to remand to the District Court, Cleveland County, for further proceedings.

Justice MEYER dissenting.

I must respectfully dissent from the majority opinion because I feel it contains significant errors in both reasoning and result.

To begin with, the opinion of the majority errs by only vacating the default judgment originally obtained in North Carolina by the plaintiff-husband. While I agree with the con-

struction of Rule 4 adopted by the majority, I would vote to dismiss the husband's action, not merely to set aside his default judgment. The fact that the judgment is only vacated, as I understand it, means that the action is still pending. This is especially significant in light of the majority's decision, discussed below, that defendant-wife has now made a general appearance in this State.

I find the majority opinion to be absolutely inconsistent in saying in one breath:

> *We disagree with defendant's contention* that once the North Carolina courts assert jurisdiction over her to determine whether the Illinois judgment is entitled to full faith and credit, they likewise retain jurisdiction over her in the event that plaintiff files a motion seeking a new determination of custody on the basis of a substantial change in circumstances. (Emphasis added.)

and in the next breath:

> As a general rule, once a court in this state properly asserts jurisdiction to determine the rights of the parties to custody of a minor child, that court retains jurisdiction to modify its custody decree upon a showing of a substantial change of circumstances. (Citations omitted.) In addition, we have held that when a court in this state asserts jurisdiction in a habeas corpus proceeding to enforce a custody decree of another state, the court retains jurisdiction to modify the sister state's decree upon a showing of a substantial change in circumstances since the date the foreign decree was entered.

The majority opinion goes on, however, to say in effect that if a final judgment (and I assume it would be an order rather than a judgment) awarding full faith and credit is entered *before* allegations of changed circumstances are properly made, then the jurisdiction of the North Carolina court terminates. I submit that this would be of little consolation to this defendant if such allegations are properly presented by the plaintiff before the case is *dismissed.*

The action of the husband should be dismissed rather than the order vacated for the simple reason that the courts of North

Carolina do not have personal jurisdiction over the defendant. The majority says that the defendant did not properly contest personal jurisdiction and thus waived that issue, and that defendant's motion for full faith and credit is a sufficient basis for the courts of this State to exercise the full power of jurisdiction over this defendant. I quarrel with both conclusions.

First, it seems patently clear to me that defendant did challenge personal jurisdiction from the outset. Defendant's third motion filed in this action read:

> 3. To dismiss the custody action on the ground that the Orders entered and G.S. 50-13.5(c)(2)a, as applied to the facts of this case, are unconstitutional *and the Court has no personal jurisdiction over the defendant.* (Emphasis added.)

The majority states that they "interpret" this motion as challenging only subject matter jurisdiction because defendant cited our statute involving subject matter jurisdiction. They say it is "unclear" whether she intended to also challenge personal jurisdiction. I submit that defendant has used simple English which requires no "interpretation." I contend that motion number 3 challenges jurisdiction of both subject matter and the person. If this were not so what other earthly reason could there be for the use of the conjunctive "and" in her motion.

The majority quotes at length from statements of fact made by defendant with her motion and concludes correctly that those statements were not actual motions. They were not intended to be. But they do quite clearly illustrate what defendant intended to accomplish by the filing of her motions. In my view it is quite clear that defendant intended to challenge personal jurisdiction. Moreover, if there is some possible ambiguity, which I submit is not present here, that ambiguity should be resolved against finding that defendant waived so fundamental a right as the due process right to contest personal jurisdiction. Under our Rules of Civil Procedure, the pleadings of parties are to be "construed as to do substantial justice." Rule 8(f).

As defendant did make a proper motion challenging personal jurisdiction coupled with a motion to dismiss, the proper course would be to consider the motion to dismiss before considering defendant's motion for full faith and credit. If the motion to

dismiss is granted because of lack of personal jurisdiction, the motion for full faith and credit remains, but is not appended to the husband's action. It should be clear that our Rules of Civil Procedure allow for alternative defenses to an action. Rule 12(b) provides that "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." The effect of the majority opinion is to suggest that defendant should have filed a motion contesting personal jurisdiction, and upon denial of that motion, then filed a motion for full faith and credit. Such a multi-fold process frustrates the efficient operation of our courts which the Rules were designed to insure. It also allows a court to bootstrap jurisdiction by passing over a jurisdictional defense if a defense on the merits is also pleaded. I would dismiss plaintiff-husband's action for lack of personal jurisdiction over the wife.

I would also grant defendant's motion for full faith and credit but find that in this case that is not a sufficient reason for finding that the defendant made a general appearance. This result may seem a bit tortured at first glance, but in the area of full faith and credit in custody decrees, I would caution my brethren that few rules are hard and fast. Ehrenzweig, Conflict of Laws § 87 (1962).

I believe that one of the reasons the majority wrongly interpreted defendant's motion to challenge subject matter jurisdiction only was its mistaken belief that "the courts of North Carolina *must* assert personal jurisdiction over defendant in order to grant her request for full faith and credit . . . ." (emphasis added). I submit that the majority's assumption in that regard is clearly wrong.

I would agree with the majority that defendant had made a general appearance if defendant had brought suit on the Illinois judgment, or if defendant in any way involved the adjudicatory power of this State's courts. This she has not done. Rather, she has merely brought to this State for full faith and credit recognition a judgment of a sister state. After the matter has been fully litigated in Illinois, the action of this State in recognizing and enforcing the already valid judgment is essentially administrative in character, not adjudicatory. Leflar, American Conflicts Law § 78 (3d ed. 1977). As previously stated, the position of the majority is that once we accord full faith and credit the jurisdiction of this

Court terminates, despite our holding that defendant made a general appearance. I have argued that under our prior case law our jurisdiction continues. *In re Marlowe*, 268 N.C. 197, 150 S.E. 2d 204 (1966); *Richter v. Harmon*, 243 N.C. 373, 90 S.E. 2d 744 (1956). For that reason also we should find that defendant did not make a general appearance.

I fear that the majority does not fully appreciate the impact of the *Marlowe* decision on the question before us. *Marlowe* squarely says that the granting of full faith and credit in a custody matter does not preclude inquiry into changed circumstances. "Changed conditions will always justify inquiry by the courts in the interst and welfare of the children, and decrees may be entered as often as the facts justify." 268 N.C. at 199, 150 S.E. 2d at 206. The inquiry of the court is limited, however, to the question of changed circumstances. In *Richter* this Court cited with approval the language of Judge, later Justice, Cardozo:

> The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. . . . But the limits of the jurisdiction are suggested by its origin. (Citations omitted.)

Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925). We do have jurisdiction to consider changed circumstances because we have jurisdiction over the child. Saying that we have jurisdiction to conduct this limited inquiry is not paramount to saying we have personal jurisdiction over the wife. My conviction that defendant should not now be subject to the jurisdiction of our courts is further bolstered by my reading of U.S. Supreme Court decisions concerning personal jurisdiction, beginning with *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and running through *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 83 L.Ed. 2d 683 (1977). Simply put, *Shaffer* mandates that "all assertions of state court jurisdiction" be evaluated under a "fair play and substantial justice" standard. Weintraub, Commentary on the Conflict of Laws § 4.11 (2d. ed. 1980). *See generally* Symposium: State Court Jurisdiction After *Shaffer v. Heitner*, 63 Iowa L. Rev. 991 (1978); Note, In Personam Jurisdiction, 4 N.C.J. Int'l L. & Com. Reg. 41 (1978). The jurisdiction of our courts is

subject to due process limitations, and the core concepts of due process in this area in my opinion are reasonableness and fairness. Weintraub § 4.3. I deem it both unreasonable and unfair that Mrs. Lynch now finds herself subject to the jurisdiction of our courts simply because she has tried to enforce what, under the majority result, is a meaningless determination of custody.

Since this action was instituted, our legislature has enacted G.S. 50A-15, the section of the Uniform Child Custody Act under which Mrs. Lynch could have proceeded to register her Illinois judgment in North Carolina had that Act then been in force. The pertinent part of G.S. 50A-15 provides:

> Filing and enforcement of custody decree of another state.—(a) An exemplified copy of a custody decree of another state may be filed in the office of the clerk of any superior court of this State. The clerk shall treat the decree in the same manner as a custody decree of a court of this State. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this State.
>
> (b) A person violating a custody decree of another state which makes it necessary to enforce the decree in this State may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody of such party's witnesses.

I question whether even perfunctory registration of a judgment under this statute would likewise amount to a general appearance, and thus whether in a similar situation Mrs. Lynch would be deemed to have so appeared. I would say that she has not.

For the reasons given, I would vote to dismiss the husband's action for lack of personal jurisdiction over defendant-wife, and to grant Mrs. Lynch's motion for full faith and credit. As noted above, granting full faith and credit does give us jurisdiction to consider changed circumstances, and the husband must ordinarily be given the opportunity to make such a motion. Under the facts of this case, however, inquiry into changed circumstances would be precluded by either the requirement of Illinois law that there be no reconsideration, on an allegation of changed circumstances,

of a custody decision for two years after entry of the decree or by the intervening adoption by this State of the Uniform Child Custody Act, whereunder courts of this State may decline jurisdiction in cases such as this. (See G.S. 50A-8.)

Justice HUSKINS joins in this dissent.

GREAT AMERICAN INSURANCE COMPANY v. C. G. TATE CONSTRUCTION COMPANY

No. 9

(Filed 8 July 1981)

1. **Insurance § 96.1— notice to insurer of accident—unexcused delay—insurer's obligation to defend**

An unexcused delay by the insured in giving notice to the insurer of an accident does not relieve the insurer of its obligation to defend and indemnify unless the delay operates materially to prejudice the insurer's ability to investigate and defend.

2. **Insurance § 96.1— notice to insurer of accident—timeliness—test of insurer's obligation to defend**

When faced with a claim that notice of an accident was not timely given to an insurer, the trier of fact must determine: (1) whether the notice was given as soon as possible; (2) if not, whether the insured has shown that he acted in good faith, e.g., that he had no actual knowledge that a claim might be filed against him; and (3) whether the insurer's ability to investigate and defend was materially prejudiced by the delay.

Justice MEYER dissenting.

ON discretionary review of the decision of the Court of Appeals reported at 46 N.C. App. 427, 265 S.E. 2d 467 (1980), reversing and remanding the judgment of *Bailey, Judge*, entered 17 May 1979 in Superior Court, WAKE County.

The primary question on this appeal is whether failure of an insured to comply with a provision in an insurance policy which requires him, as a condition precedent to coverage, to give the insurer notice of an accident "as soon as practicable," of itself, relieves the insurer of its obligations under the policy.

Johnson, Patterson, Dilthey & Clay, by Robert M. Clay, Robert W. Sumner and Sanford W. Thompson IV, for plaintiff-appellant.

Nye, Mitchell, Jarvis & Bugg, by Charles B. Nye, for defendant-appellee.

CARLTON, Justice.

I.

Appellant, Great American Insurance Company (Great American), brought this declaratory judgment action to determine its obligations under a liability insurance contract with the defendant-appellee. This dispute arose out of an automobile accident the facts of which are bitterly disputed. This much is certain: On 6 April 1976 defendant C. G. Tate Construction Company (Tate) was engaged in a highway project on U.S. Highway 221 north of Spartanburg, South Carolina. Tate's job was to widen the existing two-lane road to four lanes. The job required the use of numerous pieces of heavy equipment to grade the shoulders, to fill in low spots and to haul away excess dirt. At about three o'clock that afternoon a gasoline tanker owned by State Petroleum, Inc., and driven by Robert Allen Thomas collided with a car driven by Norma Jean Pegg. Shortly after the collision the gasoline in the tanker caught fire and exploded. Both drivers escaped before the explosion and, although seriously injured, survived the accident.

The controversy concerning the accident centers around its cause and the directions in which the vehicles were traveling. Pegg, Thomas and another motorist who witnessed the accident claim that Pegg was traveling south and Thomas north when Tate's front-end loader backed out onto the road in the northbound lane causing Thomas to swerve to the left and collide head-on with Pegg's car. Several Tate employees and an eyewitness who viewed the accident from her patio testified that both vehicles were traveling north, that the car slowed or stopped, and that the tanker braked sharply, jackknifed and rolled over the car. According to these witnesses, the front-end loader was parked about ten feet from the edge of the highway and was not involved in the accident.

Officers of Tate testified that they did not notify Great American, its liability carrier, of the accident because its employees who saw the accident said that Tate was not involved. The local news media, however, ran stories attributing fault to Tate, and the investigating policeman testified that on the evening of the accident he told Tate foreman A. G. Foster that Pegg's version of the accident differed considerably from the version given by Tate employees and that she claimed that a piece of Tate's equipment backed into the road causing the tanker to swerve and collide head-on with her car. Foster denied that he had been informed of Pegg's claims but admitted that he knew that the local news media had assigned fault to Tate.

Tate never reported the accident to Great American. Great American did not learn of Tate's potential involvement in the accident until 3 May 1978, some twenty-seven days after it occurred, by way of a letter from Space Petroleum Company, Thomas' employer, and by way of a telephone call from Thomas' lawyer. Great American is the workers' compensation carrier for Space Petroleum and the 3 May 1978 communications involved a workers' compensation claim for injuries sustained by Thomas in the accident.

Plaintiff Great American initiated this action for declaratory relief seeking a judgment that it has no obligation to defend or indemnify Tate in any suit arising out of this accident because Tate failed to notify Great American of the incident "as soon as practicable." In its answer Tate alleged that it did not notify the plaintiff of the accident because all the information received by its officers and directors indicated that Tate was not involved and that it knew of no potential involvement until contacted by the plaintiff.

The matter was heard on depositions and live testimony in the Superior Court, Wake County by Judge Bailey who sat without a jury. At the conclusion of the evidence Judge Bailey found, *inter alia*, that Tate knew or should have known of its potential involvement in the accident shortly after it occurred and that its failure to notify the plaintiff was unjustified. Based on his findings of fact Judge Bailey concluded that:

> Defendant's unjustified and inexcusable failure to give plaintiff notice of the accident on April 6, 1978 "as soon as

practicable" constituted a violation of a condition precedent to coverage under plaintiff's policy of insurance, and, as such, releases plaintiff from its obligation under the policy for the accident on April 6, 1978.

On appeal, the Court of Appeals reversed and held that in order to escape its duty to defend and indemnify an insurer must show not only unjustified delay in giving notice but also that it suffered prejudice because of the delay. Because no findings had been made on the issue of prejudice, the Court of Appeals remanded the case to the trial court for consideration of that issue.

We denied plaintiff's original petition for discretionary review on 15 August 1980. However, on 4 November 1980 we allowed plaintiff's petition for reconsideration and granted discretionary review.

II.

A.

[1] The sole issue with which we are confronted on this appeal is the effect to be given the provision in the policy insuring defendant requiring that written notice be given the insurer "as soon as practicable." More precisely, we must decide whether to continue to apply traditional contract principles and hold that failure to comply strictly with this condition precedent releases the insurer from its obligation to defend and indemnify or to reject the traditional approach and embrace the modern view that this provision, although denominated by the policy as a condition precedent, should be construed in accord with its purpose and with the reasonable expectations of the parties. For the reasons discussed below we adopt the modern view and construe this provision according to the reasonable expectations of the parties. Accordingly, we hold that an unexcused delay by the insured in giving notice to the insurer of an accident does not relieve the insurer of its obligation to defend and indemnify unless the delay operates materially to prejudice the insurer's ability to investigate and defend.

In its briefs and arguments before both appellate courts, plaintiff correctly argued that prior decisions of this Court dictate a contrary result. Notice provisions in a liability insurance con-

tract were first considered by this court in *Peeler v. United States Casualty Co.*, 197 N.C. 286, 148 S.E. 261 (1929). In *Peeler* plaintiff sought satisfaction of a judgment rendered against defendant's insured by claiming a right to enforce the insured's policy with defendant as a third party beneficiary. The policy in question required that notice of an accident be given to the insurer "as soon as practicable." Defendant-insurer did not receive notice of the accident until after the trial of Peeler's action against its insured had begun, approximately a year-and-a-half after the accident. Although there was no provision in the policy which made the notice provision a condition precedent, this Court held that the notification provision was of the essence of the contract and, thus, a condition precedent to coverage. Therefore, we held that plaintiff's claim was barred as a matter of contract law.

We again employed the strict contractual approach to construction of notice provisions in *Muncie v. Travelers Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474 (1960). The facts in *Muncie* were similar to those in *Peeler*. The plaintiff in *Muncie* was involved in an automobile accident with defendant's insured against whom she secured judgment. She sued the defendant-insurer to satisfy her judgment against its insured. The insurer did not receive notice from its insured until some eight months after the accident and plaintiff offered no evidence which explained or justified the delay. This Court held that the trial judge erred in instructing the jury that the burden of proof was on the insurer to show that notice had not been given within a reasonable time and that it was prejudiced by failure to give timely notice. In so holding, we employed the traditional contract analysis: Freedom of contract is constitutionally guaranteed and provisions in private contracts, unless contrary to public policy or prohibited by statute, must be enforced as written. Because the policy makes the giving of notice a condition precedent, the party seeking to enforce the contract has, under general common law contract principles, the burden of pleading and proving strict compliance. Since notice was given eight months after the accident and plaintiff presented no evidence to justify or explain the delay, notice was not given "as soon as practicable" *as a matter of law:*

> Notice without explanation for the delay, given eight months after the happening of the accident, resulting in injuries as serious as depicted by plaintiff's judgment against

> Crosby, cannot be said to be given "as soon as practicable." Since plaintiff has failed to establish compliance with the conditions or to justify the delay, it follows that she has failed to establish her right to maintain the action.

Id. at 81, 116 S.E. 2d at 479.

On the basis of this language the Court of Appeals distinguished *Muncie* as applying only when no explanation for the delay was given. Limiting *Muncie* strictly to its facts paved the way for the Court of Appeals to adopt a new rule for cases in which some explanation was offered. We cannot agree with that court's reasoning. The reasoning in *Muncie*, summarized above, allows no consideration of prejudice. The language relied on by the Court of Appeals merely amounts to a statement of when the question of timely notice becomes one of law properly decided by the court. *See First Citizens Bank & Trust Co. v. Northwestern Insurance Co.*, 44 N.C. App. 414, 261 S.E. 2d 242 (1980). *Muncie* squarely stands for the proposition that strict contract law applies to the interpretation of insurance policies.

We reaffirmed our adherence to the strict contractual approach enunciated by *Peeler* and *Muncie* in *Fleming v. Nationwide Mutual Insurance Co.*, 261 N.C. 303, 134 S.E. 2d 614 (1964). In an opinion by Justice Moore, this Court stated:

> No part of the insurance contract may be ignored. The giving of notice is a condition precedent to insurer's liability. The burden of proof is upon plaintiff to show that notice was given as soon as practicable. . . . "Notice without explanation for the delay, given eight months after the happening of the accident, resulting in injuries . . . , cannot be said to be given 'as soon as practicable.' Since plaintiff has failed to establish compliance with the condition or to justify the delay, it follows that she has failed to establish her right to maintain the action."

Id. at 306, 134 S.E. 2d at 616 (quoting *Muncie v. Travelers Insurance Company*, 253 N.C. at 81, 116 S.E. 2d at 479).

This line of cases reflects the traditional reasoning applied by courts in construing insurance contracts: Parties have freedom to contract and, absent a violation of law or public policy, courts will enforce those contracts as written. If the insurance contract

makes notice a condition precedent to recovery or if notice is of the "essence" of the contract, the party seeking to enforce the contract has the burden of pleading and proving strict compliance with the notification requirement. Although this Court, on occasion, has been more liberal in its decisions as to whether the notice was given "as soon as practicable,"[1] we have never departed from the strict contractual approach.[2] Clearly, under *Peeler, Muncie* and *Fleming* failure to give timely notice, of itself, defeated plaintiffs' attempt to enforce the policy without regard to whether the delay materially prejudiced the insurer's ability to defend the claim.

1. A delay in giving notice because of physical or mental incapacity has been held not to violate the requirement that notice be given "as soon as practicable." *E.g., Rhyne v. Jefferson Standard Life Ins. Company,* 196 N.C. 717, 147 S.E. 6 (1929). A delay due to inability to discern any injury has also been held to be excusable. *Ball v. Employers' Assur. Corp.,* 206 N.C. 90, 172 S.E. 878 (1934).

2. We have, however departed from the strict contractual approach when construing cooperation clauses in insurance contracts and have held that, in order to relieve an insurer of its obligations, the failure to cooperate must be both material and prejudicial. *Henderson v. Rochester American Insurance Co.,* 254 N.C. 329, 118 S.E. 2d 885 (1961). The following language from *Henderson* is, perhaps, a harbinger of the holding in this case:

> The provisions of liability insurance policies imposing as conditions to liability the duty of insured to give notice of accidents and cooperation in the defense of actions which might result in a judgment against insured are, except where otherwise provided by statute, binding on the parties. Properly interpreted, they will be enforced. *Muncie v. Insurance Co.,* 252 N.C. 74; *Peeler v. Casualty Co.,* 197 N.C. 286, 148 S.E. 261.
>
> The provisions are to be given a reasonable interpretation to accomplish the purpose intended, that is, to put insurer on notice and afford it an opportunity to make such investigation as it may deem necessary to properly defend or settle claims which may be asserted, and to cooperate fairly and honestly with insurer in the defense of any action which may be brought against insured, and upon compliance with these provisions to protect and indemnify within the policy limits the insured from the result of his negligent acts. An insurer will not be relieved of its obligation because of an immaterial or mere technical failure to comply with the policy provisions. The failure must be material and prejudicial. *Ball v. Assurance Corp.,* 206 N.C. 90, 172 S.E. 878; *Mewborn v. Assurance Corporation,* 198 N.C. 156, 150 S.E. 887; *Hunt v. Fidelity Co.,* 174 N.C. 397, 93 S.E. 900; *MacClure v. Casualty Co.,* 229 N.C. 305, 49 S.E. 2d 742, where it is said: "While there is some contrary authority, the better reasoned cases hold that the failure to co-operate in any instance alleged must be attended by prejudice to the insurer in conducting the defense. Blashfield, Automobile Law, Vol. 6, sec. 4059, p. 78."

Id. at 332, 118 S.E. 2d at 887.

The holdings of these cases were in accord with the then-prevailing majority view. Recently, however, many courts have rejected the strict contractual approach and interpreted notice conditions in insurance contracts in accord with the reasonable expectations of the parties. *E.g., State Farm Mutual Automobile Insurance Co. v. Milam,* 438 F. Supp. 227 (S.D.W. Va. 1977); *Johnson Controls, Inc. v. Bowes,* 1980 Mass. Adv. Sh. 1831, 409 N.E. 2d 185 (1980); *Cooper v. Government Employees Insurance Co.,* 51 N.J. 86, 237 A. 2d 870 (1968); *Brakeman v. Potomac Insurance Co.,* 472 Pa. 66, 371 A. 2d 193 (1977); *Pickering v. American Employers Insurance Co.,* 109 R.I. 143, 282 A. 2d 584 (1971). For a discussion of this developing trend and the Court of Appeals' opinion in this case see Note, 17 Wake Forest L. Rev. 141 (1981). Under this theory, the question becomes whether the insurer has been prejudiced by the delay in receiving notice. The reasons for the trend away from the application of strict contract law to insurance cases were aptly stated by the Supreme Court of Pennsylvania:

> The rationale underlying the strict contractual approach reflected in our past decisions is that courts should not presume to interfere with the freedom of private contracts and redraft insurance policy provisions where the intent of the parties is expressed by clear and unambiguous language. We are of the opinion, however, that this argument, based on the view that insurance policies are private contracts in the traditional sense, is no longer persuasive. Such a position fails to recognize the true nature of the relationship between insurance companies and their insureds. An insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured. The only aspect of this contract over which the insured can "bargain" is the monetary amount of coverage.

Brakeman v. Potomac Insurance Company, 472 Pa. at 72, 371 A. 2d at 196. The New Jersey Supreme Court gave its reasons for rejecting the strict contractual approach thusly:

> [W]e have recognized that the terms of an insurance policy are not talked out or bargained for as in the case of contracts generally, that the insured is chargeable with its terms because of a business utility rather than because he read or

> understood them, and hence an insurance contract should be read to accord with the reasonable expectations of the purchaser so far as its language will permit. And although the policy may speak of the notice provision in terms of "condition precedent," . . . nonetheless what is involved is a forfeiture, for the carrier seeks, on account of a breach of that provision, to deny the insured the very thing paid for. This is not to belittle the need for notice of an accident, but rather to put the subject in perspective. Thus viewed, it becomes unreasonable to read the provision unrealistically or to find that the carrier may forfeit the coverage, even though there is no likelihood that it was prejudiced by the breach. To do so would be unfair to insureds. It would also disserve the public interest, for insurance is an instrument of a social policy that the victims of negligence be compensated. To that end companies are franchised to sell coverage. We should therefore be mindful also of the victims of accidental events in deciding whether a forfeiture should be upheld.

Cooper v. Government Employees Insurance Co., 51 N.J. at 93-94, 237 A. 2d at 873-74 (citations omitted).

We agree with both statements. The terms of an insurance contract are not bargained for in the traditional sense. Insurance policies are offered on a take-it-or-leave-it basis and, frequently, the only term over which the insured has any say is the amount of coverage. Strict interpretation of the notice requirement leads to harsh results: failure to notify the insurer within a reasonable time, for whatever reason, relieves the insurer of its obligations to defend and indemnify, the essence of the contract, even though it may have suffered no prejudice whatsoever as a result of the delay. Rejection of the strict contractual approach means that the interpretation of the notice provision will be guided more by its purpose—the reason for its inclusion in the insurance contract—than by its seemingly conclusive terms. Additionally, adoption of the modern rule of reasonable expectations promotes the social function of insurance coverage: providing compensation for injuries sustained by innocent members of the public. The rule we adopt today has the advantages of promoting social policy and fulfilling the reasonable expectations of the purchaser while fully protecting the ability of the insurer to protect its own interests. While under the new reasonable expectation rule the number of

claims insurers will be obligated to defend may rise, this is no justification for continued application of the rule we now reject. Our decision merely tells insurers that they are obligated to defend when the delay in receiving notice has not prejudiced their ability to investigate or otherwise defend the claim, an obligation which, in the reasonable expectation of the purchaser, should exist. Because it takes prejudice into account, the new rule does not affect the *ability* of the insurer to investigate and defend. Thus, the *risk* undertaken by the insurer remains unchanged. Accordingly, we hereby overrule the *Peeler-Muncie-Fleming* line of cases and hold that failure of an insured to notify its insurer of an accident "as soon as practicable" does not relieve the insurer of its obligations under the contract unless the delay operates materially to prejudice the ability of the insurer to investigate and defend.

The rule we adopt today places the notice requirement in its proper context. No condition of timely notice will be given a greater scope than required to fulfill its purpose. Simply put, the scope of the condition precedent which will relieve an insurer of its obligations under an insurance contract, is only as broad as its purpose: to protect the ability of the insurer to defend by preserving its ability fully to investigate the accident, *e.g.*, *Peeler v. United States Casualty Co.*, 197 N.C. 286, 148 S.E. 261. If, under the circumstances of a particular case, the purpose behind the requirement has been met, the insurer will not be relieved of its obligations. If, on the other hand, the purpose of protecting the insurer's ability to defend has been frustrated, the insurer has no duty under the contract. This equitable approach to the interpretation of notice requirements in insurance contracts has the advantages of providing coverage whenever in the reasonable expectations of the parties it should exist and of protecting the insurer whenever failure strictly to comply with a condition has resulted in material prejudice.

Unquestionably, the requirement that a liability insurer be given notice of a relevant event "as soon as practicable" is an essential part of the insurance contract. Without it, the insurer would be required to defend claims which it never had the opportunity adequately to investigate. It was the importance of the notice requirement that led to the adoption of a strict contractual approach:

> In insurance of this character it is a matter of first importance to the insurer, who may be forced to become the real defendant in a lawsuit against the insured . . . , to be speedily informed of all the facts and witnesses concerning a possible litigation. In a very little time the facts may in a great measure fade out of memory, or become distorted, witnesses may go beyond reach, physical conditions may change, and, more dangerous than all, fraud and cupidity may have had opportunity to perfect their work. Therefore this stipulation is vital to the contract . . . .

Travelers' Insurance Co. v. Myers, 62 Ohio St. 529, 539, 57 N.E. 458, 459 (1900), *overruled on other grounds, Employers' Liability Assur. Corp. v. Roehm*, 99 Ohio St. 343, 124 N.E. 223 (1919), *quoted in Peeler v. United States Casualty Company*, 197 N.C. at 290, 148 S.E. at 263. The clear purpose of the notice provision is to protect the ability of the insurer to prepare a viable defense by preserving its ability fully to investigate the accident. It follows, then, that if the delay in giving notice has not materially prejudiced the ability of the insurer to defend the claim, its obligations under the insurance contract should not be excused.

B.

There remains the question of which party should have the burden of proof on the issue of prejudice. The authorities are split on this issue. Some hold that because the insured is seeking relief from the literal meaning of the terms of the contract, he should bear the burden of showing that his delay has not materially prejudiced the insurer. *E.g., Hartford Accident & Indemnity Co. v. Lochmandy Buick Sales, Inc.*, 302 F. 2d 565 (7th Cir. 1962); *Dairyland Insurance Co. v. Cunningham*, 360 F. Supp. 139 (D. Colo. 1973). Other jurisdictions have reasoned that the burden of showing prejudice should be on the insurer because it is seeking to escape its obligation to defend and indemnify, the very thing which it is paid to do. *E.g., State Farm Mutual Automobile Insurance Co. v. Milam*, 438 F. Supp. 227; *Cooper v. Government Employees Insurance Co.*, 51 N.J. 86, 237 A. 2d 870. "[A]lthough the policy may speak in terms of 'condition precedent' . . . , nonetheless what is involved is a forfeiture, for the carrier seeks, on account of a breach of that provision, to deny the insured the very thing paid for." *Id.* at 93-94, 237 A. 2d at 873.

We believe the sounder rule to be that requiring the insurer to prove that it has been materially prejudiced by the delay. If the insurer has the burden of proving prejudice, then when it receives a delayed notification the rule will encourage the insurer to make a prompt preliminary investigation of the claim to protect its interests. An investigation may reveal that the delay has materially prejudiced the insurer, and, in that event, the insurer may deny coverage and either wait for a suit against it or file suit for declaratory relief. If, on the other hand, the preliminary investigation reveals that the ability of the insurer to investigate and defend has not been materially prejudiced, the insurer, presumably, will proceed with the claim and the question of coverage will never reach the courts. Additionally, the insurer, because it is an expert in investigation of accidents, is in a much better position to know what factors are relevant to its ability to investigate and to recognize prejudice. An insured would be in a far less enviable position if he had the burden of showing an absence of prejudice. Indeed, the insured would be forced to prove a negative. Placing the burden of showing prejudice on the insurer encourages an adequate investigation by the qualified party at the earliest possible time. These factors lead us to conclude that the burden of proof on the issue of prejudice is properly placed on the insurer.

As the Court of Appeals indicated, among the relevant factors to be considered by a jury in deciding whether the insurer has been prejudiced are:

> the availability of witnesses to the accident; the ability to discover other information regarding the conditions of the locale where the accident occurred; any physical changes in the location of the accident during the period of the delay; the existence of official reports concerning the occurrence; the preparation and preservation of demonstrative and illustrative evidence, such as the vehicles involved in the occurrence, or photographs and diagrams of the scene; the ability of experts to reconstruct the scene and the occurrence; and so on.

46 N.C. App. at 437, 265 S.E. 2d at 473. Proof of existence of any of the above factors is not determinative; the insurer must also show that the changed circumstance materially impairs its ability

to investigate the claim or defend and, thus, to prepare a viable defense. Often, proof of the changed circumstance itself will give rise to an inference of prejudice; for example, proof of the unavailability of a sole independent eyewitness.

We do not intend the above list of factors to be exclusive. Circumstances which may cause prejudice to an insurer are as varied and as numerous as the circumstances surrounding automobile accidents. We merely intend the above list to be illustrative. A more complete discussion of prejudicial factors will have to wait a case-by-case development.

C.

The rule which we adopt today amounts to a reversal of a long line of previous cases upon which insurers have justifiably relied. Lest this decision be perceived as encouraging dilatory tactics in the notification of the insurer and, thus, as being unfair to insurers, we also now impose the requirement that any period of delay beyond the limits of timeliness be shown *by the insured* to have been in good faith. Anyone who knows that he may be at fault or that others have claimed he is at fault and who purposefully and knowingly fails to notify ought not to recover even if no prejudice results. Equity dictates that a bad faith delay in notifying an insurer, even though no material prejudice results, should bar the insured from enforcing the policy. This requirement is in accord with the common law principle that implicit in every contract is the obligation of each party to act in good faith. 17 Am. Jur. 2d, Contracts § 256 (1964).

D.

[2] The effect of this decision is to create a three-step test for determining whether the insurer is obliged to defend. When faced with a claim that notice was not timely given, the trier of fact must first decide whether the notice was given as soon as practicable. If not, the trier of fact must decide whether the insured has shown that he acted in good faith, *e.g.*, that he had no actual knowledge that a claim might be filed against him. If the good faith test is met the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay.

We agree with the result reached by the Court of Appeals albeit on a somewhat different basis. We also agree with that court that the case must be remanded for further proceedings because the trial court refused to consider the question of prejudice because, in its opinion, that question "does not arise." Although the record discloses that evidence relevant to the question of prejudice was before Judge Bailey, we deem that it would be unfair to Great American to remand for additional findings only. This case reverses well-established law upon which Great American has justifiably relied. Justice demands that it be given the opportunity to present its claim in light of the newly imposed requirements. Additionally, while Judge Bailey found that the delay was "unjustified," there is no finding concerning defendant's good faith. For these reasons, further proceedings are required to allow the parties to present additional evidence relevant to the issues of good faith and prejudice.

The decision of the Court of Appeals is modified and affirmed. This cause is remanded to that court with instructions to remand to the Superior Court, Wake County, for further proceedings not inconsistent with this opinion.

Modified and affirmed.

Justice MEYER dissenting.

I must respectfully dissent. First, I cannot agree with the result reached by the majority; and second, even if I agreed with that result, I am convinced it could have been reached by the application of law well established in this jurisdiction and certainly without the violence done to existing precedent by the majority opinion.

I.

It is well settled in this jurisdiction that a provision in a policy of liability insurance which requires the insured to give notice "as soon as practicable" is reasonable, valid and enforceable. *Muncie v. Insurance Company,* 253 N.C. 74, 116 S.E. 2d 474 (1960); *accord Waters v. American Automobile Insurance Company,* 363 F. 2d 684 (D.C. Cir. 1966); *Allstate Insurance Company v. Edwards,* 237 F. Supp. 195 (N.D. Ca. 1964); *Resseguie v.*

American Mutual Liab. Ins. Co., 51 Wisc. 2d 92, 186 N.W. 2d 236 (1971).

For over half a century North Carolina has followed the rule that if under the policy of insurance the insured is required to give the insurer notice of an accident "as soon as practicable" and that requirement is made a condition precedent to coverage under the policy, then it is immaterial whether the insurer is prejudiced by the insured's failure to give such notice. The failure to give notice is a failure to comply with the notice requirement and constitutes a violation of a condition precedent to coverage. As a result, coverage is forfeited. *Fleming v. Nationwide Mutual Insurance Co.*, 261 N.C. 303, 134 S.E. 2d 614 (1964); *Muncie v. Travelers Insurance Company*, 253 N.C. 74, 116 S.E. 2d 474 (1960); *Peeler v. United States Casualty Co.*, 197 N.C. 286, 148 S.E. 2d 261 (1929). *See also Taylor v. Insurance Co.*, 35 N.C. App. 150, 240 S.E. 2d 497, *pet. for discret. rev. denied*, 294 N.C. 739, 244 S.E. 2d 156 (1978).

The most recent case applying North Carolina law was filed 14 August 1980, three months after the decision of the Court of Appeals in this case. In *Fortress Re, Inc. v. Jefferson Ins. Co.*, 628 F. 2d 860 (4th Cir. 1980), the Fourth Circuit affirmed Judge Dupree's lower court ruling, applying North Carolina law, that failure of the insured to comply with a contractual requirement of prompt notice resulted in a forfeiture of insurance coverage. I realize that Judge Dupree lacked the authority to overrule existing North Carolina cases as the majority has done here, but I point out that Judge Dupree and the Fourth Circuit Court of Appeals held that the insured's failure to comply with the notice provision resulted in forfeiture of coverage under the policy. Specifically rejected was the insured's contention that a showing of prejudice is required.

While there is indeed a modern trend to the contrary, I believe this continues to be the majority rule in this nation:

> The rule established by the weight of authority is that where, by the terms of the insurance contract, a specific notice of accident, given by or on behalf of the insured to the insurer, is made a condition precedent to liability on the part of the latter, the failure to do so will release the insurer from

> the obligations imposed by the contract, although no prejudice may have resulted.
>
> . . . .
>
> By reason of the overwhelming weight of authority of the courts of last resort within the United States, we are compelled to hold that on account of the respondent's failure to perform the condition precedent, stipulated in the policy as such, of giving notice of the suit and forwarding summons and complaint within a reasonable time, no action on his part lay against the company. *Lack* of prejudice, under the *terms of the policy*, was immaterial.

State Farm Mut. Automobile Ins. Co. v. Cassinelli, 216 P. 2d 606, 610-611, 616 (Nev. 1950), *quoting Houran v. Preferred Acc. Ins. Co. of New York*, 109 Vt. 258, 195 A. 253, 259 (1937) and citing numerous cases reaching a similar result.

As one commentator has noted:

> The majority, however, have refused to abandon their disciplined approach to contract law. While there appears to be a trend towards a more liberal approach in favor of the insured, the plurality of courts still place great emphasis on the sanctity of the policy.
>
> . . . .
>
> The majority of courts favor adherence to this strict contractual obligation except where the terms of the policy are ambiguous or unemphatic.

Comment, *The Materiality of Prejudice to the Insurer as a Result of the Insured's Failure to Give Timely Notice*, 74 Dick. L. Rev. 260, 261, 262 (1970). *See* Annot., 18 A.L.R. 2d 443 (1951); 44 Am. Jur. 2d Insurance § 1455; Note, *Insurance — A New Approach for the Interpretation of Insurance Contracts*, 17 Wake Forest L. Rev. 141 (1981). *See also Ziman v. Employer's Insurance Co.*, 493 F. 2d 196 (2d Cir. 1974); *Sohm v. United States Fidelity & Guaranty Co.*, 352 F. 2d 65 (6th Cir. 1965); *National Surety Co. v. Dotson*, 270 F. 2d 460 (6th Cir. 1959); *Preferred Accident Insurance Co. of New York v. Castellano*, 148 F. 2d 761 (2d Cir. 1945); *Hartford Accident & Indemnity Co. v. Loyd*, 173 F. Supp. 7 (W.D. Ark. 1973);

Maryland Casualty Co. v. Wilkerson, 119 F. Supp. 383 (E.D. Va. 1953), *aff'd per curiam*, 210 F. 2d 245 (4th Cir. 1954); *Liberty Mutual Insurance Co. v. Bob Roberts & Co.*, 357 So. 2d 968 (Ala. 1978); *Bituminous Casualty Corp. v. J. B. Forrest & Sons, Inc.*, 133 Ga. App. 864, 212 S.E. 2d 497 (1975); *Viani v. Aetna Insurance Co.*, 95 Idaho 22, 501 P. 2d 706 (1972); *INA Insurance Co. of Illinois v. City of Chicago*, 62 Ill. App. 3d 80, 379 N.E. 2d 34 (1978); *Security Insurance Group v. Emery*, 272 A. 2d 736 (Me. 1971); *Rose v. Regan*, 344 Mass. 223, 181 N.E. 2d 796 (1962); *Gizzi v. State Farm Mutual Insurance Co.*, 56 App. Div. 2d 973, 393 N.Y.S. 2d 107 (1977); *Shelton v. Ray*, 570 S.W. 2d 419 (Tex. Civ. App. 1978).

I do not believe this case is the proper vehicle for so drastic a departure from our prior case law. The facts of the case simply do not justify it. This is a declaratory judgment action by which the plaintiff-insurance company seeks a judicial determination as to whether it must provide coverage to the defendant-contractor under a policy of insurance. I cannot agree with the majority that under the facts of this case the defendant may be entitled to coverage.

I cannot conclude from the record before me that Tate's failure to notify the plaintiff of the accident was either justified or excusable. This is not a case of a bent fender on the family car—this accident involved the head-on collision between a gasoline tanker and a passenger automobile in which the tanker exploded, causing very serious personal injuries to several people and substantial property damage. Tate's own bulldozer-type tractor was severely burned. On the very evening of the accident, within hours of the collision, the South Carolina patrolman who investigated the accident told Tate's job superintendent that both the driver of the car and the driver of the tanker stated that Tate's bulldozer-type tractor backed into the road and caused the collision. There were stories in the local news media attributing fault to Tate. These stories were known to the job superintendent. In view of the serious nature of the accident, the injuries and damage that grew out of it, and the magnitude of potential claims, it is inconceivable to me that any ordinary, prudent person would not or should not have known that claims might be filed against Tate and that the insurance carrier should be notified.

Judge Bailey, a very able and experienced trial judge, after hearing all of the evidence, found as fact that Tate knew, or

should have known, in the exercise of ordinary and reasonable prudence, that claims might be filed against it. Tate knew of its potential involvement in the accident shortly after it occurred. There was ample evidence to support that finding and the conclusion that Tate's failure to give notice as soon as practical was "unjustified and inexcusable." The majority does not contend otherwise. They tacitly acknowledge that under these circumstances, unless we change the law, precedent would dictate that we reverse the Court of Appeals and affirm the trial judge. The majority has voted to change the law of this State and today hold that Tate's "unjustified and inexcusable" delay does not relieve Great American of its obligation to defend and indemnify Tate unless the delay operates materially to prejudice Great American's ability to investigate and defend. This is not interpreting the law—it is making it—a process we would be well advised to leave to the legislature.

I am also concerned about several other aspects of the majority opinion.

After establishing the new rule that the delay in giving (and presumably here failure to give[1]) notice must materially prejudice the ability of the insurer to defend the claim, the majority then places the burden on the insurer to prove material prejudice. I contend that the burden should be upon the party attempting to excuse his failure to comply with the contract—the insured. Admittedly, it may be difficult for either party to satisfy the burden. It seems to me that common sense dictates that the insured will have more relevant facts within its knowledge concerning the accident than an untimely notified carrier. The insured's knowledge of the facts surrounding an accident would also necessarily be more timely. The insured would be in a far better position to meet that burden of proof. *See* Restatement (Second) of Contracts § 225 (1973). In my opinion, prejudice should be presumed with the burden being upon the insured to show that the insurer suffered no prejudice. I believe that to be the majority view in those courts which have elected to follow the modern trend. *See* 8 J. Appleman, Insurance Law and Practice § 4732 at 15-19 (1962) where this comment appears:

1. Even though in this case Tate never reported the accident, it is still a question of delay in the receipt of notice and the majority opinion is couched in terms of "delay."

> Many courts have adopted the rule that it is unnecessary for the company to show that it was prejudiced by the neglect of the insured in order to assert this policy defense, it being frequently stated that prejudice is presumed under these circumstances. This does not mean that upon a showing of delay, alone, the insurer walks out of court free of potential claims. It means, rather, that prejudice being a difficult matter affirmatively to prove, it is not required to make such proof. Prejudice may be presumed, with the burden upon the one seeking to impose liability to show that no prejudice did, in fact, occur—for example, that a complete investigation was made by another insurer or by competent persons who turned over the results to the 'late notice' insurer.
>
> A few courts, however, have adopted a so called rule of 'substantial prejudice' which requires that the insurer, in order to be relieved of liability, demonstrate that it was materially and substantially hampered in the making of its defense or in the discovery of facts by the lack of timely notice. *Since it is often impossible for the insurer to know what witnesses it would have found or what facts it could have ascertained had immediate notice been given and a prompt investigation made, it is submitted that this test is unworkable. The burden should be placed upon the one seeking to recover.* (Emphasis added.)

Nor can I agree with the majority that "the *risk* undertaken by the insurer remains unchanged" under the new rule. Such a conclusion ignores reality. Previously the insurer had no burden of showing prejudice. Under the new rule it has the added burden of proving that its ability to investigate and defend was materially prejudiced by the delay. This new burden creates a substantial additional risk of non-persuasion. Prior to this case, the insurer bore no such risk.

I agree with the majority that the polar star in interpreting notice provisions should be to interpret them "in accord with the reasonable expectations of the parties." Unlike the majority, however, I do not feel this to be an innovative idea. Nor do I find this idea an impediment to what I deem to be the proper resolution of this case. As this Court said over forty years ago, the intent of the contracting parties is assumed to be the fulfillment of

both parties' expectations: to guarantee the insurer the payment of premiums and *protection from fraud and imposition*, and to give the insured the protection and benefits for which it paid. *Woodell v. Aetna Life Ins. Co.*, 214 N.C. 496, 499, 199 S.E. 719, 721 (1938). In my opinion, the majority has not adequately considered the reasonable expectations of the insurer.

II.

Now, assuming *arguendo* that the majority is correct that the carrier should not be relieved of its policy obligations under the particular facts of this case, I believe that result could and should be reached by a different route, thereby avoiding so radical a departure from precedent. In my view this case ought to be decided on the basis that the delay of twenty-seven days was excusable by reason of the fact that Tate's investigation revealed no involvement in the accident by its personnel or vehicles.

The majority acknowledges the latitude allowed by our previous decisions in excusing delays where there is good reason to do so. The record before us indicates that the dialogue between Tate and the insurance company began on the same day the carrier received notice of the accident by way of the Workers' Compensation claim of Thomas. The insurance company here received actual notice of the accident within twenty-seven days of its happening.

There are many cases from other jurisdictions to the effect that the insured may be excused for a delay or even failure to give notice where it appears that, acting as a reasonable, prudent person, he believed that he was not liable for the accident. *Hartford Accident and Indem. Co. v. Lochmandy Buick Sales*, 302 F. 2d 565 (7th Cir. 1962); *Standard Accident Ins. Co. v. Turgeon*, 140 F. 2d 94 (1st Cir. 1944); *Dunn v. Travelers Indemnity Co.*, 123 F. 2d 710 (5th Cir. 1941); *Young v. Travelers Ins. Co.*, 119 F. 2d 877 (5th Cir. 1941); *United States Casualty Company v. Reese*, 229 F. Supp. 24 (E.D. Tex. 1964); *Day v. Hartford Accident and Indemnity Company*, 223 F. Supp. 953 (N.D. Okla. 1963); *Hughey v. Aetna Casualty & Surety Company*, 30 F.R.D. 508 (Del. 1962); *Barnes v. Waco Scaffolding & Equip. Co.*, 589 P. 2d 505 (Colo. App. 1978); *H. H. Hall Construction Company v. Employer's Mut. Liability Ins. Co.*, 43 Ill. App. 2d 62, 193 N.E. 2d 51 (1963); *Leytem v. Firemen's Fund Indemnity Co.*, 249 Iowa 524, 85 N.W. 2d 921

(1957); *Frederick v. John Wood Company*, 263 Minn. 101, 116 N.W. 2d 88 (1962); *Williams v. Cass-Crow Wing Co-op. Ass'n*, 224 Minn. 275, 28 N.W. 2d 646 (1947); *Pawtucket Mutual Insurance Company v. Lebrecht*, 104 N.H. 465, 190 A. 2d 420 (1963); *Farm Bureau Mut. Automobile Ins. Co. v Manson*, 94 N.H. 389, 54 A. 2d 580 (1947); *Figueroa v. Puter*, 84 N.J. Super. 349, 202 A. 2d 195 (App. Div. 1964); *LoTempio v. Safeco Ins. Co. of America*, 71 App. Div. 2d 799, 419 N.Y.S. 2d 347 (1979); *Public Service Mut. Ins. Co. v. Levy*, 57 App. Div. 2d 794, 395 N.Y.S. 2d 1 (1977); *Utica Mut. Ins. Co. v. C.L. Haines Mfg. Co.*, 55 App. Div. 2d 834, 390 N.Y.S. 2d 320 (1976); *Marallo v. Aetna Casualty and Surety Company*, 148 N.Y.S. 2d 378 (S.Ct. 1955); *Munal Clinic v. Applegate*, 273 S.W. 2d 712 (Tenn. App. 1954); *Employers Casualty Company v. Scott Electric Co.*, 513 S.W. 2d 642 (Tex. Civ. App. 1974).

The facts of this case fit comfortably in the category of the cases in which the delay or failure to give the required notice was justified or excused, assuming as the majority has done that the record does not support Judge Bailey's conclusion that Tate's failure to give notice was unjustified and inexcusable.

CONCLUSION

I compliment the majority opinion for its explanation of the "three-step test" for determining whether the insurer is obligated to defend. It will certainly be needed.

Lastly, even under the new rule adopted by the majority, I fail to see how remand for further proceedings is justified under the particular facts of this case. I question how, on remand, Tate's actions can be found to be "in good faith" in view of the fact that they have already been found to be "unjustified and inexcusable."

I vote to reverse the Court of Appeals and reinstate Judge Bailey's judgment in favor of the plaintiff.

BURKE COUNTY PUBLIC SCHOOLS BOARD OF EDUCATION v. THE SHAVER PARTNERSHIP

No. 94

(Filed 8 July 1981)

1. **Arbitration and Award § 1— Federal Arbitration Act—transaction involving commerce**

A contract need not contemplate the interstate shipment of goods in order for it to evidence "a transaction involving commerce" within the meaning of the Federal Arbitration Act; rather, a contract evidences a transaction involving commerce where performance of the contract necessarily involves, so that the parties to the agreement must have contemplated, substantial interstate activity.

2. **Arbitration and Award § 1— contract to design school buildings—Federal Arbitration Act—transaction involving commerce**

A contract for defendant architectural firm to design two school buildings for plaintiff board of education was a "contract evidencing a transaction involving commerce" within the meaning of § 2 of the Federal Arbitration Act where the contract contemplated that architectural services would be rendered by a firm with its principal place of business in Indiana for the construction of two schools in North Carolina; the contract required the architect to consult with the owner, to prepare schematic design studies, to prepare a statement of probable construction costs and working drawings and specifications, to assist the owner in obtaining bids and awarding construction contracts, to make periodic visits to the construction site, to issue the owner's instructions to the contractor and guard against work deficiencies, and to keep accounting records; the design work for the buildings was done in Indiana; most of the field work was done by personnel working out of the Indiana office; the bookkeeping and accounting records were maintained in Kansas; plaintiff made payments to the defendant's Indiana office; defendant dealt with representatives of building material suppliers from all over the country and specified the use of materials manufactured by suppliers in several states; and the structural engineering design work was performed for defendant by a Michigan firm.

3. **Arbitration and Award § 1— Federal Arbitration Act—application by State courts**

The courts of this State must, by virtue of the Supremacy Clause, U.S. Const. Art. VI, Clause 2, apply the Federal Arbitration Act to a contract evidencing a transaction involving commerce notwithstanding the contract contains a provision calling for application of North Carolina law.

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

Board of Education v. Shaver Partnership

ON discretionary review[1] of a decision of the Court of Appeals[2] affirming Judge Griffin's order at the 18 May 1979 Session of BURKE Superior Court denying defendant's motion to stay this lawsuit and granting plaintiff's motion to stay further arbitration proceedings. This case was argued as No. 106, Fall Term 1980.

Simpson, Aycock & Beyer, P.A., by Samuel E. Aycock, Attorneys for plaintiff appellee.

Moore and Van Allen, by Jeffrey J. Davis, Attorneys for defendant appellant.

EXUM, Justice.

This appeal presents two questions. First, whether the contract between plaintiff and defendant is "a contract evidencing a transaction involving commerce" within the meaning of § 2 of the Federal Arbitration Act.[3] We conclude that it is. Second, whether the Federal Arbitration Act must be applied in state courts. We hold, for reasons given, that it must.

Defendant is a multi-state architectural firm which, in 1969, contracted with plaintiff to design two school buildings. After one of the buildings was built and occupied plaintiff discovered that the roof leaked and would require extensive repairs. Plaintiff, alleging that the leaks were caused in part by design defects, on 14 February 1979 instituted this lawsuit for $150,000 damages for breach of contract. Defendant on 2 March[4] filed a demand for arbitration of the dispute with the American Arbitration Association in accordance with Article Eleven of the contract which provides, "all claims, disputes and other matters in question arising out of . . . this Agreement or the breach thereof shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining. This agreement so to arbitrate shall be specifically enforceable under the prevailing arbitration law." On 12 April

1. Allowed 15 August 1980.

2. Reported at 46 N.C. App. 573, 265 S.E. 2d 481 (1980).

3. 9 U.S.C. §§ 1-14 (1976).

4. All events in the trial court occurred in 1979.

defendant moved for stay of the lawsuit pending arbitration. Plaintiff on 3 May moved for and was granted by Judge Riddle a temporary restraining order staying further arbitration proceedings. On 18 May Judge Griffin denied defendant's motion to stay the lawsuit and allowed plaintiff's motion to stay further arbitration proceedings. Judge Griffin held that plaintiff had "the right . . . to disregard the agreement to arbitrate future disputes and institute litigation" since he found the law applicable to this dispute to be former G.S. § 1-544 and cases decided thereunder.[5] He rejected defendant's contention that the dispute is subject to compulsory arbitration under § 2 of the Federal Arbitration Act which provides:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

5. Former G.S. § 1-544 provided:

> "Agreement for arbitration.—*Two or more parties may agree in writing to submit to arbitration*, in conformity with the provisions of this article, *any controversy existing between them at the time of the agreement* to submit. Such an agreement shall be valid and enforceable, and neither party shall have the power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or equity for the rescission or revocation of any contract." (Emphasis supplied.)

Cases interpreting this provision concluded that agreements to arbitrate future disputes could not oust the courts of their jurisdiction. *See, e.g., Skinner v. Gaither Corp.*, 234 N.C. 385, 67 S.E. 2d 267 (1951).

Agreements to arbitrate future disputes are now, by virtue of G.S. 1-567.2, effective 1 August 1973, binding and irrevocable. This provision provides in pertinent part:

> "*Arbitration agreements made valid, irrevocable and enforceable; scope.*—(a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy."

On 29 May defendant moved that the court amend its findings of fact, stay the lawsuit, and dissolve the injunction prohibiting arbitration. This motion was denied by Judge Griffin on 26 June.

The Court of Appeals affirmed. It found the dispositive issue to be "whether the contract between the parties is a transaction involving interstate commerce" within the meaning of the Federal Arbitration Act.[6] If so, it concluded, the federal act "supersedes conflicting state law, notwithstanding a choice of law provision in the contract." The Court of Appeals concluded, however, that the contract in question did not evidence a transaction involving commerce.

It reached this conclusion notwithstanding contractual provisions indicating that the parties contemplated substantial interstate activity and its recognition that the following facts set forth in the affidavit of John Shaver, a general partner of defendant, are undisputed:

> "2. At the time the building which is the subject of this action was designed and built, The Shaver Partnership had offices in Salina, Kansas, Michigan City, Indiana, and Hickory, North Carolina.
>
> 3. Virtually all of the design work done for the building which is the subject of this lawsuit was done in Michigan City, Indiana.
>
> 4. Even during the construction phase, most of the field work was done by personnel working out of the Michigan City, Indiana, office.
>
> 5. Approximately 85% to 90% of all the work done by The Shaver Partnership in fulfillment of its contract with respect to the building that is the subject of this lawsuit was done in Michigan City, Indiana.
>
> 6. All of the bookkeeping and accounting records maintained by The Shaver Partnership with respect to the design and construction of the building that is the subject of this lawsuit were maintained in Salina, Kansas.

6. Commerce is defined in § 1 of the Act as "commerce among the several states . . . ."

7. Payments made by Plaintiff in this action to The Shaver Partnership for work done in the design of the building that is the subject of this lawsuit were made to The Shaver Partnership's office in Michigan City, Indiana.

8. In the course of the design of the building that is the subject of this lawsuit, personnel from The Shaver Partnership had numerous dealings with representatives of building material suppliers from all around the country concerning the specification of building materials for the construction of the buildings.

9. In fact, The Shaver Partnership did indeed specify the use of materials manufactured by suppliers in many different states, for the construction of the building that is the subject of this lawsuit.

10. In addition, in the course of performing the contract for the design of the building that is the subject of this lawsuit, The Shaver Partnership consulted with an Indiana food service consultant for the design of food service facilities for the building.

11. Also, the structural engineering design work, required for the design of the building that is the subject of this lawsuit, was performed for The Shaver Partnership by Carl Walker Associates, whose offices are in Kalamazoo, Michigan."

Relying, however, on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Court of Appeals held that in order for a contract to evidence a transaction involving commerce within the meaning of the Federal Arbitration Act it must involve or relate to the "actual physical interstate shipment of goods." It then concluded that the Act was inapplicable since "the essence of the contract was for the defendant to provide architectural services to plaintiff for the construction of two high schools. The architectural services were the very heart of the contract, that is the consummation of it. *The . . . factors* [contained in the affidavit set forth above] *incidental to the contract*, many of which might go to establish diversity of citizenship between the parties, *do not establish that the essence of the contract . . . involve commerce, e.g., the interstate shipment of goods.*" (Emphasis supplied.)

Plaintiff urges this Court to adopt the Court of Appeals' reading of *Prima Paint* and affirm. Defendant contends that the Court of Appeals "simply used the wrong test in determining whether interstate commerce was involved in this matter."

We agree with defendant. In concluding that a contract must involve or relate to the interstate shipment of goods in order for it to evidence "a transaction involving commerce" the Court of Appeals has fashioned a narrow view of the federal act's applicability which, while purportedly based on *Prima Paint*, is, instead, incongruous both with it and with numerous federal and state decisions. We must, therefore, reverse.

I

Prima Paint involved a "consulting agreement" which was related to a contract whereby a multistate paint business was sold and its manufacturing operation transferred from New Jersey to Maryland. The United State Supreme Court, in concluding that the consulting contract evidenced a transaction involving commerce, found that "[t]he consulting agreement was inextricably tied to this interstate transfer and to the continuing operations of an interstate manufacturing and wholesaling business. There could not be a clearer case of a contract evidencing a transaction in interstate commerce." *Id.* at 401. Mr. Justice Black, in dissent, contended that Congress intended the Federal Arbitration Act to apply only to "contracts between merchants for the interstate shipment of goods." Mr. Justice Fortas, writing for a six-member majority, responded to the dissent in footnote 7:

> "It is suggested in dissent that, despite the absence of any language in the statute so indicating, we should construe it to apply only to 'contracts between merchants for the interstate shipment of goods.' Not only have we neither the desire nor the warrant so to amend the statute, but we find persuasive and authoritative evidence of a contrary legislative intent. *See, e.g.*, the House Report on this legislation which proclaims that '[t]he *control over interstate commerce* [one of the bases for the legislation] *reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.*' H. R. Rep. No. 96, 68th Cong. 1st Sess., 1 (1924). We note, too, that were the dissent's curious narrowing of the statute correct, there would have

been no necessity for Congress to have amended the statute to exclude certain kinds of employment contracts. See § 1. In any event, the anomaly urged upon us in dissent is manifested by the present case. It would be remarkable to say that a contract for the purchase of a single can of paint may evidence a transaction in interstate commerce, but that an agreement relating to the facilitation of the purchase of an entire interstate paint business and its re-establishment and operation in another State is not." *Id.* at 401-02. (Emphasis supplied.)

The Court of Appeals concluded that the statement, "control over interstate commerce . . . reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce," equates the term "interstate commerce" with the phrase "actual physical interstate shipment of goods." Therefore only contracts relating to the interstate shipment of goods would be covered by the federal act. This conclusion considered in light of the entire footnote and decisions rendered both before and after *Prima Paint* is without question incorrect.

Footnote 7 was in essence the rejection by a majority of the Court of the dissent's contention that only contracts between merchants for the interstate shipment of goods could evidence "a transaction involving commerce." The majority's position was that Congress intended the federal act to encompass not only contracts for the interstate shipment of goods but also contracts merely "relating to interstate commerce." Furthermore the majority did not view "relating to interstate commerce" as equivalent to "relating to the actual physical interstate shipment of goods." Instead, it viewed the phrase "relating to interstate commerce" in a broader, more encompassing sense. To state this view was, indeed, the purpose of footnote 7. Had the Court's majority, while holding that the act was not restricted to contracts *for* the interstate shipment of goods, intended to restrict the act's applicability to contracts *involving* or *relating* to the interstate shipment of goods we think it would have said so, especially since such a restriction would have conflicted both with language

from an earlier opinion, *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956),[7] and with earlier lower court decisions.[8]

Further, decisions rendered both in federal and state courts since *Prima Paint* establish almost beyond argument that personal service contracts whose "essence" does not involve or relate to, *i.e.*, which do not contemplate or call for, the interstate shipment of goods may nonetheless evidence a transaction involving commerce within the meaning of the Federal Arbitration Act.[9] Many of these decisions rely on *Prima Paint*. We find one, *Erving v. Virginia Squires Basketball Club*, 468 F. 2d 1064 (2d Cir. 1972), to be of particular interest.

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7. In *Bernhardt* the Court, while holding that the contract before it did not involve commerce, suggested a liberal construction of the act's applicability: "[T]his contract [does not] evidence 'a transaction involving commerce' within the meaning of § 2 of the Act. There is no showing that petitioner while performing his duties under the employment contract was *working 'in' commerce*, was *producing goods for commerce*, or was *engaging in activity that affected commerce. . . .*" *Id.* at 200-01. (Emphasis supplied.)

8. For example, the contracts in the following cases were found to involve commerce within the meaning of § 2 even though they called for construction work to be performed entirely within one state, *i.e.*, their "essence" was not the interstate shipment of goods but was instead the construction or installation of some facility: *Galt v. Libbey-Owens-Ford Glass Co.*, 376 F. 2d 711 (7th Cir. 1967) (contract pursuant to which New York contractor came to Illinois to install glass supplied by Ohio manufacturer); *Monte v. Southern Delaware County Authority*, 321 F. 2d 870 (3d Cir. 1963) (contract to build sewer system in Pennsylvania); *Electronic & Missile Facilities, Inc. v. United States*, 306 F. 2d 554 (5th Cir. 1962), *rev'd on other grounds*, 374 U.S. 167 (1963) (contract to construct missile facilities in Georgia); *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F. 2d 382 (2d Cir. 1961), *cert. denied*, 368 U.S. 817 (1961) (contract to paint housing project in Florida).

9. *See e.g., Varley v. Tarrytown Assoc., Inc.*, 477 F. 2d 208 (2d Cir. 1973) (textile consulting agreement whereby plaintiff would evaluate plants and fabrics manufactured throughout the country for defendant who would invest funds according to plaintiffs' recommendations); *Erving v. Virginia Squires Basketball Club*, 468 F. 2d 1064 (2d Cir. 1972) (athlete's contract to play for a professional basketball club; discussed *infra* in text); *Dickstein v. duPont*, 443 F. 2d 783 (1st Cir. 1971) (contract whereby plaintiff became defendant's "registered representative" to the New York Stock Exchange pursuant to which he would seek prospective customers nationwide); *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104 (N.D. Ill. 1980) (contract between New York Stock Exchange brokerage firm and employee); *Fox v. Merrill Lynch & Co., Inc.*, 453 F. Supp. 561 (S.D. N.Y. 1978) (pension contract between New York Stock Exchange brokerage firm and employee); *Romnes v. Bache & Co., Inc.*, 439 F. Supp. 833 (W.D. Wis. 1977) (partnership contract to trade commodities futures contracts); *Weight Watchers of Quebec Ltd. v. Weight Watchers*

Erving involved a contract dispute between an athlete and a professional basketball club. Plaintiff Erving sought to avoid an arbitration clause in the contract by contending that the contract did not evidence a transaction involving commerce. He relied, as does both plaintiff and the Court of Appeals in the present case, on *Conley v. San Carlo Opera Co.*, 163 F. 2d 310 (2d Cir. 1947). In *San Carlo Opera Co.*, defendant contracted for plaintiff's services as an opera singer. A dispute arose and defendant, citing the arbitration clause in the contract, demanded arbitration under the federal act. The Second Circuit concluded that even though the contract required plaintff to give operatic performances throughout the country it did not evidence a transaction involving commerce under the act. Thus *San Carlo Opera Co.* could be read to support the proposition that personal service contracts which do not involve or relate to the interstate shipment of goods do not involve interstate commerce.

In *Erving*, however, the Second Circuit repudiated this broad reading of its decision in *San Carlo Opera Co.* After noting that the foundations on which the decision rested had eroded,[10] the

Int'l, Inc., 398 F. Supp. 1057 (E.D.N.Y. 1975) (contract granting franchises by New York corporation to foreign corporations); *Warren Bros. Co. v. Community Bldg. Corp. of Atlanta, Inc.*, 386 F. Supp. 656 (M.D. N.C. 1974) (contract to construct apartments in North Carolina); *C. P. Robinson Const. Co. v. Nat'l Corp. for Housing Partnerships*, 375 F. Supp. 446 (M.D.N.C. 1974) (contract to construct housing project in North Carolina); *Litton RCS, Inc. v. Pennsylvania Turnpike Commission*, 376 F. Supp. 579 (E.D. Pa. 1974), *aff'd mem.*, 511 F. 2d 1394 (3d Cir. 1975) (research and development contract in which contractor agreed to use best efforts to develop toll collection equipment for State Turnpike Commission); *Keating v. Superior Court, Alameda County*, 109 Cal. App. 3d 784, 167 Cal. Rptr. 481 (1980) (franchise agreements entailing the right to use federally registered trademarks); *University Casework Systems, Inc. v. Bahre*, 362 N.E. 2d 155 (Ind. App. 1977) (contract to construct university facility in Indiana); *Pathman Construction Co. v. Knox County Hospital Ass'n*, 326 N.E. 2d 844 (Ind. App. 1975) (contract for building and remodeling of hospital); *Dean Witter Reynolds Inc. v. Roven*, 94 N.M. 273, 609 P. 2d 720 (1980) (contract for commodity trading in gold futures); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 239 S.E. 2d 647 (1977) (contract to construct housing project in South Carolina). *But see Bryant-Durham Electric Co. v. Durham County General Hospital Corp.*, 42 N.C. App. 351, 256 S.E. 2d 529 (1979) (contract to perform electrical work on hospital facility in North Carolina).

10. The Second Circuit noted at 468 F. 2d 1069:

"The District Court . . . [in deciding *San Carlo Opera Co.*] relied heavily on the Supreme Court's decision in *Federal Base Ball Club v. National League*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922), in holding that contracts for the

Second Circuit concluded that its "holding [in *San Carlo Opera Co.*] that a contract of personal service with a business engaged in interstate commerce is not within the Arbitration Act appears to be inconsistent with *Prima Paint* . . . ." *Erving v. Virginia Squires Basketball Club, supra*, 468 F. 2d at 1069. It then held that plaintiff Erving's contract did evidence a transaction involving commerce and that arbitration was required.

It is evident then that the Second Circuit in *Erving* read *Prima Paint* to support *Erving's* holding that a personal service contract to be performed across state lines but which does not contemplate the interstate shipment of goods may evidence a transaction involving commerce. Thus reliance by plaintiff and our Court of Appeals on *San Carlo Opera Co.* is misplaced as the Second Circuit would in fact reject, as we do, the narrow view of the federal act's applicability fashioned by our Court of Appeals.

[1] It is clear, then, that a contract need not contemplate the interstate shipment of goods in order to evidence a transaction involving commerce. As *Erving* and the decisions set forth in notes 8 and 9, *supra*, make clear, a personal service contract which contemplates substantial interstate activity is a contract evidencing a transaction involving commerce within the meaning of the act. We agree with the approach suggested by Judge Lumbard, concurring in *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F. 2d 382 (2d Cir. 1961), *cert. denied*, 368 U.S. 817 (1961):

> "The significant question, therefore [in determining whether a contract evidences a transaction involving com-

personal services of entertainers were matters of state law not the subject of interstate commerce. The Supreme Court made clear as long ago as *United States v. Shubert*, 348 U.S. 222, 75 S.Ct. 277, 99 L.Ed. 279 (1955), and *United States v. International Boxing Club*, 348 U.S. 236, 75 S.Ct. 259, 99 L.Ed. 290 (1955), that *Federal Base Ball* did not apply to any form of interstate exhibition other than baseball. Two years later, *Radovich v. National Football League*, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed. 2d 456 (1957), held that a contract between a professional football player and his club was a subject of interstate commerce within the antitrust laws. At the last term the Court observed that *Federal Base Ball* and its successor, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953), "have become an aberration confined to baseball," *Flood v. Kuhn*, 407 U.S. 258, 282, 92 S.Ct. 2099, 2112, 32 L.Ed. 2d 728 (1972). *San Carlo Opera Co.* cannot properly be given a wider application than the underpinning on which it rested."

> merce], is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity. Cogent evidence regarding their state of mind at the time would be the terms of the contract, and if it, on its face, evidences interstate traffic . . . the contract should come within § 2. In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated." 287 F. 2d at 387. (Emphasis original.)

We do not mean to suggest that where the contracting parties are merely located in different states or where other facts tending only to show diversity of citizenship are present, the contract must necessarily be found to contemplate substantial interstate activity so as to trigger the act's applicability. Where, however, performance of the contract itself necessarily involves, so that the parties to the agreement must have contemplated, substantial interstate activity the contract evidences a transaction involving commerce within the meaning of the Federal Arbitration Act.[11]

[2] Turning to the present case, there can be no doubt that the contract in question contemplated substantial interstate activity. The contract, a standard form agreement between owner and architect, states that it is between "Burke County (North Carolina) Public Schools Board of Education" and "Shaver & Company, a Partnership." Further, it specifically lists Lee J. Brockway as one

11. We note further that the Federal Arbitration Act, unlike other statutes involving the commerce power, does not attempt to regulate activity affecting interstate commerce. Instead, it provides for those who so desire an expeditious quasi-judicial process for settling disputes. Parties seeking to avoid the act need only not place an arbitration provision in their contracts. If, however, the parties do contract for arbitration of their disputes and if their contract evidences a transaction involving substantial interstate activity, then their expectations should not be undermined by the courts. *See Metro Industrial Painting Corp. v. Terminal Const. Co., supra,* (Lumbard concurring). Indeed, both federal and state courts favor arbitration as an economical form of dispute resolution which helps relieve overburdened court dockets. *See, e.g., Galt v. Libby-Owens-Ford Glass Co., supra,* 376 F. 2d 711; *Robert Lawrence Co. v. Devonshire Fabrics, Inc.,* 271 F. 2d 402 (2d Cir. 1959), *cert. granted,* 362 U.S. 909 (1960), *cert. dismissed,* 364 U.S. 801 (1960); *American Airlines, Inc. v. Louisville & Jefferson County Air Board,* 269 F. 2d 811 (6th Cir. 1959); *Singer Co. v. Tappan Co.,* 403 F. Supp. 322 (D.C. N.J. 1975), *aff'd mem.,* 544 F. 2d 513 (3d Cir. 1976). *See also* G.S. 1-567.1 *et seq.*

of the principal architects and describes the project as being the construction of two high schools and other education facilities. Although the address of Shaver & Company is not given in the agreement between owner and architect, it is listed as follows on the standard form agreement between owner and contractor: "The Architect for this project is Shaver and Company, Lee J. Brockway, Architect, 105 Washington Street, Michigan City, Indiana." Further, the agreement between owner and contractor makes clear that the construction site of the high schools is Burke County.

It is clear then that the contract between owner and architect contemplates that on behalf of Burke County Public Schools Board of Education and in order to facilitate construction of high schools in Burke County architectural services would be rendered by a firm with its principal place of business in Indiana. Further, the contract between owner and architect calls for the architect, among other things, to consult with the owner, to prepare "Schematic Design Studies," to prepare a statement of probable construction costs and working drawings and specifications, to assist the owner in obtaining bids and awarding construction contracts, to make periodic visits to the construction site, to issue the owner's instructions to the contractor and guard the owner against work deficiencies, and to keep accounting records. In addition, undisputed statements in the affidavit submitted by John Shaver, a general partner of defendant, indicate that the design work for the buildings was done in Indiana; most of the field work was done by personnel working out of the Indiana office; the bookkeeping and accounting records were maintained in Kansas; plaintiff made payments to the defendant's Indiana office; defendant dealt with representatives of building material suppliers from all over the country and specified the use of materials manufactured by suppliers in several states; and the structural engineering design work was performed for defendant by Carl Walker Associates, a Kalamazoo, Michigan, firm. Thus the contractual provisions, the parties' circumstances at the time of the agreements, and the actual manner of performance, con-

sidered together, make clear that the parties in making the contract contemplated substantial interstate activity.[12]

We conclude, therefore, that the contract in question evidences a transaction involving commerce within the meaning of the Federal Arbitration Act.

II

[3] Plaintiff next contends that state courts need not apply the Federal Arbitration Act since it provides only for a federal remedy to be applied in federal courts. Thus, plaintiff argues, this Court is free to apply North Carolina law which the parties agreed would govern the contract[13] and which, at the time of contracting in 1969, made agreements to arbitrate future disputes unenforceable.[14] Defendant contends that the Federal Arbitration Act is the law in North Carolina insofar as it applies to any North Carolina contract. The Court of Appeals agreed with defendant on this point, and so do we.

The federal act applies expressly to petitions filed in "any United States district court . . . ." 9 U.S.C. § 4 (1976). However, in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed*, 364 U.S. 801 (1960), the Second Circuit, in determining whether the validity and interpretation of an arbitration clause in a con-

12. We note, further, an observation made in *C. P. Robinson Const. Co. v. Nat'l Corp. for Housing Partnerships*, *supra*, 375 F. Supp. 446, 450, a case involving a contract to construct a housing project in North Carolina:

> "Initially it is useful to examine the parties' intent in entering into an agreement with an arbitration clause. Such subjective intent of the parties is not controlling in determining if the agreement objectively evidences a transaction involving commerce, but it is illuminating as to how the parties interpreted their own contract. In this case, the plaintiffs and defendant voluntarily entered into a broad agreement to arbitrate future disputes. North Carolina statutory law, at the time the agreement was made, would not enforce future arbitration agreements. Therefore, the parties must have viewed the contract's arbitration clause as being validated by federal law, unless they sought to incorporate a useless provision into the partnership agreement."

13. The contract provides in Article 13: "APPLICABLE LAW—Unless otherwise specified, this agreement shall be governed by the law of the state of North Carolina."

14. *See supra*, n. 5.

tract evidencing a transaction involving commerce should be governed by the federal act or by state law, concluded:

> "[W]e think the text of the Act and the legislative history demonstrate that the *Congress based the Arbitration Act in part on its undisputed substantive powers over commerce and maritime matters.* To be sure much of the Act is purely procedural in character and is intended to be applicable only in the federal courts. But Section 2 declaring that arbitration agreements affecting commerce or maritime affairs are 'valid, irrevocable, and enforceable' goes beyond this point and must mean that arbitration agreements of this character, previously held by state law to be invalid, revocable or unenforceable are now made valid, irrevocable, and enforceable.' *This is a declaration of national law equally applicable in state or federal courts." Id.* at 407. (Emphasis supplied.)

Accordingly, the Second Circuit held that a claim of fraud in the inducement of the contract—as opposed to a claim of fraud in the inducement of the arbitration clause itself—is, as a matter of federal law, to be resolved by arbitration and not, as state law would have required in *Robert Lawrence*, by the courts.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra*, the Supreme Court was faced with the same issue, *i.e.*, whether a claim of fraud in the inducement of the contract is, as a matter of federal law, to be resolved by arbitration or whether, where state law requires, it is to be resolved by the courts. The Court agreed, "albeit for somewhat different reasons," with the Second Circuit's conclusion in *Robert Lawrence* that as a matter of "national substantive law" a claim of fraud in the inducement of the entire contract is for the arbitrator to decide "even in the face of a contrary state rule." 388 U.S. at 400. While the Court did not address specifically whether this "national substantive law" must be applied in state courts, it did note that "it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.' " *Id.* at 405.

State courts, relying on *Prima Paint* and *Robert Lawrence* for the proposition that the Federal Arbitration Act is based on Congress' power to control commerce and admiralty, have with great uniformity concluded that they must, pursuant to the

Supremacy Clause, U.S. Const. Article VI, Clause 2, apply the act to maritime transactions or contracts evidencing a transaction involving commerce notwithstanding conflicting state law.[15] We agree with this conclusion. It furthers the Congressional intent of making available to the business community the benefits of arbitration while simultaneously relieving crowded court dockets. Further, it promotes uniformity where the parties have agreed to arbitrate and discourages "forum shopping."[16]

Our conclusion that we must apply the federal act is not altered by the contractual provision calling for application of North Carolina law. The Federal Arbitration Act, by virtue of the Supremacy Clause, is, as discussed, part of North Carolina law. In

15. *See, e.g., Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 136 Cal. Rptr. 378 (1977); *West Point-Pepperell, Inc. v. Multi-Line Indus., Inc.*, 231 Ga. 329, 201 S.E. 2d 452 (1973); *Matter of A/S Ludwig Mowinckels Rederi (Dow Chem. Co.)*, 25 N.Y. 2d 576, 307 N.Y.S. 2d 660, 255 N.E. 2d 744, *cert. denied*, 398 U.S. 939 (1970); *Cooper v. Computer Credit Systems, Inc.*, 40 A.D. 2d 692, 336 N.Y.S. 2d 380 (1972); *Aerojet-General Corp. v. Non-Ferrous Metal Refining, Ltd.*, 37 A.D. 2d 531, 322 N.Y.S. 2d 33 (1971); *Pathman Construction Co. v. Knox County Hospital Ass'n, supra*, 326 N.E. 2d 844; *Episcopal Housing Corp. v. Federal Ins. Co., supra*, 269 S.C. 631, 239 S.E. 2d 647; *Miller v. Puritan Fashions Corp.*, 516 S.W. 2d 234 (Tex. Civ. App. 1974); *Mamlin v. Susan Thomas, Inc.*, 490 S.W. 2d 634 (Tex. Civ. App. 1973); *Pinkis v. Network Cinema Corp.*, 9 Wash. App. 337, 512 P. 2d 751 (1973). *But see Pullman, Inc. v. Phoenix Steel Corp.*, 304 A. 2d 334 (Del. Super. 1973).

16. As noted in *Bernhardt v. Polygraphic Co., supra*, 350 U.S. 198, which held that in a federal diversity action state, not federal, law must be applied where the transaction is wholly intrastate:

> "If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. . . . There would in our judgment be a resultant discrimination if the parties suing on a Vermont cause of action in the federal court were remitted to arbitration, while those suing in the Vermont court could not be." *Id.* at 203-04.

The converse is, of course, equally true: Parties in a state court to a contract evidencing an interstate transaction should not be permitted to avoid arbitration when, had the action been brought in federal court, they would have been compelled to arbitrate. This much flows from the denomination of compulsory arbitration as a matter of substantive, rather than procedural, law. It was so denominated in both *Bernhardt* and *Prima Paint*.

Mamlin v. Susan Thomas, Inc., 490 S.W. 2d 634 (Tex. Civ. App. 1973), the Texas Court of Civil Appeals, in finding the federal act to be applicable despite the parties' selection of New York law, stated:

> "The Federal Arbitration Act is the law of New York and also the law of Texas with respect to any 'contract evidencing a transaction involving commerce,' as defined in that act. The federal act has been held to be substantive rather than procedural, and equally applicable in state and federal courts, even though the contract provides that any dispute should be settled by arbitration under the laws of a particular state." *Id.* at 637.

Similarly, in *Pinkis v. Network Cinema Corp.*, 9 Wash. App. 337, 512 P. 2d 751 (1973), the Washington Court of Appeals, in considering a contract which provided that it would be governed by New York law, stated:

> "In any event, we need not decide whether New York law would require arbitration or permit court proceedings to decide the issues raised in view of our decision that the federal act controls.
>
> "Further, our discussion has set forth the primacy of the federal arbitration act, substantively and procedurally, over state law when interstate commerce is the subject matter of the contract in dispute." 9 Wash. App. at 344-45, 512 P. 2d at 756-57.

In *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F. 2d 1263, 1269 (7th Cir. 1976), the Seventh Circuit stated:

> "Parties are not free to burden the arbitration process under the Federal Act by adopting state law which shifts the determination of disputes from arbitrators to courts. To allow parties to so contract would undermine the provisions of the Federal Act. Congress, in enacting the Federal Arbitration Act, exercised its power over admiralty and interstate commerce. Any arbitration contract involving one of those areas is governed by the Federal Act. To permit the parties to contract away the application of the Act by adopting state law to govern their agreement would be inconsistent with the Act itself and with the holding in *Prima Paint*."

See also Collins Radio Co. v. Ex-Cell-O Corp., 467 F. 2d 995 (8th Cir. 1972); *American Airlines, Inc. v. Louisville & Jefferson Coun-*

ty Air Board, 269 F. 2d 811 (6th Cir. 1959); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 239 S.E. 2d 647 (1977). *But see Standard Co. v. Elliott Const. Co., Inc.*, 363 So. 2d 671 (La. 1978). We conclude therefore that the choice of law provision in the contract does not preclude application of the Federal Arbitration Act.

We hold, then, that the contract in question must be submitted to arbitration pursuant to the federal act.

The decision of the Court of Appeals is reversed and the case remanded to that court for further remand to Burke Superior Court for proceedings not inconsistent with this opinion.

Reversed.

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

PELHAM REALTY CORPORATION AND MODELLE SCISM v. THE BOARD OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA

DEPARTMENT OF TRANSPORTATION v. PELHAM REALTY CORPORATION

No. 120

(Filed 8 July 1981)

1. **Eminent Domain § 7.7— condemnation proceeding—failure of landowner to file answer—stipulations**

Plaintiff landowners' failure to answer a proceeding filed by the Board of Transportation to condemn property for an access road was not a fatal defect where plaintiffs filed an independent action against the Board seeking a permanent injunction against the construction of the access road, and the parties stipulated that the court ruling in plaintiffs' independent action would be applicable to the Board's condemnation action and that the ruling would resolve issues in the condemnation action concerning public use and public purpose.

2. **Eminent Domain § 7.8; Injunctions § 2— injunction against condemnation proceeding—adequate remedy at law**

Plaintiff landowners were not entitled to an injunction restraining the Board of Transportation from condemning plaintiffs' land for an access road on the ground that the road would not serve a public purpose since the ground of objection is one which plaintiffs may assert as a defense in the condemnation proceeding itself.

3. Eminent Domain § 3.2— taking of property for service road

Where the upgrading of a highway from a two-lane, unlimited access highway to a multi-lane, limited access expressway will deny a quarry owner access to its property from the highway, an access road to the quarry owner's property proposed by the Board of Transportation to be located a substantial distance from the expressway was a "service road" authorized by G.S. 136-89.55, and the Board of Transportation did not abuse its discretion under the circumstances of this case in deciding to provide access to the quarry owner's property by such a service road rather than by a right-of-way adjacent to the expressway.

4. Eminent Domain § 3.2— taking of property for service road—public purpose

An exercise of the power of condemnation by the Board of Transportation to acquire a right-of-way for a service road to a quarry owner's property was for a public purpose where the owner had access to its quarry at three points along a two-lane, unlimited access highway; when the highway is upgraded to a multi-lane, limited access expressway, the owner will have access to its quarry from Virginia but will no longer have access in North Carolina; the quarry property is effectively landlocked because it is bounded on the west by the expressway, on the north by the State of Virginia, and on the south and east by private property; and the service road will also provide access to property south of the quarry.

ON discretionary review of the decision of the North Carolina Court of Appeals reported at 50 N.C. App. 106, 272 S.E. 2d 777 (1980), and the unpublished opinion of the Court of Appeals reported at 50 N.C. App. 212, 273 S.E. 2d 336 (1980), reversing judgment of *Long, J.*, entered 6 December 1979 in CASWELL Superior Court.[1]

Plaintiffs, Pelham Realty Corp. and Modelle Scism, are the owners of a 116-acre tract of land which is situated in the northwestern corner of Caswell County near the boundary between North Carolina and Virginia. Plaintiffs' property is bounded on the west by U.S. Highway 29 and on the east it is bounded by the Southern Railway. State Road 1353[2] runs parallel to and on the

1. In *Department of Transportation v. Pelham Realty Corporation*, the Department of Transportation (hereinafter referred to as "the Department") initiated proceedings to condemn plaintiffs' land. In *Pelham Realty Corporation v. Board of Transportation*, plaintiffs sought to enjoin such taking by the state. It has been agreed and stipulated by the parties that the record in the latter case will serve as the proper basis for decision on both cases.

2. U.S. Highway 29 was relocated to the west of plaintiffs' property in 1951 or 1952. The highway which previously bore that designation then became identified as State Road 1353.

east side of the railroad. Vulcan Materials Company (Vulcan) owns a large tract of land which is adjacent to and north of plaintiffs' property. The Vulcan property lies between that of plaintiffs and the Virginia state line. It also extends a significant distance into Virginia.

From the time of its relocation in the early 1950's, and until its upgrading in the middle or late 1970's, U.S. 29 was a two-lane, undivided highway, with unlimited access, which crossed the northwestern corner of Caswell County and extended on to Danville, Virginia. Traffic over the highway has steadily increased, and, during the last decade, the Department and its predecessor agencies engaged in an ongoing process to redesign and rebuild the thoroughfare from the town of Ruffin in Rockingham County to the boundary between North Carolina and Virginia. The result of this process was a decision to upgrade the facility by making it a four-lane, limited access highway. The proposed design contemplated two roadways twenty-four feet wide separated by a median no less than 68 feet wide.

At and before the time these actions were instituted, Vulcan operated a quarry on its property. It had several means of access to its land with three access roads leading from the property to U.S. 29. Formerly, there was also an access road to State Road 1353 which crossed the Southern Railway tracks by way of a wooden bridge constructed and maintained by the railroad. The bridge had been closed by the railroad because of its unsafe condition. In addition, there was an access road which led northward and entered onto a public highway in Virginia.

The plans for the improvement of U.S. 29 envisioned the need for the acquisition of eighteen acres of land belonging to Vulcan. Such an acquisition would result in the company being denied its previously unlimited access to the highway. The only access which would remain would be that provided by the public road in Virginia.

On 29 September 1976, Vulcan made a formal request to the Department for an access road to nearby N.C. Highway 700[3] or, in the alternative, an on-grade crossing over the railroad. Several

3. N.C. Highway 700 is located south of plaintiffs' property and runs generally east and west. It has access to the improved U.S. 29.

feasibility studies were made concerning Vulcan's access to its property. The Department ultimately concluded that the best approach would be the construction of a paved access road leading to the Vulcan tract adjacent to the west side of and paralleling the Southern Railway. This new road would be approximately four-tenths of a mile east of U.S. 29. The access road would extend from Vulcan's property on the north to Highway 700 on the south. In return for the construction of a paved service road, Vulcan agreed to sell 18.21 acres of land and all of its rights of access to Highway 29 for $31,000.00. The service road was to traverse the property of several landowners, including that of plaintiffs. Therefore, it became necessary for the Department to acquire the needed right-of-way in some appropriate fashion.

On 12 January 1979, construction of the service road was authorized by a resolution of the Board of Transportation. A contract for the construction of the road was subsequently let for a total price of $174,464.00. The contract called for a completion date of 30 November 1979.

On 29 May 1979, the Department filed a complaint and declaration of taking for the purpose of acquiring the land necessary for the construction of the access road. Later that same day, plaintiffs filed an independent lawsuit against the Department seeking a permanent injunction against the construction of the access road. Plaintiffs alleged that the acquisition of a right-of-way over this land would not serve a valid public purpose.

The matter came on for hearing on 1 August 1979 before Judge Long who denied plaintiffs' motion for a preliminary injunction. At a hearing on 8 November 1979, Judge Long denied plaintiffs' request for a permanent injunction.[4] On 30 November 1979, the day upon which the road was completed, the judge signed an order denying plaintiffs relief. Plaintiffs appealed.

In an opinion by Judge Wells, concurred in by Judges Vaughn and Martin (Robert M.), the Court of Appeals reversed the judgment of the trial court and remanded the case for the entry of an order permanently enjoining the taking of plaintiffs' property. The panel held that the road in question did not meet

4. By stipulation of the parties, all of the evidence received at the hearing on 1 August was admissible at the hearing on 8 November.

the statutory definition of a frontage road and that the road served a private purpose rather than a public purpose.

We granted the Department's petition for discretionary review pursuant to G.S. § 7A-31 (1969), on 4 March 1981.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Charles M. Hensey, for the North Carolina Department of Transportation, appellant.

Tuggle, Duggins, Meschan, Thornton & Elrod, P.A., by David F. Meschan, for appellees.

BRITT, Justice.

I.

After finding numerous facts, Judge Long made three conclusions of law: First, the Department has the authority, pursuant to G.S. § 136-89.55, to construct such service roads as in its opinion are necessary or desirable; second, the right-of-way which the Department seeks to acquire from plaintiffs is for a public road; and, third, the Department's exercise of its powers of condemnation in this case is for a public purpose. Each of these conclusions is pertinent to a proper resolution of the case *sub judice.* However, two preliminary considerations must be addressed first if the substantive issues of the case are to be answered: First, the procedural posture of the litigation; and, second, the propriety of the remedy of an injunction in a condemnation proceeding.

A.

Article 9 of Chapter 136 of the General Statutes governs the Department's exercise of its powers of eminent domain. *See generally* G.S. §§ 136-103 to -121.1 (1981). Specifically, G.S. §§ 136-103 (1981), provides that in the event that condemnation becomes necessary, the Department shall institute a civil action in the superior court of any county in which the land in question is located. Such an action is commenced by the filing of a complaint,[5]

5. The complaint shall contain or have attached thereto the following:

(1) A statement of the authority under which and the public use for which said land is taken.

as well as a declaration of taking which declares that such land, easement or interest is taken for the use of the Department of Transportation.[6] The filing of the complaint and the notice of taking must be accompanied by the deposit of the sum of money which the Department estimates to be just compensation for the taking in question. Upon the filing of the complaint, the declaration of taking, and the deposit of estimated compensation, title to the land or other interest in question, as well as the right to immediate possession vests in the Department. G.S. § 136-104 (1981); *see generally State v. Johnson*, 278 N.C. 126, 179 S.E. 2d 371 (1971); *State Highway Comm'n v. Myers*, 270 N.C. 258, 154 S.E. 2d 87 (1967). The judge of the court in which the action is filed must enter such orders as are required to place the Department in immediate possession. G.S. § 136-104 (1981). Such land or interest is deemed to be condemned and taken for the use of the Department as of the time of filing. *Id.* Any person named in and served with a complaint and a declaration of taking has twelve months from the date of service to answer. G.S. § 136-107 (1981).[7] Such persons

(2) A description of the entire tract or tracts affected by said taking sufficient for the identification thereof.

(3) A statement of the estate or interest in said land taken for public use and a description of the area taken sufficient for the identification thereof.

(4) The names and addresses of those persons who the Department of Transportation is informed and believes may have or claim to have an interest in said lands, so far as the same can by reasonable diligence be ascertained and if any such persons are infants, non compos mentis, under any other disability, or their whereabouts or names unknown, it must be so stated.

(5) A statement as to such liens or other encumbrances as the Department of Transportation is informed and believes are encumbrances upon said real estate and can by reasonable diligence be ascertained.

(6) A prayer that there be a determination of just compensation in accordance with the provisions of this Article.

G.S. § 136-103 (1981).

6. The declaration shall contain or have attached thereto the information required by subsections 1 through 4 of footnote 5, as well as a statement of the sum of money which the Department of Transportation estimates to be just compensation for the taking in question.

7. The courts have no discretionary power to allow an extension of time for the filing of an answer under G.S. § 136-107 (1981). *State Highway Comm'n v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967).

may also apply to the court for disbursement of the money deposited in the court, or any part thereof, as full compensation, or as a credit against just compensation without prejudice to any further proceedings to determine just compensation. G.S. § 136-105 (1981)

In the present case, there is no dispute that the Department has complied with the relevant statutory provisions concerning the procedure that is to be employed in condemnation proceedings.[8] On 28 May 1979, the Department filed its complaint and declaration of taking with the Caswell County Clerk of Superior Court. The Department also deposited the sum of $19,800.00 with the court, that amount being its estimate of fair compensation. Plaintiffs were informed by letters dated 23 May 1979 of the Department's intention to file suit.

[1] Plaintiffs have never answered the complaint filed by the Department. Ordinarily, that failure would subject them to the entry of default. *See* G.S. § 1A-1, Rule 55 (1969). However, later in the day on 28 May 1979, plaintiffs filed an independent lawsuit in which they sought a permanent injunction against the proposed taking. The Department filed answer to that action on 17 August 1979.

Plaintiffs' failure to answer the condemnation proceeding filed by the Department is not a fatal defect. The parties have entered into several stipulations to chart the progress of the litigation. Not only have the parties stipulated to having the cause heard out of county and out of term by Judge Long, they have also agreed that the evidence submitted at the hearing on the motion for a preliminary injunction would be admissible at the subsequent hearing on the motion for a permanent injunction. Furthermore, the parties have stipulated that the court ruling concerning plaintiffs' independent action would be applicable to the Department's condemnation action and that the ruling would resolve the issues in the condemnation action concerning public use and public purpose.

Stipulations are viewed favorably by the courts because their usage tends to simplify, shorten, or settle litigation as well as

8. The documents filed by the Department comport with the requirements of G.S. § 136-103 (1981).

save costs to litigants. *Outer Banks Contractors, Inc. v. Forbes*, 302 N.C. 599, 276 S.E. 2d 375 (1981); *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). The stipulations which the parties have entered into have had their desired effect. The duplication of evidence, as well as the repetition of trial proceedings, has been avoided. The entire course of the litigation has been expedited by the cooperative efforts of the litigants and their counsel. While a court has no authority to alter the requirements of G.S. § 136-107, we perceive no reason why parties may not make reasonable stipulations concerning matters to which the statute is addressed. In any event, the rights of neither party have been violated or prejudiced by plaintiffs' failure to file answer. It is clear that there has been a complete and spirited adversary proceeding throughout the course of these proceedings.[9]

B.

[2] In their complaint, plaintiffs prayed for the entry of a permanent injunction which would enjoin the Department "from acquiring or constructing the contemplated right-of-way" through the property in question. On 1 August 1979, the case came on for hearing on plaintiffs' motion for a preliminary injunction. The motion was denied. On 8 November 1979, a hearing was held on plaintiffs' motion for a permanent injunction. Again, the court denied plaintiffs relief. The Court of Appeals reversed,[10] and it remanded the cause for entry of an order permanently enjoining the taking of plaintiffs' property for the project. The Court of Appeals was in error by so ordering.

It is fundamental that an injunction is an equitable remedy. *Lane Trucking Co. Haponski*, 260 N.C. 514, 133 S.E. 2d 192 (1963);

9. We would pause to note that the parties concluded one additional stipulation at the trial level which is significant. On 6 September 1979, the Department stipulated that plaintiffs could withdraw the sum deposited as its estimate of just compensation without prejudice to its right to contest the issues of the public purpose or the public use of the taking.

10. The Court of Appeals grounded its decision upon its conclusion that the evidence before the trial court failed to establish that the proposed road met the statutory definition of a frontage road or that it was constructed to provide access where all other access has been denied. Those principles will be dealt with in a subsequent section of our opinion.

see generally D. Dobbs, *Handbook on the Law of Remedies* § 2.10 (1973). It follows, therefore, that where there is a full, complete, and adequate remedy at law, the equitable remedy of injunction will not lie. *E.g., City of Durham v. Public Service Company of North Carolina, Inc.*, 257 N.C. 546, 126 S.E. 2d 315 (1962). This court has relied upon these fundamental principles to hold that an injunction will not lie to restrain the state from maintaining condemnation proceedings on the ground that it was without authority to condemn the land since the ground of objection is one which the landowner may assert as a defense in the condemnation proceeding itself. *State Highway Comm'n v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967); *see generally City of Reidsville v. Slade*, 224 N.C. 48, 29 S.E. 2d 215 (1944). We are of the opinion that *Thornton* controls the case *sub judice.*

Thornton was a case in which the State Highway Commission sought to condemn a right-of-way across a tract of land owned by the defendants. The Commission proposed to construct an access road as a component of a larger highway project. The proceeding was commenced on 1 October 1965 by the issuance of a summons, the filing of a complaint, the filing of a declaration of taking, and the deposit of the estimated compensation due the defendants for the taking of their property. On 6 October 1965, the state began construction. Not until 22 July 1966, when the road was virtually completed, did defendants file their answer.[10a] Defendants contended that the taking was not for a public purpose, and they sought the entry of a permanent injunction enjoining the condemnation of their land. Upon receiving evidence and making findings of fact, the court concluded that the taking of defendants' land was not for a public purpose, and it entered judgment permanently enjoining the state from appropriating defendants' land. On appeal, this court reversed the judgment of the trial court, and it remanded the cause for the determination of appropriate compensation. Writing for the majority, Justice Lake observed that the defendants could have derived no benefit from the entry of an injunction which they would not have gained by the entry of a judgment dismissing the condemnation proceeding. Such is the case here.

In their independent action in which they sought the entry of a permanent injunction restraining the taking of their land, plain-

10a. During oral arguments in the case at hand attorneys for the parties admitted that construction of the road in question has been completed.

tiffs alleged that the project did not serve a public purpose. In view of the stipulations that allegation constitutes a substantive ground of defense to the Department's condemnation action. It follows, therefore, that the plaintiffs were able to establish the absence of a public purpose, the appropriate remedy would be the dismissal of the condemnation suit brought by the Department, not the entry of a permanent injunction. We therefore hold that the Court of Appeals erred in ordering that the cause be remanded for entry of a permanent injunction.

II.

Having resolved the procedural and remedial issues[11] posed by the case *sub judice*, we now direct our attention to the substantive issues which have been preserved for our review: whether the Department's action in proceeding to condemn plaintiffs' property was authorized, and assuming that it was authorized, whether that action was for a public purpose. We answer both questions in the affirmative.

A.

[3] G.S. § 136-89.55 (1981), provides, in pertinent part, that

> In connection with the development of any controlled-access facility the Department of Transportation is authorized to plan, designate, establish, use, regulate, alter, improve, maintain, and vacate local service or frontage roads and streets or to designate as local service or frontage roads and streets any existing road or street, and to exercise jurisdiction over service or frontage roads in the same manner as is authorized over controlled-access facilities under the terms of this Article, if in its opinion such local service or frontage roads and streets are necessary or desirable; . . . .

G.S. § 136-89.49(3) (1981), defines a frontage road as being "a way, a road or a street which is auxiliary to and located on the

11. In their prayer for relief, plaintiffs sought the entry of a permanent injunction enjoining the action of the Department. We have held above that the entry of a permanent injunction would be an inappropriate remedy. However, that does not mean that our consideration of the substantive issues posed herein is foreclosed. Plaintiffs' prayer for relief and the particular remedy which it seeks does not control the relief that a court may grant under appropriate circumstances. *See State Highway Comm'n v. Thornton, supra.*

side of another highway, road or street for service to abutting property and adjacent areas and for the control of access to such other highway, road or street." The Court of Appeals concluded that the road about which the present litigation is concerned is not a frontage road under the language of the statutory definition. *Pelham Realty Corp. v. Board of Transportation*, 50 N.C. App. at 108, 272 S.E. 2d at 778. We agree with that conclusion. The right-of-way which the Department seeks to obtain from plaintiffs is located a substantial distance from the expressway now under construction. To so hold, however, does not necessarily resolve the case before us in favor of plaintiffs.

It is well-established that the intent of the legislature controls the interpretation of a statute. *E.g., State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975); *State v. Johnson*, 278 N.C. 126, 179 S.E. 2d 371 (1971); *Underwood v. Howland*, 274 N.C. 473, 164 S.E. 2d 2 (1968). Statutes which deal with the same subject matter must be construed *in pari materia*, *e.g., Shaw v. Baxley*, 270 N.C. 740, 155 S.E. 2d 256 (1967); *Becker County Sand and Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E. 2d 19 (1967); *Hobbs v. County of Moore*, 267 N.C. 665, 149 S.E. 2d 1 (1966), and harmonized, if possible, to give effect to each. *E.g., Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 166, 155 S.E. 2d 78 (1969).

It is within the power of the legislature to define a word used in a statute, *Vogel v. Reed Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970), and that statutory definition controls the interpretation of that statute. *Martin v. Glenwood Park Sanatorium*, 200 N.C. 221, 156 S.E. 849 (1931). However, where the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or indicated by the context. *E.g., Lafayette Transportation Service, Inc. v. County of Robeson*, 283 N.C. 494, 196 S.E. 2d 770 (1973).

The term "service road" is not defined by statute, nor is its meaning controlled by the statutory definition of the term "frontage road." It is therefore appropriate to apply a common sense construction to the term. It is manifest that the construction of a limited access highway necessarily involves the disruption of existing traffic patterns as well as access to parcels of property. The proposed project across plaintiffs' property would serve to

alleviate such disruption. The evidence in the present case tends to show that Vulcan will be denied access to its property by way of Highway 29 as a result of the upgrading of its status. While it is true that the Department could have sought to procure a right-of-way adjacent to the expressway rather than some distance away as it has done, it was not required to do so. In the absence of an abuse of discretion, the Department of Transportation has broad authority over the design and construction of proposed highways. *State Highway Comm'n v. Greensboro City Bd. of Education*, 265 N.C. 35, 143 S.E. 2d 87 (1965); *Cameron v. State Highway Comm'n*, 188 N.C. 84, 123 S.E. 465 (1924); *Road Comm'n of Edgecombe v. State Highway Comm'n*, 185 N.C. 56, 115 S.E. 886 (1923). In the exercise of its authority, the Department may conclude that a frontage road may not be feasibly constructed. Such factors as comparative cost, the use to which the proposed road will be put, and the peculiarities of the local topography ought to be weighed in assessing such decision.

We perceive no abuse of discretion by the Department in the case at hand. Beginning in the fall of 1976, the Department began considering the feasibility of constructing a road which would provide access to the Vulcan tract. The Department concluded that it was not practical to provide access across the right-of-way belonging to Southern Railway because the construction cost of adequate structures across the property alone would amount to $140,000 and the design speed for them would make their usage by the general public hazardous. The Department further concluded that grade crossings of the railroad tracks would be hazardous to vehicular traffic, as well as to trains passing over the tracks. The Department rejected the construction of a frontage road along Highway 29 because the topography along the proposed route would have caused the project to cost over $140,000. On the other hand, a road adjacent to the railroad right-of-way would have incurred construction costs of approximately $60,000.00. The cost differential among the proposals is apparent. In addition, the construction of the road in question would yield substantial savings in right-of-way costs for the overall project. The evidence showed that lack of an adequate access road would result in substantial losses of value to the parcels affected by the overall project. Such losses are compensable to the owners. We conclude, therefore, that plaintiffs have failed to establish that the Depart-

ment abused its discretion in selecting the route adjacent to the railroad right-of-way as a means of access to the Vulcan property.

B.

[4] Since the other issues which are posed by the present case have been resolved adversely to plaintiffs' position, the outcome of this dispute ultimately turns upon the nature of the proposed project. After careful deliberation, we conclude that there is competent evidence in the record to support Judge Long's conclusion of law that the Department's exercise of its power of condemnation was for a public purpose. Accordingly, we reverse the judgment of the Court of Appeals.

It is fundamental that private property may be taken by the state under its powers of eminent domain only for a public purpose. *E.g., State Highway Comm'n v. Farm Equipment Co.*, 281 N.C. 459, 189 S.E. 2d 272 (1972); *State Highway Comm'n v. Asheville School, Inc.*, 276 N.C. 556, 173 S.E. 2d 909 (1970); *Vance County v. Royster*, 271 N.C. 53, 155 S.E. 2d 790 (1967). However, the state's exercise of its power of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that a private use or benefit will result which would not of itself warrant an exercise of the power. *State Highway Comm'n v. Asheville School, Inc., supra.* The question of whether property is taken for a public purpose is a question of law which is reviewable on appeal. *State Highway Comm'n v. Batts*, 265 N.C. 346, 144 S.E. 2d 126 (1965); *City of Charlotte v. Heath*, 226 N.C. 750, 40 S.E. 2d 600 (1946).

It will be recalled that before Highway 29 was upgraded to a multi-laned, limited access highway, Vulcan had access to its quarry at three points along the road. The upgrading of the thoroughfare resulted in these points of access no longer being available for Vulcan's use. The Department's action effectively denied the company access to its property from a North Carolina road. To the south of the quarry and its contiguous land lies the land owned by plaintiffs. Vulcan has no right to traverse that area in order to utilize its own parcel. To the east of Vulcan's property is the right-of-way owned by the Southern Railway. At one time, Vulcan had been able to cross the railroad's property by way of a wooden bridge constructed and maintained by the railway. However, the bridge had been closed by the railroad

because of its hazardous condition. It is, therefore, apparent that upon completion of the Highway 29 project, Vulcan would have no right of access to its property in North Carolina. While it may be true that Vulcan does have access to its quarry from Virginia, that is not determinative of the issue before us. North Carolina has no authority over the Commonwealth of Virginia or its political subdivisions. These entities are free to continue to provide this access in the future. However, they are also free to restrict or deny this access in accordance with their own established procedures. In other words, the fact that Vulcan may have continued access to its property through the Commonwealth of Virginia is irrelevant. Due to the action of an agency of the State of North Carolina, Vulcan will be denied access to its property through this state unless some alternative access is provided. It is within the power and responsibility of the state to so provide. *State Highway Comm'n v. Asheville School, Inc., supra,* is illustrative of this principle.

In *Asheville School,* the state sought to condemn a tract of land belonging to the defendant so that it could provide access to a 1.5 acre tract belonging to one C. A. Mashburn. In the process of constructing a portion of Interstate 40 through Asheville, the state was required to relocate a segment of a secondary road to which the Mashburn tract previously had access. On one side, the tract was bounded by the right-of-way for the Interstate. On all other sides, the tract was bordered by property belonging to the defendant. The Mashburn tract had no right of access to any public road. To alleviate that problem, the state sought to condemn .074 acres belonging to the defendant in order to construct a driveway leading to the Mashburn residence. The defendant resisted the taking and argued that the road served a private use only. Speaking for a unanimous court, Justice (later Chief Justice) Sharp held that while the proposed roadway would benefit a private purpose, its construction was auxiliary to and necessitated by the construction of a comprehensive highway project. Therefore, it was within the power of the state to exercise its powers of eminent domain to secure property for the roadway's construction. 276 N.C. at 562-63, 173 S.E. 2d at 914; *compare Andrews v. State of Indiana,* 248 Ind. 525, 229 N.E. 2d 806 (1967); *Luke v. Massachusetts Turnpike Authority,* 337 Mass. 304, 149 N.E. 2d 225 (1958).

In the case *sub judice*, as a result of the action of the Department of Transportation in upgrading Highway 29 from a two-lane road with unlimited access to a multi-lane, limited access expressway, Vulcan will be denied access to its property in North Carolina. It is effectively landlocked because it is bounded on the west by the expressway, on the north by an independent sovereignty, and on the south and east by private property. Furthermore, while Vulcan and its employees will be the primary users of the road in question, the thoroughfare will also provide access to property to the south of the quarry, including that of plaintiffs. To that extent, the proposed access road will serve the public interest to a greater extent than was the case in *Asheville School* where the only usage which was reasonably contemplated was concerned with but one parcel of land.[12]

For the reasons stated above, the decisions of the Court of Appeals are reversed and the judgment of the trial court will be reinstated. This cause will be remanded to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

12. Plaintiffs' reliance upon *State Highway Comm'n v. Batts, supra*, is misplaced. In *Batts*, the state sought to condemn land in order to construct a road designed to serve five farm properties upon which four houses were located. All of the occupants of the houses were members of the Batts family. The road in question was to begin at the boundary of another secondary road and run 3,316 feet to a dead end. This court held that the proposed road would serve only a private purpose and proscribed the condemnation. In the case *sub judice*, while it is true that the proposed access road is part of the contract concluded between the state and Vulcan and will be primarily used in connection with Vulcan's operations, it is an incidental component of a larger project serving the public interest. *Compare State Highway Comm'n v. Thornton, supra.*

STATE OF NORTH CAROLINA v. HERMAN K. SIMPSON

No. 20

(Filed 8 July 1981)

1. **Criminal Law § 75.1— confession at police administration building—no illegal arrest—inculpatory statement admissible**

There was no merit to defendant's contention that, when law enforcement officers requested that he accompany them to the police administration building, he was "arrested" without a warrant and without probable cause and that any statements he had made subsequent to this "arrest" were the fruits of and tainted by the illegal arrest and were therefore inadmissible, since defendant voluntarily agreed to accompany law enforcement officers to the police administration building; officers did not frisk or handcuff defendant at that time; defendant was not subjected to any physical contact with the officers until after he made an incriminating statement; during his interrogation the officers honored each of his requests for food, water, or use of bathroom facilities; he was not treated as though he was incarcerated; defendant was not under arrest until an officer appeared with a warrant for his arrest, and he would have been allowed to leave, had he asked to do so, at any time prior to the officer's appearance with the arrest warrant; when the officer appeared with a warrant for defendant's arrest, there was sufficient evidence before the law enforcement officers to constitute probable cause to arrest defendant, and any subsequent deprivation of his liberty was based on probable cause and was therefore constitutionally valid; and the fact that defendant was not actually served with the warrant before being deprived of his liberty did not affect the constitutionality of any arrest based on probable cause.

2. **Criminal Law § 26.8— deadlocked juries in former trials—third trial not double jeopardy**

Defendant was not placed in double jeopardy by his third trial for the same offense after two prior trials ended when the jury was unable to reach a verdict and the trial judge declared a mistrial, since there was no indication of harassment by the State or bad faith conduct by the trial judges in defendant's two previous trials; the juries in the prior trials were genuinely deadlocked and the trial judges afforded them every reasonable opportunity to reach a verdict; and there was no evidence that the trial judges acted too quickly in declaring a mistrial in order to provide the State with a more favorable opportunity to convict defendant.

3. **Burglary and Unlawful Breakings § 5— first-degree murder—felonious intent—sufficiency of evidence**

The State presented sufficient circumstantial evidence of defendant's intent to commit a felony at the time of the breaking and entering to withstand defendant's motion to dismiss where the evidence tended to show that defendant was observed near the crime scene several hours before the breaking and entering occurred; he broke into the dwelling by cutting the screen in the screen door and breaking a pane of glass in the main door; and defendant in fact killed the occupant of the house and took several items therefrom.

4. Homicide § 26— second degree murder—instructions not prejudicial

The trial court's error in defining second degree murder as "the unlawful and intentional killing of a human being with malice but with premeditation and deliberation" was not prejudicial to defendant, since the error was not brought to the court's attention at the time it was made, and any effect of this *lapsus linguae* was cured by the court's subsequent instruction that, if the jury found beyond a reasonable doubt that defendant intentionally and with malice struck the decedent with a poker type instrument which was then being used as a deadly weapon, then the jury's duty would be to return a verdict of guilty of second degree murder.

5. Homicide § 24.1— presumptions arising from use of deadly weapon—instructions proper

In a first degree murder prosecution the trial court's instructions on the presumption arising from the proof of a killing by the intentional use of a deadly weapon did not relieve the State of its burden to prove each element of the offense charged beyond a reasonable doubt.

DEFENDANT appeals from judgment of *Lee, J.*, entered at the 26 May 1980 Criminal Session of Superior Court, CUMBERLAND County.

Defendant was tried upon indictments, proper in form, charging him with first degree murder, first degree burglary, and armed robbery. The jury found defendant guilty of first degree murder, first degree burglary, and felonious larceny. The trial judge ruled that the first degree burglary merged with the first degree murder for judgment and imposed one life imprisonment sentence for both offenses. Defendant was sentenced to a prison term of ten years, to commence at the expiration of the life sentence, for felonious larceny. We allowed defendant's motion to bypass the Court of Appeals on the felonious larceny charge on 17 December 1980. Defendant appeals from the trial court's judgment sentencing him to life imprisonment as a matter of right pursuant to G.S. 7A-27(a).

The State's evidence tended to show that at approximately 6:00 p.m. on 20 March 1976 Albert B. Richardson went to the home of his seventy-six year old step-father, Willie A. Kinlaw, at 126 Wade Street in Fayetteville, North Carolina, for the purpose of bringing him his evening meal. Mr. Richardson testified that as he was leaving the house about an hour later, he observed defendant walking down the street in front of his step-father's home.

On the following Sunday morning, 21 March 1976, Willie A. Kinlaw's body was found in the living room of his dwelling. The cause of death was determined to be brain damage and hemorrhage within the brain caused by two penetrating wounds on either side of the head inflicted by a hard object with an "L" or "V" shaped surface. The front screen door of Mr. Kinlaw's home had been cut or torn, and a window pane in the front wooden door had been broken. The back door was found ajar. An inventory of the house disclosed that the bedroom had been ransacked and a clock-radio and a .32 caliber revolver had been taken.

Shortly after Mr. Kinlaw's death his step-daughter, who was taking care of the deceased's bills, received a telephone bill for the phone at deceased's residence which reflected that a long distance call had been placed at 8:02 a.m. on 21 March 1976 from Mr. Kinlaw's telephone number to a number in Philadelphia, Pennsylvania. She reported this information to the Fayetteville Police Department.

Upon investigation by the Philadelphia police authorities it was determined that the Philadelphia phone number listed on Mr. Kinlaw's bill was assigned to the residence of Ms. Millie Smith. On 9 April 1976 Philadelphia police officers went to the Smith residence and interviewed Ms. Smith and defendant, who was present in the house at the time. Ms. Smith's daughter, Mary Melton, was then defendant's "girlfriend." Defendant informed the officers that he had been in Fayetteville, North Carolina, from approximately 15 March 1976 to 6 April 1976. He stated that he was then living at the Wyneva Hotel in Philadelphia, near Ms. Smith's residence. The Philadelphia officers returned to Ms. Smith's home on 12 April 1976 and were informed by Ms. Smith that defendant and Mary Melton were at the Wyneva Hotel at that time. The officers found defendant at the hotel and took defendant, Ms. Smith, and Mary Melton to the Police Administration Building for questioning. Ms. Smith testified at trial that defendant called her home before 8:30 a.m. on a Saturday or Sunday morning in March, 1976, and asked to speak to Mary Melton.

Upon his arrival at the Police Administration Building in Philadelphia, defendant was interviewed by Fayetteville and Philadelphia police officers and signed an exculpatory statement. The officers continued to question defendant, and at approximate-

ly 8:30 p.m. on that evening Detective Dupe of the Fayetteville Police Department entered the interrogation room and informed defendant that he had a warrant for his arrest. Detective Daniel Rosenstein of the Philadelphia Police Department and North Carolina State Bureau of Investigation Agent David Van Parker testified that defendant then made an oral statement confessing that he broke into Mr. Kinlaw's house during the early morning hours of 21 March 1976 and fell asleep on the floor. He awoke sometime later and observed Mr. Kinlaw walking toward him. Defendant then struck Mr. Kinlaw several times on the head with a wood and metal poker, took a radio, a .32 caliber revolver, and about $20.00 from the house, made a phone call from Mr. Kinlaw's telephone to Mary Melton in Philadelphia, and left the scene. Defendant's oral statement was prepared in typewritten form and read to him. He stated that the statement was correct to the best of his knowledge, but he refused to sign it.

Defendant presented no evidence at trial.

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

Assistant Public Defenders John G. Britt, Jr. and Orlando F. Hudson, Jr. for defendant.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Acie L. Ward for the State.

COPELAND, Justice.

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

[1] Defendant first argues that the trial court erred in denying his motion to suppress his inculpatory statement made to law enforcement officers on 12 April 1976 at the Police Administration Building in Philadelphia. He contends that when law enforcement officers requested that he accompany them to the Police Administration Building, he was "arrested" without a warrant and without probable cause, in violation of his Fourth Amendment right not to be unreasonably seized. He further submits that any

statements he made subsequent to this "arrest" are the fruits of and tainted by the illegal arrest, and therefore inadmissible under the holdings of *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975) and *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed. 2d 824 (1979).

The trial judge held a *voir dire* on defendant's motion to suppress, after which he entered the following conclusions of law:

> "The Court concludes that the defendant intelligently, intentionally and voluntarily accompanied police officers from his hotel room to the Police Administration Building in Philadelphia on April 12, 1976, for the purpose of talking with them and answering their questions concerning any knowledge that he had of or arising out of the aforementioned Kinlaw killing on March 21, 1976 . . .
>
> That the defendant was fully advised of, understood and intentionally and intelligently waived his constitutional right to remain silent and to legal counsel and talked with and answered questions put to him by Philadelphia and North Carolina law enforcement officers concerning the aforementioned . . . homicide; and that any and all statements made by defendant to said law enforcement officers were freely, voluntarily, understandingly and intentionally made and that no threat of physical or mental violence of any nature or promise or assurance of reward of any nature was made to the defendant by said law enforcement officers as an inducement to the defendant to make statements and furnish information to them;
>
> That the defendant was not restrained of his liberties by law enforcement officers until the aforementioned Philadelphia fugitive warrant was served on him, but that he probably would not have been permitted to leave the Police Administration Building after Fayetteville Police Officer Dupe entered the room where he was with a warrant for defendant's arrest which had been issued by North Carolina authorities.
>
> IT IS, THEREFORE, ORDERED that defendant's aforesaid motion to suppress evidence of statements made by the defendant to law enforcement officers at the Police Ad-

ministration Building in Philadelphia, Pennsylvania, on April 12 and 13, 1976, be and the same is denied."

Since we find the trial judge's conclusions supported by competent evidence presented at the *voir dire* hearing, those conclusions are binding on this Court on appeal and defendant's assignment of error must be overruled. *State v. Whitt*, 299 N.C. 393, 261 S.E. 2d 914 (1980); *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). The evidence presented indicated that as part of an investigation into the homicide of Willie Kinlaw, Philadelphia Police Detective Daniel Rosenstein went to the Wyneva Hotel in Philadelphia on the morning of 12 April 1976 to locate defendant for questioning. Upon finding defendant at the hotel the officers requested that he come to the Police Administration Building to answer questions concerning the Fayetteville murder. Defendant agreed to accompany the officers and was driven to the Police Administration Building in a police vehicle, arriving at approximately 9:15 a.m. He was taken to an interrogation room and left alone until 9:30 a.m., at which time Detective Rosenstein advised him of his constitutional *Miranda* rights. Several officers testified that defendant was not locked in the interrogation room or deprived of his liberty in any way at this time; he was free to leave upon request. Defendant was again informed of his constitutional rights at about 10:10 a.m., after which he was interviewed by Detective Rosenstein and two officers of the Fayetteville Police Department until 11:25 a.m. At that time, defendant requested and was allowed to use the bathroom, and was subsequently questioned until 1:25 p.m. Defendant was then offered food, which he refused, and was questioned until 2:45 p.m. During these interviews defendant continued to deny any participation in or knowledge of the murder of Willie Kinlaw. He was not handcuffed, arrested, or restrained of his liberties during this time. Defendant then accompanied officers to a cafeteria located within the building, returning to the interrogation room at about 3:10 p.m. He then signed a form consenting to a search of his hotel room, and signed a typewritten transcript of his exculpatory statements at approximately 5:15 p.m. The officers continued to interview defendant until 7:00 p.m., at which time defendant requested and was furnished drinking water.

At about 7:30 p.m., Officer Dupe of the Fayetteville Police Department entered the interrogation room and informed defend-

ant that he had a warrant for his arrest, which warrant had been issued in Fayetteville. No attempt was made to serve the warrant on defendant at that time. The officers resumed their interview of defendant, at which time he confessed to the murder of Mr. Kinlaw, and asked to speak to Ms. Smith before admitting the details. He was allowed to talk to Ms. Smith and Mary Melton, after which he admitted the murder of Mr. Kinlaw, the theft of a clock radio, a revolver, and $20.00, and the fact that he had phoned Mary Melton in Philadelphia from Mr. Kinlaw's residence on the morning of 21 March 1976. It was at this point that the door to the interrogation room was locked and defendant was deprived of his liberty for the first time. Defendant's confession was reduced to a typewritten form, which defendant refused to sign, although he did inform Officer Parker of the Fayetteville Police Department that he considered the transcript to be correct. Defendant was formally arrested pursuant to a warrant at 1:25 a.m. on 13 April 1976.

Defendant places much emphasis on the testimony of Detective Rosenstein at *voir dire* to the effect that defendant was in his "custody" at the time they left the hotel on the morning of 12 April 1976. It is defendant's contention that this testimony establishes that he was arrested at this time. This Court has held that in determining whether an arrest has occurred, the dispositive factor is not the label which is appended to the encounter between law enforcement officers and an individual, but whether the individual has actually been deprived of his freedom of action by a "seizure" within the meaning of the Fourth Amendment. One is not arrested until law enforcement officers significantly restrict his freedom of action. Where one is free to choose whether to continue the conversation with the officers, he has not been arrested. *State v. Morgan*, 299 N.C. 191, 261 S.E. 2d 827 (1980). An individual's voluntary agreement to accompany law enforcement officers to a place customarily used for interrogation does not constitute an arrest. *United States v. Brunson*, 549 F. 2d 348 (5th Cir.), *cert. denied*, 434 U.S. 842, 98 S.Ct. 140, 54 L.Ed. 2d 107 (1977); *United States v. Bailey*, 447 F. 2d 735 (5th Cir. 1971); *Doran v. United States*, 421 F. 2d 865 (9th Cir. 1970); *State v. Morgan, supra.*

In the present case, there is competent evidence which indicates that defendant voluntarily agreed to accompany law en-

forcement officers to the Police Administration Building on the morning on 12 April 1976. The officers did not frisk or handcuff defendant at that time. Defendant was not subjected to any physical contact with the officers until after he had made an incriminating statement. During his interrogation the officers honored each of defendant's requests for food, water, or the use of the bathroom facilities. He was not treated as though he was incarcerated. Several officers testified that had defendant asked to leave before Officer Dupe informed them that he had a warrant for defendant's arrest, he would have been allowed to go as he pleased. Thus, there is sufficient evidence in the record to support the trial judge's conclusion that defendant was not under arrest until Officer Dupe appeared with a warrant for his arrest, and defendant's contentions to the contrary are without merit.

When Officer Dupe appeared with a warrant for defendant's arrest, there was sufficient evidence before the law enforcement officers to constitute probable cause to arrest defendant, and any subsequent deprivation of his liberty was based on probable cause and therefore constitutionally valid. *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706 (1973); *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973). The fact that defendant was not actually served with the warrant before being deprived of his liberties does not affect the constitutionality of any arrest based on probable cause. Since we have held that no illegal arrest occurred under the facts of this case, then the holdings of *Brown v. Illinois*, *supra*, and *Dunaway v. New York*, *supra*, are inapplicable and defendant's motion to suppress was properly denied.[1]

[2] Defendant next maintains that the trial court erred in denying his motion to dismiss on the ground of double jeopardy.

He contends that since he was previously tried twice for the same offense charged in the present case, both of which trials ended when the jury was unable to reach a verdict and the trial

1. We previously upheld the admissibility of defendant's inculpatory statement on a similar challenge in defendant's trial for a separate, unrelated offense which he admitted in the same confession as that involved in the case *sub judice*. *State v. Simpson*, 299 N.C. 335, 261 S.E. 2d 818 (1980). We have also held the statement admissible as a confession given freely and voluntarily with full knowledge and understanding of an accused's constitutional rights. *State v. Simpson*, 297 N.C. 399, 255 S.E. 2d 147 (1979).

judge declared a mistrial, then his third and present trial was an attempt by the State to try him three times for the same offense, in violation of his right under the Fifth Amendment of the United States Constitution not to be placed in double jeopardy, made applicable to the states through the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969).

Defendant admits that the United States Supreme Court has held that where a defendant is put on trial and the jury is unable to reach a verdict, it is not unconstitutional for the accused to be retried for the same offense. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824). The courts of this jurisdiction have also long held that an order of mistrial which is declared for a "manifest necessity" or to serve the "ends of public justice" will not ordinarily cause a subsequent conviction after retrial to be susceptible to a double jeopardy challenge. *State v. Shuler*, 293 N.C. 34, 235 S.E. 2d 226 (1977); *aff'd sub nom. Shuler v. Garrison*, 631 F. 2d 270 (4th Cir. 1980); *State v. Beal*, 199 N.C. 278, 154 S.E. 604 (1930). It is axiomatic that a jury's failure to reach a verdict due to a deadlock is a "manifest necessity" justifying the declaration of a mistrial. *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed. 2d 717 (1978); *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed. 2d 100 (1963).

Defendant correctly notes that where a defendant is harassed by multiple retrials after several juries fail to reach a verdict, the double jeopardy clause can apply in extreme circumstances to prohibit further retrial for the same offense. *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed. 2d 267 (1976); *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 2d 425 (1973). Absent oppressive practices by the State, however, the public's interest in a final adjudication of guilt or innocence outweighs the defendant's right to be free from further judicial scrutiny after a mistrial is declared. *Arizona v. Washington, supra; Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949); *State v. Shuler, supra.* Each double jeopardy claim must be considered in light of the particular facts of the case; there is no specific limit to the number of times a defendant may be retried after a mistrial has been properly declared. *Gori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed. 2d 901 (1961).

In the case *sub judice* there is no indication of harassment by the State or bad faith conduct by the trial judges in defendant's two previous trials. It appears that the juries in the prior trials were genuinely deadlocked and that the trial judges afforded them every reasonable opportunity to reach a verdict. There is no evidence that the trial judges acted too quickly in declaring a mistrial in order to provide the State with a more favorable opportunity to convict defendant. Consequently, the present case is one in which the defendant's right to be free from repeated trials is outweighed by the public's interest in the administration of justice, and we find defendant's double jeopardy challenge without merit and overruled.

By his next assignment of error defendant submits that the trial court erred in refusing to grant his motion to dismiss on the grounds that the evidence was insufficient to sustain his convictions of first degree murder, first degree burglary, and felonious larceny. In his brief defendant does not argue that the evidence was insufficient to support his first degree murder and felonious larceny convictions, therefore this portion of defendant's assignment is deemed abandoned. North Carolina Rules of Appellate Procedure, Rule 28(b)(3).

In ruling upon defendant's motion to dismiss, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Fletcher*, 301 N.C. 709, 272 S.E. 2d 859 (1981); *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980). The Court must determine as a question of law whether the State has offered substantial evidence against defendant of every essential element of the crime 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). The test of the sufficiency of evidence to withstand dismissal is the same whether the State's evidence is direct, circumstantial, or a combination of the two. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

[3] After considering the evidence in this case in the light most favorable to the State, we find that there was substantial evidence presented of defendant's guilt on each material element

of first degree burglary. The elements of burglary in the first degree are the breaking and entering, in the nighttime, into a dwelling house or a room used as a sleeping apartment, which is actually occupied at the time of the offense, with the intent to commit a felony therein. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972). Defendant contends that the State failed to present substantial evidence of defendant's intent to commit a felony within Mr. Kinlaw's residence at the time of the breaking. We disagree. The only direct evidence of defendant's intent in entering the dwelling is contained in his 12 April 1976 confession to law enforcement officers, in which he stated that after entering the dwelling, he immediately went to sleep on the floor. We note that defendant never claimed that his intent in entering the dwelling was to find a place to sleep; he merely stated that he in fact went to sleep after entering. It is well established that in the absence of proof to the contrary, a reasonable inference of felonious intent may be drawn from the fact that an individual broke and entered the dwelling of another in the night. *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. McBryde*, 97 N.C. 393, 1 S.E. 925 (1887). The average person recognizes that a man or woman does not usually enter the dwelling of another in the night, without his or her consent, with an innocent intent. The State's evidence in the case *sub judice* tended to show that defendant was observed near Mr. Kinlaw's residence several hours before the breaking and entering occurred, that he broke into the dwelling by cutting the screen in the screen door and breaking a pane of glass in the main door, and that he in fact killed Mr. Kinlaw and took several items from the house. We believe this evidence gives rise to more than a suspicion or conjecture of defendant's felonious intent. The State presented sufficient circumstantial evidence of defendant's intent to commit a felony at the time of the breaking and entering to withstand defendant's motion to dismiss, and we hold that the trial judge properly submitted the case to the jury.

[4] Defendant next contends that the trial court erred in defining second degree murder as "the unlawful and intentional killing of a human being with malice but with premeditation and deliberation." While we agree that the trial court's instruction was in error, we find the error nonprejudicial to defendant.

Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Poole*, 298 N.C. 254, 258 S.E. 2d 339 (1979). By instructing the jury that second degree murder is a homicide committed *with* premeditation and deliberation rather than one committed *without* those elements, the trial court gave an erroneous instruction. However, a mere slip of the tongue by the trial judge in his charge to the jury which is not called to the court's attention at the time it is made will not constitute prejudicial error when it is apparent from the record that the jury was not misled thereby. *State v. Carelock*, 293 N.C. 577, 238 S.E. 2d 297 (1977); *State v. Sanders*, 280 N.C. 81, 185 S.E. 2d 158 (1971). In the case *sub judice* the error was not brought to the court's attention at the time it was made, and any effect of this *lapsae linguae* was cured by the court's subsequent instruction that if the jury found beyond a reasonable doubt that defendant intentionally and with malice struck the decedent with a poker type instrument which was then being used as a deadly weapon, then the jury's duty would be to return a verdict of guilty of second degree murder. There was no mention of premeditation and deliberation in this instruction. We therefore find the court's error nonprejudicial, and defendant's assignment of error is overruled.

[5] By his final assignment of error defendant challenges the constitutionality of the following portion of the trial judge's charge to the jury:

> "If the State proves beyond a reasonable doubt that the defendant intentionally killed Willie A. Kinlaw with a deadly weapon or intentionally inflicted one or more wounds upon Willie A. Kinlaw with a deadly weapon that proximately caused his death the law implies, first, that the killing was unlawful and second that it was done with malice."

It is defendant's position that this instruction creates an impermissible presumption relieving the State of its burden to prove each element of the offense charged beyond a reasonable doubt and thereby denies him his constitutional right to due process of law. *See Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975); *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). We disagree.

Speaking for this Court in *State v. Hankerson*, 288 N.C. 632, 649, 220 S.E. 2d 575, 588 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1976), Justice Exum observed:

> "The *Mullaney* ruling does not, however, preclude all use of our traditional presumptions of malice and unlawfulness. It precludes only utilizing them in such a way as to relieve the state of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and, we believe, constitutional."

We reaffirmed this holding in light of several United States Supreme Court decisions rendered subsequent to *Hankerson* in *State v. White*, 300 N.C. 494, 268 S.E. 2d 481 (1980).[2]

In the case before us the presumption of an unlawful killing done with malice was not used in such a way that the State was relieved of its burden of proof. The effect of the presumption is to impose upon the defendant the burden of going forward with or producing some evidence of a lawful reason for the killing or an absence of malice; *i.e.*, that the killing was done in self-defense or in the heat of passion upon sudden provocation. The State is not required to prove malice and unlawfulness unless there is some evidence of their non-existence, but once such evidence is presented, the State must prove these elements beyond a reasonable doubt. The instruction given by the trial judge in this case complied with the principles set forth in *Hankerson* and *White* and defendant's allegations to the contrary are without merit.

Defendant presented no argument in support of his assignments of error numbered three, five, and seven, therefore these assignments are deemed abandoned. North Carolina Rules of Appellate Procedure, Rule 28(b)(3).

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

No error.

2. The United States Supreme Court decisions analyzed in *White* are *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979) and *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed. 2d 777 (1979).

In re Lamb

IN THE MATTER OF THE WILL OF LOUIS DEMPSEY LAMB, DECEASED

No. 63

(Filed 8 July 1981)

1. **Wills § 9.1— domicile of deceased—effect of decision by foreign court**

Comity does not require that the North Carolina court in which a will is offered for probate recognize the conclusion of domicile reached by a foreign court.

2. **Wills § 13— foreign order of probate of will—caveat to will**

A caveat may not be entered to the recordation of an exemplification or authenticated copy of a will and foreign order of probate which has been allowed, filed and recorded in the office of the clerk pursuant to G.S. 31-27 but can only be entered to the probate of such will.

ON propounders' petition for discretionary review of a decision of the Court of Appeals, 48 N.C. App. 122, 268 S.E. 2d 831 (1980), which affirmed an order of *Barefoot, J.*, entered 8 November 1979 in Superior Court, PASQUOTANK County denying propounders' motion to dismiss the purported caveat and allowing caveators' motion for a restraining order *pendente lite.* We allowed propounders' petition on 7 October 1980.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White and John H. Hall, Jr., attorneys for defendant appellants.

Twiford, Trimpi, Thompson & Derrick, by Russell E. Twiford and John G. Trimpi; O. C. Abbott, P.A. by O. C. Abbott and James A. Beales, Jr., attorneys for caveators.

MEYER, Justice.

Louis Dempsey Lamb died 21 February 1979 in Baltimore, Maryland. Decedent left surviving a widow and a total of ten children by two marriages. On 23 February 1979, within two days after decedent's death, his will was admitted to probate in common form in the Circuit Court of the City of Virginia Beach, Virginia. On the same date two of his children were issued letters of administration. These two children, Alice Lamb Ferrell, Executrix and Mildred Lamb Papuchis, Administratrix C.T.A. were the propounders of the will in Virginia and are petitioners in this action. For the sake of convenience, they are hereinafter referred to as "propounders" although testator's alleged will has not been

probated in this State. A bill to impeach will (caveat) was filed in Virginia on 22 March 1979 by decedent's widow Ellie Ferrell Lamb and four of decedent's other children, Ellodia Lamb Raby, C. D. Lamb, Hattie Lamb Harris and Florence Lamb Boone (hereinafter "caveators"). Caveators contended *inter alia* that the Virginia court had no jurisdiction to admit decedent's will to probate and that the will was void by reason of lack of competency of the testator to make a will and undue influence.

On 9 April 1979 the Circuit Court entered a decree temporarily enjoining and restraining the propounders from continuing to administer the estate. Apparently an evidentiary hearing limited to the question of jurisdiction was held before the judge of the Virginia Circuit Court on 7 June 1979. However, no transcript of any such evidentiary hearing appears in the record before this Court nor in the record before the Court of Appeals.

On 19 June 1979 propounders filed an answer to the caveat in the Virginia case denying the material allegations of the caveat. On 23 August 1979 the judge of the Virginia Circuit Court informed the parties by letter that he had determined that decedent had abandoned his home in North Carolina, that at the time of his death decedent was a resident of Virginia Beach, and that the Virginia court had jurisdiction. The letter indicated to the parties that they should proceed to set the matter for hearing on the other issues (competency to make a will, undue influence, etc.). The record before us does not disclose what further proceedings, if any, have occurred in the Virginia Circuit Court.

On 11 May 1979 counsel for caveators of the will before the Virginia court forwarded the following letter to the Clerk of Superior Court of Perquimans County, North Carolina:

TO:

Clerk of Court—Perquimans County
129 North Church Street
Hertford, North Carolina 27944

Please record exemplified copy of will of Lewis [sic] Lamb.

Check for filing fee attacked. [sic]

If incorrect let me know.

Thanks,

Enclosed with the letter was an exemplified copy of the Virginia proceedings including decedent's will. The clerk of court placed those documents in a file, and filed them in the clerk's office.

On 2 November 1979 caveators filed a caveat to decedent's will in the Superior Court, Perquimans County. At that time testator's alleged will had not been probated in North Carolina, nor has it since. In the caveat the caveators gave notice that they would seek a restraining order *pendente lite* prohibiting the executrix and administratrix C.T.A. appointed by the Virginia court from proceeding with the administration of the estate in North Carolina. On 7 November 1979 propounders filed a motion to dismiss the caveat pursuant to Rule 12(b) of the Rules of Civil Procedure. By consent the matter came on for hearing before Judge Barefoot in Pasquotank County on 8 November 1979. Judge Barefoot first heard the motion of the propounders to dismiss. At that hearing the propounders offered into evidence the exemplified copy of the record of the proceedings in the Circuit Court of the City of Virginia Beach, Virginia, including decedent's will, and the file in the office of the Clerk of Superior Court of Perquimans County, North Carolina. Both the statement of case on appeal and Judge Barefoot's order refer to a "petition" filed in the Perquimans County proceeding by the caveators seeking an order *pendente lite* restraining further administration of the estate pending resolution of the issues raised in the pleadings. This petition was not made a part of the record on appeal but was allowed by Judge Barefoot in his order of 8 November 1979. By that order Judge Barefoot overruled propounders' motion to dismiss and allowed caveators' petition for a restraining order *pendente lite*. The propounders appealed to the Court of Appeals which affirmed Judge Barefoot's order.

The caveators in the proceeding before the Circuit Court of the City of Virginia Beach, Virginia and in the proceeding in Superior Court, Perquimans County, North Carolina are the same parties. The allegations by caveators in both proceedings as to the invalidity of the will, to-wit, a lack of sufficient mental or testamentary capacity to execute the will and coercion and undue influence, are essentially the same.[1]

1. There are additional allegations. The caveat filed in the North Carolina proceedings also alleges that the signature on the purported will is not that of the

At the hearing on propounders' motion to dismiss the caveat proceeding in Perquimans County, Judge Barefoot had before him memoranda of law, verified pleadings, an affidavit of plaintiff caveators and the contents of the clerk's file: a record of the Virginia proceedings and an exemplified copy of a paper writing purported to be the last will of Louis Lamb. Judge Barefoot also heard arguments of counsel.

The documentary evidence before Judge Barefoot is replete with contradictory allegations. Caveators allege that decedent was a resident and domiciliary of the State of North Carolina;[2] that the decedent had no known residence in the City of Virginia Beach, owned no real estate or estate of any kind anywhere in Virginia, and did not die in Virginia; but to the contrary was a resident and domiciliary of North Carolina and that all of his estate, including all real property and personal property, is situate in North Carolina. Propounders deny that decedent was not a resident of the City of Virginia Beach but admit that decedent owned no land in Virginia. They neither admit nor deny caveators' allegations that all of decedent's estate is located in North Carolina but demand strict proof thereof. Decedent's will was executed in Norfolk on 9 December 1977 but recites that the testator is a resident of Hertford County, North Carolina.

[1] With those conflicting allegations as background, we now move to a consideration of the issue before this Court. The issue of the jurisdiction of the Virginia Circuit Court to admit the will of Louis Dempsey Lamb to probate in that state was argued in that court. It is not before the appellate courts of this State. Because it may become an issue in future proceedings in this State, we will simply note that domicile is a question of fact. The Circuit Court in Virginia and the superior court in Perquimans County, North Carolina (if the alleged will is offered for probate there), may reach different conclusions with respect to the question of the domicile of the testator at the time of his death. An ex-

decedent and that the will was not "executed according to law and witnesses," while the caveat filed in the Virginia proceeding also alleges that the purported will "was not executed with the formalities required by law."

2. Because the parties have stipulated in the record before this Court that verifications need not be printed we must assume that the Bill to Impeach Will and all other pleadings were properly verified.

press adjudication by the Virginia Circuit Court in the probate proceeding before it that the decedent was a resident of Virginia at the time of his death would not be binding on the superior court in Perquimans County in the probate proceeding before it. Comity does not require that the North Carolina court in which the will is offered for probate recognize the conclusion of domicile reached by the foreign court. *In re Will of Marks*, 259 N.C. 326, 130 S.E. 2d 673 (1963), and cases there cited.[3]

[2] The narrow issue presented by this appeal is whether the caveat action in Perquimans County is properly brought where, as here, the clerk of court has not entered an order admitting an exemplified copy of the will to probate in common form but has simply received and filed the copy of the will.

In pertinent part, G.S. 31-27 provides:

> Whenever any will made by a citizen or subject of any other state or country is duly proven and allowed in such state or country according to the laws thereof, a copy or exemplification of such will and of the proceedings had in connection with the probate thereof, duly certified, and authenticated by the clerk of the court in which such will has been proved and allowed, . . . when produced or exhibited before the clerk of the superior court of any county wherein any property of the testator may be, shall be allowed, filed and recorded in the same manner as if the original and not a copy had been produced, proved and allowed before such clerk. . . . Any copy of a will of a nonresident heretofore allowed, filed and recorded in this State in compliance with the foregoing shall be valid to pass title to or otherwise dispose of real estate in this State.

Caveators contend that allowing, filing and recording by the clerk is nothing more than an administrative, as opposed to a

3. Assuming *arguendo* that the testator's domicile at the time of his death was in Virginia, probate of the testator's will could have been had in the first instance in North Carolina without regard to whether the Virginia proceeding was ever undertaken. *In re Will of Cullinan*, 259 N.C. 626, 131 S.E. 2d 316 (1963); *In re Will of Marks*, 259 N.C. 326, 130 S.E. 2d 673 (1963). This apparently is in accord with the generally recognized view. *See* Annot., "Probate in State Where Assets Are Found, of Will of Nonresident Which Has Not Been Admitted to Probate in State of Domicile," 20 A.L.R. 3d 1033, 1043 (1968).

judicial, function and that when the clerk accepted physical possession of the will, he "allowed" it; that when he placed it in his office in a folder or court shuck, he "filed" it; and when he assigned the file a number and put it in a metal cabinet, he "recorded" it. The propounders, on the other hand, contend that the allowing, filing and recording is a judicial process and not a perfunctory matter to be presumed by merely filing the will in a folder.

The Court of Appeals held that a caveat may be properly entered to the recordation of an exemplification or authenticated copy of a will and foreign order of probate that has been "allowed, filed and recorded" in the office of the clerk but which has not been probated. The holding of that court on this issue was as follows:

> The decision allowing the caveat does not rest upon the *probate* of the will in this State but upon its recordation . . . . We hold that where a certified or authenticated copy or exemplification of a will of a nonresident together with the proceedings had in connection with its probate in another state is allowed, filed and recorded by the clerk of superior court in the same manner as if the original and not a copy had been produced, proved and allowed before such clerk, a caveat to the will may be properly entered. (Emphasis added.)

48 N.C. App. at 125, 268 S.E. 2d at 833-34.

In reaching that result, the Court of Appeals relied upon the cases of *In re Will of Chatman*, 228 N.C. 246, 45 S.E. 2d 356 (1947) and *McEwan v. Brown*, 176 N.C. 249, 97 S.E. 20 (1918). We believe such reliance to be misplaced. As the Court of Appeals recognized, *Chatman* is clearly distinguishable in that, although it is not referred to in this Court's reported opinion, an examination of the record on appeal discloses that the will there was actually probated by the clerk of superior court in New Hanover County. In *Chatman*, the testator's will was probated in South Carolina. A certified and authenticated copy or exemplification of the will and of the proceedings had in connection with the probate in South Carolina was produced and exhibited before the clerk of Superior Court, New Hanover County, who then probated the will.

McEwan was a civil action to remove a cloud on title and did not involve a caveat. We have reviewed the record on appeal in *McEwan* and find that, though not mentioned in the opinion of this Court, the Clerk of Superior Court, Beaufort County entered an order on 20 January 1916 as follows:

> It appearing to the satisfaction of the Court from the exemplification of the record hereinafter mentioned, that the last will and testament of Sylvester Brown, deceased, a citizen of Norfolk County and State of Virginia, has been duly proved and allowed in the proper court of probate of said county and State, according to the laws of said State, and it further appearing that the said Sylvester Brown left property in the county of Beaufort and State of North Carolina, it is therefore ordered and adjudged that the exemplification of said will and of its probate in the proper court of Norfolk County and State of Virginia, which has been produced and exhibited here duly certified and authenticated, be allowed, recorded and filed in this Court.

This Court held in *McEwan* that if a will is executed and probated in another state, and a certified copy has been filed in the office of the superior court in the county in North Carolina wherein the land lies and that copy is relied upon to pass title to real property here, if it appears from that copy of the will that the law of this State has not been sufficiently complied with, the heirs at law in possession may maintain an action to declare the writing a cloud upon their title. The beneficiary under the will may then offer it for probate in solemn form, and issues as to mental incapacity or other matters affecting the validity of the will may also be raised. Any implication in *McEwan* that a caveat may be offered to a foreign will that has been allowed, filed and recorded, but not offered for probate, in this State is expressly overruled.

In this jurisdiction, the right to contest a will by caveat is given by statute; and the procedure to be followed is outlined in the statute conferring the right. *In re Will of Brock*, 229 N.C. 482, 50 S.E. 2d 555 (1948); G.S. 31-32 to 37.

G.S. 31-32 provides in pertinent part: "At the time of application for *probate* of any will, and the *probate* thereof in common form . . . any person entitled under such will, or interested in the

estate, may appear . . . before the clerk . . . and enter a caveat to the *probate* of such will . . . ." (emphasis added). This statute permits a person in interest to caveat an alleged will offered for probate and to contest the validity of such alleged will *before* it has been admitted to probate. *Brissie v. Craig*, 232 N.C. 701, 62 S.E. 2d 330 (1950).

The word "probate" means the judicial process by which a court of competent jurisdiction in a duly constituted proceeding tests the validity of the instrument before the court, and ascertains whether or not it is the last will of the deceased. *In re Will of Marks*, 259 N.C. 326, 130 S.E. 2d 673 (1963); *Brissie v. Craig*, 232 N.C. 701, 62 S.E. 2d 330 (1950); *Steven's Executors v. Smart's Executors*, 4 N.C. 83 (1814).

The propounders contend that where there is no duly probated will there can be no properly constituted caveat under G.S. 31-32 to the "probate" of a will. We agree.

We find the language of Rodman, J., in *In re Will of Marks*, 259 N.C. 326, 130 S.E. 2d 673 (1963), pertinent here:

> The will of a resident of this state should be probated in the county of his domicile. G.S. 28-1(1). When a resident of this state dies outside the state and his will is probated in another state, a duly certified copy of the will so probated may be offered for original probate in this state, and its validity as a testamentary disposition of property established in the same manner as if the original had been offered for probate here. G.S. 31-22. When the will of a nonresident dying outside the state disposes of property in the state, the will may be offered for original probate before the clerk of the county in which the property is situated. G.S. 28-1(3). Instead of offering such will for original probate in this state, the interested parties may have it probated in the state in which the testator was domiciled. When probated according to the laws of that state, an exemplified copy of the will and the probate proceedings may be brought to this state and probated here.

Id. at 330, 130 S.E. 2d at 676.

In *Marks*, two reported wills of the same testator were probated in the same county in North Carolina. The first to be

probated, by an assistant clerk, was dated January 1961. A subsequently executed will, dated February 1961, which by its terms revoked all prior wills, was later probated by the principal clerk, who was apparently unaware of his assistant's prior action, by means of an exemplified copy of a South Carolina probate proceeding. The clerk, upon learning of the prior probate, vacated his order probating the later will dated February 1961. This Court affirmed the order of the clerk. We held that after the first will was probated it was error to allow the probate of the second will without first attacking the first probate by caveat, in which caveat proceeding parties interested in the second will executed in the other state could offer to probate the second will in solemn form or controvert the facts of the deceased's domicile. In *Marks*, the foreign will was actually probated in North Carolina. While *Marks* is factually distinguishable, it does stand for the proposition that a foreign will should be *probated* even if the probate is accomplished by means of an exemplified copy of the foreign probate proceedings.

The opinion of this Court in *Brissie v. Craig*, 232 N.C. 701, 62 S.E. 2d 330 (1950), makes it clear that the probate powers of the judiciary afford a complete remedy to a person interested *against* an alleged will in instances where those interested *for* the alleged will do not offer it for probate. He may invoke such remedy by the simple expedient of simultaneously applying to the clerk of the superior court having jurisdiction to have the script probated and filing a caveat at the same time asking that it be declared invalid as a testamentary instrument. In *Brissie* plaintiffs brought a civil action to annul or cancel an alleged unprobated will as a cloud on title and prayed that the paper writing "be declared . . . not to be the last will" of the decedent, and that they, as decedent's heirs at law, be adjudged the owners of all of his property free from the claims of the defendants. The defendants claimed that the decedent devised property to them by a will which had never been offered for probate.

In an especially eloquent opinion, Justice Ervin wrote in part:

> Notwithstanding the vindication of their claim is dependent solely upon the lawful establishment of the paper writing in dispute as the valid will of the deceased, the defendants take no steps to offer the script for probate before the only

tribunal having jurisdiction of the matter, *i.e.*, the Clerk of the Superior Court of Mecklenburg County. Their neglect in this respect provokes this civil action by the plaintiffs, who entertain the motion that the defendants have paralyzed the probate powers of the judiciary by failing to ask the Clerk of the Superior Court to adjudge that the paper is the will of the decedent.

. . . .

Ordinarily a proceeding for the probate of a will is begun by a person who claims under the paper and instinctively makes the allegation that the script is the last will of the decedent. There is no reason in logic, however, why the proceeding should not be initiated by a person who claims against the instrument and makes the counter allegation that it is not the last will of the deceased.

. . . .

. . . [T]he statute permits a person interested in the estate of a supposed testator to present an alleged will for probate merely for the purpose of obtaining an adjudication of its invalidity. (Citations omitted.)

232 N.C. at 704-05, 62 S.E. 2d at 333-34. *See* Note, Wills—Caveat by Proponent, 29 N.C.L. Rev. 331 (1951).

In the case before us the clerk did not enter an order allowing, filing and recording testator's will in Perquimans County. The Court of Appeals suggested that it may have been better practice for the clerk to enter such an order. We believe that his failure to do so is in no way determinative here since a formal order of the clerk simply "allowing, filing and recording" does not rise to the dignity of an order of probate to which a caveat may be properly entered.

We hold that a caveat may not be entered to the recordation of an exemplification or authenticated copy of a will and foreign order of probate that has been allowed, filed and recorded in the office of the clerk, but can only be entered to the probate of such will.

If propounders offer the will for probate in North Carolina, the caveators may of course enter a caveat. If they do not offer

the will for probate, nothing in the record before us prohibits the caveators themselves from offering the will of Louis Dempsey Lamb for probate in solemn form before the clerk in Perquimans County for the purpose of obtaining an adjudication of its validity.

The caveat being defective, the clerk's order transferring the cause to the civil issue docket for trial was without effect; therefore, Judge Barefoot lacked jurisdiction to rule on propounders' motion to dismiss and caveators' motion for a temporary restraining order and he erred in doing so. The decision of the Court of Appeals affirming Judge Barefoot's orders must be reversed and the cause remanded to that court so that these orders may be vacated and the cause further remanded to the Superior Court, Perquimans County for dismissal.

Reversed and remanded.

MARION C. NORWOOD v. SHERWIN-WILLIAMS COMPANY, A CORPORATION INCORPORATED UNDER THE LAWS OF THE STATE OF OHIO AND DOING BUSINESS IN NORTH CAROLINA

No. 57

(Filed 8 July 1981)

1. **Negligence §§ 52.1, 53.8— plaintiff as invitee—duty of care owed by proprietor**

Plaintiff was an invitee on defendant's premises because her purpose for entering defendant's store was to purchase goods, and defendant proprietor owed its invitees the legal duty to maintain its aisles and passageways in such condition as a reasonably careful and prudent person would deem sufficient to protect its patrons while exercising ordinary care for their own safety.

2. **Negligence § 57.5— store keeper—failure to maintain premises in safe condition—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in plaintiff's action to recover for injuries sustained in its store where the evidence tended to show that defendant created an unsafe condition in its store by placing a platform at the end of a crowded aisle so that one corner of the pallet protruded three to six inches into the aisle; the pallet was raised about four inches from the floor and the plywood top overhung the base by three or four inches; there was no kickboard to prevent plaintiff's foot from catching underneath the corner of the platform; the edges of the platform were not painted and were not readily distinguishable from the color of the floor; lighting in the store was poor and the areas at the edges of

the aisles shadowy; and defendant placed a display upon the platform and items along the aisle which were designed and intended to draw the customer's attention upward and away from the floor.

3. Negligence § 58— customer's failure to look at floor—no contributory negligence as matter of law

In an action by plaintiff to recover for injuries sustained when she tripped over a platform in the aisle of defendant's store, the trial court erred in entering judgment n.o.v. for defendant on the ground that the evidence showed that plaintiff was contributorily negligent as a matter of law, since plaintiff offered evidence that the extension of the platform into the aisle was not obvious due to poor lighting and lack of contrast between the platform and the floor; there was evidence that the display and the placing of impulse items along the aisle were intended to attract and keep the customer's attention at eye level; such evidence was sufficient to permit the inference that the corner of the pallet would not have been obvious to one exercising ordinary care; and it could not be concluded as a matter of law that a customer was contributorily negligent in not looking down at the floor.

4. Negligence § 58.1— action by invitee—instructions proper

In an action by plaintiff to recover for injuries sustained when she tripped over a platform in defendant's aisle, the trial court's instruction that "a customer is not contributorily negligent where the only way he or she could protect theirself [sic] would be to focus their attention towards the floor which a customer is not required to do" did not leave the jury with the impression that plaintiff was not under a duty to see what was obvious; rather, the trial court properly told the jury that plaintiff had a duty to see what the ordinary prudent person would have seen even though plaintiff was not required to focus her attention on the floor.

5. Evidence § 50— expert medical opinion—admissibility

There was no merit to defendant's argument that, because medical evidence concerned plaintiff's condition some thirteen months prior to trial, it was inadmissible or that an expert medical witness could give his opinion only as to plaintiff's condition at the time of trial and must base his opinion on personal knowledge of plaintiff's then existing condition, since the expert witness in this case testified as to his present opinion, not as to an opinion he had held at an earlier time, and, while his opinions were based on prior examination of the plaintiff, the expert witness testified that plaintiff's condition was permanent and his opinion was thus final.

ON appeal of right pursuant to G.S. 7A-30(2) of the decision of the Court of Appeals reported at 48 N.C. App. 535, 269 S.E. 2d 277 (1980), one judge dissenting, affirming judgment notwithstanding the verdict entered 2 April 1979 in favor of defendant by *Herring, Judge.* Trial proceedings were held at the 28 February 1979 Session of Superior Court, DURHAM County.

Watson, King & Hofler, by Malvern F. King, Jr. and R. Hayes Hofler III, for plaintiff-appellant.

Haywood, Denny & Miller, by John D. Haywood and Charles H. Hobgood, for defendant-appellee.

Pollock, Fullenwider, Cunningham & Pittman, by Bruce T. Cunningham, Jr., for North Carolina Academy of Trial Lawyers, amicus curiae.

CARLTON, Justice.

I.

Plaintiff filed this suit for serious personal injuries sustained when she tripped over a raised platform in defendant's store. The gravamen of plaintiff's claim was the alleged negligence of defendant and its agents in constructing the pallet without a kickboard, in placing the platform in the store so that one of its corners extended several inches into the aisle, and in placing a display on the platform that drew the patrons' attention away from the floor and toward the display at approximately eye level. Defendant's answer denied negligence on its part, alleged that plaintiff's injuries were due solely to her own negligence in failing to keep a proper lookout and, as an alternative defense, alleged that plaintiff was contributorily negligent.

At trial plaintiff presented evidence which tended to show that she entered defendant's store shortly before noon on 9 November 1974 to purchase some art supplies for her daughter. After selecting the items she wished to purchase plaintiff walked toward some store employees and indicated that she wanted to pay for the goods. The employees motioned towards the cash register located at the rear of the store. To reach the check-out counter plaintiff walked down a crowded aisle about two and one-half feet wide which ran the length of the store from front to back. The floor along the sides of the aisle was cast in shadows. At the end of the aisle closer to the cash register was a raised pallet about three or four inches high on which a tall paint sprayer was displayed. The platform was approximately four feet square and had been placed "catty-cornered" to the aisle forming a diamond shape in relation to the aisle, and one of its corners protruded three to six inches into the aisle. As plaintiff reached

the end of the aisle she was looking toward the cash register and cashier. Although she saw the platform and paint sprayer out of the corner of her eyes she did not realize that the platform protruded into the aisle or that it did not have a kickboard. As she passed the paint sprayer plaintiff's left foot caught on the corner of the platform, causing her to stumble. Plaintiff let out a cry of pain. The injury did not tear her hose and produced only a drop of blood, but was extremely painful. Believing her injury not to be serious, plaintiff paid for her purchases and left the store.

Later that day the top of plaintiff's foot became red and swollen and she was unable to place weight on it. The foot continued to swell and throb with pain and two days after the incident plaintiff visited the Watts Hospital Emergency Room. As a result of that visit plaintiff soaked her foot and wore an ace bandage but received no relief. Her foot and leg remained swollen, red and very painful. Over the months that followed plaintiff saw numerous doctors and was hospitalized several times for periods varying from a few days to almost two months and underwent several operations. Her condition was diagnosed as sympathetic or vasomotor dystrophy resulting from the injury to her foot. As a result of this condition, plaintiff's left leg and foot have atrophied and are smaller than her right leg and foot. Her left foot is now one and one-half inches shorter than her right foot. The muscles in her left foot have contracted and her toes have drawn up. Plaintiff is now able to walk but must use a special shoe and must wear a prosthetic stocking at all times, even when she sleeps. Although the pain and swelling have lessened, they are still present, and plaintiff is unable to work. Dr. Bassett, an orthopaedic surgeon at Duke University who treated plaintiff, testified that plaintiff has reached maximum improvement and her condition is permanent.

Defendant's evidence contradicted that presented by plaintiff in two significant points. The manager and assistant manager of the store testified that the aisles were wide, well-lit, and free of merchandise and that the platform on which the paint sprayer was displayed was placed parallel to the end of the counter and was not protruding into the aisle.

Defendant's motions for directed verdict at the close of plaintiff's evidence and at the close of all evidence were denied, and

the case was submitted to the jury on three issues: defendant's negligence, plaintiff's contributory negligence and damages. The jury concluded that defendant was negligent and that plaintiff was not contributorily negligent and awarded plaintiff damages in the amount of $90,000. Defendant then moved pursuant to Rules 50(b) and 59 of the N.C. Rules of Civil Procedure for judgment notwithstanding the verdict and, in the alternative, for a new trial. Judge Herring granted defendant's motion for judgment notwithstanding the verdict, denied the alternative motion for new trial and entered judgment for the defendant.

The Court of Appeals affirmed the entry of judgment for the defendant. In an opinion by Judge Webb in which Judge Hedrick concurred, that court held that "all the evidence shows the plaintiff was contributorily negligent" because it showed that plaintiff failed to keep a proper lookout. 48 N.C. App. at 536, 269 S.E. 2d at 278. Judge Wells argued in dissent that the evidence taken in the light most favorable to the plaintiff showed that defendant designed the display to attract a customer's attention to the paint sprayer and away from the floor and that defendant gave no warning. Under these circumstances, the unsafe condition caused by the protruding platform was not obvious and plaintiff was not required "to anticipate that defendant's display would be mounted on a pedestal not flush with the floor, protruding in such a way that if she did not tiptoe around it, she might catch her foot underneath." *Id.* at 541, 269 S.E. 2d at 280. Judge Wells concluded that the issue of contributory negligence was for the jury and that its verdict must stand.

Plaintiff gave notice of appeal of right to this Court on 3 October 1980.

Other facts pertinent to this decision will be set forth below.

II.

We first consider whether the Court of Appeals properly affirmed the trial court's entry of judgment notwithstanding the verdict in favor of defendant. That ruling was proper only if evidence at trial, when taken in the light most favorable to the plaintiff and with the benefit of all favorable inferences, either failed to create a prima facie case of defendant's negligence or established beyond question that plaintiff's own negligence caused

her injuries. *See Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973); *Brokers, Inc. v. High Point City Board of Education*, 33 N.C. App. 24, 234 S.E. 2d 56, *cert. denied*, 293 N.C. 159, 236 S.E. 2d 702 (1977).

A.

[1] The legal duty owed by defendant to plaintiff depends upon her status as an invitee or licensee. Here, plaintiff was an invitee on defendant's premises because her purpose for entering the store was to purchase goods, *Morgan v. Great Atlantic & Pacific Tea Co.*, 266 N.C. 221, 145 S.E. 2d 877 (1966), and, as such, defendant owed to plaintiff the duty to exercise ordinary care to keep its store in a reasonably safe condition and to warn her of hidden dangers or unsafe conditions of which it had knowledge, express or implied, *Long v. Methodist Home for Aged, Inc.*, 281 N.C. 137, 187 S.E. 2d 718 (1972); *Wrenn v. Hillcrest Convalescent Home, Inc.*, 270 N.C. 447, 154 S.E. 2d 483 (1967). More apposite to this case, a proprietor owes its invitees the legal duty to maintain its aisles and passageways in such condition as a reasonably careful and prudent person would deem sufficient to protect its patrons while exercising ordinary care for their own safety. *Harrison v. Williams*, 260 N.C. 392, 132 S.E. 2d 869 (1963). Failure to conform to this standard of care is negligence. W. Prosser, *Law of Torts* § 143 (4th ed. 1971).

[2] Our review of the record indicates that plaintiff made out a prima facie case of a breach of defendant's duty to maintain its store premises in a reasonably safe condition and, therefore, that the issue of negligence was properly submitted to the jury. When taken in its most favorable light, plaintiff's evidence tends to show that defendant created an unsafe condition in its store by placing a platform at the end of a crowded aisle so that one corner of the pallet protruded three to six inches into the aisle. The pallet was raised about four inches from the floor and the plywood top overhung the base by three or four inches. There was no kickboard to prevent plaintiff's foot from catching underneath the corner of the platform. The edges of the platform were not painted and were not readily distinguishable from the color of the floor. Plaintiff's evidence indicates that the lighting in defendant's store was poor and the areas at the edges of the aisles shadowy.

The evidence also indicates that the display was designed to attract the customer's attention at eye level and away from the floor. Additionally, defendant's own evidence shows that certain small items known as "impulse items" were placed along the aisle counter and behind the cash register. The impulse items "are designed to attract the attention of a customer. They are placed high where [a customer's] eyes will follow them right in that back area where the wrapping counter is. They are designed to attract the attention of the customer." Plaintiff's evidence shows that defendant's employees built a raised platform and placed it so that one of its corners protruded into the aisle and placed a display upon the platform and items along the aisle which were designed and intended to draw the customer's attention upward and away from the floor. This evidence, when considered in the light most favorable to the plaintiff, is sufficient to create a prima facie case that the danger was not obvious and that defendant was negligent in creating an unsafe condition.

B.

[3] The Court of Appeals held that the judgment notwithstanding the verdict was properly entered because the evidence showed that plaintiff was contributorily negligent as a matter of law. That court based its holding on what it believed to be the well-established principle that "[a] plaintiff who trips or falls over an object on the premises of another is barred from recovery by his or her contributory negligence if the object is in a position at which the plaintiff would have seen it had he or she looked." 48 N.C. App. at 536, 269 S.E. 2d at 278. We disagree with both the statement of the rule and its application to the evidence adduced at trial. The basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for her own safety. The question is not whether a reasonably prudent person would have seen the platform had he or she looked but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor.

When a defendant moves for a directed verdict on the grounds that the evidence establishes plaintiff's contributory negligence as a matter of law the question before the trial court is whether " 'the evidence taken in the light most favorable to

plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge.'" *Rappaport v. Days Inn, Inc.*, 296 N.C. 382, 384, 250 S.E. 2d 245, 247 (1979), *quoting Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E. 2d 506, 510 (1976); *accord, Hunt v. Montgomery Ward & Co.*, 49 N.C. App. 638, 272 S.E. 2d 357 (1980).

As a general rule one is not required to anticipate the negligence of others; in the absence of anything which gives or should give notice to the contrary, one is entitled to assume and to act on the assumption that others will exercise ordinary care for their own or others' safety. *Chaffin v. Brame*, 233 N.C. 377, 64 S.E. 2d 276 (1951); *Murray v. Atlantic Coast Line Railroad*, 218 N.C. 392, 11 S.E. 2d 326 (1940). Applying this principle to the facts of the case *sub judice*, plaintiff was contributorily negligent only if in the exercise of ordinary care she should have seen and appreciated the danger of the protruding platform. Stated more exactly, the question here is whether the evidence taken in the light most favorable to the plaintiff allows no reasonable inference except her negligence: that a reasonably prudent and careful person exercising due care for his or her safety would have looked down and seen that the corner of the platform extended into the aisle.

In our opinion the evidence adduced at trial is susceptible of a reasonable inference that the danger would not have been seen by a person exercising ordinary care. Plaintiff gave evidence that the extension of the platform into the aisle was not obvious due to poor lighting and lack of contrast between the platform and the floor. Although defendant offered contradictory evidence, plaintiff's evidence is sufficient to permit the inference that the corner of the pallet would not have been obvious to one exercising ordinary care. Additionally, there is evidence that the display and the placing of the impulse items were intended to attract and keep the customer's attention at eye level. When a merchant entices a customer's eyes away from a hazardous condition, we do not think he should be heard to complain when his efforts succeed. Likewise, when the designs of the merchant have the desired effect upon a customer, we cannot conclude as a matter of

law that the customer was contributorily negligent in not looking down at the floor.

Thus, we hold that plaintiff's evidence was sufficient to withstand defendant's directed verdict motion and to take her case to the jury. It follows that the entry of judgment notwithstanding the verdict was improper. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549.

III.

In its brief before this Court defendant contends that should its judgment notwithstanding the verdict be reversed, it should be granted a new trial. As defendant correctly contends, this request is properly before us even though defendant did not take an appeal from the denial of its motion in the alternative for a new trial. Rule 10(d) of the North Carolina Rules of Appellate Procedure provides that:

> [w]ithout taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

The defendant duly excepted to and cross-assigned as error the denial of its alternative motion for a new trial and the propriety of that ruling is properly before us.

Denial of a motion in the alternative for a new trial lies within the sound discretion of the trial judge and his decision will not be disturbed absent an abuse of discretion. *Coppley v. Carter*, 10 N.C. App. 512, 179 S.E. 2d 118 (1971). Defendant claims entitlement to a new trial on the ground of errors of law fully reviewable by this Court.

A.

[4] Defendant first contends that the trial court erroneously instructed the jury on the law of contributory negligence to its prejudice. The statement in the jury charge to which defendant assigns error is, "A customer is not contributorily negligent where the only way he or she could protect theirself [sic] would

be to focus their attention towards the floor which a customer is not required to do." This statement, standing alone, might constitute reversible error. However, when it is read contextually, it becomes obvious that the statement merely clarifies plaintiff's duty to keep a proper lookout:

> I instruct you, members of the jury, that a customer in a store has a duty to exercise due care for her own safety and well being, and to see any hazards in her path which the ordinary prudent person in the exercise of due care or ordinary care would have done under the same or similar circumstances and a failure to do so is negligence.
>
> A customer is not contributorily negligent where the only way he or she could protect theirself [sic] would be to focus their attention towards the floor which a customer is not required to do. However, the customer does have an obligation to keep a lookout in her path of travel and to see what she ought to have seen as the ordinary prudent person would have done in the exercise of ordinary care under the same or similar circumstances.

The substance of this instruction is entirely correct and left, we think, no doubt in the jurors' minds of the standard of care required of the plaintiff.

Defendant cites to us the case of *Johnson v. Brand Stores, Inc.*, 241 Minn. 388, 63 N.W. 2d 370 (1954), in support of its contention that the instruction was erroneous. *Johnson* is a "trip-and-fall" case and the question there was whether the plaintiff was contributorily negligent in failing to see a scale which extended into the aisle of defendant's store. In its charge to the jury the trial court stated:

> The plaintiff customer was not required to fix her eyes upon the floor upon entering the store of the defendant, as though she expected to find an obstruction or obstacle on the floor, which she should avoid, unless you decide that a reasonably prudent person, under the particular facts and circumstances of this case, would have done so.

Id. at 390-91, 63 N.W. 2d at 372. In holding that the instruction was erroneous because it left the jury with the impression that

plaintiff was not required to see what was in plain sight, the Minnesota Supreme Court stated:

> The jury should be told that it was plaintiff's duty to see that which was in plain sight unless there was some excuse for not seeing. The question then is whether a person of ordinary prudence would have failed to observe the obstruction under the facts and circumstances of the case.

Id. at 393-94, 63 N.W. 2d at 374. In the case *sub judice* the trial court told the jury that plaintiff had a duty to see what the ordinary prudent person would have seen even though plaintiff was not required to "focus . . . on the floor." There is no danger here, as there was in *Johnson*, that the jury was left with the impression that the plaintiff was not under a duty to see what was obvious. While the trial judge could, perhaps, have chosen a better way to convey the law to the jury, the instruction, when read as a whole, was not prejudicial.

B.

[5] Defendant also contends that it is entitled to a new trial because the expert medical evidence of permanent injury was insufficient to support a jury verdict of $90,000. Defendant argues that because medical evidence concerned plaintiff's condition in January 1978, some thirteen months prior to trial, it was inadmissible. Defendant bases its claim of inadmissibility on the following statement contained in 31 Am. Jur. 2d Expert and Opinion Evidence § 1 at 494 (1967): "The opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying and not his opinion at some previous time; unless it is final, the opinion is inadmissible."

According to defendant, this statement means that an expert medical witness can give his opinion only as to the plaintiff's condition at the time of trial and must base his opinion on personal knowledge of plaintiff's then-existing condition. We disagree. The above-quoted principle means only that an expert witness may testify only as to his present opinion and only if that opinion is final. *See In re Buck's Dependents' Case*, 342 Mass. 766, 175 N.E. 2d 369 (1961); *Hubach v. Cole*, 133 Ohio St. 137, 12 N.E. 2d 283 (1938). Here, the expert witness testified as to his present opinion, not as to an opinion he had held at an earlier time. Addition-

ally, while his opinions were based on prior examination of the plaintiff the expert witness testified that plaintiff's condition was permanent. Thus, his opinion was final and the opinion evidence was properly admitted.

In the absence of any error of law in the trial below, the decision of whether to grant a new trial was within the discretion of the trial court, and its decision will not be reversed absent abuse. *Coppley v. Carter*, 10 N.C. App. 512, 179 S.E. 2d 118. No abuse of discretion has been shown here; therefore, we affirm the trial court's denial of defendant's motion in the alternative for a new trial.

C.

Doubtless, this is a close case, on the issues of both negligence and contributory negligence. The jury has, however, resolved the factual controversy. Appellate courts, absent error of law, are bound by the jury's verdict. Having found that the evidence at trial was sufficient to go to the jury and that no errors of law were committed, we hold that the judgment notwithstanding the verdict must be reversed and the jury verdict in favor of plaintiff reinstated. *Dickinson v. Pake*, 284 N.C. 576, 586, 201 S.E. 2d 897, 904 (1974); W. Shuford, *North Carolina Civil Practice and Procedure* § 50-10 (1975). Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court with instructions to remand to the Superior Court, Durham County, for entry of judgment in accordance with the jury verdict and judgment in favor of plaintiff.

Reversed and remanded.

STATE OF NORTH CAROLINA v. CHARLES NORWOOD

No. 27

(*Filed 8 July 1981*)

1. Searches and Seizures § 28— incorrect date on affidavit and warrant—correction by magistrate

A search of defendant's premises was not illegal because the affidavit and warrant had the date of 11 December typed on them and the search was con-

ducted on 10 December where the date had been changed on both documents to 10 December and the date changes were initialed by the magistrate who issued the warrant, since the error was clearly a clerical one on the part of the magistrate and was subsequently corrected.

2. **Criminal Law §§ 42.4, 42.5; Homicide § 15— article seized from defendant—failure to connect to crime—admission as harmless error**

In a prosecution for murder, kidnapping and malicious burning, defendant was not prejudiced by error, if any, in the admission of seized handcuffs, handcuff keys and firearms because no connection was shown between the items seized and the crimes charged in that the keys had not been tried to discover if they fit handcuffs on the victim and ballistics tests performed on the seized firearms and bullets removed from the victim's body were inconclusive where the items themselves were not introduced into evidence and there was no description of them contained in the record, and where the State presented overwhelming eyewitness testimony that defendant was guilty of the crimes charged.

3. **Homicide § 25— first degree murder—submission of theories of felony murder and premeditation and deliberation**

In this prosecution for first degree murder, the State was not required to elect between the theories of felony murder and premeditation and deliberation, and the trial court properly submitted both theories to the jury where the evidence presented by the State was sufficient to prove the charge of first degree murder under either theory.

4. **Homicide § 31.1— first degree murder—guilty verdict upon theories of felony murder and premeditation and deliberation—punishment for underlying felonies**

Where the jury found defendant guilty of first degree murder on theories of felony murder and premeditation and deliberation, the trial court could disregard the felony murder basis of the verdict and impose additional punishment upon defendant for the underlying felonies.

5. **Criminal Law § 34.7— evidence of prior criminal conduct—admissibility to show motive**

In a prosecution for kidnapping and murder, evidence of a transaction in which deceased was supposed to sell marijuana for defendant and deliver the proceeds to defendant but instead sold the marijuana and kept the proceeds was competent to show defendant's motive for killing deceased even though it tended to show prior criminal conduct by defendant.

6. **Criminal Law § 99.9— questioning of witness by court—no expression of opinion**

In this prosecution for kidnapping and murder, the trial court's question to a witness as to whether the witness had seen any money change hands when defendant gave marijuana to deceased merely clarified the answers of the witness and did not constitute an expression of opinion in violation of G.S. 15A-1222.

7. Criminal Law § 128.2— improper testimony—denial of mistrial

The trial court in a prosecution for murder, kidnapping and malicious burning did not err in refusing to order a mistrial when a witness testified in response to a question by the prosecutor that he had worked his magic on the prosecutor and caused him to lose a prior case against defendant where the trial court instructed the jury to disregard both the question and answer.

8. Criminal Law § 89.2— *corroborative testimony not inadmissible hearsay*

An officer's testimony admitted for corroborative purposes was not inadmissible hearsay because the corroborated witness had not testified that he made any statement to the officer and defendant had no opportunity to cross-examine the witness with regard to the statement attributed to him since the officer testified that the witness made the statement to him and defendant had the right to recall the witness if he desired to cross-examine him.

ON appeal from judgments of *Rousseau, Judge*, entered 21 April 1980 in Superior Court, MECKLENBURG County.

Defendant was tried on bills of indictment, proper in form, for murder, kidnapping and damage to personal property of another by use of explosive and incendiary material while the property was occupied by another. He was convicted of the murder and kidnapping charges and was sentenced to life imprisonment for each conviction. He also was convicted of damage to personal property of another by use of explosive and incendiary material and received a sentence of thirty years imprisonment to begin at the expiration of the murder sentence. The life sentences imposed in the murder and kidnapping convictions were appealed to this Court as a matter of right. We allowed defendant's motion to bypass the Court of Appeals in the case for damage to property on 5 January 1981.

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

Assistant Public Defenders Cherie Cox and Grant Smithson for the defendant.

CARLTON, Justice.

I.

Evidence for the State tended to show that the decedent, Ethell "Slim" Wilson, left his sister's house in Salisbury on 13 July 1979 at approximately nine a.m. driving a green Cadillac

automobile. Sometime before noon on that date Wilson, accompanied by defendant, drove the Cadillac into the driveway of James Pearson at 217 Oregon Street in Charlotte. Defendant was holding a pistol to Wilson's temple. Defendant placed handcuffs on Wilson and took him out of the car. Others, including co-defendant Jerry Lee Easter, Joe Chisholm, Tyree Froneberger, Sterling Easter and Larry Adams, were in the immediate area. Defendant unlocked the trunk of the Cadillac and placed Wilson in it. Defendant had a gun in his hand throughout this time. Defendant and Jerry Easter then got into the front seat of the Cadillac and, with defendant at the wheel, they drove off.

Larry Adams and Joe Chisholm followed the Cadillac in a Vega. The Cadillac eventually stopped in a wooded area. Defendant got out, removed the license tag from the Cadillac and threw it into some bushes. Defendant gave Chisholm a gun. Defendant opened the trunk and talked to Wilson. Defendant pulled his gun and asked if everyone was ready. Defendant and Chisholm commenced shooting. After they stopped, defendant said, "He's not dead." Defendant took the gun from Jerry Easter and shot Wilson several more times. Defendant then closed the trunk and Adams, Chisholm, Jerry Easter and defendant left in the Vega.

Over a month later, on 19 August 1979, defendant hired Terry Allen Black to destroy the Cadillac. In return for destroying the car Black was to receive an advance of an ounce of cocaine and, upon successful completion, $500 and a bonus. Two days later, on 21 August 1979, Black met defendant at Fred Williams' home and received the cocaine. He, defendant and Williams then left Williams' home and drove to the wooded area where the Cadillac was parked. Black and defendant prepared the incendiary devices and set the Cadillac on fire. The three men left the scene and went to a home in Tega Cay, where Black was paid $500 and was given a stereo receiver as a bonus.

A volunteer fireman testified that the Cadillac was burning when he arrived at the scene on 21 August. The trunk was pried open and a body found in a small amount of fire. The body was decomposed and the hands were handcuffed. The body was taken to the county morgue, where Hobart Wood, the Mecklenburg County medical examiner, performed an autopsy. Three bullets were recovered from the body. In Dr. Wood's opinion, decedent

died of multiple gunshot wounds, had been dead a number of weeks prior to 21 August and died shortly after receiving the gunshot wounds.

The parties stipulated that the body found in the green Cadillac in the wooded area in question on 21 August 1979 was that of decedent, Ethell Wilson.

Defendant affirmed in open court that he did not wish to testify and offered no evidence. He was tried, convicted and sentenced as set forth above.

Further facts pertinent to our decision are set out below.

II.

[1] Defendant contends that the search of his premises shortly after his arrest was illegal and that the items seized as a result of the search should have been suppressed. He contends that the record shows that the affidavit supporting probable cause for issuance of the search warrant was sworn to before the magistrate on 11 December 1979 while the search occurred on 10 December 1979. This argument is without merit. The record clearly discloses that the trial court, during argument on the motion to suppress, examined the originals of the warrant and affidavit. While both documents had the date of 11 December 1979 typed on them, the date had been changed on both documents to 10 December 1979 and the date changes were initialed by the magistrate who issued the warrant. The error was clearly a clerical one on the part of the magistrate and was subsequently corrected. The trial court thoroughly reviewed this matter before allowing the testimony in question, and the admission of testimony concerning the items seized was not error. This assignment is without merit.

[2] In a related argument defendant contends that the trial court erred in submitting testimony concerning items seized from the defendant's residence. Defendant argues that no connection was shown between the items seized and the crimes with which he was charged and, therefore, the testimony concerning such items was irrelevant. He also argues that the testimony concerning those items was inflammatory and prejudicial. The items in question included handcuffs, handcuff keys and "numerous guns on the premises, handgun and also rifle."

Defendant argues that because no link was established between the items seized and the actual instruments used to commit the crimes charged, testimony concerning the seized items should have been excluded. In presenting this argument defendant strongly relies on the Court of Appeals' decision in *State v. Milby*, 47 N.C. App. 669, 267 S.E. 2d 594 (1980). In *Milby*, guns which were seized from the defendants on arrest were admitted into evidence absent any testimony that either gun matched the description of the gun used in the crime charged and absent testimony which would otherwise connect the guns with the crime. The court held that, under these circumstances, the guns were inadmissible. On discretionary review, however, this Court reversed, reasoning thusly:

> 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.

302 N.C. 137, 141, 273 S.E. 2d 716, 719 (1981). Additionally, we held that, assuming the admission of the guns was error, the defendants had not met their burden of showing the error to be prejudicial because overwhelming evidence of their guilt was presented by the State: "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." *Id.* at 142, 273 S.E. 2d at 720.

In the case at hand, the items complained of were not themselves introduced into evidence nor is any description of them contained in the record. But on cross-examination defendant

brought out that the seized handcuff keys had not been tried to discover if they fit the handcuffs on the victim and that the ballistics tests performed on the seized firearms and the bullets removed from the victim's body were inconclusive. This, however, is not determinative. Here, as in *Milby*, even if the admission of testimony concerning these items was error, defendant has not met his burden of showing that "there is a reasonable possibility that the evidence complained of contributed to the conviction." The State presented the testimony of three eyewitnesses to the kidnapping. Each witness was personally acquainted with defendant and each one's identification is unchallenged. These witnesses saw defendant place the handcuffs on the victim, saw defendant holding a gun, saw defendant lock the victim in the trunk of the Cadillac, and saw defendant drive the Cadillac away. Additionally, the State presented overwhelming evidence, through the testimony of an eyewitness, that defendant shot and killed the victim. Although the items seized were not probative of the charge of malicious burning, the evidence that defendant was the perpetrator of that crime was also overwhelming. Under these circumstances, defendant has not shown that the error, if any, was prejudicial.

[3] Defendant next contends that the trial court erred in submitting the murder charge to the jury under the theories both of felony murder and premeditation and deliberation. He argues that the two theories are inconsistent and that an election must be made between the two. The jury found defendant guilty of first degree murder under both theories, and defendant contends that the verdicts are invalid. He also contends that, therefore, he was improperly sentenced and his judgment and commitments are invalid.

Defendant's indictment for murder tracked the language of G.S. 15-144 and charged the following: "That Charles Norwood . . . with force and arms . . . , wilfully, and of his malice aforethought, did kill and murder Ethell Lewis Wilson . . . ." This indictment allows the State to prove both premeditated murder and felony murder. *State v. Haynes*, 276 N.C. 150, 171 S.E. 2d 435 (1970); *see State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976); *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970). To prove premeditated murder, the State must show that the killing was done with malice and after premeditation and deliberation; to con-

vict of first degree murder under the felony murder rule, the State need show only that the killing was done in the perpetration or attempt to perpetrate a felony. *E.g., State v. Haynes*, 276 N.C. 150, 171 S.E. 2d 435. A murder may be committed after premeditation and deliberation *and* during the perpetration or attempt to perpetrate a felony. The theories involve different elements, but in no way are they inconsistent. The evidence presented by the State was sufficient to prove the charge of first degree murder under either theory. Submission of both theories was proper and the verdicts returned by the jury are valid. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979).

[4] There was likewise no error with respect to defendant's sentencing. There was clearly sufficient evidence to submit the issue of defendant's guilt or innocence to the kidnapping and malicious damage to personal property charges. As Justice Britt, writing for the Court, stated in *State v. Goodman*:

> If defendant were found guilty of first-degree murder solely by virtue of the felony-murder rule, the court would be precluded from imposing upon him additional punishment for the underlying felony; if defendant were found guilty of first-degree murder pursuant to premeditation and deliberation, and if the jury also found him guilty on one or more other felony charges, the court would not be so precluded.

298 N.C. 1, 15, 257 S.E. 2d 569, 580 (1979).

Here, the trial court clearly instructed the jury that there was only one murder charge, but two theories. The jury was instructed that it could find defendant guilty under either or both theories and that if the jury found that the State had proven defendant's guilt under both theories then they should place the appropriate checkmark by each theory on the written verdict sheet. The jury found the defendant guilty of first degree murder on both theories and so indicated on the verdict sheet provided to them. Since conviction of the defendant for first degree murder was based upon proof of premeditation and deliberation, proof of the underlying felony was not an essential element of the State's homicide case and the trial court properly sentenced defendant both upon the murder conviction and the felony conviction. *Id.*

[5] Defendant next contends that the trial court erred in allowing the State to ask the witness James Pearson certain questions

relating to a transaction in Washington, D.C., between defendant and the deceased. Defendant contends that evidence of this transaction was improper and prejudicial because it allowed the State to introduce evidence of prior criminal conduct even though his credibility and character had not been placed in issue. Defendant contends that no link was established between the out-of-state transaction and the crimes with which he was charged.

We find no error in the admission of this testimony. The exchange between the assistant district attorney and the witness clearly establishes that the State's purpose for introduction of this evidence was to establish defendant's motive for killing the deceased. The witness testified that in the winter of 1978 defendant turned over to the deceased some marijuana which the deceased was to sell in Washington, D.C. The deceased was supposed to turn over to the defendant the proceeds of the sales but, instead, sold the marijuana for $6,000 and kept the money. Such testimony, if believed by the jury, clearly would establish a motive for the crimes with which defendant was charged. Additionally, Pearson testified that while defendant was sitting in deceased's car on the date of the alleged kidnapping, he held a gun to deceased's head and said, "I just want my money, that's all I want, my money." It is well established in this jurisdiction that where evidence tends to prove a motive on the part of the accused to commit the crime charged, it is admissible even though it discloses the commission of another offense by the accused. *State v. Patterson*, 288 N.C. 553, 567, 220 S.E. 2d 600, 611 (1975); *State v. McClain*, 240 N.C. 171, 176, 81 S.E. 2d 364, 367 (1954).

[6] Defendant next contends that the trial court improperly engaged in cross-examination of a witness and thereby expressed his opinion on a question of fact in violation of G.S. 15A-1222. During the questioning of the witness James Pearson, the trial court at one point interrupted and inquired of the witness if he had seen any money change hands when defendant gave marijuana to the deceased. Defendant contends that this intimated that the trial court was of the opinion that drug dealing transactions had taken place, a collateral issue not otherwise relevant and which was improper because it dealt with alleged prior criminal activity.

We find no merit in this contention. It is entirely proper for a trial judge to question a witness in order to clarify or promote a

better understanding of the testimony being given. *State v. Hunt*, 297 N.C. 258, 254 S.E. 2d 591 (1979). Here the questions asked by the trial court merely clarified the witness' answers and we find nothing which the jury could interpret as an expression of the trial court's opinion. This assignment of error is overruled.

[7] Defendant next asserts that the trial court erred in denying his motion for mistrial. During the direct examination of the witness James Pearson, the assistant district attorney inquired if he had worked his "herb doctor magic" in a case previously tried. The court sustained defendant's objection to this question. On redirect examination, the prosecutor asked, "Whose case was it that you worked your magic on me and caused me to lose?" The witness answered, "Norwood." Defendant's objection was sustained, and the jury was instructed to disregard the answer. Defendant then, in the absence of the jury, moved for a mistrial. Defendant contended that the purpose for asking the question was to elicit testimony concerning defendant's prior criminal record and that, therefore, he was prejudiced thereby. In response to the trial court, the assistant district attorney stated his purpose in asking the question was to establish the close relationship between the witness and the defendant. The trial court found no justification for the question and instructed the assistant district attorney not to mention anything about defendant's prior record, and the motion for mistrial was denied.

The trial court correctly noted that there was no justification for the question and promptly sustained the defendant's objection. We do not perceive, however, that defendant suffered any prejudice from this exchange. No reference to any prior charges against defendant was mentioned in the presence of the jury. Indeed, the question itself indicated that the assistant district attorney had lost the case, whatever case it might have been. The trial court instructed the jury to disregard both the question and the answer and we presume that they heeded this instruction. This assignment of error is overruled.

Defendant next contends that the trial court erred in allowing certain testimony from Officer H. D. Jones of the Charlotte Police Department as corroborative testimony, the purpose for which it was expressly limited by the trial court. Defendant's argument is strained and completely without merit.

Officer Jones testified that the witness Pearson told him a week-and-a-half after the alleged kidnapping that defendant had kidnapped the deceased. Further, he testified that Pearson had stated to him that defendant had handcuffed the deceased, placed him in the trunk of deceased's car and drove off in the car. The trial court gave the appropriate instructions to the jury with respect to limiting the testimony to corroborative purposes. Our review of the record discloses that the witness Pearson had testified to essentially the same facts. The testimony was clearly corroborative.

[8] Defendant also argues that the testimony was inadmissible hearsay because the witness Pearson had not testified that he made any statement to Officer Jones and this denied defense counsel the right to cross-examine the witness Pearson with regard to the statement attributed to him. Again, defendant's contention is without merit. Officer Jones testified that Pearson made the statement to him and defendant had every opportunity and right to recall the witness Pearson if he desired to cross-examine him. No such request was made.

In his brief, defendant has grouped sixty-two exceptions into twenty-two assignments of error and has presented twenty-two arguments. Those of even arguable merit have been addressed above. The remaining arguments are patently without merit and we will not clutter the pages of our reports or waste valuable time by discussing them. We add, however, that we have examined each assignment and have scrutinized the record to make sure that no prejudicial error occurred. We have also heeded defendant's request that we review the instructions of the trial court, due to the seriousness of the charge and the extent of the sentence, to determine whether error exists. We find no error in the instructions or the trial.

We conclude that defendant had a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. RONNIE GRAY GIBBONS

No. 107

(Filed 8 July 1981)

1. **Criminal Law § 43.4— admissibility of photographs**

In a prosecution of defendant for burglary, armed robbery, conspiracy, and assault with a deadly weapon with intent to kill inflicting serious injuries, the trial court did not err in admitting into evidence fifteen photographs introduced by the State, since the trial judge properly instructed the jury that they were to consider the photographs only as illustrative, not substantive, evidence; none of the twelve photographs illustrating the exterior and interior of the house was sufficiently horrible, gruesome, or gory to raise a question of their admissibility; and while the three photographs of the victim did depict the horrible injuries which resulted from a vicious, calculated act of cruelty, they were nevertheless properly admitted to illustrate the doctor's testimony concerning the extent of the victim's injuries.

2. **Robbery § 5.2— armed robbery—fists as dangerous weapon**

There was no merit to the State's contention that defendant's fists were a deadly weapon which would support a conviction of armed robbery, since the trial judge related the facts and law concerning the use of fists as a deadly weapon only to the crime of assault with a deadly weapon, and this application of the law to the facts could not be related back to the charge of robbery with firearms so as to assist the jury in reaching a correct verdict on the charge of robbery with firearms.

3. **Robbery § 4— armed robbery—possession of firearm—sufficiency of evidence**

Mere possession of a firearm during the course of a robbery is insufficient to support an armed robbery conviction under G.S. 14-87; rather, the statute includes an additional requirement that the possession of the firearm threaten or endanger the life of a person.

Justice CARLTON dissenting.

Justices HUSKINS and MEYER join in the dissenting opinion.

APPEAL by defendant from *Wood, J.*, 15 September 1980 Criminal Session of STOKES Superior Court.

Defendant was charged in bills of indictment proper in form with burglary, armed robbery, conspiracy, and assault with a deadly weapon with intent to kill inflicting serious injury.

The State's evidence tended to show that the victim, Mrs. Marietta Boaz Wilson, lived alone in rural Stokes County. She heard someone turning the knob of her door at 4:00 a.m. on 3 December 1979. After attempting to use the telephone and getting no dial tone, she went toward the door, but she was knocked

down and rendered unconscious as she approached the door. When Mrs. Wilson regained consciousness, someone was beating her about the head, and she observed a teenage boy standing at her feet. The person beating her said, "We come after your money." She lost consciousness again, and, when she came to, she managed to go outside and flag down a school bus for assistance. A doctor testified that the victim's face had been severely injured by the repeated blows. He said that the left eye socket had been pulverized so that not enough bone was left for reconstruction and that she was almost blinded in that eye. She had to stay in the hospital for three months.

James Edward Marsh testified that he, Roberto Roman Webber, and Ronnie Gray Gibbons had committed the break-in. He identified defendant as the person who beat Mrs. Wilson. The witness further testified that they took Mrs. Wilson's pocketbook which contained seven dollars and some change.

Defendant took the stand in his own defense and denied that he had gone to Mrs. Wilson's home on the morning of 3 December 1979.

On rebuttal Roberto Roman Webber testified that he was the third member of the group who broke into the house. He gave the following account of the break-in: Marsh was the first of the three who went into the house. Webber and defendant followed after Webber broke out the glass in a door with the butt of a shotgun he was carrying. Webber rested the shotgun against a wall. Mrs. Wilson was already on the floor when Webber and defendant entered the house, and Webber testified, "I don't reckon she could see the gun." After the three left the house defendant told the other two he thought he had killed the woman.

The jury found defendant guilty of first-degree burglary, robbery with a firearm, felonious conspiracy, and assault with a deadly weapon inflicting serious injury. On 18 September 1980, Judge Wood sentenced defendant to concurrent life sentences for the burglary and robbery with a firearm convictions and to consecutive ten-year sentences for the assault and conspiracy convictions to run at the expiration of the life sentences. Defendant appealed to this Court as a matter of right pursuant to G.S. 7A-27(a).

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

James L. Dellinger for defendant.

BRANCH, Chief Justice.

[1] By his first assignment of error, defendant contends that the trial court erred by admitting into evidence an excessive number of gory pictures, the sole purpose of which was to inflame the jury. The State, on the other hand, contends that the photographs were properly admitted under the rule in *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).

In *Atkinson* this Court stated:

> The fact that a photograph depicts a horrible, gruesome, or revolting scene, indicating a vicious, calculated act of cruelty, malice, or lust does not render the photograph incompetent in evidence, when properly authenticated as a correct portrayal of conditions observed by and related by the witness who uses the photograph to illustrate his testimony.

Id. at 311, 167 S.E. 2d at 255.

In this case the State introduced fifteen photographs into evidence. Six of the photographs depict the exterior of the house and the broken door. Six others illustrate the scene inside the house, including some blood stains. Three of the photographs show the condition of the victim on being admitted to the hospital.

We have carefully examined these photographs and conclude that the trial court did not err in admitting them. First, we note that the trial judge properly instructed the jury that they were to consider the photographs only as illustrative, not substantive, evidence. Second, we hold that none of the twelve photographs illustrating the exterior and interior of the house is sufficiently horrible, gruesome, or gory to raise a question of their admissibility. Third, while the three photographs of the victim do depict the horrible injuries which resulted from "a vicious, calculated act of cruelty," we hold that they were properly admitted to illustrate the doctor's testimony concerning the extent of

the victim's injuries. *Id.* at 311, 167 S.E. 2d at 255. Further, we do not find the number of photographs introduced to be excessive.

Defendant next assigns as error the submission of the armed robbery charge to the jury. Defendant contends that the State offered no evidence that the shotgun was ever used to threaten or endanger the life of the victim. The State counters defendant's contention with two arguments. First, the State argues that defendant's fists were a deadly weapon which would support a conviction of armed robbery. Second, the State contends that it introduced sufficient evidence of the presence of the shotgun to place the issue before the jury.

The armed robbery statute under which defendant was convicted reads in pertinent part:

> § 14-87. *Robbery with firearms or other dangerous weapons.* (a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any . . . residence . . . at any time . . . or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony . . . .

[2] We first consider the State's argument that defendant's fists constituted a "dangerous weapon, implement or means" under this statute. Although a novel theory in North Carolina, the State contends that we should follow other states which recognize that fists, in certain circumstances, can be considered weapons to support an armed robbery charge. Defendant agrees that some states do so hold, but he contends that the judge's instructions to the jury on armed robbery did not include an instruction on fists as a deadly weapon. Therefore, he concludes that the jury could not have found defendant guilty under this theory.

In his charge to the jury on the armed robbery charge, the judge instructed:

> So I charge if you find from the evidence and beyond a reasonable doubt that on or about December 3, 1979, Ronnie Gibbons, either by himself or acting together with James Edward Marsh or Roberto "Chico" Webber, had in his posses-

sion a firearm and took and carried away a pocketbook with seven dollars in it from the person or presence of Marietta Boaz Wilson without her voluntary consent by endangering or threatening her . . . life with the use or the threatened use *of a shotgun*, Ronnie Gibbons knowing that he was not entitled to take the pocketbook with seven dollars in it and intending at that time to deprive Marietta Boaz Wilson of its use permanently, it would be your duty to return a verdict of guilty of robbery with a firearm.

However, if you do not so find or if you have a doubt as to one or more of *these* things, you will not return a verdict of guilty of robbery with a firearm. [Emphasis added.]

As we said in *State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875 (1971), "The chief purpose of a charge is to give a clear instruction which applies the law to the evidence in such a manner as to assist the jury in understanding the case and in reaching a correct verdict." *Id.* at 136, 184 S.E. 2d at 877.

The trial judge in his charge related the facts and law concerning the use of fists as a deadly weapon only to the crime of assault with a deadly weapon. We do not believe that this application of the law to the facts could be related back to the charge of robbery with firearms so as to assist the jury in reaching a correct verdict on the charge of robbery with firearms. Thus, a fair reading of this charge indicates that the trial court restricted the State's proof of robbery with firearms to defendant's use of the shotgun.

[3] The State's second argument presents an issue of first impression in this State—whether mere possession of a firearm during the course of a robbery is sufficient to support an armed robbery conviction under G.S. 14-87.

The interpretation of an armed robbery statute depends on its wording. Some states have statutes which simply provide that a robbery perpetrated by a person "armed with a deadly weapon" is robbery in the first degree. 67 Am. Jur., Robbery, § 4 (1973). In these states, courts have held that the statute does not require actual use of a weapon, and that mere possession is sufficient to fulfill the requirement that the perpetrator was armed. *E.g. People v. Hall*, 105 Cal. App. 359, 287 P. 533 (1930). Other states have

statutes which make the "display" of a weapon an aggravating factor of robbery. Model Penal Code, Robbery § 222.1, Comment 5, Note 64 (1980). These states require more than mere possession of a dangerous weapon to make out this element of the crime. *E.g. State v. Smallwood*, 346 A. 2d 164 (Del., 1975).

The wording of North Carolina's statute, however, does not fall neatly into either of these categories. The pertinent language of our statute reads, "Any person or persons who, having in possession . . . any firearms . . . whereby the life of a person is endangered or threatened . . . ." G.S. 14-87. While it does include words prohibiting possession, it includes an additional requirement that the possession threaten or endanger the life of a person. Only if we construe the statute to mean that mere possession of a firearm is threatening or endangering can defendant's action come within the proscription of the statute.

We can find no case in which this Court has held or even implied that mere possession of a dangerous weapon is sufficient to support a charge of armed robbery. On the contrary, in the recent case of *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978), we recognized that possession and endangering or threatening are separate elements of the crime:

> The essentials of the offense set forth in G.S. 14-87 are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of "firearms or other dangerous weapon, implement or means"; and (3) danger or threat to the life of the victim.

Id. at 63, 243 S.E. 2d at 373. The element of danger or threat to the life of the victim is the essence of the offense. As the Court said in *State v. Covington*, 273 N.C. 690, 161 S.E. 2d 140 (1968),

> Prerequisite to conviction for armed robbery . . . the jury must find from the evidence beyond a reasonable doubt that the *life* of the victim was *endangered* or *threatened* by the *use* or *threatened use* [or possession] of "firearms or other dangerous weapon, implement or means."

Id. at 699-700, 161 S.E. 2d at 147. [Original emphasis.]

In a case presenting the only fact situation close to the one presented by this case, this Court held that possession of a load-

ed, but breeched shotgun did not endanger or threaten the life of the alleged victim of a robbery. *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971). In *Evans* the defendant entered a store with the loaded, breeched shotgun after a companion said, "This is a holdup; no one's going to get hurt." Upon the remonstrance of one of the customers in the store, the defendant removed the shell from the shotgun and said his purpose was only to settle an argument. The Court noted that the defendant "never pointed the gun at anyone or threatened to use it for any purpose." *Id.* at 454, 183 S.E. 2d at 545. The Court concluded, "The State's evidence completely negates . . . the allegation that the defendants endangered and threatened [the victim's life by the use or threatened use of the shotgun . . . ." *Id.* at 455, 183 S.E. 2d at 545-46.

In this case, while the State presented evidence of the element of possession of a deadly weapon, it presented no evidence that defendant endangered or threatened the life of the victim by possession of that weapon, aside from the mere fact of the weapon's presence. The victim did not testify that a weapon was used in the crime. The perpetrators testified that the shotgun was present at the scene, but they did not testify that the gun was pointed at the victim or used to threaten her. On this evidence we hold that the State has not offered any evidence that the life of the victim was endangered or threatened by possession of the shotgun.

We recognize that the contemporary problem of the proliferation of cheap handguns might call for a law which makes criminal the mere possession of a gun during the perpetration of a felony, but we do not think that the legislature intended this law to meet this policy for three reasons. First, the language of the pertinent section of this statute has not been changed since its promulgation in 1929, so it cannot be considered a legislative response to a contemporary problem. Second, this Court has often stated that G.S. 14-87 does not create a new crime, it merely increases the punishment which may be imposed for common law robbery where the perpetrator employs a weapon. *E.g. State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974). The focus of the statute then is not the creation of a new crime for commission of an offense with a firearm, but the punishment of a specific person who has committed a robbery which endangers a specific victim. In this sense, a statute seeks retribution by punishing a specific offender,

rather than deterrence by creating a new crime of possession of a firearm during a robbery. Third, our interpretation of the statute comports with the well-recognized canon of statutory construction which requires that a statute be construed so that all of its terms have meaning. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). If the statute were construed to proscribe mere possession of a weapon, then the phrase, "whereby the life of a person is endangered or threatened," would be mere surplusage. Our interpretation, which requires both an act of possession and an act with the weapon which endangers or threatens the life of the victim gives substance to all the terms of the statute.

We do not disagree that it might be wise policy for the legislature to enact a law making mere possession of a firearm during a robbery a crime, but we do not believe this commendable result should be reached by judicial legislation.

The defendant's contention that the offense of assault with a deadly weapon inflicting serious injury is a lesser included offense of armed robbery has no merit. *See State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971).

In cases #80CR2778, 80CR3054, and 80CR3055 no error.

In case #80CR3051, reversed and remanded for sentencing for common law robbery.

Justice CARLTON dissenting.

I must respectfully dissent in case #80CR3051. In my opinion, the majority, contrary to the plain language of the statute, has judicially imposed upon the State an impossible burden of proof with regard to the element of endangering another's life in armed robbery cases.

The Legislature itself has defined the crime of armed robbery and listed the elements which make up that offense. Under our statutes, armed robbery is defined thusly:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to

> take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than seven years nor more than life imprisonment in the State's prison.

G.S. § 14-87(a) (Cum. Supp. 1979). The elements are (1) possession, use or threatened use of a firearm or other dangerous instrumentality, (2) the endangering or threatening of another's life, and (3) the unlawful taking or attempt to take the personal property of another. From the listing of these elements it is clear that, absent an actual threat to use the firearm, the endangerment requirement can be proved only by circumstantial evidence. It is further obvious, I think, that the only circumstances relevant to this element are the possession or use and the taking of or attempt to take personal property, the remaining elements of armed robbery. In my opinion, whenever the State has shown these two elements there arises a *permissible inference* of endangerment and the case should be submitted to the jury. Were it otherwise, possession of a firearm during a robbery or attempted robbery could never constitute the crime of armed robbery as the Legislature says it can. The majority opinion would require proof of something more than mere possession. I submit that when a firearm is possessed during a robbery and there is no threat of use, there is never "something more" that the State can show to prove, either directly or circumstantially, the element of endangerment. In short, the majority opinion has construed the word "possession" in the armed robbery statute to be meaningless. Under its interpretation of the statute, possession of a firearm during a robbery can never be armed robbery, contrary to the plain language of the statute. I do not believe that our prior case law dictates the majority's result. If, indeed, it does support the majority's conclusion, it ought to be overruled.

I vote to hold that once the State has produced substantial evidence of possession of a firearm during a robbery or attempted robbery, a permissible inference of endangerment arises and the case must be submitted to the jury. In my opinion, the evidence of armed robbery presented at trial was sufficient to warrant sub-

mission of the case to the jury and to support defendant's conviction.

Justices HUSKINS and MEYER join in this dissenting opinion.

ROBERT MAZZACCO v. HARVEY PURCELL AND ROSEMARY PURCELL

No. 128

(Filed 8 July 1981)

1. **Negligence § 52.1— relative cutting trees—invitee**

Plaintiff, who sustained injuries during a tree cutting accident on his brother-in-law's property, was an invitee of defendants where he was on their property by express invitation; he entered the rental property of defendants to cut trees; and this service was of direct and substantial benefit to defendants in maintaining and improving their rental property.

2. **Negligence § 57.10— tree cutting accident—negligence and contributory negligence as jury questions**

In an action to recover for injuries sustained by plaintiff in a tree cutting accident, the trial court erred in directing verdict for defendants on the ground that the evidence failed to establish actionable negligence on the part of defendants and, in the alternative, that the evidence showed contributory negligence as a matter of law, since defendants owed plaintiff, as an invitee, a duty of ordinary care to maintain their premises in a safe condition and to warn of hidden dangers that had been or could have been discovered by reasonable inspection; the evidence raised a question for the jury as to whether the male defendant negligently failed to warn plaintiff of the hidden danger in the rigging of a rope to a tree which was being felled; a question was raised for the jury as to whether plaintiff knew or should have known that a rope, a part of which was slack and lying on the ground, was tied to a third tree in such a manner that his body would be catapulted skyward when the falling section took up the slack; and a jury question was raised as to whether plaintiff was experienced in cutting trees, whether the attachment of the rope to a third tree was visible, and whether plaintiff's actions were reasonable and prudent under the circumstances or whether his actions constituted contributory negligence.

PLAINTIFF appeals from decision of the Court of Appeals, 51 N.C. App. 42, 275 S.E. 2d 190 (1981), affirming a directed verdict in favor of defendants entered by *Davis, J.*, on 24 January 1980 in FORSYTH Superior Court.

This is a civil action to recover damages for personal injuries received when plaintiff was allegedly thrown through the air "like

an arrow shot from a bow." Plaintiff alleged that, at the time of the injury, he was an invitee of defendants who failed to warn him of a dangerous condition on their property which was the proximate cause of his injuries.

Defendants answered denying that they created a dangerous condition on their land or that they were negligent in any way. Defendants contend plaintiff's injuries were the result of unforeseeable and unavoidable accident or, in the alternative, the injuries were the result of plaintiff's own contributory negligence.

The action came on for trial at which time plaintiff presented evidence which tended to show the following:

In 1977 plaintiff was a resident of Bricktown, New Jersey where he was employed as a boiler plant supervisor. For three or four years, he had also worked on a part-time basis with two of his wife's brothers in their business of removing and pruning trees. Defendants, who live in Pfafftown, North Carolina, are the brother-in-law and sister of plaintiff.

In June 1977, plaintiff's sister telephoned him that she and her husband had purchased a rental house within walking distance of their home in Forsyth County and needed to remove some trees. She invited plaintiff to visit and bring his tree removal equipment and, while there, help her and her husband remove the trees. Plaintiff agreed. He, his wife, and two daughters came to North Carolina, arriving at defendant's home on a Friday or Saturday. He brought with him a rope, a climbing saddle and a chain saw. The purpose of the trip was more of a vacation, but he was going to help cut trees while there.

Plaintiff discussed with defendants the removal of trees which were blocking sunlight from the house and causing a mildew problem. Plaintiff and his sister began removing trees on Monday morning and continued through the week. On the following Saturday, 2 July 1977, plaintiff went to the property with his brother-in-law and Wade Purcell, a son of defendants, to remove the larger trees which plaintiff and his sister could not remove. They took down two large pine trees without incident. They then turned their attention to a large live oak tree leaning over the roof of the house causing an actual danger to the structure. The tree towered upwards sixty to eighty feet. Using a ladder,

the three men went onto the roof of the house. Plaintiff then climbed a ladder into the tree and proceeded to cut away branches which he lowered by rope to his nephew and brother-in-law on the roof of the house who in turn threw the limbs to the ground. This continued until noon when only one large branch and several small branches remained. While removing the large branch, plaintiff cut three of his fingers and his sister took him to the hospital emergency room. He received five stitches in one finger which was immobilized in a splint. The three fingers were then bandaged. The treatment took three to four hours. His sister then returned him to the rental property. Plaintiff did not know defendant and his sons would continue to work in his absence. Plaintiff's brother-in-law did not expect him back at this particular time.

When plaintiff came around the corner of the rental house, he saw his brother-in-law and John Purcell, another of defendants' children, on the ground pulling on a rope tied to the upper portion of the tree on which they had been working when plaintiff cut his hand. He then heard the sound of a chain saw. He looked up and saw his nephew, Wade Purcell, on a ladder which ran from the roof of the house to a branch on the tree. One end of the rope had been rigged by defendant and his son to the top section of the tree being sawed off, then the rope passed over a nearby limb on a second tree and, unknown to plaintiff, the other end of the rope had been tied to the trunk of a third tree at ground level. By pulling on the rope they could make the severed section of the tree topple away from the house. The nephew was under the lean of the tree with the chain saw making a cut toward a notch. It appeared to plaintiff that the cut might miss the notch. This would create a situation where control of the direction of the fall of the tree section would be lost. The section being removed was fifteen to twenty feet in length, twelve to fifteen inches in diameter and weighed 1500 to 2000 pounds.

Plaintiff went to where his brother-in-law and John Purcell were pulling on the rope, a very strong 120-foot climbing rope brought by plaintiff from New Jersey. One of the two asked plaintiff, "Well how are you going to pull with one hand?" The bandage on his left hand made it difficult for plaintiff to grip. Plaintiff demonstrated how he could pass the rope behind him and hold it with one hand against his hip. Plaintiff laid the rope across

his left palm and below the beltline on his hips and pulled with his right hand and hips by leaning and pushing backwards. The Purcells were situated on the left side of the rope "pulling back" with their hands while plaintiff was on the right side of the rope "pushing back" with his hips. No one told plaintiff not to get on that side of the rope. There was no further conversation between the parties except plaintiff stated he had received a couple of stitches and was all right. Plaintiff's sister and wife sought to assist with the pulling but were told to go back.

Within two minutes, the top section of the tree was sawed off but the rope was too short to permit the severed portion to reach the ground. As it started to fall, plaintiff's brother-in-law yelled "turn it loose" or "let go." When the rope snapped taut by the weight of the falling tree section, plaintiff was "catapulted" through the air thirty or forty feet into a large pine tree, striking it with his right shoulder. He did not remember flying through the air or whether he let go of the rope. He received injuries consisting of a complete left acromioclavicular dislocation, bruises to the back and rope burn under the left arm. He lost approximately ten weeks of work and had corrective surgery performed in New Jersey.

Plaintiff was not aware when he went to pull on the rope that the other end of it was tied to a third tree at ground level. He did observe a slack portion of the rope lying on the ground behind him when he took the rope in his left hand and ran it behind his back. He did not know whether the end of the rope was covered by foliage or brush.

When plaintiff returned to North Carolina in late July 1977 for a family wedding, he returned to the scene of the accident. His brother-in-law told him it looked like plaintiff was flying through the air forty or fifty miles an hour when he was catapulted by the rope. He further told plaintiff he knew the rope was too short to allow the tree section to fall clear to the ground and he was amazed the rope did not break when the tree section fell. He had thought it might break the rope and he would have to buy plaintiff a new one. The defendant Harvey Purcell told plaintiff that he and his son, who was pulling on the rope with him, had agreed that as soon as they saw the tree starting to lean in the direction of the notch they would both let go.

At the close of plaintiff's evidence, the trial court allowed defendants' motion for a directed verdict upon the grounds that (1) the evidence failed to establish actionable negligence on the part of the defendants and, in the alternative, (2) the evidence showed contributory negligence as a matter of law. Plaintiff appealed to the Court of Appeals, and that court, with Clark, J., dissenting, affirmed the trial court. Plaintiff appealed to this Court as of right pursuant to G.S. 7A-30(2).

Craighill, Rendleman, Clarkson, Ingle & Blythe, P.A., by John R. Ingle, attorneys for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and James M. Stanley, Jr., attorneys for defendant appellees.

HUSKINS, Justice.

The determinative question on this appeal is whether the Court of Appeals erred in upholding directed verdict for defendants. This requires two decisions: first, whether defendants were negligent in any respect whatsoever; and second, whether plaintiff was contributorily negligent as a matter of law so as to bar any claim for relief.

Taking the evidence in a light most favorable to plaintiff and giving plaintiff the benefit of every reasonable inference to be drawn therefrom, we conclude it was error to grant directed verdict for the male defendant Harvey Purcell. However, a directed verdict in favor of the female defendant Rosemary Purcell was properly granted.

The standard of care owed to plaintiff depends upon whether plaintiff was a licensee or invitee. The distinction between an invitee and a licensee is determined by the nature of the business bringing a person to the premises. A licensee is one who enters on the premises with the possessor's permission, express or implied, *solely for his own purposes* rather than the possessor's benefit. An invitee is a person who goes upon the premises in response to an express or implied invitation by the landowner for the mutual benefit of the landowner and himself. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979); *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154 (1959).

[1] Plaintiff in this case was an invitee of defendants. He was there by express invitation. He entered the rental property of defendants to cut trees. This service was of direct and substantial benefit to defendants in maintaining and improving their rental property. *Contrast Thompson v. De Vonde*, 235 N.C. 520, 70 S.E. 2d 424 (1952), *with Murrell v. Handley*, 245 N.C. 559, 96 S.E. 2d 717 (1957).

[2] Defendants owed plaintiff as an invitee a duty of ordinary care to maintain the premises in a safe condition and to warn of hidden dangers that had been or could have been discovered by reasonable inspection. *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E. 2d 507 (1978). Plaintiff contends defendants were negligent in failing to warn him of the hidden danger created by attaching one end of the rope to the tree section being felled, then passing the rope over a high limb on a second tree and tying the other end to the trunk of a third tree, knowing the rope, thus arranged, was too short to allow the severed portion of the tree to fall all the way to the ground. We agree that the jury could find the male defendant negligently failed to warn plaintiff of the hidden danger in the rigging of the rope. We find no such breach of duty on the part of the female defendant.

Plaintiff has made no showing that Rosemary Purcell was aware of the dangerous condition on her property. She was with plaintiff at the hospital when the dangerous condition was created. There is no evidence that she was aware, or should have been aware upon reasonable inspection, of the danger.

The jury could find that the male defendant should have warned plaintiff of the hidden peril or unsafe condition in the rigging of the rope. Since defendant changed the condition of the premises while plaintiff was at the hospital, a jury could reasonably conclude that this change created a dangerous condition on the property of which defendant failed to warn plaintiff upon his return from the hospital. The jury could further find that plaintiff did not know the rope, a part of which was slack and lying on the ground, was tied to a third tree in such a manner that his body would be catapulted skyward when the falling section took up the slack.

Defendants argue this condition was obvious and that there was no duty on the part of the owner to warn of such an obvious

condition. *See Long v. Methodist Home*, 281 N.C. 137, 187 S.E. 2d 718 (1972); *Jones v. Pinehurst, Inc.*, 261 N.C. 575, 135 S.E. 2d 580 (1964). However, we cannot say that the condition was equally obvious to the male defendant and plaintiff. Plaintiff's testimony is that he was not aware of the condition at the time and indeed was not made aware of it until almost a month later when the male defendant explained to him how the rope was rigged and that defendant was aware the rope was too short to let the tree section fall to the ground and thought the rope would probably break. The jury could further find that plaintiff was not made aware of the understanding between Harvey Purcell and his son to let go of the rope once the severed tree started leaning in the proper direction.

Finally, it is for the jury to weigh the evidence and find as facts whether plaintiff was experienced in cutting trees and whether the attachment of the rope to a third tree was visible and determine whether plaintiff's actions were reasonable and prudent under the circumstances or whether his actions constitute contributory negligence. The evidence offered does not establish contributory negligence as a matter of law. While permitting an inference that plaintiff was negligent, the evidence does not conclusively establish it.

For the reasons stated, the decision of the Court of Appeals affirming directed verdict in favor of Harvey Purcell is reversed. The case against Harvey Purcell is remanded to that court for further remand to Forsyth Superior Court for further proceedings consistent with this opinion. The decision of the Court of Appeals affirming directed verdict in favor of Rosemary Purcell is affirmed.

As to Rosemary Purcell—Affirmed.

As to Harvey Purcell—Reversed and Remanded.

STATE OF NORTH CAROLINA v. FREDDIE LEE JONES

No. 131

(Filed 8 July 1981)

1. **Criminal Law § 106.2— circumstantial evidence—sufficiency to withstand motion for nonsuit**

When the State relies on circumstantial evidence to establish defendant's guilt, such evidence is not required to exclude every reasonable hypothesis except that of guilt to withstand a motion for nonsuit; rather, the evidence, whether direct, circumstantial, or both, is sufficient to withstand a motion to dismiss if there is evidence which tends to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction and not merely such as raises a suspicion or conjecture.

2. **Homicide § 4.4— intent to kill**

While a specific intent to kill is an essential element of first degree murder, it is also a necessary constituent of the elements of premeditation and deliberation, and proof of premeditation and deliberation thus is also proof of intent to kill.

3. **Homicide § 18— proof of premeditation and deliberation**

Some of the circumstances which give rise to an inference of premeditation and deliberation are ill will or previous difficulty between the parties, the want of provocation on the part of the deceased, the conduct of defendant before and after the killing and whether the killing was done in a brutal and vicious manner.

4. **Homicide § 21.5— premeditation and deliberation and intent to kill—sufficiency of evidence**

The State's evidence of premeditation and deliberation and intent to kill was sufficient to support defendant's conviction of first degree murder where it tended to show that defendant had threatened the victim's life on at least two occasions within a few days prior to the shooting of the victim and on one such occasion was armed with a pistol; immediately after the shooting defendant flagged down a prosecution witness to tell her he had just shot the victim; and the day after the shooting defendant told another prosecution witness that he, or rather the bullet, had killed the deceased over a money matter.

5. **Criminal Law § 113.9— misstatement of evidence—failure to object at trial**

Defendant waived his right to challenge the trial court's misstatement of evidence that defendant had been seen with a pistol while with deceased at her mother's home by failing to bring the misstatement to the judge's attention at trial; furthermore, defendant was not prejudiced by the misstatement where a witness testified that defendant was armed with a pistol when he threatened at a motel room to kill the deceased and where the trial judge told the members of the jury to use their own recollection of the evidence and not his summary in their deliberations.

State v. Jones

ON appeal as a matter of right from the judgment of *Sitton, Judge*, entered at the 20 October 1980 Criminal Session of Superior Court, MECKLENBURG County, imposing a life sentence for conviction of first degree murder.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

Wardlow, Knox, Knox, Robinson & Freeman, by H. Edward Knox and John S. Freeman, for the defendant.

CARLTON, Justice.

I.

Defendant was charged in an indictment, proper in form, with the murder of Wanda Rene Davis. He entered a plea of not guilty and was tried by a jury.

At trial, evidence for the State tended to show that Wanda Rene Davis was shot and killed at approximately four o'clock on the afternoon of 5 June 1980 by a black male. The shooting took place in a parking lot behind McDonald's Cafeteria and the Mini-Pantry located at the intersection of LaSalle Street and Beatties Ford Road in Charlotte. Ms. Davis died as a result of a bullet wound to her chest which passed completely through her body. She was shot at a distance of two feet or more.

Shortly after the shooting Pearl Smith was driving down LaSalle Street near McDonald's Cafeteria when defendant flagged her down. She stopped her car and defendant told her he had just shot the deceased, who was known as "Shank" or "Shang," and added, "If you think I'm lying, go down there and look behind McDonald's. She's still laying down there on the ground." When defendant stopped Ms. Smith he was carrying "something like a clutch bag with a pistol in it." Ms. Smith described the pistol as black with a brown handle. After her discussion with defendant Ms. Smith drove to McDonald's Cafeteria and saw the deceased lying on the ground face down, bleeding from her mouth.

Herbert Walker was a little over a block away from the Mini-Pantry on the afternoon of 5 June 1980 when he heard a shot. He ran toward the back of the Mini-Pantry and saw a woman who he knew as "Shank" lying on the ground face down, bleeding from

the mouth. He went around to the front to call an ambulance and saw defendant in his car at the intersection of Beatties Ford and LaSalle waiting for the light to change.

Deceased's mother, Ann Davis, testified that her daughter was living with her at the time of her death. On the Monday before the shooting, 2 June 1980, Ms. Davis was awakened at approximately four o'clock in the morning by the sounds of an argument. She looked out her window and saw the defendant and Shank, her daughter, seated in a car in her driveway "cursing and fighting." Defendant had an object in his hand and every time the deceased tried to get out of the car defendant would "throw something up at her, and make her get back in the car." Although Ms. Davis could not hear the entire conversation, she did hear her daughter say "please don't kill, don't shoot me" when defendant made her get back in the car. This continued until Ms. Davis called to defendant that she was going to call the police. The deceased got out of the car and defendant left, yelling that he was going to kill Ms. Davis, Shank and Shank's baby.

Pearl Smith also testified that the deceased had stayed with her in her motel room one night four or five days before the shooting. On that night defendant knocked on the door of the motel room. The deceased, fearing that it was the defendant, hid under a bed. Ms. Smith opened the door and defendant asked if she knew where Shank was. He was armed with a pistol and said that he was going to kill Shank. The pistol was black with a brown handle. Ms. Smith forced him out of the room and called the police.

On the morning of 5 June 1980, Joe Johnson, a Charlotte police officer, saw defendant in McDonald's Cafeteria. Defendant was with a young black female and had a cast on his right hand. Officer Johnson, having gone to school with the defendant, asked how defendant hurt his hand. Defendant replied, "beating this bitch here," and that he was going to kill her next time.

On the day after the deceased was shot defendant talked to Maxine Harris at her home. She asked if he had killed Shank. He replied, "I didn't kill her, the bullet killed her." When asked why, defendant said that the deceased had had "somebody do something to him and he rounded back on her and did something to her" and that she "messed up some money that he was sup-

posed to get." According to Ms. Harris, the deceased worked for defendant as a prostitute.

The defendant presented no evidence.

The case was submitted to the jury and it found defendant guilty of first degree murder. From a sentence of life imprisonment[1] the defendant appeals of right to this Court pursuant to G.S. 7A-27.

II.

[1] Defendant first assigns as error the trial court's denial of his motion for nonsuit. Defendant argues that the circumstantial evidence presented by the State was insufficient to go to the jury. He interprets our case law to require that when the State relies on circumstantial evidence to establish a defendant's guilt that evidence must not only be consistent with guilt but must also be inconsistent with every other reasonable hypothesis. Although this is the standard recited by some of the older cases, *e.g., State v. Harvey*, 228 N.C. 62, 44 S.E. 2d 472 (1947); *State v. Stiwinter*, 211 N.C. 278, 189 S.E. 868 (1937), it is no longer the yardstick by which the sufficiency of the evidence is measured.

The conflict in the authority was resolved by this Court in *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). In *Stephens*, defendant raised a challenge to the evidence identical to that brought forth in this case: that circumstantial evidence failed to exclude every reasonable hypothesis of guilt and was insufficient to withstand defendant's nonsuit motion. The Court, per Justice Higgins, rejected the standard urged upon it by defendant and, thus, put an end to the controversy concerning the standard by which the sufficiency of circumstantial evidence is measured:

> We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons*, 240 N.C. 780, 83 S.E. 2d 904, quoting

1. At the sentencing hearing the State presented no evidence of any aggravating circumstances. The trial judge found as a matter of law that no aggravating circumstances existed and imposed a sentence of life imprisonment.

> from *S. v. Johnson*, 199 N.C. 429, 154 S.E. 730: "If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury.

Id. at 383-84, 93 S.E. 2d at 433-34. *Accord, State v. Daniels*, 300 N.C. 105, 265 S.E. 2d 217 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980); *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971); *State v. Pinyatello*, 272 N.C. 312, 158 S.E. 2d 596 (1968); *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967). The test of the sufficiency is the same whether the evidence is circumstantial or direct, or both: the evidence is sufficient to withstand a motion to dismiss and to take the case to the jury if there is "evidence [which tends] to prove the fact [or facts] in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture." *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930). If the evidence adduced at trial gives rise to a reasonable inference of guilt, it is for the members of the jury to decide whether the facts shown satisfy them beyond a reasonable doubt of defendant's guilt. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

We believe this rule to be the same in substance as that announced by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979). In *Jackson*, the Supreme Court held that in challenges to state

criminal convictions brought under 28 U.S.C. § 2254 the relevant inquiry in determining the sufficiency of the evidence to support a finding of guilt beyond a reasonable doubt is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319, 99 S.Ct. at 2789, 61 L.Ed. 2d at 573 (emphasis in original). Although the rule established by the case law of this State employs different language, the basic rule is the same—in order to survive a motion for nonsuit there must be substantial evidence of all material elements of the offense. It is against this standard that defendant's claim of insufficient evidence must be judged.

[2] Defendant contends that the State's evidence was fatally deficient with regard to several elements of first degree murder: premeditation, deliberation and intent to kill. Premeditation is defined as thought beforehand for some length of time; deliberation means an intention to kill, executed by defendant in a "cool state of blood" in furtherance of a fixed design or to accomplish some unlawful purpose. *E.g., State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296, *death sentence vacated*, 429 U.S. 809, 97 S.Ct. 47, 50 L.Ed. 2d 69 (1976); *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970). Specific intent to kill is an essential element of first degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation. *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970). Thus, proof of premeditation and deliberation is also proof of intent to kill.

[3, 4] The elements of premeditation and deliberation are often not susceptible of direct proof and, in most cases, can be proved only by inference from circumstantial evidence. *E.g., State v. Cates*, 293 N.C. 462, 238 S.E. 2d 465 (1977). Some of the circumstances which give rise to an inference of premeditation and deliberation are ill will or previous difficulty between the parties, *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972), the want of provocation on the part of the deceased, the conduct of defendant before and after the killing and whether the killing was done in a brutal and vicious manner, *State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333, *death sentence vacated*, 429 U.S. 809, 97 S.Ct. 46, 50 L.Ed. 2d 69 (1976). In this case the State presented evidence that defendant had threatened the deceased's life on at least two occasions within a few days prior to the shooting. On both of those oc-

casions defendant stated that he intended to kill the deceased and, on one occasion, he was armed with a pistol. Immediately after the shooting defendant flagged down the prosecution witness Smith to tell her he had just shot the deceased. The day after the shooting defendant told State witness Harris that he, or, rather, the bullet, had killed the deceased over a money matter. This evidence is sufficient to give rise to an inference that, prior to the shooting, defendant, in a cool state of blood, thought about and informed an intent to kill and did kill Wanda Rene Davis in furtherance of an unlawful purpose. The circumstantial evidence of the elements of premeditation and deliberation and intent to kill was sufficient to enable a rational trier of fact to find these elements beyond a reasonable doubt, and the case was properly submitted to the jury. There was no error in the denial of defendant's nonsuit motions.

III.

[5] Defendant's second assignment relates to a misstatement by the trial judge in summarizing the State's evidence. In his charge to the jury, the trial judge stated "that the defendant had been seen with a pistol while with the said Wanda Davis at her mother's home." The decedent's mother did not testify that defendant was armed with a pistol but said only that defendant had something in his hand which she could not make out. Defendant contends that because the State's case relies so heavily upon prior threats this misstatement of the evidence constitutes prejudicial error for which he should be granted a new trial. However, defendant, by failing to bring the alleged misstatement to the judge's attention at trial, has waived his right to challenge the misstatement on appeal. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975). However, we note that even had defendant properly preserved his challenge for review, his challenge still would not succeed. On appeal the defendant has the burden of showing not only that there was error but also that the error was material and prejudicial. *E.g., State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971). The misstatement here was of no substantial consequence. Another witness, Pearl Smith, testified that defendant was armed with a pistol when he knocked on the door of her motel room and threatened to kill the deceased. Additionally, the trial judge told the members of the jury to use their own recollection of the evi-

dence and not his summary in their deliberations. Under these circumstances, we conclude that the misstatement of the evidence by the trial judge did not operate materially to prejudice the rights of the defendant. *See State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976). This assignment of error is overruled.

IV.

Defendant's remaining assignment alleges error in the denial of his post-verdict motions and is based on the assignments of error discussed above. Because we have found no error in the submission of this case to the jury on the theory of first degree murder and that the jury instructions contained no prejudicial error, this assignment is without merit and must also fail.

V.

We conclude that defendant had a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. CARLTON LEE WILLIAMS

No. 132

(Filed 8 July 1981)

1. Indictment and Warrant § 17; Rape § 11— variance between indictment and proof—failure to dismiss improper

The trial court erred in failing to dismiss charges of first degree sexual offense "to wit: cunnilingus and anal intercourse" in violation of G.S. 14-27.4(a) where all of the State's evidence tended to show that defendant penetrated the vaginal and rectal orifices of two girls by using a tampon, and no evidence in the record tended to show that defendant committed the act of cunnilingus or of anal intercourse with either victim.

2. Rape § 10— photographs of victims—admissibility

In a prosecution of defendant for engaging in sexual acts with two girls under the age of twelve, photographs of the nude girls pointing to parts of their bodies where defendant allegedly put a tampon were admissible for the purpose of illustrating the testimony of the victims, and the trial court properly instructed the jury that the photographs were for illustrative purposes only and were not substantive evidence of "anything that may or may not have happened in this case."

3. Criminal Law § 87.1— leading questions

In a prosecution of defendant for engaging in sexual acts with children who were five and nine years old, the trial court did not err in allowing the district attorney's use of leading questions.

4. Rape § 10— "nude book"—admissibility

In a prosecution of defendant for engaging in sexual acts with children under the age of twelve, the trial judge did not err in admitting into evidence a "nude book," since one of the victims testified that defendant used the book during perpetration of the crime charged.

5. Criminal Law § 34.7; Rape § 10— defendant's guilt of other offense—admissibility

In a prosecution of defendant for engaging in a sexual act with children under the age of twelve, the trial court did not err in admitting testimony by a twelve year old witness that defendant had lifted her shirt and rubbed her breasts, since such evidence was properly admitted to show intent and plan or design on the part of defendant to commit the charged crimes.

6. Rape § 11.1— engaging in sexual act with children under twelve—taking indecent liberties not lesser offense

In a prosecution of defendant under G.S. 14-27.4(a) for engaging in a sexual act with children under twelve, the trial court did not err in failing to instruct on taking indecent liberties with children in violation of G.S. 14-202.1, since taking indecent liberties with children is not a lesser included offense of the crime proscribed by G.S. 14-27.4(a).

APPEAL by defendant from judgment of *DeRamus, J.*, entered at the 10 November 1980 Session of STANLY Superior Court.

Defendant was charged in separate indictments with unlawfully and feloniously engaging in a "sexual act, to wit: cunnilingus and anal intercourse" with Deborah Bowers and with Susan Rebecca Williams, both being children "of the age of twelve years or less," and "the defendant, Carlton Lee Williams being more than four years older" than either child.

Evidence for the State tended to show that on the evening of 1 May 1980, Deborah Bowers was visiting Susie Williams at the home of Susie's father, the defendant. Susie, aged 5, testified that her father took Deborah to his bedroom and that she watched through the keyhole as defendant took Deborah's pants off and opened a box of tampons. Susie stated that defendant "put the tampax in Deborah down there (indicating her genital area)" and that he "put the tampax in Deborah five times in front and in

back." She further testified that defendant had, on the same occasion, committed similar acts with her.

Deborah Lynn Bowers, aged 9, testified that on the date in question defendant took her into his bedroom and took off her clothes. According to Deborah's account, defendant picked up a "naked book" and laid it over her head. She stated that he took a tampon and "put it in me in front and in back," and that he "kissed me up top . . . and down below." Deborah further stated that she had observed defendant through the keyhole as he did to Susie "everything he did to me."

Mary Rummage, a Detective Service Social Worker for the Stanly County Department of Social Services, testified in corroboration of the testimony of the two girls.

Defendant took the stand in his own behalf and stated that he had had disciplinary problems with the neighborhood children and that these problems in turn had caused problems with his own two children, Susie and Jeffrey. He testified that on 1 May 1980 he drove his school bus on the customary route, returning home at approximately 5:00 p.m. Shortly thereafter, he and his children went shopping for groceries. He testified that, "[o]n the day in question I neither had any contact with Deborah Bowers nor did she come to my residence."

The jury returned verdicts of guilty to two first-degree sex offenses, and defendant was sentenced in each case to a life sentence. He appealed to this Court pursuant to G.S. 7A-27.

Norman I. Singletary, attorney for defendant.

Rufus L. Edmisten, Attorney General, by Lester V. Chalmers, Jr., Special Deputy Attorney General, for the State.

BRANCH, Chief Justice.

[1] By his sixth assignment of error, defendant contends that the trial court erred in failing to dismiss the charges in that there was a fatal variance between the acts charged in the indictments and the State's proof at trial. He maintains that, while the indictments charged the specific acts of cunnilingus and anal intercourse, all of the State's evidence at trial failed to show the commission of either of those sexual offenses.

It is well settled that the evidence in a criminal case must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, there is a fatal variance between the allegations and the proof requiring dismissal. *State v. Waddell*, 279 N.C. 442, 183 S.E. 2d 644 (1971); *State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525 (1968).

In the instant case, defendant was charged specifically with a first-degree sexual offense "to wit: cunnilingus and anal intercourse." G.S. 14-27.4(a) provides that,

> A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> * * *
>
> (2) The victim is a child of the age of 12 years or less and the defendant is four or more years older than the victim.

"Sexual act" is defined in G.S. 14-27.1(4) to mean "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 . . . ." Defendant contends that the sexual acts of cunnilingus and anal intercourse are separate and distinct from the sexual act committed by the penetration of an object "into the genital or anal opening of another person's body." He further maintains that the State's evidence, if believed, tended to show the penetration of an object into the genital or anal opening rather than the sexual acts of cunnilingus or anal intercourse. We agree. All of the State's evidence tended to show that defendant penetrated the vaginal and rectal orifices of the two girls by using a tampon. The indictment in this case specifically denominated the sexual acts as being cunnilingus and anal intercourse. No evidence in the record tends to show that defendant committed the act of cunnilingus or of anal intercourse with either victim. We therefore hold that the trial court erred in failing to dismiss the charges of cunnilingus and anal intercourse on grounds of a fatal variance between the allegations and the proof at trial. The State may, if it elects, proceed to charge and try defendant for a "sexual offense" under that portion of G.S. 14-27.1(4) which defines sexual act as "the penetration . . . by any

object into the genital or anal opening of another person's body. . . ." *State v. Overman*, 257 N.C. 464, 125 S.E. 2d 920 (1962); *State v. Hicks*, 233 N.C. 31, 62 S.E. 2d 497 (1950).

Although we are reversing the judgment entered in this case, we nevertheless elect to address defendant's remaining assignments of error to the extent they may arise in the event of a new trial.

[2] Defendant's first assignment of error relates to the admission into evidence, for the purpose of illustrating the victims' testimony, certain photographs depicting the victims in the nude. The photographs were made by Ms. Rummage, the social worker, and showed each girl pointing to the parts of her body where defendant had put the tampon. Defendant contends that the photographs were highly inflammatory and that their probative value was far outweighed by their extremely prejudicial effect. We disagree. It has long been the rule in this State that photographs which are properly authenticated are admissible for the purpose of illustrating the testimony of a witness. *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971). In the instant case, the photographs were used to illustrate the testimony of both victims, and the trial court carefully instructed the jury that they were for illustrative purposes only "and not substantive evidence of anything that may or may not have happened in this case." This assignment is overruled.

[3] Defendant next assigns as error the district attorney's use of leading questions on direct examination of the State's witnesses. We note initially that our review of this assignment is limited since defendant failed to set out in the record, as required by Rule 9(c) of the Rules of Appellate Procedure, the questions posed by the district attorney. Even so, it is settled law that "the trial judge has discretionary authority to permit leading questions in proper instances, and such discretionary action on the part of the trial judge will not be disturbed absent a showing of abuse of discretion." *State v. Clark*, 300 N.C. 116, 123, 265 S.E. 2d 204, 209 (1980). Two well-recognized exceptions to the rule against leading questions are when the witness has difficulty in understanding the question because of age or immaturity, or where "the inquiry is into a subject of delicate nature such as sexual matters." *State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 236 (1974). The pros-

ecuting witnesses in this case were children aged 5 and 9 and were testifying to matters of an extremely delicate nature. We are unable to say that the trial court abused its discretion in permitting the State to ask leading questions of the witnesses.

Defendant next contends that the trial court erred in allowing a t-shirt into evidence. The record indicates that the State attempted to offer into evidence a t-shirt, handprinted with several suggestive statements. Upon defendant's objections, the court agreed to wait and rule on its admissibility the following day. However, the record discloses that no such ruling was ever made, and upon the State's subsequent attempt to offer the t-shirt into evidence during cross-examination of defendant, the court sustained defendant's objection and refused to admit the t-shirt into evidence. Even so, defendant contends that by allowing the State to question defendant regarding the t-shirt, and ruling only later that the shirt was inadmissible, the trial court effectively put before the jury the shirt as substantive evidence. Without deciding whether the use of the t-shirt by the State would amount to prejudicial error warranting a new trial, we are hard pressed to see the relevance of this particular evidence. Defendant identified the t-shirt as his, but the State failed in any way to connect the t-shirt to the offenses charged in this case. *See* 1 Stansbury's North Carolina Evidence § 117 (Brandis Rev. 1973). Since we are reversing the judgments in the case, however, we deem it necessary only to hold that the trial court correctly sustained the defendant's objection to the admission of the t-shirt as substantive evidence.

[4] The defendant contends that the trial judge erred in admitting into evidence a "nude book." The witness Deborah Bowers testified concerning defendant's use of "a book with pictures of naked people in it." The State then offered into evidence the book, identified by Deborah as the one used by defendant. Thereafter, defendant testified that he had been in possession of the book identified as State's Exhibit Number 6, and that upon her request he had given it to Ms. Rummage.

In criminal cases every circumstance that is calculated to throw light upon the alleged crime is admissible into evidence, and any article shown by the evidence to have been used in connection with the alleged crime is competent and properly admit-

ted as evidence. *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968). Here the challenged evidence was properly identified and was shown by the State's evidence to have been used in connection with the crime. It was relevant in that it tended to corroborate the testimony of the witness Deborah Bowers.

This assignment of error is overruled.

[5] By his next assignment, defendant contends that it was error to admit the testimony of Rhonda McGee, aged 12, to the effect that defendant had lifted her shirt up and rubbed her breasts for about twenty minutes. According to the witness' testimony, the acts occurred "since about the first of May, 1980." The trial court instructed the jury that Rhonda's testimony was "not offered to show that any particular thing transpired with respect to the defendant and Susie Williams and Deborah Bowers," but was admitted "for the purpose of showing a scheme or plan or overall design and for that purpose only." As a general rule, "the State may not offer proof of another crime independent of and distinct from the crime for which defendant is being prosecuted even though the separate offense is of the same nature as the charged crime." *State v. Humphrey*, 283 N.C. 570, 572, 196 S.E. 2d 516, 518, *cert. denied*, 414 U.S. 1042 (1973). However,

> equally well-established exceptions to the rule permit proof of commission of like offenses to show, *inter alia*, intent, plan or design to commit the offense charged or to show identity of the accused. Our Court has been very liberal in admitting evidence of similar sex crimes in construing the exceptions to the general rule.

State v. Green, 294 N.C. 418, 241 S.E. 2d 662 (1978). We hold that this evidence was correctly admitted to show intent and plan or design on the part of defendant to commit the charged crimes.

[6] Finally, defendant contends that the court erred in failing to instruct on G.S. 14-202.1, taking indecent liberties with children. Defendant maintains that this offense constituted a lesser-included offense of the crime for which he was tried and therefore should have been submitted to the jury. G.S. 14-202.1 provides as follows:

> (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.

The offense of taking indecent liberties with children requires proof that the crime be willful and that it be for the "purpose of arousing or gratifying sexual desire." Thus, the offense of taking indecent liberties with children requires proof of essential elements not contained in the offense proscribed by G.S. 14-27.4(a) and is therefore not a lesser-included offense of the latter first-degree sexual offense. We therefore hold that the trial court did not err in failing to instruct on G.S. 14-202.1.

For reasons stated, the judgment of the trial court is

Reversed.

IN RE: FORECLOSURE OF DEED OF TRUST RECORDED IN BOOK 911, AT PAGE 512, CATAWBA COUNTY REGISTRY

No. 74

(Filed 8 July 1981)

1. **Mortgages and Deeds of Trust § 33.1; Husband and Wife § 15— entirety property—foreclosure sale—surplus proceeds held as tenants in common**

Surplus funds generated by a foreclosure sale of real property pursuant to a power of sale in a deed of trust on entirety property are not held constructively as entirety property but are held by the husband and wife as tenants in common, since the sale at foreclosure is not an involuntary conversion.

2. **Mortgages and Deeds of Trust § 33.1; Husband and Wife § 16; Taxation § 34— foreclosure sale of entirety property—surplus proceeds—priority of judgment and tax liens**

Where a federal tax lien was filed against the husband individually on 9 April 1976, a corporation's judgment lien against the husband and wife was filed 13 May 1976, a second corporation's judgment lien was filed against the husband and wife on 6 July 1976, a foreclosure sale of realty owned by the

husband and wife as tenants by the entirety was thereafter held pursuant to a power of sale in a deed of trust on the property, and surplus funds from the sale, which were held by the husband and wife as tenants in common, were paid to the clerk of court, the two judgment liens of the corporations attached to the entirety property and continued in the funds generated by the foreclosure sale, but the federal tax lien did not attach to the entirety property and gave the Internal Revenue Service no right to recovery until the surplus proceeds were paid over to the clerk of court; therefore, since the federal tax lien was the last to attach to any interest in the surplus proceeds, it was junior to the judgment liens of the two corporations.

APPEAL of right by the United States Government, through its agent Internal Revenue Service (hereinafter I.R.S.), from a decision of the Court of Appeals (*Morris, C. J., Wells, J.*, concurring; *Vaughn, J.*, dissenting) reported at 50 N.C. App. 69, 272 S.E. 2d 893 (1980), affirming the judgment of *Collier, J.*, entered 20 December 1979 in Superior Court, CATAWBA County.

John F. Murray, Acting Assistant Attorney General; Michael L. Paup, Daniel F. Ross and Donald B. Susswein, Attorneys, Tax Division, Department of Justice, Washington, D.C., for appellant Internal Revenue Service.

E. James Moore, Attorney for appellee Northwestern Factors, Inc.

MEYER, Justice.

This action was brought to determine the proper disposition of surplus proceeds generated by the foreclosure sale of certain real property. The property was owned by Mr. and Mrs. Frank Cline but was foreclosed in accordance with a power of sale contained in the deed of trust on the property. The property sold for $30,000.00 at foreclosure. After payment of the note secured by the deed of trust and expenses incurred in connection with the sale of the property, the substituted trustee deposited the remaining funds, $16,430.02, with the Clerk of Superior Court, Catawba County, in accordance with G.S. 45-21-31(b).

This action was originally instituted by North Carolina National Bank, holder of a promissory note secured by a second deed of trust on the property. North Carolina National Bank and various other parties, including petitioner-I.R.S., sought to satisfy a total of eight judgments and liens from the surplus fund.

Judge Collier filed an initial judgment in this matter on 23 October 1979, but that judgment was set aside by the court on motion of the I.R.S. on the grounds that the I.R.S. had not received proper notice of the hearing.

On 21 November 1979, prior to the second hearing in this matter, which is the subject of this appeal, the I.R.S. stipulated that it did not object to the payment of those liens recorded prior to the entry of its lien. Rather, the objection of the I.R.S. was to the payment of two liens recorded after the entry of the I.R.S. lien. Those two liens, held by Northwestern Factors, Inc. and Conover Foam and Fiber Corporation, were given priority because they were incurred by the Clines as husband and wife. The tax lien upon which petitioner seeks to recover was filed on 9 April 1976, but it is a lien against only Frank S. Cline individually.

The matter was heard by Judge Collier on 21 November 1979. On 20 December 1979 Judge Collier entered an order which contained the following conclusion of law:

> The property in question being entirety property prior to the foreclosure, the funds received from such foreclosure stand in the stead of the entirety property and retain the same characteristics.

The effect of Judge Collier's determination that the foreclosure proceeds retained the characteristics of entirety property was that the two liens held by the corporations, although junior in time, were superior to the I.R.S. lien, because those two liens were against husband and wife and thus attached to the entirety property.

The Court of Appeals affirmed Judge Collier's determination that the surplus proceeds retained the characteristics of entirety property. Appeal as of right to this Court by the I.R.S. followed.

[1] As the Court of Appeals recognized, this case presents a question of first impression in this State: Are surplus funds generated by a foreclosure sale of real property pursuant to a power of sale in a deed of trust on entirety property held constructively as entirety property, or is the tenancy by the entirety terminated and the funds held as tenants in common? The majority in the Court of Appeals held that such funds retain their status as entirety property. We disagree. We find no compelling reason

to extend the reach of a common law fiction, the concept of entirety property, to include funds which, even at common law, could only be deemed personalty. In North Carolina, as a general rule, the estate by the entirety exists only in realty.[1] *Bowling v. Bowling*, 243 N.C. 515, 91 S.E. 2d 176 (1956); *Wilson v. Ervin*, 227 N.C. 396, 42 S.E. 2d 468 (1947). North Carolina is one of a distinct minority of states which in general recognizes a tenancy by the entirety only in realty. *See* Annot., 64 A.L.R. 2d 8 (1959). Accordingly, we hold that the surplus proceeds of foreclosure at issue in this appeal are held by husband and wife as tenants in common.

Prior decisions of this Court establish the general rule that when husband and wife voluntarily sell and convey real property they own as tenants by the entirety, the proceeds of the sale become personal property, held as tenants in common. *Shores v. Rabon*, 251 N.C. 790, 112 S.E. 2d 556 (1960); *Wilson v. Ervin*, 227 N.C. 396, 42 S.E. 2d 468 (1947). An exception to this general rule is found in cases where the conversion of the entirety property is involuntary on the part of the husband and wife. In cases where the conversion is involuntary, such as where the State appropriates land under its power of eminent domain, this Court has held that "such involuntary transfer of title does not destroy or dissolve the estate by the entirety . . . the compensation paid by the [Highway] Commission therefor has the status of real property owned by husband and wife as tenants by the entirety." *Highway Commission v. Myers*, 270 N.C. 258, 262; 154 S.E. 2d 87, 90 (1967).

Cognizant of both the general rule and the exception, the majority in the Court of Appeals concluded that the forced sale of property at foreclosure was, in effect, an involuntary transfer. Thus, citing the language of *Myers* quoted above, the Court of Appeals concluded that the surplus proceeds remained entirety property.

There is substantial authority from other jurisdictions that a sale at foreclosure is not an involuntary conversion. Rather, as

1. We note in passing that the current session of the General Assembly has, by the enactment of an amendment to Chapter 41 of the General Statutes, created a tenancy by the entirety in mobile homes without regard to their classification as either real or personal property. House Bill 583, ratified 5 June 1981, to be codified as G.S. 41-2.5.

Judge Vaughn recognized in his dissent, a number of voluntary choices are made by parties who sign a deed of trust conveying a power of sale. In *Nat. Bank & Trust v. Rickard*, 57 App. Div. 2d 156, 393 N.Y.S. 2d 801 (1977), the court answered this question quite succinctly: "[T]he giving of the mortgage, the vehicle which authorized the sale, was a voluntary act of the husband and wife and the authorized sale merely an incident in producing the fund." 57 App. Div. 2d at 158, 393 N.Y.S. 2d at 802. We agree with Judge Vaughn that the numerous voluntary decisions made by the Clines in buying realty and subjecting it to a deed of trust do not provide the proper factual background for determining that sale at foreclosure was involuntary in the true sense of that word as used in this context.

Since the foreclosure sale of the realty here cannot be considered involuntary, surplus funds so created are not held by the entirety. Perhaps the leading case so holding is *Franklin Square Nat. Bank v. Schiller*, 119 N.Y.S. 2d 291, (Sup. Ct. 1950). In *Schiller*, husband and wife, owners by the entirety of the real property in question, filed separate claims seeking to recover surplus proceeds generated by sale at foreclosure. Plaintiff wife urged that the court hold the surplus funds as tenancy in common property; defendant husband argued that the funds should retain the special characteristics of entirety property. The New York Supreme Court adopted the opinion of the referee in the matter, which said in part:

> The reason for holding that the parties are tenants in common is that there can be no tenancy by the entirety of personal property. Such a tenancy is a common-law one and can be only in real estate. *Matter of Albrecht*, 136 N.Y. 91, 32 N.E. 632, 18 L.R.A. 329; *Matter of McKelway's Estate*, 221 N.Y. 15, 116 N.E. 348, L.R.A. 1917E, 1143; *Matter of Blumenthal's Estate*, 236 N.Y. 448, 141 N.E. 911, 30 A.L.R. 901. In these cases the tenancy by the entirety was held terminated because of a voluntary sale of the real property and conversion of the proceeds of sale to personalty. The rule should be the same where the conversion came about through foreclosure of a mortgage and the sale of the property at public auction to an outsider. The surplus proceeds of the sale are personal property.

119 N.Y.S. 2d at 294.

In *Hawthorne v. Hawthorne*, 13 N.Y. 2d 82, 242 N.Y.S. 2d 50 (1953), the Court of Appeals of New York expressly approved the *Schiller* decision, citing it as controlling authority on the question of whether surplus monies generated at foreclosure could be held by the entirety. This Court, in turn, recently cited with approval the reasoning and result in *Hawthorne. See Lovell v. Rowan Mut. Fire Ins. Co.*, 302 N.C. 150, 274 S.E. 2d 170 (1981). In *Lovell* we held that proceeds of a fire insurance policy covering entirety property were not constructively entirety property where one spouse intentionally burned the dwelling involved. Just as in *Lovell* we reufsed to extend the concept of entirety property, so do we here. Accordingly, we conclude that the surplus proceeds of the foreclosure sale are held by Frank S. and Sally Cline as tenants in common.

[2] We turn now to the question of the priority of the competing liens of the I.R.S. and the two corporations. By affirming the trial court, the Court of Appeals did not reach the question of priority of the liens. On the facts of the record before us, our determination that the surplus proceeds are held by husband and wife as tenants in common is not dispositive on the question of priority.

Facts relevant to the question of priority are as follows: (1) the tax lien of the I.R.S. against Frank Cline individually was filed 9 April 1976; (2) the judgment lien of Northwestern Factors against Frank S. and Sally Cline was filed 13 May 1976; (3) the judgment lien of Conover Foam and Fiber Corporation against Frank S. and Sally Cline was filed 6 July 1976.

The priority of liens generally depends upon the time that they attach to the property involved. 51 Am. Jur. 2d Liens § 52 (1970). A lien of judgment, including a tax lien, effective against only one spouse does not attach to real property held by husband and wife by the entireties. *Duplin County v. Jones*, 267 N.C. 68, 147 S.E. 2d 603 (1966); *Air Conditioning Co. v. Douglas*, 241 N.C. 170, 84 S.E. 2d 828 (1954); *Winchester-Simmons Co. v. Cutler*, 199 N.C. 709, 155 S.E. 611 (1930); *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); Webster, Real Estate Law in North Carolina § 366. Thus, the tax lien upon which petitioner seeks to recover could not attach to any interest in the entirety property until the property was converted into another form of estate at the time of final sale under foreclosure. *Porter v. Bank*, 251 N.C. 573, 111 S.E.

2d 904 (1960). After the sale was completed, the I.R.S. properly presented its claim in the surplus proceeds to the clerk of court, as provided for in G.S. 45-21.32. That statute outlines the procedure to be followed by parties claiming an interest in the surplus proceeds.

Conversely, the judgment liens held by Northwestern Factors and Conover Foam properly attached to the entirety property on 13 May 1976 and 6 July 1976 respectively. Both of those debts were incurred by husband and wife, and both judgments were properly entered as liens on the entirety property. Therefore, even though we agree with petitioner that surplus funds generated at a sale under foreclosure of entirety property are held by husband and wife as tenants in common, we further conclude that petitioner's federal tax lien gave petitioner no right to recovery until the surplus proceeds were paid over to the clerk of court.

Once properly attached to the underlying property, the liens of the corporations continued in the proceeds generated by sale at foreclosure. As noted in *In re Castillian Apartments*, "Surplus money arising upon a sale of land under a decree of foreclosure stands in the place of the land itself in respect to liens thereon or vested rights therein." 281 N.C. 709, 190 S.E. 2d 161 (1972). Since the federal tax lien was the last to attach to any interest in the surplus proceeds, it is junior to the liens of the corporate appellees.

The result is that the decision of the Court of Appeals is reversed and the cause is remanded to the Court of Appeals to be further remanded to Superior Court, Catawba County for the entry of an order not inconsistent with the result reached in this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. WAYON DAVIS GRAHAM

No. 130

(Filed 8 July 1981)

Criminal Law § 40— testimony at former trial—transcript properly suppressed

In a prosecution of defendant for aiding and abetting a murder, the trial court properly granted defendant's motion to suppress a transcript of a witness's testimony given at defendant's prior trial for accessory before the fact of murder, though defendant was present and represented by counsel at his former trial for accessory before the fact of murder and though the witness, who asserted his Fifth Amendment right not to testify, was considered "unavailable" for the purpose of determining whether his prior recorded testimony could be admitted into evidence, since the proceeding at which the witness's testimony was given was not a former trial of the same cause as that involved in the present case, the offense of accessory before the fact to murder being distinct from the offense of aiding and abetting the same murder. Moreover, defendant's prior trial for accessory before the fact of murder could not be viewed as the trial of another cause involving the same issues and subject matter as those involved in this case for aiding and abetting a murder, and allowing the transcript of the witness's prior testimony to be admitted in this case would deprive defendant of his right to cross-examine the witness concerning elements of the offense of aiding and abetting.

Justices HUSKINS and CARLTON dissent.

THE State of North Carolina appeals from judgment of *Hairston, J.*, entered at the 2 February 1981 Criminal Session of Superior Court, DAVIDSON County, granting defendant's motion to suppress. The State appeals pursuant to G.S. 15A-1445(b) and G.S. 15A-979.

Defendant was previously charged in an indictment with the offense of accessory before the fact of murder. That case was tried at the 22 April 1980 Session of Superior Court in Davidson County. At that trial, Benjamin Elwood Peace testified for the State pursuant to a plea bargaining agreement in which the State agreed to allow him to plead guilty to second-degree murder for the killing of Donald Felts on 17 September 1979 in exchange for his testimony against defendant. Peace testified under oath before a jury concerning defendant's involvement in the homicide. Since Peace's testimony tended to establish that defendant was present at the scene of the homicide, the court allowed

defendant's motion to dismiss the accessory before the fact charge at the close of the State's evidence. Defendant was subsequently charged in an indictment, proper in form, with aiding and abetting the murder of Donald Felts on 17 September 1979, and the case was set for trial on 2 February 1981.

Prior to trial the State was informed that Peace would refuse to testify in this case. The State then moved to offer into evidence the transcript of Peace's testimony at the prior trial. Before a jury was selected on 2 February 1981 defendant moved to suppress this evidence. The trial judge held a hearing on the motion and granted defendant's motion to suppress.

J. Calvin Cunningham for defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Nonnie F. Midgette for the State.

COPELAND, Justice.

The sole issue presented by this appeal is whether the trial court erred in granting defendant's motion to suppress the evidence of Benjamin Peace's testimony at defendant's prior trial for accessory before the fact of murder. For the reasons stated below, we affirm the trial court's action in granting defendant's motion.

The recorded testimony of a witness in a former trial will not ordinarily be admitted as substantive evidence in a later criminal trial. The prior testimony is considered hearsay evidence, the admission of which would violate the accused's right under the Sixth Amendment of the United States Constitution to confront the witnesses presented against him.[1] If possible, the witness himself must be produced to testify *de novo. Mancusi v. Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed. 2d 293 (1972); *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255 (1968); *State v. Cope*, 240 N.C. 244, 81 S.E. 2d 773 (1954).

However, it has long been held that an exception to the Sixth Amendment right of confrontation exists where a material

1. The Sixth Amendment right of confrontation has been made applicable to the states through the Fourteenth Amendment. *Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965).

witness is unavailable to testify, but has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant at the prior proceeding. *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). In such a situation, the transcript of the witness' testimony at the prior trial may be admitted as substantive evidence against the same defendant at a subsequent trial. The justification for this exception is that the defendant's right of confrontation is adequately protected by the opportunity to cross-examine afforded at the initial proceeding. *Barber v. Page, supra; State v. Prince*, 270 N.C. 769, 154 S.E. 2d 897 (1967).

Speaking for this Court in *State v. Smith*, 291 N.C. 505, 524, 231 S.E. 2d 663, 675 (1977), Justice Huskins set forth the circumstances under which the prior recorded testimony of a witness may be admitted at a subsequent trial in this jurisdiction as follows:

> "(1) The witness is unavailable; (2) the proceedings at which the testimony was given was a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter at which the testimony is directed; and (3) the current defendants were present at that time and represented by counsel."

See also 1 Stansbury's North Carolina Evidence § 145 (Brandis Rev. 1973). The State contends that each of the three circumstances enumerated in *Smith* is present in the case *sub judice*, and therefore Benjamin Peace's prior recorded testimony should have been admitted.

We agree that the first and third requirements specified in *Smith* are present in this case. It is uncontroverted that defendant was present and represented by counsel at his former trial for accessory before the fact of murder. In addition, it has been held that where a witness is physically present at the trial, but asserts his Fifth Amendment right under the United States Constitution not to testify, then he is considered "unavailable" for the purpose of determining whether his prior recorded testimony may be admitted into evidence. The relevant inquiry is whether the witness' testimony was available, not whether his body was. *Mason v. United States*, 408 F. 2d 903 (10th Cir. 1969), *cert. denied* 400 U.S. 993, 91 S.Ct. 462, 27 L.Ed. 2d 441 (1971); *State v.*

Keller, 50 N.C. App. 364, 273 S.E. 2d 741 (1981). *See also United States v. Zurosky*, 614 F. 2d 779 (1st Cir. 1979), *cert. denied* 446 U.S. 967, 100 S.Ct. 2945, 64 L.Ed. 2d 826 (1980); *United States v. Toney*, 599 F. 2d 787 (6th Cir. 1979); *United States v. Wilcox*, 450 F. 2d 1131 (5th Cir. 1971), *cert. denied* 405 U.S. 917, 92 S.Ct. 941, 30 L.Ed. 2d 787 (1972). Benjamin Peace testified at the hearing on defendant's motion to suppress that he would assert his Fifth Amendment privilege against self-incrimination and refuse to testify in this case, despite the consequences. He may therefore be considered an "unavailable" witness.

Nevertheless, we find that Peace's prior testimony fails to meet the second requirement specified in *Smith*, that "the proceeding at which the testimony was given was a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter at which the testimony is directed." 291 N.C. at 524, 231 S.E. 2d at 675. In his prior trial, defendant was charged as an accessory before the fact to the murder of Donald Felts. In the present action, defendant is charged with aiding and abetting the same murder. This Court has long maintained a distinction between the offenses of accessory before the fact and aiding and abetting, thus it cannot be argued that the proceeding at which Peace's testimony was given was a former trial of the same cause as that involved in the present action.

The elements which the State must prove in order to convict a defendant of being an accessory before the fact are:

> "(1) that the defendant counseled, procured, commanded, encouraged, or aided another to commit the offense; (2) the defendant was not present when the crime was committed; and (3) the principal committed the crime.

State v. Hunter, 290 N.C. 556, 576, 227 S.E. 2d 535, 547 (1976). *See also State v. Saults*, 294 N.C. 722, 242 S.E. 2d 801 (1978); *State v. Philyaw*, 291 N.C. 312, 230 S.E. 2d 370 (1976). An aider is one who is present at the time and place of the offense and renders aid to the perpetrator, without actually committing the offense. An abettor is one who gives aid and comfort to the perpetrator, or one who commands, advises, instigates or encourages another to commit the offense. *State v. Matthews*, 299 N.C. 284, 261 S.E. 2d 872 (1980); *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970).

The distinction between the two offenses lies in the element of presence or absence at the time and place the crime is committed. An accessory before the fact must be absent from the scene of the offense, while an aider and abettor must be actually or constructively present at the scene. *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193 (1977); *State v. Benton, supra.* Since each offense has a separate and distinct element not included in the other, they cannot be considered the same cause.

The State submits that even if the two offenses cannot be considered the same cause for purposes of defendant's motion to suppress, defendant's prior trial for accessory before the fact should be viewed as the trial of another cause involving the same issues and subject matter as that involved in the action before us, thereby satisfying the second circumstance set forth in *Smith.* We disagree. Although the subject matter of the two trials was the same, *i.e.*, defendant's participation in the murder of Donald Felts, the issues with which the trial court is concerned in the present action differ significantly from those involved in the prior trial.

The attorney who represented defendant at his prior trial testified at the hearing on defendant's motion to suppress that his cross-examination of Benjamin Peace at the former trial was limited to the issue of defendant's presence or absence at the scene of the homicide. He stated that the trial judge in the former proceeding indicated to him in chambers that little purpose would be served by a full cross-examination of Peace on all the elements involved in the offense. Consequently, his sole motive and purpose in cross-examining Peace was to establish defendant's presence at the time and place of the murder. Were we to allow the transcript of Peace's prior testimony to be admitted in this case, we would deprive defendant of his right to cross-examine Peace concerning the remaining elements of the offense of aiding and abetting.

The exception to the hearsay rule which renders prior recorded testimony of an unavailable witness admissible at a subsequent trial applies only where the issues in the two proceedings are sufficiently similar to assure that the party against whom the evidence is presented had a meaningful opportunity to cross-examine the witness when the testimony was first offered. *United States v. Wingate*, 520 F. 2d 309 (2d Cir. 1975); *United*

States v. Mobley, 421 F. 2d 345 (5th Cir. 1970). *See also United States v. Zurosky, supra.* Since the cross-examination of Peace at the prior trial was limited to the issue of defendant's presence at the scene of the homicide, defendant had no meaningful opportunity to cross-examine Peace as to the other elements of the aiding and abetting offense. We therefore find the hearsay exception for prior recorded testimony of an unavailable witness inapplicable under the facts of this case, and hold that the trial court properly granted defendant's motion to suppress. Accordingly, the judgment of the trial court is

Affirmed.

Justices HUSKINS and CARLTON dissent.

STATE OF NORTH CAROLINA v. ELSIE JUANITA NORRIS

No. 106

(Filed 8 July 1981)

1. Homicide § 9— law of perfect self-defense

The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed: (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; (3) defendant was not the aggressor in bringing on the affray; and (4) defendant did not use excessive force.

2. Homicide § 9— imperfect right of self-defense

If defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant has only the imperfect right of self-defense and is guilty at least of voluntary manslaughter.

3. Homicide §§ 4, 9— meaning of "without justification or excuse"

"Without justification or excuse" as an element of murder in the first or second degree means the absence of either of the first two elements of self-

defense, *i.e.*, the defendant did not believe it was necessary to kill the victim in order to save herself from death or great bodily harm; or, if she did believe this, her belief under the circumstances as they appeared to her at that time was unreasonable.

4. Homicide § 28— self-defense—erroneous use of "without justification or excuse"

The trial court in a homicide prosecution erred in using the expression "without justification or excuse" as the equivalent of "self-defense" throughout the charge, not only with respect to murder in the first degree but also murder in the second degree and voluntary manslaughter, since the instructions seemingly require the jury to find the existence of all four elements going to make up defendant's *perfect* right of self-defense before she could derive any benefit whatsoever from the principles of self-defense and erroneously deprived defendant of the benefits flowing from her *imperfect* right of self-defense should the jury find that (1) it appeared to her and she believed it was necessary to kill the deceased in order to save herself from death or great bodily harm; and (2) her belief was reasonable because the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; but (3) without the intent to kill deceased or inflict serious bodily harm upon him, she commenced the quarrel and was the aggressor; or (4) she used more force than was necessary or reasonably appeared to her to be necessary under the circumstances to protect herself from death or great bodily harm.

APPEAL by defendant from *Kirby, J.*, at the 29 September 1980 Regular Criminal Session, BUNCOMBE Superior Court.

Defendant was indicted and tried for the murder of her husband and for a felonious assault on her husband's girlfriend. The jury found defendant guilty of the first degree murder of her husband and not guilty of the assault. Upon recommendation of the jury, a life sentence was imposed for the murder. Defendant appealed to this Court.

The State's evidence tends to show the following:

On 20 January 1980 the deceased Donald Norris was married to defendant but was living with Bernice Owens. About 8 o'clock that night, defendant went to the trailer where her husband and Bernice Owens were living, knocked and tried to enter but was unable to do so. She left, came back in a few minutes and knocked again. She did this all night.

At 6 o'clock the next morning, Donald Norris opened the door to see if defendant had gone. She was still there. About 6:30, he went out because his ride to work was coming up the drive.

He carried a coat with him but had no lunch pail and no weapon. Defendant shot Donald Norris four times. His body was within a foot or two of defendant's car. Bernice Owens went outside her trailer and defendant began beating her with the gun. Owens fought with defendant, finally knocked her down and ran for help.

Defendant's evidence tends to show the following:

She was forty-five years of age and a native of Georgia. She had lived there and had six children by a previous marriage. At time of trial she had six grandchildren. She had a good reputation in her community.

After her first marriage ended, she met and married Donald Norris on 14 June 1978 in Statesboro, Georgia. At that time, he was a master sergeant in the U.S. Marine Corps. She sold her property in Georgia and they moved to North Carolina. The marriage was peaceful for about two weeks, and then Donald Norris began a series of threats, assaults and beatings which lasted intermittently until the day of his death. Her husband was a heavy drinker. On one occasion in August 1979 she shot and wounded him in her own self-defense. After a separation agreement was signed, they resumed living together until 22 December 1979 when Donald went to live with Bernice Owens in her trailer.

By 21 January 1980, defendant was out of money. She tried, unsuccessfully, to see her husband at work. On the evening of 20 January she went to the Bernice Owens trailer where he was living but got no response. She decided to get up early the next morning and see him before he left for work. She drove to the trailer about 5:30 a.m. As he came out to catch his ride for work, she got out of her car, met him on the passenger side and said she wanted to talk to him. He cursed her, threatened her and struck her in the nose with his fists, breaking her nose and knocking her to the ground. A medical examination verified that her nose was broken. Defendant got up and saw Bernice Owens come out of her trailer. Defendant had a pistol on the passenger side of her car which she reached in and got as Donald was coming at her. Defendant was afraid of him and felt that if he and Bernice Owens got to her that she didn't have a chance. She was afraid her husband would kill her. For that reason, she shot him.

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

Herbert L. Hyde, Attorney for defendant appellant.

HUSKINS, Justice.

Defendant has posed numerous questions for review. We find it necessary to address only one of them, viz: Whether the trial court erred in its charge on self-defense. We conclude there was error in this respect which entitles defendant to a new trial.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17; *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971).

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963).

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Benge*, 272 N.C. 261, 158 S.E. 2d 70 (1967). For example, a killing by reason of anger suddenly aroused by provocation which the law deems adequate to dethrone reason temporarily and thus to displace malice is voluntary manslaughter. Likewise, a killing resulting from the use of excessive force in the exercise of the right of self-defense is manslaughter. *See State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971); *State v. Marshall*, 208 N.C. 127, 179 S.E. 427 (1935); *State v. Merrick*, 171 N.C. 788, 88 S.E. 501 (1916); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910).

Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. *State v. Foust*, supra. Stated somewhat differently, involuntary manslaughter is the unintentional killing of a human being without malice by (1) some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) an act or omission constituting culpable negligence. *State v. Honeycutt*, 250 N.C. 229, 108 S.E. 2d 485 (1959); *State v. Satterfield*, 198 N.C. 682, 153 S.E. 155 (1930).

[1] The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Potter, 295 N.C. 126, 244 S.E. 2d 397 (1978); *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974); *State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971); *State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971); *State v. Ellerbe*, 223 N.C. 770, 28 S.E. 2d 519 (1944). The existence of these four elements gives the defendant a *perfect right of self-defense* and requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well.

[2] On the other hand, if defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter. *State v. Potter*, supra; *State v. Watson*, 287 N.C. 147, 214 S.E. 2d 85 (1975); *State v. Crisp*, 170 N.C. 785, 87 S.E. 511 (1916).

In the case now before us the able trial judge instructed the jury it could find defendant guilty of murder in the first degree, guilty of murder in the second degree, guilty of voluntary manslaughter or not guilty. He told the jury that a separate sentencing proceeding would be conducted in the event defendant was found guilty of first degree murder. He summarized the evidence briefly and then defined in detail each degree of homicide and the elements thereof. He told the jury that in order to convict defendant of first degree murder, the State must prove beyond a reasonable doubt, among other things, that defendant intentionally and without justification or excuse, and with malice, shot Donald Norris with a deadly weapon. He then defined the term "without justification or excuse" as follows:

> Members of the jury, when I say without justification or excuse, I have reference to self-defense which will be fully explained hereafter.

While the quotation appears in that part of the charge dealing with the various elements of murder in the first degree, the expression "without justification or excuse" was used as the equivalent of "self-defense" throughout the charge, not only with respect to murder in the first degree but also murder in the second degree and voluntary manslaughter. We hold this error requiring a new trial.

[3] In our view, "without justification or excuse" as an element of murder in the first or second degree means the absence of either of the first two elements of self-defense, *i.e.*, the defendant did not believe it was necessary to kill the victim in order to save herself from death or great bodily harm; or, if she did believe this, her belief under the circumstances as they appeared to her at that time was unreasonable. *State v. Potter*, supra; *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910).

[4] The instruction as given here seemingly required the jury to find the existence of all four elements going to make up defendant's *perfect* right of self-defense before she could derive any benefit whatsoever from the principles of self-defense. This was error because it deprived defendant of the benefits flowing from her *imperfect* right of self-defense should the jury find that (1) it appeared to her and she believed it was necessary to kill the deceased in order to save herself from death or great bodily

harm; and (2) her belief was reasonable because the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; *but* (3) without the intent to kill Donald Norris or inflict serious bodily harm upon him, she commenced the quarrel and was the aggressor; or (4) she used more force than was necessary or reasonably appeared to her to be necessary under the circumstances to protect herself from death or great bodily harm. Should the jury make these findings, she would be guilty of voluntary manslaughter only.

Where the issue in a homicide case narrows to the exercise of either the perfect or imperfect right of self-defense, as the jury may find, the question for the jury is not limited to whether defendant is guilty of first degree murder or not guilty by reason of self-defense. When the defendant has exercised the imperfect right of self-defense, the homicide is reduced from murder to manslaughter. The doctrine and consequences of imperfect self-defense are adequately stated in *State v. Crisp*, 170 N.C. 785, 793, 87 S.E. 511, 515 (1916), as follows:

> '[I]f one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy in which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter.'

See also State v. Wetmore, 298 N.C. 743, 259 S.E. 2d 870 (1979).

We forego discussion of the other assignments, most of which are addressed to the charge, since they are not likely to arise on retrial. Because the error in the charge on self-defense may have caused the jury to convict defendant of murder instead of voluntary manslaughter, there must be a new trial.

For the reasons stated, the judgment is vacated and the case remanded to the Superior Court of Buncombe County for a new trial in accord with this opinion.

New trial.

STATE OF NORTH CAROLINA v. JERRY R. WATSON

No. 121

(Filed 8 July 1981)

1. **Constitutional Law § 67— confidential informant—cross-examination properly limited**

In a prosecution of defendant for possession and sale of LSD, the trial court did not err in limiting defense counsel's cross-examination of a witness concerning the name of the confidential informer used by the State and the nature of the reward given to the informer, since defendant failed to establish that the identity of the informer was relevant and helpful to his defense or essential to a fair determination of the case.

2. **Criminal Law § 78— stipulation—admissibility**

In a prosecution of defendant for possession and sale of LSD, the trial court did not err in receiving into evidence a stipulation between the State and defense counsel that four purple tablets were LSD, since defendant failed to establish the absence of authority on the part of his attorney to enter into the stipulation.

ON writ of certiorari to review judgment entered by *Clark, J.*, at the 11 October 1976 Criminal Session of CUMBERLAND Superior Court.

Defendant was tried on a bill of indictment charging him with (1) possessing lysergic acid diethylamide (LSD) for purpose of sale, and (2) selling LSD.

Evidence presented by the state tended to show that on 3 February 1976 an undercover agent of the State Bureau of Investigation went into the F&W Foodmart in Cumberland County where, in a back room, he purchased four round purple tablets from defendant for $10.00. The state and the defendant stipulated that a chemical analysis of the tablets indicated that they were LSD.

Defendant presented evidence, including his own testimony, which tended to show that on the date in question he was co-owner of the market; that he had never seen the SBI agent; that he had never sold LSD; and that the SBI agent had not been seen in the market.

Other evidence relevant to the questions raised on appeal will be reviewed in the opinion.

The jury found defendant guilty as charged. The court entered judgments imposing a prison sentence of not less than 4 nor more than 6 years in each case. The sentences were to run concurrently.

Defendant gave notice of appeal but his privately employed counsel did not perfect the appeal within the time allowed by the Rules of Appellate Procedure. On 30 June 1980, the district attorney filed a motion asking that the appeal be dismissed. On 17 July 1980, Preston, J., entered an order finding that defendant was an indigent entitled to the services of counsel as provided by law and assigned the public defender to represent him.

On behalf of defendant, the public defender, on 21 November 1980, petitioned the Court of Appeals for a writ of certiorari. The Court of Appeals denied the petition on 17 December 1980. Defendant then petitioned this court for a writ of certiorari, and the petition was allowed on 4 March 1981. This court also treated the papers filed by defendant as a motion to bypass the Court of Appeals and allowed that motion.

Attorney General Rufus L. Edmisten, by Assistant Attorneys General Norma S. Harrell and Lucien Capone, III, for the State.

Paul F. Herzog for defendant-appellant.

BRITT, Justice.

[1] Defendant has abandoned his first and second assignments of error. By his third assignment, he contends that the trial court erred in sustaining the state's objections to defense counsel's questions of witness Eastman concerning the name of the confidential informer used by the state, and the nature of the reward given to the informer. We find no merit in this assignment.

SBI Agent Redding W. Leggett was the first witness presented by the state. On direct examination, he testified, among other things, that he went to the F&W Foodmart on the day in question, encountered defendant in the storage room of the store, and purchased the LSD tablets from him. On cross-examination he testified that a confidential source, whose name he did not know, accompanied him to the store; that there were four people in the store at the time in question—witness Leggett, a store clerk, the

confidential informant and defendant; that no one except witness Leggett and defendant heard the conversation between them; and that no one except witness Leggett and defendant were in the storage room when the drug transaction took place.

The state then presented SBI Agent Ray Eastman. He testified, among other things, that from January until July 1976 he was a supervisor in an undercover operation relating to illegal drug activity in Cumberland County; that he obtained a confidential informant and introduced him to Agent Leggett on 27 January 1976; that he saw Agent Leggett and the informant enter the F&W Foodmart on 3 February 1976; and that Agent Leggett subsequently told him that while in the store he purchased four LSD tablets from Bobby Watson for $10.00.

On cross-examination of Agent Eastman by defense counsel, the following exchange occurred:

Q. Would you tell the jury the name of the confidential informant?

DISTRICT ATTORNEY: Objection.

COURT: Sustained.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 3

Q. Do you intend to offer him as a witness for the State in this case?

DISTRICT ATTORNEY: Objection.

COURT: Sustained.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 4

I don't know whether the confidential source was present to hear the conversation testified to by Agent Leggett. Drug informants do normally have knowledge of the drug-cultured area and the drug dealers. Some of the informants are paid and some aren't.

Q. What benefit does the informant receive if he doesn't receive money?

DISTRICT ATTORNEY: Objection.

COURT: Sustained.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 5

Q. Do you do anything for the informants if you don't pay them money?

DISTRICT ATTORNEY: Objection.

COURT: Sustained.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 6

Q. You know from your own knowledge that informants are usually people that have been convicted of narcotic violations themselves, aren't they?

DISTRICT ATTORNEY: Objection.

COURT: Sustained.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 7

The informant in this case was not a police officer, undercover narcotic agent, or SBI agent. Nor to my knowledge was he using drugs. The informant was working on a continuous basis and wasn't paid by the number of people he produced to buy from. He was paid as he needed money, small amounts, not very large amounts.

Q. He only required a small amount to keep him going in his style of living, didn't he?

DISTRICT ATTORNEY: Objection.

COURT: Sustained.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 8

While defendant's assignment of error purports to relate to exceptions 3, 4, 5, 6, 7 and 8, the main thrust of his argument relates to exception 3: the failure of the court to require Agent Eastman to divulge the name of the confidential informant.

We agree with the parties that the fundamental rule of law involved in the present case is that stated in *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1957), as follows:

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against

> the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors. 353 U.S. at 62, 1 L.Ed. 2d 639, at 646, 77 S.Ct. at 628-29.

However, before the courts should even begin the balancing of competing interests which *Roviaro* envisions, a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure. *State v. Boles*, 246 N.C. 83, 97 S.E. 2d 476 (1957); *see also United States v. Coke*, 339 F. 2d 183 (2d Cir. 1964); *State v. Brown*, 29 N.C. App. 409, 224 S.E. 2d 193, *cert. denied*, 290 N.C. 552, 226 S.E. 2d 511 (1976). We hold that defendant has failed to carry his burden in this regard.

At the time the trial court sustained the district attorney's objections to defense counsel's questions concerning the identity and remuneration of the confidential informant, defendant had not apprised the court of the particular need he had for the information. At that point in the trial, the trial judge could only speculate as to the need defendant had for the information. In his brief, defendant argues that the informant's identity should have been revealed so that he could have a chance to make a full and complete defense before the jury. Yet, defendant made no showing before the court at the time of the questions concerning the informant as to his particular need for knowing the identity of the source. The conflicts in the evidence to which defendant now points were not apparent at that stage in the proceeding nor did defendant forecast their appearance. On the basis of this conduct, we hold that defendant has failed to establish that the identity of the informer was relevant and helpful to his defense or essential to a fair determination of the case.[1] *Roviaro v. United States, supra.* There was no error.

[2] Likewise, we find no error in the action of the trial court in receiving into evidence a stipulation between the state and

1. We note that the conflicts in the evidence arose only after defendant and a clerk in his store testified. Defendant did not, at that time, indicate his desire to secure the information about the informer.

defense counsel that the four purple tablets were LSD. In his final assignment defendant contends that it was error to have admitted the stipulation because he failed to sign it and because there is nothing in the record to indicate that he knowingly and intelligently consented to it. There is no merit in this contention.

It is well-established that stipulations are acceptable and desirable substitutes for proving a particular act. *See generally* 1 Stansbury's North Carolina Evidence § 166 (Brandis Rev. 1973). Statements of an attorney are admissible against his client provided that they have been within the scope of his authority and that the relationship of attorney and client existed at the time. *Winborne v. McMahan*, 206 N.C. 30, 173 S.E. 278 (1934); *see generally* 1 Stansbury's North Carolina Evidence § 171 (Brandis Rev. 1973). In conducting an individual's defense an attorney is presumed to have the authority to act on behalf of his client. *State v. Woody*, 271 N.C. 544, 157 S.E. 2d 108 (1967); *Howard v. Boyce*, 254 N.C. 255, 118 S.E. 2d 897 (1961). The burden is upon the client to prove lack of authority to the satisfaction of the court. *Howard v. Boyce, supra.*

In the present case, defendant has failed to establish the absence of authority on the part of his attorney. The record is free of any indication that defense counsel was acting contrary to the wishes of his client. That being the case, this assignment of error is overruled.

We hold that defendant received a fair trial, free from prejudicial error.

No error.

FOOD TOWN STORES, INC., PETITIONER v. CITY OF SALISBURY, NORTH CAROLINA, RESPONDENT

BRAD RAGAN, INC., BRAD RAGAN REALTY COMPANY, B. V. HEDRICK GRAVEL AND SAND COMPANY, HEDRICK REALTY & INVESTMENT COMPANY AND 601 INDUSTRIAL DEVELOPMENT CORPORATION, PETITIONERS v. CITY OF SALISBURY, RESPONDENT

No. 30

(Filed 8 July 1981)

Municipal Corporations § 2.2— annexation ordinance—remand for amendment—findings and hearing unnecessary—effective date of ordinance

Where the Supreme Court found that a city was in compliance with the 60% use test of G.S. 160A-48(c)(3) by the inclusion of a previously uncounted lot in the annexed area and that the city had met its statutory burden for annexation but remanded the case because the Court had no authority to amend the annexation report and ordinance by recognizing the previously uncounted lot, it was unnecessary for the city council upon remand to hold a hearing and make findings of fact before amending the annexation report and ordinance to comply with the Supreme Court decision, and the ordinance became effective on the date the amendment was adopted by the city council.

APPEAL by petitioners from judgment of *Hairston, J.*, entered at the 3 November 1980 Session of Superior Court, ROWAN County. This Court allowed the City of Salisbury's petition for writ of *certiorari* on 15 December 1980.

This case was before us previously in the Spring Term, 1980. The earlier opinion of the Court is reported in 300 N.C. 21, 265 S.E. 2d 123 (1980).

In our previous opinion we upheld the City Council's methods of counting and classifying lots, and found that the Council's plans for extending municipal services met statutory requirements. However, we found error in the trial court's use classification of several lots. We further noted, however, that the trial court had found an additional qualifying lot within the annexed area, a lot not previously counted by the city for purposes of establishing compliance with the use test of G.S. 160A-48(c)(3).

Petitioners did not contest the finding by the trial court concerning this additional lot, which was being used for a qualifying

purpose. By the addition of that lot to the total, we found the city to be in compliance with the sixty percent use test.

However, since our earlier case law had established that courts do not have authority to amend an annexation report or ordinance, we remanded the cause to the city for amendment of the annexation report.

On 17 June 1980, the City Council of Salisbury amended the annexation ordinance in accordance with the opinion of this Court. On that same day, petitioner Food Town Stores filed a petition in Superior Court, Rowan County seeking review of the City Council's action and a stay of the annexation ordinance. The remaining petitioners filed an action on 15 July 1980, seeking the same relief. The City of Salisbury moved to dismiss both actions for failure to state a claim upon which relief can be granted. Judge Riddle issued an order staying operation of the ordinance on 18 August 1980. Judge Wood did likewise on 22 August 1980.

On 23 October 1980 the city served notice on petitioners that the city was converting its Rule 12(b) motions to dismiss to motions for summary judgment under Rule 56. A full hearing on the Rule 56 motions was held at the 3 November 1980 Session of Superior Court, Rowan County. In an order dated 19 November 1980, Judge Hairston denied the city's motions for summary judgment. Judge Hairston further ruled that he found a question of law of substantial importance involved in the cause, and that he could find no just cause why petitioner should not seek expedited review by petitioning this Court.

Shuford & Caddell by Thomas M. Caddell and Dwight L. Crowell III, attorneys for Food Town Stores, Inc.; Kluttz and Hamlin by Clarence Kluttz and Malcolm B. Blankenship, Jr., attorneys for Brad Ragan, Inc., et al.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Norwood Robinson, F. Joseph Treacy, Jr. and Penni L. Pearson, attorneys for City of Salisbury; Margaret R. Short, City Attorney.

PER CURIAM.

In this proceeding appellants challenge the process whereby the City Council amended the annexation report to reflect the

earlier opinion of this Court. Specifically, petitioners allege that the City Council was required to make new findings of fact before amending the annexation report and ordinance, and that petitioners were entitled to notice and a hearing prior to Council's amendment of the annexation report and ordinance.

We find both contentions to be without merit. It is clear from the language of this Court's prior decision that the case was remanded solely because this Court did not have the authority to make the necessary corrections. Those corrections were purely administrative in nature, and could in no way alter our prior determination that the City of Salisbury had in fact met its statutory burden, which is a prerequisite to effective annexation. On remand, no further hearing was necessary.

Furthermore, as we had determined in our earlier opinion that annexation was properly accomplished, the action before us cannot be deemed a motion in the cause. It is instead a new action. Accordingly, we hold that the date upon which the ordinance became effective was the date the amendment was adopted by the City Council, 17 June 1980. G.S. 160A-50(i). This holding in no way conflicts with our decision in *Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E. 2d 265 (1980).

The result is that the city's motion for summary judgment should have been allowed and the orders entered staying the effective date of the ordinance should now be dissolved. The orders of Riddle, J., dated 18 August 1980, of Wood, J., dated 22 August 1980, and of Hairston, J., dated 19 November 1980 staying the effective date of annexation are hereby vacated. The cause is remanded to Superior Court, Rowan County for entry of appropriate orders granting the city's motions for summary judgment and dismissing the action.

Reversed and remanded.

BETTY V. JOHNSON	)	
	)	
v.	)	ORDER
JOE STONE D/B/A SURRY DRUG COMPANY	)	
	)	

No. 217PC

(Filed 17 August 1981)

IT appearing that plaintiff's notice of appeal given in open court at the conclusion of the trial in the Superior Court, SURRY County was inadvertantly omitted from the record on appeal before the North Carolina Court of Appeals, and that the Court of Appeals dismissed plaintiff's appeal for failure of the record to indicate such notice, and that said court further declined to suspend the rules in the interest of justice to include said notice, and

It further appearing to the Court that the transcript of the trial proceedings at page 132 clearly shows that plaintiff gave appropriate notice of appeal in open court which was acknowledged by the trial judge and dictated into the trial proceedings, and

It further appearing that the interests of justice would be better served if the record is amended to include such notice of appeal to permit plaintiff's appeal to be heard on the merits by the Court of Appeals,

NOW, THEREFORE, upon motion by the plaintiff that this Court note *de novo* a deficiency in the record, and pursuant to Rule 15(f)(1) of the Rules of Appellate Procedure, the Court hereby amends the record on appeal before the Court of Appeals to include plaintiff's notice of appeal in open court in the trial tribunal.

IT IS FURTHER ORDERED that the decision of the North Carolina Court of Appeals in number 8017SC836 filed 2 June 1981, 52 N.C. App. 378, is reversed and the cause is remanded to the North Carolina Court of Appeals for further proceedings consistent with this order.

By order of the Court in conference this 17th day of August, 1981.

MEYER, J.

For the Court

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

ALLISON v. ALLISON

No. 208 PC.

Case below: 51 N.C. App. 622.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 17 August 1981.

BELL v. BELL

No. 251 PC.

Case below: 52 N.C. App. 585.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 17 August 1981.

BUTLER v. PETERS, COMR. OF MOTOR VEHICLES

No. 87.

Case below: 52 N.C. App. 357.

Motion of defendants to dismiss appeal for lack of substantial constitutional question allowed 17 August 1981.

GILLIAM v. HOLDEN

No. 157 PC.

Case below: 51 N.C. App. 464.

Petition by defendant Beasley for discretionary review under G.S. 7A-31 denied 17 August 1981.

HILL v. SMITH

No. 199 PC.

Case below: 51 N.C. App. 670.

Petition by defendant Smith for discretionary review under G.S. 7A-31 denied 17 August 1981.

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

IN RE ALTMAN

No. 260 PC.

Case below: 52 N.C. App. 291.

Petition by petitioner Altman for discretionary review under G.S. 7A-31 denied 17 August 1981.

IN RE COOK

No. 209 PC.

Case below: 52 N.C. App. 164.

Petition by Marvin Donald Cook for discretionary review under G.S. 7A-31 and alternative petition for writ of certiorari to North Carolina Court of Appeals denied 17 August 1981.

IN RE N.C.N.B.

No. 243 PC.

Case below: 52 N.C. App. 353.

Petition by N.C. National Bank for discretionary review under G.S. 7A-31 denied 17 August 1981.

IN RE WAKE FOREST UNIVERSITY

No. 213 PC.

Case below: 51 N.C. App. 516.

Petition by Forsyth County for discretionary review under G.S. 7A-31 denied 17 August 1981.

JOHNSON v. JOHNSON

No. 192 PC.

Case below: 51 N.C. App. 710.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981.

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

NICKELS v. NICKELS

No. 204 PC.

Case below: 51 N.C. App. 690.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981.

O'NEAL v. WATKINS

No. 242 PC.

Case below: 52 N.C. App. 164.

Petition by defendants for discretionary review under G.S. 7A-31 denied 17 August 1981. Motion of plaintiffs to dismiss appeal for lack of substantial constitutional question allowed 17 August 1981.

PALLET CO. v. WOOD

No. 207 PC.

Case below: 51 N.C. App. 702.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 17 August 1981.

PARDUE v. PARDUE

No. 206 PC.

No. 100 (Fall Term).

Case below: 52 N.C. App. 164.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 17 August 1981.

REYNOLDS v. REYNOLDS

No. 210 PC.

Case below: 51 N.C. App. 711.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981.

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

SMITHERS v. COLLINS

No. 246 PC.

Case below: 52 N.C. App. 255.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981.

SOUTHLAND ASSOCIATES, INC. v. PEACH

No. 245 PC.

Case below: 52 N.C. App. 340.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 17 August 1981.

STATE v. BLACK

No. 185 PC.

Case below: 51 N.C. App. 687.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 17 August 1981.

STATE v. CAMPBELL

No. 154 PC.

Case below: 51 N.C. App. 710.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981.

STATE v. COASEY

No. 271 PC.

Case below: 51 N.C. App. 450.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 17 August 1981.

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

STATE v. COTTEN

No. 212 PC.

Case below: 52 N.C. App. 164.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981.

STATE v. CROMARTIE

No. 116 PC.

Case below: 50 N.C. App. 212.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 17 August 1981.

STATE v. CURRY

No. 244 PC.

Case below: 52 N.C. App. 585.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981.

STATE v. DICKERSON

No. 170 PC.

Case below: 51 N.C. App. 710.

Application by defendant for further review denied 17 August 1981.

STATE v. ELKINS

No. 265 PC.

Case below: 52 N.C. App. 378.

Petition by State for writ of certiorari to North Carolina Court of Appeals denied 17 August 1981.

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

STATE v. GILES

No. 197 PC.

Case below: 34 N.C. App. 112.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 17 August 1981.

STATE v. GORE & GAUSE

No. 215 PC.

Case below: 52 N.C. App. 165.

Petition by defendant Gause for discretionary review under G.S. 7A-31 denied 17 August 1981.

STATE v. GOSNELL

No. 277 PC.

Case below: 52 N.C. App. 586.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981.

STATE v. HAMLIN

No. 94 PC.

Case below: 46 N.C. App. 607.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 17 August 1981.

STATE v. ISOM

No. 250 PC.

Case below: 52 N.C. App. 331.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981.

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

STATE v. JOHNSON

No. 257 PC.

Case below: 52 N.C. App. 592.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 July 1981. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 17 July 1981.

STATE v. LOCKLEAR

No. 249 PC.

Case below: 52 N.C. App. 378.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981.

STATE v. MARTIN

No. 248 PC.

Case below: 52 N.C. App. 378.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 17 August 1981. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 17 August 1981.

STATE v. SELF

No. 273 PC.

Case below: 52 N.C. App. 586.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981.

STATE v. THOMPSON

No. 268 PC.

Case below: 52 N.C. App. 629.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 August 1981.

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

SUGG v. PARRISH

No. 198 PC.

Case below: 51 N.C. App. 630.

Petition by defendants for discretionary review under G.S. 7A-31 denied 17 August 1981.

SUNSET INVESTMENTS, LTD. v. SARGENT

No. 282 PC.

Case below: 52 N.C. App. 284.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 17 August 1981.

TRUCKING CO. v. PHILLIPS

No. 134 PC.

Case below: 51 N.C. App. 85.

Petition by defendants for reconsideration of denial of discretionary review under G.S. 7A-31 denied 17 August 1981.

STATE OF NORTH CAROLINA v. BOBBY DEAN RINCK AND RONALD DEAN McMURRY

No. 45

(Filed 17 August 1981)

1. Criminal Law § 92.1— two defendants charged with same crime—consolidation proper

The trial court did not err in granting the State's motion to consolidate defendants' cases for trial where each defendant was charged with having committed the same offense at the same time; neither defendant acted at trial in such a way as to incriminate the other and their defenses were not antagonistic; and while the State on occasion presented evidence that was competent against only one defendant, the trial court proceeded at those times to instruct the jury that such evidence was competent against only a particular defendant.

2. Criminal Law § 162.5— witness's testimony—failure to request limiting instructions

In a prosecution of defendants for murder committed during the perpetration of a robbery, defendants were not prejudiced by the admission of testimony by a radio dispatcher, since the trial judge instructed the jury that it was not to consider the testimony of the dispatcher against one defendant, and the other defendant made a series of general objections to the dispatcher's testimony but at no time requested a special instruction which would limit the jury's consideration of the evidence.

3. Arrest and Bail § 3.1; Searches and Seizures § 10— warrantless search and arrest—probable cause

There was adequate justification for officers to stop defendants as they walked along the road and to conduct a limited search of defendants, and there was probable cause to arrest defendants where defendants were walking along a road at an unusual hour for persons to be going about their business; the officer who directed defendants to stop knew that a homicide had been committed within a few hundred feet and within little more than the preceding half hour; after defendants were stopped, an officer asked them to identify themselves, and one defendant gave a name different from that which he had given officers only a few minutes earlier; one officer noticed a bulge in the left front pocket of one defendant's pants; the officer also observed defendant placing his hand in the pocket; thinking that the bulge was a weapon, the officer grabbed defendant's hand and pulled it out of the pocket; the officer then reached into the pocket and retrieved a pill bottle which bore decedent's name; officers had observed defendants at decedent's home; defendants were observed going back into the dwelling where the body was subsequently found; and defendants were disheveled and there were stains upon their clothing which appeared to be blood.

4. Criminal Law § 99.1— no expression of opinion by judge

The trial judge did not express an opinion as to defendants' guilt by his questions of witnesses, which tended to clarify unclear and confusing testimony, by his comments to counsel, which were straightforward and were not demeaning, insulting or patronizing, or by his arranging of the evidence before the jury in his charge; moreover, the trial court did not express an opinion by spending more time in summarizing the evidence for the State, and the trial court gave equal stress to the contentions of the State and the defendants.

5. Homicide § 25.1— felony murder—instructions on burglary proper

The trial court did not err by submitting burglary to the jury as the underlying felony for first degree murder on the theory of felony murder where the evidence tended to show that at 1:16 a.m. a caller purporting to be decedent called the sheriff's department and reported that he had been robbed by Bobby Swink; the dispatcher attempted to call back but the line was constantly busy; investigating officers who discovered decedent's body found one of the telephones in the house off the hook and the other telephone had its cord broken off; defendants were at the scene of the homicide when the first officer arrived at the scene, and they left shortly thereafter; and the State's evidence therefore tended to show that, while the homicide was not committed to overcome resistance or consummate the crime of burglary, it was committed to silence the decedent and thereby prevent him from identifying defendants.

6. Homicide § 30— felony murder—failure to instruct on lesser offenses

Where defendants were charged with first degree murder and the evidence tended to show that defendants killed decedent in the perpetration of the underlying felony of burglary, but there was no evidence that decedent was killed other than in the course of the commission of burglary, the trial court was not required to submit lesser included offenses of second degree murder and voluntary manslaughter to the jury.

7. Constitutional Law § 30— names of State's witnesses—no pretrial discovery

A defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him.

8. Homicide § 25— felony murder—lesser offenses of underlying felony—instruction not required

Where defendants were charged with first degree murder under the felony murder doctrine, the underlying felony became part of the first degree murder charge, and further prosecution for the underlying felony was prohibited; therefore, the trial court was not required to instruct the jury as to the lesser included offenses of the underlying felony.

9. Criminal Law § 69— telephone conversation—identity of caller—res gestae—business entry

The trial court in a first degree murder case did not err in admitting evidence of a telephone conversation between a sheriff's department dispatcher and a person identifying himself as decedent where the identity of the caller was sufficiently established by the conversation itself and by testimony of decedent's daughter and granddaughter that the voice on the tape of the con-

versation was that of decedent, and though the content of the telephone conversation was hearsay, it was nevertheless admissible as part of the res gestae, and the transcript of the tape recording of the phone call was admissible under the business records exception to the hearsay rule.

10. Criminal Law § 73.3— statements showing state of mind—admissibility

The trial court in a first degree murder case did not err in allowing several of the State's witnesses to testify that decedent had often referred to defendant Rinck as "Bobby Swink," since the evidence was offered to show decedent's knowledge of defendant Rinck's identity as one of the persons who had robbed him and to explain why he referred to defendant as "Bobby Swink" during a telephone call which he made to the police department on the day that he was killed.

11. Constitutional Law § 65—telephone conversation—admissibility—right to confront witnesses not abridged

In a first degree murder case there was no merit to defendant's contention that admission of a telephone conversation between deceased and a sheriff's department dispatcher violated defendant's right to confront the witnesses against him, since decedent's death rendered him unavailable to testify at defendant's trial; evidence of the phone conversation fell into two well recognized exceptions to the hearsay rule; and the necessity of using the hearsay evidence outweighed the preference for in-court confrontation of the witness.

APPEAL by defendants from judgments of *Grist, J.*, entered at the 25 March 1980 Criminal Session of CATAWBA Superior Court sentencing each defendant to life imprisonment for the crime of first-degree murder.

Upon entry of pleas of not guilty, defendants were tried upon bills of indictment, proper in form, which charged them with the first-degree murder of Donald B. Williamson. At trial, the State presented evidence that tended to show that:

During the evening of 18 August 1979, defendants were in the company of several of their friends, including Cynthia Bass, a witness for the State. Early in the evening of 18 August, Ms. Bass drove defendants from the home of a friend to a tavern on Highway 321 between Newton and Maiden. After a short while, defendants gave Ms. Bass directions and instructed her to drive them to another destination. At approximately one o'clock on the morning of 19 August, Ms. Bass drove her car into the driveway of the home of Donald B. Williamson located near Maiden, North Carolina. The Williamson house was built of cement blocks. Both defendants got out of the car, and Ms. Bass drove away without observing where the men went.

At 1:16 a.m. a dispatcher at the Catawba County Sheriff's Department received a telephone call from a person identifying himself as the decedent, Donald B. Williamson. The caller requested that he be allowed to talk with the Maiden Police Department. Upon inquiry by the dispatcher, the person said he had been robbed of his pocketbook which contained the sum of $35.00. As the caller described the robbery, he identified one of his assailants as being Bobby Swink.[1] Before the conversation ended, the caller gave his name, address and telephone number, as well as a description of his house. After the conversation ended at approximately 1:19 a.m., Deputy Sheriff Gary Sigmon was dispatched to the address.

Deputy Sigmon arrived at the Williamson residence at 1:35 a.m. The officer went to the front door and knocked several times but no one answered. It appeared to the deputy that most of the lights were on in the house. As he stood on the front porch of the house, the officer heard a noise at the rear of the dwelling that sounded like a door closing. As he walked around the left side of the house, he saw a blue automobile parked at the rear of the house. The back door of the house was open.

As Deputy Sigmon approached the vehicle, he saw an individual sitting in the driver's seat whom he subsequently identified as being defendant Rinck. Upon being asked by the officer who had called the sheriff's department, defendant Rinck said "Them in there." Defendant Rinck thereupon got out of the car and walked in front of it. Thereafter, the officer saw another person standing at the threshold of the back door. That individual was wearing faded blue jeans and no shirt, and he had shoulder length brown hair. Officer Sigmon observed both individuals go back into the house. As he stood at the car after the men had gone inside, he saw two rifles, one resting in the rear floorboard, the other lying on the backseat.

The deputy went back to his cruiser and radioed in the license tag number of the automobile parked at the rear of the

1. Judy Gail Beal was decedent's daughter and testified for the State. Ms. Beal testified that she and defendant Rinck had dated one another until approximately one week before her father's death. Throughout that time, defendant Rinck had spent much time at decedent's home. According to Ms. Beal, decedent referred to defendant Rinck as "Swink." Decedent's granddaughter, Candy Frye, confirmed the practice.

house. The Communications Center ran a check upon the license number and informed the officer that it was registered in decedent's name. The officer also requested that the dispatcher telephone the residence. After calling the house, the dispatcher told the deputy that the line was busy.

Shortly thereafter, two policemen, Office Tom Hurley and Officer Steve Pruitt, from Maiden arrived. The policemen went to the rear of the house, and Deputy Sigmon covered the front door. Meanwhile, Lieutenant Gene Finger, Shift Commander of the Catawba County Sheriff's Department, arrived at the scene.

Lieutenant Finger and Deputy Sigmon entered the front door to find a telephone cord on the floor and numerous .22 caliber rifle cartridges strewn about the living room. Some of the cartridges had been spent. The men proceeded through the house to the bedroom to find decedent's body lying in the bed. The body bore two bullet wounds about the face.

Upon the arrival of a detective, the lieutenant left the scene to return to the sheriff's office. As he drove along, the officer noticed two individuals walking along the road approximately 200 feet from decedent's residence. The lieutenant turned on his blue light and stopped the men. The individuals were the defendants.

Lieutenant Don Burgess, a detective with the Catawba County Sheriff's Department, observed the blue light from the Williamson house, and Deputy Sigmon, as well as an agent of the State Bureau of Investigation, accompanied the detective to the place where the defendants had been stopped. Lieutenant Burgess observed defendant McMurry placing his hand in a bulging pocket. The detective ordered defendant McMurry to stop and to take his hand out of the pocket. The defendant did as he was told, and Lieutenant Burgess reached into the pocket and retrieved a pill bottle which bore decedent's name. Thereupon, the officers arrested defendants and proceeded to search them. The subsequent search revealed, among other things, a set of keys. The keys were those to the automobile parked at the rear of the Williamson residence which belonged to the decedent. Subsequent investigation identified fingerprints found within the house as being those of the defendants.

Defendant McMurry did not offer any evidence.

Defendant Rinck offered evidence, including his own testimony, that tended to show that he and defendant McMurry had visited the Williamson home during the early morning hours of 19 August for the purpose of visiting decedent's son Jerry Beal, and decedent's daughter, Judy Beal, whom defendant Rinck had dated. They knocked on the front door, but nobody answered. The pair then proceeded to look around the outside premises. Upon the arrival of Deputy Sigmon, the pair left. Defendant Rinck denied that anyone ever called him "Swink."

Other evidence pertinent to our decision will be discussed in the opinion.[2]

Attorney General Rufus L. Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Robert M. Grant, Jr., for defendant Bobby Dean Rinck.

Thomas C. Morphis, for defendant Ronald Dean McMurry.

COPELAND, Justice.

I

While defendants have filed separate briefs before this court, there are several issues that are argued by both of them. Therefore, for the sake of clarity and convenience, those issues which are raised by both defendants will be addressed first.

A

[1] Defendants argue first that the trial court erred in granting the State's motion to consolidate their cases for trial. The essence of their argument is that by granting the State's motion, the trial court allowed the jury to consider evidence which was competent against only one defendant against both of them. We are compelled to disagree.

Upon the written motion of the prosecutor, charges against two or more defendants may be joined for trial when each of the

2. The State proceeded under a theory of felony murder. Upon inquiry by the court, the State conceded that the only aggravating circumstance for which it had evidence was that of the underlying felony of burglary. Thereupon, the court entered judgments sentencing defendants to life imprisonment. *See State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980).

defendants is charged with accountability for each offense. G.S. § 15A-926(b)(2) (1978). Such motions are addressed to the sound discretion of the trial court and are not reviewable on appeal absent a showing of abuse of discretion. *E.g., State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977).

There has been no showing that the trial court abused its discretion. In the case *sub judice*, each defendant was charged with having committed the same offense at the same time; the first-degree murder of Donald B. Williamson on or about the 19th day of August 1979. Neither defendant acted at trial in such a way as to incriminate the other, and their defenses were not antagonistic. While it is the case that, on occasion, the State presented evidence that was competent only against one of the defendants, the trial court proceeded at those times to instruct the jury that such evidence was competent only against a particular defendant. *Compare State v. Clark*, 298 N.C. 529, 259 S.E. 2d 271 (1979).

B

During its case-in-chief, the State offered the testimony of Mrs. Denise Allen, a dispatcher with the Catawba County Sheriff's Department, concerning a call for assistance which she received at 1:16 a.m. on 19 August 1979. Purporting to be decedent Williamson, the caller said that he had been robbed of his pocketbook which contained thirty-five dollars. Upon inquiry by the dispatcher, the caller identified his assailant as being "Bobby Swink." At the close of the *voir dire* held to determine the competency of Mrs. Allen's testimony concerning the conversation, the trial court ruled that the testimony was admissible as part of the *res gestae* of the crime of robbery but not as part of the *res gestae* of burglary. However, the trial court received the proffered testimony without limiting its consideration by the jury. There was no error.

Initially, we are compelled to observe that defendants are in violation of the Rules of Appellate Procedure. Rule 10(c) provides, in pertinent part, that "[e]ach assignment of error . . . shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the pages of the record on appeal at which they appear." The exceptions to the actual receipt of the evidence in question are not so listed. Therefore, the Rules

of Appellate Procedure mandate that they are deemed abandoned. N.C.R. App. p. 10(c). However, because of the gravity of this crime and the severity of the punishment imposed, we have elected to exercise our discretion and reach the merits of the argument. *See* N.C.R. App. p. 2.

[2] We note initially that even if the trial court had committed error in its handling of this matter, that action could not have prejudiced defendant McMurry because the trial judge instructed the jury that it was not to consider the testimony of the dispatcher against him. The record indicates that, upon giving this instruction, the court asked the jury if the instruction was clear, and that all of the jurors nodded affirmatively. That being the case, defendant McMurry has no basis upon which to argue prejudicial error. *See State v. Clark, supra.*

Similarly, defendant Rinck has no basis upon which to assert error. Defendant Rinck made a series of general objections to the dispatcher's testimony. At no time did he request a special instruction which would limit the jury's consideration of the evidence. Defendant's only motion sought to strike the entire conversation, not an instruction to limit its consideration by the jury. Consequently, the overruling of defendant Rinck's general objection without an appropriate limiting instruction was not error. *State v. Montgomery,* 291 N.C. 91, 229 S.E. 2d 572 (1976).

C

[3] Defendants next contend that the trial court erred in receiving evidence at trial which was obtained as a result of an illegal and unconstitutional arrest. An individual is arrested when law enforcement officers interrupt his activities and significantly restrict his freedom of action. *State v. Morgan,* 299 N.C. 191, 261 S.E. 2d 827, *cert. denied,* 446 U.S. 986 (1980). No one disputes that defendants were placed under arrest within a matter of minutes after being stopped as they walked along the road near decedent's house. However, defendants argue that there was no basis upon which law enforcement officers could legally detain or search them. If defendants are correct in their position, it follows necessarily that the subsequent arrests were invalid and cannot justify a search of their persons. After careful deliberation, we conclude that this assignment is without merit.

If from the totality of circumstances, a law enforcement officer has reasonable grounds to believe that criminal activity may be afoot, he may temporarily detain an individual. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968); *State v. Buie*, 297 N.C. 159, 254 S.E. 2d 26, *cert. denied*, 444 U.S. 971 (1979); *State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776, *cert. denied*, 444 U.S. 907 (1979); *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973). If upon detaining the individual, the officer's personal observations confirm that criminal activity may be afoot and suggest that the person detained may be armed, the officer may frisk him as a matter of self-protection. *Terry v. Ohio, supra; State v. Buie, supra; State v. Streeter, supra.*

In *State v. Streeter, supra*, the State's evidence tended to show that while they were on routine patrol at approximately 2:45 a.m., two police officers in Greenville, North Carolina observed the defendant walking along a highway roughly four hundred feet from a doctor's office. Because of the time and his proximity to the nearby business offices, defendant was approached by the officers and directed to stop. One of the officers testified that they had stopped the defendant to learn his identity and the reason he was in the area at that hour of the morning. As he talked with the defendant, one of the officers observed a bulge under the defendant's shirt, and he ordered defendant not to move. Thinking that the bulging object was a weapon, the officer touched it and thought the object was made of metal. The policeman thereupon reached under the defendant's shirt and found one pair of gloves, one screwdriver, one hammer, one prybar, a flashlight, and a bank bag. Thereupon, the officers seized the items and arrested defendant for the possession of burglary tools. Over the objection of defendant, the trial court received the testimony of one of the officers concerning the encounter, as well as the items that had been seized.

On appeal, this court affirmed the judgment of the Court of Appeals finding no error in the defendant's trial. Writing for the majority, Justice Huskins drew upon the rule and rationale enunciated in *Terry v. Ohio, supra*, to uphold the officer's conduct in stopping the defendant and subsequently frisking him for weapons. The opinion notes that:

> "Crimes of violence are on the increase, and officers are becoming the victims of such crimes in increasing numbers.

> As a result the necessity for officers to protect themselves and others in situations where probable cause for an arrest may be lacking is now recognized and permitted. Of course, North Carolina has no 'stop and frisk' statute although many states do. (Citation omitted.) The lack of such a statute, however, is not fatal to the authority of law enforcement officers in North Carolina to stop suspicious persons for questioning (field interrogation) and to search those persons for dangerous weapons (frisking). These practices have been a time-honored police procedure and have been recognized as valid at common law 'as a reasonable and necessary police authority for the prevention of crime and the preservation of public order.'" (Citations omitted.) 283 N.C. at 209, 195 S.E. 2d at 506.

It is our conclusion that *Streeter* controls the case *sub judice*, and, therefore, we hold that on the facts of this particular case there was nothing illegal about defendants being stopped or searched. It must be remembered that defendants were walking along the road at an unusual hour for persons to be going about their business. In this regard, the present case approximates the situation dealt with in *Streeter*. However, in one critical respect, there was a more compelling reason for stopping defendants as they walked along the road. The officer who directed them to stop knew that a homicide had been committed within a few hundred feet and within little more than the preceding half hour. While these circumstances do not constitute probable cause for an arrest, they do amount to a reasonable basis for directing defendants to stop and identify themselves.

However, to say that it was lawful to stop defendants as they walked along the road does not end the matter. It must be determined whether it was permissible for the officers to search defendants. Upon seeing them as they walked along the road near decedent's house, Lieutenant Finger turned on his blue light and directed defendants to stop. As we noted above, the officer was acting lawfully in directing the men to stop. Meanwhile, Deputy Sigmon and Lieutenant Burgess arrived at the scene. Both men had been at the Williamson house investigating the homicide, and they had seen the flashing blue light nearby. Lieutenant Burgess thereupon asked defendants to identify themselves. Defendant McMurry identified himself by his given name. However, defend-

ant Rinck said that his name was "Shuford." Deputy Sigmon, who recognized defendants from his earlier encounter, told his fellow officers that defendant Rinck had identified himself earlier as "Swink."

At the same time, Lieutenant Burgess noticed a bulge in the left front pocket of defendant McMurry's pants. The officer also observed defendant McMurry placing his hand in the pocket. Thinking that the bulge was a weapon, Lieutenant Burgess grabbed defendant McMurry's hand and pulled it out of the pocket. The officer then reached in the pocket and retrieved a pill bottle which bore decedent's name. Thereupon, the officers placed both defendants under arrest and searched them.

Again, we perceive nothing unlawful. As we noted earlier, if an officer who has detained an individual has reason to believe that criminal activity may be afoot and that the individual may be armed, the officer may frisk him as a matter of self-protection. *Terry v. Ohio, supra; State v. Buie, supra; State v. Streeter, supra.* Such was the case here. Defendants had been lawfully stopped in close proximity to the scene of a recent homicide. Nothing else appearing, there were no grounds upon which a search could be justified. However, Officer Burgess observed a bulge in defendant McMurry's pocket. He also saw defendant McMurry put his hand in the pocket. A reasonable man facing the same set of circumstances would have reacted as did Lieutenant Burgess. That the search did not reveal a weapon is irrelevant. Evidence of a crime which is necessarily exposed by a limited weapons search is evidence which is lawfully obtained. *State v. Streeter, supra.*

Having established that there was adequate justification for stopping defendants as well as searching them, we now turn our attention to the question of whether there was probable cause to arrest defendants. Unless probable cause existed at the time of their seizure, defendant's arrest was constitutionally invalid, *State v. Streeter, supra,* as well as statutorily prohibited. *See* G.S. § 15A-401 (Cum. Supp. 1979). The existence of probable cause depends upon whether at the time of the arrest there were facts and circumstances within the knowledge of the arresting officer which would justify a prudent man's belief that a suspect had committed an offense. *Beck v. Ohio,* 379 U.S. 89, 13 L.Ed. 2d 142,

85 S.Ct. 223 (1964); *State v. Joyner*, 301 N.C. 18, 269 S.E. 2d 125 (1980); *State v. Streeter, supra; see generally* J. Cook, Constitutional Rights of the Accused; Pretrial Rights § 17 (1972). The existence of probable cause to arrest an individual is a pragmatic question to be determined in each case in light of the particular circumstances and the particular offense involved. *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971).

We conclude from all the facts and circumstances in the case *sub judice* that there was probable cause to arrest defendants. Deputy Sigmon recognized defendants from his earlier encounter with them at decedent's house. That fact alone does not establish probable cause for an arrest. It is but one fact among several that must be considered. Not only had defendants been seen at decedent's home, they were observed going back into a dwelling where a body was subsequently found. Also, Deputy Sigmon recognized that defendant Rinck gave a different last name in identifying himself to Lieutenant Finger than he had at the house. Defendants' appearance were disheveled and there were stains upon clothing that appeared to be blood. All of these considerations, coupled with the medicine bottle bearing decedent's name found in defendant McMurry's pocket, would be sufficient to justify a prudent man's belief that defendants had been involved in decedent's death. It, therefore, follows that the arresting officers were acting lawfully by thoroughly searching the person of each defendant and that the items so seized were not subject to being suppressed. *Chimel v. California*, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969).

D

[4] Similarly, we find no merit in defendants' contentions that by his questions of witnesses, his comments to counsel, and in his arranging of the evidence before the jury in his charge, the trial judge expressed an opinion as to their guilt in violation of G.S. § 15A-1222 (1978).

A trial judge may properly question witnesses in order to clarify and to promote a proper understanding of the testimony. *E.g., State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). However, such questions constitute prejudicial error if by their tenor, frequency, or persistence, the trial judge expresses an opinion. *E.g., State v. Lea*, 259 N.C. 398, 130 S.E. 2d 688 (1963). In

the case *sub judice*, we find nothing objectionable about the judge's questions. Since they were asked in a detached and neutral fashion, they tended to clarify unclear and confusing testimony.

Nor do we find anything objectionable in the judge's comments to defense counsel during the cross-examination of Deputy Sigmon. They were directed at the form of the questions employed, as well as the proper scope of cross-examination. The comments are straightforward, and they are not demeaning, insulting, or patronizing. *See State v. Berry*, 295 N.C. 534, 246 S.E. 2d 758 (1978).

Defendants' objections to the judge's array of the evidence before the jury are also without merit. It is clear that while the judge spent more time summarizing the evidence for the State than he did the evidence for defendant Rinck,[3] the mere fact that a judge spends more time summarizing the evidence for the State does not amount to an expression of opinion. *E.g.*, *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091 (1976). While evidence which is brought out on cross-examination is evidence for a defendant, *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979), it is not error for a court to fail to summarize such evidence if it is not of an exculpatory nature which goes to the establishment of a defense. *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980). The cross-examination of the State's witnesses elicited no such evidence. Lastly, defendants argue that the trial court erred in failing to state their contentions sufficiently. A trial court is not required to state the contentions of the parties. *E.g.*, *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976). In the present case, the court merely stated that it was the contention of the State that the jury ought to be satisfied of defendant's guilt beyond a reasonable doubt from all of the evidence; and that it was the contention of defendants that the State's evidence ought not to be believed, and that, at the very least, the jury ought to have a reasonable doubt as to their guilt. Nothing more is required, and it is clear from the record that the court gave equal stress to the contentions of the State as well as to those of defendants.

3. Defendant McMurry did not offer any evidence. The court instructed the jury that they were not to use defendant McMurry's silence against him in any way.

E

[5] Defendants next contend that the trial court erred by submitting burglary to the jury as the underlying felony for first-degree murder on the theory of felony murder. There was no error.

A killing is committed in the perpetration or attempted perpetration of a felony when there is no break in the chain of events leading from the initial felony to the act causing death. *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). The underlying felony is not deemed terminated prior to the killing merely because the participants have proceeded far enough to be convicted of the underlying felony. *State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563, *cert. denied*, 434 U.S. 998 (1977).

It is our conclusion that *State v. Thompson*, *supra*, controls the present case. In *Thompson*, the defendant broke and entered an apartment and took various articles of property. An accomplice asked the defendant if he had gotten everything he wanted. The defendant replied affirmatively, but he went on to say that he had something "to take care of." Upon further questioning by the accomplice, the defendant said that it was "somebody upstairs." The defendant then went upstairs to the apartment and killed a youth who lived there. On appeal, this Court held that it was not error to have charged the jury on felony murder with felonious breaking and entering and felonious larceny being the underlying felonies.

In the present case, the evidence tends to show a similar factual pattern to that of *Thompson*. At 1:16 a.m. a caller purporting to be decedent called the Catawba County Sheriff's Department and reported that he had been robbed by Bobby Swink. The dispatcher attempted to call back but the line was constantly busy. Investigating officers who discovered decedent's body found one of the telephones in the house off the hook, and the other telephone had its cord broken off. Defendants were at the scene of the homicide when the first officer arrived at the scene, and they left shortly thereafter. The State's evidence therefore tends to show that while the homicide was not committed to overcome resistance or consummate the crime of burglary, it was committed to silence the decedent and thereby prevent him from identi-

fying defendants. In this respect, the present case is identical to *State v. Thompson, supra.*

There was no error.

F

[6] Defendants were charged with the crime of first-degree murder. The State proceeded under a felony murder theory, and the trial judge so instructed the jury. Defendants now assert that the trial court erred in failing to charge the jury on the lesser included offenses of second-degree murder and voluntary manslaughter. There was no error.

It is well-established in North Carolina that the trial court is under a duty to instruct the jury upon, and to submit for its consideration, a lesser included offense only when there is evidence tending to show the commission of such lesser included offense. *State v. Squire, supra.* In particular, where the law and the evidence justify the use of the felony murder rule, the State is not required to prove premeditation and deliberation, and neither is the court required to submit the offenses of second-degree murder or manslaughter unless there is evidence to support it. *State v. Warren,* 292 N.C. 235, 232 S.E. 2d 419 (1977); *State v. Swift,* 290 N.C. 383, 226 S.E. 2d 652 (1976).

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *E.g., State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971). Voluntary manslaughter is the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation. *E.g., State v. Fleming,* 296 N.C. 559, 251 S.E. 2d 430 (1979).

The State submits, and we agree, that the evidence tends to show that defendants killed decedent in the perpetration of the underlying felony of burglary. *Compare State v. Thompson, supra.* There is no evidence that decedent was killed other than in the course of the commission of the felony of burglary. There is no evidence in the record which would justify submitting any lesser included offenses. The record establishes that defendants were guilty of first-degree murder or not guilty of any crime. The State has established a *prima facie* case as to first-degree murder under the felony murder rule. No other crime was made out by the evidence.

There was no error.

II

We next address those assignments of error raised by defendant McMurry.

A

[7] Defendant McMurry first contends that the trial court erred in denying his motion for pretrial discovery of the names of the State's witnesses.

It is well settled that a defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. G.S. 15A-903, which lists the information the State must disclose upon defendant's proper discovery motion, does not alter this rule. *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980); *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). There was no error.

B

[8] By his next assignment, McMurry argues that the trial court erred in failing to more fully set forth the elements of robbery in his charge to the jury. The trial judge defined robbery as follows:

> "Robbery is the forcible taking and carrying away personal property of another from his person or in his presence without his consent with the intent to deprive him of its use permanently, the taker knowing that he is not entitled to take it."

This instruction was in compliance with the definitions of common law robbery previously outlined by this Court. *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980); *State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971).

Defendant alleges that the trial judge should have also submitted an instruction to the jury on the lesser included offenses of non-felonious larceny and non-felonious breaking and entering. We disagree. McMurry was charged in an indictment with first-degree murder under the felony-murder doctrine. The State sought to prove that the murder occurred during the perpetration of the felony of burglary in the first-degree. First-degree burglary is defined as the breaking and entering in the nighttime of an oc-

cupied dwelling or sleeping apartment with the intent to commit a felony therein. *State v. Simpson*, 299 N.C. 377, 261 S.E. 2d 661 (1980); *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). The State's evidence tended to show that robbery was the felony that defendants intended to commit at the time of the breaking and entering into the home of Donald Williamson. Thus, the instructions on both burglary and armed robbery were submitted to the jury as part of the murder charge. Under such circumstances, the underlying felonies become part of the first-degree murder charge, prohibiting a further prosecution of the defendant for the underlying felonies. *State v. Thompson, supra.* Defendant McMurry could not have been lawfully convicted of robbery upon his indictment for first-degree murder. The court was therefore not required to instruct the jury as to the lesser included offenses of robbery. *State v. Squire, supra.* Defendant's assignment of error is without merit and overruled.

III

We finally address those issues argued solely by defendant Rinck.

A

[9] Rinck submits that the trial court erred in admitting evidence of the telephone conversation between Deputy Denise Allen and a person identifying himself as the decedent, Donald B. Williamson.

Deputy Allen, a dispatcher for the Catawba County Sheriff's Department, testified for the State that she received a telephone call on one of the emergency lines at the Catawba County Communications Center at 1:16 a.m. on 19 August 1979. The caller identified himself as Donald Williamson and stated that he had just been robbed of his pocketbook containing about $35.00. He identified one of his assailants as "Bobby Swink." Upon Deputy Allen's request, the caller gave his address, telephone number, and a description of his house. The entire conversation was tape recorded and retained as part of the records of the Catawba County Sheriff's Department, as are all calls made on the Communications Center's emergency lines. A transcript of the recorded conversation was received into evidence.

Defendant maintains that the evidence of the telephone call was improperly admitted on two grounds; first, because the State

was unable to sufficiently identify the caller as Donald Williamson and second, because the statements made in the telephone conversation were hearsay and not admissible under any of the recognized exceptions to the hearsay rule.

Justice Exum, speaking for the Court in *State v. Richards*, 294 N.C. 474, 480, 242 S.E. 2d 844, 849 (1978), summarized the principles of law relevant to establishing the identity of a telephone caller as follows:

> "Before a witness may relate what he heard during a telephone conversation with another person, the identity of the person with whom the witness was speaking must be established. *State v. Williams*, 288 N.C. 680, 698, 220 S.E. 2d 558, 571 (1975). If the call was from the person whose identity is in question, the mere fact that he represented himself to be a certain person is not enough to identify him as that person, 1 Stansbury's N.C. Evidence § 96, p. 310 (Brandis Rev. 1973) *accord, State v. Williams, supra.* Identity of the caller may be established by testimony that the witness recognized the caller's voice, or by circumstantial evidence. *State v. Williams, supra*, 288 N.C. at 698, 220 S.E. 2d at 571. It is not always necessary to prove the identification before introducing evidence of the conversation, particularly in criminal prosecutions where secrecy, anonymity and concealed identity are generally resorted to. In such cases it is only necessary that identity of the person be shown directly or by circumstances somewhere in the development of the case. . . . *State v. Strickland*, 229 N.C. 201, 208, 49 S.E. 2d 469, 474 (1948)."

Applying these principles to the facts of the case *sub judice*, we find that there was sufficient evidence presented to identify the caller as Donald Williamson. During the conversation, the caller clearly stated his name, address, and telephone number and gave an accurate description of his house, all of which information was verified by law enforcement officers. Further, although Deputy Allen was not personally familiar with Mr. Williamson's voice so as to recognize it at the time of the conversation, both decedent's daughter, Zonnie Reinhardt, and his granddaughter, Candy Frye, listened to the tape recording of the call at *voir dire* and were able to immediately and without hesitation identify the male voice on the tape as that of decedent.

We are likewise unpersuaded by defendant Rinck's contention that, assuming the identity of the caller was sufficiently established, Deputy Allen's testimony regarding the substance of that conversation and the transcript of the tape recording of the call were still inadmissible as hearsay not falling within any of the recognized exceptions to the hearsay rule. Whenever a statement of any person other than the witness himself in his present testimony is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977). Stated differently, evidence, whether oral or written, is hearsay "when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *State v. Deck*, 285 N.C. 209, 213, 203 S.E. 2d 830, 833 (1974). Unless it falls within one of the recognized exceptions to the hearsay rule, hearsay evidence is inadmissible. *State v. Connley*, 295 N.C. 327, 245 S.E. 2d 663 (1978), *death sentenced vacated*, 441 U.S. 929 (1979). Indisputably, the content of the telephone conversation between Deputy Allen and the decedent was hearsay, as the evidence was offered to prove the truth of the matters discussed during the call and its probative force depended upon the credibility of the decedent. We hold, however, that this evidence falls within two well-established exceptions to the hearsay rule and was therefore properly admitted.

First, Deputy Allen's testimony regarding the entire conversation was admissible under the *res gestae* exception. Under that exception, statements made by an individual immediately prior to or during the course of a continuing criminal transaction are admissible despite their hearsay nature. The *res gestae* doctrine was described in *State v. Connley, supra*, as follows:

> "The rule of res gestae, under which it is said that all facts which are a part of the res gestae are admissible, is a rule determining the relevancy and not the character or probative force of the evidence. If the court determines that the fact offered is a part of the the res gestae, it will be accepted, because, as it is said, that fact is then relevant. . . . Circumstances constituting a criminal transaction which is being investigated by the jury, and which are so interwoven with other circumstances and with the principal facts which are at issue that they cannot be very well separated from the

> principal facts without depriving the jury of proof which is necessary for it to have in order to reach a direct conclusion on the evidence, may be regarded as res gestae.
>
> These facts include declarations which grow out of the main fact, shed light upon it, and which are unpremeditated, spontaneous, and made at a time so near, either prior or subsequent to the main act, as to exclude the idea of deliberation or fabrication. A statement made as part of res gestae does not narrate a past event, but it is the event speaking through the person and therefore is not excluded as hearsay, and precludes the idea of design." 295 N.C. at 341-2, 245 S.E. 2d at 672, *quoting from* 1 Underhill's Criminal Evidence § 266 (5th Ed. 1956).

For a declaration to be competent as part of the *res gestae*, the State must show: (a) that the declaration was of such a spontaneous character that it is unlikely that the declarant had the opportunity to reflect and fabricate; (b) that it was spoken contemporaneously with the transaction or so close in time to the transaction as to be practically inseparable therefrom; and (c) it must be relevant to the facts sought to be proved. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755, *cert. denied*, 414 U.S. 874 (1971); *Coley v. Phillips*, 224 N.C. 618, 31 S.E. 2d 757 (1944).

Both Deputy Allen's testimony and the transcript of the tape clearly show that when the decedent called the dispatcher, he immediately stated that he had "just" been robbed. In addition, although the decedent was alive during the phone conversation, the State's evidence indicates that he was killed no more than seventeen minutes after the call, at which time law enforcement officers arrived at his home and found his body. Deputy Allen testified that she called decedent's home immediately after their conversation to verify the call, but was unable to get anything other than a busy signal. The officers who investigated the incident found that decedent's phone had been taken off the hook. This evidence is sufficient to show the spontaneous character of the phone conversation and the fact that it was made contemporaneously with the continuing criminal transaction of the robbery and the homicide. Under these facts, we hold that Deputy Allen's testimony concerning the phone conversation was properly admitted as part of the *res gestae*. *See also State v. Cawthorne*, 290 N.C. 639, 227 S.E. 2d 528 (1976).

The transcript of the tape recording of the phone call was likewise admissible under the business records exception to the hearsay rule. Business entries made in the regular course of business, at or near the time of the transaction, and which are authenticated by a witness who is familiar with the system under which they are made, are admissible despite their hearsay nature. *State v. Connley, supra;* 1 Stansbury's N.C. Evidence § 155 (Brandis Rev. 1973). Several witnesses employed by the Catawba County Sheriff's Department testified at *voir dire* that all calls made on the emergency lines of the Catawba County Communications Center were regularly recorded and stored, and that the call at issue in this case was recorded and stored in the normal manner. The transcript of this conversation was thus admissible as a business entry.

B

[10] Defendant Rinck next argues that the trial court erred in allowing several of the State's witnesses to testify that the decedent, Donald Williamson had often referred to defendant Rinck by the name "Bobby Swink." Defendant complains that such testimony was inadmissible hearsay evidence not falling within any recognized exception to the hearsay rule.

It is well settled that an individual's statements concerning his own state of mind are admissible to prove his state of mind, knowledge and intention, despite the hearsay nature of the statements. 1 Stansbury's North Carolina Evidence § 161 (Brandis Rev. 1973). In the case before us, several witnesses testified that the decedent had referred to defendant as "Bobby Swink" on several occasions prior to his death. This evidence was offered to show the decedent's knowledge of defendant Rinck's identity and to explain why he referred to him as "Bobby Swink" during the telephone call to the Catawba County Police Department at 1:16 a.m. on 19 August 1979. Consequently, the testimony was properly admitted and defendant's allegations to the contrary are without merit.

C

[11] Defendant Rinck further argues that even if the hearsay evidence of the phone call between the deceased and Deputy Allen on 19 August 1979 is admissible under an exception to the hearsay rule, the admission of this evidence is nevertheless a violation of defendant's right under the Sixth Amendment to the

United States Constitution to confront the witness presented against him.

In support of his argument, defendant chiefly relies on the recent case of *Ohio v. Roberts*, --- U.S. --- , 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980). The Court in *Roberts*, however did not prohibit the use of hearsay testimony, but merely expressed a strong preference for face-to-face confrontation and suggested a weighing of this preference against considerations of public policy and the necessities of the case. *See also Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970). The court held that hearsay evidence may be used without violating an accused's sixth amendment right of confrontation where: (a) the declarant is unavailable to testify at defendant's trial and (b) where the testimony bears adequate indicia of reliability, which reliability can be inferred where the evidence falls within a firmly established hearsay exception.

In the case *sub judice*, decedent's death rendered him unavailable to testify at defendant's trial. Furthermore, we held that evidence of the phone conversation between Donald Williamson and Deputy Allen fell into two well recognized exceptions to the rule which renders hearsay evidence generally inadmissible. The fact that the conversation was part of the *res gestae* of the robbery and homicide offenses indicates its reliability, in that the decedent had not had the opportunity to fabricate his statements. Under these circumstances we find that the necessity of using the hearsay evidence outweighs the preference for in-court confrontation of the witness, and defendant Rinck's assignment of error is without merit.

D

Defendant Rinck finally contends that the trial court erred in sustaining the State's objections to several of his attempts to explain his answers, thereby violating his right to testify in his own behalf pursuant to G.S. 8-54. We disagree.

We find that any error by the trial court in sustaining the State's objections was cured when the evidence sought to be admitted was subsequently admitted without objection. *State v. Colvin*, 297 N.C. 691, 256 S.E. 2d 689 (1979); *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979); *State v. Holmes*, 296 N.C. 47, 249 S.E.

2d 380 (1978). Consequently, defendant's assignment of error is overruled.

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

No error.

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA, COMPLAINANT v. McWHIRTER GRADING COMPANY, INC., RESPONDENT

No. 119

(Filed 17 August 1981)

1. Administrative Law § 8; Master and Servant § 114— scope of review of decision of Safety and Health Review Board

In an appeal from a decision of the N.C. Safety and Health Review Board assessing a penalty against respondent for a "serious" and "repeated" OSHA violation, respondent's contention that the violation was neither "serious" nor "repeated" and that the penalty should be stricken raised on appeal issues as to (1) whether the Board properly interpreted the terms "serious" and "repeated," *i.e.*, whether the Board's interpretation is affected by error of law, G.S. 150A-51(4), and (2) whether there is substantial evidence in view of the entire record as submitted to support the Board's conclusion that the violation was "serious" and "repeated," G.S. 150A-51(5).

2. Master and Servant § 114— serious OSHA violation

In order to establish a serious OSHA violation under G.S. 95-138, the Commissioner of Labor must show by substantial evidence that the violation created a possibility of an accident a substantially probable result of which was death or serious physical injury.

3. Master and Servant § 114— serious OSHA violation—insufficient evidence

The Safety and Health Review Board erred in concluding that respondent committed a "serious" violation of an OSHA standard where there was no evidence that the failure to shore or slope the sides of a trench, which was dug in soil of ninety-five to ninety-seven percent compaction, created the possibility of an accident.

4. Master and Servant § 114— repeated OSHA violations—violations of different subsections of same standard

Where two alleged OSHA violations were of different subsections of the same standard and involved the same hazard, the second violation could form the basis of a citation for a "repeated" violation.

5. Master and Servant § 114— meaning of "repeated" OSHA violation

A subsequent OSHA violation by the same employer substantially similar to a prior violation or violations is a "repeated" violation only if the employer should have known of the standard by virtue of the prior citation or citations. Factors which should be considered in determining whether the employer should have known of the standard are the extent to which the condition was obviously unsafe, the proximity in time to the prior citation, whether management or key employees had changed between citations, and the number of prior substantially similar violations. G.S. 95-138(a).

6. Master and Servant § 114— "repeated" OSHA violation—insufficient evidence

The Safety and Health Review Board erred in concluding that respondent committed a "repeated" OSHA violation in 1977 by failing to shore or slope the sides of a sewer line trench where a prior 1974 violation was based on the inadequacy of speed shoring used by respondent to support a trench dug in unstable soil adjacent to a highway; the 1977 violation was based on the absence of sloping or shoring of a trench dug in hard, compact soil; the second violation took place approximately two and one-half years after the first; the persons in charge of the work at the two jobsites were not the same; and there was ample evidence that the trench dug in hard and stable soil in 1977 was not "obviously unsafe."

ON writ of certiorari to the Court of Appeals to review the decision of that court, reported at 49 N.C. App. 352, 271 S.E. 2d 568 (1980), affirming judgment entered by *Hobgood (Hamilton H.), Judge*, on 12 October 1979 in Superior Court, WAKE County. The judgment of the superior court affirmed the decision of the North Carolina Safety and Health Review Board assessing against respondent a fine of $2,500 for a "serious" and "repeated" trenching violation.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the Commissioner of Labor.

Ervin, Kornfield & MacNeill, by John C. MacNeill, Jr., and Winfred R. Ervin, Jr., for appellant-respondent.

CARLTON, Justice.

I.

The facts leading to this controversy are as follows: On 21 April 1977 James W. Stephens, a safety officer with the Occupational Safety and Health Division of the North Carolina Department of Labor [hereinafter "OSHANC"], made an inspection visit to respondent's work site at a shopping center on Tyvola Road in Charlotte. At the time of Mr. Stephens' visit respondent's

foreman, Mr. Leatherman, and two other employees were working on a storm sewer trench. The entire trench was about forty-five feet long, but only ten to twelve feet of the trench remained open. The trench had been dug in ten- to twelve-foot segments. After a segment was dug with a backhoe, steps which took up about four feet were placed in the trench and an employee entered the trench to grade it. The eight-foot sections of pipe were laid by a machine and were then covered. The trench was about eight feet deep, and the sides had neither been shored nor sloped, a violation of 29 CFR § 1926.652(c),[1] which provides that trenches dug in hard or compact soil more than eight feet long and five feet deep must be adequately shored or sloped.

Respondent's employees had dug about 1,000 feet of storm sewer trenching at the Tyvola Road jobsite and all trenches except the forty-five-foot section had been properly sloped. The engineering survey for the project stated that the soil at the jobsite was red clay earth at ninety-five to ninety-seven percent compaction. Mr. Leatherman, the foreman, himself decided not to slope the forty-five-foot trench because the ground was so hard. At the time of Mr. Stephens' visit respondent's employees had been working on the trench for about two hours, and no supervisory personnel had visited the site that day. The storm sewer pipe was thirty inches in diameter and was laid in the trench by a machine. Mr. Leatherman testified that only five or six feet of the trench was as much as eight feet deep and that a four-foot length of the trench was used for steps. Even though Mr. Stephens thought the violation was serious, he asked one of respondent's employees to get down into the trench to help him measure it.

Respondent's vice president, Michael Warr, is its chief estimator. As such, he goes over each site before work starts and advises the foremen or supervisors of the safety regulations that must be followed. With regard to the Tyvola Road site, he told Mr. Leatherman to slope or brace each trench over five feet deep. Neither he nor other management personnel had visited the jobsite on 21 April 1977 and none was aware of Mr. Leatherman's decision not to slope the sides of the forty-five-foot trench.

1. The federal occupational safety and health standards, Part 1926 of Title 29 of the Code of Federal Regulations, have been adopted in this state pursuant to G.S. 95-131 (1981).

On 18 November 1974 one of respondent's employees was killed when the trench in which he was working caved in. The accident occurred at a jobsite different from the one where the 1977 violation occurred. At the time of the 1974 violation respondent was constructing a sewer line about 29,000 feet long and 14½ feet deep. The trench was being dug in unstable soil and was adjacent to a highway. To support the sides of the trench respondent used speed-shoring, aluminum panels seven feet long held in place by hydraulic jacks placed one and one-half feet from the top and bottom of the trench. The cave-in occurred while respondent's employees were installing the next piece of speed shoring about four feet from the last piece. As a result of the accident respondent was cited for a "serious" violation of 29 CFR § 1926.652(b) for failure to shore, slope, sheet and brace properly the sides of a trench in unstable soil and for a violation of 29 CFR § 1926.652(e) for failure to use additional shoring when the trench is dug adjacent to a highway. Respondent did not contest the citation and paid the $500 fine.

Respondent has received no citations except for the 1977 and 1974 violations. After the 1974 fatality an OSHA inspector reviewed the trenching safety requirements with respondent's management personnel. Both the management personnel and the job foreman of the Tyvola Road site at which the 1977 violation occurred were aware of the OSHA requirements governing trenching at the time of Mr. Stephens' 1977 inspection visit.

Mr. Stephens determined that respondent had violated 29 CFR § 1926.652(c) (1980) which requires shoring or sloping the sides of a trench dug in compact soil and which is more than five feet deep and eight feet long. Mr. Stephens recommended that respondent be cited for a serious violation of 29 CFR § 1926.652(c) and that it be fined $500. On 28 April 1977, as a result of Mr. Stephens' visit and recommendation, respondent was issued a citation for a "serious" and "repeated" violation carrying a proposed penalty of $1,800.

On 18 May 1977 respondent filed its notice of contest with the North Carolina Department of Labor and on 20 May 1977 the Department of Labor filed the notice of contest with the North Carolina Safety and Health Review Board [hereinafter "Board"]. Pleadings were filed and the matter came on for hearing before Fred S. Hutchins, Jr., Hearing Examiner, on 18 August 1977. The

hearing examiner agreed with the Commissioner that respondent had violated 29 CFR § 1926.652(c) but concluded that the violation was neither "serious" nor "repeated" and, accordingly, struck the proposed $1,800 penalty in its entirety. Hearing Examiner Hutchins reasoned that the violation was not repeated because it was not of the same substandard of the OSHA regulations as the earlier violations and that it was not serious because respondent's foreman made the decision not to slope the sides of the trench on his own and without the knowledge or approval of the management and because in the event a cave-in occurred there was not a substantial probability that death or serious physical harm could result "because three men and a backhoe should be able to uncover a man very, very rapidly."

The Commissioner petitioned the Board on 26 September 1977 for review of the hearing examiner's decision.[2] After hearing evidence and considering the arguments of counsel the Board concluded that "the Hearing Examiner's order should be overturned, and the citation reinstated along with the penalty" for both a "serious" and a "repeated" violation and ordered that respondent be assessed a penalty of $2,500.

Pursuant to G.S. 95-141 respondent sought judicial review of the Board's decision before the Superior Court, Wake County. Arguments and briefs were considered by Judge Hobgood, who affirmed the Board's decision in its entirety on 12 October 1979. Respondent gave notice of appeal to the Court of Appeals.

The Court of Appeals, in an opinion written by Judge Wells, with Judges Arnold and Erwin concurring, held that (1) G.S. 95-135(i) does not require that the Board make new findings of fact and conclusions of law separate from those contained in the order of the hearing examiner, (2) the decision of the Board acceptably served to modify the order of the hearing examiner to conclude that the cited violation was "repeated" and "serious," justifying the additional penalty assessed, (3) there was sufficient evidence to support the Board's conclusion that the cited violation was "repeated" and "serious," (4) the acts and omissions of respondent's job superintendent were, on this occasion, imputable

2. Review of a hearing examiner's decision by the Board is provided for by G.S. 95-135(i) (1981).

to it, and (5) "[c]onsidering the whole record before the Superior Court . . . , the trial court was justified in affirming the decision of the Review Board . . . ."

After the applicable time period for petitioning this Court for discretionary review pursuant to G.S. 7A-31(a) had elapsed, respondent petitioned for a writ of certiorari. We granted the writ on 4 March 1981.

II.

A.

SCOPE OF JUDICIAL REVIEW

This Court is once again confronted with an appeal from a decision of a state administrative agency in which none of the parties suggests in brief the applicable scope of judicial review, nor does the Court of Appeals' opinion identify an appropriate standard. *See In re Appeal of North Carolina Savings & Loan League*, 302 N.C. 458, 276 S.E. 2d 404 (1981); *State ex rel. Utilities Commission v. Bird Oil Company*, 302 N.C. 14, 273 S.E. 2d 232 (1981). This continuing deficiency in the presentation for judicial review of the parties' contentions about the decision of an administrative agency is alarming and must be abated. We remind the lower courts, state administrative agencies and the profession of our comments in *Bird Oil*:

> 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.

302 N.C. at 19, 273 S.E. 2d 232 at 235.

We therefore turn to a determination of the appropriate scope of judicial review of an order of the OSHANC Safety and Health Review Board. We discussed the guidelines for determin-

ing the appropriate scope of judicial review for appeals from state administrative agencies in *Commissioner of Insurance v. Rate Bureau*, 300 N.C. 381, 394, 269 S.E. 2d 547, 558 (1980). There, we noted that G.S. 150A-43, a part of the North Carolina Administrative Procedure Act (APA),[3] provides that a party aggrieved by a final agency decision is entitled to judicial review of the decision under the APA unless adequate procedure for review is provided by some other statute. Here, not only is there no other procedure for judicial review prescribed by some other statute, G.S. 95-141 expressly provides that judicial review from final decisions in contested cases made under OSHANC shall be in accordance with Chapter 150A of the General Statutes, the APA. *See also* G.S. § 95-135(i) (1981).

Clearly, therefore, this appeal is governed by the APA. We therefore turn to the APA to determine the proper standard for review. We reiterate our statement in *Appeal of North Carolina Savings & Loan League* that "[s]election 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." 302 N.C. at 464, 276 S.E. 2d at 409. Also, as we said in *Bird Oil*, "it becomes necessary for this Court to determine under which criterion for review the Court of Appeals [and the superior court] should have addressed this proceeding. Only then can we decide whether the Court of Appeals' decision was proper." 302 N.C. at 20-21, 273 S.E. 2d at 236.

The guidelines for our determination were reviewed in our decision in *Appeal of North Carolina Savings & Loan League:*

> 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:

3. The APA is codified as Chapter 150A of the North Carolina General Statutes.

(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 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).

302 N.C. at 463-464, 276 S.E. 2d at 408-409.

The appropriate standard, from those noted above, can be determined only after an examination of the issues presented by the appeal. "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." *State ex rel. Utilities Commission v. Bird Oil Company*, 302 N.C. at 21, 273 S.E. 2d at 236.

[1] On this appeal, respondent contends that the 1977 trenching violation was neither "serious" nor "repeated" and that the fine imposed should be stricken. This contention raises two issues: whether the Board properly interpreted the terms "serious" and "repeated," *i.e.*, whether the Board's interpretation is affected by error of law, G.S. § 150A-51(4), and whether there is substantial evidence in view of the entire record as submitted to support the Board's conclusion that the 1977 violation was "serious" and "repeated." G.S. § 150A-51(5).

The propriety of the Board's action first turns on the meaning accorded the terms "serious" and "repeated." These are statutory terms, and any error made in interpreting them is an error of law. Hence, whether the substantial rights of respondents may have been prejudiced because the Board's decision is affected by an error of law is the first part of the scope of our inquiry on this appeal.

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, 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).

In re Appeal of North Carolina Savings & Loan League, 302 N.C. at 465-66, 276 S.E. 2d at 410.

After applying the standard noted above and determining the correct interpretation of the statutory terms involved, we will determine whether the Board's findings and conclusions are "[u]nsupported by substantial evidence . . . in view of the entire record as submitted" as contemplated by G.S. 150A-51(5). In applying this standard of review, we keep in mind that:

> [I]t is for the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. 73 C.J.S., *Public Administrative Bodies and Procedure*, *supra* at § 126. It is not our function to substitute our judgment for that of the Commissioner when the evidence is conflicting. However, . . . when evidence is conflicting, the standard for judicial review of administrative decisions in North Carolina is that of the "whole record" test. (Citations omitted.) As Justice Exum stated in *In re Rogers:* "The 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative

> decision has a rational basis in the evidence. *See* Jaffe, Judicial Control of Administrative Action . . . 601 [(1965)]; Daye, *supra* at 920-921." 297 N.C. at 65, 253 S.E. 2d at 922.

State ex rel. Commissioner of Insurance v. Rate Bureau, 300 N.C. at 430, 269 S.E. 2d at 578.

This Court explained the "whole record" test in *Thompson v. Wake County Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977):

> This standard of judicial review is known as the "whole record" test and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951); *Underwood v. Board of Alcoholic Control*, 278 N.C. 623, 181 S.E. 2d 1 (1971); Hanft, *Some Aspects of Evidence in Adjudication by Administrative Agencies in North Carolina*, 49 N.C.L. Rev. 635, 668-74 (1971); Hanft, *Administrative Law*, 45 N.C.L. Rev. 816, 816-19 (1967). The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*, Universal Camera Corp., *supra*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. Universal Camera Corp., *supra*.

Having determined the specific statutory scope of our review, we turn to the merits of this controversy and apply the stated criteria for review to the decision of the Board.

B.

SERIOUS VIOLATION

We next address the issue of whether the Court of Appeals erred in affirming the lower court's action in upholding the Board's determination that the violation was "serious." Whether

the violation was properly found to be "serious" is important in view of the penalty section of our Occupational Safety and Health Act. G.S. 95-138(a) (1981) provides that "[a]ny employer who has received a citation for a serious violation . . . *shall* be assessed by the Commissioner a civil penalty of up to one thousand dollars ($1,000) for each such violation."[4] (Emphasis added.)

In finding the violation to be "serious," the Board simply stated:

> We do not think that there is any doubt in anyone's mind how extremely hazardous trenching is in the construction industry. . . . This board can envision marginal situations in which shoring has been improperly installed or a trench has been improperly sloped. Under these circumstances, a violation might be termed non-serious; however, there are no mitigating factors present in this case.

As noted by the Court of Appeals, the Board's decision is "inexpertly written," containing "discussions, arguments, contentions, evidence and conclusions, all of which are intermixed and thrown together in somewhat random fashion." 49 N.C. App. at 356, 271 S.E. 2d at 571-72.

In the Court of Appeals, as here, respondent argued that the Board's finding that the violation was "serious" was not supported by substantial evidence. The Court of Appeals rejected respondent's argument with these simple statements: "The trench in question was eight feet deep and at least eight feet in length. There was no shoring or wall support of any kind, nor any sloping. Such evidence supports the Board's findings and conclusion that the violation was serious." *Id.* at 358, 271 S.E. 2d at 572. In our opinion, the Court of Appeals erred in dismissing respond-

4. We note that G.S. 95-138(a), the penalty section, also provides that "[i]f the violation is adjudged not to be of a serious nature, then the employer *may* be assessed a civil penalty of up to one thousand dollars ($1,000) for each such violation." (Emphasis added.) Although we are unaware of how the amount of the penalty for a nonserious violation is calculated, the record in the case before us indicates that when the violation is "serious," a presumptive fine of $1,000 is imposed. Adjustments of up to fifty percent are allowed for good faith, size and history in amounts of up to twenty, ten and twenty percent, respectively. The adjustments are deducted from the presumptive or "unadjusted" penalty to arrive at the proposed penalty. N.C. Department of Labor—Occupational Safety and Health Administration, Penalty Assessment Worksheet—Serious Violations.

ent's argument so summarily. By failing to identify and apply the appropriate scope of judicial review, as discussed above, that court failed to construe the statutory term "serious" and then apply a proper interpretation to the facts disclosed by the record to determine whether the Board properly imposed the additional penalty. "In reviewing an administrative agency's interpretation of a term, the appropriate inquiry is whether that interpretation is 'affected by . . . error of law,' G.S. 150A-51(4)." *In re North Carolina Inheritance Taxes*, 303 N.C. 102, 105, 277 S.E. 2d 403, 406 (1981).

Our task, therefore, is to ascertain the proper meaning of a "serious" violation. We will then review the Safety and Health Board's decision to determine if its conclusion that the cited violation was "serious" is supported by substantial evidence in view of the entire record, G.S. 150A-51(5).

G.S. 95-127(18) (1981) defines a "serious violation" as follows:

> A "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

This definition of a "serious violation" is substantially similar to that set forth in Section 17(k) of the Occupational Safety and Health Act of 1970, codified as 29 U.S.C. § 666(j) (1975). The decisions construing the corresponding federal provision provide some guidance for interpreting this state's provision.

[2] Our research reveals that the majority of courts considering the meaning of "serious violation" as used in the federal statute have concluded that that term embraces both (1) the *possibility* of an accident resulting from the conditions at the work site and (2) the *substantial probability* that death or serious physical harm could result if an accident did occur. *See Bunge Corp. v. Secretary of Labor*, 638 F. 2d 831, 834 (5th Cir. 1981); *Bethlehem Steel Corp. v. OSHRC*, 607 F. 2d 1069 (3d Cir. 1979); *Usery v. Hermitage Concrete Pipe Co.*, 584 F. 2d 127 (6th Cir. 1978); *Titanium Metals Corp. of America v. Usery*, 579 F. 2d 536 (9th

Cir. 1978); *Dorey Electric Co. v. OSHRC*, 553 F. 2d 357 (4th Cir. 1977); *California Stevedore & Ballast Co. v. OSHRC*, 517 F. 2d 986 (9th Cir. 1975). Although employers have argued that the substantial probability component of the statutory definition of serious violation applies also to the likelihood that an accident will occur, this contention has been rejected. The reasons for limiting the application of "substantial probability" to the likelihood of injury were best expressed by the Ninth Circuit Court of Appeals in *California Stevedore & Ballast Co.:*

> Congress declared its purpose "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ." OSHA § 2(b), 29 U.S.C. § 651(b). Congress clearly intended to require employers to eliminate all foreseeable and preventable hazards. *National Realty & Construction Co. v. OSHRC*, 160 U.S. App. D.C. 133, 489 F. 2d 1257, 1265-67 (1973). The original Senate bill treated all violations as "serious." As finally enacted, however, OSHA incorporated a House proposal to leave discretionary penalties for violations "determined not to be of a serious nature." Conf. Rep. No. 91-1765, 1970 U.S. Code Cong. & Admin. News, p. 5237. Congress apparently decided that violation of some regulations might pose so little threat of harm that a penalty should not be mandatory. Where violation of a regulation renders an accident resulting in death or serious injury possible, however, even if not probable, Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey the regulation. When human life or limb is at stake, any violation of a regulation is "serious." We therefore adopt the Secretary's construction of section 17(k).

517 F. 2d at 988 (footnote omitted). We think this reasoning persuasive. The purpose of our General Assembly in enacting the Occupational Safety and Health Act, G.S. §§ 95-126 to 95-160 (1981), like that of Congress, was "to assure so far as possible every working man and woman . . . safe and healthful working conditions and to preserve our human resources." G.S. § 95-126(2). Thus, we hold that in order to establish a serious violation under G.S. 95-138 the Commissioner must show by substantial evidence, *see* G.S. § 150A-51(5), that the violation created a *possibility* of an accident a *substantially probable* result of which was death or

serious physical injury. *But see California Stevedore & Ballast Co. v. OSHRC*, 517 F. 2d at 988 n.1 (possibility of accident element satisfied by proof of specific standard, indicating legislative judgment that an accident is possible under conditions specified in this standard).

[3] Applying this standard to the evidence before the Board, we conclude that the Commissioner's case was fatally defective in that there was no evidence that the failure to shore or slope the sides of the trench created the possibility of an accident. While Officer Stephens testified that in his opinion the violation was serious, whether the violation was indeed serious is a question of law and not a matter for a witness' speculation. While the safety officer may give his opinion on the factual elements, he is incompetent to testify on the ultimate legal issue. There was substantial testimony that a probable result of a cave-in would be death or serious harm, but this testimony does not show that failure to shore or slope *this* trench, which was dug in soil of ninety-five to ninety-seven percent compaction, created the possibility of an accident. Indeed, there is evidence to the contrary. Mr. Leatherman, the foreman at the jobsite, testified that he thought that shoring or sloping was unnecessary in soil of such high compaction. Officer Stephens requested one of respondent's employees to get in the trench to measure it, the inference being that a safety inspector would not allow someone to get into an unsafe trench. All that is required of the Commissioner is that he produce substantial evidence, whether it be data or opinion, that the violation created a *possibility* of a serious accident. This he has failed to do, and the fine for a serious violation was improperly imposed. We find that the Board's decision is affected by error of law, G.S. § 150A-51(4), in that it incorrectly applied the term "serious violation" and that its findings and conclusion that respondent committed a "serious violation" is not supported by substantial evidence in view of the entire record as submitted, G.S. § 150A-51(5). Accordingly, the Board's conclusion that respondent committed a serious violation of 29 CFR § 1926.652(c) is reversed and the order imposing the penalty therefor is vacated.

We note, however, that the Commissioner has shown a nonserious violation for which a civil penalty of up to $1,000 *may* be imposed, G.S. § 95-138(a), and the case must be remanded to the

Board for its consideration of what, if any, penalty should be imposed for this violation.

Because we have decided that the Commissioner failed to show the possibility of an accident, we do not consider whether the evidence establishes that the respondent, in the exercise of reasonable diligence, could not have known of the violation.

C.

REPEATED VIOLATION

We next address the question whether the Court of Appeals erred in affirming the Board's decision that respondent was also guilty of committing a "repeated" violation. Whether respondent has "repeatedly" violated an OSHA standard is important because G.S. 95-138 provides that an employer who willfully or repeatedly violates the requirements of OSHANC may be assessed by the Commissioner a civil penalty of not more than $10,000 for each violation.

It is the opinion of this Court that the Court of Appeals erred in not finding that the Board committed an "error of law," G.S. 150A-51(4), in failing to interpret properly the statutory meaning of the word "repeated." Likewise, the Court of Appeals made no attempt to interpret the meaning of the term.

Unlike the word "serious," the term "repeated" is nowhere defined in our Occupational Safety and Health Act. As noted above, G.S. 95-138 provides simply that one who "repeatedly" violates any standards of the Act is subject to the maximum fine of $10,000, a penalty ten times larger than that permissible for a "serious" violation.

It is our task, therefore, to interpret the word "repeated" as it is employed in G.S. 95-138. Our primary task in interpreting the meaning of a statutory term is, of course, to ascertain and adhere to the intent of the Legislature. *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978). The cardinal rule of statutory construction is that the intent of the Legislature is controlling. *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E. 2d 338, 350 (1978).

[4] Respondent first argues that for a violation to be repeated it must be of the same substandard. Such an interpretation would mean that the 1977 violation of 29 CFR 1926.652(c) for failure to slope or shore a trench dug in compact soil could not be a "repeat-

ed" violation because the 1974 violations were of 29 CFR § 1926.652(b), failure to shore properly the sides of a trench dug in unstable soil, and 29 CFR § 1926.652(e), failure to add additional shoring when the trench is dug adjacent to a highway. We cannot accept this construction of repeated violation. Although the violations here involved are of different subsections, they are still of the same standard. The standard, 29 § CFR 1926.652, governs safety precautions for sewer line trenches. Although each subsection specifies the minimum precautions against cave-ins for trenches depending on soil condition, size and location, the standard is still the same: all trenches must be adequately supported either by shoring or sloping. What constitutes adequate safety precautions, of course, depends on the location and size of the trench and the condition of the soil.

We think the purpose behind the much greater fine for repeated violations is to punish an employer for failure to comply with a standard about which, because of prior violations, he should be cognizant. While the minimum requirements for trenches dug in hard soil are different from those dug in unstable soil, the basic requirement of adequate support remains the same, and a violation of one subsection should make an employer aware that minimum support standards exist. In order for a violation to be repeated, it must be against the same employer and it must also be *substantially similar* to prior violations. *See Bunge Corp. v. Secretary of Labor*, 638 F. 2d 831; *Todd Shipyards Corp. v. Secretary of Labor*, 586 F. 2d 683, 685-87 (9th Cir. 1978); *George Hyman Construction Co. v. OSHRC*, 582 F. 2d 834 (4th Cir. 1978); Potlatch Corp., 1979 OSHD Empl. Safety & Health Guide (CCH) ¶ 23,294. In this case, where the violations were of different subsections of the same standard and involved the same hazard, the subsequent violation is one which *may* form the basis of a citation for a repeated violation.

There remains the question of when the commission of a violation substantially similar to a prior violation is "repeated" within the meaning of G.S. 95-138(a) such that a fine may be imposed. Our research reveals that the authorities are divided on this issue.

This question was first addressed by the Third Circuit in *Bethlehem Steel Corp. v. OSHRC*, 540 F. 2d 157 (3d Cir. 1976). That court interpreted "repeatedly" as requiring a flaunting

disregard of the requirements of the safety standards and that "[t]he mere occurrence of a violation of a standard or regulation more than twice does not constitute that flaunting necessary to be found before a penalty can be assessed . . . ." *Id.* at 162. Under the Third Circuit's interpretation of "repeatedly," a second violation could never form the basis for a citation for a repeated violation. *Id.* at 162 n. 11.

The Third Circuit's interpretation of "repeatedly" has been strongly criticized in subsequent cases in other circuits. In *Todd Shipyards Corp. v. Secretary of Labor*, 566 F. 2d 1327 (9th Cir. 1977), the Ninth Circuit rejected the "flaunting" requirement saying, "We decline to adopt that view, which essentially equates 'wilful' with 'repeated' while failing to give appropriate weight to the disjunctive 'or.' " *Id.* at 1331. The *Todd* court did not address the general question of the meaning of "repeatedly" but indicated that when the two violations involved the same facility, similar hazards and similar conditions the subsequent violation was repeated. This view was reaffirmed in *Todd Shipyards Corp. v. Secretary of Labor*, 586 F. 2d at 685-87. Thus, the Ninth Circuit would uphold a "repeated" citation for a second substantially similar violation. The Fourth Circuit adopted the Ninth Circuit's interpretation and rejected the reasoning of the Third Circuit in *George Hyman Construction Co. v. OSHRC*, 582 F. 2d 834.

In *Potlatch Corp.*, 1979 OSHD Empl. Safety & Health Guide (CCH) ¶ 23,294, the federal OSHA Review Commission faced the issue of interpreting "repeatedly," and a majority of that body voted to reject the notion that "repeatedly" requires flaunting conduct. The Commission concluded that "[a] violation is repeated . . . if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Id.* at p. 28,171. In the Commission's opinion, the length of time between the substantially similar violations was irrelevant to the issue of whether the later violation was repeated, although in its opinion the lapse of time could be considered in determining the appropriate penalty. The *Potlatch* definition of "repeatedly" was adopted by the Fifth Circuit in *Bunge Corp. v. Secretary of Labor*, 638 F. 2d 831.

[5] The North Carolina Safety and Health Review Board addressed this issue in *Brooks v. Baker Cammack Hosiery Mills*, OSHANC No. 77-178 (Sept. 29, 1977). In *Baker Cammack Hosiery*

Mills, the Board concluded that a repeated violation occurs when "the circumstances of the subsequent violation of the same standard by the same employer are such as to lead to the conclusion that, at the time of the subsequent violation, the employer . . . should have known of the standard by virtue of his prior citation . . . . " Slip op. at 3. The factors the Board thought should be considered in determining whether the employer should have known of the standard were the extent to which the condition was obviously unsafe, the proximity in time to the prior citation, whether management or key employees had changed between citations, and the number of prior substantially similar violations. Under this interpretation a second violation could be a repeated violation.

We agree with the reasoning of our own Board. The great disparity between fines for repeated or willful violations and other violations indicates that our Legislature intended to impose the greater fine only when the employer has some degree of culpability. In our opinion, however, the culpability necessary to sustain a citation for a repeated violation does not rise to the level of flaunting conduct that the Third Circuit would require. We agree with the federal Review Commission, the Fourth Circuit and the Ninth Circuit that the imposition of the flaunting conduct requirement as an element for a repeated violation amounts to equating "repeatedly" with "willfully." We disagree with those decisions, however, to the extent they conclude that culpability is irrelevant in determining whether a violation is repeated. We hold that a subsequent violation by the same employer substantially similar to a prior violation or violations is a repeated violation only if the employer should have known of the standard by virtue of the prior citation or citations. We adopt the factors listed by the North Carolina Safety and Health Review Board as relevant to the determination of whether the violation was repeated.

[6] The second violation in this case took place approximately two and one-half years after the first. The basis of the 1974 violation was the inadequacy of the speed shoring used by respondent to support a trench dug in unstable soil adjacent to a highway. The conditions surrounding the 1977 violation present little similarity: the absence of sloping or shoring of a trench dug in hard, compact soil. Additionally, the persons in charge of the

work at the two jobsites were not the same. Although the potential hazards of the two violations, *i.e.*, cave-in, are the same, the conditions surrounding those violations are strikingly dissimilar. Additionally, there is ample evidence that the trench, dug in hard and stable soil, was not "obviously unsafe." The length of time between the two violations, the dissimilarity of conditions, the fact that the job supervisors were different, and that the failure to support the sides of this trench did not create an obvious danger, lead us to conclude that the Board's conclusion that the 1977 violation was repeated is unsupported by substantial evidence in view of the entire record as submitted. Accordingly, its decision that respondent has committed a repeated violation must be reversed pursuant to G.S. § 150A-51(5) and the corresponding penalty must be stricken.

III.

This Court has been particularly lenient in agreeing to address the merits of the issues raised by this appeal. In addition to the failure of the parties and the lower courts to properly identify and apply the appropriate scope of judicial review under the APA, as discussed in Section IIA of this opinion, we must also note that respondent's brief flagrantly violates the North Carolina Rules of Appellate Procedure. Rule 28(b)(3) provides, in part, that "immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages of the printed record on appeal at which they appear." Respondent's brief here contains no references to assignments of error and exceptions relating to the arguments presented. We remind counsel that the Rules of Appellate Procedure are mandatory and failure to comply invites dismissal of the appeal.

We also agree with the Court of Appeals' statement that "the decision section of the Board's 'decision' is inexpertly written. It contains discussions, arguments, contentions, evidence, and conclusions, all of which are intermixed and thrown together in somewhat random fashion." 49 N.C. App. at 356, 271 S.E. 2d at 571-72. The final order in a contested case of an administrative agency should be clearly and cogently written with appropriate findings of fact and conclusions of law preceding the statement of

decision. An administrative agency's final decision, always subject to review by the courts, is no place for a rambling, disjointed discourse.

In spite of the many deficiencies noted above in the manner by which this appeal has been presented to this Court, we have elected to address the merits in light of its importance to the agency and to industry. However, we will not necessarily be so lenient in the future; appeals presented in violation of the Rules of Appellate Procedure are subject to outright dismissal.

In conclusion, we reverse the Court of Appeals' holding affirming the conclusions of the Safety and Health Review Board that the 1977 violation was both "serious" and "repeated" and the $2,500 fine imposed therefor. On remand, the Board may, if it so chooses, impose an appropriate penalty for a non-serious violation in accordance with G.S. 95-138(a). The decision of the Court of Appeals is reversed and this cause is remanded to that court with instructions to remand to the Safety and Health Review Board for further proceedings not inconsistent with this opinion.

Reversed and remanded.

IN RE CLARK, A MINOR CHILD

No. 136

(Filed 17 August 1981)

1. Parent and Child § 1— Termination of Parental Rights Act—no provision for counsel—Act constitutional

The trial court erred in concluding as a matter of law that the Termination of Parental Rights Act unconstitutionally deprives the parent and the child of the right to counsel in that it makes no provision for appointment and payment of counsel in a case where the indigent respondent mother is either a minor or not *sui juris* or both and where the minor child is obviously indigent, since, under G.S. 1A-1, Rule 17(c) and traditional practice of this State, the minor parties to a civil action or a special proceeding must be represented by a guardian ad litem who may defend *pro se* or employ counsel; a traditional practice has been to appoint licensed attorneys as guardians ad litem; and in this case both the indigent mother and child were represented by competent and conscientious counsel and were therefore in no way deprived of the right to counsel.

2. Parent and Child § 1— termination of parental rights—indigent parent—no right to counsel

In proceedings to terminate parental rights brought prior to 9 August 1981, the effective date of an amendment to G.S. 7A-289.23 requiring the appointment of counsel for any indigent parent, where other circumstances do not dictate to the contrary, an indigent parent is not entitled to appointment of counsel as a matter of law; rather, the right to appointed counsel must be determined on a case by case basis.

3. Attorneys at Law § 9— proceeding to terminate parental rights—attorney's fees

Attorney's fees allowed by the court for attorneys appointed in proceedings to terminate parental rights (whether as separate counsel or as guardian ad litem) brought before the effective date of Chapter 966 of the Session Laws of 1981 shall be borne by the Administrative Office of the Courts.

4. Parent and Child § 1— failure to provide reasonable child support—termination of parental rights—statute constitutional

The trial court erred in dismissing a proceeding for the termination of parental rights on the ground that G.S. 7A-289.32(4), which permits termination when the child is in the custody of a department of social services and the parent has failed to pay a reasonable portion of the cost of child care for six months preceding filing of the petition, is unconstitutionally vague and overbroad, since the phrase "reasonable portion of the cost of care for the child" is, by all normal standards, understandable by people of common intelligence without any necessity of guessing as to its meaning or differing as to its application; the phrase contains words of such common usage and understanding as to give parents notice of their responsibilities and of the type of conduct which is condemned; and the phrase provides boundaries sufficiently distinct that judges may interpret and administer it uniformly.

5. Jury § 1; Parent and Child § 1— proceeding to terminate parental rights—no right to jury trial

The trial court erred in concluding that the Termination of Parental Rights Act was unconstitutional because it deprived the parties of trial by jury, since the parties are entitled to trial by jury only if such right existed by virtue of the State Constitution; under Art. I, § 19 of the Constitution trial by jury is guaranteed only where the prerogative existed at common law or by statute at the time the Constitution was adopted; and proceedings to terminate parental rights in children were unknown at common law and did not exist by statute until the adoption of the Act in 1969.

APPEAL from an order of *Williford, Judge*, entered at the 7 October 1980 Session of District Court, HERTFORD County dismissing a petition brought by the Hertford County Department of Social Services (hereinafter "DSS") seeking to terminate the parental rights of the respondent-mother Vernice Clark in and to her minor child Kim Clark. This Court allowed the petition of the

DSS for discretionary review prior to determination by the Court of Appeals by order dated 7 April 1981.

Revelle, Burleson, Lee & Revelle, by L. Frank Burleson, Jr., attorney for petitioner appellant.

Jenkins & Jenkins, by Robert C. Jenkins, guardian ad litem for respondent-appellee Kim Clark, a minor child.

Gram and Baker, by Ronald G. Baker, guardian ad litem for respondent-appellee Vernice Clark, a minor parent.

Rufus L. Edmisten, Attorney General, amicus curiae, by Blackwell M. Brogden, Jr., Associate Attorney.

MEYER, Justice.

At issue in this case is the constitutionality of Subsection (4) of G.S. 7A-289.32 which permits the termination of the parental rights of a parent when the child has been placed in the custody of a county department of social services and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child. We find no constitutional defect in G.S. 7A-289.32(4). The conclusion of the trial judge that the statute is unconstitutional was therefore erroneous, and his dismissal of the petition for termination of parental rights for failure to state a claim upon which relief may be granted is reversed.

This appeal concerns the dismissal of an action brought by a county department of social services to terminate the parental rights of the biological mother and putative father of a minor child approximately twenty-two months old born out of wedlock. The child has been in the custody of the DSS since it was approximately ten months old. Williford, J., dismissed the petition of the DSS upon his findings and conclusions of three independent constitutional defects in the general statutes authorizing the petition, the Termination of Parental Rights Act, Chapter 7A, Article 24B, of the General Statutes (hereinafter "the Act"). The default of the putative father has been entered and his rights are not a subject of this appeal.

The factual background to the present appeal is as follows: On 2 February 1979 as the result of DSS filing a juvenile petition alleging that Kim Clark, at that time ten months old, was a

neglected child as defined by G.S. 7A-278(4), and alleging that Vernice Clark, the child's mother was a minor and mentally deficient, Judge Williford issued an order placing the child's physical custody with DSS. The order was executed by the Hertford County Sheriff's Department on that same date and Kim Clark was placed in a foster home by DSS.

A hearing was held on 16 February 1979 at which Vernice Clark was present and at which Kim Clark was represented by a court-appointed attorney. The court found that Kim Clark was a neglected child as defined by G.S. 7A-278(4) and custody of Kim Clark was continued in the DSS.

DSS filed a motion for review, and on 22 August 1979, Judge Williford continued custody in DSS and the child remained in foster care.

On 26 February 1980, and in a separate proceeding, DSS petitioned the Hertford County District Court to terminate the parental rights of the biological father, McCoy Futrell, and of the respondent-mother Vernice Clark in their minor child, Kim Clark.

DSS relied only upon G.S. 7A-289.32(4) as grounds for termination of the mother's parental rights to her minor child and alleged:

> 11. The child has been placed in the custody of the Hertford County Department of Social Services and the mother, for a continuous period of six months next preceding the filing of this petition, has failed to pay a reasonable portion of the cost of care for the child.

In an *ex parte* order, Long, C.J., of the District Court for the Sixth Judicial District, made the preliminary jurisdiction determination required by G.S. 7A-289.23.

Even though the mother of the child was over fourteen years of age, she was an infant, and DSS, upon information and belief, alleged that she was not *sui juris.* In his *ex parte* order determining jurisdiction, Judge Long found as facts that Vernice Clark was an infant, was not *sui juris,* and had no general or testamentary guardian in North Carolina. Judge Long thereupon appointed Ronald G. Baker, an attorney at law, as guardian ad litem for Vernice Clark.

The petition, the *ex parte* order, and the summons were duly served upon Vernice Clark and upon her guardian ad litem.

Vernice Clark's guardian ad litem in apt time filed an answer denying material allegations of the petition. Pursuant to G.S. 7A-289.29(b), Judge Williford appointed Robert C. Jenkins, an attorney at law, as guardian ad litem for Kim Clark, the minor child. A copy of the petition and a copy of the answer of Vernice Clark's guardian ad litem were mailed to Mr. Jenkins by the Clerk of Superior Court, Hertford County and to the other parties.

The special hearing required by G.S. 7A-289.29(b) was scheduled and rescheduled several times. Meanwhile, Vernice Clark's guardian ad litem was permitted by the court to file an amendment to her answer, and Kim Clark's guardian ad litem was permitted by the court to file an answer after the original time for answering had expired.

The special hearing ultimately was scheduled for 15 August 1980 at the Hertford County Courthouse, Winton, North Carolina, before Judge Williford presiding at that Session of District Court, Hertford County.

At the call of the matter for hearing, each of the guardians ad litem orally moved Judge Williford pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure to dismiss the entire proceeding as to the mother and the child on the grounds that the petition failed to state a claim upon which relief can be granted because the Act contravenes the Constitutions of the State of North Carolina and of the United States in that (1) the indigent mother and child are denied the right to appointed counsel to represent them in these revocation proceedings, (2) trial by jury in these proceedings is denied, and (3) each statutory ground in G.S. 7A-289.32 for terminating parental rights is overly broad and vague.

After taking the matter under advisement, Judge Williford again heard it in open court on 7 October 1980. He concluded as a matter of law that the motion to dismiss should be granted because, alternatively, the Act unconstitutionally (I) deprives the indigent parent and child the right of counsel, (II) denies trial by jury in these proceedings, and (III) each of the statutory grounds for revocation of parental rights is unconstitutionally vague and

overbroad. Judge Williford then ordered that the proceeding be dismissed on the basis of each of his alternative conclusions of law.

We now consider the three constitutional issues raised by the order dismissing the proceeding.

I.

[1] The first assignment of error is that the trial court erred in concluding as a matter of law that the Act unconstitutionally deprives the parent and the child the right to counsel in that it makes no provision for appointment and payment of counsel "in such a case as is now before the court." We interpret the quoted language to refer to a case where the indigent respondent-mother is either a minor or not *sui juris* or both and where, as here, the minor child is obviously indigent. We believe the trial court erred in dismissing the action on that basis.

We acknowledge that after this case was filed and argued before this Court our legislature adopted Chapter 966 of the Session Laws of 1981. This act amends G.S. 7A-289.23, 7A-289.27, 7A-289.30 and 7A-451(a) to provide *inter alia* that in such cases a parent has a right to counsel and to appointed counsel in case of indigency unless the parent waives the right. The amendment further requires that a guardian ad litem be appointed to represent a parent where that parent suffers a diminished mental capacity as defined by G.S. 7A-289.32(7) or is a minor. The amendment also provides that fees of appointed counsel shall be borne by the Administrative Office of the Courts. Clearly the mother here would have been entitled to appointed counsel under the terms of this recent amendment had the provisions of the amendment been effective when the petition before us was filed.[1] Since this amendment was not then effective we must determine whether the indigent[2] respondent-mother was entitled to appointed counsel in the absence of such a statutory provision.

1. Chapter 966 was ratified by the General Assembly on 10 July 1981 and becomes effective according to its terms thirty days after ratification and only applies to cases brought on or after the effective date.

2. The record before us does not establish to a certainty that the minor respondent-mother has been determined to be indigent although it appears certain that the minor child is such. The conclusions of the trial court seem to find that the constitutional defect existed because of a lack of provision of counsel for both

We recognize that G.S. 7A-289.29(b) requires that a guardian ad litem *who is an attorney* be appointed for the child *only* if an answer is filed denying the material allegations of the petition. This language does not prevent the application of other pertinent statutory provisions. Whether or not the Act requires it, appointment of a guardian ad litem for both the minor respondent-mother and her minor child is mandated by G.S. 1A-1, Rule 17(c), Rules of Civil Procedure.[3]

"The appointment of the guardian *ad litem* is to protect the interest of the infant defendant at every stage of the proceeding." 7 Strong's N.C. Index 3d, Infants § 9, p. 202. "The guardian ad litem may prepare the answer himself or employ an attorney to represent the infant . . . . " McIntosh, N.C. Practice and Procedure, (Wilson & Wilson Ed.) § 693(d) (1956), *citing* former G.S. 1-67 (now found in parts of G.S. 7A-305 and G.S. 7A-306), and *Hood v. Cheshire*, 211 N.C. 103, 189 S.E. 189 (1937).

Thus, under the statutory law and traditional practice of this State, the minor parties to a civil action or a special proceeding must be represented by a guardian ad litem who may defend *pro se* or employ counsel. A traditional practice has been to appoint licensed attorneys as guardians ad litem, and, even then, in the more complicated matters, for the guardian to employ separate counsel.

Even though the respondent-mother was over fourteen years of age,[4] she was an infant and alleged to be not *sui juris*. In his *ex*

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parent and child. The conclusion of law found specific defect in the absence of provision for appointment and payment of counsel. Since the only right to appointed counsel ever found to have existed under the Constitution of the United States was on the basis of indigency and the Act cannot be interpreted to prohibit representation by counsel, we treat this case based on the principles enumerated in indigency cases.

3. The conclusion that G.S. 1A-1, Rule 17(c)(2), Rules of Civil Procedure, applies is inescapable. All remedies in the courts of this State divide into (1) actions or (2) special proceedings. G.S. 1-1. A proceeding to terminate parental rights is clearly not a criminal action, thus it is either a civil action or a special proceeding, G.S. 1-2, G.S. 1-3, G.S. 1-4. If this is a civil action, the Rules apply, G.S. 1A-1, Rule 2; if this is a special proceeding, the Rules apply, G.S. 1-393, except where a different procedure may be prescribed by statute.

4. The Act provides for the appointment of guardians ad litem for minor parents under 14 (G.S. 7A-289.23) (now 18 by virtue of Chapter 966, Session Laws 1981), for parents alleged to be subject to termination under G.S. 7A-289.32(7)

parte order, Judge Long, finding as facts that she was an infant, not *sui juris* and had no general or testamentary guardian, appointed as guardian ad litem for her an attorney at law licensed and admitted to practice in the courts of North Carolina. Her guardian ad litem filed answer in apt time and vigorously represented her as attorney as well as guardian ad litem in all phases of the proceeding and in filing a brief and engaging in oral argument before this Court.

By order dated and filed 16 April 1980, Judge Williford appointed a guardian ad litem for the child (Kim Clark) who is likewise an attorney at law licensed and admitted to practice in the courts of North Carolina. He also filed answer and vigorously represented the child as attorney as well as guardian ad litem in all phases of the proceeding and in filing a brief and engaging in oral argument before this Court.

Thus, in the case before us both the indigent respondent-mother and her minor child were in fact represented by competent and conscientious counsel and therefore were in no way deprived of the right to counsel. Where, as here, the guardians ad litem are licensed attorneys and actively defend their client's interests, the resulting procedure is fundamentally fair and in accord with both the State and Federal Constitutions.

We do not consider respondent's further contention that the Act is unconstitutional because it fails to affirmatively provide for the appointment of counsel in *all* cases of indigency, because having both received representation of counsel, neither the respondent-mother nor the minor have standing to complain of possible procedural defects which might occur in other cases not now before the Court. *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973); *State v. Fredell*, 283 N.C. 242, 195 S.E. 2d 300 (1973); 3 Strong's N.C. Index 3d, Constitutional Law § 4.2.

[2] The amendment to G.S. 7A-289.23 made by Chapter 966 of the 1981 Session Laws requires the appointment of counsel for

which was enacted subsequent to the filing of this proceeding (*see* footnote 1) involving dependency due to mental illness, mental retardation or degenerative mental condition, and for minor children when an answer is filed controverting a material allegation of the petition, G.S. 7A-289.29(a). The provision for appointment of guardians ad litem in these particular situations does not exclude their appointment in other situations.

any indigent parent in all cases brought on or after its effective date of 9 August 1981. There remains, however, the question of whether in proceedings brought prior to 9 August 1981 an indigent parent who is an adult and *sui juris* is entitled to the appointment of counsel as a matter of law.

The United States Supreme Court has very recently addressed this question in *Lassiter v. Department of Social Services of Durham County,* 49 U.S.L.W. 4586, No. 79-6423 decided 1 June 1981,[5] and held that the United States Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding.[6] The Court noted however that a parent's interest in the accuracy and justice of the decision to terminate parental status is an extremely important one and that, while the State shares those same interests, it has a relatively weak pecuniary interest in avoiding the expense of appointed counsel. These factors, in connection with others which might be present in a given case, could require the appointment of counsel to satisfy due process.

Though not controlling, a decision by the Supreme Court of the United States construing the due process clause of the fourteenth amendment to the Federal Constitution is persuasive in our interpretation of the law of the land clause of our State Constitution. *Horton v. Gulledge,* 277 N.C. 353, 359, 177 S.E. 2d 885, 889 (1970); 3 Strong's N.C. Index 3d, Constitutional Law § 23. We find that the failure of our Act (prior to the recent amendment) to require the appointment of counsel for an indigent parent or the minor child in all cases did not make the Act constitutionally defective under the Constitution of North Carolina.

As to the right of the minor child to counsel in the absence of a guardian ad litem who is an attorney, we find the same rules applicable on a case by case basis. However, whenever the

5. In our courts *sub nom In the Matter of Lassiter,* 43 N.C. App. 525, 259 S.E. 2d 336 (1979), *pet. for disc. rev. denied* 299 N.C. 120, 262 S.E. 2d 6 (1980).

6. The Court stated however that wise public policy may require that higher standards be adopted than those minimally tolerable under the Constitution and noted that as of that time some thirty-three states and the District of Columbia provided statutorily for appointment in termination cases, No. 79-6463 decided 1 June 1981 at p. 15. *See also,* Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights, 80 A.L.R. 3d 1141 (1977).

respondent-parent is represented by counsel, appointed or retained, we believe that fundamental fairness requires that the minor child be represented by counsel.

While not necessary for a decision in this case, but in the interest of judicial economy, we state for the guidance of the judges of our trial and intermediate appellate court that we would follow *Lassiter* and hold that in proceedings brought prior to 9 August 1981, where other circumstances do not dictate to the contrary, an indigent parent is not entitled to appointment of counsel as a matter of law. In such proceedings begun prior to 9 August 1981, the right to appointed counsel must be determined on a case by case basis. While in the case before us the indigent parent was both a minor and not *sui juris*, we believe that either circumstance standing alone would be sufficient ground to require appointment of counsel. Such entitlement to counsel may ordinarily be satisfied by the appointment for said parent of a guardian ad litem who is a licensed attorney.

[3] The issue of compensation of appointed counsel was raised as a part of the constitutional deficiency found by the trial court. If counsel is the guardian ad litem the matter of attorney's fees would seem to be governed by G.S. 7A-305(d)(7) in the case of a civil action or G.S. 7A-306(c)(5) in the case of a special proceeding. Both statutes allow assessment of such fees as costs. *Hood v. Cheshire*, 211 N.C. 103, 189 S.E. 189 (1937) and other of our cases make it clear that fees of a separate attorney for a guardian ad litem are chargeable as an item of the costs of the guardian ad litem. The Act itself provides in G.S. 7A-289.31(d) that "[t]he court may tax the cost of the proceeding to any party." It seems therefore that in a proceeding under the Act, whatever its nature, the attorney's fee may be taxed as a part of the costs. One of the new amendments to the Act providing for payment of counsel by the Administrative Office of the Courts (AOC), though not applicable to the case before us, evidences a legislative intent that counsel fees in these cases should be borne by the AOC rather than by the departments of social services of the various counties. We deem it appropriate, and so hold, that attorney's fees allowed by the court for attorneys appointed in such proceedings (whether as separate counsel or as guardian ad litem) brought before the effective date of Chapter 966 of the Session Laws of 1981 shall also be borne by the AOC.

As to the first assignment of error, we hold that the trial court erred in dismissing the proceeding on the ground that subsection (4) of G.S. 7A-289.32 unconstitutionally deprived the respondent-parent and the minor child of the right to counsel.

Because the other assignments of error would be applicable to further proceedings in this matter, we will also address them in this opinion.

II.

[4] The second assignment of error is that the trial court erred in dismissing the proceeding on the ground that the Act is unconstitutional for the reason that *all* of the grounds for termination of parental rights set forth in the Act are vague and overbroad.

G.S. 7A-289.32 provides six separate grounds upon which parental rights can be terminated.[7] The finding of any one of the six grounds is sufficient to order termination. Subsection (4) of G.S. 7A-289.32 provides as follows:

> (4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

The petition filed by the Hertford County Department of Social Services, insofar as it relates to the respondent-mother, alleges only one ground (G.S. 7A-289.32(4)):

> 11. The child has been placed in the custody of the Hertford County Department of Social Services and the mother, for a continuous period of six months next preceding the filing of this petition, has failed to pay a reasonable portion of the cost of care for the child.

The record clearly indicates that the only ground for termination of parental rights to be applied to the respondent-mother in this action is her failure as a parent to provide a reasonable portion of

7. The original subdivision (1) relating to failure to establish or maintain concern or responsibility for the child was repealed by Session Laws 1979, C. 669 § 2 and the subdivisions were renumbered. A new subsection (7) relating to inability to support the child by reason of mental incapacity was added by Session Laws 1979, C. 1206 § 2.

the support of the child for six continuous months immediately preceding the filing of the petition. Therefore, subsection (4) of G.S. 7A-289.32 is the only section of the statute properly before this Court for review. The constitutionality of subsections (2), (3), (6) and (7) was not before the trial court and will not be considered on this appeal. *In re Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974); *State v. Fredell*, 283 N.C. 242, 195 S.E. 2d 300 (1973); 3 Strong's N.C. Index 3d, Constitutional Law § 4.2.

We examine first the allegation of vagueness. This Court stated the test for fatal vagueness in *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969), *aff'd.* 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed. 2d 647 (1971) as follows:

> 'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' . . . . Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. (Citations omitted.)

275 N.C. at 531, 169 S.E. 2d at 888.

The test is whether the language conveys a substantially definite warning of the proscribed conduct when measured by common understanding and practices.

It cannot be said that men of common understanding and intelligence must guess at the meaning of the terms of the statutory subsections in question or differ as to its application. The terms are brief and plain in their meaning: first, the child must have been placed in the custody of one of three types of institutions: (a) a county department of social services, (b) a licensed child-placing agency, or (c) a child-caring institution; and secondly, the parent has failed to pay a reasonable portion of the cost of the child for a continuous period of six months next preceding the filing of the petition. Since there can be no serious question as to the identification of the three types of institutions listed, the time element involved or the cost of providing foster care for the child, we will address the only other term used: "reasonable portion."

Our Court of Appeals in an excellent opinion by Vaughn, J., has recently plowed this ground to a substantial depth for us in *In re Biggers*, 50 N.C. App. 332, 274 S.E. 2d 236 (1981). We deem it unnecessary to restate that examination of applicable law here. A parent's ability to pay is the controlling characteristic of what is a "reasonable portion" of cost of foster care for the child which the parent must pay. A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay. What is within a parent's "ability" to pay or what is within the "means" of a parent to pay is a difficult standard which requires great flexibility in its application. G.S. 7A-289.32(4) requires a parent to pay a *reasonable* portion of the child's foster care costs. The requirement applies irrespective of the parent's wealth or poverty. In the case before us the indigent respondent-mother was at the time of the hearing both an infant fifteen years old and alleged to be not *sui juris*. As this matter was determined in the trial court on a motion to dismiss before any hearing on the merits of the proceeding was had, no evidence of the respondent-mother's ability to pay was before the court. At a hearing on the merits, evidence may be offered by the respondent-mother or by the State as to her ability or means to pay any portion of the costs of the child's care or whether she is eligible for or has made any attempt to obtain public assistance for such purpose. The burden of DSS on the merits of the petition is a heavy one. The statute requires that all findings of fact be based on clear, cogent and convincing evidence. G.S. 7A-289.30(e).

Challenges to termination of parental rights statutes on the ground of vagueness are not uncommon. Our Court of Appeals has recently addressed such a challenge.

> We note that vagueness challenges to similar statutes have been increasingly made across the nation, but they have been almost uniformly rejected. *See* Comment, Application of the Vagueness Doctrine to Statutes Terminating Parental Rights, 1980 Duke L.J. 336, 341; Day, Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the *Parens Patriae* Rationale, 16 J. Fam. L. 213, 232 (1977-78); 70 Colum. L. Rev. 465, 469 (1970). *But see Davis v. Smith*, 266 Ark. 112, 583 S.W. 2d 37 (1979); *Roe v. Conn.*, 417 F. Supp. 769 (M.D. Ala. 1976); *Alsager v. District*

> *Court*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F. 2d 1137 (8th Cir. 1976). An 'impossible standard of statutory clarity' would be inappropriate in cases involving child care and custody. 'What might be unconstitutional if only the parents' rights were involved is constitutional if the statute adopts legitimate and necessary means to protect the child's interests.' *State v. McMaster*, 259 Or. 291, 296, 486 P. 2d 567, 569 (1971) (rejecting a vagueness claim to the Oregon statute for termination of parental rights). *Accord, In re Daniel H.*, 591 P. 2d 1175 (Okla. 1979). This context requires flexibility in the weighing of each case's facts in order to give the child, as well as the parent, the highest form of due process.
>
> . . . .
>
> . . . [W]e hold that the provisions of G.S. 7A-289.32 . . . (4) are sufficiently definite to be applied in a uniform manner to protect both the State's substantial interest in the welfare of minor children and the parents' fundamental right to the integrity of their family unit.

In re Biggers, Two Minor Children, 50 N.C. App. at 341-43, 274 S.E. 2d at 242.

We concur in the foregoing language of Vaughn, J., in *Biggers*. We find no constitutional defect for vaugeness in G.S. 7A-289.32(4).

Nor do we find the terms employed in subsection (4) to be "overbroad." A statute is not overbroad when it punishes, prohibits, or inhibits only conduct which is *not* constitutionally protected. Overbreadth is an issue only where some constitutionally protected conduct is punished, prohibited or inhibited by the very same statutory provision which punishes, prohibits or inhibits the unprotected behaviour. *See In re Harris*, 37 N.C. App. 590, 246 S.E. 2d 532 (1978). We find no constitutionally protected conduct here with regard to the respondent-mother's obligation to pay some portion of the foster care cost for her child. Could it reasonably be argued that failure for a continuous period of six months to pay a reasonable portion of the cost of care for one's child which has been placed in the custody of the department of social services for foster care is a constitutionally protected right? Obviously not.

We hold that the phrase "reasonable portion of the cost of care for the child" as used in the context of the Act is, by all normal standards, understandable by people of common intelligence without any necessity of guessing as to its meaning or differing as to its application. The phrase contains words of such common usage and understanding as to give parents notice of their responsibilities and of the type of conduct which is condemned, to-wit, failure to provide a reasonable portion of the cost of caring for the child. This phrase also provides boundaries sufficiently distinct that judges may interpret and administer it uniformly. While meeting these standards, it remains sufficiently flexible for application to the great variety of circumstances which will be presented to our courts tomorrow and tomorrow. As to the second assignment of error, we hold that the trial court erred in dismissing the proceeding on the ground that subsection (4) of G.S. 7A-289.32 is unconstitutionally vague and overbroad.

III.

[5] The third assignment of error is that the trial court erred in dismissing the proceeding on the ground that the petition fails to state a claim upon which relief may be granted because the Act is unconstitutional in that it deprives the respondent-mother and the minor child of trial by jury in the proceeding for termination of parental rights.

G.S. 7A-289.30(a) provides that the district court shall hear the case without a jury. Such a provision was within the prerogative of the legislature. *Board of Education v. Forest*, 193 N.C. 519, 137 S.E. 431 (1927). The respondents argue that this statutory provision denies them equal protection under the laws.

The right of trial by jury only "as declared by the Constitution or statutes of North Carolina" is preserved inviolate by Rule 38 of the North Carolina Rules of Civil Procedure. Since the statute directs that the proceeding be heard without a jury, the respondents are not entitled to trial by jury unless such right exists by virtue of our state constitution.[8] It is well settled that

8. The seventh amendment of the United States Constitution, guaranteeing jury trials in federal courts, is not applicable to state courts. *St. Louis & San Fran. R.R. v. Brown*, 241 U.S. 223, 36 S.Ct. 602, 60 L.Ed. 966 (1916); *Caudle v. Swanson*, 248 N.C. 249, 103 S.E. 2d 357 (1958).

under section 19 Article I of the North Carolina Constitution trial by jury is guaranteed only where the prerogative existed at common law or by statute at the time the Constitution was adopted. *In re Wallace*, 267 N.C. 204, 147 S.E. 2d 922 (1966). Proceedings to terminate parental rights in children were unknown at common law and they did not exist by statute until the adoption of the Act in 1969. *See In the Matter of Mary Lou Ferguson*, 50 N.C. App. 681, 274 S.E. 2d 879 (1981). There exists no constitutional right to trial by jury in proceedings to terminate parental rights. As to the third assignment of error, we hold that the trial judge erred in concluding that the Act is unconstitutional because it deprives the parties of trial by jury.

IV.

The fourth and last assignment of error is that "The trial court erred in dismissing the proceeding because that order is without foundation in law or in fact." We agree. Having found in the Act none of the constitutional defects stated by Judge Williford as the basis for his order, we conclude that there was no foundation in law or in fact for dismissing the proceeding. The trial judge erred in concluding as a matter of law that Article 24B of Chapter 7A of the General Statutes contravenes the Constitutions of the United States and the State of North Carolina and in dismissing the proceeding for failure to state a claim upon which relief could be granted.

Judge Williford's order of 7 October 1980 dismissing the proceeding is vacated and the cause remanded to the District Court, Hertford County for proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. WILLIAM EARL SANDERS, ALIAS SMOKEY JOE

No. 97

(Filed 17 August 1981)

1. **Criminal Law § 75.1— unlawful arrest—subsequent incriminating statement—admissibility**

Defendant's incriminating in-custody statement was not inadmissible as the fruit of his original unlawful arrest or pursuant to G.S. 15A-974 where the statement was not the result of the original unlawful arrest but had its origin in and was the result of a subsequent lawful arrest for a murder to which the statement related.

2. **Criminal Law § 75.1— in-custody statement—no violation of Posse Comitatus Act**

Defendant's incriminating in-custody statement was not inadmissible on the ground that it was obtained in violation of the Posse Comitatus Act, 18 U.S.C. § 1385, since there was no violation of the Act where military officers did not execute civilian law but patrolled a city street for the purpose of removing military personnel from situations potentially involving breach of civil law and assisted the police department in returning apprehended military personnel to Fort Bragg, and since a violation of the Act would not call for invocation of the exclusionary rule.

3. **Arrest and Bail § 3; Criminal Law § 169.2— refusal to strike testimony—subsequent jury instructions**

In this prosecution for the murder of a military policeman, the trial court did not err in refusing to strike the testimony of a military policeman that defendant was placed in "protective custody" and in failing to instruct the jury at the time of objection that there was no basis in the law for one to be taken into protective custody where the court in six separate instances in its final charge instructed the jury that defendant's arrest was unlawful.

4. **Criminal Law § 102.11— jury argument—personal belief by prosecutor—absence of prejudice**

In this prosecution for murder of a military policeman, defendant was not prejudiced by the prosecutor's ambiguous jury argument that "[w]e wouldn't be trying this case today if that [to beat up defendant] had been their intent," even if the statement is viewed as indicating a personal belief by the prosecutor as to defendant's guilt and the credibility of the testimony in violation of DR 7-106(C), since there was no reasonable possibility of a different result had the statement not been uttered.

5. **Criminal Law § 102.3— improper jury argument cured by instruction**

In this prosecution of defendant for the murder of a military policeman while defendant was in a holding cell, the prosecutor's improper jury argument which was not supported by the evidence that the victim and another military policeman entered the holding cell in order to protect persons therein confined was cured when the court instructed the jury to disregard such statement.

6. Criminal Law § 113.1— court's statement of evidence supported by testimony

In this prosecution of defendant for the murder of a military policeman while defendant was in a holding cell, the testimony supported the trial court's instruction that there was evidence tending to show that defendant swung at the victim before being kicked by a second military policeman.

7. Homicide § 28.3— right to kill in self-defense—voluntarily entering fight by abusive language—instructions

In this prosecution of defendant for the murder of a military policeman while defendant was in a holding cell after having been illegally arrested, the trial court's instruction, dealing with the right to kill in self-defense, that "one enters a fight voluntarily if he uses toward his opponent such abusive language which considering all of the circumstances is calculated and intended to bring on a fight, and if a person precipitates an altercation or a fight with the intent to provoke a deadly assault by the victim in order that he might kill him the subsequent killing of the victim in response to the attack is murder" was a correct statement of the law and was supported by the evidence in this case.

8. Homicide § 28.3— use of force against unlawful arrest—instructions

In this prosecution of defendant for the murder of a military policeman while defendant was in a holding cell after he had been unlawfully arrested, the trial court did not err in failing to charge the jury that regardless of the force used to effectuate the unlawful arrest, defendant was entitled to use deadly force if such was required to prevent the arrest or to free himself from unlawful confinement, since the victim of an unlawful arrest is not *ipso facto* entitled to kill or to use deadly force against the person attempting the arrest, and the court's instructions correctly explained to the jury the law regarding defendant's use of both non-deadly and deadly force in the context of an unlawful arrest.

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

BEFORE *Judge John Martin*, presiding at the 7 April 1980 Criminal Session of Cumberland Superior Court, and a jury, defendant was found not guilty of assault with a deadly weapon inflicting serious bodily injury and guilty of murder in the second degree. Upon a sentence of life imprisonment on the second degree murder conviction defendant appeals of right pursuant to G.S. 7A-27(a). This case was docketed and argued as No. 124, Fall Term 1980.

Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General, for the State.

Mary Ann Tally, Public Defender, for defendant appellant.

EXUM, Justice.

This is the third time this case has been before us. In both the first and second appeals we found prejudicial error and granted defendant new trials. *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979); *State v. Sanders*, 295 N.C. 361, 245 S.E. 2d 674 (1978).

In this appeal defendant brings forth assignments of error relating to: failure of the trial court to suppress defendant's incriminating statement, certain evidentiary rulings, portions of the prosecutor's argument to the jury, failure of the trial judge adequately to summarize the evidence in his charge to the jury, portions of the trial judge's substantive instructions to the jury, denial of defendant's motion for mistrial, and denial of defendant's motions to set the verdict aside and to order a new trial. After careful examination of each assignment we conclude that defendant's trial was free from prejudicial error.

The state's evidence tends to show the following: On 16 October 1976 Fayetteville Police Officer Wayne Alsup, accompanied by military policemen Sergeant Charles Terry and Sergeant Willard Barber, unlawfully[1] arrested defendant as he walked down Hay Street in Fayetteville. Defendant was handcuffed, searched and his military identification card seized. The officers informed him that he was not going to be charged with the commission of any offense but was being held in "protective custody" pursuant to which he would be transported to the Law Enforcement Center and then to his unit at Fort Bragg. Upon arrival at the Law Enforcement Center defendant was placed in a holding cell. While so confined he verbally abused law enforcement personnel and failed to comply with repeated requests to be quiet.

Sergeant Lambert, a military policeman assigned to assist the local police department in returning apprehended military personnel to Fort Bragg, approached the holding cell and reminded defendant that he was not going to be charged by the civilian authorities. Defendant reached through the bars and slapped Lambert in the face, whereupon Lambert and Terry, both unarmed, entered the cell in order to handcuff defendant and to

1. The trial court at defendant's first trial and we on defendant's first appeal so concluded.

charge him with the military offense of slapping a non-commissioned officer. Defendant retreated to the toilet area of the cell and motioned to the military officers to come in; he told them to "bring the deputies, that he'd kick all of our asses and kill us all." When Lambert and Terry reached the toilet area defendant swung at Lambert. Terry delivered a karate kick to defendant's stomach and attempted to pin his arms. Defendant, before being subdued by other officers, produced a knife and stabbed Terry in the arms and back and Lambert in the back, abdomen and lower chest. Lambert died shortly thereafter from the stab wound in his back.

Defendant did not testify. Terry Singleton, a military specialist assigned to assist Sergeant Lambert, testified on defendant's behalf that "the demeanor of the officers at the time that they entered [the] cell . . . was hostile."

I

After being charged with the murder of Sergeant Lambert and the felonious assault upon Sergeant Terry, defendant made a statement, later reduced to writing and signed by him, which in part provided, "I saw a knife on the floor and picked it up. . . . I reached up and grabbed one of [the officers] and pulled him to me and stuck him and stuck him. I was just swinging the knife. I think two got cut." The trial court, after a *voir dire* hearing at which defendant presented no evidence, concluded that there was probable cause for defendant's arrest on charges of murder and felonious assault, that defendant was advised of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966), and that defendant "intentionally, intelligently, understandingly and voluntarily waived said rights and thereafter freely and voluntarily made an in-custody statement . . . ."

[1] Defendant first assigns as error the trial court's failure to suppress his incriminating statement. He contends the statement was (1) the fruit of the original unlawful arrest on Hay Street (2) obtained in violation of G.S. 15A-501 and (3) obtained in violation of the Posse Comitatus Act, 18 U.S.C. § 1385 (1976). We find no merit in any of these contentions.

On defendant's first appeal this Court, relying primarily on *Brown v. Illinois*, 422 U.S. 590 (1975), expressly rejected defendant's contention that his statement, made after a lawful arrest

for the murder of Sergeant Lambert, must be suppressed as the fruit of the original unlawful arrest. *State v. Sanders, supra*, 295 N.C. at 370-72, 245 S.E. 2d at 681-82. Defendant's contention that a different result is suggested by *Dunaway v. New York*, 442 U.S. 200 (1979), decided since our earlier determination on this point, is without merit. In *Dunaway* the Supreme Court reiterated principles set forth in *Brown* and concluded, "[t]he situation in this case is virtually a replica of the situation in *Brown*." 442 U.S. at 218. We are in full agreement with our prior determination made after full consideration of the issue that "defendant's statement was sufficiently attenuated from the unlawful arrest such that it was not obtained by undue exploitation of the Fourth Amendment violation and was properly admissible in evidence." 295 N.C. at 372, 245 S.E. 2d at 682.

Defendant's contention that his statement was obtained in violation of G.S. 15A-501[2] and thus must be suppressed pursuant to G.S. 15A-974 is for the same reason without merit. General Statute 15A-974 in part provides that "evidence must be suppressed if . . . . (2) It is obtained *as a result of* a substantial violation of the provisions of this Chapter." (Emphasis supplied.) The thrust of our original decision was that defendant's statement was not the result of the original unlawful arrest; it had, instead,

2. G.S. 15A-501 provides:

"*Police processing and duties upon arrest generally.*—Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer:

(1) Must inform the person arrested of the charge against him or the cause for his arrest.

(2) Must, with respect to any person arrested without a warrant and, for purpose of setting bail, with respect to any person arrested upon a warrant or order for arrest, take the person arrested before a judicial official without unnecessary delay.

(3) May, prior to taking the person before a judicial officer, take the person arrested to some other place if the person so requests.

(4) May, prior to taking the person before a judicial officer, take the person arrested to some other place if such action is reasonably necessary for the purpose of having that person identified.

(5) Must without unnecessary delay advise the person arrested of his right to communicate with counsel and friends and must allow him reasonable time and reasonable opportunity to do so."

its origin in and was the result of the lawful arrest for the Lambert murder to which the statement related. *State v. Sanders, supra*, 295 N.C. at 370-72, 245 S.E. 2d at 681-82.

[2] Defendant contends finally that suppression of his statement is required by the Posse Comitatus Act, 18 U.S.C. § 1385 (1976), which provides:

> "§ 1385. *Use of Army and Air Force as posse comitatus*
>
> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

The purpose of the Act, as noted in *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), is to preclude direct active use of federal troops in aid of execution of civilian laws. Here there was no violation of the Act. The Fayetteville Police Department did not use military policemen Barber and Terry to execute civilian law; instead, these officers patrolled Hay Street for the purpose of removing military personnel from situations potentially involving breach of civil law. Similarly, military policeman Lambert's duty was not to execute civilian law but to assist the police department in returning apprehended military personnel to Fort Bragg. "[T]hose situations where an act performed primarily for the purpose of insuring the accomplishment of the mission of the armed forces incidentally enhances the enforcement of civilian law do not violate the statute." *State v. Nelson, supra*, 298 N.C. at 585, 260 S.E. 2d at 639, *quoting* Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 Mil. L. Rev. 85, 128 (1960).

Further, a violation of the Act does not call for invocation of the exclusionary rule. *United States v. Walden*, 490 F. 2d 372 (4th Cir. 1974), *cert. denied*, 416 U.S. 983 (1974); *State v. Nelson, supra*.

We conclude, then, that the trial court properly admitted defendant's statement.

II

Defendant next assigns as error certain evidentiary rulings by the trial court. In assignments two, three and six defendant repeats evidentiary challenges earlier addressed and rejected by this Court.[3] We hold with our previous determinations.

[3] In assignment four defendant contends the trial court erred in refusing to strike Sergeant Barber's testimony that defendant was placed in "protective custody" and in failing to instruct the jury that "there is no such thing as protective custody." The testimony in question is as follows:

"Q. [By prosecuting attorney] Did you at any time tell Mr. Sanders why you were cuffing him, sir?

A. No, sir. I told him he was under protective custody.

MRS. TALLY: Objection. Move to strike. Ask that the jury be instructed that there is no such thing.

COURT: Overruled. Motion denied.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 15

When I was holding his arm up on the wall, I saw his wallet and his I.D. card which was taken out of it.

Q. Now, why did you cuff Mr. Sanders, sir?

A. It was normal procedure—

MRS. TALLY: Objection. Move to strike.

COURT: Overruled. Motion denied.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 16

3. Assignment two, wherein defendant challenges admission of Fayetteville police officer Richard Porter's testimony that after observing defendant argue with the "bouncer" of a Hay Street bar, he asked defendant to leave the area and advised Officer Alsup of the incident, is dealt with at 298 N.C. at 515, 259 S.E. 2d at 259-60. Assignment three, wherein defendant challenges admission of testimony concerning his appearance at the time of arrest, is dealt with at 298 N.C. at 515-16, 259 S.E. 2d at 260. Assignment six, wherein defendant challenges the trial court's refusal to permit defense witness Singleton to testify as to why he thought the military policemen entered the holding cell prior to the stabbing, is dealt with at 295 N.C. at 369-70, 245 S.E. 2d at 680-81. Defendant has abandoned assignment of error number five.

A. —for all protective custody subjects going back to Fort Bragg so we could safely transport them to the Law Enforcement Center then back to Fort Bragg.

MRS. TALLY: Objection. Move to strike. Ask the jury be instructed that again there is no such thing as protective custody.

COURT: Objection is overruled. Motion to strike is denied. The Court will instruct the jury as to the illegality of the arrest at the time jury instructions are given.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 17

. . . .

Q. Did you have any conversation with Mr. Sanders during this period of time, sir?

A. Yes, sir. I repeatedly told him he was just under protective custody, not under arrest, and being transported back to Fort Bragg.

MRS. TALLY: Move to strike.

COURT: Motion denied.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 18"

Defendant contends the challenged testimony was prejudicial in that it served "to convince [the jury] that the defendant was taken into custody under some lawful policy and that it was standard operating procedure." We disagree, and find no error in the trial court's refusal to strike this testimony or at the time of objection to charge that there is no basis in the law for one to be taken into protective custody. In its final charge the trial court emphatically and repeatedly instructed the jury that this initial arrest was unlawful. In its summation of the evidence the court stated:

"[M]embers of the jury, there is no basis in law for one to be taken into protective custody. That is not a legal arrest. Mr. Sanders' arrest was therefore plainly unlawful. At the time that he was taken into custody this constituted an illegal arrest. . . ."

Similarly, "[r]ecall again that I have instructed you that this . . . was an illegal arrest." Further:

> "I instruct you again that the defendant's initial arrest on Hay Street was unlawful, that his continued restraint in the holding cell was likewise unlawful and that any attempt by the officers to place him under further arrest for slapping Sgt. Lambert was likewise unlawful."

Indeed, in six separate instances in its final charge the trial court instructed the jury that the arrest was unlawful. It is inconceivable that after such instruction the jury thought otherwise. This assignment of error is overruled.

III

Defendant assigns as error certain portions of the prosecutor's jury argument.

[4] In his seventh assignment defendant objects to a statement made by the prosecutor concerning why Sergeants Lambert and Terry entered the holding cell. Defendant's counsel argued to the jury that "they [Lambert and Terry] were hostile, they were angry . . . they went in there to beat the daylights out of William Sanders . . . to beat William Sanders to a pulp." The prosecutor responded by noting testimony that Lambert and Terry entered the cell not to fight with defendant but to handcuff him and to charge him with slapping a non-commissioned officer. The prosecutor noted that both were unarmed, that Terry in fact removed his nightstick prior to entering the cell, and that despite being slapped Lambert did not become angry. The prosecutor further stated, "Mrs. Tally said they went in there to beat him up. We wouldn't be trying this case today if that had been their intent." Defendant's objection to this statement was overruled. Defendant contends the trial court's failure to instruct the jury to disregard the statement was prejudicial error since the statement "indicated a personal belief on behalf of the prosecutor as to the defendant's guilt and a personal belief in the credibility of the testimony offered through the State's witnesses." This contention is meritless.

The statement, "[w]e wouldn't be trying this case today if that [to beat up defendant] had been their intent," is ambiguous. It is, as defendant contends, susceptible to the interpretation that

it reflects the prosecutor's belief as to the credibility of several of the state's witnesses and as to defendant's guilt generally. It is, however, capable of other equally likely interpretations. One is that if Lambert and Terry had in fact intended to beat up defendant they would have done so and disabled defendant prior to his stabbing them. Another is that if such had been their intent the state, realizing the difficulty of securing a conviction in the face of such police conduct, would not have brought charges.

In any event, even if we were to view the prosecutor's statement as being violative of his ethical responsibilities,[4] such a violation does not necessarily entitle defendant to a new trial. Ethical transgressions by trial counsel do not always constitute legal error, *see generally* Patterson, *A Preliminary Rationalization of the Law of Legal Ethics*, 57 N.C. L. Rev. 519 (1979), and legal error does not entitle a defendant to a new trial unless it is prejudicial. Here we are satisfied the statement in question did not prejudice defendant because there is no reasonable possibility of a different result had the statement not been uttered. *See* G.S. 15A-1443. However viewed, therefore, the statement does not entitle defendant to a new trial.

[5] In assignment eight defendant challenges the following portion of the prosecutor's argument:

> "(Those people in that cell with William Sanders had a right to be free from fear too and they went in to put those cuffs on so it wouldn't happen again, to try to find out his unit—)

4. Disciplinary Rule 7-106 of the North Carolina State Bar Code of Professional Responsibility in pertinent part provides:

"DR 7-106 Trial Conduct.

. . . .

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

. . . .

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein."

MRS. TALLY: —Objection.

COURT: Overruled.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 26

MR. DICKSON: (And hopefully take him into custody at that time for what they thought was an offense for slapping an NCO.)

MRS. TALLY: Objection.

COURT: Overruled.

THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 27

MR. DICKSON: (Not to beat him up. That was to protect themselves and other people in the cell.)

MRS. TALLY: Objection.

COURT: Sustained as to that. There is no evidence as to that, Mr. Dickson.

MRS. TALLY: Ask that the jury be instructed to disregard that.

COURT: Do not consider that portion of the argument, members of the jury."

Defendant contends this argument was prejudicial because it suggested that Terry and Lambert entered the holding cell for the purpose of protecting other persons therein confined. This contention is without merit.

Defendant correctly observes that no evidence was presented tending to show that Terry and Lambert entered the holding cell in order to protect persons therein confined. Several witnesses, however, testified that Terry and Lambert entered the cell to handcuff defendant and to charge him with slapping a non-commissioned officer. Thus the prosecutor's argument as to these reasons why Terry and Lambert entered the cell was supported by the evidence and defendant's objections thereto were properly overruled. The prosecutor then added an additional reason: "to protect . . . other people in the cell." This argument lacked evidentiary support and defendant's objection to it was sustained. The trial court then instructed the jury to disregard the offending statement. Thus the impropriety was cured and possible prejudice to defendant avoided. *See State v. Martin*, 294 N.C. 253, 240 S.E. 2d 415 (1978); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). This assignment of error is overruled.

IV

Defendant assigns as error certain portions of the trial court's final charge to the jury.

[6] In assignment nine defendant contends the following was a substantial misstatement of the evidence prejudicial to his claim of self-defense:

> "(There was evidence tending to show that the defendant was motioning with his hands for them to come toward him; that he backed up to the partition at the toilet area of the holding cell and that Sgt. Lambert and Sgt. Terry were going toward him; that the defendant struck out at Sgt. Lambert, that Sgt. Lambert blocked the blow and Sgt. Terry then kicked the defendant in the stomach to knock the wind out of him.)
>
> THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 28"

Specifically, defendant contends there was no evidence that he swung at Sergeant Lambert before being kicked by Sergeant Terry.

The record, however, belies this contention. Sergeant Terry testified on direct examination that "I believe the defendant stepped up towards Sergeant Lambert, and they made contact, but I don't know how, sir." On cross-examination Terry said, "Sergeant Lambert and William Sanders never made any contact before I decided to kick William Sanders in the stomach. I think I'm getting — there was contact before I made the decision." Officer Carl Moore of the Fayetteville Police Department was near the holding cell at the time of the events in question. He testified on direct examination that "I heard the door open and I looked up and saw that Lambert and Terry were starting into the cell. I stood and watched. The defendant was backing up toward the back right portion of the holding cell . . . . As the defendant started backing up he was motioning for them to come on and get him. They went to the latrine area in the back righthand portion of the cell, but you can't see it after they go behind the partition. Deputy [Lonnie] Sanders approached the cell door and walked into the middle of the cell and at this time I seen the defendant struck out at Sergeant Lambert and Sergeant Lambert blocked the throw." On cross-examination Moore admitted that he did not see Sergeant Terry kick defendant. His testimony, however, indicates that this was because after defendant swung at Lambert the threesome disappeared behind the partition wall: "I could not

see behind the wall. The first thing that I saw was the defendant swing and Sergeant Lambert blocked, and then they disappeared behind the partition. They were not behind the wall yet, so I could see before they disappeared behind the partition."

It is clear then that the challenged portion of the trial court's evidentiary summation is in fact supported by the evidence. This assignment of error is overruled.

Defendant's tenth assignment, wherein he challenges a portion of the trial court's instruction on the elements of second degree murder, lacks even a suggestion of merit; we overrule it without extended discussion. Suffice it to say that the challenged instruction, taken directly from North Carolina Pattern Jury Instructions—Criminal § 206.30, is an accurate statement of the law. We decline defendant's invitation to consider the challenged instruction apart from the instructions which immediately precede it and apart from the charge as a whole.

[7] In his eleventh assignment defendant challenges the following instruction wherein the jury was charged that the killing would be excused on the grounds of self-defense if:

> "[T]hird . . . the defendant was not the aggressor. If the defendant voluntarily and without provocation entered the fight he was the aggressor. (One enters a fight voluntarily if he uses toward his opponent such abusive language which considering all of the circumstances is calculated and intended to bring on a fight, and if a person precipitates an altercation or a fight with the intent to provoke a deadly assault by the victim in order that he might kill him the subsequent killing of the victim in response to the attack is murder.)
>
> THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 30"

Defendant contends the charge was error in that "the jury was not allowed to consider whether the defendant's abusive language was used in lawful right to resist the illegal arrest and the continued illegal custody perpetrated upon him by the officers." We disagree.

Defendant was entitled to verbally demand cessation of his unlawful confinement. The trial court instructed the jury that defendant's arrest was unlawful and that while defendant could not resort to unnecessary force he "had the right to use such force in resisting the unlawful arrest as reasonably appeared to

him to be necessary to prevent the unlawful arrest and free himself from the illegal confinement." Given such instruction as to defendant's right to use force to resist unlawful arrest the jury undoubtedly realized that defendant had the right to verbally resist such an arrest. Defendant's contention to the contrary is without merit.

Further, the instruction here challenged deals not with defendant's right to resist, by force or otherwise, his unlawful arrest, but with his right to kill in self-defense. The instruction, taken substantially from North Carolina Pattern Jury Instructions—Criminal § 206.30, correctly indicates that the right to kill in self-defense may be forfeited by, among other things, provoking the fatal encounter. *State v. Spaulding*, 298 N.C. 149, 154, 257 S.E. 2d 391, 395 (1979); *State v. Jennings*, 276 N.C. 157, 163, 171 S.E. 2d 447, 451 (1970). "[I]f the defendant precipitated the altercation intending to provoke a deadly assault by the victim in order that he might kill him, his subsequent killing of the victim in response to the attack is murder." *State v. Sanders, supra*, 295 N.C. at 367, 245 S.E. 2d at 679. Thus while defendant had the right to resist the unlawful arrest by reasonable force and by words neither this right nor that of self-defense sanctions his provoking an encounter with intent to kill and killing pursuant to the encounter thus provoked.

The evidence is that while armed with a knife and confined in the holding cell defendant used language calculated to and which did in fact provoke the fatal encounter with Sergeant Lambert. Officer Newman of the Fayetteville Police Department testified that several weeks earlier defendant and Lambert had a confrontation after which defendant declared "nobody does this to me and if it is the last thing I ever do I will kill [you]." Defendant's statement reveals "I remembered him [Sergeant Lambert] from before, I asked him if he remembered me . . . . [He] said that he did remember me." Terry testified that when he removed the handcuffs defendant "could have said, 'Why don't you take these cuffs off me and fight me man-to-man.' " Also, "Sanders . . . started calling me names such as fatboy, honky, if you want to do something about it come and get me. . . . Sanders said . . . 'if you want to make me be quiet come in here and make be quiet or try and I will kill you. Bring your other buddies with you, bring the little fat honky and I will kill him, too.' " Terry testified further that when he and Lambert entered the cell defendant, while motioning for them to come in, said, " 'come on in,' that he'd take us

all on. He told us to bring the deputies, that he will kick all of our asses and kill us all." Officer Moore testified that defendant said, "All you pigs come on over here and get me."

The instruction here challenged dealing with the right to kill in self-defense is, therefore, a correct statement of law and is supported by the evidence. Defendant's assignment of error thereto is overruled.

[8] Defendant's twelfth assignment may be summarily dealt with. As we understand his argument, defendant contends the trial court erred by failing to charge the jury that regardless of the force used to effectuate the unlawful arrest he was entitled to use deadly force if such was required to prevent the arrest or to free himself from unlawful confinement. This is not the law. Contrary to defendant's contention the victim of an unlawful arrest is not *ipso facto* entitled to kill or to use deadly force against the person attempting the arrest. As we noted in *State v. Sanders*, *supra*, 295 N.C. at 367, 245 S.E. 2d at 679:

> "A person indeed has the right to resist an unlawful arrest by the use of force, as in self-defense, to the extent that it *reasonably* appears necessary to prevent unlawful restraint of his liberty . . . . Nonetheless, *a killing done with malice and not in self-defense is murder, even though the person killed may have been seeking to effect an unlawful arrest upon the defendant.*" (Citations omitted.) (Emphasis supplied.)

The charge complained of adequately and correctly explained to the jury the law regarding defendant's use of both non-deadly and deadly force in the context of an unlawful arrest. This assignment of error is overruled.

V

Defendant in his final assignments contends that the alleged errors already addressed entitle him to a mistrial, to have the second degree murder conviction set aside, and to a new trial. For reasons discussed we conclude defendant received a fair trial free from prejudicial error; therefore, we overrule these assignments.

In defendant's trial we find

No error.

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

Ingram, Comr. of Insurance v. Insurance Co.

STATE OF NORTH CAROLINA, ON RELATION OF JOHN R NDOLPH INGRAM, COMMISSIONER OF INSURANCE OF NORTH CAROLINA, PLAINTIFF v. RESERVE INSURANCE COMPANY, DEFENDANT AND NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, THIRD-PARTY PLAINTIFF AND PHILIP R. O'CONNOR, AS DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS AND AS DOMICILIARY RECEIVER OF RESERVE INSURANCE COMPANY, THIRD-PARTY DEFENDANT AND ROBERT P. BINKLEY, BENJAMIN T. SIMMONS, JR., WALLACE GRAHAM GETCHELL, AND ARNOLD ENGLAND, INDIVIDUALLY AND AS REPRESENTATIVE OF THE POLICYHOLDERS OF RESERVE INSURANCE COMPANY WHO ARE CITIZENS OR RESIDENTS OF NORTH CAROLINA OR WHO HOLD POLICIES ISSUED UPON PROPERTY IN NORTH CAROLINA, AND CAROLINA INSURANCE SERVICE, INC., THIRD-PARTY PLAINTIFFS

No. 113

(Filed 17 August 1981)

Insurance § 1 — insolvent insurer — special deposit — payment to Guaranty Association

Application of the Quick Access Statute, G.S. 58-155.60, which requires that special deposits made by an insolvent insurer be paid to the N.C. Insurance Guaranty Association for use in paying covered claims against the insolvent insurer of $100 to $300,000, to the insolvency of a foreign casualty company did not divest the G.S. 58-185 lien rights in the deposit of N.C. policyholders whose policies were issued before the statute was enacted into law. While the Guaranty Association has the initial right to use deposit funds to cover operating expenses incident to the insolvent insurer, all deposit funds must be paid to claimants pro rata as provided by G.S. 58-185, and if all claimants are satisifed either directly by the Guaranty Association or by the Commissioner of Insurance (if the claim is under $100) and deposit funds remain, then and only then are such funds to be permanently credited to the Guaranty Association for its expenses.

APPEAL by the Commissioner of Insurance and third-party plaintiffs Carolina Insurance Service, Inc., and Binkley et al., from decision of the Court of Appeals, 48 N.C. App. 643, 269 S.E. 2d 757 (1980), reversing judgment of *Hobgood, J.*, at the 6 July 1979 Session of WAKE Superior Court.

These proceedings were spawned by the insolvency of Reserve Insurance Company, an Illinois corporation doing business in North Carolina. On 7 May 1979 Reserve was enjoined by the Circuit Court of Cook County, Illinois from doing business except with the consent of the Illinois Director of Insurance. On 16 May 1979, the North Carolina Commissioner of Insurance

ordered Reserve to cease writing new or renewal business in this State until its minimum maintained capital was restored. Reserve was adjudicated insolvent, and the Illinois Director of Insurance was appointed "Domiciliary Receiver" on 29 May 1979, with powers to liquidate the business affairs of Reserve. The North Carolina Commissioner of Insurance filed this action against Reserve on 31 May 1979 pursuant to the Uniform Insurers Liquidation Act which is codified as part of Article 17A of Chapter 58 of the General Statutes.

The Commissioner alleged the insolvency of the defendant company and sought appointment as receiver in North Carolina. The Commissioner was appointed "Ancillary Receiver," and a restraining order was entered. This initial order of the North Carolina Court was followed by a preliminary injunction and order continuing the receivership on 8 June 1979. The relief sought was not resisted by Reserve and judgment by default was entered on 14 September 1979 making the ancillary receivership permanent. On the same date, the superior court entered a separate order requiring the Commissioner as "Ancillary Receiver" to liquidate Reserve's North Carolina assets, process claims and file his report with the court.

The only asset of Reserve in North Carolina is a special deposit of securities having a face value of $185,000. The securities were deposited with the Treasurer of North Carolina pursuant to Article 20 of Chapter 58 of the General Statutes as a condition of doing business in North Carolina. Reserve was required to deposit the securities and give the Commissioner a power of attorney to use the securities to pay liabilities of North Carolina policyholders resulting from any default of Reserve.

The North Carolina Insurance Guaranty Association also began operations to pay liabilities and claims for North Carolina policyholders resulting from the insolvency of Reserve. The Guaranty Association was created by the Insurance Guaranty Association Act, which is Article 17B of Chapter 58 of the General Statutes. The Association is composed of all casualty insurance companies which transact business in North Carolina. When a member company is adjudged insolvent by a court of competent jurisdiction, the Association bears the responsibility for paying claims against the company which are greater than

$100 but not to exceed $300,000 per claim. The payments are financed through membership assessments.

On 8 June 1979, the Guaranty Association filed a motion, which was allowed, to intervene in the Commissioner's liquidation suit. On 15 June 1979, the Guaranty Association filed an "answer, counterclaims, crossclaims, and third-party complaint," the basic purpose of which was to assert the Association's rights to the special securities deposit both as lienor and under a piece of legislation enacted by the General Assembly on 23 May 1979 as part of the Insurance Guaranty Association Act entitled the "Quick Access Statute" and codified as G.S. 58-155.60. A motion for partial summary judgment was filed with this pleading requesting the court to enter judgment declaring the Guaranty Association's right to have the special deposit of Reserve delivered to the Association to pay covered claims as provided in G.S. 58-155.60. The Commissioner as ancillary receiver in answer denied the essential allegations of the Guaranty Association.

On 2 July 1979, Carolina Insurance Service, Inc.,[1] the general agent for Reserve in North Carolina and several individual policyholders on their own behalf and on behalf of other individual policyholders with Reserve, filed motions to intervene in the liquidation suit which were allowed. These third-party plaintiffs sought a declaratory judgment (1) that the policyholders of Reserve had a lien on the special deposit superior to that of the Guaranty Association and (2) that the deposit not be delivered to the Guaranty Association. On the same day, the Commissioner as Ancillary Receiver moved to dismiss the claim of the Guaranty Association to the deposit, alleging G.S. 58-155.60 was void and unconstitutional.

The superior court heard arguments of the parties concerning disposition of the special deposits. The Guaranty Association contended G.S. 58-155.60 gave it a right to the deposit to cover *claims and expenses* arising out of the insolvency of Reserve. The Commissioner, Carolina Insurance Service, Inc. and the individual policyholders argued that allowing the Guaranty Association's

1. Carolina Insurance Service, Inc., alleged it held $81,326.25 in funds, representing premiums for policies written prior to the liquidation proceeding. Carolina sought to create a trust for its policyholders in these funds and determine whether they should be paid to the domiciliary receiver or the ancillary receiver. These questions raised by Carolina are not at issue in this appeal.

claim to the special deposit pursuant to G.S. 58-155.60 would interfere with a vested property right of the policyholders in that it would unlawfully and retroactively divest them of their lien rights in the special deposits as specified in G.S. 58-185.

On 6 July 1979, the superior court denied the Guaranty Association's motion for summary judgment. In support of this order, the superior court listed these material facts which were not excepted to by any party on appeal: (1) Reserve was adjudicated insolvent on 29 May 1979; (2) there were more than 1700 policyholders in North Carolina who held contracts of insurance with Reserve written between 30 May 1978 and 7 May 1979; (3) all these policyholders will be entitled to return of the unearned premiums by virtue of the insolvency; (4) the total amount of unearned premiums equals approximately $184,528.49 of which amount approximately $89,096.78 represents claims to be paid by the Guaranty Association and $95,431.71 represents total unearned premiums up to a maximum of $100 on each policy which will not be paid by the Guaranty Association; and (5) the Quick Access statute, G.S. 58-155.60 was enacted on 23 May 1979 with an effective date of 23 May 1979. The court then concluded as a matter of law that G.S. 58-155.60 could be applied prospectively only and therefore not to the insurer insolvency in question in this case and that the policyholder liens against the special deposits pursuant to G.S. 58-185 were superior to any rights of the Guaranty Association. The Guaranty Association appealed to the Court of Appeals.

The Court of Appeals reversed the superior court and remanded the case, ordering that the special deposits be delivered to the Guaranty Association. That court reasoned G.S. 58-155.60 could be applied retroactively. The Court of Appeals stated:

> We hold that the superior court committed error when it did not order the deposits of Reserve delivered to the Guaranty Association. The claimants under G.S. 58-185 will retain their lien rights and may proceed against the Guaranty Association to the extent of the deposit for any claims they may have had under G.S. 58-185 which are not satisfied by the Guaranty Association.

48 N.C. App. at 648, 269 S.E. 2d at 760.

The Commissioner as Ancillary Receiver, Carolina Insurance Service, Inc., and the individual policyholders appealed to this Court which granted their petitions for discretionary review pursuant to G.S. 7A-31.

Rufus L. Edmisten, Attorney General, by Richard L. Griffin, Assistant Attorney General, for State of North Carolina ex rel. Commissioner of Insurance, plaintiff appellant.

Craige, Brawley, Liipfert & Ross, by Cowles Liipfert, C. Thomas Ross and Terrie A. Davis, attorneys for Carolina Insurance Service, Inc., Robert P. Binkley, Benjamin T. Simmons, Jr., Wallace Graham Getchell and Arnold England and the North Carolina policyholders of Reserve Insurance Company, third-party plaintiff appellants.

Allen, Steed and Allen, P.A., by Arch T. Allen, III, and Ann Hogue Pappas, attorneys for North Carolina Insurance Guaranty Association, third-party plaintiff appellee.

HUSKINS, Justice.

This case involves construction of G.S. 58-155.60, the "Quick Access" statute, and whether it applies retroactively to divest the lien of North Carolina policyholders of Reserve, whose policies were issued before the statute was enacted into law, in certain securities deposited by Reserve to cover claims in the event of its default. We conclude the statute can be applied constitutionally to the present case.

Before we explain the effect of G.S. 58-155.60 in the present case, some background information is relevant to show how our regulated insurance industry operates when a foreign insuring company defaults on its obligations in this State.

Three separate articles of Chapter 58 of the General Statutes apply to the present case: Article 20—Deposits by Insurance Companies, originally enacted in 1909; Article 17A—Mergers, Rehabilitation and Liquidation of Insurance Companies, which contains the Uniform Insurers Liquidation Act, originally enacted in 1947; and Article 17B—the Insurance Guaranty Association Act, originally enacted in 1971. The older articles were neither repealed nor superseded by the later articles. All the provisions have one basic purpose: to better protect North Carolina

claimants and policyholders. The interrelationship of the provisions is readily apparent on the facts of this case: The security deposit of Reserve was made and held pursuant to Article 20; the ancillary receivership of the Commissioner was established pursuant to Article 17A and the Guaranty Association is paying claims and liabilities pursuant to Article 17B.

Beginning in 1909, the State required certain insurance companies to make deposits with the Commissioner of Insurance. G.S. 58-182. Foreign casualty companies such as Reserve have been required to make deposits since 1945. G.S. 58-182.1. Such deposits are a prerequisite for a license to do business in this State. G.S. 58-188. The deposits are in an amount specified by statute, G.S. 58-182, -182.1, -182.2, and are not made in currency but in bonds of the United States, North Carolina or cities and counties of this State. G.S. 58-182.3. The deposits are to be delivered by the Commissioner to the Treasurer of the State for safekeeping to "be held exclusively and solely for the protection of contract holders." G.S. 58-182.6; *see also* G.S. 58-188.1. The depositing insurance company is entitled to the interest from the securities "until the company fails to pay any liability arising upon any" covered policy, "and thereafter the interest, so long as the liability exists shall be payable to the Commissioner of Insurance, to be applied, if necessary, to the payment of such liability." G.S. 58-183.

The deposit statutes also require a power of attorney to the Commissioner "authorizing the sale or transfer of said securities or any part thereof for the purpose of paying any of the liabilities provided for in this Article." G.S. 58-182.5. "If the company fails to pay any of its liabilities on its contracts . . . , the Commissioner of Insurance shall, upon application of the party to whom the debt or money is due, . . . proceed to sell at public auction such an amount of securities as, with the interest in his hands, will pay the sum due and expenses of sale, and out of the proceeds of sale pay said sums and expenses . . . ." G.S. 58-184. G.S. 58-185 creates a lien in the deposit for policyholders and a procedure[2] for disposition of the funds on deposit in the event of insolvency of an insurer as follows:

2. This procedure for disposition was altered by the adoption of the Uniform Insurers Liquidation Act in 1947 in that the ancillary receiver of a foreign insurer is to liquidate "special deposit claims." G.S. 58-155.12(b).

> Upon the securities deposited with the Commissioner of Insurance by any such insurance company, the holders of all contracts of the company who are citizens or residents of this State at such time, or who hold policies issued upon property in the State, shall have a lien for the amounts due them respectively, under or in consequence of such contracts for losses, equitable values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said securities, if such proceeds be not sufficient to pay all of said contract holders. When any company depositing securities as aforesaid becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors, any holder of such contract may begin an action in the Superior Court of the County of Wake to enforce the lien for the benefit of all the holders of such contracts. The Commissioner of Insurance shall be a party to the suit, and the funds shall be distributed by the court, but no cost of such action shall be adjudged against the Commissioner of Insurance.

See also G.S. 58-188.1. Deposits pursuant to Article 20 constitute a *trust* for the benefit of North Carolina policyholders and are not *assets* of the insolvent insurance company. *Continental Bank & Trust Co. v. Gold,* 140 F. Supp. 252 (E.D.N.C. 1956); 2 Couch on Insurance §§ 22:94, 22:96, 22:111 (2d Ed. 1959); 19 Appleman, Insurance Law and Practice § 11094 (1979 Supp.); *see also Guaranty Association v. Assurance Co.,* 48 N.C. App. 508, 269 S.E. 2d 688, *cert. den.,* 301 N.C. 527, 273 S.E. 2d 453 (1980), *cert. granted,* --- U.S. --- , 68 L.Ed. 2d 838, --- S.Ct. --- (1981). Such deposits supplement the general corporate law which does little to protect claimants and policyholders of insolvent insurers. Reserve made deposits pursuant to Article 20 having a face value of $185,000. The policyholders are entitled to the lien provided for in G.S. 58-185.

The deposits required by Article 20 and the general corporate law did not go far enough to protect North Carolina policyholders and claimants. To further this desired protection, the legislature adopted in 1947 as part of Article 17A the Uniform Insurers Liquidation Act. *See* 25 N.C. L. Rev. 429 (1947). It provides the mechanism for liquidation of Reserve. Illinois has also adopted the Uniform Insurers Liquidation Act. Ill. Rev. Stat. Ch. 73 §§ 833.1 to 833.13. A domiciliary receiver was appointed in Il-

linois. Under the Act, the Commissioner is appointed ancillary receiver in this State. G.S. 58-155.9(b); G.S. 58-155.12(a).

Both the North Carolina and Illinois versions of the Uniform Act make specific reference to "special deposits" and recognize the right of an ancillary receiver to liquidate claims against these deposits. G.S. 58-155.10(11), -155.12(b) and -155.15(c); Ill. Rev. Stat. Ch. 73 §§ 833.1(8), 833.6 and 833.8. A "special deposit claim" is defined as "any claim secured by a deposit made pursuant to statute for the security or benefit of a limited class or classes or persons. . . ." G.S. 58-155.10(11). The funds in question in this case are such deposits. Such deposits are expressly excluded from general assets. G.S. 58-155.10(5). The ancillary receiver "shall, as soon as practicable, liquidate from their respective securities those special deposit claims . . . which are proved and allowed in this State. . . ." G.S. 58-155.12(b). "The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority against their several special deposits in accordance with the provisions of the statutes governing the creation and maintenance of such deposits." G.S. 58-155.15(c). Thus, whatever Article 20, *i.e.*, G.S. 58-185, says about priorities, controls. Article 17A merely provides supplemental procedures to expedite the liquidation process and specifies the date on which all rights are fixed:

> The rights and liabilities of the insurer and of its creditors, policyholders . . . and all other persons interested in its estate shall, unless otherwise directed by the court, be *fixed as of the date on which the order directing the liquidation of the insurer is filed* in the office of the clerk of the court which made the order, subject to the provisions of G.S. 58-155.29 with respect to the rights of claimants holding contingent claims.

G.S. 58-155.25 (emphasis added).

In 1971, the legislature effected additional protection for North Carolina policyholders by enacting Article 17B, creating an organization, the Insurance Guaranty Association, which would promptly ascertain claims against an insolvent insurer and pay each covered claim of $100 to $300,000 which arises within thirty days of a determination of insolvency. G.S. 58-155.48(a)(1). The purpose of the association "is to provide a mechanism for the pay-

ment of covered claims under certain insurance policies, to avoid excessive delay in payment, and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer. . . ." G.S. 58-155.42. At least forty-five states have enacted versions of a Model Post-Assessment Guaranty Association Act. *See* Hank, Post-Assessment Guaranty Funds: Are They the Ultimate Solution to the Insolvency Problem? 1976 Insurance Law Journal 482. It serves as an adjunct to normal liquidation proceedings. *See Cooper Claims Service v. Arizona Insurance Guaranty Ass'n.*, 22 Ariz. App. 156, 158, 524 P. 2d 1329, 1331 (1974). The Guaranty Association is a non-profit unincorporated legal entity which covers all property and casualty insurance business transacted in North Carolina. G.S. 58-155.46. All insurance companies licensed to transact business in North Carolina and not exempted by G.S. 58-155.43 must become members of the Association. G.S. 58-155.46. The Association acts as insurer. G.S. 58-155.48(a)(2).

To pay covered claims, the Guaranty Association assesses its members based upon the percentage of business transacted in North Carolina. G.S. 58-155.48(a)(3). The Association has the power to borrow funds to pay covered claims. G.S. 58-155.48(b)(2). Once the Association pays a claim, any person receiving payment "shall be deemed to have assigned his rights under the policy to the Association to the extent of his recovery from the Association." G.S. 58-155.51(a). The Act also provides that "[t]he expenses of the Association . . . shall be accorded the same priority as the liquidator's expenses." G.S. 58-155.51(b).

This is a basic outline of the law as it existed in May 1979 when Reserve was adjudicated insolvent and G.S. 58-155.60 was enacted by the legislature. The parties refer to this statute as the "Quick Access" statute, and it is captioned "use of deposits made by insolvent insurer." It reads in pertinent part as follows:

> Notwithstanding any other provision of Chapter 58 of the General Statutes pertaining to the use of deposits made by insurance companies for the protection of policyholders, the Commissioner shall deliver to the Association, and the Association is hereby authorized to expend, any deposit or deposits previously or hereinafter made, whether or not required by statute, by an insolvent insurer to the extent those

> deposits are needed by the Association first to pay the covered claims in excess of one hundred dollars ($100.00) as required by this Article and then to the extent those deposits are needed to pay all expenses of the Association relating to the insurer.
>
> . . . .
>
> The Association shall account to the Commissioner and the insolvent insurer for all deposits received from the Commissioner hereunder, and shall repay to the Commissioner a portion of the deposits received which shall be equal to an amount computed by adding the lesser of the amount of the covered claim or one hundred dollars ($100.00) for each covered claim. Said repayment shall in no way prejudice the rights of the Association with regard to the portion of the deposit repaid to the Commissioner. After all of the deposits of the insolvent insurer have been expended by the Association for the purposes set out in this section, the member insurers shall be assessed as provided by this Article to pay any remaining liabilities of the Association arising under this Article.

The statute was ratified a week before Reserve was adjudged insolvent. The legislature specified that the Act would become effective upon ratification. 1979 N.C. Sess. Laws c. 628, § 2. The Guaranty Association sought access to the special deposits pursuant to this statute and was opposed by both the Commissioner and policyholders of Reserve.

No one contends the Quick Access statute fails to pass constitutional muster except in its application to the facts of this case. The policyholders contend that application of the statute's provisions to the Reserve insolvency will result in a retroactive divestment of the liens of North Carolina policyholders which were effective before the statute was ratified. The Commissioner contends that although the Guaranty Association has the right to use the deposits pursuant to the Quick Access statute, the Association is required to repay him the full amount of the deposit.

The Guaranty Association contends the Quick Access statute is a procedural and remedial statute intended to expedite payment of claims against the insolvent insurer by using the special deposit to pay those claims directly rather than later reimbursing

the Guaranty Association for the claims. Thus, it does not divest policyholders of any rights in the deposits but merely provides an expedited procedure for obtaining those deposits. The Association also contends the Commissioner is not entitled to a full repayment of deposits.

The Quick Access statute applies "[n]otwithstanding any other provision of Chapter 58 of the General Statutes pertaining to the use of deposits made by insurance companies for the protection of policyholders. . . ." The statute thus controls should there be any conflict in pre-existing provisions. The statute goes on to provide that "the Commissioner shall deliver to the Association" and "the Association is hereby authorized to expend . . ." the deposit. The statute expressly mandates the delivery to and use of the deposit by the Guaranty Association. The statute applies "to any deposit or deposits previously or hereinafter made. . . . " This coupled with the legislative mandate that the statute apply on ratification is a clear expression that the legislature intended the statute to apply to the present case. The policyholders make four arguments that this retroactive application of the statute creates new classes and priorities of claims against deposits.

The policyholders argue that as the Association pays claims and expenses from the deposit, the "lien would dwindle and possibly disappear." This is not so. The lien of the policyholders remains as long as needed. The Association has subrogation rights to the liens. G.S. 58-155.51(a). Thus, as the Association pays claims, it continuously acquires the liens. Once the Guaranty Association has paid claims between $100 and $300,000, and has returned deposit funds covering claims less than $100, all liens in the deposit pursuant to G.S. 58-185 are extinguished or have been acquired by the Association. The policyholders still have a lien until satisfied by the Association or the Commissioner. The lien rights of policyholders transfer with the deposit proceeds when they pass from the Commissioner to the Association. *See Surety Corp. v. Sharpe*, 236 N.C. 35, 72 S.E. 2d 109 (1952).

The policyholders next argue the statute eliminates interest on the deposits that would otherwise be earned and applied to payment of liabilities pursuant to G.S. 58-183. The only policyholders who can complain on this point are those with claims under $100. All other claims are promptly paid by the

Association. The loss in interest is de minimis, particularly in light of the Association's quicker payment of claims in amounts greater than the deposits.

The policyholders contend that G.S. 58-155.48(a)(1) creates an entirely separate class of claims not covered by G.S. 58-185. The Association is required by G.S. 58-155.48(a)(1) to pay claims on policies terminated by the insolvency of an insurer arising within a thirty-day period *after* the adjudication of insolvency and before an insured has replaced the policy. On the other hand, G.S. 58-155.25 fixes the rights and liabilities of the parties as of the day of insolvency unless otherwise specified by the court. Along the same lines, the policyholders contend the "$100-over $300,000-under" exclusion conflicts with the pro rata distribution requirement of G.S. 58-185, thus extending coverage at the expense of their liens. This is not so. Neither the thirty-day extension nor the amount of the exclusion expands the liens. The liens of policyholders remain the same and remain limited pro rata "for the amounts due them." G.S. 58-185.

Finally, the policyholders argue that the Association can consume the deposit funds for Association expenses and thereby dilute their fixed rights. Such is not the case. The statute does authorize the use of deposits after claims of over $100 are paid "to the extent those deposits are needed to pay all expenses of the Association relating to the insurer." G.S. 58-155.60. However, this is only a temporary use. All deposits must be applied to claims and liabilities except for a minor amount related to the Commissioner's expenses in selling the bonds. G.S. 58-184. The only rights the Association has against the deposits are the subrogation rights under G.S. 58-155.51(a). The Association does not have a right to debit deposits for its expenses unless *all* deposit liens are satisfied and there is a surplus of deposit proceeds.

The expenses of the Association are accorded "the same priority as the liquidator's expenses." G.S. 58-155.51(b). However, that priority extends only to general assets. Special deposits are not general assets. Thus, the mechanism of this statute does nothing to dilute any rights of policyholders.

The Commissioner contends the Association is required to repay all of the deposit to the Commissioner. His authority for

this contention is the statute's provisions that "the Association shall *account* to the Commissioner and the insolvent insurer for all deposits received from the Commissioner hereunder." The Commissioner would have us construe the word "account" to mean "pay over" to the receiver the entire special deposit of $185,000. The Commissioner also cites G.S. 58-155.51(c), which requires the Association to file statements with the liquidator or receiver to "preserve the rights of the Association against the assets of the insolvent insurer," as authority for his position that the Association has only temporary use of the deposits. We reject the Commissioner's argument insofar as it would require absurd repayments of funds the Association has paid to policyholders. The Association must account to the Commissioner on how it uses and applies *all* the funds. When all is said and done, it must establish that every cent of the money was applied to claims or was returned to the Commissioner. The Association can use the funds at the outset to cover its operating expenses. However, the Association has no permanent right in these funds for operating expenses unless all claims are paid and deposit funds remain. Thus, the only repayment to the Commissioner is for the claims under $100 which the Association is not authorized to pay. After all claims are paid, deposit funds can be used by the Association and not refunded to the Commissioner since he would then have no claimants to reimburse.

In summary, the Court of Appeals was correct in its interpretation of G.S. 58-155.60 as not affecting the lien rights of policyholders under G.S. 58-185. The Association has the initial right to use deposit funds to cover operating expenses incident to the insolvent. However, *all* deposit funds must be paid to claimants pro rata as provided by G.S. 58-185. If all claimants are satisfied either directly by the Association or by the Commissioner (if the claim is under $100) and deposit funds remain, then and only then are such funds to be permanently credited to the Association for its expenses. These deposit funds which are provided to the Association as "seed money" must bear fruit for the policyholders and claimants for whom they were placed in trust.

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

Modified and affirmed.

IRENE B. FOSTER v. WINSTON-SALEM JOINT VENTURE, A GENERAL PARTNERSHIP; JACOBS, VISCONSI & JACOBS COMPANY; CENTER RIDGE CO.; BELK-HENSDALE COMPANY OF FAYETTEVILLE, N.C., INC.; SEARS, ROEBUCK AND COMPANY; AND J. C. PENNEY PROPERTIES, INC.

No. 124

(Filed 17 August 1981)

1. **Negligence § 55— invitee injured by acts of criminal—sufficiency of complaint to state claim**

If an invitee alleges in a complaint that he was on the premises of a store owner during business hours for the purpose of transacting business thereon and that while he was on the premises injuries were sustained from the criminal acts of a third person, which acts were reasonably foreseeable by the store owner and which could have been prevented by the exercise of ordinary care, then the plaintiff has set forth a cause of action in negligence which, if proved, would entitle plaintiff to recover damages from the store owner.

2. **Negligence § 55— invitee injured by criminal—sufficiency of complaint to state claim**

Plaintiff's complaint was sufficient to state a cause of action in negligence against defendant shopping mall owners where the complaint alleged that, at the time plaintiff was assaulted in defendants' parking lot, she was present on the premises during business hours for the purpose of shopping at defendants' mall; had defendants taken adequate precautions to provide for the safety of the customers, plaintiff would not have sustained the injuries complained of; defendants breached their duty adequately to patrol and provide security for the mall parking lot, and breach of this duty was the proximate cause of plaintiff's injuries; in the year preceding the assault upon plaintiff, at least twenty-nine incidents of crime were reported as having taken place in the mall parking lot; and these incidents were sufficient to charge defendants with the knowledge that the parking lot was unreasonably dangerous to the customers who used it.

3. **Negligence § 57.10— assault in mall parking lot—summary judgment for owners improper**

In an action to recover for injuries sustained by plaintiff during an assault in the parking lot of defendants' shopping mall, the trial court erred in entering summary judgment for defendants where genuine issues of fact existed as to whether notice to defendants of thirty-one criminal incidents in the parking lot during the preceding year placed defendants on notice that the likelihood of criminal conduct existed in the parking lot and as to whether defendants, by providing only one guard to patrol the large parking area during the busy shopping period five days before Christmas, breached their duty to exercise reasonable care to maintain the shopping center premises in such a manner that they might be used safely by the customers invited thereon.

Justice CARLTON dissenting.

Chief Justice BRANCH concurs in the dissenting opinion.

PLAINTIFF appeals as a matter of right from the decision of the Court of Appeals, 50 N.C. App. 516, 274 S.E. 2d 265 (1981) (opinion by *Judge Hill* with *Judge Arnold* concurring and *Judge Wells* dissenting). The Court of Appeals affirmed summary judgment entered in favor of defendant by *Hairston, J.*, at the 28 January 1980 Civil Session of Superior Court, DAVIE County.

This case arose out of an assault on plaintiff, Irene B. Foster, in the parking lot of Hanes Mall Shopping Center in Winston-Salem, North Carolina. Defendants are the owners of Hanes Mall.

Plaintiff drove her car to Hanes Mall on 20 December 1976 and parked near the entrance of Belk's Department Store. She purchased several items at the shopping center and returned to her car at approximately 4:30 p.m. As she was placing her purchases in the car she was assaulted by two unidentified males who beat her, violently pushed her onto the seat of the car, and then threw her to the pavement, continuing to beat and kick her. The assailants robbed plaintiff of her purse and about $145.00. After the two males fled, plaintiff crawled across the parking lot to Belk's Department Store and reported the incident.

Plaintiff brought this action claiming that defendants were negligent in failing to provide adequate security for the protection of their patrons in the mall parking lot, and that this negligence was the proximate cause of plaintiff's injuries. Defendants' own evidence, presented with their motion for summary judgment, indicates that there were thirty-six criminal incidents reported at the mall during a period of one year prior to the assault on plaintiff. From the Court of Appeals' decision affirming summary judgment entered in favor of defendants, plaintiff appeals as a matter of right pursuant to G.S. 7A-30(2).

Hutchins & Tyndall by Richard D. Ramsey for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and James M. Stanley, Jr. for defendant-appellees.

Johnson, Gamble & Shearon by Samuel H. Johnson amicus curiae for North Carolina Merchants Association.

COPELAND, Justice.

Plaintiff presents two issues for our determination; first, whether plaintiff has a cause of action against defendants in negligence for their alleged failure to provide adequate security in the Hanes Mall parking lot, and second, if it is determined that plaintiff has stated a claim for relief, whether she has presented sufficient evidence in support of her claim to withstand defendants' motion for summary judgment. For the reasons stated below, we affirm that portion of the Court of Appeals' decision which held that plaintiff had stated a proper claim for relief, reverse that portion of the decision which found that plaintiff had failed to present sufficient evidence to withstand defendants' motion for summary judgment, and remand for a trial on the merits.

It is well established that an individual who enters the premises of a store as a customer during business hours holds the status of a business invitee for purposes of establishing the duty owed to the individual by the owner of the premises. *Smithson v. W. T. Grant Co.*, 269 N.C. 575, 153 S.E. 2d 68 (1967); *Long v. National Food Stores, Inc.*, 262 N.C. 57, 136 S.E. 2d 275 (1964). A parking lot provided by the owner for the use of his invitees is considered part of the premises of the store to which the duty owed by the owner extends. *Game v. Charles Stores Company, Inc.*, 268 N.C. 676, 151 S.E. 2d 560 (1966). The general duty imposed upon the owner is not to insure the safety of his customers, but to exercise ordinary care to maintain his premises in such a condition that they may be used safely by his invitees in the manner for which they were designed and intended. *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 245 S.E. 2d 507 (1978); *Wagner v. Delly-Land Delicatessen, Inc.*, 270 N.C. 62, 153 S.E. 2d 804 (1967); *Long v. National Food Stores, Inc., supra.*

Ordinarily the store owner is not liable for injuries to his invitees which result from the intentional, criminal acts of third persons. It is usually held that such acts cannot be reasonably foreseen by the owner, and therefore constitute an independent, intervening cause absolving the owner of liability. *Williams v. Mickens*, 247 N.C. 262, 100 S.E. 2d 511 (1957); *Ross v. Atlantic Greyhound Corp.*, 223 N.C. 239, 25 S.E. 2d 852 (1943); *Ward v. Southern Railway*, 206 N.C. 530, 174 S.E. 443 (1934). Nevertheless, the Court recognized in these cases that where circumstances ex-

isted which gave the owner reason to know that there was a likelihood of conduct on the part of third persons which endangered the safety of his invitees, a duty to protect or warn the invitees could be imposed. In *Aaser v. City of Charlotte*, 265 N.C. 494, 499, 144 S.E. 2d 610, 615 (1965), this Court discussed a landowner's general duty to protect his invitees from injury caused by the acts of third persons as follows:

> "In the place of amusement or exhibition, just as in the store, when the dangerous condition or activity . . . arises from the act of third persons, whether themselves invitees or not, the owner is not liable for injury resulting unless he knew of its existence or it had existed long enough for him to have discovered it by the exercise of due diligence and to have removed or warned against it."

See also Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E. 2d 678 (1977).

[1] The Restatement (second) of Torts, Section 344, sets forth the duty owed by a store owner to protect his invitees from the acts of third persons as follows:

> "A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it."

Comment f to section 344 further provides:

> "Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the

> visitor even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of the third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection."

Thus, under both the Restatement (Second) of Torts and the prior decisions of this Court, foreseeability is the test in determining the extent of a landowner's duty to safeguard his business invitees from the criminal acts of third persons. *See Tyndall v. United States*, 295 F. Supp. 448 (E.D.N.C. 1969). If an invitee, such as the plaintiff in this case, alleges in a complaint that he or she was on the premises of a store owner, during business hours for the purpose of transacting business thereon, and that while he or she was on the premises injuries were sustained from the criminal acts of a third person, which acts were reasonably foreseeable by the store owner, and which could have been prevented by the exercise of ordinary care, then the plaintiff has set forth a cause of action in negligence which, if proved, would entitle that plaintiff to recover damages from the store owner.

This holding is supported by the decisions of other jurisdictions. Under facts nearly identical to those of the case before us, the court in *Morgan v. Bucks Association*, 428 F. Supp. 546 (E.D. Pa. 1977), followed Section 344 of the Restatement (Second) of Torts and upheld a jury verdict in favor of plaintiff against the defendant shopping center owner where plaintiff presented sufficient evidence to submit to the jury the question of whether defendant knew or had reason to know that assaults on customers might occur in the shopping center parking lot. The court in *O'Brien v. Colonial Village, Inc.*, 119 Ill. App. 2d 105, 255 N.E. 2d 205 (1970), likewise acknowledged that a cause of action in negligence could be established under facts similar to those of the case *sub judice*. In *O'Brien* the plaintiff's complaint was dismissed for failure to allege that defendants had knowledge of previous incidents or circumstances which would indicate their awareness of any danger of criminal activity occurring in the shopping mall parking lot. The court noted that had plaintiff amended her complaint to allege such awareness on the part of defendants, the

court would have been compelled to deny defendants' motion to dismiss. *Accord Kenny v. Southeastern Pennsylvania Transportation Authority*, 581 F. 2d 351 (3d Cir. 1978); *Taylor v. Centennial Bowl, Inc.*, 65 Cal. 2d 114, 416 P. 2d 793, 52 Cal. Rptr. 561 (1966); *Atamian v. Supermarkets General Corp.*, 146 N.J. Super. 149, 369 A. 2d 38 (1976). *But see Cornpropst v. Sloan*, 236 Tenn. 188, 528 S.W. 2d 188 (1975). We find the holdings of the courts in *Morgan* and *O'Brien* well reasoned and in compliance with the general established principles of tort liability for negligence.

[2] Plaintiff in the present action alleged in her complaint that at the time she was assaulted in defendants' parking lot, she was present on the premises during business hours for the purpose of shopping at the mall owned by defendants. She further stated that had defendants taken adequate precautions to provide for the safety of their customers, she would not have sustained the injuries complained of. She thus contends that defendants breached their duty to adequately patrol and provide security for the mall parking lot, and that the breach of this duty was the proximate cause of her injuries. In support of her claim that defendants had a duty to provide security measures to protect their customers in the parking lot, plaintiff contends that in the year preceding the assault upon her, at least twenty-nine incidents of crime were reported as having taken place in the mall parking lot. These incidents, she maintains, were sufficient to charge defendants with the knowledge that the parking lot was unreasonably dangerous to the customers who used it. We find these allegations sufficient to state a cause of action against defendants in negligence.

[3] In addition, we hold that plaintiff presented sufficient evidence in support of her claims to withstand defendants' motion for summary judgment. Summary judgment is properly granted only "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." G.S. 1A-1, Rule 56(c); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. The purpose of Rule 56 is not to allow the court to decide an issue of fact, but to determine whether a genuine issue of fact exists and thereby

eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim or defense of a party is exposed. *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E. 2d 54 (1980); *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

Defendants claim that plaintiff failed to present sufficient proof to withstand their motion for summary judgment on the issues of (1) the foreseeability of criminal acts in the mall parking lot which would create a duty in defendants to provide adequate protection for its customers and (2) assuming such a duty exists, that defendants breached this duty by failing to provide adequate security measures.

In support of her claim that defendants were aware that a likelihood of criminal conduct existed in the mall parking lot, plaintiff submitted an interrogatory listing thirty-one incidents of criminal activity reported on defendants' premises during the period from 1 January 1976 to 19 December 1976, the day before the assault upon her. Defendants acknowledged that these incidents had been reported and that they were aware of them. Although only four or five of the reported crimes were characterized as "assaults," we believe the evidence of repeated incidents of criminal activity could be sufficient for the jury to determine that defendants knew or had reason to know of the existence of a likelihood of injury to its customers from the criminal acts of third persons. It is axiomatic that to establish the element of foreseeability, the plaintiff need not prove that the defendant foresaw the injury in the exact form in which it occurred. The plaintiff need only show that in the exercise of reasonable care the defendant should have foreseen that some injury would result from his act or omission or that consequences of a generally injurious nature might have been expected. *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979); *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972); *Johnson v. Lamb*, 273 N.C. 701, 161 S.E. 2d 131 (1968). We cannot hold as a matter of law that the thirty-one criminal incidents reported as occurring on the shopping mall premises within the year preceding the assault on plaintiff were insufficient to charge defendants with knowledge that such injuries were likely to occur. The issue of foreseeability should therefore be determined by the jury, and the Court of Appeals erred in affirming the trial court's order granting summary judgment in favor of defendants.

We likewise find that plaintiff presented adequate evidence of defendants' breach of their duty owed to her to withstand defendants' summary judgment motion. The manager of Hanes Mall, who had the responsibility to provide security for the shopping center, testified upon deposition that only one guard had been employed to patrol the parking lot on the date that plaintiff was assaulted. He further stated that he had represented to the public that the mall had augmented its security measures for the Christmas season, but that he had taken no steps to increase the number of guards patrolling the parking lot area. We believe that a jury could reasonably find that by providing only one guard to patrol the large parking area during the busy shopping period five days before Christmas, defendants breached their duty to exercise reasonable care to maintain the shopping center premises in such a manner that they might be used safely by the customers invited thereon. Since a triable issue of fact exists, summary judgment in favor of defendants was improperly granted.

Accordingly, we affirm that portion of the Court of Appeals' opinion which found that plaintiff had stated a proper claim for relief, reverse that portion of the decision which held that plaintiff had failed to present sufficient evidence in support of her claim to withstand defendants' motion for summary judgment, and remand to the Court of Appeals for further remand to the Superior Court of Davie County for a trial on the merits.

Affirmed in part, reversed in part, and remanded.

Justice CARLTON dissenting.

I must respectfully dissent. I fear that the majority has created a duty, with a potentially limitless scope, on the part of landowners to protect their invitees against sudden and intentional criminal acts of third parties. I find the majority opinion objectionable for two reasons: (1) it gives no persuasive reason for creating such a duty and (2) plaintiff has not alleged sufficient facts to show that a *criminal assault* was reasonably foreseeable by the defendant.

The majority attempts to predicate the recognition of the duty on the foreseeability of criminal activity. This, I believe, is a fundamental error. As stated by Chief Judge Reilly in *Cook v. Safeway Stores, Inc.*, 354 A. 2d 507, 508-09 (D.C. 1976):

> "Everyone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide 'police' protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner. And since hijacking and attack upon occupants of motor vehicles are also foreseeable, it would be the duty of every motorist to provide armed protection for his passengers and the property of others. Of course, none of this is at all palatable.
>
> "The question is not simply whether a criminal event is foreseeable, but whether a *duty* exists to take measures to guard against it. Whether a *duty* exists is ultimately a question of fairness." . . . [*Goldberg v. Housing Authority of City of Newark*, 38 N.J. 578, 583, 186 A. 2d 291, 293 (1962) (Emphasis in original).]

The question this Court should first address is whether it is *fair* to impose upon a retail merchant a duty to protect its invitees from sudden and intentional criminal acts of third parties. Such an inquiry should take into account the relationship of the parties, the nature of the risk, and the public interest in the proposed solution. As stated by the New Jersey Supreme Court in a case involving the duty of a landowner to provide police protection for tenants of a housing project:

> Fairness ordinarily requires that a man be able to ascertain in advance of a jury's verdict whether the duty is his and whether he has performed it. To which multi-family houses would the duty apply? Would it depend upon the number of tenancies? If so, can we now fix the number? And if the duty springs from a combination of tenancies and prior unlawful events, what kind of offenses will suffice, and in what number, and will crimes next door or around the corner or in the neighborhood, raise the obligation? And if a prescient owner concludes the duty is his, what measures will discharge it? It is an easy matter to know whether a stairway is defective and what repairs will put it in order. Again, it is fairly simple to decide how many ushers or guards suffice at a skating rink or a railroad platform to deal with the crush of a crowd and the risks of unintentional injury which the nature of the business creates, but how can one know

> what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic? Must the owner prevent all crime? We doubt that any police force in the friendliest community has achieved that end. How then can the owner know what is enough to protect the tenants in their persons and property? . . . We assume that advocates of liability do not intend an absolute obligation to prevent all crime, but rather have in mind some unarticulated level of effectiveness short of that goal. Whatever may be that degree of safety, is there any standard of performance to which the owner may look for guidance? We know of none, and the record does not suggest one, and we are at a loss to understand what standard the jurors here employed. The charge to the jury was unrevealing; it simply left to 12 men and women the task of deciding whether a prudent owner would have done more, and whether, if defendant had, the robbers here would likely have been deterred. . . .

Goldberg v. Housing Authority of Newark, 38 N.J. 578, 589-90, 186 A. 2d 291, 297 (1962); *accord, Ellis v. Safeway Stores, Inc.*, 410 A. 2d 1381 (D.C. 1979); *Cook v. Safeway Stores, Inc.*, 354 A. 2d 507 (D.C. 1976); *Davis v. Allied Supermarkets, Inc.*, 547 P. 2d 963 (Okla. 1976); *Cornpropst v. Sloan*, 528 S.W. 2d 188 (Tenn. 1975).

Another consideration which should be weighed in the balance is whether the owner has a right to develop, or should be allowed to develop, a private police force to patrol its parking lots. *See Goldberg v. Housing Authority of Newark*, 38 N.J. 578, 186 A. 2d 291. Although the right to maintain a security force is unquestioned, security forces operate for the benefit of the merchant to protect him from theft and achieve their goal primarily through their conspicuousness. If protection of patrons becomes the goal of private security forces, then the security personnel will become members of a private police force who, like their public counterparts, will require special training and special skills. They must be trained to detect potential criminals and to do whatever is required to prevent assaults, if such assaults are foreseeable. In my opinion, the creation of myriad private police forces and the shift of law enforcement duties to the private sector amounts to taking the law into one's own hands and contravenes public policy.

Even if I were to agree that a limited duty to protect its patrons on the part of a merchant could exist I cannot agree that

it arises in this case. A duty to protect arises only in the event a criminal assault is foreseeable. During the fifteen months prior to the assault on plaintiff, a total of approximately thirty-seven criminal incidents occurring in the parking lot had been reported to defendant. Of these, twenty-seven involved larceny or damage to property; only six or seven involved assaults on a person; the remainder involved reckless driving, public drunkenness and indecent exposure.

From these statistics, I would agree that while larceny of personal property was foreseeable, a physical assault was not. The incidence of physical assault was less than one every two months. If a duty to protect arises in this case because of the foreseeability of certain criminal activity, it must be a duty to protect against larceny, the only type of criminal activity which was even arguably foreseeable.

The cases relied on by the majority premise the existence of the duty to protect against personal assaults on patrons on the foreseeability of criminal assaults. In those cases, criminal assaults were found to be foreseeable only because of the high incidence of *criminal assaults* in the past. In short, the foreseeability was only as broad as the type of criminal activity which had occurred in the past. These courts did not state, or even imply, that a history of criminal assaults made other crimes, such as larceny, foreseeable. Here, the majority has premised the foreseeability of criminal assaults upon the history of larceny in the mall parking lot. The cases the majority has cited in support of its reasoning provide no support for making the scope of foreseeability broader than the scope of past experience.

Additionally, I would argue that the Restatement (Second) of Torts supports my argument that criminal assaults are foreseeable only if the same type of criminal activity has occurred in the past at sufficiently high rates. Section 344 of the Restatement imposes liability for "*physical harm*" (emphasis added) when the possessor of the land should, in the exercise of reasonable care, "discover that *such acts* are being done or are likely to be done." (Emphasis added.) The duty to protect, as explained by comment f, arises whenever past experience indicates "that there is a likelihood of conduct on the part of third persons in general which is *likely to endanger the safety of the visitor.*" (Emphasis

added.) These statements indicate that before the duty to protect arises, an endangerment of the patrons' *safety* must be foreseeable due to *past experience.* If foreseeability is limited to the types of criminal activity which have frequently occurred, then a high incidence of larceny cannot make a criminal assault foreseeable.

Finally, I would dismiss plaintiff's complaint because it fails to allege that the incidence of criminal activity in defendant's parking lot was any higher than the crime rate for the surrounding neighborhood. It seems to me that if the parking lot was just as safe, or as dangerous, as the surrounding area, no duty on the part of the owner should arise because the foreseeability of criminal activity is equally obvious to the owner or the patron. It must be remembered that to fulfill the duty to protect, the defendant must either correct the condition or warn of it. When the incidence of criminal activity within the borders of a shopping center parking lot is the same as without, the patron is simply taking a *known* and *accepted* risk in venturing out. Additionally, if the crime rates are substantially the same, what legal theory or social policy compels the owner to make his premises safer? What right does a patron have to demand that the store premises be safer than the general area in which it is situated? And how safe is safe enough?

Although I recognize the commendability of promoting safety in quasi-public places such as shopping centers, I remain resolute that the route chosen by the majority is not the appropriate means. For the above reasons, I vote to affirm the Court of Appeals and uphold dismissal of plaintiff's complaint for failure to state a claim for which relief can be granted.

Chief Justice BRANCH concurs in this dissenting opinion.

FRANCES MADDOX v. COLONIAL LIFE AND ACCIDENT INSURANCE COMPANY

No. 18

(Filed 17 August 1981)

Insurance § 52— select risk accident policy—reduction clause for "shooting self-inflicted"

In an action to recover under a "Master Select Risk Accident Policy" providing coverage for death caused by "accidental means" and excluding coverage for death by suicide, a clause of the policy reducing the beneficiary's recovery to one-fifth of the face amount of the policy for death resulting from "shooting self-inflicted" was inapplicable where insured was killed by a bullet from a pistol which had been handed to insured by his son, the pistol was fired while still in its holster, the pistol was found a few feet from insured's body, and the gun could discharge if it struck the ground while holstered, and the beneficiary was entitled to recover the face amount of the policy.

Justices HUSKINS, EXUM, BRITT and MEYER concur in the result.

Justice CARLTON concurring in the result.

Chief Justice BRANCH joins in the concurring opinion.

PLAINTIFF appeals as a matter of right from the decision of the Court of Appeals, 49 N.C. App. 251, 271 S.E. 2d 103 (1980) (opinion by *Judge Harry C. Martin* with *Judge Clark* concurring and *Judge Hill* dissenting). The Court of Appeals reversed summary judgment in favor of plaintiff entered by *McDarris, J.*, at the 10 December 1979 Session of District Court, SWAIN County, and remanded to that court for entry of summary judgment in favor of defendant.

Plaintiff brought this action as the named beneficiary of a "Master Select Risk Accident Policy" issued by defendant, insuring the life of Carter Maddox. The policy was in effect at the time of Carter Maddox's death on 26 October 1977.

On that date the deceased and his son, Keith Maddox, were working at a water tank or reservoir. Keith was carrying a .41 caliber magnum Ruger pistol in a holster. When he began working at the tank, Keith handed the holstered pistol to Carter Maddox. Shortly thereafter Keith heard a sound, turned around, and saw his father sitting or lying on the ground. He had been injured by a bullet from the pistol and subsequently died as a result of

the gunshot wound. The pistol was found on the ground a short distance from Carter Maddox with the muzzle end of the holster torn out by the discharge of the pistol. No other persons were in the vicinity at the time of the incident. The parties agree that the pistol could fire if it was dropped on the ground while holstered.

Plaintiff contends that upon this evidence she was entitled to receive the face amount of the policy, $3,750.00. Defendant contends that plaintiff's claim is governed by the reduction clause of the policy, and therefore plaintiff is entitled to recover only $750.00.

Both plaintiff and defendant filed motions for summary judgment. The trial court denied defendant's motion and entered summary judgment for plaintiff in the amount of $3,750.00. The Court of Appeals reversed, Judge Hill dissenting, and remanded to the trial court for entry of summary judgment in favor of defendant. Plaintiff appeals as a matter of right pursuant to G.S. 7A-30(2).

Holt, Haire & Bridgers, P.A., by Phillip Haire for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and James M. Stanley, Jr., for defendant appellee.

COPELAND, Justice.

The sole question presented by this appeal is whether the reduction clause of the "Master Select Risk Accident Policy" issued by defendant to insure the life of Carter Maddox applies in this case to reduce plaintiff's recovery to one-fifth of the face amount of the policy. For the reasons stated below, we reverse the Court of Appeals' majority opinion and find that the trial court properly held the reduction clause inapplicable and correctly granted summary judgment in favor of plaintiff for the face amount of the policy.

The provisions of the policy which we are called upon to construe state in pertinent part as follows:

EXCEPTIONS AND REDUCTIONS

> The insurance under this policy shall not cover: (a) suicide while sane or insane; . . .

. . . .

> For death covered by the provisions of this policy, where it results from . . . shooting self-inflicted, . . . the amount payable shall be one-fifth the amount otherwise payable for accidental death. . . .

Defendant contends and the Court of Appeals held that although the shooting which resulted in Carter Maddox's death was accidental, it was also "self-inflicted" within the meaning of the reduction clause, and therefore plaintiff's recovery was limited to one-fifth of the face amount of the policy.

In interpreting the relevant provisions of the insurance policy at issue, we are guided by the general rule that in the construction of insurance contracts, any ambiguity in the meaning of a particular provision will be resolved in favor of the insured and against the insurance company. Exclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy. The various clauses are to be harmoniously construed, if possible, and every provision given effect. *Woods v. Nationwide Mutual Insurance Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978); *Grant v. Emmco Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978); *Wachovia Bank & Trust Co. v. Westchester Fire Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970). An ambiguity exists where, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions asserted by the parties. *Wachovia Bank & Trust Co. v. Westchester Fire Insurance Co., supra.*

After considering the disputed provisions of the policy at issue in light of the above rules of insurance contract construction, we hold that the reduction clause does not apply to limit plaintiff's recovery in the case *sub judice.* We initially note that absent the applicability of an exclusion or reduction clause, Carter Maddox's death was within the coverage of the policy as a death brought about by "accidental means." The policy expressly provides "indemnity for loss of life . . . caused by bodily injuries effected through accidental means, as herein limited and provided." The term "accidental means" has been interpreted by this Court as follows:

> " 'accidental means' refers to the occurrence or happening which produces the result and not to the result. That is, 'accidental' is descriptive of the term 'means.' The motivating, operative and causal factor must be accidental in the sense that it is unusual, unforeseen and unexpected. . . . (T)he emphasis is upon the accidental character of the causation—not upon the accidental nature of the ultimate sequence of the chain of causation." *Fletcher v. Trust Co.*, 220 N.C. 148, 150, 16 S.E. 2d 687, 688 (1941). *See also Chesson v. Pilot Life Insurance Co.*, 268 N.C. 98, 150 S.E. 2d 40 (1966).

The pistol discharge which caused Carter Maddox's death occurred while the gun was still holstered. The parties agreed that the pistol could fire if it was dropped on the ground while holstered. The evidence is thus clear that the shooting was brought about by an unusual, unforeseen, and unexpected event which was an "accidental means" within the policy description.

We find that the majority in the Court of Appeals erred in interpreting the clause reducing recovery for death resulting from "shooting self-inflicted" as applying to a situation, such as the one before us, in which the shooting was brought about by accidental means. The Court of Appeals reached its conclusion by finding no ambiguity in the disputed provisions of the policy and holding that a "shooting self-inflicted" necessarily includes the situation in which an insured accidentally shoots himself. The majority reasoned that one could shoot oneself with a pistol, causing death, in one of only two ways: "(1) intentionally, that is, suicide, and (2) accidentally." 40 N.C. App. at 253, 271 S.E. 2d at 104. Where the shooting resulted from any intentional act, the court held that the beneficiary was precluded from any recovery under the suicide exclusion. Therefore, for the reduction clause pertaining to "shooting self-inflicted" to have any effect, it must be construed to apply to the insured's accidental shooting of himself. The court further reasoned that since Carter Maddox's death resulted from an accidental shooting of himself, the reduction clause applied to limit plaintiff's recovery under the policy. We agree that the reduction clause and the suicide exclusion must be construed together so that each provision has a separate application and effect. However, we believe the Court of Appeals based its decision on two erroneous premises; first, that no ambiguity exists in the disputed provisions of the policy, and second, that

one could shoot oneself in only two ways. The court interpreted the term "suicide" as it appears in the policy to include any situation in which one is killed by his own intentional actions. Since no definition of suicide appears in the policy, the court must define the term in a manner consistent with the context in which it is used and the meaning accorded it in ordinary speech. *Woods v. Nationwide Insurance Co., supra.* "Suicide" is defined in Webster's Third International Dictionary 2286 (1971), as an "act or an instance of taking one's own life voluntarily and intentionally." Black's Law Dictionary 1286 (5th ed. 1979) refers to "suicide" as follows: "Self-destruction: the deliberate termination of one's existence." From these definitions it is clear that in its ordinary use, the term suicide embodies not merely an intent to do the act which ultimately results in one's own death, but the intent to end one's own life. This interpretation of suicide is consistent with the context in which it is used in the insurance policy at issue and comports with the general rule that exclusions in an insurance policy are to be strictly construed against the company. Applying this definition of suicide to the rationale employed in the Court of Appeals' majority opinion, it appears that there are three ways in which one could shoot oneself with a pistol, causing death: (1) with the intent to kill oneself, which is suicide, (2) with the intent to perform the act which ultimately resulted in one's own death, but without the intent to kill oneself, and (3) accidentally. Considering these three methods in light of the policy provisions which we are compelled to construe in this case, we find that the clauses may be harmoniously interpreted in a manner which allows plaintiff to recover the full face amount of the policy. The provision excluding coverage for death by suicide would apply to the situation in which one shot oneself with the intent to take one's own life. The clause reducing coverage for deaths caused by a "shooting self-inflicted" by one-fifth of the amount otherwise recoverable would apply in the event that the insured intended the act of shooting, which shooting ultimately resulted in his death, but did not intend to kill himself. In a situation such as the one before us, where the shooting was apparently accidental and the resulting death unintended, neither the suicide exclusion nor the reduction provision applies, and the beneficiary may recover the face amount of the policy due to the insured's death by "accidental means."

Our interpretation of the term "shooting self-inflicted" as referring to only those shootings which occur when the insured

wills or intends to employ the firearm is supported by the decisions of other jurisdictions. In *National Security Insurance Co. v. Ingalls,* 323 So. 2d 384 (Ala. Civ. App. 1975), the insured was injured when an object fell onto a shotgun resting on the floorboard of his car, causing it to discharge and strike the insured in the leg. The policy under which he was insured for injury or death caused by "accidental means" contained a clause reducing recovery to twenty-five percent of the amount otherwise payable where the injury or death resulted from a "shooting accidentally self-inflicted." In construing the phrase "shooting accidentally self-inflicted," the court noted that "[a]n injury is 'self-inflicted' only when the insured wills it or intends to cause it." The reduction clause, said the court, applies only when "the injury results from direct, immediate, and conscious employment of a firearm by the victim." 323 So. 2d at 386. *See also Lynch v. Mutual Life Insurance Co. of New York,* 48 A. 2d 877 (Pa. Super. Ct. 1946). The reduction clause of the policy at issue in the case before us lends itself even more readily to this interpretation, in that the term "shooting self-inflicted" is not modified by the word "accidentally."

The Court of Appeals' majority opinion correctly cited two cases, *Colonial Life and Accident Insurance Co. v. Cook,* 374 So. 2d 1288 (Miss. 1979), and *Lemmon v. Massachusetts Protective Association,* 53 F. 2d 255 (N.D. Okla. 1931), as authority for the proposition that a "shooting self-inflicted" includes a shooting brought about by accidental, unintentional means. However, we find both decisions distinguishable from the case *sub judice.* In the *Cook* case, the court was interpreting a clause which reduced recovery where the insured's death or injury was caused by a "shooting accidentally self-inflicted." Since the reduction provision at issue in this case reads "shooting self-inflicted," the court's decision in *Cook* is not directly contrary to our present holding.

The policy provision interpreted in *Lemmon* was more similar to the one before us, in that it provided for reduced coverage in the event that death was caused by a "shooting self-inflicted." In that case, however, the court did not follow the rules of construction by which this Court is guided. The general rules that exclusion and reduction clauses in an insurance contract are to be strictly construed against the company, and that any am-

biguity in the terms of the policy is to be resolved in favor of the insured, were never mentioned in the opinion.

We feel the fact that the courts of other jurisdictions have reached conflicting interpretations emphasizes the ambiguity inherent in the phrase "shooting self-inflicted." We believe our interpretation of the term as referring to a shooting of oneself with the intent to employ the firearm, but without the intent to kill oneself, best comports with the general rules of insurance contract construction without rendering any provision of the policy redundant or ineffectual. Consequently, neither the suicide exclusion nor the reduction provision apply in this case to limit plaintiff's recovery of the face amount of the policy due to Carter Maddox's death by "accidental means."

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, Swain County, for entry of summary judgment in favor of the plaintiff.

Reversed.

Justices HUSKINS, EXUM, BRITT and MEYER concur in the result.

Justice CARLTON concurring in the result.

I concur only in the result reached by the majority because I cannot agree with its interpretation of the term "self-inflicted." In interpreting that term to require an intent to inflict but not to kill, the majority has, in effect, created coverage for shooting deaths in which the shooting was intentional but the result, death, was not. Such an interpretation is clearly inconsistent with the *express* purpose and scope of the insurance policy—to compensate only those losses caused by an *accidental* means. Because the policy expressly covers only losses due to "accidental means" and the express purpose of the clause which contains the term "self-inflicted" is to *reduce* the scope of coverage, the term "self-inflicted" can be logically interpreted only to refer to accidental means and not to accidental result.

My reasoning is simple: Defendant issued Carter Maddox, the deceased, a "Master Select Risk Accident Policy." The policy in-

sured him "against loss resulting directly and exclusively of all other causes from bodily injuries effected solely through external, violent and *accidental* means." (Emphasis added.) As the majority states:

> " 'Accidental means' refers to the occurrence or happening which produces the result and not to the result. That is, 'accidental' is descriptive of the term 'means.' The motivating, operative and causal factor must be accidental in the sense that it is unusual, unforeseen and unexpected. Under the majority view the emphasis is upon the accidental character of the causation—not upon the accidental nature of the ultimate sequence of the chain of causation."

(quoting *Fletcher v. Security Life & Trust Co.*, 220 N.C. 148, 150, 16 S.E. 2d 687, 688 (1941)). Thus, the policy insuring Carter Maddox insured only against loss resulting from an accidental cause. It follows, then, that the policy does not insure against losses resulting from non-accidental means even though the resulting injury was accidental. In short, under this "Master Select Risk Accident Policy," the accidental nature of the result is irrelevant; the loss is covered only if it results from accidental means.

The policy issued by defendant does not provide full coverage for all losses resulting from accidental means. As its title indicates, the policy insures only against *selected* risks. Further, the policy coverage for loss resulting from accidental means is limited. One of these limitations is for "shooting self-inflicted." With regard to this risk, the policy provides: "*For death covered by the provisions of this policy,* when it results from . . . shooting self-inflicted, . . . the amount payable shall be one-fifth the amount otherwise payable." (Emphasis added.) It is with regard to the interpretation of his provision that the majority and I disagree. The above-quoted clause provides a reduction in the proceeds payable for a certain class of loss already covered by the policy. This reduction clause begins with, "For death covered by the provisions of the policy," and does not create, but reduces, coverage. The policy covers loss effected through *accidental means* only, and the interpretation of the term "shooting self-inflicted" in the limitation or reduction clause *must*, I submit, be interpreted in light of the scope of the policy's coverage. Therefore, death from "shooting self-inflicted" can refer only to death due to accidental means.

The majority has interpreted this reduction clause to apply to situations in which the insured intends the act of shooting but does not intend to kill himself: intentional means, but accidental results. I strenuously contend that because the general coverage clause of the policy limits its coverage to losses resulting from accidental means, the reduction clause can only further reduce the coverage and does not create coverage for losses resulting from an intentional means.

In my opinion, the reduction in coverage for death resulting from shooting self-inflicted applies to reduce coverage in a situation in which the insured shoots himself and the means is accidental, *i.e.*, when the insured does not intend to, but accidentally does, cause the gun to fire. "Self-inflicted" means simply that the insured pulled the trigger or otherwise directly caused the gun to fire. Whether the result was accidental is irrelevant. The policy covers losses from accidental means only; therefore, the reduction in coverage for "shooting self-inflicted" must also refer only to accidental means. A clause which reduces coverage cannot be interpreted to create coverage. "Shooting self-inflicted" can mean only the situation in which the deceased is shot by his own hand when he accidentally pulled the trigger, *i.e.*, the causal factor of pulling the trigger must be "unusual, unforeseen and unexpected." *Fletcher v. Security Life & Trust Co.*, 220 N.C. at 150, 16 S.E. 2d at 688.

In this case, there is no direct evidence of who or what caused the gun to fire. We know only that the gun was fired while in its holster, that the gun was found a few feet from the insured's body, and that the gun could discharge if it struck the ground while holstered. There is no evidence that the insured committed suicide; indeed, in this state there is a strong presumption against suicide. *Adcock v. Life Assurance Co. of Carolina*, 31 N.C. App. 97, 228 S.E. 2d 654 (1976). Both plaintiff and defendant agree that this shooting resulted from an accidental means; defendant's concession of coverage in the amount of $750 is an admission that the shooting resulted from accidental means. Whether the insured accidentally pulled the trigger or whether he dropped the gun and the force of impact caused the discharge is a matter we will never know. To decide on the cause would be pure speculation. The amount to which plaintiff is entitled depends upon the burden of proof with regard to the issue of "shooting self-inflicted." In my opinion, whenever the plaintiff has established coverage, the

burden shifts to the insurer to prove that coverage has been reduced. Because the insurer cannot, under the facts of this case, meet the burden of showing that the shooting was self-inflicted, *i.e.*, that the insured pulled the trigger, plaintiff is entitled to recover the full amount of the policy, $3,750.

Chief Justice BRANCH joins in this concurring opinion.

HARRIS C. CRUMPTON AND WIFE, DEBBIE CRUMPTON, STEVE CRUMPTON AND WIFE, SHARON CRUMPTON, AND BROOKS CRUMPTON (SINGLE), PETITIONERS v. KNOX MITCHELL (SINGLE), AND GEORGE E. MITCHELL AND WIFE, MARY MITCHELL, RESPONDENTS

No. 85

(Filed 17 August 1981)

Descent and Distribution § 5— deed granting remainder to issue—child adopted out of family

In enacting G.S. 48-23 the legislature contemplated that upon a final order of adoption a complete substitution of family would take place with the adopted child becoming the child of his adoptive parents and a member of their family, and the legal relationship with the child's natural parents and family would by virtue of the adoption order be completely severed; therefore, those adopted out of a family may not take as "issue" of that family under a deed granting a remainder to issue.

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

ON discretionary review prior to determination by the Court of Appeals. This case was argued as No. 39, Fall Term 1980.

Graham & Cheshire by D. Michael Parker, Attorneys for petitioner appellees.

Burke and King by Ronnie P. King, Attorneys for respondent appellants.

EXUM, Justice.

By order entered at the 20 December 1979 Session of Person Superior Court Judge Anthony Brannon concluded as a matter of law that respondents were not entitled to share in certain proceeds passing under a deed. The sole question presented is

whether those adopted out of a family take as "issue" of that family under a deed granting a remainder to "issue." We conclude that they do not and affirm the decision of the trial court.[1]

The facts are not in dispute. On 1 December 1941 G.E. Harris and wife Valeria Harris conveyed a tract of land in Person County to "Ruth Harris Crumpton for the term of her natural life, with remainder to her living issue, *per stirpes* . . . . " The habendum clause of the deed provided that Ruth Crumpton should hold the land "for and during the term of [her] natural life, and at her death to her issue then living, *per stirpes*; Provided, however, that if she has no issue then living said land shall revert to the heirs at law of the grantor G. E. Harris."

Pursuant to an Order of Sale dated 7 May 1975 the land so conveyed was sold and the proceeds invested by the Clerk of Superior Court of Person County with the interest thereon payable to Ruth Crumpton during her lifetime and the corpus held for distribution upon her death to her then living issue, *per stirpes.* At some date after the sale Ruth Crumpton took a lump sum payment in lieu of her right to the interest. The clerk invested the remaining funds for ultimate distribution upon her death to her then living issue, *per stirpes.*

Ruth Crumpton is now dead. She had five children, two of whom, Valeria and Rosie, survive her. A third daughter, Elaine, is deceased and left no children. Ruth Crumpton's two sons, William Robert and George Edward, are both deceased and left, respectively, six and five children, all of whom survive her. The Clerk of Superior Court of Person County has distributed, *per stirpes*, three-fourths of the approximately $70,000 available for distribution to the issue of Ruth Crumpton: One-fourth to Valeria; one-fourth to Rosie; and one-fourth divided equally among William Robert's six children. This lawsuit concerns division of the remaining one-fourth interest among George Edward's five children.

1. The controversy herein presented has been previously decided by the Court of Appeals. *Crumpton v. Crumpton*, 28 N.C. App. 358, 221 S.E. 2d 390 (1976). Without expressing our view as to the merits, we vacated this opinion on the ground it was prematurely decided. *Crumpton v. Crumpton*, 290 N.C. 651, 227 S.E. 2d 587 (1976). The matter having become ripe for decision, we now agree with the result reached by the Court of Appeals in its earlier decision.

Two of George Edward's children, Knox Mitchell and George Mitchell, both born to him by the wife of his first marriage, were on 13 June 1955 adopted *from* him, *i.e.*, they were adopted out of the Crumpton family. As part of the order granting the petition to sell the land conveyed to Ruth Crumpton the clerk ordered that Knox Mitchell and George Mitchell share equally with George Edward's other three children that portion of the sale proceeds which George Edward would have received had he survived Ruth Crumpton. The other children appealed. By order dated 6 June 1975 Judge Clark concluded that "as a Matter of Law . . . George Edward Mitchell and Edgar Knox Mitchell . . . own no remainder interest, vested or contingent, in the subject lands or in the proceeds from the sale thereof."

The Court of Appeals affirmed Judge Clark's order, *Crumpton v. Crumpton*, 28 N.C. App. 358, 221 S.E. 2d 390 (1976). The Court of Appeals held that on 13 June 1955, the date of the final order of adoption, Knox Mitchell and George Mitchell "became legal strangers to the bloodline of their father, the son of the grantee in the deed conveying the property. No interest in the property had vested in them, and at that time, they, by force of the statute, ceased to be children of George Edward Crumpton and became the children of their parents by adoption." *Id.* at 364, 221 S.E. 2d at 394.

This Court, in an opinion reported at 290 N.C. 651, 227 S.E. 2d 587 (1976), vacated the decision of the Court of Appeals. After first concluding that there was no substantial constitutional question upon which to base the appeal, we treated the appeal as a petition for writ of certiorari and held that the Court of Appeals erred in prematurely determining the ultimate disposition of the fund.[2] We expressed no opinion as to the correctness of its decision on the issue it erroneously reached.

2. We noted that:

"Many events may obviate the need to determine the question answered by the clerk, judge, and Court of Appeals: (1) The life tenant [Ruth Crumpton] is still living. Respondent appellants [Knox Mitchell and George Mitchell] and those claiming through them may not survive her. (2) Before her death the General Assembly may speak more specifically to the precise situation here—the right of those adopted out of a family to take as 'issue' of that family when a deed grants a remainder to 'issue.' (3) This lawsuit involves the sale of land worth $70,000. However, the amount contested is the remainder interest in only one-tenth of that amount. It is highly conceivable that appellants and appellees, half-brothers by birth, could reach an amicable settlement before their contingent interest vests at the death of the life tenant." 290 N.C. at 656, 227 S.E. 2d at 592.

Upon the death of Ruth Crumpton the other children of George Edward, petitioner-appellees, again caused this matter to be heard by the Clerk of Person Superior Court. The clerk concluded that Knox Mitchell and George Mitchell, respondent-appellants, were by virtue of their adoption removed from the bloodline of George Edward Crumpton and enjoyed "no remainder interest in the proceeds of the sale of the land in question." Judge Brannon, by order entered 20 December 1979, reached the same conclusion.[3] On 3 June 1980 we allowed the parties' joint motion for discretionary review prior to determination by the Court of Appeals.

The question, then, before us is whether those adopted out of a family may take as "issue" of that family under a deed granting a remainder to "issue."

Petitioner-appellees, urging a negative answer, contend that G.S. 48-23 is relevant in that it provides "guidance to the effect that adoption severs the legal child-parent relationship between the adopted child and natural parent." G.S. 48-23 provides in pertinent part:

> "*Legal effect of final order.*—The following legal effects shall result from the entry of every final order of adoption:
>
> (1) The final order forthwith shall establish the relationship of parent and child between the petitioners and child, and from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property by, through, and from the adoptive parents in accordance with the statutes relating to intestate succession. An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth.

3. This order was amended *nunc pro tunc* on 12 February 1980 to correct typographical omissions in the original order.

(2) The natural parents of the person adopted, if living, shall, from and after the entry of the final order of adoption, be relieved of all legal duties and obligations due from them to the person adopted, and shall be divested of all rights with respect to such person. This section shall not affect the duties, obligations, and rights of a putative father who has adopted his own child.

(3) From and after the entry of the final order of adoption, the words 'child,' 'grandchild,' 'heir,' 'issue,' 'descendant,' or an equivalent, or the plural forms thereof, or any other word of like import in any deed, grant, will or other written instrument shall be held to include any adopted person, unless the contrary plainly appears by the terms thereof, whether such instrument was executed before or after the entry of the final order of adoption and whether such instrument was executed before or after the enactment of this section."

Respondent-appellants contend that they are entitled to take under the deed since this Court has defined "issue" as meaning "all persons descended from a common ancestor." *Bradford v. Johnson*, 237 N.C. 572, 581, 75 S.E. 2d 632, 638 (1953). Thus, they argue, despite their adoption out of the Crumpton family they are still persons descended from Ruth Crumpton. Respondent-appellants further contend that G.S. 48-23 has no bearing on this controversy since "[t]he legislature, by virtue of G.S. 48-23, has spoken relative to the right of an adopted child to 'inherit' by, through, or from its natural parents, but there is no such guidance where the remainder interest is created by deed." We disagree, and conclude that in enacting G.S. 48-23 our legislature has in fact given clear guidance applicable to the present controversy.

I

The Court of Appeals, after a thorough discussion of the original North Carolina adoption statute and its evolution into current G.S. 48-23, concluded that the General Assembly has "evidenced its intent that by adoption the child adopted becomes legally a child of its new parents, and the adoption makes him

legally a stranger to the bloodline of his natural parents." *Crumpton v. Crumpton, supra*, 28 N.C. App. at 363, 221 S.E. 2d at 393. We agree fully with this conclusion.

General Statute 48-23 provides initially in subsection (1) that the adopted child "shall be entitled to inherit real and personal property by, through, and from the adoptive parents in accordance with the statutes relating to intestate succession." This much of G.S. 48-23 simply recognizes that which is provided for in G.S. 29-17 dealing with intestate succession by, through and from adopted children.[4] Contrary to respondent-appellants' contention, however, G.S. 48-23 deals with more than intestate succession, and, as its title indicates, addresses generally the legal effect of a final order of adoption. The statute provides in subsection (1) that the final order of adoption shall establish the relationship of parent and child between the adoptive parents and the child and that "[a]n adopted child shall have the same legal status, including all legal rights and obligations . . . as he would have had if he were born the legitimate child of the adoptive parent or parents . . . ." Subsection (2) provides that upon adoption the adopted child's natural parents are relieved of all legal duties and obligations due from them to the child and are divested of all rights with respect to the child. Subsection (3) provides that words such as "child," "grandchild," "heir," "issue" or "descendant" in

4. General Statute 29-17 in pertinent part provides:

> "§ 29-17. *Succession by, through and from adopted children.*—(a) A child, adopted in accordance with Chapter 48 of the General Statutes or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to any property by, through and from his adoptive parents and their heirs the same as if he were the natural legitimate child of the adoptive parents.
>
> (b) An adopted child is not entitled by succession to any property, by, through, or from his natural parents or their heirs . . . .
>
> (c) The adoptive parents and the heirs of the adoptive parents are entitled by succession to any property, by, through and from an adopted child the same as if the adopted child were the natural legitimate child of the adoptive parents.
>
> (d) The natural parents and the heirs of the natural parents are not entitled by succession to any property, by, through or from an adopted child . . . ."

any deed, grant, will or other written instrument shall, in the absence of expression of a contrary intent therein, include adopted children.

We believe that in enacting G.S. 48-23 the legislature contemplated that upon a final order of adoption a complete substitution of families would take place with the adopted child becoming the child of his adoptive parents and a member of their family; likewise, the legal relationship with the child's natural parents and family would by virtue of the adoption order be completely severed. In *Headen v. Jackson*, 255 N.C. 157, 159, 120 S.E. 2d 598, 599-600 (1961), this Court, in discussing G.S. 48-23 which at that time consisted solely of subsection (1), quoted with approval *A Survey of Statutory Changes in North Carolina in 1955*, 33 N.C. L. Rev. 513, 522 (1954-55):

> "Here is a simple and clear rule which eliminates all doubt as to the standing and rights of an adopted child. For all legal purposes he is in the same position as if he had been born to his adoptive parents at the time of the adoption. . . . *Whatever the problem is concerning an adopted child, his standing and his legal rights can be measured by this clear test: 'What would his standing and his rights be if he had been born to his adoptive parents at the time of the adoption?'* " (Emphasis supplied.)

Further, G.S. 48-23(3) makes clear that the legislature intended this complete substitution of families and severance of the adopted child's legal ties with his natural parents to embrace not only intestate succession but also property passing under deeds, grants, wills or other written instruments.[5] That portion of G.S. 48-23 relevant to the present controversy provides:

> "From and after the entry of the final order of adoption, the words . . . 'issue' . . . in any deed . . . shall be held to include

5. In *Thomas v. Thomas*, 258 N.C. 590, 129 S.E. 2d 239 (1963), it was held that an adopted child did not take under a provision in a will to "children" absent an indication of a contrary intent clearly appearing in the will or in the attendant circumstances. It was noted that "courts in most jurisdictions still make a distinction between devises and inheritances with respect to the right of an adopted child, even though all distinctions between natural born and adopted children have been abolished by statute." *Id.* at 592, 129 S.E. 2d at 240. As noted, at the time *Thomas* was decided G.S. 48-23 consisted solely of subsection (1). Subsection (3), enacted almost immediately after *Thomas* was decided, changed the law as there declared.

> any adopted person, unless the contrary plainly appears by the terms thereof, whether such instrument was executed before or after the entry of the final order of adoption and whether such instrument was executed before or after the enactment of this section."

We note also the statutory command that this construction of the word "issue" be applied regardless of when the deed was executed.

With this understanding of the legislative intent we now address the problem before us which, as noted by the Court of Appeals, is one of first impression in this state. It is true as respondent-appellants contend that the legislature has not specifically provided that the word "issue" in any deed does not include children adopted out of the grantor's family. However, "[t]he primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. In seeking to discover this intent, the courts should consider 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). Further, "[m]atters necessarily implied by the language of a statute must be given effect to the same extent as matters specifically expressed." *Lutz v. Bd. of Ed.*, 282 N.C. 208, 220, 192 S.E. 2d 463, 471-72 (1972).

Given the legislative intent that the legal effect of a final order of adoption shall be substitution of the adoptive in place of the natural family and severance of legal ties with the child's natural family, the implication is clear that the legislature intended that children adopted out of a family would, for *all* legal purposes, no longer be a part of that family. We are convinced the severance of legal ties with the child's natural family was not intended to be partial. It is most unlikely that in enacting G.S. 48-23 the legislature intended the child would for some purposes remain legally in its natural bloodline. Such a construction violates the spirit of the act and thwarts that which the act seeks to accomplish.

Instead, we view G.S. 48-23 to mean that upon a final order of adoption the severance of legal ties with the child's natural family is total. The child acquires full status as a member of his

adoptive family and in so doing is for all legal purposes removed from his natural bloodline.

We conclude, then, that the clear implication of G.S. 48-23(3) as it applies to the present case is as follows: Upon entry of the final order of adoption the word "issue" in any deed does not include persons adopted out of the family unless a contrary intent plainly appears from the terms of the deed. Further, this construction of the word "issue" shall be applied regardless of whether the deed was executed before or after entry of the final order of adoption and regardless of whether it was executed before or after enactment of G.S. 48-23(3).

We are in full agreement with the holding of *Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973), that G.S. 48-23(3) as applied to a will does not abolish the rule that the intent of the testator controls the construction of his will. We considered in *Peele* whether a devise to "issue" included an adopted child. We noted that "[u]nder the statute, such child takes unless a contrary intent plainly appears by the terms of the will or conveyance." We concluded that "[n]othing in the devise made by the [testator's will] . . . throws any light whatever upon his intent with reference to this matter . . . . [W]e are required by the statute to hold that the adopted child . . . is 'issue' . . . within the meaning of the will . . . ." *Id.* at 383, 200 S.E. 2d at 641.

So it is here. Respondent-appellants by virtue of their adoption out of the Crumpton family do not take as "issue" of Ruth Crumpton absent a contrary intent plainly appearing by the terms of the deed. The deed in question fails to evidence such a contrary intent. We hold, accordingly, that respondent-appellants do not share in the proceeds of the land conveyed to Ruth Crumpton.

II

Respondent-appellants contend further that denial of their interest in the proceeds of the land conveyed to Ruth Crumpton deprives them of property without Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution and in violation of the Law of the Land provision in Article I, § 19 of the North Carolina Constitution. We addressed this contention in our previous decision in this matter: "If appellants are ultimately denied an interest in this property . . . it is now settled

that such 'statutes destroying or diminishing *contingent interests* in property do not, *per se*, deprive the holder thereof of property without due process of law . . . or violate any other constitutional limitation upon legislative power. *Stanback v. Citizens National Bank*, 197 N.C. 292, 148 S.E. 313 (1929).' *Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973)." (Emphasis original.) *Crumpton v. Crumpton, supra*, 290 N.C. at 653, 227 S.E. 2d at 590.

We still hold with our previous determination.

The decision of the trial court is

Affirmed.

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

STATE OF NORTH CAROLINA v HURTIS KLINEY LUDLUM

No. 75

(Filed 17 August 1981)

1. **Rape § 8— elements of first-degree sexual offense with child**

To convict a defendant of a first-degree sexual offense with a child of twelve years or less, the State need only prove (1) the defendant engaged in a "sexual act," (2) the victim was at the time of the act twelve years old or less, and (3) the defendant was at that time four or more years older than the victim. G.S. 14-27.4.

2. **Rape §§ 8, 11— first-degree sexual offense with child—meaning of cunnilingus—sufficiency of evidence**

Penetration is not a necessary element of cunnilingus as the term is used in G.S. 14-27.1(4); rather, cunnilingus means stimulation by the tongue or lips of any part of a female's genitalia, and the required stimulation is accomplished when there has been the slightest toughing by the lips or tongue of another to any part of the female's genitalia. Therefore, testimony by a four-year-old girl that defendant "touched me . . .with his tongue . . . between my legs" while indicating the place of touching to the jury constituted sufficient evidence of cunnilingus to support a conviction for a first-degree sexual offense.

BEFORE *Judge Braswell* at the 6 October 1980 Session of BRUNSWICK Superior Court defendant was convicted of a first-

degree sexual offense. He was sentenced to imprisonment for life. Defendant appeals of right to this Court pursuant to G.S. 7A-27.

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the State.

James R. Prevatte and Richard S. Owens, III, Attorneys for defendant appellant.

EXUM, Justice.

The principal question presented by this appeal is whether testimony by a four-year-old girl that defendant "touched me . . . with his tongue . . . between my legs" while indicating the place of touching to the jury constitutes sufficient evidence of "cunnilingus" to support a conviction for a first-degree sexual offense. We hold that it does.

[1] To convict a defendant of a first-degree sexual offense with a child of twelve years or less, the State need only prove (1) the defendant engaged in a "sexual act," (2) the victim was at the time of the act twelve years old or less, and (3) the defendant was at that time four or more years older than the victim. G.S. 14-27.4. A "sexual act" is defined as "cunnilingus, fellatio, analingus, or anal intercourse . . . [or] the penetration, however slight, by any object into the genital or anal opening of another's body . . . [except for] accepted medical purposes." G.S. 14-27.1(4). The "sexual act" relied on in this case is cunnilingus.

The State's evidence tends to show the following: On 20 May 1980 at about 5:00 p.m., Heather Rice, age four, was in the yard of her house at Holden Beach in Brunswick County. She was wearing a bathing suit with panties underneath. She saw a man across the street. The man said hello to her, crossed the street, and beckoned to her to follow him into the woods. Heather followed the man into the woods and when she got there, the man pulled down her bathing suit and panties. About what happened after this, Heather testified as follows:

"Q. After he pulled down your pants did he touch you in any way?

A. Yes.

Q. How did he touch you, Heather?

A. With his tongue.

When he touched me with his tongue I was lying down.

Q. Now where did he touch you with his tongue?

A. (Indicating).

Q. Would you stand up and point so that the jury can see where you are pointing to.

A. (Indicating).

Q. Did he touch you between your legs or on your leg?

A. Between my legs.

Q. And how long did he touch you between your legs with his tongue?

A. A minute."

She said the man told her not to tell anyone about what had happened, but Heather ran home and told her mother, who called the police.

Heather pointed out defendant as the man who had "bothered" her. She also testified that she had picked his photograph out of an array on 21 May 1980, the day after the assault. She recalled picking defendant out of a lineup as well.

Heather's mother and Frances Goins of the Brunswick County Sheriff's Department testified in corroboration of Heather's story by recounting Heather's similar accounts shortly after the assault. After the judge instructed the jury on the limits of corroborative testimony, he permitted Mrs. Goins to read the following from a statement which Heather made on 21 May 1980:

> "I was out in the yard watching my horse. I saw this man at the edge of the woods. I saw him at the white garage across the street before him in the woods. The man said, 'Hi,' and I said 'Hi.' He said, 'Come here. Come here.' I didn't want to but I went over to him. He backed in the woods and motioned with his finger for me to go too so I went. He took me by the hand and made me run. He stopped in the woods. He pulled my swimsuit and panties off. He put his tongue in my thing where I use the bathroom . . . ."

Defendant took the stand in his own defense and presented an alibi for his whereabouts at the time of the assault. He said he was with others the entire day. Defendant's wife, mother-in-law, and brother-in-law testified in corroboration of this account. Another witness, Billy Eason, testified that he was with defendant from 4:30 to 7:00 p.m. on 20 May 1980.

On rebuttal, the State offered evidence tending to show the following: Nancy Morton testified that at about 5:00 p.m. on 20 May 1980 she saw defendant fleeing from her trailer. Keith Kennedy of the Brunswick County Sheriff's Department testified that defendant had confessed to breaking into the trailer and that defendant had said he had been near the Rices' home earlier in the day.

[2] Defendant's principal contention on appeal is: The evidence fails to prove any penetration of Heather's genitalia, or external genital organs; penetration is required in order for cunnilingus, as the term is used in G.S. 14-27.1(4), to occur; therefore he was entitled to a dismissal at the close of the evidence.

We agree with defendant that the evidence is insufficient to prove any penetration of Heather's genitalia. Heather testified that defendant only "touched" her with his tongue between her legs. While Heather's statement to Mrs. Goins does indicate that defendant had actually penetrated her genitalia, the statement was admitted only for corroboration and cannot be considered as substantive evidence of the facts stated. *State v. Parish*, 79 N.C. 610 (1878); 1 Stansbury's North Carolina Evidence § 52 (Brandis rev. 1973).

We do not agree, however, that penetration is required before cunnilingus, as that word is used in the statute, can occur. Defendant's argument to the contrary rests entirely on cases arising under G.S. 14-177 which proscribes and makes punishable "the crime against nature." The cases are *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978); *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961), and *State v. Fenner*, 166 N.C. 247, 80 S.E. 970 (1914).

In *Fenner*, the act in question was fellatio. The evidence tended to show only "an attempt [by a male defendant to insert] his private parts in the mouth of [another] male." This Court concluded that because "there was no evidence of penetration, which

is an essential . . . element of the offense" defendant could not be convicted of the crime charged. Because, however, there was evidence of an *attempt* to commit "the crime against nature," the Court remanded the matter for a new trial on the attempt.

In *Whittemore* defendant, a male over eighteen, was charged with committing "the crime against nature" against a thirteen-year-old girl. The evidence tended to show that defendant placed his hand and then put his mouth on the victim's "privates" and "kept his mouth there about one or two minutes. He just left it there." Because this evidence failed to show any penetration of the female genitalia, the Court concluded that "the crime against nature" charged should have been dismissed.

Whittemore was followed in *Joyner*, where defendant, a male, was indicted for, among other things, "the crime against nature." The evidence tending to support this charge showed that defendant had put his mouth on the victim's "vagina and inserted his tongue into her vagina." Against defendant's contention that to be convicted of "the crime against nature" there must be some penetration by the male sexual organ, this Court said, "though penetration by or of a sexual organ is an essential element of the crime [citing *Whittemore*], the crime against nature is not limited to penetration by the *male* sexual organ . . . . In present case the State's evidence showed that the defendant penetrated the victim's female sexual organ with his tongue. This is sufficient to overrule defendant's motion for nonsuit."

In none of these cases, however, did the Court define the acts of either fellatio or cunnilingus as such. The Court was concerned, rather, with the elements of "the crime against nature," which, it concluded, might be committed by way of these acts. The Court said in *Whittemore*, 255 N.C. at 585, 122 S.E. 2d at 398:

> "Conduct declared criminal by G.S. 14-177 is sexual intercourse contrary to the order of nature. Proof of penetration of or by the sexual organ is essential to conviction. This interpretation was put on the statute in *State v. Fenner*, 166 N.C. 247, 80 S.E. 970, decided in 1914. The Legislature has not disapproved of the interpretation then given by amending the statute. That interpretation accords with the interpretation generally given to similar statutes. The Supreme Court of Maine said: '(I)t does not follow that every act of

> sexual perversion is encompassed within the definition of "the crime against nature" . . . The crime against nature involving mankind is not complete without some penetration, however slight, of a natural orifice of the body. The penetration need not be to any particular distance.' *S. v. Pratt*, 116 A. 2d 924; *S. v. Hill*, 176 So. 719 (Miss.); *People v. Angier*, 112 P. 2d 659 (Cal.); *Hopper v. S.*, 302 P. 2d 162 (Okla.); *S. v. Withrow*, 96 S.E. 2d 913 (W. Va.); *Wharton v. S.*, 198 S.E. 823 (Ga.); 81 C.J.S. 371; 48 Am. Jur. 550."

We conclude, therefore, that these cases decide, insofar as the penetration question is concerned, only that penetration is a necessary element of "the crime against nature." They do not decide that penetration is a necessary element of the acts of fellatio or cunnilingus. These cases, therefore, do not control our decision here.

Whether penetration is required before cunnilingus, as the word is used in the statute, may occur is a question really of legislative intent. What did the Legislature mean by its use of the term?

In arriving at this intent, we look first to the ordinary meaning of the word. Unless statutory words have acquired some technical meaning they are construed in accordance with their ordinary meaning unless some different meaning is definitely indicated by the context. *State v. Lee*, 277 N.C. 242, 176 S.E. 2d 772 (1970). Courts may and often do consult dictionaries for such meanings. *Id.; State v. Martin*, 7 N.C. App. 532, 173 S.E. 2d 47 (1970).

Cunnilingus is defined by *Webster's Third New International Dictionary* (Unabridged) (hereinafter Webster's) as "stimulation of the vulva or clitoris with the lips or tongue." The word is defined by the *Oxford English Dictionary* to mean, "[o]ral stimulation of the vulva or clitoris." (Supplement, Vol. I, 1972). According to *Gray's Anatomy*, (28th Edition, 1966) at pp. 1328-1329, the external genital organs of the female consist, in pertinent part, of the *mons pubis*, *labia majora*, *labia minora*, and the clitoris. The outermost of these are the *labia majora*. Next come the *labia minora*. The innermost of these anatomical structures is the clitoris. *Gray's Anatomy* also teaches that the term "vulva, as generally applied, includes all these parts" (in addition to the

vestibule of the vagina, the bulb of the vestibule, and the greater vestibule glands). According to Webster's, the term "vulva" means: "1 a: the external parts of the female genital organs, b: the opening between the projecting parts of the external organs."

If the term "vulva" means *all* of the external female genitals, as the cited authorities say, and the clitoris lies beneath both the outer and inner *labia*, then in order for the vulva *in its entirety* or the clitoris to be stimulated, there must be some penetration of at least the outer labia. On the other hand, one may reasonably argue that stimulation of the vulva means stimulation of any part of the vulva, for example, the *labia majora*, or the *mons pubis*.

We are satisfied the Legislature did not intend that the vulva in its entirety or the clitoris specifically must be stimulated in order for cunnilingus to occur. To adopt this view would saddle the criminal law with hypertechnical distinctions and the prosecution with overly complex and in some cases impossible burdens of proof. We think, rather, that given the possible interpretations of the word as ordinarily used, the Legislature intended to adopt that usage which would avoid these difficulties. We conclude, therefore, that the Legislature intended by its use of the word cunnilingus to mean stimulation by the tongue or lips of any part of a woman's genitalia.

Our view of the legislative intent is borne out by the context in which the word is used in G.S. 14-27.1(4) and the overall statutory scheme. Article 7A, Chapter 14, by which this kind of act is made punishable. The statute, G.S. 14-27.1(4) defines "sexual act" as "cunnilingus, fellatio, analingus, or anal intercourse . . . [or] the penetration, however slight, by any object into the genital or anal opening of another person's body [except for] accepted medical purposes." If the Legislature intended cunnilingus to require penetration by the lips or tongue, then its inclusion in the statute as a form of sexual act would have been superfluous because, the lips or tongue being themselves objects, the act would have been prohibited under the clause dealing specifically with penetrations.

Furthermore unlike prosecutions under "the crime against nature" statute, G.S. 14-177, in which the act itself, if it is deemed to be such a crime, is punishable, none of the "sexual acts"

described by G.S. 14-27.1(4) are punishable *per se* under Article 7A. They are punishable only if committed under the circumstances set out in G.S. 14-27.4 or G.S. 14-27.5. In order for a "sexual act" such as cunnilingus to be punished under this article as a first-degree sexual offense, it must either be committed "by force and against the will" of the victim and the perpetrator must:

> "a. [Employ] or [display] a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> b. [Inflict] serious personal injury upon the victim or another person; or
>
> c. . . . [commit] the offense aided and abetted by one or more other persons[;]"

or it must be committed, as in the instant case, upon a victim who is twelve years old or less, the perpetrator being "four or more years older than the victim." G.S. 14-27.4. In order for a sexual act such as cunnilingus to be punishable as a second-degree sexual offense, it must be committed "[b]y force and against the will" of the victim or against a victim

> "[w]ho is mentally defective, mentally incapacitated, or physically helpless, and the person performing the acts knows or should reasonably know that the other person is mentally defective, mentally incapacitated, or physically helpless." G.S. 14-27.5.

Thus in Article 7A prosecutions, although the form of the sexual act is limited to those listed in G.S. 14-27.1(4), the gravamen of the sexual offense itself is that it is committed by force and against the will of the victim or upon a victim who because of age or other incapacity is incapable of consenting. The purpose of Article 7A is to increase the punishment for various kinds of *forcible* sexual acts, which were not punishable as rapes, beyond that which was available under "the crime against nature" statute, G.S. 14-177, or the statute which prohibits "taking indecent liberties with children." G.S. 14-202.1. Once the victim of one of these acts has been forced against his or her will to submit, the degradation to his or her person, the real evil against which the statutes speak, has been accomplished. The degradation

to the person of a woman forced to submit or a small girl incapable of consenting is complete in the case of cunnilingus once the perpetrator's lips or tongue have touched any part of her genitalia whether or not any actual "penetration" of the genitalia takes place.

We do not choose to quibble either over the word "stimulation" contained in the definitions of cunnilingus upon which we have relied. Whatever "stimulation" is required is accomplished for purposes of Article 7A prosecutions when there has been the slightest touching by the lips or tongue of another to any part of the woman's genitalia.

We think Heather's testimony, when all reasonable inferences favorable to the State are drawn therefrom, is sufficient to permit a jury to find beyond a reasonable doubt that defendant touched a part of her genitalia with his tongue. Therefore, the trial judge did not err in denying defendant's motion to dismiss for insufficiency of the evidence.

Defendant next assigns as error the admission of Frances Goins' testimony. He argues that it should not have been admitted to corroborate Heather's testimony because it goes far beyond Heather's testimony in tending to show penetration, which defendant has maintained is an essential element of the offense. He relies on *State v. Fowler*, 270 N.C. 468, 155 S.E. 2d 83 (1967). Since we have determined that penetration is not an essential element of the offense charged, we believe the testimony was properly admitted for corroborative purposes.

In defendant's third assignment of error he contends that the jury should have been instructed on the crime of taking indecent liberties with a child. G.S. 14-202.1. Defendant was properly charged in the bill of indictment only with a first-degree sexual offense. General Statute 15-170 permits the judge to instruct on only two types of crimes not charged in the bill of indictment—attempts to commit the indicted offense and lesser-included offenses of the indicted offense. The trial judge instructed here on an attempt. His decision not to charge on the crime of taking indecent liberties was proper since this crime is neither an attempt to commit the indicted offense nor is it a lesser-included offense of a first-degree sexual offense. *State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (No. 132, Spring Term 1981, filed 8 July 1981).

Finally, we conclude, contrary to defendant's last contention, that the trial judge did not abuse his discretion in failing to set aside the verdict as being against the greater weight of the evidence.

In defendant's trial, we find

No error.

MELODY KENT v. FLETCHER HUMPHRIES AND H & W PLASTICS, INC.

No. 125

(Filed 17 August 1981)

1. **Landlord and Tenant § 14— void lease—payment of rent—periodic tenancy**

When a tenant enters into possession under an invalid lease and tenders rent which is accepted by the landlord, a periodic tenancy is created, and the period of the tenancy is determined by the interval between rental payments.

2. **Frauds, Statute of § 1— voidable lease—other claims not barred**

The Statute of Frauds bars only enforcement of an invalid contract but does not bar other claims which a party might have even though those claims arise in connection with the voidable lease; therefore, though plaintiff's action on a lease contract was barred by the Statute of Frauds, her other claims of nuisance, fraud and unfair trade practices based on defendant's operation of a plastics manufacturing plant near her beauty salon were not barred.

APPEAL by defendants from a decision of the North Carolina Court of Appeals (*Clark, J., Whichard, J.*, concurring; *Hedrick, J.*, concurring in part and dissenting in part) reported at 50 N.C. App. 580, 275 S.E. 2d 176 (1981). The Court of Appeals affirmed summary judgment in favor of defendants on plaintiff's breach of contract claim entered by *Brown, Judge*, at the 8 January 1980 Civil Session of Superior Court, CURRITUCK County. The Court of Appeals reversed the action of *Brown, Judge*, in entering summary judgment in favor of defendants on plaintiff's fraud, unfair trade practices and nuisance claims. *Judge Hedrick* dissented in part, saying that plaintiff did not have a sufficient property interest to maintain a claim for nuisance. Appeal of right on the issue of nuisance followed; defendant's petition for discretionary review on the questions of fraud and unfair trade practices was

allowed 7 April 1981. By separate order, this Court limited the questions before it to nuisance, fraud and unfair trade practices.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White and William Brumsey, III, for defendant appellants.

Sanford, Adams, McCullough & Beard, by J. Allen Adams, Catharine B. Arrowood and William George Pappas for plaintiff appellees.

MEYER, Justice.

The issue presented on this appeal is whether plaintiff forecast sufficient evidence to survive defendants' motion for summary judgment on the issues of nuisance, fraud and unfair trade practices. We hold that she did and therefore affirm the Court of Appeals.

By her complaint, plaintiff Melody Kent alleges that in August of 1976 defendant Humphries orally offered to lease space to her in a shopping center which defendant was building. Plaintiff further alleges that defendant offered a 5-year lease with a fixed rental and an option to renew for another five years, with plaintiff responsible for completing the interior of the leased space. Before agreeing to those terms, plaintiff sought assurances from defendant that he would not operate his plastics and fiberglass manufacturing concern, H & W Plastics, Inc., in or around the shopping center. Plaintiff alleges that she told defendant that she could not conduct her business in the area of a plastics plant due to certain allergies from which she suffered. Plaintiff alleges that defendant assured her that he would not operate his plastics plant near the location of plaintiff's beauty salon.

Relying on those statements allegedly made by defendant, plaintiff accepted defendant's offer to lease space in the shopping center, terminated her former lease arrangement and began to purchase items for and to make improvements to the new leased space.

In January of 1977, according to the complaint, defendant and the defendant corporation began to manufacture plastic and fiberglass products in an area behind the shopping center. At that

time, alleges plaintiff, defendant informed plaintiff's husband that the plant's location was only temporary, and that it would move in three months.

On 1 April 1977 plaintiff occupied the leased area and began to operate a beauty salon. Defendant signed and delivered to plaintiff a written lease for five years which plaintiff refused to sign because it varied from the oral agreement in several respects, one of which was that it did not include defendant's promise not to operate a plastics plant in the vicinity of the shopping center. Plaintiff alleges that she was forced to vacate the leased premises on 3 March 1978 because of the air pollution caused by the operation of the plant near her business. Plaintiff seeks damages for personal injuries, lost profits and business losses resulting from defendants' actions. Defendants deny that plaintiff was ever told that the plastics plant would not operate near the shopping center.

In considering the motion for summary judgment, Judge Brown had before him the pleadings, several affidavits and other documents, answers to interrogatories and the depositions of the plaintiff Melody Kent, and defendant Fletcher Humphries and Larry Bryant, a former employee of defendant H & W Plastics, Inc. Since the defendant moved for summary judgment, and therefore had the burden of showing the absence of any triable issue of fact, our task is to review all of that evidence in the light most favorable to the plaintiff. Summary judgment is properly granted only "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." G.S. 1A-1, Rule 56(c); *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). With the proper standard of review in mind, we turn now to a consideration of each of plaintiff's three claims (nuisance, fraud and unfair trade practices).[1]

In order for plaintiff to recover in nuisance, she must show an unreasonable interference with the use and enjoyment of her property. *Barrier v. Troutman*, 231 N.C. 47, 55 S.E. 2d 923 (1949). That question involves three separate inquiries. First, did the

1. Plaintiff's claim in contract is not properly before us, and we therefore decline to disturb the opinion of the Court of Appeals on that issue.

defendant interfere with plaintiff's use of her property? Considering plaintiff's allegations as true, the answer is yes. Second, was the interference unreasonable? That is a question of fact reserved for the jury if plaintiff satisfies the third element of this inquiry; that is, did plaintiff have sufficient property interest in the rented space to maintain a nuisance action? Defendants argue that, because plaintiff entered under a void lease, she was merely a tenant at will. As such, she was subject to eviction at any time and thus her constructive eviction by defendants' operation of a plant did not violate the very limited property rights she held in the leased property.

Judge Clark, expressing regret, agreed with defendants that plaintiff's tenancy was one at will under the law in North Carolina. "The invalidity of the rental contract leaves the defendants in the position of tenants at will, whose occupancy may be terminated *instanter* by demand for possession." *Davis v. Lovick*, 226 N.C. 252, 255, 37 S.E. 2d 680, 681-82 (1946). *See also Barbee v. Lamb*, 225 N.C. 211, 34 S.E. 2d 65 (1945); *Mauney v. Norvell*, 179 N.C. 628, 103 S.E. 372 (1920). Like Judge Clark, we are troubled by the equities of this rule. It seems patently unfair to us that a tenant who takes under a lease void by operation of the statute of frauds, but who then pays rent as it becomes due periodically, should have only the barest of legal rights as a tenant at will. As Judge Clark recognized, most modern authorities would say that entry under a lease void under the Statute of Frauds creates a periodic tenancy, more consonant with the expectations of both parties. According to the Restatement (Second) of Property, Landlord and Tenant (1977):

> Where, in addition to entry into possession under an invalid lease, rent is paid and accepted under the lease, a periodic tenancy is created. By the payment and acceptance of such rent, the parties have given further indication of their intention to be bound by the invalid lease, and the periodic tenancy provides a measure of security to their expectations. The initial period is determined by the interval between the rent payments specified in the invalid lease.

Id. at § 2.3(d).

We note further that this is the rule in the majority of jurisdictions. Annot., Character and Duration of Tenancy Created by Entry Under Invalid or Unenforceable Lease, 6 A.L.R. 2d 685 (1949).

[1] This rule strikes us as both better reasoned and more fundamentally fair than the rule currently employed in this jurisdiction. Accordingly, we hold today that when a tenant enters into possession under an invalid lease and tenders rent which is accepted by the landlord, a periodic tenancy is created. The cases cited above, *Davis*, *Barbee* and *Mauney*, shall no longer constitute authority insofar as they are inconsistent with this holding. The period of the tenancy is determined by the interval between rental payments. In this case a month-to-month tenancy was created. The effect of so holding in the case now before us is that plaintiff clearly had a sufficient property interest to maintain a claim in nuisance. We agree with the majority in the Court of Appeals that summary judgment on the issue of nuisance in favor of defendant was improper.

Plaintiff's other claims of fraud and unfair trade practices were, as the Court of Appeals panel unanimously agreed, also improvidently dismissed by the trial court. In light of Judge Clark's thorough treatment of those issues, we see no need to comment on those questions save to say that we agree with the rationale and the result reached in the Court of Appeals on those issues.

[2] We have reserved until now a discussion of defendants' claim that, because plaintiff's action on the lease contract is barred by the Statute of Frauds, plaintiff's other claims of nuisance, fraud and unfair trade practices are also barred. We, like the Court of Appeals, are unpersuaded by defendants' argument. It has long been the rule in this State that the Statute of Frauds bars only enforcement of the invalid contract; it does not bar other claims which a party might have even though those claims arise in connection with the voidable lease. *Ingram v. Corbit*, 177 N.C. 318, 99 S.E. 18 (1919). The reason for this rule is clearly illustrated by the instant case. Even though the lease contract is voidable, a party should not escape liability for alleged fraudulent statements made to a second party to induce that party to occupy, make improvements to and pay rent for the property involved.

The decision of the Court of Appeals is therefore modified as to the status of the plaintiff as a periodic tenant rather than as a

tenant at will and otherwise affirmed, and the cause is remanded to the Court of Appeals for further remand to the Superior Court, Currituck County for further proceedings not inconsistent with this opinion.

Modified and affirmed.

STATE OF NORTH CAROLINA v. JOHNELL PORTER AND KEITH EMERSON ROSS

No. 129

(Filed 31 August 1981)

1. **Robbery § 3; Criminal Law § 71— robbery victim's testimony—shorthand statement of fact**

The trial court in an armed robbery case did not err in allowing a robbery victim to testify that the cash register at the crime scene was difficult to open or that he had been robbed, since such statements were properly admitted as shorthand statements of fact.

2. **Robbery § 4— armed robbery—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where it tended to show that a store employee was robbed at gunpoint by more than one person; the persons who robbed him fled from the scene in a red Dodge Aspen; at least one person fled from the Dodge into the woods at the end of a high speed chase by a county police officer; police officers used a bloodhound to follow the trail of that person to a location where both defendants were found hiding under a bridge; and a .32 caliber revolver was also found at that location. G.S. 14-87.

3. **Robbery § 5.4— armed robbery charged—instruction on common law robbery not required**

The trial court in an armed robbery case properly refused defendants' request for an instruction on common law robbery, since the victim testified that all he observed during the incident before being rendered unconscious was the barrel of a gun held at his forehead, and there was no evidence in the record to contradict this testimony

4. **Constitutional Law § 45— right of accused to represent self—alternative right to counsel**

In this jurisdiction an accused has the right to appear in propria persona or, in the alternative, by counsel, but he may not represent himself as co-counsel with an attorney.

5. Criminal Law § 92.1— joinder of case against two defendants

The trial court did not err in granting the State's motion to join defendant's case with that of a codefendant for trial, since both defendants were charged with accountability for the same armed robbery; moreover, there was no merit to defendant's contention that, had the parties been tried separately, a witness's testimony that he saw a man not fitting defendant's description leave the getaway vehicle and run into the woods would not have been admissible against him, since the witness's testimony would have been admissible against defendant in any event as the witness's personal observation of one of the events taking place during the incident, and the testimony would be more favorable to defendant than prejudicial. G.S. 15A-926(b)(2)a; 15A-927(c)(2)a.

6. Criminal Law § 40.2— transcript of grand jury proceedings

The trial court did not err in denying defendant's request for a transcript of the grand jury proceedings concerning his indictment, since such proceedings are considered secret, and defendant is adequately protected by his right to object to improper evidence and to cross-examine the witnesses presented against him at trial. G.S. 15A-623.

7. Criminal Law § 44— bloodhound—pure blood established

If a dog's owner or handler identifies the dog as a bloodhound and the dog justifies this description by his performance, then the pure blood requirement for introduction of evidence of the dog's conduct has been met; therefore, testimony in this armed robbery case by the handler of the dog which tracked defendant that he was familiar with the dog's lineage, that the dog was a pure blood bloodhound, that the dog had been trained to follow the human scent, and that the dog had successfully done so on at least 60 prior occasions was adequate to establish the dog's pure blood.

8. Criminal Law § 75.9— volunteered statement—officer's question not interrogation

In a prosecution for armed robbery where the evidence tended to show that the conversation in question transpired immediately after both defendants were apprehended and handcuffed, the arresting officer radioed his supervisor to inform him that two suspects had been taken into custody, the supervisor asked the arresting officer if he had recovered a bank bag, defendant heard the question over the radio and stated that the bag was in the car, the arresting officer then asked "What bank bag?", and defendant replied, "The bag from the robbery," defendant's statement about the location of the bag was volunteered and was not made in response to an in-custody interrogation; moreover, the arresting officer's question addressed to defendant did not convert the dialogue into an interrogation since the question was a request that defendant explain his previous statement, and the request was an immediate response in an emotional situation made before the officer had the opportunity to form a design or motivation to elicit incriminating statements from defendant.

9. Constitutional Law § 72— inculpatory statement by codefendant—right to confrontation not abridged

Defendant's constitutional right of confrontation was not violated by the admission of inculpatory statements made by a codefendant at the time of his

arrest, though the codefendant elected not to testify at trial, since the codefendant's statements were admissible as spontaneous utterances and as such were admissible against defendant as an exception to the hearsay rule, and since the statements were inherently reliable due to the very nature of their spontaneity.

10. Criminal Law § 92.1— consolidated trial—same charges against two defendants—codefendant's statements admissible against defendant

There was no merit to defendant's contention that the trial court erred in joining his case for trial with that of a codefendant because he was unfairly prejudiced by the admission of the codefendant's statements at their joint trial and, had he been tried separately, such evidence would have been excluded, since the codefendant's extrajudicial statements were indeed admissible against defendant under the spontaneous utterance exception to the hearsay rule, and defendant failed to show an abuse of the trial court's discretion in joining the charges against the two defendants. G.S. 15A-927(c)(1).

DEFENDANTS appeal as a matter of right from the decision of the Court of Appeals, 50 N.C. App. 568, 274 S.E. 2d 860 (1981) (opinion by *Hill, J.*, with *Webb, J.*, concurring and *Martin (Harry C.), J.*, dissenting) affirming the judgments of *Ferrell, J.*, entered at the 14 January 1980 Session of Superior Court, MECKLENBURG County.

Defendants were charged in indictments, proper in form, with armed robbery. Their cases were consolidated for trial over each defendant's objection and the jury returned a verdict finding both guilty of armed robbery. The trial court sentenced defendant Ross to a term of imprisonment for not less than twenty years nor more than thirty years, and sentenced defendant Porter to imprisonment for not less than twenty-five years nor more than thirty years. The majority in the Court of Appeals, with Judge Harry C. Martin dissenting, found no error which would entitle either defendant to a new trial. Defendants appeal to this Court as a matter of right pursuant to G.S. 7A-30(2).

The State's evidence tended to show that between 9:00 and 9:15 a.m. on the morning of 5 October 1979 Mr. Hal B. Martin, an employee at the Phillips 73 Store on Highway 73 and Beatties Ford Road in Mecklenburg County, was standing in the back of the store when he felt a hand on his shoulder and heard someone say "don't turn around." A gun was held to his head and he was ordered to crouch on the floor. He was then hit on the head and rendered unconscious. He never saw his assailant.

When Mr. Martin regained consciousness he observed a customer, Mr. William Lackey, lying on the floor. Mr. Martin noticed that a bag containing sandwich labels, a bag of loose cigarettes, and a bank bag containing approximately $150.00 had been taken from the store. He immediately reported the incident to law enforcement officers.

Mr. William Lackey testified that when he arrived at the Phillips 73 Store on the morning of the robbery, he observed a red Dodge Aspen automobile parked at the end of the building with the engine running. When he entered the store he was hit on the head from behind and ordered to crawl on the floor. He was later beaten until be became unconscious, but not before hearing a male voice from the back of the store. He glanced at his assailant, whom he described as a black male approximately five feet eight inches tall. As Mr. Martin was calling the police, Mr. Lackey regained consciousness and described to the police over the telephone the vehicle he had seen parked outside the store.

An alert for the vehicle was broadcast by the police dispatcher. Shortly thereafter, Officer Joe Wilson of the Mecklenburg County Police Department located a red Dodge Aspen near the location of the robbery and began to pursue it. A high speed chase ensued, ending when Officer Wilson was forced to drive his car into a ditch to avoid a collision with the Dodge. After driving into the ditch, Officer Wilson observed a black male about five feet eight inches tall leave the Dodge and run into the woods. The Dodge was driven away at a high rate of speed.

Officer Wilson summoned assistance and a bloodhound was brought to the location at which the black male ran into the woods. County officers followed the bloodhound about one mile into the woods to an old bridge under which both defendants were hiding. A .32 caliber revolver was also found under the bridge. The officers held both defendants at gun point until they were handcuffed. Officer Wilson then notified his supervisor by radio that two suspects were being held. The supervisor then asked Wilson if a bank bag had been found. Defendant Porter heard this question and responded, "The bank bag is in the car." Officer Wilson then asked, "What bank bag?"; to which Porter replied, "The bag from the robbery."

State's witness Dennis Sink testified that as he was driving upon Beatties Ford Road on the morning of 5 October 1979 he observed a red Dodge Aspen traveling in the opposite direction at a high rate of speed. He saw one of the passengers in the car throw two paper bags out of the car window. He then noticed a county police car following the Dodge, also at a high rate of speed. Mr. Sink turned his vehicle around, stopped and picked up the paper bags, and turned them over to law enforcement officers. He stated that the bags contained food labels and cigarettes.

Defendants presented no evidence at trial.

Scott T. Pollard for defendant Johnell Porter.

Assistant Public Defender Lyle J. Yurko for defendant Keith Emerson Ross.

Attorney General Rufus L. Edmisten by Assistant Attorney General Ben G. Irons, II, for the State.

COPELAND, Justice.

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

I

Although defendants submitted separate briefs, several issues are argued by both defendants. For the sake of clarity and convenience, we will first address those issues which are raised by both defendants.

[1] Defendants first contend that the trial court erred in allowing State's witness Hal Martin to testify that the cash register at the Phillips 73 Store was difficult to open. Defendants argue that this testimony was an expression of opinion by a non-expert witness, and therefore inadmissible.

As a general rule, a witness may not give opinion evidence when the facts underlying the opinion are such that the witness can state them in a manner which will permit an adequate understanding of them by a jury and the witness is no better qualified than the jury to draw inferences and conclusions from

the facts. *State v. Sanders*, 295 N.C. 361, 245 S.E. 2d 674 (1978); *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978). However, this Court has long held that despite the general rule prohibiting opinion evidence, a witness may employ "shorthand statements of fact" as a means of referring to matters about which he has previously testified. Such shorthand statements are admissible even though the witness must also state a conclusion or opinion in rendering them. *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968); 1 Stansbury's North Carolina Evidence § 125 (Brandis Rev. 1973). In the present case, Mr. Martin first testified that to open the cash register one must "put a dime in it" and hit the groceries and total keys, or one must punch the no sale key. His subsequent statement that the cash register was difficult to open was therefore a shorthand method of referring to his prior testimony, and defendants' objection to the statement was properly overruled.

Under similar reasoning, we likewise find defendants' next assignment of error without merit. Defendants maintain that the trial court erred in allowing Mr. Martin to testify that he had been "robbed," since such a statement was conclusory and involved a statement of opinion by the witness. Before making this statement Mr. Martin had testified that a gun had been held to his head, that he was forced to crawl on the floor, that he had been beaten over the head until rendered unconscious, and that money and several other items had been taken from the store. His later testimony that he had been "robbed" was thus properly admitted as a shorthand statement of the facts.

Defendants also allege that the trial court erred in denying their motions to dismiss on the ground that the evidence was insufficient to sustain their convictions. In ruling upon defendants' motion to dismiss, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The defendants' motion must be denied if the State has offered substantial evidence against defendant of every essential element of the crime 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. Fletcher*, 301

N.C. 709, 272 S.E. 2d 859 (1981); *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). The test of the sufficiency of evidence to withstand dismissal is the same whether the State's evidence is direct, circumstantial, or a combination of the two. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

[2] An armed robbery occurs when an individual takes or attempts to take personal property from the person of another, or in his presence, or from any place of business or residence where there is a person or persons in attendance, by the use or threatened use of a dangerous weapon, whereby the life of a person is endangered or threatened. G.S. 14-87. *See also State v. Ballard*, 280 N.C. 479, 186 S.E. 2d 372 (1972); *State v. Waddell*, 279 N.C. 442, 183 S.E. 2d 644 (1971). In the case *sub judice*, the defendants acknowledged that a robbery had taken place. The State presented evidence tending to show that Hal Martin was robbed at gunpoint by more than one person, that the persons who robbed him fled from the scene in a red Dodge Aspen, that at least one person fled from the Dodge into the woods at the end of a high speed chase by a county police officer, that police officers used a bloodhound to follow the trail of that person to a location where both defendants were found hiding under a bridge, and that a .32 caliber revolver was also found at that location. After considering this evidence in the light most favorable to the State, we find that there was substantial evidence presented of defendants' guilt on each material element of armed robbery. The determination of defendants' guilt or innocence was therefore a question to be answered by the jury, and the trial court did not err in denying defendants' motion to dismiss.

[3] Defendants next argue that the trial court erred in failing to instruct the jury on common law robbery. As a general rule, when there is evidence of defendant's guilt of a crime which is a lesser included offense of the crime stated in the bill of indictment, the defendant is entitled to have the trial judge submit an instruction on the lesser included offense to the jury. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976); *State v. Bell*, 284 N.C. 416, 200 S.E. 2d 601 (1973). Common law robbery is a lesser included offense of armed robbery, and an indictment for armed robbery will support a conviction of common law robbery. *State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974). Nevertheless, the trial judge is not required to instruct on common law robbery when

the defendant is indicted for armed robbery if the uncontradicted evidence indicates that the robbery was perpetrated by the use or threatened use of what appeared to be a dangerous weapon. Justice Branch (later Chief Justice), speaking for the Court in *State v. Thompson*, 297 N.C. 285, 289, 254 S.E. 2d 526, 528 (1979), set forth the test for determining when an instruction on common law robbery is required as follows:

> "We conclude that when the State offers evidence in an armed robbery case that the robbery was attempted or accomplished by the use or threatened use of what appeared to the victim to be a firearm or other dangerous weapon, evidence elicited on cross-examination that the witness or witnesses could not positively testify that the instrument used was in fact a firearm or dangerous weapon is not of sufficient probative value to warrant submission of the lesser included offense of common law robbery. When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be—a firearm or other dangerous weapon."

See also State v. Rivens, 299 N.C. 385, 261 S.E. 2d 867 (1980).

In the case before us, Mr. Hal Martin testified that all he observed during the incident before being rendered unconscious was the barrel of a gun, held at his forehead. There is no evidence in the record to contradict this testimony. We therefore presume the instrument described by Mr. Martin to be a firearm, and hold that the trial court properly refused defendants' request for an instruction on common law robbery.

II

We next address those issues argued solely by defendant Porter.

[4] Porter contends that the trial court erred in denying his motion to participate as co-counsel at his trial, in violation of his constitutional right to represent himself, guaranteed by the Sixth Amendment to the United States Constitution. The Sixth Amendment, made applicable to the states by the Fourteenth Amendment, guarantees the accused in a State criminal action the right to proceed without counsel and represent himself at trial when he

voluntarily and knowingly elects to do so. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976). Defendant Porter urges us to interpret the holding of the United States Supreme Court in *Faretta v. California, supra*, as establishing not only the right to represent oneself in a criminal action, but also as establishing the right of an accused to represent himself as co-counsel with an attorney. This Court has previously held in *State v. House*, 295 N.C. 189, 244 S.E. 2d 654 (1978), that the *Faretta* decision extends only to an accused's right to forego all assistance of counsel and does not create a right to be simultaneously represented by himself and an attorney. We reaffirmed this holding in *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981). It is clear that in this jurisdiction, an accused has the right to appear *in propria persona* or, in the alternative, by counsel. Since defendant Porter elected to retain the services of his court-appointed attorney, the trial court properly denied his motion to participate as co-counsel, and his allegations to the contrary are without merit.

[5] By his next assignment of error, defendant submits that the trial court erred in granting the State's motion to join his case with defendant Ross' case for trial, and erred in denying his motion to sever. G.S. 15A-926(b)(2)a provides that the charges against two or more defendants may be joined for trial when each of the defendants is charged with accountability for each offense joined. Since both defendants in the case before us were charged with accountability for the same armed robbery, the armed robbery charges against them were properly joined for trial.

Nevertheless, defendant complains that the consolidation prevented him from obtaining a fair trial, and therefore his motion to sever should have been granted pursuant to G.S. 15A-927(c)(2)a. The decision to join the charges against two or more defendants for trial is within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. The defendant seeking to overturn the discretionary ruling must show that the joinder has deprived him of a fair trial. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976); *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976), *death sentence vacated* 429 U.S. 809, 97 S.Ct. 46, 50 L. Ed. 2d 69 (1976).

Defendant Porter contends that had the parties been tried separately, Mr. Martin's testimony that he saw a man not fitting

Porter's description leave the Dodge and run into the woods would not have been admissible against him, and that the admission of this testimony deprived him of a fair trial. We disagree. Mr. Martin's testimony would be admissible against defendant Porter in any event as the witness' personal observation of one of the events taking place during the incident, which observation is relevant as tending to prove a fact in issue, the identity of the robbers. *See Cross v. Beckwith*, 293 N.C. 224, 238 S.E. 2d 130 (1977); *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951). We fail to understand how defendant Porter could be prejudiced by the admission of this evidence which tended to prove that he was not the individual who fled from the Dodge. Such testimony would be more favorable to him than prejudicial. Defendant's assignment of error is without merit and overruled.

[6] Porter next argues that the trial court committed prejudicial error in denying his request for a transcript of the grand jury proceedings concerning his indictment. An accused in this jurisdiction has no right to obtain a transcript of the grand jury proceedings against him. Such proceedings are considered "secret." G.S. 15A-623. Defendant is adequately protected by his right to object to improper evidence and cross-examine the witnesses presented against him at trial. *See generally United States v. Kernodle*, 367 F. Supp. 844 (M.D.N.C. 1973).

[7] Defendant Porter also maintains that the trial court erred in admitting the evidence relating to the tracking by a bloodhound. Before the conduct of bloodhounds will be received into evidence it must be shown:

> "(1) That they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification." *State v. McLeod*, 196 N.C. 542, 545, 146 S.E. 409, 411 (1929).

Porter contends that since the dog handler who testifed at trial could not establish the pedigree of the dog that tracked him, the

first element specified in *McLeod* was not established. It is defendant's position that to show "pure blood," the dog's registration papers must be introduced into evidence. Defendant's allegation was squarely rejected by this Court in *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965). In that case Justice Sharp (later Chief Justice), speaking for the Court, set forth the test for determining "pure blood" as follows:

> "In practice, if the dog has been identified as a bloodhound, it has been the conduct of the hound and other attendant circumstances, rather than the dog's family tree, which have determined the admissibility of his evidence.
>
> We find no North Carolina cases, and defendant has cited us to none, in which bloodhound evidence has been excluded for a deficiency in the proof of the bloodhound's pedigree if he is shown to be naturally capable of following the human scent, *i.e.*, that he is a bloodhound, and if the evidence is corroborative of other evidence tending to show defendant's guilt." 263 N.C. at 359, 139 S.E. 2d at 665.

It is thus sufficient if the dog's owner or handler identifies the dog as a bloodhound and the dog justifies this description by his performance. In the case *sub judice* the handler of the dog that tracked defendant testified that he was familiar with the dog's lineage and that he was a pureblood bloodhound. He further stated that the dog had been trained to follow the human scent and had successfully done so on at least 60 prior occasions. We find this testimony adequate to establish the dog's "pure blood" under the holding in *Rowland*, and defendant's allegations to the contrary are overruled.

[8] The thrust of defendant Porter's case on appeal is his contention that the trial court erred in denying his motion to suppress the incriminating statements he made at the time of his arrest. Porter maintains that his statements were elicited by a custodial interrogation from law enforcement officers before he was advised of his constitutional rights, and are therefore inadmissible under the holding of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). There is no question but that defendant Porter's statements were rendered after he was taken into custody and before he was advised of his constitutional rights. The question for our determination is thus whether Porter's

statements were given in response to an "interrogation" by law enforcement officers which would bring his statements under the exclusionary rule established in *Miranda*. We agree with the majority of the Court of Appeals that the dialogue at issue in this case between defendant Porter and police officers cannot be characterized as an "interrogation," and therefore Porter's statements were properly admitted into evidence against him.

The conversation to which defendant Porter objects transpired immediately after both defendants were apprehended and handcuffed. Officer Wilson radioed his supervisor to inform him that two suspects had been taken into custody. The supervisor asked Officer Wilson if he had recovered a bank bag. Defendant Porter heard the question over the radio and stated, "The bank bag is in the car." Officer Wilson then asked "What bank bag?", to which Porter replied, "The bag from the robbery."

When the State offers a defendant's incriminating statement into evidence and defendant objects, the trial court must conduct a *voir dire* hearing to determine its admissibility. *State v. Jones*, 294 N.C. 642, 243 S.E. 2d 118 (1978). The trial judge's finding after the *voir dire* hearing that an inculpatory statement was freely and voluntarily given is conclusive on appeal when supported by competent evidence. *State v. Parton, supra, State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979). In the case before us, a *voir dire* hearing was held to determine the admissibility of Porter's inculpatory statements, after which the trial court found that the statements were spontaneous utterances, voluntarily given, and not in response to an in-custody interrogation within the meaning of *Miranda*.

The Court in *Miranda* expressly noted that not all statements obtained by the police after a person has been taken into custody are to be considered the product of an interrogation, stating:

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and

> states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 384 U.S. at 478, 86 S.Ct. at 1630, 16 L.Ed. 2d at 726.

Porter's initial statement that "the bank bag is in the car" was clearly the type of volunteered statement expressly excluded from the *Miranda* holding. The question by Officer Wilson's supervisor was addressed to Officer Wilson, not to defendant. Porter's response was spontaneous and voluntary, and therefore admissible despite the fact that he had not yet been informed of his constitutional rights.

We further hold that the question Officer Wilson addressed to defendant, "What bag?", did not convert the dialogue into an "interrogation" within the meaning of *Miranda*. As we said in *State v. Haddock*, 281 N.C. 675, 682, 190 S.E. 2d 208, 212 (1972):

> "[a] voluntary in-custody statement does not become the product of an 'in-custody interrogation' simply because an officer, in the course of appellant's narration, asks defendant to explain or clarify something he has already said voluntarily."

Thus, where a defendant voluntarily stated that he committed a murder, and a law enforcement officer asked him to "explain what happened," the Court held that the officer's statement did not convert the conversation into an "interrogation," and defendant's subsequent statements were admissible despite the absence of *Miranda* warnings. *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975), *death sentence vacated* 428 U.S. 904, 96 S.Ct. 3210, 49 L. Ed. 2d 1210 (1976). Likewise, where defendant ran up to a burning building and said to a uniformed police officer, "I didn't mean for it to happen like this," the police officer's request to explain what she meant by that statement did not constitute an "interrogation" rendering defendant's susequent confession inadmissible. *State v. Freeman*, 295 N.C. 210, 244 S.E. 2d 680 (1978). The principle that emerges from these decisions is that to constitute an "interrogation" within the meaning of *Miranda*, the conduct of the police must involve a measure of compulsion. "Interrogation" involves a procedure designed to elicit a statement from the individual at whom it is directed. An officer's request in the heat of an emo-

tional situation that the accused explain or clarify a volunteered statement is not a procedure designed to elicit an inculpatory response.

Applying these principles to the facts of the case *sub judice*, it is apparent that Officer Wilson's question, "What bag?", was a request that Porter explain his previous statement, which request was an immediate response in an emotional situation, made before Officer Wilson had the opportunity to form a design or motivation to elicit incriminating statements from Porter. Consequently, under the prior decisions of this Court, Officer Wilson's question did not transform the situation into an "interrogation," and defendant's subsequent statements are admissible in the absence of *Miranda* warnings.

Defendant submits, however, that our prior decisions have been modified by the United States Supreme Court's decision in *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed. 2d 297 (1980). In that case, the Court was called upon to address for the first time the meaning of "interrogation" as it was employed in *Miranda*, and defined the term as follows:

> "We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to envoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely

to elicit an incriminating response." 446 U.S. at 300-02, 100 S.Ct. at 1689-90, 64 L.Ed. 2d at 307-08.

It is Porter's position that Officer Wilson "should have known" that his question was likely to elicit an incriminating response, and thus it was "interrogation" within the definition set forth in *Innis*. We believe defendant Porter's argument ignores the language in *Innis* which emphasizes that the holding in *Miranda* was designed to protect an accused from *coercive* police practices. The facts and holding of *Innis* reflect this emphasis. In that case, a body was discovered in the vicinity of a school for handicapped children. It was determined that the individual died as a result of wounds received from a shotgun blast. Defendant was arrested near the school and taken to police headquarters in a police vehicle. During the drive, two of the patrolmen who arrested defendant spoke with each other concerning the possibility that one of the handicapped children from the nearby school might find a weapon and get hurt. Defendant overheard the conversation and volunteered to show the patrolmen where the shotgun was located. The Court found that the patrolmen had no reason to know that their conversation was likely to elicit an inculpatory response, therefore it did not constitute an "interrogation" within the meaning of *Miranda*. It is difficult to discern how the question asked by Officer Wilson could be any more likely to invoke an incriminating response than was the conversation involved in *Innis*. Officer Wilson voiced his question as an immediate response to Porter's spontaneous utterance, without the opportunity to reflect or to consider whether his query was reasonably likely to elicit an inculpatory remark. There was no evidence of any coercive practice on the part of the law enforcement officers beyond that inherent in the arrest itself. Under the circumstances present in this case, we hold that the officer had no reason to know that his question was "likely to elicit an incriminating response" within the meaning of *Innis*. Consequently, the definition of "interrogation" in *Innis* does not apply to bring the conversation at issue within the holding of *Miranda*, and defendant Porter's motion to suppress was properly denied.

III

We finally address those arguments presented by defendant Ross.

[9] Defendant Ross contends that the trial court erred in denying his motion to suppress the inculpatory statements made by codefendant Porter at the time of his arrest. Specifically, he argues that since defendant Porter elected not to testify at trial, the admission of these statements violated his right, as guaranteed by the Sixth Amendment of the United States Constitution, to confront the witnesses against him. We disagree and hold that, under the particular facts and circumstances of this case, defendant's constitutional right of confrontation was not violated by the admission of the challenged evidence. Consequently, defendant Ross is not entitled to a new trial on this basis.

In essence, defendant Ross argues that the trial court's admission of Porter's statements violated the decision of the Supreme Court in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968). In *Bruton*, the Court held that where one codefendant made extrajudicial statements implicating the other and the declarant elected not to testify at trial, the non-declarant's constitutional right to confront his accuser was violated by the introduction of those statements at their joint trial. Significantly though, the Court also emphasized that the declarant's statements were hearsay and not admissible against the non-declarant codefendant under any of the recognized exceptions to the hearsay rule. 391 U.S. at 128 n. 3, 88 S.Ct. at 1623-24 n. 3, 20 L.Ed. 2d at 480-81 n. 3. Thus, *Bruton* stands for the general proposition that the admission of a codefendant's extrajudicial statements against the non-declarant violates the Confrontation Clause of the Sixth Amendment if two circumstances simultaneously co-exist: (1) the statements inculpate the non-declarant and (2) the statements do not fall within an exception to the hearsay rule. It is in this light that we must examine Porter's statements to determine whether their admission deprived Ross of any constitutional right.

In the first instance, we believe that Porter's statements did, in fact, inculpate Ross. Officer Wilson testified at the *voir dire* hearing that when he asked Porter "What bank bag?", Porter responded, "The bag *we got* from the robbery." Though the trial court redacted the statement and allowed Officer Wilson to testify that Porter had said, "The bag from the robbery," the deletion of an express reference to defendant Ross was insufficient to absolve the statements of any incriminating implications

as to Ross's guilt. The two defendants were tracked by a bloodhound and found hiding together under a bridge about a mile from the location at which they entered the woods, and a gun was also found nearby. Moreover, Porter and Ross had both been arrested when Porter made the damaging statement. Under such circumstances, the jury could readily infer that Porter meant to incriminate Ross, as well as himself, by the statement, "The bag from the robbery."

In the second instance, however, we are persuaded that Porter's statements fit within an exception to the hearsay rule. For, it is well established that "[w]hen a startling or unusual incident occurs, the exclamations of a participant or a bystander concerning the incident, made spontaneously and without time for reflection or fabrication, are admissible." 1 Stansbury, N.C. Evidence § 164, at 554 (Brandis rev. 1973). The record in the instant case reveals that there was a spirited chase and the tracking of at least one of the defendants with bloodhounds; that defendants were found under a bridge by Officer Wilson and arrested; that a voice came over the officer's walkie-talkie asking him if a bank bag had been recovered; that defendant Porter reacted to the stimulus by saying "The bag is in the car"; that Officer Wilson then asked "What bank bag?"; and that defendant Porter replied "The bag we got from the robbery." [As previously indicated, the trial judge subsequently edited this final statement by eliminating the words "we got."] Thus, we believe Porter's exclamations, made almost immediately after the defendants' apprehension and arrest and in direct response to the unusual stimulus of a question addressed to another over a radio, constituted "spontaneous utterances" and as such were admissible against Ross as an exception to the hearsay rule.

It has been noted that the Confrontation Clause and the hearsay rule "stem from the same roots" and are "designed to protect similar values." *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970); *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed. 2d 489 (1970). In accordance with that view, this Court has consistently held that statements which fall under exceptions to the hearsay rule may be admitted against codefendants without violating the Confrontation Clause. *See State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978) (dying declarations); *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977) (implied ad-

missions). However, the particular facts of *each* case must be carefully examined by the courts to determine whether an accused's right of confrontation was violated whenever the extrajudicial statement of a codefendant declarant, who is not available for cross-examination, is offered as evidence of the accused's guilt under an exception to the hearsay rule. *Dutton v. Evans, supra; United States v. Carlson,* 547 F. 2d 1346 (8th Cir. 1976). In this regard, the United States Supreme Court has recently held that merely classifying a statement as a hearsay exception does not *automatically* satisfy the requirements of the Sixth Amendment and that hearsay testimony is admissible against the accused, without violating his right of confrontation, only when it bears adequate "indicia of reliability" to guarantee its trustworthiness. *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980).

We have already indicated that Porter's statements, though hearsay, were admissible against defendant Ross as spontaneous utterances. We further hold that this hearsay testimony was inherently reliable[1] due to the very nature of its spontaneity.

> "[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); *State v. Johnson,* 294 N.C. 288, 291, 239 S.E. 2d 829, 830-31 (1978).

The reliability of Porter's statements are additionally enhanced by the unusual character of the overall surrounding events which culminated in the defendants' arrests and triggered the incriminating exclamations. In sum, upon this record, we are compelled to conclude that defendant Ross's right of confrontation was not violated by the trial court's admission of the testimony complained of at the defendants' joint trial.

1. In *Ohio v. Roberts, supra,* the Supreme Court indicated that a sufficient inference of reliability can be made "without more" from the showing that the challenged evidence falls within "a firmly rooted hearsay exception." 448 U.S. at 66, 100 S.Ct. at 2539, 65 L.Ed. 2d at 608. The hearsay exception for spontaneous utterances is firmly rooted in North Carolina. *See* 1 Stansbury, N.C. Evidence § 164 (Brandis rev. 1973).

[10] In his only remaining assignment of error, defendant Ross contends that the trial court erred in granting the State's motion to join both him and Porter for trial and in denying his motion for severance. At the outset, defendant admits that the cases were properly joined for trial under G.S. 15A-926(b)(2)a because Porter and he were charged with accountability for the same offense, the armed robbery. He nevertheless maintains that the joinder was improper under G.S. 15A-927(c)(1) and essentially contends that he was unfairly prejudiced by the admission of Porter's statements at their joint trial because, had he been tried separately, this evidence would have been excluded. This contention cannot be sustained.

G.S. 15A-927(c)(1) requires the prosecutor to select one of three courses of action "[w]hen a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him *but is not admissible against him.* . . ." (Emphasis added.) The trial court's joinder of the charges is not subject to attack on the basis of this subsection since we have ruled that Porter's extrajudicial statements were indeed admissible against defendant under the spontaneous utterance exception to the hearsay rule.

Defendant finally asserts that the joinder was improper under G.S. 15A-927(c)(2)b. That statute requires the judge to deny a joinder for trial or grant a defendant's motion to sever when "it is found necessary to achieve a fair determination of the guilt or innocence of that defendant." As we have already stated in addressing the similar contention of defendant Porter, the decision to join the charges against two or more defendants rests within the trial judge's sound discretion, and we may not disturb that decision on appeal unless defendant adequately demonstrates the existence of an abuse of discretion. *State v. Slade, supra; State v. Alford, supra.* It suffices to say that we are not persuaded that joinder in this case deprived defendant Ross of a fair trial. The assignment of error is consequently overruled.

For the foregoing reasons, the convictions of these defendants must be upheld.

The decision of the Court of Appeals is affirmed.

Affirmed.

HAYDEN P. OXENDINE AND WIFE, DOROTHY W. OXENDINE v. CATAWBA COUNTY DEPARTMENT OF SOCIAL SERVICES

No. 71

(Filed 31 August 1981)

1. **Courts § 9; Rules of Civil Procedure § 42— consolidation—order of superior court judge improper**

The discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial; therefore, the trial court erred in granting defendant's motion to consolidate plaintiffs' custody action and petition for adoption for trial in the superior court where the judge had a hearing on defendant's motion and entered his order of consolidation out of term and out of session, but there was no indication that he was scheduled to preside at the session of court during which he set the consolidated cases to be presented for trial. G.S. 1A-1, Rule 42(a).

2. **Infants § 6; Divorce and Alimony § 25— who may bring custody action**

The Court of Appeals erred in determining that G.S. 50-13.1, which names the parties who may institute a custody proceeding, applied only to those custody disputes arising from a divorce or separation.

3. **Infants § 6; Parent and Child § 1— child custody—controlling statute**

In plaintiffs' action to obtain custody of a child placed in their home pursuant to a foster parent agreement, the Court of Appeals erred in relying on G.S. 7A-289.33 as the controlling statute, since that statute sets forth the effects of a court order terminating the parental rights of a natural parent on the grounds of abuse or neglect of a minor child, but such a court order was not involved in this case, as the natural parents of the minor child in issue voluntarily released their parental rights and surrendered the child to defendant for adoptive placement; therefore, this action was governed by the provisions of G.S. 48-9.1.

4. **Infants § 6; Parent and Child § 1— parental rights voluntarily surrendered—action by foster parents for custody**

According to G.S. 48-9.1, the county department of social services or the child placing agency to which a child has been surrendered by his parents retains legal custody of the child until the occurrence of one of the events specified in the statute, and legal custody never passes to any foster parent charged with the duty of caring for and supervising the child; therefore, plaintiffs were without standing to bring an action seeking custody of the minor child placed in their home for foster care by defendant.

5. **Adoption § 2— foster parents—standing to file adoption petition**

Since the welfare of the child is the controlling factor in an adoption proceeding, any agreement between plaintiffs and defendant concerning the adoption of a child who was placed in plaintiffs' home for foster care is subject to the court's independent judgment as to what is in the best interest of the

child; consequently, defendant could not by contract seek to deprive plaintiffs, as foster parents, of standing to challenge the reasonableness of defendant's denial of plaintiffs' request to adopt the minor child placed in their home.

6. Adoption § 1— adoption action transferred from clerk to superior court

The clerk of superior court did not err in transferring plaintiffs' adoption action to the superior court where a number of factual issues arose in determining whether defendant unreasonably withheld its consent to allow plaintiffs to institute an adoption proceeding. G.S. 48-12(a); G.S. 1-273.

ON plaintiffs' petition for discretionary review of a decision of the Court of Appeals, 49 N.C. App. 570, 272 S.E. 2d 417 (1980) (opinion by *Morris, C.J.*, with *Hedrick, J.* and *Whichard, J.* concurring), vacating the order entered by *Ferrell, J.*, on 12 November 1979 in Superior Court, CATAWBA County.

This case involves the custody and adoption of a minor child, Jeffrey Thomas Brown, who was placed in the custody of and surrendered for adoptive placement to defendant, the Department of Social Services, by his biological mother on 19 April 1978. On 20 October 1978 the child's biological father executed a consent for the child to be placed for adoption by defendant.

On 2 June 1978, when the child was approximately five weeks old, he was placed in plaintiffs' home pursuant to a foster parent agreement. Plaintiffs were to provide care and supervision for the child as licensed foster parents under the Foster Home Program. The child developed, and still suffers from, severe respiratory problems which necessitate special care, attention, and supervision of the child by plaintiffs. Due to the danger of death to the child from wheezing, coughing, and other respiratory symptoms, the child slept in the same room with plaintiffs from the time he was placed in their care. Plaintiffs at all times sought appropriate medical care for the child and followed the instructions given by doctors explicitly.

One provision of the foster parent agreement entered into between plaintiffs and defendant requires that plaintiffs, as foster parents, initiate no proceedings for the adoption or custody of a child placed with them without the prior written consent of the supervising agency. In accordance with this provision, plaintiffs in April of 1979 requested defendant's consent to adopt the child at issue in this case. Defendant denied their request, stating that plaintiffs were ineligible to adopt the child because (1) at ages

forty-four and forty-three they were not in the normal child bearing years for a child of this age, and (2) their residency in Catawba County greatly increased the likelihood that the child's natural parents would learn of his identity and whereabouts. On 7 May 1979 defendant informed plaintiffs that adoptive placement of the child in another home was imminent and that they could expect removal of the child in the near future.

On 25 May 1979, plaintiffs filed a complaint pursuant to G.S. 50-13.4 and G.S. 50-13.5(b)(1) in Catawba County District Court seeking permanent custody of the child. On the same day, Judge Tate entered an interlocutory order awarding temporary custody to plaintiffs pending the final outcome of their custody action.

Plaintiffs filed a petition for the adoption of Jeffrey Thomas Brown with the Clerk of Superior Court of Catawba County on 12 June 1979. Defendant answered, contending that since plaintiffs did not obtain defendant's permission to seek adoption of the child, as required by the foster parents agreement, then they had no standing to institute an adoption proceeding and the adoption petition should be dismissed for failure to state a claim for relief. Defendant also claimed that the adoption of the child by plaintiffs would not be in the best interests of the child, enumerating several justifications for this conclusion.

On 11 October 1979, the Clerk of Superior Court, in accordance with G.S. 1-273, ordered the adoption proceeding transferred to the civil issue docket of Catawba County Superior Court, in that both factual and legal matters were at issue in this case.

Thereafter defendant moved, pursuant to rule 42(a) of the North Carolina Rules of Civil Procedure, to consolidate plaintiffs' custody action in district court with plaintiffs' petition for adoption in superior court for a joint trial in the superior court. Plaintiffs filed notice of limited appearance challenging the superior court's jurisdiction to hold a hearing on the consolidation matter. Plaintiffs argued that the district court had exclusive jurisdiction over child custody matters under G.S. 50-13.5(h) and, further, that G.S. 48-12 gives the Clerk of Superior Court exclusive original jurisdiction over adoption proceedings, with no jurisdiction in the superior court except on appeal from the Clerk's determination.

Despite plaintiffs' contentions, Judge Ferrell entered an order on 12 November 1979 dismissing plaintiffs' motion to vacate

the Clerk of Superior Court's order transferring the adoption proceeding to superior court and granted defendant's motion to consolidate the custody action and the adoption proceeding for trial in superior court.

On 16 November 1979, plaintiffs filed a notice of appeal from Judge Ferrell's order. Defendant filed a motion on 26 November 1979 requesting that the superior court declare plaintiffs' notice of appeal and appeal entries null and void, and asking that the court schedule the consolidated actions for trial. The hearing date for defendant's motion was set for 3 December 1979. Plaintiffs objected to this hearing on the grounds that the superior court had no jurisdiction to hear either action and that the matter was already on appeal to the Court of Appeals on the jurisdictional issues.

On 10 December 1979, Judge Ferrell entered an order concluding that his judgment of 12 November 1979 was a nonappealable interlocutory order, and therefore holding that the notice of appeal and appeal entries which he had previously signed were a nullity. The trial of the consolidated actions was set for 4 February 1980. The Court of Appeals allowed plaintiffs' petition for a writ of certiorari on 23 January 1980.

The Court of Appeals vacated the superior court's order of 12 November 1979 granting defendant's motion to consolidate the custody action and adoption proceeding for trial in superior court, and remanded the custody action to district court with instructions to dismiss due to plaintiffs' lack of standing to seek custody of the child. It was further held that the Clerk of Superior Court properly transferred the adoption proceeding to the superior court for trial, and the adoption action was remanded to the superior court for a determination of any issues of fact and law presented.

We granted plaintiffs' petition for a temporary stay of enforcement of the Court of Appeals' decision on 22 December 1980. Plaintiffs' petition for discretionary review pursuant to G.S. 7A-31 was allowed 6 January 1981.

Rudisill & Brackett by J. Richardson Rudisill, Jr., for plaintiff-appellants.

Thomas W. Warlick; Sigmon and Sigmon by W. Gene Sigmon for defendant-appellee.

COPELAND, Justice.

Plaintiffs raise several issues on appeal which have substantial impact on the procedure to be followed in seeking to adopt a child voluntarily surrendered to a county department of social services pursuant to G.S. 48-9(a)(1). For the reasons stated below, we affirm the conclusions reached by the Court of Appeals.

[1] We first address the question of whether Judge Ferrell erred in granting defendant's motion to consolidate plaintiffs' custody action and petition for adoption for trial in the superior court.

G.S. 1A-1, Rule 42(a) provides that when actions involving a common question of law or fact are pending in both the superior and district courts of the same county, a judge of the superior court in which the action is pending may order the consolidation of the actions. Although the custody action and petition for adoption in the case *sub judice* do involve related issues of fact and law, and therefore could be properly consolidated under Rule 42(a), we find Judge Ferrell's actions in entering the order of consolidation procedurally in error.

We approve the Court of Appeals' holding in *Pickard v. Burlington Belt Corporation*, 2 N.C. App. 97, 103, 162 S.E. 2d 601, 604-05 (1965), where Judge Brock (later Justice Brock) reasoned for the Court as follows:

> "Whether cases should be consolidated for trial is to be determined in the exercise of his sound discretion by the judge who will preside during the trial; a consolidation cannot be imposed upon the judge presiding at the trial by the preliminary Order of another trial judge."

Although the *Pickard* decision was rendered prior to the effective date of the current North Carolina Rules of Civil Procedure, we believe the enactment of Rule 42(a)(1) does not affect this decision. *See Maness v. Bullins*, 27 N.C. App. 214, 218 S.E. 2d 507 (1975). The general principle that one superior court judge may not

restrain another from proceeding in a cause over which he has jurisdiction survives the enactment of the Rules of Civil Procedure. In accordance with this general rule, we find that the discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial.

In the case before us, Judge Ferrell held a hearing on defendant's motion and entered his order of consolidation out of term and out of session. There was no indication that he was scheduled to preside at the session of court during which he set the consolidated cases to be presented for trial. Under these circumstances, we agree with the Court of Appeals that Judge Ferrell's order of consolidation must be vacated.

We must next determine whether the Court of Appeals erred in holding that plaintiffs had no standing to bring their custody action. Plaintiffs argue that they are authorized to seek custody of the child under the following language of G.S. 50-13.1:

> "Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided."

Since they are "other person[s] . . . claiming the right to custody of a minor child . . .", plaintiffs contend that they have standing to bring the custody action at issue.

The Court of Appeals disagreed with plaintiffs, reasoning that when G.S. 50-13.1 is considered in light of G.S. 7A-289.33, it becomes apparent that G.S. 50-13.1 does not apply to grant standing to foster parents to bring an action seeking custody of a child placed in their care. G.S. 7A-289.33 sets forth the effects of a court order terminating parental rights due to the parent's abuse or neglect of his or her child, and provides in pertinent part:

> "If the child had been placed in the custody of or released for adoption by one parent to, a county department of social services or licensed child-placing agency and is in the custody of such agency at the time of such filing of the petition, that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of said child as such agency would have acquired had the parent whose

rights are terminated released the child to that agency pursuant to the provisions of G.S. 48-9(a)(1), including the right to consent to the adoption of such child."

The Court of Appeals, relying on its earlier interpretation of a similar statute in *Browne v. Department of Social Services*, 22 N.C. App. 476, 206 S.E. 2d 792 (1974), held that G.S. 7A-289.33 applied in this case to place legal custody of the child in defendant, which custody could not be contested by plaintiffs as the foster parents of the child. The Court focused on the language of G.S. 7A-289.33 which states that once the department of social services has obtained custody of the child, it shall "acquire all of the rights for placement of said child. . . ." It was held that this clause applied to vest custody in defendant and to deprive plaintiffs of standing to challenge defendant's exercise of its rights as legal custodian of the child.

Chief Judge Morris, speaking for the Court, noted the apparent conflict in the general grant of standing to seek custody bestowed in the language of G.S. 50-13.1 and the specific, incontestable award of custody to the department of social services or licensed child-placing agency as set forth in G.S. 7A-289.33. She resolved this conflict by reasoning that since G.S. 50-13.1 is found in Chapter 50 of the General Statutes, which is entitled "Divorce and Alimony," the Legislature must have intended this statute to apply only to those custody disputes arising from a divorce or separation. Thus, plaintiffs as foster parents could not employ this Statute to gain standing to institute a custody proceeding.

[2] While we agree with the conclusion reached by the Court of Appeals, we disagree with its rationale. After considering the legislative history of G.S. 50-13.1, we find that the Court of Appeals' narrow interpretation of that statute as applying to only those custody disputes arising from a divorce or separation is in error.

G.S. 50-13.1 was enacted as Section 2 of Chapter 1153 of the 1967 Session Laws. Prior to the enactment of Chapter 1153, entitled "An Act to Rewrite the Statutes Relating to Custody and Support of Minor Children," statutes concerning the custody of minor children were found throughout the General Statutes. Section 1 of Chapter 1153 repealed G.S. 17-39 thru G.S. 17-40, which governed habeas corpus proceedings to determine custody and

which were not limited to custody disputes arising out of divorce or separation. That section likewise repealed G.S. 50-13 and G.S. 50-16, which dealt specifically with custody issues involved in a divorce or separation. By the enactment of this chapter, the Legislature clearly sought to eliminate conflicting and inconsistent custody statutes and to replace them with a comprehensive act governing all custody disputes. *See In re Holt*, 1 N.C. App. 108, 160 S.E. 2d 90 (1968). Had the Legislature intended G.S. 50-13.1 to apply to only those custody disputes involved in a divorce or separation, it would have expressly so provided, as it did in the prior statutes G.S. 50-13 and G.S. 50-16. The mere fact that G.S. 50-13.1 is found in the Chapter of the General Statutes governing Divorce and Alimony is not sufficient to cause its application to be restricted to custody disputes involved in separation or divorce. Consequently, we find the Court of Appeals' narrow interpretation of the statute in error.

[3, 4] We likewise find error in the Court of Appeals' reliance on G.S. 7A-289.33 as the controlling statute in this case. That statute sets forth the effects of a court order terminating the parental rights of a natural parent on the grounds of abuse or neglect of a minor child. Such a court order is not involved in this case. The natural parents of the minor child at issue here voluntarily released their parental rights and surrendered the child to defendant for adoptive placement. They executed written releases of their rights and consents to the adoption of the child in accordance with G.S. 48-9(a)(1). This case is therefore governed by the provisions of G.S. 48-9.1, which outline the legal effects of a surrender and consent for adoption executed pursuant to G.S. 48-9(a)(1). G.S. 48-9.1(1) provides for the custody of such a child as follows:

> "The county department of social services which the director represents, or the child-placing agency, to whom surrender and consent has been given, shall have legal custody of the child and the rights of the consenting parties, except inheritance rights, until entry of the interlocutory decree provided for in G.S. 48-17, or until the final order of adoption is entered if the interlocutory decree is waived by the court in accordance with G.S. 48-21, or until consent is revoked within the time permitted by law, or unless otherwise ordered by a court of competent jurisdiction. A county department of

social services having custody of the child shall pay the costs of the care of the child prior to placement for adoption."

According to the statute, the county department of social services or the child-placing agency to which the child has been surrendered retains legal custody of the child until the occurrence of one of the events specified in the statute. Legal custody never passes to any foster parents charged with the duty of caring for and supervising the child. Foster parents are given only physical custody, which the department or agency having legal custody is free to revoke at any time. There is nothing in the language of the statute which gives foster parents standing to contest the department or agency's exercise of its rights as legal custodian. Custody is vested in the department or agency until the happening of one of the specified events.

Plaintiffs argue that despite the specific provisions of G.S. 48-9.1(1) granting legal custody of the minor child at issue to defendant, they are nevertheless authorized under G.S. 50-13.1 to challenge this statutory grant of custody. We disagree. G.S. 48-9.1 and G.S. 50-13.1 were enacted in the same session of the Legislature. *See* 1967 N.C. Sess. Laws, ch. 926, s. 1. When the two statutes are construed together, it is apparent that G.S. 50-13.1 was intended as a broad statute, covering a myriad of situations in which custody disputes are involved, while G.S. 48-9.1 is a narrow statute, applicable only to custody of a minor child surrendered by its natural parents pursuant to G.S. 48-9(a)(1). Clearly, G.S. 48-9.1(1) was intended as an exception to the general grant of standing to contest custody set forth in G.S. 50-13.1. Since the circumstances present in the case before us place the case within the purview of G.S. 48-9.1(1), we find that the issue of custody is resolved by the provisions of that statute and plaintiffs are without standing to bring an action seeking custody of the minor child placed in their home by defendant.

[5] We next address the question of whether plaintiffs had standing to file a petition to adopt the minor child placed in their home. Defendant contends that the clause of the foster parent agreement between plaintiffs and defendant which prohibits plaintiffs from initiating any proceedings for the adoption of a child placed in their home without the prior written permission of the supervising agency should be specifically enforced. Since defend-

ant, as the supervising agency, denied plaintiffs' request for permission to seek adoption of the minor child, specific enforcement of the foster parent agreement would deprive plaintiffs of standing to bring their adoption action.

It is well established that in any case involving the adoption of a child, the court's paramount concern is the child's welfare. *Knight v. Deavers*, 531 S.W. 2d 252 (Ark. 1976); *State ex rel. Department of Institutions, Social & Rehabilitative Services v. Griffis*, 545 P. 2d 763 (Okla. 1975). The Court of Appeals emphasized the primary importance of the best interests of the child in a case involving an analogous issue, *In Re Daughtridge*, 25 N.C. App. 141, 212 S.E. 2d 519 (1975). The issue before the Court in *Daughtridge* was whether the Department of Social Services had an absolute right under G.S. 48-9(b) to decide whether a petition for adoption should be granted. The Court found that the Legislature's purpose in enacting the consent requirement under G.S. 48-9(b) was to supply an additional safeguard to the welfare of the child. Consequently, the department will not be allowed to unreasonably and unjustly withhold its consent in a manner inimical to the child's best interests. Due to the overriding importance of protecting the welfare of the child, the Court of Appeals held that the courts shall have the authority to determine whether the department's failure to grant a petition for adoption was unreasonable and unjust. *See also In Re Norwood*, 43 N.C. App. 356, 258 S.E. 2d 869 (1979), *discretionary review denied*, 299 N.C. 121, 261 S.E. 2d 922 (1980). This holding is supported by the courts of other jurisdictions which have ruled upon the issue. *In Re McKenzie*, 197 Minn. 234, 266 N.W. 746 (1936); *State ex rel. Department of Institutions, Social & Rehabilitative Services v. Griffis, supra.*

We find the rationale of the Court in *Daughtridge* applicable to this case. Defendant, by contracting with plaintiffs, sought to retain absolute authority to determine whether plaintiffs could institute an action to adopt a foster child placed in their home. A child cannot be made the subject of a contract with the same force and effect as if it were a chattel. Since the welfare of the child is the controlling factor in an adoption proceeding, any agreement between plaintiffs and defendant concerning the child's adoption is subject to the court's independent judgment as to what is in the best interests of the child. *Accord Knight v.*

Deavers, supra; In Re McDonald's Adoption, 43 Cal. 2d 447, 274 P. 2d 860 (1954); *In Re Adoption by Alexander*, 206 So. 2d 452 (Fla. App. 1968). *See also In Re Dionisio R.*, 81 Misc. 2d 436, 366 N.Y. S. 2d 280 (1975). Consequently, defendant cannot by contract seek to deprive plaintiffs, as foster parents, of standing to challenge the reasonableness of defendant's denial of plaintiffs' request to adopt the minor child placed in their home. If the court determines that consent was unreasonably withheld to the detriment of the welfare of the child, plaintiffs may initiate proceedings to adopt the child as if defendant's consent had been given. We agree with the Court of Appeals that the case must be remanded for a determination of whether defendant unreasonably and unjustly withheld its consent.

[6] Plaintiffs finally argue that the Clerk of Superior Court erred in transferring plaintiffs' adoption action to the superior court. G.S. 48-12(a) mandates that "[a]doption shall be by a special proceeding before the clerk of superior court." However, G.S. 1-273 provides:

> "If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court."

See In Re Estate of Wallace, 267 N.C. 204, 147 S.E. 2d 922 (1966). An issue of fact arises whenever a material fact is maintained by one party and controverted by the other. *Johnson v. Lamb*, 273 N.C. 701, 161 S.E. 2d 131 (1968). In the present action, the determination of whether defendant unreasonably withheld its consent to allow plaintiffs to institute an adoption proceeding involves the resolution of a number of factual issues. We therefore find no error in the Clerk of Superior Court's order transferring plaintiffs' adoption action to the superior court.

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

Modified and affirmed.

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

ABBOTT v. TOWN OF HIGHLANDS

No. 201 PC.

Case below: 52 N.C. App. 69.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 31 August 1981. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 31 August 1981.

AMERICA CLIPPER CORP. v. HOWERTON

No. 189 PC.

No. 119 (Fall Term).

Case below: 51 N.C. App. 539.

Petition by Finance America for discretionary review under G.S. 7A-31 allowed 31 August 1981.

CAROLINA-ATLANTIC DISTRIBUTORS v.
TEACHEY'S INSULATION

No. 182 PC.

Case below: 51 N.C. App. 705.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 31 August 1981.

DILLS v. SUMNER

No. 283 PC.

Case below: 52 N.C. App. 585.

Petition by defendants Clyde M. and Martha I. Sumner for discretionary review under G.S. 7A-31 denied 31 August 1981.

GORE v. HILL

No. 266 PC.

Case below: 52 N.C. App. 620.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 31 August 1981.

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

LOWERY v. NEWTON

No. 263 PC.

Case below: 52 N.C. App. 234.

Petition by defendants for discretionary review under G.S. 7A-31 denied 31 August 1981.

STATE v. CLONTZ

No. 288 PC.

No. 120 (Fall Term).

Case below: 51 N.C. App. 639.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 31 August 1981.

STATE v. DUGAN

No. 239 PC.

Case below: 52 N.C. App. 136.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 August 1981. Appeal dismissed ex mero motu 31 August 1981.

STATE v. FISHER

No. 163 PC.

Case below: 50 N.C. App. 567.

Application by defendant for further review denied 31 August 1981.

STATE v. SUTTON

No. 341 PC.

Case below: 53 N.C. App. 281.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 August 1981.

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

STATE v. WILLIAMS

No. 296 PC.

Case below: 31 N.C. App. 588.

Application by defendant for further review denied 31 August 1981.

STATE v. WILLIAMS

No. 231 PC.

Case below: 33 N.C. App. 344.

Application by defendant for further review denied 31 August 1981.

APPENDIX

AMENDMENTS TO RULES OF
APPELLATE PROCEDURE

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 9(c)(1) is amended by adding a third paragraph to read as follows:

As an alternative to narrating the testimonial evidence as a part of the record on appeal, the appellant may cause the complete stenographic transcript of the evidence in the trial tribunal, as agreed to by the opposing party or parties or as settled by the trial tribunal as the case may be, to be filed with the clerk of the court in which the appeal is docketed. If this alternative is selected, the briefs of the parties must comport with Rule 28(b)(4) and 28(c).

Rule 28(b) is amended as follows:

(1) By striking the third sentence from Section (b)(2).

(2) By adding a new Section (b)(3) reading as follows:

(3) A full statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the stenographic transcript, or the record on appeal, or both, as the case may be.

(3) By adding a new subsection (b)(4) reading as follows:

(4) If pursuant to Rule 9(c)(1) appellant utilizes the stenographic transcript of the evidence in lieu of narrating the evidence as part of the record on appeal, the appellant's brief must contain an appendix which sets out verbatim those portions of the certified stenographic transcript which form the basis for and are necessary to understand each question presented in the brief.

(4) By renumbering the present subsections (b)(3) and (4) and making them (5) and (6).

Rule 28(c) is amended as follows:

(1) By changing (3) and (4) in the first sentence to (5) and (6).

(2) By changing the second sentence thereof to read as follows:

It need contain no statement of the questions presented, statement of the case, statement of the facts, or appendixes, unless the appellee disagrees with the appellant's statements or appendixes, and desires to make a restatement or suggest errors in or supplement the appellant's appendixes, or unless the appellee desires to present questions in addition to those stated by the appellant. If the appellee desires to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the stenographic transcript, or the record on appeal, or both, as the case may be. If the stenographic transcript is used in lieu of narrating the testimony pursuant to Rule 9(c)(1), the appellee's brief must contain appendixes which set out verbatim those portions of the certified stenographic transcript which form the basis for and are necessary to understand the new questions presented by the appellee.

This amendment shall become effective and relate to all appeals docketed on and after 1 October 1981.

By order of the Court in conference, this 10th day of June, 1981.

MEYER, J.
For the Court

Commentary: These amendments to Rules 9 and 28 will provide litigants with an *alternative* to the provision of Rule 9(c)(1) which requires that generally the evidence must be set out in narrative form. This alternative pertains only to the testimony given at trial. Other items necessary to the appeal, *e.g.*, pleadings, jury instructions, judgments, etc. should be contained in the record on appeal as required by appropriate appellate rules.

Rule 10(b)(2) of the Rules of Appellate Procedure is amended by rewriting said section to read as follows:

Jury Instructions; Findings and Conclusions of Judge. No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objec-

tion out of the hearing of the jury and, on request of any party, out of the presence of the jury. In the record on appeal an exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance immediately following the instructions given, or findings or conclusions made. A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

This amendment shall apply to every case the trial of which begins on or after 1 October 1981.

By order of the Court in conference, this 10th day of June, 1981.

MEYER, J.
For the Court

Commentary: This amendment will make North Carolina's procedure for reviewing alleged errors in the jury charge similar to that of the federal courts and many, if not most, of the other states including Connecticut, Florida, Indiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Texas and South Carolina.

Rule 30 of the Rules of Appellate Procedure is amended by rewriting subdivision (f) to read as follows:

Pre-argument Review; Decision of Appeal Without Oral Argument.

(1) At anytime that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision

under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument.

This amendment will become effective 1 July 1981.

By order of the Court in conference, this 10th day of June, 1981.

MEYER, J.
For the Court

Commentary: Rule 30(f) now provides that the Court of Appeals may dispense with oral arguments in certain cases. This amendment merely extends the rule to cases heard by the Supreme Court.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW

§ 8. Scope and Effect of Judicial Review

An appeal from a decision of the Safety and Health Review Board assessing a penalty against respondent for a serious and repeated OSHA violation raised issues as to whether the Board's interpretation of the terms "serious" and "repeated" was affected by error of law and whether there was substantial evidence in view of the entire record to support the Board's conclusions. *Brooks, Comr. of Labor v. Grading Co.*, 573.

ADOPTION

§ 1. Transfer to Superior Court

The clerk of superior court properly transferred plaintiffs' adoption action to the superior court where factual issues arose in determining whether defendant county department of social services unreasonably withheld its consent to allow plaintiffs to institute an adoption proceeding. *Oxendine v. Dept. of Social Services*, 699.

§ 2. Parties and Procedure

Defendant county department of social services could not by contract deprive plaintiff foster parents of standing to challenge the reasonableness of defendant's denial of plaintiffs' request to adopt a minor child placed in their home, and any agreement between plaintiffs and defendant concerning the adoption of a child placed in plaintiffs' home for foster care was subject to the court's independent judgment as to what was in the best interest of the child. *Oxendine v. Dept. of Social Services*, 699.

APPEARANCE

§ 1.1. What Constitutes a General Appearance

Defendant made a general appearance by requesting the court to give full faith and credit to a foreign judgment awarding child custody to her, and by making the general appearance before filing a motion contesting personal jurisdiction, defendant waived her right to challenge the court's exercise of personal jurisdiction over her from the date of such appearance. *Lynch v. Lynch*, 367.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements

The courts of this state must apply the Federal Arbitration Act to a contract evidencing a transaction involving commerce, and a contract for defendant architectural firm to design two school buildings for plaintiff board of education was such a contract. *Board of Education v. Shaver Partnership*, 408.

ARMY AND NAVY

§ 1. Generally

Order of the trial court increasing the amount of child support is vacated and the matter is remanded for a new hearing on plaintiff's motion in the cause for increased child support so that defendant, who was stationed with the U.S. Navy in Hawaii and who attempted to obtain a stay of the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940, may be given proper notice and may be afforded a reasonable opportunity to be heard. *Cromer v. Cromer*, 307.

ARREST AND BAIL

§ 3.1. Probable Cause for Arrest

There was adequate justification for officers to stop defendants as they walked along the road and to conduct a limited search of defendants, and officers thereafter had probable cause to arrest defendants for a murder. *S. v. Rinck*, 551.

ATTORNEYS AT LAW

§ 9. Persons Liable for Compensation of Attorney

Fees allowed by the court for attorneys appointed in proceedings to terminate parental rights brought before the effective date of Ch. 966 of the 1981 Session Laws shall be borne by the Administrative Office of the Courts. *In re Clark*, 592.

AUTOMOBILES

§ 13. Lights; Statutory Requirements

The legislature intended that a "headlamp" within the contemplation of G.S. 20-129(c) and G.S. 20-131 should be one that was specifically designed and constructed for use as a headlamp, and the five-cell flashlight which plaintiffs attached to their motorcycle fell short of the headlamp requirement. *Bigelow v. Johnson and Johnson v. Millican*, 126.

§ 59.1. Negligence in Entering Highway

The trial court erred in directing verdicts for defendants where it was possible to infer that, although plaintiffs may have had an inadequate headlamp, the collision was caused solely by the defendant's negligence in breaching his duty to keep a proper lookout. *Bigelow v. Johnson and Johnson v. Millican*, 126.

§ 73. Nonsuit on Ground of Contributory Negligence

Plaintiff motorcycle passenger could not maintain an action against defendant driver to recover damages resulting from the driver's negligence since the passenger was contributorily negligent as a matter of law in suggesting the use of a flashlight as a substitute for the original headlamp, assisting in attaching it to the motorcycle, and voluntarily riding with the driver with full knowledge of the substituted flashlight. *Bigelow v. Johnson and Johnson v. Millican*, 126.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions

Where the prosecutor furnished defense counsel with a summary of an oral statement made by defendant, the trial court did not err in refusing to strike an SBI agent's testimony on the ground that defendant had not been provided a copy of a second summary of defendant's statement prepared by the agent for his own use at the trial. *S. v. McCoy*, 1.

Even if the State failed to comply with the discovery statute by failing to notify defense counsel of tests performed upon deceased's bedcovers and a bullet removed from her body until three days before trial, the trial court acted within its discretion in refusing to suppress evidence of the tests and in ordering a recess to permit defendant to examine the evidence and question the State's witnesses. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence

The State presented sufficient circumstantial evidence of defendant's intent to commit a felony at the time of the breaking and entering to withstand defendant's motion to dismiss. *S. v. Simpson*, 439.

§ 5.1. Fingerprint Evidence

Fingerprint evidence was insufficient for the jury in a prosecution for first degree burglary. *S. v. Bass*, 267.

CONSTITUTIONAL LAW

§ 23.3. Taxation

Annexation statutes are not unconstitutional because they subject the property annexed to taxation when the property owners do not have the right to vote on the members of the annexing city's governing board which adopts the annexation ordinance. *In re Annexation Ordinance*, 220.

§ 24.9. Right to Jury Trial

Annexation statutes are not unconstitutional because they provide that the review by the superior court is without a jury. *In re Annexation Ordinance*, 220.

§ 28. Due Process in Criminal Proceeding

The admission of evidence that defendant, after having been given the Miranda warnings, refused to take a gunshot residue test until she talked with her attorney did not violate defendant's right to due process. *S. v. Odom*, 163.

§ 30. Discovery

Under the statutory discovery scheme in N.C., neither the State nor defendant is required to respond voluntarily to a request for discovery, but, if either party unequivocally advises the other that it will respond voluntarily to the other's request for disclosure, that party thereby assumes the duty fully to disclose all of those items which could be obtained by court order. *S. v. Anderson*, 185.

Any failure of defendant to derive full benefit from the N.C. discovery statutes resulted from his own lack of diligence in pursuing the opportunities for voluntary discovery which the State offered and in failing actively to pursue his later motion to compel discovery. *Ibid.*

A criminal defendant is not entitled to a list of the State's witnesses who are to testify against him. *S. v. Rinck*, 551.

§ 31. Affording the Accused the Basic Essentials for Defense

The constitutional and statutory rights of an indigent defendant charged with two murders were not violated by the trial court's denial of his motion requesting funds with which to hire an investigator to research the backgrounds and characters of the State's witnesses and the two victims. *S. v. Parton*, 55.

§ 32. Right to Public Trial

Defendant waived his constitutional right to a public hearing on his motion to discharge his court-appointed attorneys. *S. v. Hutchins*, 321.

§ 43. Right to Counsel; Critical Stage

Defendant's right to counsel was not violated by the admission of evidence that she refused to submit to a gunshot residue test until she talked with her attorney. *S. v. Odom*, 163.

CONSTITUTIONAL LAW — Continued

§ 45. Right to Appear Pro Se

Trial court had no constitutional obligation to inform defendant of his right to proceed pro se when defendant expressed a desire that his court-appointed attorneys be replaced. *S. v. Hutchins*, 321.

Defendant had no Sixth Amendment right to serve as co-counsel with his court-appointed attorney. *S. v. Parton*, 55.

Defendant had no constitutional right to represent himself as co-counsel with an attorney. *S. v. Porter*, 680.

§ 46. Removal or Withdrawal of Appointed Counsel

A defendant charged on three counts of first degree murder was not denied the effective assistance of counsel by the court's denial of his motion for removal of his court appointed attorneys and appointment of substitute counsel because defendant believed his attorneys had not visited him enough to discuss the case with him. *S. v. Hutchins*, 321.

§ 51. Delays In and Between Arrest

Neither defendant's right to due process nor his Sixth Amendment right to a speedy trial was violated by an eleven month delay between the issuance of the arrest warrant and his trial for second degree murder. *S. v. McCoy*, 1.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

Defendant's constitutional right to a jury selected from a fair cross-section of the community was not violated when the prosecutor in a capital case was allowed to inquire into a prospective juror's views as to capital punishment and when all those finally seated were committed to being able to impose the death penalty. *S. v. Anderson*, 185.

§ 65. Right of Confrontation

Admission of a telephone conversation between deceased and a sheriff's department dispatcher did not violate defendant's right to confront the witnesses against him. *S. v. Rinck*, 551.

§ 67. Identity of Informants

Trial court did not err in limiting defense counsel's cross-examination of a witness concerning the name of a confidential informer. *S. v. Watson*, 533.

§ 72. Use of Confession or Inculpatory Statement

Defendant's constitutional right of confrontation was not violated by the admission of inculpatory statements made by a codefendant at the time of his arrest, although the codefendant did not testify at the trial, where the codefendant's statements were admissible as spontaneous utterances. *S. v. Porter*, 680.

§ 75. Testimony by Defendant

Where defendant testified at a hearing on a motion to suppress that he was under the influence of PCP or "bam" at the time he confessed, defendant's right against self-incrimination was not violated when the State was permitted to use his testimony from the suppression hearing to cross-examine him for impeachment purposes as to whether he used "bam." *S. v. Bracey*, 112.

COURTS

§ 9. Jurisdiction to Review Rulings of Another Superior Court Judge

The discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial. *Oxendine v. Dept. of Social Services*, 699.

CRIMINAL LAW

§ 15.1. Prejudice, Pretrial Publicity

Defendant's right to due process was not violated by the denial of his motion for change of venue of his trial for two murders on the ground of prejudicial pretrial publicity. *S. v. Parton*, 55.

§ 26.8. Former Jeopardy; Mistrial

Defendant was not placed in double jeopardy by his third trial for the same offense after two prior trials ended when the jury was unable to reach a verdict and the trial judge declared a mistrial. *S. v. Simpson*, 439.

§ 29. Mental Capacity to Stand Trial

Although defendant was experiencing headaches as a result of gunshot wounds, the trial court did not err in finding him competent to stand trial. *S. v. McCoy*, 1.

§ 34.3. Defendant's Guilt of Other Offenses; Error Cured

The trial court in a prosecution upon two charges of first degree murder did not err in denying defendant's motion for a mistrial because of unresponsive answers by two State's witnesses which referred to the possibility that defendant had killed other persons. *S. v. Parton*, 55.

§ 34.7. Admissibility of Evidence of Other Offenses

In a prosecution of defendant for the first degree murder of a grocery store owner, trial court did not err in permitting the State to introduce evidence of defendant's involvement in two prior break-ins at the murder victim's grocery store. *S. v. Adcox*, 133.

Evidence of a transaction in which deceased was supposed to sell marijuana for defendant and deliver the proceeds to defendant but instead kept the proceeds was competent to show defendant's motive for killing deceased. *S. v. Norwood*, 473.

In a prosecution of defendant for engaging in a sexual act with children under the age of twelve, trial court properly admitted evidence of defendant's guilt of another offense. *S. v. Williams*, 507.

§ 40. Evidence and Record at Former Trial

In a prosecution of defendant for aiding and abetting a murder, trial court properly granted defendant's motion to suppress a transcript of a witness's testimony given at defendant's prior trial for accessory before the fact of murder. *S. v. Graham*, 521.

§ 40.2. Defendant's Motion for Transcript or Record

Trial court properly denied defendant's request for a transcript of the grand jury proceedings. *S. v. Porter*, 680.

§ 42.4. Identification of Object and Connection With Crime

Defendant was not prejudiced by error, if any, in the admission of seized handcuffs, handcuff keys and firearms because no connection was shown between the items seized and the crimes charged. *S. v. Norwood*, 473.

CRIMINAL LAW — Continued

§ 43.1. Photographs of Defendant

A photograph of defendant taken at the police station would have been admissible even if he had not consented to the taking of the photograph. *S. v. Williams*, 142.

§ 43.4. Gruesome Photographs

Trial court did not err in admitting twelve photographs illustrating the crime scene and three photographs depicting the victim of an assault. *S. v. Gibbons*, 484.

§ 44. Bloodhounds

If a dog's owner or handler identifies the dog as a bloodhound and the dog justifies this description by his performance, then the pure blood requirement for introduction of evidence of the dog's conduct has been met. *S. v. Porter*, 680.

§ 57. Evidence in Regard to Firearms

The admission of evidence that defendant refused to take a gunshot residue test until she talked with her attorney did not violate defendant's right to counsel or her right to due process. *S. v. Odom*, 163.

§ 60.5. Competency of Fingerprint Evidence

Fingerprint evidence was insufficient for the jury in a prosecution for first degree burglary, second degree rape and felonious larceny. *S. v. Bass*, 267.

§ 61.2. Competency of Shoeprints Evidence

Trial court in a first degree murder case did not err in admitting testimony concerning the similarity between shoeprints found at the scene of the crime and the soles of a pair of shoes found at the home of defendant's parents where defendant lived. *S. v. Adcox*, 133.

§ 62. Lie Detector Tests

Trial court did not err in permitting the State on recross examination to ask defendant about his taking of a polygraph test. *S. v. Albert*, 173.

§ 66.15. Independent Origin of In-Court Identification; Lineup Identification

An in-court identification of defendant by a robbery victim was not tainted where a lineup procedure used prior to trial was not suggestive. *S. v. Thompson*, 169.

§ 66.16. Independent Origin of In-Court Identification; Photographic Identification

An in-court identification of defendant by a robbery victim was not tainted by a pretrial photographic procedure. *S. v. Thompson*, 169.

§ 69. Telephone Conversations

A telephone conversation between a sheriff's department dispatcher and a person identifying himself as decedent was admissible as part of the res gestae, and a transcript of a tape recording of the phone call was admissible under the business records exception to the hearsay rule. *S. v. Rinck*, 551.

§ 71. "Shorthand" Statements of Fact

Statements by a robbery victim that a cash register at the crime scene was difficult to open and that he had been "robbed" were competent as shorthand statements of fact. *S. v. Porter*, 680.

CRIMINAL LAW — Continued

§ 73.3. Statements Showing State of Mind

Testimony that decedent often referred to defendant Rinck as "Bobby Swink" was competent to explain why decedent referred to defendant as "Bobby Swink" during a telephone call which he made to the police department on the day he was killed. *S. v. Rinck*, 551.

§ 75.1. Confessions; Effect of Fact that Defendant is in Custody

Defendant's incriminating in-custody statement was not inadmissible as the fruit of his original unlawful arrest where the statement was the result of a subsequent lawful arrest for a murder to which the statement related. *S. v. Sanders*, 608.

Defendant's incriminating in-custody statement was not inadmissible on the ground that it was obtained in violation of the Posse Comitatus Act. *Ibid.*

There was no merit to defendant's contention that, when law enforcement officers requested that he accompany them to the police administration building, he was arrested without a warrant and without probable cause and that any statements he subsequently made were the fruits of and tainted by the illegal arrest and were therefore inadmissible. *S. v. Simpson*, 439.

§ 75.9. Volunteered and Spontaneous Statements

Statements made by defendant at the arrest scene were not the result of in-custody interrogation and were admissible although defendant had not been given the Miranda warnings where defendant, in response to a police radio message not directed to him, stated that a bank bag was in the car, an officer then asked, "What bank bag?", and defendant replied, "The bag from the robbery." *S. v. Porter*, 680.

§ 75.15. Defendant's Mental Capacity to Confess or Waive Rights; Intoxication

There was no merit to defendant's contention that the State failed to demonstrate that he knowingly waived certain of his constitutional rights before making a pretrial, in-custody, incriminating statement and that he was mentally competent to make the statement. *S. v. Anderson*, 185.

The trial court did not err in the admission of incriminating statements made by defendant to an SBI agent in a hospital emergency room after defendant received treatment for gunshot wounds on the ground that defendant "must have been" under the influence of pain-killing drugs. *S. v. McCoy*, 1.

There was no merit to defendant's position that, because he was intoxicated and under the influence of drugs at the time of his statement, he was unable to comprehend the reading of his constitutional rights and incapable of intelligently waiving those rights. *S. v. Oxendine*, 235.

Defendant's statements to law officers subsequent to his arrest for disorderly intoxication in Florida were not inadmissible because of defendant's intoxication. *S. v. Parton*, 55.

§ 76.1. Voir Dire Hearing; Generally

Where the trial judge found after a suppression hearing that defendant was not under the influence of drugs when he confessed, the trial court did not err in refusing to conduct a second suppression hearing because of newly discovered evidence when a robbery victim testified at trial that he saw defendant at the police station and he appeared sleepy. *S. v. Bracey*, 112.

§ 76.7. Voir Dire Hearing; Evidence Sufficient to Support Findings

The trial court properly denied defendant's motion to suppress oral and written statements given by him to the police. *S. v. Williams*, 142.

CRIMINAL LAW — Continued

§ 78. Stipulations

Trial court did not err in receiving into evidence a stipulation between the State and defense counsel that four purple tablets were LSD. *S. v. Watson*, 533.

§ 85.3. State's Cross-Examination of Defendant

Cross-examination of defendant in a robbery prosecution about his purchase and use of marijuana and drinking of beer was relevant to impeach evidence of his good character and to establish a pecuniary motive for the robberies. *S. v. Bracey*, 112.

§ 86. Credibility of Defendant

In a homicide and assault case where defendant allegedly used a rifle to accomplish both crimes, trial court did not err in allowing defendant to be questioned concerning his use of a screwdriver to threaten victims of a previous robbery. *S. v. Oxendine*, 235.

§ 89.2. Corroboration

An officer's testimony admitted for corroborative purposes was not inadmissible hearsay because the corroborated witness had not testified that he made any statement to the officer and defendant had no opportunity to cross-examine the witness with regard to the statement attributed to him. *S. v. Norwood*, 473.

§ 89.3. Prior Statements of Witness; Consistent Statements

Testimony by an SBI agent was admissible as tending to establish a prior consistent statement by a rape victim. *S. v. Cox*, 75.

§ 90. Rule that Party May Not Discredit Own Witness

Trial court did not err in allowing the State's witness to answer the district attorney's questions concerning his prior convictions of bootlegging, and by these questions the State did not impeach its own witness. *S. v. Oxendine*, 235.

§ 91. Nature and Time of Trial; Speedy Trial

In computing the statutory speedy trial period, the trial court properly excluded a delay of 27 days resulting from a continuance granted to defendant, and the State was entitled to exclude at least 60 of the 67 days defendant was held in a mental health facility to determine his capacity to stand trial plus the number of days between the examination and the date the report became available to defendant and the State. *S. v. McCoy*, 1.

§ 91.6. Continuance on Ground that Defendant Needs Additional Time to Obtain Evidence

Defendant's constitutional rights were not violated by the denial of his motion for continuance because defendant was available for consultation with his attorney for only 77 of the 135 days between his arrest and trial. *S. v. Parton*, 55.

Defendant was not denied the effective assistance of counsel by the trial court's denial of his motion for continuance made on the ground that defendant was in Dorothea Dix Hospital in Raleigh for some eight days and was returned to the county of trial only three days before the trial began. *S. v. Hutchins*, 321.

§ 92.1. Consolidation of Charges Against Multiple Defendants

The trial court did not err in consolidating for trial charges against two defendants for first degree murder even though the State presented evidence that was competent against only one defendant. *S. v. Rinck*, 551.

CRIMINAL LAW — Continued

The trial court properly consolidated for trial armed robbery charges against two defendants even though one codefendant's statements were admitted against the other codefendant at their joint trial. *S. v. Porter*, 680.

§ 92.3. Consolidation of Multiple Charges Against Same Defendant

Three charges against defendant for common law robbery committed within a ten-day period were properly consolidated for trial. *S. v. Bracey*, 112.

§ 92.4. Consolidation of Charges Against Defendant Held Proper

Two murder charges against defendant were sufficiently similar in time, place and circumstances so as to justify their consolidation for trial, although the killing of one victim occurred approximately 30 days before the killing of the second victim. *S. v. Parton*, 55.

Trial court did not abuse its discretion in granting the State's motion to consolidate murder and assault charges for trial where both offenses were committed within a short interval of time and the offenses were similar in nature. *S. v. Oxendine*, 235.

§ 99.1. Court's Expression of Opinion on the Evidence

The trial judge did not express an opinion by his questions to witnesses, by his comments to counsel, by his arranging of the evidence before the jury in his charge, or by spending more time in summarizing the evidence for the State. *S. v. Rinck*, 551.

§ 102.3. Prosecutor's Argument; Cure of Impropriety

Defendant was not prejudiced by the prosecutor's jury argument of facts not in evidence concerning a photographic identification of defendant where the court gave a curative instruction. *S. v. Bracey*, 112.

Prosecutor's improper jury argument which was not supported by the evidence was cured when the court instructed the jury to disregard such argument. *S. v. Sanders*, 608.

§ 102.11. Prosecutor's Argument; Comment on Defendant's Guilt or Innocence

Defendant was not prejudiced by the prosecutor's ambiguous jury argument that "we wouldn't be trying this case today if that [to beat up defendant] had been their intent," even if the statement is viewed as indicating a personal belief by the prosecutor as to defendant's guilt and the credibility of the testimony. *S. v. Sanders*, 608.

§ 112.6. Charge Concerning Burden of Proof of Insanity

In a first degree murder case there was no merit to defendant's contention that his mental disorders prevented him from forming the specific intent to kill which is required for a conviction of first degree murder by premeditation or deliberation. *S. v. Anderson*, 185.

§ 113.7. Charge as to "Acting in Concert"

Court of Appeals erred in granting a new trial on the ground that the trial court committed prejudicial error in failing to instruct the jury on the law of acting in concert as it applied to kidnapping. *S. v. Cox*, 75.

§ 113.9. Correction of Error in Charge

Defendant waived his right to challenge the trial court's misstatement of evidence that defendant had been seen with a pistol while with deceased at her

CRIMINAL LAW — Continued

mother's home by failing to bring the misstatement to the judge's attention at trial. *S. v. Jones*, 500.

§ 120. Instructions on Consequences of Verdict and Punishment

In a first degree murder case the trial court did not abuse its discretion in failing to instruct on the range of punishment available in the event of a second degree murder conviction. *S. v. Anderson*, 185.

§ 122.2. Additional Instructions Upon Failure to Reach Verdict

The trial court did not coerce a verdict where the court told the jury that "this is the last jury case of the week and when you finish this case, you'll be through for the week. If you feel like it's going to take some time, I'll be glad to let you come back after lunch or if you feel like you're close to a verdict, I'll be glad to let you go back and continue," the court ordered a recess for lunch until 2:45 p.m., and the jury resumed their deliberations at 2:45 p.m. and returned verdicts of guilty at 3:14 p.m. *S. v. Williams*, 142.

§ 128.2. Discretionary Power to Set Aside Verdict and Order Mistrial

Trial court in a homicide case did not err in denying defendant's motion for a mistrial when an officer testified that he "went to Central Prison and picked up the defendant." *S. v. McCoy*, 1.

Trial court did not err in refusing to order a mistrial when a witness testified that he had worked his magic on the prosecutor and caused him to lose a prior case against defendant. *S. v. Norwood*, 473.

The trial court did not err in refusing to declare a mistrial because the district attorney asked the black defendant several questions suggesting he had previously raped a young white girl the same age as the victim in the present case where the court sustained defendant's objection to every such question and no evidence was elicited by such line of questioning. *S. v. Williams*, 142.

§ 134.4. Place of Imprisonment; Youthful Offenders

A judgment stating that the eighteen-year-old defendant "would benefit as a Committed Youthful Offender but that Society would not" is ambiguous and requires a new sentencing hearing. *S. v. Bracey*, 112.

§ 135.4. Separate Sentencing Proceeding Under G.S. 15A-2000

The aggravating circumstance of an "especially heinous, atrocious or cruel" murder is not unconstitutionally vague. *S. v. Martin*, 246.

The evidence was sufficient to support a finding that defendant's first degree murder of his estranged wife was especially heinous, atrocious, or cruel. *Ibid.*

Sentence of death imposed upon defendant for the first degree murder of his estranged wife was not excessive or disproportionate considering both the crime and the defendant. *Ibid.*

While the State's theory in the guilt phase of a trial of defendant upon three charges of first degree murder was that the second and third murders were committed for the purpose of avoiding or preventing a lawful arrest for the first murder, the State was not barred from relying on that same conduct as an aggravating circumstance in the sentencing phase of the trial. *S. v. Hutchins*, 321.

Trial court's instructions in the sentencing phase of a first degree murder case did not permit the jury to exercise unbridled discretion but properly laid the foundation for the jury to determine whether defendant's crimes could be appropriately punished by the imposition of capital punishment. *Ibid.*

DIVORCE AND ALIMONY — Continued

§ 24. Support; Generally

The father of a minor child has the responsibility to pay the entire support of the child in the absence of pleading and proof that the circumstances of the case otherwise warrant. *In re Register*, 149.

The trial court erred in ordering that the mother and the father of a minor child who was in the custody of its maternal grandparents each pay $12.50 per week for the support of the child where the court made no findings as to the ability of the father to pay the entire amount needed for support of the child. *Ibid.*

§ 24.5. Modification of Support Order

Order of the trial court increasing the amount of child support is vacated and the matter is remanded for a new hearing on plaintiff's motion in the cause for increased child support so that defendant, who was stationed with the U.S. Navy in Hawaii and who attempted to obtain a stay of the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940, may be given proper notice and may be afforded a reasonable opportunity to be heard. *Cromer v. Cromer*, 307.

§ 26.1. Cases Involving Full Faith and Credit Clause

A temporary child custody order is not entitled to full faith and credit. *Lynch v. Lynch*, 367.

In a child custody proceeding in which the nonresident defendant made a general appearance by moving that an Illinois custody decree be given full faith and credit, the trial court's jurisdiction over defendant terminated when the court found that the Illinois decree was entitled to full faith and credit. *Ibid.*

EMINENT DOMAIN

§ 3.2. Taking for Purpose of Providing Highways and Streets

Where the upgrading of a highway from a two-lane, unlimited access highway to a multi-lane, limited access expressway will deny a quarry owner access to its property from the highway, an access road to the owner's property is a "service road" authorized by statute. *Realty Corp. v. Bd. of Transportation*, 424.

An exercise of the power of condemnation by the Board of Transportation to acquire a right-of-way for a service road to a quarry owner's property was for a public purpose. *Ibid.*

§ 7.8. Judgments and Instructions

Plaintiff landowners were not entitled to an injunction restraining the Board of Transportation from condemning plaintiffs' land for an access road on the ground the road would not serve a public purpose. *Realty Corp. v. Bd. of Transportation*, 424.

EVIDENCE

§ 31. Best and Secondary Evidence Related to Writings

Trial court erred in excluding an auditor's summary of an examination of defendant corporation's records on the ground that the records themselves were the best evidence of defendant's business transactions. *Ingram, Comr. of Insurance v. Insurance Agency*, 287.

EVIDENCE — Continued

§ 50. Testimony by Medical Experts

There was no merit to defendant's argument that, because medical evidence concerned plaintiff's condition some thirteen months prior to trial, it was inadmissible. *Norwood v. Sherwin-Williams Co.*, 462.

FRAUDS, STATUTE OF

§ 1. Nature and Operation Generally

Although plaintiff's action on a lease was barred by the Statute of Frauds, her other claims of nuisance, fraud and unfair trade practices based on defendant's operation of a plastics manufacturing plant near her beauty salon were not barred. *Kent v. Humphries*, 675.

GRAND JURY

§ 3.5. Motion to Quash Indictment

In a first degree murder case trial court did not err in denying defendant's motions to quash the indictment against him and to declare a mistrial on the ground that one of the members of the grand jury which returned the indictments against him was the brother of the murder victim and a witness for the prosecution at defendant's trial. *S. v. Oxendine*, 235.

HOMICIDE

§ 15. Competency of Evidence in General

Trial court did not err in allowing a State's witness to relate defendant's answers to questions listed on a firearms transaction record which defendant was required to fill out before purchasing a .22 caliber rifle. *S. v. Oxendine*, 235.

§ 21.5. Sufficiency of Evidence of First Degree Murder

Evidence was sufficient for the jury where it tended to show that defendant shot his victim with a .22 caliber rifle. *S. v. Oxendine*, 235.

The State's evidence was sufficient for the jury on the issue of defendant's guilt of first degree murder of his wife. *S. v. Martin*, 246.

There was insufficient evidence of premeditation and deliberation to sustain defendant's conviction of first degree murder. *S. v. Corn*, 293.

State's evidence was sufficient for the jury in a prosecution of defendant for the first degree murders of two deputy sheriffs and a highway patrolman. *S. v. Hutchins*, 321.

The State's evidence of premeditation and deliberation and intent to kill was sufficient to support defendant's conviction of first degree murder. *S. v. Jones*, 500.

§ 21.7. Sufficiency of Evidence of Second Degree Murder

The evidence was sufficient for the jury on the question of defendant's guilt of second degree murder. *S. v. McCoy*, 1.

In a second degree murder case where the victim died from stab wounds, and the knife used in the stabbing was not introduced into evidence nor was there testimony as to its size or the length of the blade, the manner in which the victim was stabbed and the penetration of the knife into the heart and lungs were sufficient evidence of use of a deadly weapon and of malice to withstand a motion for nonsuit. *S. v. Batts*, 155.

HOMICIDE — Continued

§ 24.1. Instructions on Presumptions Arising from Use of Deadly Weapon

When instructing the jury on the presumptions of unlawfulness and malice arising from proof of a killing by the intentional use of a deadly weapon, the trial court should not use the clause "or it is admitted" in a case where defendant does not in open court admit an intentional shooting. *S. v. McCoy*, 1.

Defendant was not prejudiced by the court's error in one instance in failing to charge that the inference of malice from evidence of an intentional killing with a deadly weapon was only a permissible one. *S. v. Hutchins*, 321.

In a first degree murder case trial court's instructions on the presumption arising from proof of a killing by the intentional use of a deadly weapon did not relieve the State of its burden to prove each element of the offense charged beyond a reasonable doubt. *S. v. Simpson*, 439.

§ 25. Instructions on First Degree Murder Generally

The State was not required to elect between the theories of felony murder and premeditation and deliberation, and the trial court properly submitted both theories to the jury. *S. v. Norwood*, 473.

The trial court in a felony murder prosecution was not required to instruct the jury as to the lesser included offenses of the underlying felony. *S. v. Rinck*, 551.

§ 25.1. Instructions on Felony Murder

Trial court did not err in charging on theories of felony murder as to the death of a deputy sheriff based on the underlying felony of the prior killing of another deputy and as to the death of a highway patrolman based on the underlying felony of the killing of either of the two deputies. *S. v. Hutchins*, 321.

The trial court did not err in submitting burglary to the jury as the underlying felony for first degree murder on the theory of felony murder. *S. v. Rinck*, 551.

§ 26. Instructions on Second Degree Murder

Defendant was not prejudiced by the trial court's erroneous instruction permitting the jury to find defendant guilty of second degree murder if it found the killing was "without malice." *S. v. Hutchins*, 321.

Trial court's error in defining second degree murder as "the unlawful and intentional killing of a human being with malice but with premeditation and deliberation" was not prejudicial to defendant. *S. v. Simpson*, 439.

§ 28. Instructions on Self-Defense Generally

The trial court in a homicide prosecution erred in using the expression "without justification or excuse" as the equivalent of "self-defense" throughout the charge, not only with respect to murder in the first degree but also murder in the second degree and voluntary manslaughter. *S. v. Norris*, 526.

§ 28.3. Instructions on Aggression or Use of Excessive Force by Defendant

Trial court's instruction, dealing with the right to kill in self-defense, on voluntarily entering a fight by abusive language was a correct statement of the law. *S. v. Sanders*, 608.

Trial court did not err in failing to charge the jury that regardless of the force used to effectuate defendant's unlawful arrest, defendant was entitled to use deadly force if such was required to prevent the arrest or to free himself from unlawful confinement. *Ibid.*

HOMICIDE — Continued

§ 28.7. Defense of Insanity

In a first degree murder case there was no merit to defendant's contention that his mental disorders prevented him from forming the specific intent to kill which is required for a conviction of first degree murder by premeditation or deliberation. *S. v. Anderson*, 185.

§ 30. Submission of Lesser Degrees of the Crime Generally

Trial court in a felony murder case did not err in failing to submit the lesser included offenses of second degree murder and voluntary manslaughter to the jury. *S. v. Rinck*, 551.

§ 31.1. Punishment for First Degree Murder

Sentences of death imposed on defendant for the first degree murders of a deputy sheriff and a highway patrolman were not disproportionate or excessive. *S. v. Hutchins*, 321.

Where the jury found defendant guilty of first degree murder on theories of felony murder and premeditation and deliberation, the trial court could disregard the felony murder basis of the verdict and impose additional punishment for the underlying felonies. *S. v. Norwood*, 473.

HUSBAND AND WIFE

§ 15. Nature and Incidents of Estate by the Entirety

Surplus funds generated by a foreclosure sale pursuant to a power of sale in a deed of trust on entirety property are not held constructively as entirety property but are held by the husband and wife as tenants in common. *In re Foreclosure of Deed of Trust*, 514.

§ 16. Encumbrances on Entirety Property

A federal tax lien filed against the husband individually attached to surplus proceeds from a foreclosure sale of entirety property only when the proceeds were paid over to the clerk of court, and it was junior to judgment liens which had been filed against the husband and wife. *In re Foreclosure of Deed of Trust*, 514.

INDICTMENT AND WARRANT

§ 8.4. Election Between Offenses

The trial court did not err in delaying until trial its decision on defendant's motion to require the State to elect which of two first degree murder charges against defendant to call first for trial. *S. v. Parton*, 55.

§ 17. Variance Between Averment and Proof

There was a fatal variance between the indictment and proof where the indictment charged defendant with cunnilingus and anal intercourse but there was no evidence that defendant committed the crimes charged. *S. v. Williams*, 507.

INFANTS

§ 5.1. Effect of Foreign Custody Decree on Jurisdiction to Award Custody

Defendant made a general appearance by requesting the court to give full faith and credit to a foreign judgment awarding child custody to her, and by making the general appearance before filing a motion contesting personal jurisdiction, defend-

INFANTS — Continued

ant waived her right to challenge the court's exercise of personal jurisdiction over her from the date of such appearance. *Lynch v. Lynch*, 367.

In a child custody proceeding in which the nonresident defendant made a general appearance by moving that an Illinois custody decree be given full faith and credit, the trial court's jurisdiction over defendant terminated when the court found that the Illinois decree was entitled to full faith and credit. *Ibid.*

§ 6. Hearing for Award of Custody

Plaintiffs were without standing to bring an action seeking custody of a minor child placed in their home for foster care by defendant department of social services. *Oxendine v. Dept. of Social Services*, 699.

INJUNCTIONS

§ 2. Inadequacy of Legal Remedy

Plaintiff landowners were not entitled to an injunction restraining the Board of Transportation from condemning plaintiffs' land for an access road on the ground the road would not serve a public purpose. *Realty Corp. v. Bd. of Transportation*, 424.

INSURANCE

§ 1. Control and Regulation Generally

Defendant insurance agency "procured" errors and omissions insurance written by an insurer not licensed to do business in N.C. for various insurance agents in this State and was therefore liable for the premium tax imposed by G.S. 58-53.3. *Ingram, Comr. of Insurance v. Insurance Agency*, 287.

Application of the Quick Access Statute, which requires that special deposits made by an insolvent insurer be paid to the N.C. Insurance Guaranty Association for use in paying covered claims against the insolvent insurer, to the insolvency of a foreign casualty company did not divest the G.S. 58-185 lien rights in the deposit of N.C. policyholders whose policies were issued before the statute was enacted into law. *Ingram, Comr. of Insurance v. Insurance Co.*, 623.

§ 15.4. Avoidance of Policy for Nonpayment of Premiums; Effect of Disability

Even if timely notice of decedent's total disability had been given to defendant insurer, decedent's coverage under a group life insurance policy by reason of a provision for waiver of premiums in the event of total disability ended on the date he was discharged from employment. *Bank v. Insurance Co.*, 203.

§ 52. Particular Hazards Covered or Excepted by Accident Policy

A clause of an accident policy reducing the beneficiary's recovery to one-fifth of the face amount of the policy for death resulting from "shooting self-inflicted" was inapplicable in this case. *Maddox v. Insurance Co.*, 648.

§ 96.1. Liability Insurance; Time for Giving Notice of Claim

An unexcused delay by the insured in giving notice to the insurer of an accident does not relieve the insurer of its obligation to defend and indemnify unless the delay operates materially to prejudice the insurer's ability to investigate and defend. *Insurance Co. v. Construction Co.*, 387.

JURY

§ 1. Extent of Right to Jury Trial

The Termination of Parental Rights Act is not unconstitutional because it fails to provide for a trial by jury. *In re Clark*, 592.

§ 6.3. Propriety of Voir Dire Examination

The trial court properly refused to permit defense counsel to ask each prospective juror whether such juror would change his opinion that defendant was not guilty simply because eleven other jurors held a different opinion that defendant was guilty. *S. v. Bracey*, 112.

§ 7.11. Scruples Against, or Belief In, Capital Punishment

Defendant's constitutional right to a jury selected from a fair cross-section of the community was not violated when the prosecutor in a capital case was allowed to inquire into a prospective juror's views as to capital punishment and when all those finally seated were committed to being able to impose the death penalty. *S. v. Anderson*, 185.

§ 7.14. Time of Exercising Peremptory Challenges

The trial court did not err in allowing the State to challenge peremptorily a juror after his acceptance by both the State and defendant where the juror had discussed his opposition to the death penalty with other selected jurors in the jury room and his opposition to the death penalty was not fully expressed at his initial examination. *S. v. Parton*, 55.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

Evidence that each defendant unlawfully confined or restrained the victim against her will for the purpose of committing the felony of rape was sufficient to be submitted to the jury. *S. v. Cox*, 75.

§ 1.3. Instructions

Court of Appeals erred in granting a new trial on the ground that the trial court committed prejudicial error in failing to instruct the jury on the law of acting in concert as it applied to kidnapping. *S. v. Cox*, 75.

LANDLORD AND TENANT

§ 14. Holding Over; Tenancies from Year to Year and Month to Month

When a tenant enters into possession under an invalid lease and tenders rent which is accepted by the landlord, a periodic tenancy is created, and the period of the tenancy is determined by the interval between rental payments. *Kent v. Humphries*, 675.

§ 18. Forfeiture for Nonpayment of Rent

Where a landlord padlocks premises for failure of a tenant to pay rent, a refusal by the landlord to permit a tenant to enter the premises, for whatever purposes, elevates the landlord's taking to a forceful taking and subjects him to damages. *Spinks v. Taylor*, 256.

While a landlord is permitted to use peaceful means to reenter and take possession of leased premises subject to forfeiture, he may not do so against the will of the tenant; an objection by the tenant elevates the reentry to a forceful one, and the landlord's sole lawful recourse at that time is to the courts. *Ibid.*

LANDLORD AND TENANT — Continued

A padlocking notice posted by defendant landlord on the doors of tenants who were late paying their rent did not simulate legal process in violation of G.S. 75-54(5). *Ibid.*

MASTER AND SERVANT

§ 74. Workers' Compensation for Disfigurement

When an employee suffers serious bodily disfigurement due to an accident covered by the Workers' Compensation Act and dies from unrelated causes while drawing compensation for temporary total disability, his dependents are entitled to a postmortem award for serious bodily disfigurement. *Wilhite v. Veneer Co.*, 281.

§ 114. Occupational Safety and Health Act

The Safety and Health Review Board erred in concluding that respondent committed a "serious" or a "repeated" violation of an OSHA standard by failing to shore or slope the sides of a sewer line trench. *Brooks, Comr. of Labor v. Grading Co.*, 573.

MORTGAGES AND DEEDS OF TRUST

§ 33.1. Surplus Proceeds of Foreclosure Sale

Surplus funds generated by a foreclosure sale pursuant to a power of sale in a deed of trust on entirety property are not held constructively as entirety property but are held by the husband and wife as tenants in common. *In re Foreclosure of Deed of Trust*, 514.

A federal tax lien filed against the husband individually attached to surplus proceeds from a foreclosure sale of entirety property only when the proceeds were paid over to the clerk of court, and it was junior to judgment liens which had been filed against the husband and wife. *Ibid.*

MUNICIPAL CORPORATIONS

§ 2. Annexation Generally

Statutes governing annexation by municipalities having a population of 5,000 or more do not unconstitutionally delegate authority to the governing boards of the municipalities without adequate standards and guidelines. *In re Annexation Ordinance*, 220.

Annexation a vote of the residents in the areas to be annexed does not violate due process and equal protection rights of such residents. *Ibid.*

Annexation statutes are not unconstitutional because they subject the property annexed to taxation when the property owners do not have the right to vote on the members of the annexing city's governing board which adopts the annexation ordinance. *Ibid.*

Annexation statutes are not unconstitutional because they provide that the review by the superior court is without a jury. *Ibid.*

There is no test of "reasonableness" which must be considered upon judicial review of an annexation proceeding. *Ibid.*

§ 2.1. Compliance with Statutory Requirements for Annexation

An annexation ordinance was not invalid because the city governing board and city department heads relied upon studies, reports and accountings conducted by the staffs of the various city departments. *In re Annexation Ordinance*, 220.

MUNICIPAL CORPORATIONS — Continued

§ 2.2. Requirements of Use and Size of Tracts

It was unnecessary for a city council to hold a hearing and make findings of fact before amending an annexation report and ordinance to comply with the mandate of the N.C. Supreme Court. *Food Town Stores v. City of Salisbury*, 539.

§ 2.5. Effect of Annexation

The effective date of annexation ordinances was postponed until the final judgment of the Supreme Court is certified to the clerk of superior court. *In re Annexation Ordinance*, 220.

NEGLIGENCE

§ 52.1. Cases Where Person on Premises is Invitee

Plaintiff was an invitee on defendant's premises because her purpose for entering defendant's store was to purchase goods, and defendant proprietor owed its invitees the legal duty to maintain its aisles and passageways in such condition as a reasonably careful and prudent person would deem sufficient to protect its patrons while exercising ordinary care for their own safety. *Norwood v. Sherwin-Williams Co.*, 462.

Plaintiff, who sustained injuries during a tree cutting accident on his brother-in-law's property, was an invitee of defendants where he was on their property by express invitation; he entered the rental property of defendants to cut trees; and this service was of direct and substantial benefit to defendants in maintaining and improving their rental property. *Mazzacco v. Purcell*, 493.

§ 55. Pleadings in Actions by Invitee

The complaint of a plaintiff who was assaulted in a mall parking lot was sufficient to state a claim for relief against the owners of the mall based on negligence in failing to provide adequate security for the parking lot. *Foster v. Winston-Salem Joint Venture*, 636.

§ 57.5. Injuries to Invitees from Defective or Obstructed Floors

Evidence was sufficient for the jury in an action to recover for injuries sustained by plaintiff customer who tripped over a display in defendant's store. *Norwood v. Sherwin-Williams Co.*, 462.

§ 57.10. Cases Involving Other Injuries Where Evidence is Sufficient

In an action to recover for injuries sustained by plaintiff in a tree cutting accident, trial court erred in directing verdict for defendants on the ground that the evidence failed to establish actionable negligence on the part of defendants and in the alternative that the evidence showed contributory negligence as a matter of law. *Mazzacco v. Purcell*, 493.

The trial court erred in entering summary judgment for the owners of a mall in plaintiff's action to recover for injuries sustained when she was assaulted in the mall parking lot. *Foster v. Winston-Salem Joint Venture*, 636.

PARENT AND CHILD

§ 1. Termination of Parental Rights

The Termination of Parental Rights Act does not unconstitutionally deprive the parent and the child of the right to counsel. *In re Clark*, 592.

In proceedings to terminate parental rights brought prior to the 1981 amendment to G.S. 7A-289.23, an indigent parent is not entitled to appointment of counsel

PARENT AND CHILD — Continued

as a matter of law, but the right to appointed counsel must be determined on a case by case basis. *Ibid.*

The Termination of Parental Rights Act is not unconstitutional because it fails to provide for a trial by jury. *Ibid.*

The statute permitting termination of parental rights when a child is in the custody of a department of social services and the parent has failed to pay a reasonable portion of the cost of child care for six months preceding filing of the petition is not unconstitutionally vague and overbroad. *Ibid.*

Plaintiffs were without standing to bring an action seeking custody of a minor child placed in their home for foster care by defendant department of social services after the child's parents voluntarily terminated their parental rights. *Oxendine v. Dept. of Social Services*, 699.

§ 7. Duty to Support Child

The father of a minor child has the responsibility to pay the entire support of the child in the absence of pleading and proof that the circumstances of the case otherwise warrant. *In re Register*, 149.

The trial court erred in ordering that the mother and the father of a minor child who was in the custody of its maternal grandparents each pay $12.50 per week for the support of the child where the court made no findings as to the ability of the father to pay the entire amount needed for support of the child. *Ibid.*

PARTITION

§ 7.1. Commissioners; Report and Confirmation

The report of the commissioners in a partition proceeding is a "similar paper" within the contemplation of G.S. 1A-1, Rule 5(a) which must be served upon each of the interested parties. *Macon v. Edinger*, 274.

Court of Appeals erred in concluding that unless the trial court finds as a fact that respondents in a partition proceeding had actual notice of the filing of the report of commissioners, the trial court should set aside the decree of confirmation and remand the cause to the clerk for a hearing on respondents' exceptions to the report. *Ibid.*

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 16.1. Medical Malpractice; Sufficiency of Evidence

In a medical malpractice action to recover for the death of plaintiff's intestate from tetanus in conjunction with other injuries, the evidence on motion for summary judgment presented issues of material fact as to whether a doctor-patient relationship ever existed between defendant physician and plaintiff's intestate and as to whether defendant was negligent in assigning or permitting an obstetrician-gynecologist to treat an emergency burn patient such as plaintiff's intestate. *Easter v. Hospital*, 303.

RAPE

§ 4.1. Evidence of Other Acts and Crimes

In a first degree rape case evidence of defendant's prior sexual misconduct was admissible as substantive evidence. *S. v. Freeman*, 299.

RAPE — Continued

§ 4.3. Character or Reputation of Prosecutrix

Testimony of two State's witnesses concerning the character of a rape and kidnapping victim was incompetent, but defendants waived their right to object to the testimony by failing to make prompt, timely objections thereto. *S. v. Cox*, 75.

§ 6. Instructions

Where the bills of indictment charged defendants with first degree rape "in Pasquotank County," and the State's evidence tended to show that defendants raped the prosecutrix in Pasquotank County, Virginia, and Rocky Mount, N.C., the trial judge committed prejudicial error in failing to charge the jury that they could only convict defendants, if at all, of those rapes which occurred in Pasquotank County. *S. v. Cox*, 75.

§ 10. Sexual Acts With Children; Competency of Evidence

In a prosecution of defendant for engaging in sexual acts with two girls under the age of twelve, photographs of the nude girls pointing to parts of their bodies where defendant allegedly put a tampon were admissible for the purpose of illustrating the testimony of the victims. *S. v. Williams*, 507.

In a prosecution of defendant for engaging in a sexual act with children under the age of twelve, trial court properly admitted evidence of defendant's guilt of another offense. *Ibid.*

§ 11. Sexual Acts With Children; Sufficiency of Evidence

There was a fatal variance where the indictment charged a first degree sexual offense "to wit, cunnilingus and anal intercourse" and the evidence showed that defendant penetrated the vaginal and rectal orifices of two girls by using a tampon. *S. v. Williams*, 507.

Testimony by a four-year-old girl that defendant "touched me . . . with his tongue . . . between my legs" while indicating the place of touching to the jury constituted sufficient evidence of cunnilingus to support a conviction for a first-degree sexual offense. *S. v. Ludlum*, 666.

§ 11.1. Instructions in Prosecution for Sexual Acts With Children

In a prosecution of defendant under G.S. 14-27.4(a) for engaging in a sexual act with children under twelve, trial court did not err in failing to instruct on taking indecent liberties with children in violation of G.S. 14-202.1. *S. v. Williams*, 507.

ROBBERY

§ 4. Sufficiency of Evidence in Robbery Case

Mere possession of a firearm during the course of a robbery is insufficient to support an armed robbery conviction under G.S. 14-87. *S. v. Gibbons*, 484.

Evidence was sufficient for the jury in a prosecution of two defendants for armed robbery of a store employee. *S. v. Porter*, 680.

§ 5.2. Instructions Relating to Armed Robbery

There was no merit to the State's contention that defendant's fists were a deadly weapon which would support a conviction of armed robbery. *S. v. Gibbons*, 484.

§ 5.4. Instructions on Lesser Included Offenses

Trial court in an armed robbery case properly refused to instruct on common law robbery. *S. v. Porter*, 680.

RULES OF CIVIL PROCEDURE

§ 4. Process

A child support order was a nullity as to the nonresident defendant who was purportedly served by certified mail where it was a default judgment and was entered before the affidavits required by Rule 4(j)(9)b were filed. *Lynch v. Lynch*, 367.

§ 5. Service of Pleadings and Other Papers

The report of the commissioners in a partition proceeding is a "similar paper" within the contemplation of G.S. 1A-1, Rule 5(a) which must be served upon each of the interested parties. *Macon v. Edinger*, 274.

§ 41. Dismissal of Actions Generally

A dismissal under Rule 41(b) may not be premised upon a party's failure to comply with an erroneous order. *Thornburg v. Lancaster*, 89.

§ 42. Consolidation of Claims for Trial

The discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial. *Oxendine v. Dept. of Social Services*, 699.

§ 43. Evidence

Plaintiff had a right to ask leading questions of two witnesses called by plaintiff who were agents or employees of defendant. *Ingram, Comr. of Insurance v. Insurance Agency*, 287.

SEARCHES AND SEIZURES

§ 28. Issuance of Warrant

A search of defendant's premises was not illegal because the affidavit and warrant had the wrong date typed on them where the error was clearly a clerical one on the part of the magistrate and was subsequently corrected by him. *S. v. Norwood*, 473.

TAXATION

§ 27.1. Inheritance Taxes; Trusts

Where a separation agreement required decedent to maintain in full force and effect a life insurance trust in the amount of at least $150,000 for the benefit of decedent's former wife and their children, the life insurance proceeds were a "debt of decedent" deductible from decedent's estate for inheritance tax purposes. *In re Kapoor*, 102.

§ 34. Tax Liens on Realty and Persons Liable

A federal tax lien filed against the husband individually attached to surplus proceeds from a foreclosure sale of entirety property only when the proceeds were paid over to the clerk of court, and it was junior to judgment liens which had been filed against the husband and wife. *In re Foreclosure of Deed of Trust*, 514.

TORTS

§ 7.7. Settlement

In an action to recover for personal injuries sustained by plaintiff in an automobile accident where there was an issue of fact as to whether a payment

WITNESSES

§ 7.1. Direct Examination

Plaintiff had a right to ask leading questions of two witnesses called by plaintiff who were agents or employees of defendant. *Ingram, Comr. of Insurance v. Insurance Agency*, 287.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina