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SUPREME COURT OF NORTH CAROLINA

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CASES REPORTED

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

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

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KEITH BOYD MASON ..... Bath
DAVID SANDERS MASSEY ..... Smithfield
BARNWELL PALMER MCARTHUR, JR. ..... Columbia, South Carolina
WILLIAM MCBLIEF ..... Charlotte
ROSS WILLIAM MCCANLESS ..... Salisbury
BARBARA SACCO MCCLURE ..... Benson
EDWARD MILLER MCCLURE, JR. ..... Benson
WILLIAM AUSTIN MCFARLAND, JR. ..... Columbus
MELISSA ELIOT MCMORRIES ..... Winston-Salem
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STEVEN RHEA MEDLIN ..... Roanoke Rapids
JOHN CLARK MILLER ..... Charlotte
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MARK WARNER MORRIS ..... Chapel Hill
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GERALD PATRICK MURPHY ..... Dunn
CHRISTINE LEE MYATT ..... High Point
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DOLORES DEL GAUDIO NESNOW ..... Chapel Hill
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ROBERT DALE PITT	Pinetops
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RALPH MOORE RUTLEDGE	Stanley
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RYAL WOODALL TAYLOE ..... Washington
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SUSAN JAYNE WEIGAND ..... Baltimore, Maryland
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Given over my hand and Seal of the Board of Law Examiners this the 8th day of October, 1982.

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

LICENSED ATTORNEYS

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

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

On July 1, 1982, the following individual was admitted:

MAUREEN STEWART ..... Durham

Given over my hand and Seal of the Board of Law Examiners this the 8th day of October, 1982.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC.; THE CITY OF DURHAM; CAROLINA ACTION; KUDZU ALLIANCE; GREAT LAKES CARBON CORPORATION; AND RUFUS L. EDMISTEN, ATTORNEY GENERAL v. DUKE POWER COMPANY

No. 49

(Filed 27 January 1982)

1. Administrative Law § 8; Utilities Commission § 51— electric rate case—standard of judicial review

The standard of judicial review of an order of the Utilities Commission in a rate case increasing a power company's accumulated depreciation account as an offset to a *pro forma* adjustment by the power company to depreciation expense was whether the order was "affected by error of law," G.S. 62-94(b)(4), and the standard of review of the Commission's decision fixing the power company's rate of return on common equity was whether the decision was "arbitrary or capricious," G.S. 62-94(b)(6), or "unsupported by competent, material and substantial evidence in view of the entire record as submitted," G.S. 62-94(b)(5).

2. Utilities Commission § 56— review of utility rate order

The burden of showing the impropriety of rates established by the Utilities Commission lies with the party alleging such error, and the rate order will be affirmed if upon consideration of the whole record the appellate court finds that the Commission's decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn.

3. Electricity § 3; Utilities Commission § 25— rates for electricity—authority of Utilities Commission to increase utility's accumulated depreciation account

The Utilities Commission had authority under G.S. 62-133 to reduce a power company's rate base by increasing its accumulated depreciation account

as an offset to a *pro forma* adjustment by the power company in the same amount to annualize its actual test year depreciation expense. G.S. 62-133(b)(1), (c) and (d).

4. **Electricity § 3; Utilities Commission § 41— electric rates— fair rate of return on common equity—rejection of power company's uncontradicted testimony—statement of reasons in order**

The Utilities Commission may reject the uncontradicted testimony of a power company's expert witnesses as to the fair rate of return on the company's common equity, and while the better practice is for the Commission to state in its order its reasons for rejecting such testimony, it is not required to do so as a matter of law. Furthermore, the Commission in this rate case sufficiently explained in its order that it rejected uncontradicted testimony by the power company's expert witnesses that a fair rate of return on common equity was 15% to 15.5% because, based on the company's historical experience, the company would continue to be successful in competing for funds in the open market by earning a rate of return on common equity of 14.1%.

5. **Utilities Commission § 24— rate case—consideration of "other material facts"—findings in final order**

The "other material facts of record" considered by the Utilities Commission pursuant to G.S. 62-133(d) in fixing reasonable and just rates must be found and set forth in its order so that the reviewing court may see what these elements are.

6. **Electricity § 3; Utilities Commission § 41— fair return on common equity—determination by Utilities Commission—sufficiency of evidence**

The Utilities Commission's determination that 14.1% was a fair rate of return on common equity for a power company was supported by competent, material and substantial evidence in the record and was thus not arbitrary, capricious or unreasonable.

Justice CARLTON concurring in part, dissenting in part.

Chief Justice BRANCH and Justice EXUM join in this dissenting opinion.

APPEAL as of right by Duke Power Company (hereinafter "Duke") pursuant to G.S. § 7A-30(3) from a decision of the Court of Appeals, 51 N.C. App. 698, 277 S.E. 2d 444 (1981), affirming an order of the North Carolina Utilities Commission (hereinafter the "Commission") in a general rate-making case. The proceeding before the Commission is identified as Docket No. E-7, Sub. 289.

Two issues are presented by this appeal:

(1) May the Commission under the rate-making powers conferred by G.S. § 62-133 reduce a utility's rate base by increasing

its accumulated depreciation account as an offset to a *pro forma* adjustment by the utility in the same amount to depreciation expense? We conclude that it may.

(2) May the Commission reject the uncontradicted testimony of a utility's expert witnesses as to the fair rate of return on the utility's common equity, and if so, whether the Commission in its order establishing a lower rate of return must state its reasons for rejecting such uncontradicted evidence? We conclude that the Commission may reject such testimony and, while the better practice is for the Commission to state its reasons for doing so, it is not required to do so as a matter of law.

We find the proceedings before the Commission and the Commission's order of rate determination proper and affirm the Court of Appeals.

Steve C. Griffith, Jr., Clarence W. Walker and Stephen K. Rhyne for Defendant-Appellant Duke Power Company.

Paul L. Lassiter for Plaintiff-Appellee North Carolina Utilities Commission Public Staff.

Byrd, Byrd, Ervin, Blanton & Whisnant, P.A. by Robert B. Byrd for Plaintiff-Appellee Great Lakes Carbon Corporation.

Thomas R. Eller, Jr., for Plaintiff-Appellee North Carolina Textile Manufacturers Association, Inc.

M. Travis Payne for Plaintiff-Appellee Kudzu Alliance.

W. I. Thornton, Jr., for Plaintiff-Appellee City of Durham.

MEYER, Justice.

On 29 February 1980 Duke filed an application with the Commission to adjust and increase its rates and charges for electric service to its retail customers in North Carolina by an average of approximately 9.61% or $91,572,000. In the application, Duke proposed to make the rate adjustments effective 30 March 1980. In an order dated 21 March 1980, the Commission determined, *inter alia*, that the application constituted a general rate case (G.S. § 62-137), suspended the proposed adjustments for a period of up

to 270 days (G.S. § 62-134), and ordered public hearings on the proposed rates and publication of notices of such hearings. The Commission set the test period as the twelve month period ending 31 December 1979. After interventions, the matter was heard by the Commission in public hearings in various areas of the State through June and July, 1980.

On 7 October 1980, the Commission issued its Final Order which disallowed $34,122,000 of the increase requested by Duke and allowed $57,450,000 thereby reducing the increase from the requested 9.61% to 6.03% or 63% of the amount requested. The increase was allowed for service rendered on and after 3 October 1980. In its Final Order the Commission, *inter alia*, (1) increased Duke's accumulated depreciation account, thereby reducing the rate base, by the amount of $3,879,000 as an offset to a *pro forma* adjustment in that same amount made by Duke in its test year depreciation expense and (2) fixed the rate of return on common equity at 14.1%. One commissioner dissented from the Final Order on the ground that there was no evidence to support the Commission's determination as to the fair rate of return on equity.

Duke appealed and the Court of Appeals allowed Duke's motion for accelerated hearing and decision of appeal by order dated 13 January 1981. In an opinion filed 5 May 1981, the Court of Appeals concluded that "[i]t is reasonably certain that the final disposition of this appeal will be determined by the Supreme Court [and] [w]e, therefore, will not attempt to recapitulate the evidence or set out a detailed statement of [our] reasoning . . . ." The Court of Appeals then held that the Commission's adjustment to Duke's accumulated depreciation account does not contravene G.S. § 62-133(b)(1) and (c), and that the Commission's determination of a 14.1% fair rate of return on common equity is supported by competent evidence and that the Commission adequately stated the reasons for its determination.

Duke's exceptions before the Court of Appeals and before this Court relate solely to two components of the Commission's rate determination. Duke contends that the Commission erred, first, by understating Duke's rate base by improperly deducting therefrom $3,879,000 in accumulated depreciation contrary to G.S. § 62-133(b)(1); and second, by failing to state and explain its reasons for failing to follow Duke's uncontradicted evidence that

15.0% was the minimum fair rate of return on its common equity. We do not find that the Commission erred in either respect.

I. STANDARD OF JUDICIAL REVIEW

[1] Before proceeding to address the substantive issues of this case, we must first determine the appropriate standard of judicial review of the Commission's rate determination order.

Duke's appeal to this Court of the decision of the Court of Appeals is as of right pursuant to G.S. § 7A-30(3). *See also* G.S. § 62-96. Duke's appeal to the Court of Appeals was pursuant to G.S. § 7A-29. *See also* G.S. § 62-90. G.S. § 62-94(b) specifies the standard of judicial review by the Court of Appeals.

> That section provides, *inter alia*, that the reviewing court may (1) affirm, (2) reverse, (3) declare null and void, (4) modify, or (5) remand for further proceedings, decisions of the Commission. The Court's power to affirm or remand is not specifically circumscribed by the statute. However, the power of the Court to reverse or modify and, *a fortiori*, to declare null and void, is substantially circumscribed to situations in which the court must find (a) that appellant's substantial rights, (b) have been prejudiced, (c) by Commission findings, inferences, conclusions or decisions which are
>
> (1) in violation of constitutional provisions; or
>
> (2) in excess of statutory authority or jurisdiction of the Commission, or
>
> (3) made upon unlawful proceedings, or
>
> (4) affected by other errors of law, or
>
> (5) unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) arbitrary or capricious.

Utilities Comm. v. Oil Co., 302 N.C. 14, 19-20, 273 S.E. 2d 232, 235 (1981).

Subsection (c) of G.S. § 62-94 requires the reviewing Court, in making the foregoing determinations, to "review the whole record." In order to determine whether the decision of the Court of Appeals is proper, this Court must determine which of the

listed criteria the Court of Appeals should have addressed and whether that court addressed those criteria in its review of the proceedings and order of the Commission. The criteria to be employed is in turn determined by the issues presented to the Court of Appeals, for it is the nature of the contended error that dictates the criteria.

As to the issue concerning depreciation, Duke presented in its brief to the Court of Appeals the following issue:

> 1. Did the Commission's action in reducing the original cost of Duke's property in service at the end of the test period by an amount of depreciation which did not represent a portion of original cost "consumed by previous use recovered by depreciation expense" contravene G.S. §§ 62-133(b)(1) and (c)?

The Court of Appeals answered that issue as follows:

> With regard to the first question presented in the appellant's brief, in our opinion, the Commission was correct in reducing Duke's rate base by increasing its depreciation reserve by $3,879,000 due to the fact that Duke had made similar adjustments to its depreciation and amortization expenses for the test year without making corresponding adjustments to its accumulated depreciation account. The adjustments did not contravene N.C. Gen. Stat. § 62-133(b)(1) and (c). Morever, we believe that without such adjustments, Duke's rates would have been artificially high, thereby allowing it to earn more than a fair rate of return.

It is apparent that both Duke and the Court of Appeals treated the issue as a contention that the action of the Commission, in making the adjustment to accumulated depreciation, was "affected by error of law." The Court of Appeals applied the correct criteria for review as it held that the adjustment to accumulated depreciation "did not contravene N.C. Gen. Stat. § 62-133(b)(1) and (c)." Having determined that the Court of Appeals applied the correct standard of review on the depreciation issue, this Court must consider whether the Court of Appeals erred in affirming the action of the Commission.

As to the issue concerning the rate of return on equity fixed by the Commission, Duke presented in its brief to the Court of Appeals the following issue:

2. Is the Commission's determination that 14.1% is a fair rate of return on equity unsupported by substantial evidence and arbitrary and capricious when (i) the Commission rejected, without setting out any justification, uncontradicted evidence that 15.0% is the minimum fair rate of return on equity and (ii) the method by which the Commission established the rate of return on equity cannot be determined from the Commission's order?

The Court of Appeals answered that issue as follows:

> With regard to the second question presented in appellant's brief, in our opinion, the Commission's determination that 14.1% is a fair rate of return on common equity is fully supported by the record and was not arbitrary and capricious. In its order, the Commission made findings supported by competent evidence and adequately stated the reasons for its determination that 14.1% should be the rate of return on Duke's common equity.

We conclude from the issue presented and the conclusion reached by the Court of Appeals on the issue of the rate of return on equity that both Duke and the Court of Appeals treated the issue as a contention that the Commission's decision in fixing the rate of return at 14.1% was "arbitrary or capricious" or "unsupported by competent, material and substantial evidence in view of the entire record as submitted." It is obvious to this Court that the Court of Appeals applied the correct criteria for review as it held that the Commission's determination of 14.1% rate of return "is fully supported by the record and was not arbitrary and capricious" and that the Commission "made findings supported by competent evidence and adequately stated the reasons for its determination . . . ." Having determined that the Court of Appeals applied the correct standard of review on the rate of return issue, this Court must consider whether the Court of Appeals erred in holding that the Commission's decision was not abritrary or capricious and was in fact supported by the record.

II. THE STATUTE

For a proper understanding of the issues presented by this appeal and addressed by this Court, it is necessary to set forth the provisions of G.S. § 62-133(a) through (d) in their entirety.

(a) In fixing the rates for any public utility subject to the provisions of this Chapter, other than motor carriers and certain water and sewer utilities, the Commission shall fix such rates as shall be fair both to the public utility and to the consumer.

(b) In fixing such rates, the Commission shall:

(1) Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense plus the reasonable original cost of investment in plant under construction (construction work in progress). In ascertaining the cost of the public utility's property, construction work in progress as of the effective date of this subsection shall be excluded until such plant comes into service but reasonable and prudent expenditures for construction work in progress after the effective date of this subsection shall be included subject to the provisions of subparagraph (b)(5) of this section.

(2) Estimate such public utility's revenue under the present and proposed rates.

(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

(4) Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) as will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

(4a) Require each public utility to discontinue capitalization of the composite carrying cost of capital funds used to finance construction (allowance for funds) on the construction work in progress included in its rate base upon the effective date of the first and each subsequent general rate order issued with respect to it after the effective date of this subsection; allowance for funds may be capitalized with respect to expenditures for construction work in progress not included in the utility's property upon which rates were fixed. In determining net operating income for return, the Commission shall not include any capitalized allowance for funds used during construction on the construction work in progress included in the utility's rate base.

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to subdivision (3) of this subsection the rate of return fixed pursuant to subdivisions (4) and (4a) on the cost of the public utility's property ascertained pursuant to subdivision (1).

(c) The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

(d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates.

Certain fundamental legal principles are applicable and must be adhered to in applying the statute in the resolution of the issues before us. We begin with the proposition that the Commission is vested with the power to regulate the rates charged by utilities. G.S. § 62-2. The General Assembly has delegated to the Commission, and not to the courts, the duty and power to establish rates for public utilities. *Utilities Commission v. Telephone Co.*, 266 N.C. 450, 146 S.E. 2d 487 (1966), *citing Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890 (1963). The rates fixed by the Commission must be just and reasonable. G.S. §§ 62-130 and 131. *See Telephone Co. v. Clayton, Comr. of Revenue*, 266 N.C. 687, 147 S.E. 2d 195 (1966). Rates fixed by the Commission are deemed *prima facie* just and reasonable. G.S. § 62-94(e).

[2] The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. *See Utilities Commission v. Light Co.* and *Utilities Commission v. Carolinas Committee*, 250 N.C. 421, 109 S.E. 2d 253 (1959). The rate order of the Commission will be affirmed if upon consideration of the whole record we find that the Commission's decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. *See Utilities Comm. v. Springdale Estates Assoc.*, 46 N.C. App. 488, 265 S.E. 2d 647 (1980). Of course, an appellant may show on appeal that the Commission's order is not supported by competent, material and substantial evidence. *Utilities Comm. v. Edmisten, Attorney General*, 291 N.C. 424, 230 S.E. 2d 647 (1976); *Utilities Commission v. Coach Co.*, 261 N.C. 384, 134 S.E. 2d 689 (1964); *Utilities Commission v. R. R.*, 238 N.C. 701, 78 S.E. 2d 780 (1953).

III. DEPRECIATION

[3] Duke by this appeal seeks the ultimate reversal of the Commission's order which increased Duke's accumulated depreciation account by $3,879,000 as an offset to a *pro forma* adjustment of the same amount made by Duke to its test period depreciation expenses. We are here concerned only with adjustments *for the test period.* We are not concerned in this case with adjustments for changes occurring *after the test period* but before the hearing.

The figure of $3,879,000 is the total of two adjustments by Duke:

Adjustment to annualize depreciation expense	$2,076,000
Adjustment to annualize nuclear fuel disposal cost	1,803,000
	$3,879,000

While, at present, construction work in progress (CWIP) may be included in the rate base as construction of a facility progresses, it is not depreciated (and therefore not added to accumulated depreciation) until the completed facility comes into service, or in the statute's terminology, until it is used or useful in providing service rendered to the public. Duke made the *pro forma* adjustment to the test period depreciation expenses to annualize those expenses—that is, to adjust the test year depreciation expenses to reflect a full year's depreciation which it will be entitled to in the future year when the rates being considered would be effective, rather than the partial year reflected in the actual test year's depreciation expenses for facilities which came into service at various times during the test year and were depreciated only for a part of the year.

The Commission, in effect, concluded that Duke added $3,879,000 as a *pro forma* adjustment to its operating expenses for the test period to compensate for future depreciation expense without flowing a corresponding amount to its accumulated depreciation reserve. Duke contends that this is authorized because one section of the statute (G.S. § 62-133(c)) allows an adjustment favorable to them for future depreciation expense while another section of the statute (G.S. § 62-133(b)(1)) does not allow, and indeed prohibits, a corresponding and offsetting adjustment to its rate base. We do not agree.

Duke's position with regard to the Commission's offsetting adjustment in the accumulated depreciation account is fully and accurately reflected in the testimony of its witness William R. Stimart, Duke's financial and accounting expert, who testified that such a deduction in the rate base was inappropriate because it did not represent depreciation that had been collected from ratepayers:

> I have not deducted from rate base the adjustment to annualize depreciation expense consistent with G.S. 62-133(b)(1) which states that the original cost of a public utility's property is to be reduced by 'that portion of the cost which has been consumed by previous use recovered by depreciation expense.' The amount of this adjustment to depreciation expense has not been consumed by previous use recovered by depreciation expense. Since the proposed rates will not become effective until after the test period, the ratepayers will not have paid the level of depreciation expense we are seeking in this case. (R.p. 114)

The Commission acknowledged that the additional $3,879,000 it added to the accumulated depreciation reserve and subtracted from the rate base had not been collected from Duke's customers. (R.pp. 2 & 5)

Duke vigorously contends that the Commission's action in reducing its rate base is contrary to what Duke considers to be the legislature's mandate in G.S. § 62-133(b)(1) that the rate base consist of the plant in service at the end of the test period. Duke argues that this issue is controlled by the well-established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application, and that when the section dealing with a specific matter is clear and understandable on its face, it requires no construction. *See Phillips v. Phillips*, 296 N.C. 590, 596, 252 S.E. 2d 761, 765 (1979); *Utilities Commission v. Electric Membership Corp.*, 275 N.C. 250, 260-61, 166 S.E. 2d 663, 670 (1969); *Utilities Commission v. Coach Co.*, 236 N.C. 583, 588-89, 73 S.E. 2d 562, 566 (1952). Duke contends that since G.S. § 62-133(b)(1) deals specifically with the issue of what depreciation may be deducted from plant in service in determining rate base, that specific statutory section is controlling. While we recognize the validity of this principle of construction urged by Duke, it is not controlling here.

Though we are dealing with several sections and subsections of G.S. § 62-133, we are here dealing with but *one* statute. By the adoption of this statute, the legislature intended to establish an overall scheme for fixing rates, and it must be interpreted in its entirety in order to comply with the legislative intent. In this in-

stance the more appropriate principle of statutory construction is stated as follows:

> The different parts of a statute reflect light upon each other, and statutory provisions are regarded as in pari materia where they are parts of the same act. Hence, a statute should be construed in its entirety, and as a whole. All parts of the act should be considered, and construed together. It is not permissible to rest a construction upon any one part alone, or upon isolated words, phrases, clauses, or sentences, or to give undue effect thereto. The legislative intention, as collected from an examination of the whole as well as the separate parts of a statute, is not to be defeated by the use of particular terms.

73 Am. Jur. 2d *Statutes* § 191 (1974).

As we subsequently demonstrate herein, Duke itself was dependent on this latter principle of statutory construction in increasing *pro forma* its actual test year depreciation expense by $3,879,000.

The Commission increased accumulated depreciation to reflect that Duke's ratepayers were being charged a full year's depreciation, for ratemaking purposes, on such plant despite the fact that such plant was not in service for the full year. It is axiomatic that an increase in accumulated depreciation results in a decrease in the rate base. The utility's rate base is determined in pertinent part by ascertaining the original cost of plant in service and subtracting therefrom the reserve for accumulated depreciation. Therefore any increase in the reserve for accumulated depreciation causes a corresponding reduction in the rate base. It follows, of course, that when the approved rate of return is applied to the rate base thus reduced, the ultimate result is the prospect of a lower level of revenues for Duke. It is this adjustment to accumulated depreciation that Duke contends is error.

We will now consider whether the statute authorizes the reduction in rate base resulting from the Commission's adjustment to accumulated depreciation to offset Duke's *pro forma* adjustment increasing test year depreciation expense not actually booked in depreciation expense for the test year.

The basic underlying theory of using the company's operating experience in a recently ended test period in fixing

rates to be charged by it for its service in the near future is that rates for service, in effect throughout the test period, will in the near future produce the same rate of return on the company's property as was produced by them on such property in the test period, *adjusted for known changes in conditions. Utilities Comm. v. Morgan, Attorney General,* 278 N.C. 235, 179 S.E. 2d 419 (1971). Duke correctly argues that to properly reflect probable future costs and revenues, the Commission must increase its test year expenses, *i.e.*, depreciation expense, by $3,879,000 thereby reducing its net income by this same amount. This adjustment is consistent with the Commission's statutory mandate and is appropriate. Duke would have this Court believe that even though this *pro forma* adjustment is proper to reflect probable future operations, it is somehow improper to increase the accumulated depreciation account (thereby reducing rate base) by the same amount in order fairly to reflect what the proper rate base should be. Duke would have us apply an unrealistic and narrow interpretation of G.S. § 62-133(b)(1) that would in effect negate the meaning and purpose of G.S. § 62-133 when read as a whole.

Duke relied on G.S. § 62-133(c) to increase its expenses for depreciation by $3,879,000. G.S. § 62-133(b)(3) does not authorize adjustments for anticipated changes in expenses after the test period such as increased depreciation for the coming year. The only language authorizing such an adjustment is contained in G.S. § 62-133(c). If G.S. § 62-133(b)(3) is read without reference to G.S. § 62-133(c), then Duke would lack the authority to increase its actual depreciation expense by a *pro forma* adjustment of $3,879,000 as such adjustment is for "probable future expense." The courts, however, have interpreted these statutory provisions, taken together, to allow the Commission to make *pro forma* adjustments to revenue and expenses to reflect what their effect would have been had those future conditions prevailed throughout, or at the end of, the test period or to adjust for abnormalities and changes in conditions. *Utilities Comm. v. Morgan, Attorney General,* 278 N.C. 235, 179 S.E. 2d 419 (1971); *see also Utilities Comm. v. Power Co.*, 285 N.C. 377, 206 S.E. 2d 269 (1974); *Utilities Comm. v. Power Co.*, 285 N.C. 398, 206 S.E. 2d 283 (1974). Our cases thus hold that G.S. § 62-133(b)(3) shall be read in conjunction with G.S. § 62-133(c).

To be consistent, G.S. § 62-133(b)(1) must also be read in conjunction with G.S. § 62-133(c). Just as G.S. § 62-133(b)(3) does not authorize adjustments for probable future changes in expenses past the test period, G.S. § 62-133(b)(1) does not authorize adjustment for probable future changes in the original cost rate base of a utility after the test period. As discussed above, the authority for the adjustment for actual future changes to the original cost rate base is contained in G.S. § 62-133(c). These two sections must also be read in conjunction with each other. If depreciation expense is increased to compensate for increased depreciation in the coming year through *pro forma* adjustment, then offsetting adjustments should be made to the accumulated depreciation account. To isolate the provisions as Duke argues would defeat the overall scheme of G.S. § 62-133. This Court has said that: "If an act is susceptible to more than one construction, the consequences of each are a potent factor in its interpretation, and undesirable consequences will be avoided if possible." *Little v. Stevens*, 267 N.C. 328, 336, 148 S.E. 2d 201, 207 (1966). G.S. § 62-133 is not reasonably susceptible of two interpretations; but, even if it were, we would reject Duke's argument in that it would defeat the purpose of G.S. § 62-133 when read as a whole:

> In the interpretation of statutes the legislative will is the controlling factor. 'Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law.' 73 Am. Jur. 2d, Statutes § 145 (1974). A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language. *Ballard v. Charlotte*, 235 N.C. 484, 70 S.E. 2d 575 (1952). Where possible, the language of a statute will be interpreted so as to avoid an absurd consequence. *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966); *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797 (1948); *State v. Scales*, 172 N.C. 915, 90 S.E. 439 (1916); *State v. Earnhardt*, 170 N.C. 725, 86 S.E. 960 (1915).

State v. Hart, 287 N.C. 76, 80, 213 S.E. 2d 291, 294-95 (1975). Clearly, the Commission has followed the "legislative will" in its application of G.S. § 62-133 when the entire statute is viewed as an integrated entity. When the statute is separated into its constituent components, there is no conflict between the components in contemplation of law.

With regard to the adjustment to accumulated depreciation, Public Staff Witness William W. Winters testified as follows:

> On my Schedule 2-2(a) I calculated an increase of $2,076,000 in the North Carolina retail balance of accumulated depreciation and amortization. Mr. Stimart made an adjustment to depreciation expense of this amount but failed to make the corollary increase to accumulated depreciation and amortization. By increasing depreciation expense to an end-of-period level, the ratepayers will have to pay in rates to cover additional depreciation expense as if the plant in service at the end of the test year had been in service for the entire test year. If, in fact, the end-of-period plant level had been in service throughout the test year, the depreciation reserve would have been $2,076,000 greater than the amount recorded at the end of the test year. If the ratepayers are required to pay in rates to cover depreciation expense which had not been incurred at the end of the test period, it is only fair and equitable that they be given the benefit of that additional depreciation in determining the end-of-period level of accumulated depreciation.
>
> On my Schedule 2-1(b) I calculated an increase of $1,803,000 in the North Carolina retail balance of accumulated depreciation and amortization. Mr. Stimart made an adjustment to annualize nuclear fuel disposal cost but failed to make the corollary increase to accumulated depreciation and amortization. The rationale for increasing the balance of accumulated depreciation and amortization for this item is analagous to the explanation in the preceding paragraph. (R. p. 152-53).

With regard to the evidence and conclusions for its Finding of Fact No. 6 (the original cost of Duke's property) the Commission quoted a portion of Mr. Winter's testimony and then said:

> With respect to this issue, Company witness Stimart testified as follows:
>
> > 'I have not deducted from rate base the adjustment to annualize depreciation expense. Consistent with G.S. 62-133(b)(1) which states that the original cost of a public utility's property is to be reduced by 'that portion of the

cost which has been consumed by previous use recovered by depreciation expense.'

In a recent Duke general rate case, Docket No. E-7, Sub 237, the Commission concluded that:

'In arriving at a proper level of operating revenue deductions which is consistent with the test year level of investment the Commission has added an amount to depreciation expense to annualize depreciation applicable thereto. It is therefore, entirely consistent and proper to make the corollary adjustment to accumulated depreciation. The Commission acknowledges that the pro forma adjustment to depreciation expense has not been collected from the company's customers during the test year. However, when considering the test year, the company has, in fact, not actually incurred such cost. Further, the Commission believes that the corollary adjustment to accumulated expense is necessary to achieve a proper and equitable matching of revenues and costs.'

The Commission does not believe that the evidence in this case warrants a change in the Commission's position with respect to this matter. The Commission, therefore, concludes that the adjustment of $2,076,000 proposed by the Public Staff to increase accumulated depreciation to give full effect to the pro forma adjustment to annualize depreciation expense is proper. Further, based upon the same reasoning, the Commission concludes that it is proper to increase accumulated amortization by $1,803,000 to reflect the effect of the pro forma adjustment to annualize nuclear fuel disposal cost. (R. p. 245-46).

We find that the Commission was fully justified in that conclusion.

If, as here were facilities come into service at various times during the test year, Duke is allowed to make the *pro forma* adjustment to the test year depreciation expense to reflect the future depreciation revenue requirement of a full year's depreciation and is not required to increase its accumulated depreciation account by the same amount to reflect what it would have been had the facilities been in the rate base for the full year, its customers would pay not only the adjustment for increased

depreciation but would also pay a rate of return on an inflated rate base. If we followed Duke's argument, the $3,879,000 of additional revenues required for this item of expense would be applied to an artificially inflated rate base, resulting in a more than fair rate of return for Duke.[1]

In construing the provisions of G.S. § 62-133, the Commission must also consider section (d) of the statute. Fundamental to an understanding of the conclusion reached by this Court in the decision of this case is an appreciation of the force and effect of subsection (d) which provides as follows: "(d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates." The plain meaning of subsection (d) is that, after considering all other factors, considerations and adjustments specifically set forth in the various sections of the statute, the Commission must consider "all other material facts of record" which ought to be taken into consideration in setting rates which are reasonable and just. In this regard, the fact that Duke increased its depreciation expense by a *pro forma* adjustment was a material fact of record. Consequently, the Commission had the duty pursuant to G.S. § 62-133(d) to consider the effect that such adjustment should have on accumulated depreciation so that the Commission could determine what would be reasonable and just rates.

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1. This can perhaps be illustrated by using a variation of the formulas for ratemaking set out in Justice Carlton's dissent.

Original cost of property in service at end of test year.

* - Accumulated depreciation recovered by depreciation expense.
\+ Reasonable original cost of plant under construction (CWIP).
± Adjustments for events occurring between the end of the test year and the beginning of the hearing.

= Rate base.
x Fair rate of return.

= Return on property.
* ± Adjustments for probable future revenues and expenses based on plant and equipment.

= Level of revenue.

Simply put, the future year's increased depreciation revenue requirement adjustment was properly allowed at the point in the formula designated by the second asterisk. Since the adjustment in effect simulates a situation wherein depreciation for an entire year has been allowed *in the test period* a corresponding and offsetting adjustment should be made to simulate that such depreciation was reserved or accumulated for the entire test year. This corresponding adjustment should occur in the formula designated by the first asterisk so that a rate of return will not be earned on the amount added by the first adjustment.

In reducing Duke's rate base by the addition to the accumulated depreciation account of $3,879,000 the Commission acted within its statutory power. To have allowed Duke to claim a $3,879,000 increase in depreciation expenses in its rates and not have required an offsetting adjustment to accumulated depreciation expense would have in effect resulted in a windfall to Duke and a penalty to its customers. If we followed the narrow interpretation of the statute suggested by Duke, the effect would be to annualize one factor and not the other. This was one of the "other material facts" which the Commission is required by G.S. § 62-133(d) to consider in determining "what are reasonable and just rates."

When the Commission allowed Duke to annualize its actual test year depreciation expenses (*i.e.* increase them to reflect what they would have been had all of its property used and useful at the end of the test year been in service for the entire test period), it correctly applied a corresponding or offsetting adjustment to increase the accumulated depreciation account to reflect what it would have been had that property been in service for the entire test year.

We hold that the Commission did not err in increasing Duke's accumulated depreciation account by the amount of $3,879,000 to offset a corresponding adjustment which Duke had made to annualize its depreciation expense for the test year.

IV. Rate Of Return

Duke contends in its brief that the rate of return fixed by the Commission (14.1%) is arbitrary and capricious and not supported by substantial evidence because the determination of that rate is contrary to Duke's uncontradicted evidence and because the Commission stated no justification or explanation for its rejection of such uncontradicted evidence.[2]

2. On oral argument Duke apparently narrowed its objection as to the rate of return issue. The following statement was made by Duke's counsel on oral argument as transcribed from our electronic recording of the oral arguments:

> We do not question the power of the Commission to reject uncontradicted evidence. Nor do we question the power of the Commission to compute a fair rate of return within the evidence. Nor are we contesting the amount of the rate of return fixed by the Commission in this proceeding. We do contest, however, the Commission's authority to reject uncontradicted evidence without giving its reasons for doing so.

We will consider Duke's contentions with regard to the 14.1% rate of return on common equity by addressing the following questions:

(1) May the Commission reject the uncontradicted testimony of Duke's witnesses?

(2) Must the Commission specify and explain its reasons for rejecting uncontradicted testimony?

(3) Is the rate of return fixed by the Commission supported by substantial evidence in the record?

(1)

[4] May the Commission reject the uncontradicted testimony of Duke's witnesses as to the fair rate of return? We conclude that it may.

The only evidence before the Commission as to the rate of return on equity was the testimony of Dr. Stephen F. Sherwin and Mr. W. H. Grigg. Their testimony was to the effect that a reasonable rate of return on equity is between 15.0% and 15.5%. Dr. Sherwin, an expert on rate of return, was called by Duke to testify as to the rate of return on equity. His opinion that a fair rate of return on equity for Duke is in the range of 15.0% to 15.5% was based on the results of three studies. These studies examine the question of what rate of return on equity is necessary to enable Duke:

(1) to achieve a level of earnings comparable to those earned by other enterprises with corresponding risks and uncertainty. In estimating the cost of the equity capital to Duke he utilized three methods to derive his estimate. The first method was a comparable earnings test with reference to three groups of industrial firms. A large sample of American industry, the Standard & Poor's 400-company industrial composite; and five different samples of manufacturers with risk characteristics which he contended were similar to those of Duke. From this method, witness Sherwin concluded that Duke's cost of equity capital was in the range of 15.0% to 15.5%.

Nevertheless we have elected to treat in the body of our opinion both the question of the power of the Commission to reject uncontradicted evidence and the question of the amount of the rate of return fixed by the Commission.

(2) to maintain its financial integrity. Dr. Sherwin made a comparison of electric utility market-to-book ratios and earnings with those of industrial firms. From this analysis, Dr. Sherwin concluded that a reasonable equity return was 15.0% to 15.5%.

(3) to attract capital on reasonable terms. Witness Sherwin concluded that in order to attract capital on reasonable terms, the current cost, including financing costs, would be 14.8% to 15.3%.

At the close of Dr. Sherwin's testimony, no party to the proceeding cross-examined him, and he was not questioned by any commissioner. No other witness presented any contrary evidence as to rate of return. Duke's witness Grigg, a senior vice president of the company who testified that 15.0% was a reasonable rate of return, was the only other witness to testify as to rate of return. No other party to the proceeding presented any evidence as to rate of return.

It is well settled that the credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or in part the testimony of any witness. While an administrative body must consider all of the evidence and may not disregard credible undisputed evidence, it is not required to accept particular testimony as true. 73 C.J.S. *Public Administrative Bodies and Procedure* § 126 (1951).

North Carolina is in accord with the well-established rule that it is for the administrative body, in an adjudicatory proceeding, 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 if any. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E. 2d 547, 565 (1980). 73 C.J.S., *supra*.

In *Utilities Comm. v. Power Co.*, 285 N.C. 398, 206 S.E. 2d 283 (1974), Justice Lake, in discussing the weighing of various factors in determining the fair value of utility property said this:

> As we have said many times, the credibility of the evidence and the weight to be given it in the determination of the 'fair value' of the properties are for the Commission,

> not for this Court, to determine . . . . The Commission is not required to accept Mr. Reilly's opinion as to the weight to be given to each of these indicators of fair value, even though there be no contrary expert testimony. As Mr. Reilly testified, the determination of the weighting to be given the indicators is a matter of 'subjective judgment.' The Commission may and should exercise its own expert judgment in this determination. (Citations omitted.)

285 N.C. at 409-10, 206 S.E. 2d at 292.[3]

Justice Lake, again in discussing the weighing of various factors in determining the fair value of property, said in *Utilities Commission v. Power Co.*, 285 N.C. 377, 206 S.E. 2d 269 (1974): "It is the prerogative of the Commission to determine the credibility of evidence before it, even though such evidence be uncontradicted by another witness." 285 N.C. at 390, 206 S.E. 2d at 278. The same principle applies to evidence of the fair rate of return. Judge (now Justice) Britt reiterated that principle in identical language in a case involving the consideration of a witness's testimony concerning rate of return. *Utilities Commission v. Telegraph Co.*, 24 N.C. App. 327, 210 S.E. 2d 543 (1975), *appeal dismissed for mootness*, 289 N.C. 286, 221 S.E. 2d 322 (1976).

This rule comports with the rule as to administrative bodies generally. Uncontrodicted testimony need not be accepted as true by administrative bodies. *See Lawson v. Lawson*, 415 S.W. 2d 313 (Mo. App. 1967); *Koplar v. State Tax Commission*, 321 S.W. 2d 686 (Mo. 1959); *State v. Public Service Commissioner*, 359 Mo. 109, 220 S.W. 2d 61 (1949); *Rozauski v. Glen Alden Coal Co.*, 165 Pa. Super. 460, 69 A. 2d 192 (1949); *Nickolay v. Hudson Coal Co.*, 164 Pa. Super. 550, 67 A. 2d 828 (1949); *Lavely v. Unemployment Compensation Board of Review*, 163 Pa. Super. 66, 60 A. 2d 352 (1948).

3. Although G.S. § 62-133 has been amended several times since the decision in *Utilities Comm. v. Power Co.* was rendered and, as amended, the statute now allows post test period considerations, we note that in that decision this Court recognized the possibility of offsetting adjustments. "Adjustments for post test period increases in certain categories of expense may well give a distorted picture of the need for revenue since post test period experience in other categories of expense is not known and the possibility of offsetting adjustments is not precluded." 285 N.C. at 417-18, 206 S.E. 2d at 297.

Even where there is no direct evidence in the record contrary to the expert's opinion, a regulatory body may use its own judgment in evaluating evidence as to a matter within its expertise and is not bound by even uncontradicted testimony of experts. An expert's opinion testimony may be given less credibility and therefore minimum consideration when the expert is friendly or sympathetic to the party on whose behalf he is testifying. The opinion of the expert may simply be intrinsically nonpersuasive even though it is uncontradicted. *See* 4 Mezines, Stein, Gruff, Administrative Law § 28.06 (1981).

Under G.S. § 62-133 the determination of what constitutes a fair rate of return requires the exercise of a subjective judgment by the Commission and its decision may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission. Nor is the Commission required to accept as conclusive the subjective judgment of a witness, even though the record contains no expression of a contrary opinion by another witness. *See Utilities Comm. v. Edmisten, Atty. General*, 29 N.C. App. 428, 225 S.E. 2d 101, *affirmed* 291 N.C. 424, 230 S.E. 2d 647 (1976).

We hold therefore that the Commission was not required to accept Duke's experts' evidence as to the fair rate of return, even though there is no contrary expert testimony.

(2)

[4] Duke contends that the Commission must state in its order its reason or reasons for rejecting the uncontradicted testimony. We do not agree.

G.S. § 62-79 requires in effect that the final order of the Commission "shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include: (1) Findings and conclusions and the *reasons or bases therefor upon all the material issues of fact, law or discretion* presented in the record . . . ." (Emphasis added.)

It can be argued that the rejection of uncontradicted expert testimony is a discretionary matter requiring a statement of the reasons for so doing. We are not persuaded by this argument.

We find *Baton Rouge Water Works v. La. Pub. Serv. Comm.*, 342 So. 2d 609, *cert. denied*, 434 U.S. 827 (1977), apposite here. In

that case the utility applied to the Louisiana Public Service Commission to increase its rates so as to produce additional revenues which included a 13% return on equity. After a hearing the Commission allowed a return on equity of only 10.5%. The company appealed alleging that its uncontradicted expert testimony showed that 13% return on equity was necessary in terms of raising and supporting equity capital. The Commission introduced no opposing expert evidence. The Commission concluded that the requested 13% increase was excessive and allowed only 10.5%. The district court found the Commission's allowance of only 10.5% arbitrary, as contrary to the evidence, because the uncontradicted testimony of the company's expert showed that the utility was entitled to a higher rate and modified the Commission's order to allow the higher rate. The Louisiana Supreme Court, with one justice dissenting, held that while it would have been preferable if the Commission's order, in finding that the requested increase was excessive, had specifically stated why the Commission rejected or modified the 13% return on equity which the defendant's expert opinion stated was necessary, nevertheless, where the findings and reason for the Commission's action are necessarily implied by the record and where the appellate court's study of the administrative record shows that there is sufficient evidence to support the Commission's determination, little purpose would be served by a remand for such formality. *See also Little Man's Club v. Schott*, 60 So. 2d 624 (Fla. 1952).

We hold that the Commission is not, as a matter of law, required to set forth in its order its reasons for rejecting uncontradicted opinion testimony. However, like the court in *Baton Rouge*, we believe that it is the better practice for the Commission to do so.

(3)

Although the Commission is not required to state in its final order its reasons for rejecting a utility's uncontradicted evidence as to a fair rate of return, we have concluded that in the record before us the Commission has in fact done so.

We note in particular, as did the Commission, an exhibit sponsored by Dr. Sherwin which compares Duke's rate of return on average common equity in recent years to that of forty-one other electric utilities and with eighty-six electric and electric-gas utilities. That exhibit is Schedule 15 of Sherwin's Exhibit I before the Commission and a partial summary is as follows:

RATE OF RETURN ON AVERAGE COMMON STOCK EQUITY
(averages)

YEAR	DUKE POWER	41 ELECTRIC UTILITIES	86 ELECTRIC and ELECTRIC-GAS UTILITIES
1975	9.6%	12.0%	11.7%
1976	12.7%	11.9%	12.0%
1977	12.2%	11.8%	11.7%
1978	12.8%	11.5%	11.6%
1979	13.1%	11.1%	11.5%

RATE OF RETURN ON AVERAGE COMMON STOCK EQUITY
(medians)

YEAR	DUKE POWER	41 ELECTRIC UTILITIES	86 ELECTRIC and ELECTRIC-GAS UTILITIES
1975	9.6%	12.5%	12.0%
1976	12.7%	11.6%	11.6%
1977	12.2%	11.7%	11.5%
1978	12.8%	11.3%	11.6%
1979	13.1%	10.9%	11.5%

In speaking of the rate of return of 14.1% on common equity fixed by the Commission as being "fair and reasonable, both to Duke's rate payers and its investors," the Commission said this:

> With respect to this determination, the Commission notes that although Company witness Sherwin was not cross-examined at the hearing, and although no other party to the proceeding presented evidence on the issue of rate of return, it is, without doubt, the prerogative of this Commission to determine the credibility of the evidence before it, even though such evidence may have been uncontradicted by another witness. *Utilities Commission v. Duke Power Company*, 285 N.C. 377, 206 S.E. 2d 269 (1974).
>
> Furthermore, as Chief Justice Hughes said, in *Lindheimer v. Illinois, Bell Telephone Co.*, 292 U.S. 151, 163-164, 54 S.Ct. 658, 78 L.Ed. 1182 (1934), the actual experience of a utility in the attraction of capital, under the rates of which it complains, is often more convincing than tabulations of experts and '[e]laborate calculations which are at war with realities are of no avail.'
>
> In this regard the Commission strongly believes that the evidence reflected in Sherwin Exhibit I, Schedule 15, clearly supports the rate of return the Commission has hereinabove found fair. (R. p. 273)

The Commission obviously felt that Dr. Sherwin's estimates of a fair rate of return on common equity based upon his studies and calculations were at odds with Duke's actual experience as reflected in Sherwin's Exhibit I, Schedule 15.

Schedule 15 also shows that Duke's market-to-book ratio (the market value of its common stock, divided by the book value per share) has been above the utility group averages for every year since 1976. Schedule 15 shows that Duke's rates of return have met, and still meet, the profitability and competing-for-funds tests of G.S. § 62-133(b)(4), and that Duke's stock has a higher value in the market in relation to its book value than do the stocks of the major electric utilities reported by Duke's witness Sherwin.

The Commission quite obviously believed what is obvious from any fair appraisal of Schedule 15—that Duke in recent years has been comparatively successful in competing for funds in the open market. It is clear from the record that the Commission felt that, based on this historical experience, Duke would continue to be successful in competing for funds earning a fair return for its investors at a rate of return on common equity of 14.1% as opposed to the 15.0% to 15.5% estimated by witnesses Sherwin and Grigg.[4]

The Commission *is*, of course, required to set forth factors it considers in fixing reasonable and just rates which are not enumerated in G.S. § 62-133. Subsection (d) of G.S. § 62-133 requires the Commission, in fixing rates, to consider "all other material facts of record." The statute does not contemplate that the Commission may "roam at large in an unfenced field." Justice Higgins in *Utilities Commission v. Public Service Co.*, 257 N.C. 233, 237, 125 S.E. 2d 457, 460 (1962). We believe the legislature recognized and understood that there would be other facts and circumstances of record which the Commission might rightly consider in addition to those specifically detailed in G.S. § 62-133.

[5] Prior to the 1976 and subsequent amendments to G.S. § 62-133(b)(1) the Commission, in considering the reasonable original cost of a utility's property, was required to consider any

4. We do not find *Comr. of Insurance v. Rating Bureau*, 292 N.C. 471, 234 S.E. 2d 720 (1977), and cases of similar import cited by Duke apposite as here the reason for rejecting the uncontradicted evidence is apparent on the face of the record.

"other factors" relevant to its fair value. In discussing that section of the former statute this Court said:

> 'Other facts' which the Commission considers in determining the 'fair value' of the utility's properties must be found and set forth in its order, so that the reviewing court may see what these elements are and determine the authority of the Commission to consider them as 'relevant to the present fair value.'

Utilities Comm. v. Telephone Co., 281 N.C. 318, 340, 189 S.E. 2d 705, 719 (1972). While that requirement of setting forth "other facts" in the Commission's order applied to another part of the statute relating to fair value of property, which has since been repealed, we believe a similar rule should apply to the requirement of the current G.S. § 62-133(d). We therefore hold that the "other material facts of record" considered by the Commission in fixing reasonable and just rates must be found and set forth in its order so that the reviewing court may see what these elements are. The Commission has done so in the record before us by explaining at some length in its final order its reasons for adopting a 14.1% rate of return on equity as opposed to the 15.0% urged by Duke's witnesses Sherwin and Grigg:

First, in its Final Order of 7 October 1980, the Commission, in supporting its determination of rate of return, noted that "at the time of the hearing in this matter, financial market conditions had shown significant improvement as indicated by a decline in interest rates and a rise in stock prices." (R. p. 272)

Second, the Commission noted that it was "certainly mindful of the benefits now inuring to Duke's debt and equity investors arising from the inclusion of CWIP in the Company's rate base and the effect which CWIP undoubtedly plays in decreasing investor risk." (R. p. 272) Pursuant to an amendment to G.S. § 62-133(b)(1), effective 1 July 1979, Construction Work in Progress (CWIP) may be included in the rate base. In this proceeding this amendment had the effect of increasing Duke's rate base by $174,218,000. (R. p. 247) This amount accounted for over 10.0% of Duke's rate base and had the effect of reducing the risk to Duke's debt and equity investors.

Third, the Commission considered "other factors" which also served "to decrease the level of risk faced by Duke's shareholders

and investors." (R. p. 272) These factors relate to the updated test year, the fuel adjustment procedure and the continued growth in Duke's electric revenues:

> For example, the legislature has provided for an updated test year which helps insulate the Company against increases in expenses occurring after the test year. Likewise, Duke enjoys the benefit of a fuel adjustment procedure which enables it to recover increases in its operating costs resulting from increases in the cost of fuel. Additionally, recent experience indicates that Duke's electric revenues have continued to grow, thereby helping to offset the effect of inflation.

(R. p. 267-268) The importance of these factors is pointed up by the Commission's reference to certain evidence appearing in the record: "Although the test year in this proceeding is the 12 months ended December 31, 1979, the Public Staff and the Company adjusted for all known changes with respect to the test year level of operating and capital costs as of April 30, 1980." (R. p. 267) The Commission also stated in its order that one of the Public Staff's witnesses states that "approximately 65% of Duke's operation and maintenance expenses are updated three times a year for increases in cost via the fuel cost adjustment procedure, leaving 35% of Duke's operating expenses subject to consideration only in a general rate case proceeding." (R. p. 267)

Fourth, the Commission included $3,200,000 in Duke's North Carolina retail rates to cover insurance premiums to Nuclear Electric Insurance, Limited (NEIL) for insurance to cover a portion of replacement power costs incurred by reason of a future unexpected extended reactor shutdown such as occurred at the Three Mile Island nuclear power station. This coverage serves to protect Duke and its customers from catastrophic loss in the event of a nuclear accident—it also serves to reduce the risk to Duke's equity investors. This was recognized in the final order of the Commission in these words: "The Commission also feels compelled to note that its approval in this Order of Duke's participation in NEIL on a trial basis further serves to lessen investor risk." (R. p. 272-273)

Fifth, the common equity component of Duke's capital structure at the close of the hearings was 35.8%. (R. p. 268) In its Find-

ing of Fact No. 13 and in its conclusions supporting that finding the Commission approved a capital structure which included a 38.0% equity ratio or an increase of 2.2% over actual which, by evidence introduced by Duke's witness Grigg, allowed Duke an additional $5,800,000 in revenue. (R. pp. 28, 237, 269) The Commission also noted in its order that this factor serves to lessen investor risk. "Similarly, the Commission believes that the capital structure set forth in Finding of Fact No. 13 above offers support to this premise." (R. p. 273)

Sixth, as elsewhere treated in this opinion with regard to the rejection of Duke's uncontradicted expert testimony as to rate of return, the Commission felt that Duke's actual experience in the increase of its return on average equity from 9.6% in 1975 to 13.1% in 1979 (based on averages as reflected in Sherwin's Exhibit I, Schedule 15) fully supported the rate of 14.1% fixed by the Commission. This actual historical return earned by Duke in those years showed significantly greater improvement in earnings than the two comparison groups used by Duke's witness Sherwin—for instance, the return on average equity for the group of 41 electric utilities (based on averages) declined from 12.0% in 1975 to 11.1% in 1979. (R. p. 274) The Commission's statement in the final order was: "In this regard the Commission strongly believes that the evidence reflected in Sherwin Exhibit I, Schedule 15, clearly supports the rate of return the Commission has hereinabove found fair." (R. p. 273)

The foregoing enumerated items fully state and explain the Commission's reasons for arriving at the fair rate of return on equity of 14.1% rather than the 15.0% urged by Duke and support the Commission's determination.

Duke's witness Grigg testified that for the twelve months ended 30 April 1980 (the date of a number of Duke's updatings from the actual test period data) Duke achieved a 13.3% return on the actual book value of common equity. (R. p. 43) This was achieved under a Commission-approved rate of 13.59% and did not reflect a full twelve months effect of a substantial increase which had been approved in October of 1979. (R. p. 113) Witness Grigg also testified that Duke's revenues were increasing substantially. (R. p. 42)

Public Staff witness Winters' Exhibit I, Schedule 1, tended to show that, if properly adjusted, the rate increase requested by Duke of $91.5 million would permit a rate of return on common equity of 17.44%.

Though we are addressing here only the rate of return on common equity which is but one component of the overall rate of return, we believe our case law addressing the overall rate of return is apposite. We have said in a number of cases that it is for the Commission, not for this Court, to determine what is a fair rate of return. *Utilities Comm. v. Power Co.*, 285 N.C. 377, 206 S.E. 2d 269 (1974); *Utilities Comm. v. Power Co.*, 285 N.C. 398, 206 S.E. 2d 283 (1974). The fixing of the rate of return by the Commission will be upheld on appeal where there is no evidence of capricious, unreasonable, or arbitrary action or disregard of law on the part of the Commission in arriving at such rate, and where the Commission's findings are supported by competent, material and substantial evidence in the record. *See Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972); *Utilities Commission v. Telephone Co.*, 266 N.C. 450, 146 S.E. 2d 487 (1966).

[6] We find no error in the findings or conclusions drawn by the Commission after weighing the sufficiency and credibility of the uncontradicted testimony of Duke's witnesses as to the fair rate of return. We find from the record before us that the Commission's determination of the fair rate of return is not arbitrary, capricious or unreasonable. Our review of the whole record compels the conclusion that the Commission's finding of 14.1% as a fair rate of return on common equity is indeed supported by competent material and substantial evidence.

Having determined from our review of the whole record (1) that the Commission did not err in increasing Duke's accumulated depreciation account by $3,879,000 as a corresponding adjustment to the inclusion by Duke of a *pro forma* adjustment of that same amount in its test year depreciation expense, (2) that while not required to do so the Commission stated and explained its reasons for not accepting the uncontradicted expert testimony of Duke's rate of return witnesses, and (3) that the Commission's determination that 14.1% is a fair rate of return on common equity is supported by competent, material and substantial evidence in the record, we must affirm the decision of the Court of Appeals.

Affirmed.

Justice CARLTON concurring in part, dissenting in part.

I concur with the majority in all but section III of the opinion which holds that the Utilities Commission properly increased Duke's accumulated depreciation account, thereby reducing the rate base, by the amount of $3,879,000 as an offset to an adjustment in that same amount made by Duke to reflect its probable future depreciation expense. This portion of the majority decision is, in my view, patently erroneous and I respectfully dissent therefrom. The reasoning of the majority is strained and untenable as I shall demonstrate below.

The primary reasoning of the majority, as I understand it, is that a reading of all the sections and subsections of G.S. 62-133 together justifies the Commission's action, relying on the principle that statutes *in pari materia* are to be construed together. The majority acknowledges the well-established principle of statutory construction that a statute dealing with a specific situation controls with respect to that situation, but then rejects that principle (and G.S. 62-133(b)(1)—the specific statute here involved) as being inapplicable here. The majority concludes, "the legislature intended to establish an overall scheme for fixing rates, and it must be interpreted in its entirety in order to comply with the legislative intent." With that conclusion I wholly agree. My problem is not with the principle of statutory construction relied on by the majority; it is with its application, or rather with its inconsistent application, here. This is so because after stating the broad construction approach, the majority then proceeds to pick and choose among the numerous subsections of the statute (subsections *other than* but *like* G.S. § 62-133(b)(1) dealing with *specific* matters) in determining what it considers to be the "overall scheme for ratemaking" while completely ignoring the clearest admonition found in all of the ratemaking statute—that the only depreciation to be deducted from the original cost of the utility's property is that "which has been consumed by previous use recovered by depreciation expense," G.S. § 62-133(b)(1). The majority never rationalizes its refusal to apply this clear language except to hold that when read in conjunction with other parts of the statute, this subsection does not mean what it says!

I am unable to follow this kind of reasoning. Neither the majority nor I, of course, can be certain of what the Legislature *meant* to say in the ratemaking statute. We can, however, be certain as to what the Legislature *did say*, and, given the choice, I opt to believe that it said what it meant. That a legislative body said what it meant is, I believe, the first rule of statutory construction an appellate court should apply. When the language of a statute is clear and unambiguous, an appellate court should not strain to apply other canons of statutory construction to render that statute ineffective. *Phillips v. Phillips*, 296 N.C. 590, 596, 252 S.E. 2d 761, 765 (1979). As Chief Justice Sharp stated in *Phillips*, "It is true that statutes dealing with the same subject matter must be construed together. 'When, however, the section dealing with a specific matter is clear and understandable on its face, it requires no construction.'" *Id.* (quoting *Utilities Commission v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E. 2d 663, 670 (1969)). I shall proceed to analyze the applicable statute with that principle foremost in mind. This, incidentally, does absolutely no violence to the "*in pari materia*" rule on which the majority relies. Indeed, it causes the correct application of that rule because, in determining the "overall scheme" for ratemaking, I shall not, as has the majority, blatantly ignore a plainly worded subsection of a statute. That is my understanding of the "*in pari materia*" rule—that *all parts* of an act should be considered, not just those parts which might lead to a desired result. By applying these rules correctly, I shall attempt to demonstrate below that the "overall scheme" established by statute did not authorize the Commission to increase Duke's accumulated depreciation beyond that actually recovered at the end of the test year and, hence, that the Commission improperly reduced the rate base.

While there are several positions taken by the majority with which I disagree, as noted below, its most serious error in determining the "overall scheme" from our statute, in my view, is its failure to understand the *bifocal thrust* of G.S. 62-133. The statute is not, as the majority apparently believes, limited to a single time factor for rate determination. *Two separate factors*, an understanding of which is absolutely critical to the issue here posited, is clearly contemplated by the statute.

The critical point I wish to make can best be explained by first summarizing the ratemaking procedure provided by G.S.

62-133. I am the first to concede that this statute is disjointed, somewhat inartfully drawn and confusing. Careful analysis, however, reveals that the Legislature provided a methodical scheme of ratemaking.

The first point to be made is that G.S. 62-133 contemplates that the fixing of rates to be charged by a public utility is based on *two separate factors.* The failure of the majority to recognize this critical dichotomy leads, I think, to the majority's failure to understand the two factors contemplated by the statute and how those factors affect the rate determination. The two factors which must be determined in order properly to fix rates are (1) the rate base, and (2) the utility's probable *future* expenses. These factors differ both in terms of the type of data making up each and in terms of the relevant time at which each is measured. The majority opinion completely confuses the time periods and, thus, treats the entire ratemaking process as if only the test year period were involved. Again, failure to understand the bifocal nature of rate determination leads to the misunderstanding that only one time period is involved. The following brief summary of the statute will, I believe, confirm this conclusion.

For the purpose of the question presented by this appeal, the following is an accurate summary of the relevant provisions of G.S. 62-133, the ratemaking statute.

The Commission, as a first step in setting rates, must ascertain the rate base. This is done by determining the reasonable original cost of the public utility's property in service *as of the end of the test period.* From that amount is subtracted accumulated depreciation "*which has been consumed by previous use recovered by depreciation expense.*" To this amount is added the reasonable original cost of investment in plant under construction. *The resulting figure is the rate base.* G.S. 162-133(b)(1). Thus, the rate base factor involves data concerning unrecovered cost of property as of the *end of the test period.* The rate base, which for convenience I shall call Factor 1, is then multiplied by what the Commission has determined to be a fair rate of return and the product represents a fair return on the property in service at the end of the period. The time frame for the computation of Factor 1, the rate base, is "the end of the test period," as provided in both G.S. 62-133(b)(1) and G.S. 62-133(c). The sole excep-

tion, also provided by subsection (c), is that in determining the rate base the Commission shall consider evidence of actual cost changes based upon circumstances and events occurring *after* the test period but before the hearing. This exception has no application in the case before us. The events and occurrences which led to the depreciation adjustments in question here took place only *during* the test period itself.

The second factor to be determined is that of the utility's probable *future* operating expenses. This figure is then added to the product of the rate of return and the rate base in order to fix the appropriate and lawful rates to be charged by the utility. This second factor, however, involves separate accounting data and has a timing consideration different from that of the rate base. As stated above, the rate base is determined as of the end of the test period based on events *which have already occurred* and, in this sense, is a *fait accompli.* The expenses making up the second factor, however, are those likely to occur in the *future* and involve an estimation. This estimation of probable future expenses is based on the level of plant in service at the end of the test period. While Factor 2 relies on the level of plant in service as established by Factor 1 for its estimation, the two factors encompass two entirely different periods of time. The first factor looks to the *past*, the second to the *future.*

The statutory dichotomy is thus clear; the first factor, the rate base, concerns the original cost of the plant in service at the *end* of the test year (events which have already occurred); the second, the probable *future* expenses (*projections* based on the level of plant in service at the end of the test year). When Factor 1 (rate base) is multiplied by the rate of return and that product is added to Factor 2 (future expenses), their sum represents the level of revenue deemed adequate by the Commission to pay the utility's reasonable operating expenses and to give its investors a fair return on their investment. This sum is the amount of revenue the utility will receive through sale of its services. In tabular form, I would summarize the ratemaking procedures *as it applies to this case*[1] thusly:

1. Again, it must be noted that although G.S. 62-133(c) allows adjustments to the rate base for actual changes in cost occurring after the close of the test year, that subsection is inapplicable to this case. The formula set forth in this opinion is for those cases in which no adjustments are made for events occurring after the test year.

STATUTORY FORMULA

(Factor 1 × Rate of Return) + Factor 2 = Revenues to be earned through charges for utility's service

Factor 1 (Rate Base) = Original cost of plant in service at end of test year

less: accumulated depreciation "which has been consumed by previous use recovered by depreciation expense"

plus: reasonable original cost of plant under construction.

Factor 2 = Probable *future* expenses based on level of plant and equipment in operation at the end of the test period.

THE STATUTORY TIME FRAME

For Factor 1

End of the test period (except for adjustments for events occurring *after* test period as allowed by G.S. 62-133(c)).

For Factor 2

Determine probable *future* expenses based on the plant and equipment in service at the end of the test period.

Applying the foregoing to the record before us, I think the Commission erred at one crucial point in the ratemaking process. In its application, Duke properly submitted a figure representing the original cost of its plant in service on 31 December 1979, the end of the test period. Subtracted from this figure is the amount of accumulated depreciation reserve on the utility's books at the close of the test period. The accumulated depreciation reserve is the book entry representing property "which has been consumed by previous use recovered by depreciation expense" as of the end of the test period, the precise computation prescribed by G.S. 62-133(b)(1). Duke also submitted a figure representing its probable *future* (*not test period*) depreciation expense based on the plant and equipment in service at the end of the test period.[2] The

2. The majority's assertion that Duke made a *pro forma* adjustment to its test year depreciation expense is incorrect; this figure represents probable *future* expenses.

Commission, however, subtracted not only the accumulated depreciation on Duke's books as of the end of the test period but also the sum of $3,879,000 (the same amount as Duke's estimation of its *future* depreciation expense) as a *pro forma* adjustment to the accumulated depreciation for the test year. As I understand it, the Commission's reasoning is that it regards the *pro forma* adjustment to accumulated depreciation to be a necessary accounting corollary to the *pro forma* adjustment which Duke made for future depreciation expense. (This figure represents what the depreciation expense for the full year would have been had the depreciated property in question been in service throughout the year. It had actually come into service at various times throughout the year.) The Commission acknowledged that the additional $3,879,000 added to the accumulated depreciation, thereby reducing the rate base, "ha[d] not been collected from the company's customers." The Commission also stated in its order that it was relying on its precedent in a previous rate proceeding. The Commission concluded that the adjustment to the rate base achieved "a proper and equitable matching of revenues and costs." In so acting, I believe the Commission committed serious error.

As explained above, I think the majority's error in affirming the Commission's action results from its failure to understand the different factors established by our statute and the relevant time frames encompassed by those factors. G.S. 62-133(b)(1) is plain and unambiguous: it requires that the rate base (Factor 1) be based on plant in service at the end of the test period, less only that depreciation which represents cost previously consumed and recovered by depreciation expense. The Commission violated this portion of the statute here by subtracting from the company's original plant cost accumulated depreciation which had not been consumed and recovered by depreciation expense as of the end of the test period. Duke, however, was entitled to the additional depreciation expense by way of an adjustment under Factor 2 because that factor is based on an entirely different time frame—the projection of probable future expenses (including, of course, depreciation expense).

This Court has spoken to this issue before. In *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 327, 230 S.E. 2d 651 (1976), it was said:

> Apparently the Attorney General is arguing that the Commission must assume the utility's operating expenses will remain the same as they were during the test period in setting rates for some future period. This is not the law. Rate schedules are set with an eye no less toward the future than to the past. General Statutes 62-133(b)(2), (b)(3) and (c) contemplate that the Commission will consider "probable future revenues and expenses" in setting rates for the future. "Obviously, conditions do not remain static." . . . The company's experience during the test period regarding revenues produced and operating expenses incurred "is the basis for a reasonably accurate estimate of what may be anticipated in the near future if, but only if, appropriate *pro forma* adjustments are made for abnormalities which existed in the test period and for changes in conditions occurring during the test period. . . ." . . . *Estimates regarding probable future revenues and expenses, however, must be based upon the utility's plant and equipment actually in operation at the end of the test period.*

291 N.C. at 342, 230 S.E. 2d at 660 (emphasis added) (citations omitted).

The Commission's action here, condoned by the majority, plainly violates the underlined portion above. This is so because of the requirement that estimates regarding probable future revenues and expenses must be based upon the utility's plant and equipment actually in operation at the end of the test period. Here, by reducing the rate base through the *pro forma* adjustment to accumulated depreciation, the result is to produce a smaller net plant in service than that "actually in operation at the end of the test period."

The majority stresses that G.S. 62-133(b)(1) must be read in conjunction with G.S. 62-133(c). The view taken in this dissent does indeed read these statutes in conjunction with one another. *Both* clearly provide that the *original cost* of a public utility's property is to be determined as of the end of the test period and provide no support for the Commission's action.

Nor am I able to find any support for the Commission's action in G.S. 62-133(d), which allows the Commission to consider "all other material facts of record that will enable it to determine

what are just and reasonable rates." This provision, in my opinion, is a catch-all intended to cover unusual situations which may arise in future rate cases and are too numerous and too complex to be dealt with by legislation. Depreciation expense is not such an "unusual situation." Utilities will always have probable future depreciation expense, and most plants do not initially come into service on January 1. I believe that the Legislature fully and explicitly dealt with the situation of a plant's coming into service in mid-year with G.S. 62-133(b)(1) and (c). These subsections make clear the time frames within which the rate base and expense components are to be measured. I cannot believe that the Legislature relegated the treatment of such a common situation to a general catch-all provision.

When adjustments are made within the test period, as here, the applicable portion of G.S. 62-133 is that referring to "probable future revenues and expenses." And, the first sentence of the statute clearly provides that these probable future expenses shall be based on plant and equipment in operation *at the end of the test period.* On this point, the statute is about as clear and unambiguous as it could possibly be.

I might add also that this view of the statute seems appropriate to me from an economic standpoint as well. As stated in J. Bonbright, *Principles of Public Utility Rates* 197 (1961):

> What [the accumulated depreciation reserve] represents is the amortized costs of the assets in the sense of that part of the costs which has already been charged, or which should have been charged, to previous periods of operation. "Cost minus depreciation" is therefore a shorthand expression for costs remaining to be amortized by future charges to operation and hence indirectly by future charges against the consumers of public utility service.

In other words, the purpose of the depreciation reserve in utility regulation, as I understand it, is to recognize that amount of the cost of plant which has already been recovered through rates. This Court acknowledged this principle in *State ex rel. Utilities Commission v. Heater Utilities, Inc.*, 288 N.C. 457, 219 S.E. 2d 56 (1975). Based on this understanding of the purpose of an accumulated depreciation reserve, it obviously follows that when a *pro forma* adjustment is made to that reserve to reflect

something which has *not* been recovered through previous rates, then the utility will never recover depreciation on that increment and the rates are, therefore, deficient under our statute.

This Court has decided numerous cases which hold that the Commission is not free to devise its own principles of ratemaking but must comply with the requirements of Chapter 62 of our General Statutes. *E.g., State ex rel. Utilities Commission v. Duke Power Co.*, 285 N.C. 377, 206 S.E. 2d 269 (1974). Moreover, a ratemaking practice of the Commission, even one which it has followed for many years (as I suspect is the case here) and is commonly accepted in other jurisdictions, is unlawful if contrary to G.S. 62-133(b)(1). I would also add that my reading of the appellee's brief compels the conclusion that the Commission has taken the action in question here primarily on the basis of what it considers to be a fundamental accounting principle, that of double entry bookkeeping. While the Commission's action may accord with sound accounting principles, it does not necessarily follow that those accounting principles apply to ratemaking. Ratemaking is a statutory matter; in setting up a ratemaking procedure our Legislature is free to adopt any process it so chooses, even one which does not follow accounting principles. I believe it has done so here. While accounting principles may be helpful in ratemaking, they do not control the process.

I wish also to make these additional observations:

(1) The majority devotes several pages to explaining that various subsections of G.S. 62-133 must be read in conjunction with one another. As noted above, I agree that the subsections of a statute should be construed together. Duke itself does not contest this canon of statutory construction. The majority's lengthy discourse lends absolutely no support to the majority's ultimate conclusion that the Commission's *pro forma* offset to accumulated depreciation "should be made."

(2) I also think it worthwhile to note that the majority further strains to rationalize its decision by quoting at length from Public Staff Witness Winters' testimony. Mr. Winters testified as to the Public Staff's reasoning behind seeking the offset to accumulated depreciation. After giving extensive excerpts from Winters' testimony on this point, the majority simply states, "We find that the Commission was fully justified in that conclusion."

I find it a novel approach to judicial decision-making to rely on the testimony of a witness to determine whether the action of an administrative agency is affected by error of law. It was my understanding, apparently mistaken, that questions of law were matters for the courts and not for a witness's speculation.

(3) Without any real explanation, the majority opinion also notes that to hold in favor of Duke concerning the issue before us would result in rates which would yield a "windfall" to Duke at the expense of the ratepayers. In this instance, any resulting unfairness is to Duke, not the ratepayers. This is so first because the depreciation expense definitely will be incurred by Duke. This is acknowledged by the Commission itself. It seems logical to me that, without the adjustment for future expenses, the expenses would be understated and the rates therefore deficient. An analogous situation would be an increase in wage rates. Should employee wages be increased during the test period, obviously the higher wages being paid at the end of the test period must be considered in predicting probable revenues and expenses for the future even though they were not paid throughout the test period.

The rate base, on the other hand, must include all property serving the public and should not be artificially reduced. When the rate base is decreased by adjusting the accumulated depreciation by an amount which exceeds that recorded on the company's books, the company will not earn the fair rate of return on its total plant. I simply find no logic or fairness in the position that the rate base should be reduced by taking depreciation on utility property which has not yet occurred at the end of the test period when our statute clearly provides that the rate base is supposed to be figured on the basis of that precise point in time.

When G.S. 62-133 is correctly understood as explained above and in light of the completely unambiguous language of G.S. 62-133(b)(1), it is crystal clear that the Commission erred as a matter of law in making the *pro forma* offset. Indeed, without quarreling with the majority as to the appropriate standard of review, I believe the Commission *exceeded* its statutory authority in violation of G.S. 62-94(c)(2). This is so because *with respect to the rate base* I find absolutely no authority in our statutes to make *pro forma* adjustments to the rate base for events occurring

within the test period. In this connection, the plant is to be considered as it actually existed at the end of the test period.

In fairness to the majority, I must confess that my initial study of the briefs submitted led me to the same conclusion which it has reached. I was persuaded at that time by the very appealing argument that normal accounting practices would call for the offset ordered by the Commission. Having now determined, after painstaking study of the statute, that the Legislature had a different methodology for ratemaking in mind, as explained above, I must respectfully dissent. The methodology for ratemaking is the prerogative of the Legislature, not that of the Commission or this Court.

For the reasons stated above, I vote to reverse the Court of Appeals' decision on the point here discussed. The case should be remanded to that court with instructions that it remand to the Utilities Commission with directions that it recompute the rates after removing the *pro forma* adjustment for accumulated depreciation.

Chief Justice BRANCH and Justice EXUM join in this dissenting opinion.

ALLEN L. MIMS, JR. v. MARSHA P. MIMS

No. 109

(Filed 27 January 1982)

1. Husband and Wife § 14; Trusts § 13.4— marital real estate—one spouse furnishing consideration—presumption of gift in other spouse whether husband or wife

While neither the U.S. Constitution nor the N.C. Constitution requires courts to employ presumptions of gift or trust in settling property disputes, there are compelling reasons for modifying the rules which grew out of a legal system in society so that the same presumption applies whether the husband or the wife receives title to marital property. First, the original rationale for employing different presumptions is no longer viable as no longer in all cases is the husband the supporting and the wife the dependent spouse. Second, other courts have chosen to employ the presumption of gift whether the husband or wife is the grantee of property purchased by the other spouse. Third, commentators have supported presumptions of gifts for both husbands and

wives. Fourth, our legislature has recently indicated its view that the same rule should apply to both spouses in determining ownership of property. Therefore, in all cases to which the Equitable Distribution of Marital Property Act, G.S. 50-20, is not applicable, the rule shall be that where a spouse furnishing the consideration causes property to be conveyed to the other spouse, a presumption of a gift arises, which is rebuttable by clear, cogent, and convincing evidence. All cases holding to the contrary are overruled.

2. Husband and Wife § 14; Trusts § 13.4— marital property—ability to rebut presumption of gift—summary judgment improper

In an action whereby plaintiff husband sought to be declared the sole beneficial owner of certain residential real estate, it was error to grant summary judgment for defendant wife where plaintiff presented evidence indicating that he may, at trial, be able to (1) rebut the presumption that he made a gift to defendant of an entirety interest in the real property, and (2) make out a *prima facie* case for a resulting trust in his favor. It was undisputed that plaintiff furnished from his separate funds the entire consideration for the real property before or at the time title passed, and there was substantial evidence that plaintiff at all times intended for the property to be his alone and so advised the defendant at and before the closing.

3. Husband and Wife § 14; Trusts § 13.4— deficiencies in complaint—reformation of deed—denominating claim based on mutual mistake—facts sufficient to state claim for resulting trust

Where both husband and wife understood that a deed to property would be made to both parties as husband and wife both before and at the time of closing, and the only mistake supported by the evidence was husband's erroneous understanding of N.C. law governing deeds, the court could not reform the deed on the ground of mutual mistake. Husband's incorrect choice of legal theory should not have resulted in dismissal of his claim, however, as the allegations in the complaint gave sufficient notice of the wrong complained of and as plaintiff presented a sufficient evidentiary showing to allow him, at trial, to prove that defendant wife holds on resulting trust for him.

DEFENDANT'S motion for summary judgment was granted by *Judge James H. Pou Bailey* at the 19 March 1979 Civil Session of WAKE Superior Court. The Court of Appeals affirmed.[1] The Supreme Court allowed discretionary review on 4 November 1980. The case was argued as No. 10, Spring Term 1981.

McDaniel and Heidgerd, by L. Bruce McDaniel, Attorneys for plaintiff appellant.

Gulley, Barrow & Boxley, by Jack P. Gulley, Attorneys for defendant appellee.

1. Reported at 48 N.C. App. 216, 268 S.E. 2d 544 (1980).

EXUM, Justice.

Plaintiff seeks by this action to be declared the sole beneficial owner of certain residential real estate. The deed to the realty was made to both parties as husband and wife, but it is undisputed that plaintiff furnished the entire purchase price from his separate estate. The principal question presented is whether the evidentiary showing before Judge Bailey entitles defendant to summary judgment. Judge Bailey believed it did and the Court of Appeals agreed. We disagree and reverse. We also carefully reconsider our old rules relating to presumptions of gift and resulting trust in transactions of this kind and determine that the presumptive gift rule should apply in all such cases not governed by the new Equitable Distribution Act.[2]

These parties were married on 19 May 1973, separated on 5 June 1977, and divorced on 28 July 1978. On 3 December 1974 plaintiff purchased the real estate in question, which apparently was a residential house and lot purchased as a marital home. He filed this action on 19 August 1977, shortly after the parties' separation. Plaintiff sought equitable relief, praying for reformation of the deed on the ground of mutual mistake and a declaratory judgment that he is the sole owner of the property.

Defendant answered and counterclaimed denying most of plaintiff's material allegations and asserting laches as a defense to plaintiff's action. She moved for summary judgment, offering the pre-trial depositions of the parties and a copy of an "Offer to Purchase," which bears the purported signatures of both parties and contains a provision directing that the deed be made to both parties as husband and wife.

According to plaintiff's deposition, he did sign the "Offer to Purchase" which was executed on 16 November 1974. However, he testified, "I did talk with the realtor about it at the time we made the Offer. I asked him why it had to be titled in both people's names, and he said in the State of North Carolina that it had to be. I am talking about Jim Stevenson and Richard Smith. Richard Smith is the one that made that comment." After the of-

2. An Act for Equitable Distribution of Marital Property, ch. 815, 1981 N.C. Sess. Laws (Michie) (primarily to be codified at G.S. 50-20). This Act and its effect on this aspect of our decision is more fully discussed later in the text.

fer was accepted, plaintiff began to consider how he would finance the purchase. He "decided that I would pay cash for it with money that I have received from my grandfather and my father and that is the way I handled paying for it. I am sure I told her that, I didn't really talk too much of the business. You see, as far as I was concerned I was buying the house. It was my house. Her salary or anything, nothing of her stuff was going to be applied against the purchase price of the house and so I don't believe I did too much commenting at all on how it was. . . . I don't believe I talked to her too much about how the title was written." Plaintiff did pay, he said, $69,000.00 cash for the property at the closing after having paid the $1,000.00 earnest money which accompanied the offer. He said, "[t]he closing was in December of 1974. The deed was from Louis E. Poole & Associates to Allen L. Mims, Jr., and wife, Marsha P. Mims. I saw the deed at the time of the closing and since I had been informed by the realtor finding a house for us that in North Carolina there wasn't any alternative, I asked at the time you know, can it be in my name, I mean this is my personal check and Richard said that is the way it's got to be in both names in North Carolina. . . . Marsha and I discussed the fact that I told her I was putting up the money and that as far as I was concerned, it was my money because it was my money beforehand, and it was going into this thing and it was my house. And at the time she said 'I know it.' That was at the closing. I took my realtor's word, I figured he was in real estate and sold houses and stuff and he ought to know. Most of that came up when we signed the Offer. I can't be certain that Mrs. Mims was present at the closing."

According to defendant's deposition, she did not attend the closing and she did not discuss the purchase of the house "in detail prior to the closing." She said the plaintiff told her "he was paying for it but it was for us." Defendant testified that plaintiff did not claim sole ownership of the house until after the closing. "[W]henever we would get into an argument," she said, "he would make the statement that this is his house; that he paid for it. He repeatedly told me afterwards that it was his house." Defendant recalled no "conversation between my husband and the real estate agent at the time the offer to purchase was signed. I don't recall hearing the real estate agent tell him that it had to be put in both names even though he wanted it in his name. I don't know

that it wasn't said, but I could have been reading something. I don't recall that. I do not recall any question my husband might have raised to the real estate agent or anybody else before the house is purchased about the way it was to be titled. I am saying that I do not recall now whether anything like that was discussed. He paid the total purchase price for the house."

In opposition to defendant's motion for summary judgment, plaintiff relied on so much of the deposition testimony as was favorable to him. He also relied on his affidavit which was submitted to and considered by Judge Bailey. He swore in this affidavit, among other things, that the defendant's name "was included as a grantee pursuant to specific instructions from the realtors involved and/or by a mistake of the draftsman. . . . The name of my wife was therefore included on the deed by mutual mistake insofar as my wife and I were concerned. . . . Prior to this closing, at the closing, and at all times since that closing, I told the defendant . . . that since I was paying for this real estate, that it was mine and mine alone. Prior to this closing, at the closing, and at all times since that closing, the defendant . . . agreed with me that this real estate was mine and mine alone. . . . At no time did I intend to make a gift of this realty or any part thereof to the defendant . . . nor have I ever made such a gift to the defendant."

After the hearing, Judge Bailey allowed summary judgment for defendant on the ground that there is "no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law."

The Court of Appeals concluded that plaintiff had alleged a claim for reformation of a deed on the ground of mutual mistake and that the evidence made before Judge Bailey demonstrates as a matter of law that plaintiff will not be able to make out such a claim at trial. The Court of Appeals rejected plaintiff's argument that he may be able to sustain his claim for a resulting trust because plaintiff has "neither alleged nor proved any type of trust."

We agree with the Court of Appeals, for reasons set forth *infra*, that the evidentiary showing on the summary judgment motion demonstrates as a matter of law that plaintiff will not be able to make out at trial a claim for mutual mistake. We believe,

however, that the Court of Appeals erred in limiting plaintiff to this theory of recovery. Both the pleadings and the evidentiary showing on the motion for summary judgment indicate plaintiff may be able to obtain the relief he seeks at trial by proving the facts necessary to give rise to a resulting trust in his favor.

We will discuss, first, some principles pertaining to resulting trusts, their current viability, and their applicability to the instant case. Then we will demonstrate why the pleadings and evidentiary showing proffered by plaintiff entitle him to trial on the issue of whether defendant holds her interest in the contested property on resulting trust for him. Finally, we will explain why plaintiff's claim of mutual mistake and defendant's claim of laches are not germane to this action.

I

A resulting trust arises "when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. . . . A trust of this sort does not arise from or depend on any agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another." *Teachey v. Gurley*, 214 N.C. 288, 292, 199 S.E. 83, 86-87 (1938).[3] The trust is created in order to effectuate what the law presumes to have been the intention of the parties in these circumstances—that the person to whom the land was conveyed hold it as trustee for the person who supplied the purchase money. *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222 (1957); *Bowen v. Darden*, 241 N.C. 11, 84 S.E. 2d 289 (1954); *Avery v. Stewart*, 136 N.C. 426, 48 S.E. 775 (1904); Bogert, The Law of Trusts and Trustees, § 454 (2d ed. rev. 1977) (hereinafter "Bogert"). "The classic example of a resulting trust is the purchase-money resulting trust. In such a situation, when one person furnishes the consideration to pay for land, title to which

3. *Teachey* discusses the differences between express trusts, constructive trusts, and resulting trusts. Express trusts "are created by contract, express or implied." Constructive trusts "are raised by equity in respect to property which has been acquired by fraud, or where though acquired originally without fraud, it is against equity that it should be retained by him who holds it." *Id.* For a similar discussion of the distinctions among the types of trusts, see *Bowen v. Darden*, *infra* in text. For other factual examples of resulting trusts, see *Avery v. Stewart*, *infra* in text.

is taken in the name of another, a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration. The general rule is that the trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the time the legal title passes." *Cline v. Cline*, 297 N.C. 336, 344, 255 S.E. 2d 399, 404-05 (1979).

Under the common law a notable exception to this rule developed. "The rule that a resulting trust is raised in favor of the person who pays the purchase-money for land, though the title may be made to another, is subject to the qualification that where the person who pays the price is under a legal, or even, in some instances, a moral obligation to maintain the person in whose name the purchase is made, there is a presumption in equity that the purchase is intended as an advance or gift to the recipient." *Thurber v. LaRoque*, 105 N.C. 301, 306-07, 11 S.E. 460, 462 (1890). Thus, where the husband provides the entire purchase price for realty but causes the title to be placed in both his name and his wife's "a resulting trust does not arise in favor of the husband. . . . Instead there is the presumption of a gift to the wife of an entirety interest in the property." *Tarkington v. Tarkington*, 301 N.C. 502, 506, 272 S.E. 2d 99, 101 (1980). No such exception has developed, however, when it is the wife who furnishes the purchase price yet causes title to be placed in the name of her husband. *Tarkington v. Tarkington, supra; Bowling v. Bowling*, 252 N.C. 527, 114 S.E. 2d 228 (1960); *Deese v. Deese*, 176 N.C. 527, 97 S.E. 475 (1918). Thus, the rule has developed in this state "that a gift is presumed where a husband takes title in the name of his wife, but that a resulting trust and not a gift is presumed where a wife purchases land in the name of her husband." 2 Lee, North Carolina Family Law, § 113, n. 43 (4th ed. 1980) (hereinafter "Lee").

II

[1] Plaintiff challenges the fairness of these rules governing conveyances to spouses and contends that they unconstitutionally discriminate on the basis of sex. He contends that if a resulting trust is presumed in favor of the wife when she buys property but has it titled in her husband's name, the same rule must be applied in favor of the husband who acts similarly. Thus, plaintiff

argues, he is entitled in this case to the benefit of a presumptive resulting trust in his favor.

Clearly, neither the United States Constitution nor the North Carolina Constitution require courts to employ presumptions of gift or trust in settling property disputes. These presumptions are not constitutional concepts, rather they are equitable tools developed long ago by courts attempting to give effect to the probable intention underlying property transactions. Thus, we need not resort to constitutional analysis in order to correct disparities caused by rules that grew out of a society and a legal system which generally treated men and women differently. If these ancient rules no longer serve the purpose for which they were developed—the effectuation of the intention of the parties in the majority of cases—then this Court has the power, although a power not to be used casually, to make necessary modification of the rules. We think there are compelling reasons, and both parties seem to agree,[4] for modifying our rules so the same presumption applies whether the husband or the wife receives title to the property.

One reason for changing our rules so the same presumption applies to husbands as to wives is that the original rationale for employing different presumptions is no longer viable. As Professor Scott has noted, these rules evolved out of a society in which the husband "controlled the family wealth" and the wife and children depended upon him in all instances for support. 5 Scott on Trusts, § 442 at 3340 (3d ed. 1967) (hereinafter "Scott"). "It was natural for him to make gifts to his wife and children, but quite unnatural to expect that they should make gifts to him. The wife, indeed, could not make gifts until the court invented the idea of a married woman's separate estate." *Id.* Wives were generally thought to be under the domination of their husbands, and were subject to various legal disabilities because it was assumed they lacked practical business experience. Bogert, § 460

4. Defendant's brief states: "The reason for the difference in the presumptions no longer exist [sic]. If the Court were to get to the constitutionality of the presumption, it would either have to rule: (1) If either spouse furnishes the consideration for a conveyance, there is a presumption of a gift in favor of the other spouse; (2) If either spouse furnishes the consideration for a conveyance, there is a presumption of a resulting trust in favor of the spouse furnishing the consideration; or (3) There is no presumption at all."

at 728. The law, consequently, set up presumptions favoring the wife "partly out of a desire to protect her in her subordinate and inferior position against the importunities and influence of her husband. In addition, it would have been natural for her to make her husband manager or trustee of her property for her benefit, on account of her legal disabilities and lack of business experience and capacity." *Id.* "[A] married woman . . . [was] presumed to have acted under the coercion of her husband." *Sprinkle v. Spainhour*, 149 N.C. 223, 226, 62 S.E. 910, 911 (1908).

These notions no longer accurately represent the society in which we live, and our laws have changed to reflect this fact. No longer must the husband be,[5] nor is he in all instances the sole owner of the family wealth. Bogert, *supra*, § 460 at 728. No longer is the wife viewed as "little more than a chattel in the eyes of the law." *Nicholson v. Hospital*, 300 N.C. 295, 298, 266 S.E. 2d 818, 820 (1980). No longer in all cases is the husband the supporting and the wife the dependent spouse.[6] No longer is the wife thought generally to be under the domination of her husband.[7]

Second, other courts, some for many years and some only recently, have chosen to employ the presumption of gift whether the husband or the wife is the grantee of property purchased by

5. "The married woman's provision in the North Carolina Constitution of 1868, Article X, Section 6, abolished this unrealistic legal concept of married women, and provided that a wife's property no longer automatically became that of her husband upon marriage." *Nicholson v. Hospital*, 300 N.C. 295, 298, 266 S.E. 2d 818, 820 (1980).

6. A dependent spouse is "a spouse, whether the husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance." G.S. 50-16.1(3). And " '[s]upporting spouse' means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent." G.S. 50-16.1(4) (definitions used in statutes relating to alimony).

7. Until January 1978, a married woman could not validly transfer real property to her husband in a non-testamentary conveyance without a private examination before a certifying officer. G.S. 52-6 (1976). This requirement for a private examination was repealed by Act of May 13, 1977, ch. 375, § 1, 1977 N.C. Sess. Laws, effective 1 January 1978. (Even under the private examination statute, however, a married woman could make a parol contract with her husband to hold title to land conveyed to her by a third party for the husband's benefit without undergoing a private examination because such an agreement did not involve her separate estate. *Williams v. Williams*, 231 N.C. 33, 56 S.E. 2d 20 (1949); *Bass v. Bass*, 229 N.C. 171, 48 S.E. 2d 48 (1948); *Carlisle v. Carlisle*, 225 N.C. 462, 35 S.E. 2d 418 (1945).

the other spouse. The Supreme Court of Pennsylvania in *Butler v. Butler*, 464 Pa. 522, 347 A. 2d 477 (1975), considered these presumptions in light of the adoption in 1971 of the Pennsylvania Equal Rights Amendment to the Pennsylvania Constitution.[8] The Pennsylvania Court said when the property at issue was entireties property, 464 Pa. at 528, 347 A. 2d at 480:

> "As we observed in *Di Florido v. Di Florido*, 459 Pa. 641, 331 A. 2d 174, 179 (1975), the husband is no longer necessarily the 'sole provider,' and it is likely that both spouses have contributed to the goods and furnishings of the household. Assuming then that both parties in a marriage provide for each other, anytime either a husband or wife contributes towards the purchase of entireties property their contribution is presumed to be a gift to the other."

Some courts that employ a presumption of gift when either spouse is the payor of property taken in the name of the other spouse include Connecticut, Georgia, Massachusetts, Montana, Nebraska, and Washington. *See, e.g., White v. Amenta*, 110 Conn. 314, 148 A. 345 (1930); *Printup v. Patton*, 91 Ga. 422, 18 S.E. 311 (1893); *Hogan v. Hogan*, 286 Mass. 524, 190 N.E. 715 (1934); *Emery v. Emery*, 122 Mont. 201, 200 P. 2d 251 (1948); *Peterson v. Massey*, 155 Neb. 829, 53 N.W. 2d 912 (1952); *Denny v. Schwabacher*, 54 Wash. 689, 104 P. 137 (1909).

Third, commentators have also supported presumptions of gift for both husbands and wives. For example, Professor Lee states in Lee, *supra*, § 113 at 45, that:

> "Property rights should not depend upon the sex of the individual. Since a husband is no longer necessarily the 'sole provider,' there should be a presumption that either spouse has made a gift to the other. The traditional law applicable in a case where a husband furnishes the entire purchase price of real property to be conveyed to himself and his wife should be applicable where a wife with her own funds purchases real property to be conveyed to herself and her husband."

8. That amendment, according to the Pennsylvania Court, keeps the law from imposing "different benefits or different burdens upon members of a society based on the fact that they may be man or woman." 464 Pa. at 527, 347 A. 2d at 480.

Professor Bogert also discusses several bases for presuming a gift when the husband is payor, and shows why they are applicable when the wife is payor. In Bogert, *supra*, § 460 at 727, he writes:

> "A wife is normally not under a legal duty to support her husband and so one element which furnishes a foundation for the gift presumption where the husband pays is missing where the wife pays the consideration. Yet it may with some reason be urged that a wife is under a moral duty to aid her husband financially in his effort to maintain the family. Furthermore, it would seem arguable that affection running from wife to husband is on the average as strong as that running from husband to wife and so that gifts based merely on a high degree of attachment are as natural and common in one case as in the other. In addition it would seem that wives in disposing of their property in anticipation of death, very generally make gifts to their husbands. Taking all these elements together, a good case can be made for applying the same presumption to the wife as payor as is used when the husband pays."

Tiffany similarly states that "reason would seem to support the view in favor of the presumption that a gift was intended," in discussing the dichotomy between courts presuming a gift when the wife is payor and those presuming a trust. 1 Tiffany, Real Property, § 272 at 461 (3d ed. 1939) (hereinafter "Tiffany").

Finally, our legislature has recently indicated its view that the same rules should apply to both spouses in determining ownership of property. In An Act for Equitable Distribution of Marital Property, ch. 815, 1981 N.C. Session Laws (Michie) (primarily to be codified at G.S. 50-20) (hereinafter "The Equitable Distribution Act"), the legislature mandated that one rule, the same for husbands as for wives, would govern property division between them upon dissolution of the marriage. The Act provides in part:

> "§ 50-20. *Disposition of separate and marital property upon divorce.*—(a) Upon application of a party, the court shall determine what is the marital property and shall provide for an equitable distribution of the marital property between the parties in accordance with the provisions of this section.

(b) For purposes of this section:

(1) 'Marital property' means all real and personal property acquired by either spouse during the course of the marriage and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section.

(2) 'Separate property' means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. *However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall be considered separate property regardless of whether the title is in the name of the husband or wife or both.* The increase in value of separate property and the income derived from separate property shall be considered separate property.

* * * * * *

(c) There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:

. . .

(6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker:

. . .

(8) any direct contribution to an increase in value of separate property which occurs during the course of the marriage;" (Emphasis supplied.)

This act became effective on 1 October 1981 and applies "only when the action for an absolute divorce is filed on or after that date." *Id.* at § 7.

We do not purport here definitively to construe this new statute. It does appear, however, that in the context of a divorce and the "equitable distribution" of all "marital property" the legislature has opted for a rule that where land or personalty is purchased with the "separate property" of either spouse, it remains the "separate property" of that spouse regardless of how the title is made. This statute will, of course, govern all cases to which it applies by its terms.

In all cases, however, to which the statute is not applicable the rule shall be that where a spouse furnishing the consideration causes property to be conveyed to the other spouse, a presumption of gift arises, which is rebuttable by clear, cogent and convincing evidence. The extent of the gift is determined by the degree to which the title reflects an interest in the grantee disproportionate to the consideration supplied by the grantee. All cases holding to the contrary are hereby overruled.[9] This is the rule which we will apply in this case. We believe it is the better rule because it recognizes that such transfers are normally motivated by love and affection and the desire to make a gift. As both Professor Scott and our own Robert E. Lee have accurately observed, we should not maintain a rule of law premised on the belief "that husbands have a greater affection for their wives than wives have for their husbands." Scott, § 442 at 3339; *accord*, Lee, § 113 at 44, n. 43.

Neither do we feel compelled to apply the presumptive trust, as opposed to the presumptive gift rule which we here adopt,

9. The most recent of these cases is, of course, *Tarkington v. Tarkington*, *supra* in text, 301 N.C. 502, 272 S.E. 2d 99, where we considered changing the rule but declined to do so saying simply, "[t]he facts of the case before us offer no compelling reason to change this long-standing presumption rule, favorable to the wife in this case." *Id.* at 506, 272 S.E. 2d at 102. Since *Tarkington* the legislature has enacted The Equitable Distribution Act, discussed at length in the text, evidencing unmistakably the public policy of this state to be that spouses should be treated alike in their property transactions with each other. In light of this Act, we now think it appropriate for this Court to change its common law rule so that in all cases to which The Equitable Distribution Act does not apply, husbands and wives will nevertheless be treated the same in their property transactions with each other.

simply because the legislature seems to have shown a preference for a variant of the trust rule in the Equitable Distribution Act. Although the Act does not deal in presumptions, it does provide that where "separate" property is given in exchange for property acquired during the marriage, such new property so acquired "shall be considered separate property regardless of whether the title is in the name of the husband or wife or both." This statutory rule must be understood in the context of the statute's primary emphasis on the equitable distribution of "marital" property upon dissolution of the marriage. The legislature sought to achieve this primary goal by providing a simple way to distinguish "marital" from "separate" property. How simply this aspect of the statute will actually operate will be determined only when the courts must apply it to specific cases. The point is, however, that the statute's primary focus is to devise a procedure for *equitably distributing* "marital," as opposed to "separate," property *upon dissolution of the marriage.*

The primary focus of our common law rules is to determine beneficial ownership of property acquired during marriage by giving effect to what was intended at the time the property was acquired. What the payor intended at the time of acquisition is controlling, no matter the context in which the dispute arises. The common law rules are designed to resolve not only property disputes between spouses upon dissolution of marriage but also disputes involving, for example, the heirs of a deceased spouse whose marriage was intact at death, *see Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222 (1957), and *Shotwell v. Stickle*, 83 N.J. Eq. 188, 90 A. 246 (1914), or creditors of a living spouse whose marriage remains intact, *see Thurber v. LaRoque, supra*, 105 N.C. 301, 11 S.E. 460. The Equitable Distribution Act is designed, on the other hand, to divide property equitably, based upon the relative positions of the parties at the time of divorce, rather than on what they may have intended when the property was acquired. For purposes other than those controlled by statute we believe the presumptive gift rule, being more in accord with the probabilities of the marital state, is a better procedural device than the presumptive trust rule for ascertaining the truth.

In making this change in our common law, we are cognizant of the policy of this Court, "in matters involving title to property . . . to leave changes in the law to the legislature." *Rabon v.*

Hospital, 269 N.C. 1, 20, 152 S.E. 2d 485, 498 (1967); *see also Whetsell v. Jernigan*, 291 N.C. 128, 229 S.E. 2d 183 (1976). We also recognize that although the Court "has never overruled its decisions lightly," 269 N.C. at 20, 152 S.E. 2d at 498, "[a]bsent a legislative declaration, this Court possesses the authority to alter judicially created common law when it deems it necessary in light of experience and reason." *State v. Freeman*, 302 N.C. 591, 594, 276 S.E. 2d 450, 452 (1981); *see also State v. Alford*, 274 N.C. 125, 161 S.E. 2d 575 (1968). Thus, from time to time when this Court has been convinced that changes in the way society or some of its institutions functioned demanded a change in the law, it rejected older rules which the Court itself developed in order that justice under the law might be better achieved. These decisions were sometimes made in the face of arguments that such changes ought to be made, if at all, by the legislature. *See, e.g., Nicholson v. Hospital, supra*, 300 N.C. 295, 266 S.E. 2d 818 (overruled decisions barring action for loss of consortium on the ground, among others, that these decisions contradicted "the policy of modern law to expand liability in an effort to afford decent compensation . . . to those injured by the wrongful conduct of others"); *Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981) (rejected this Court's earlier "strict contractual approach" in applying notice-to-insurer requirements of insurance contracts in favor of the "reasonable expectation of the parties approach," in recognition of the fact that the terms of insurance contracts are not truly negotiated, or bargained for, like private contracts); *Rabon v. Hospital, supra* (abolished charitable immunity for public hospitals on the ground, among others, that such hospitals are no longer, in fact, charitable institutions); *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976) (abolished sovereign immunity in contract actions against state on grounds, among others, of public's heightened expectations that government be "responsive and responsible" and because legislature had already consented for the state to be sued in "many important contractual situations"). In *Pendergrast v. Aiken*, 293 N.C. 201, 211-13, 236 S.E. 2d 787, 793-94 (1977), this Court adopted for the first time the reasonable use doctrine for resolving conflicts over property damage caused by surface water drainage after acknowledging (1) our "increasing industrialization and urbanization," (2) that "in a changing society dogmatic adherence to [our traditional civil law rule] is unfeasible and unwise," and (3) this Court's earlier will-

ingness to "modify that rule where time and circumstance so require."

We have already alluded to the ongoing march of the law to place men and women generally and husbands and wives particularly on an equal legal footing. This march in North Carolina, as evidenced by the statutes to which we have already referred, has really been led by our legislature. Because of this unmistakable legislative policy that there be no difference in treatment of husbands and wives in our courts based solely on gender, we believe we are justified in altering our own rules regarding spousal real estate transactions so that the same rule applies to both spouses, despite our long-standing policy to leave changes in the law involving property titles to the legislature. To do so simply keeps us in step with the policy making branch of our government.

III

[2] Having concluded that plaintiff in order to prevail must rebut the presumption that he made a gift to defendant of an entirety interest in the real property, we now consider whether the evidentiary forecast on the summary judgment motion shows as a matter of law that plaintiff will not at trial be able to rebut the presumption. We conclude that it does not. Rather, the evidentiary forecast indicates that plaintiff may at trial be able to rebut the presumption and make out a *prima facie* case for a resulting trust in his favor.

A defendant is entitled to summary judgment only if he can produce a forecast of evidence which, when viewed most favorably to plaintiff, would, "if offered by plaintiff at the trial, without more, . . . compel a directed verdict" in defendant's favor. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 473, 251 S.E. 2d 419, 423 (1979). In other words, if the forecast of evidence available for trial, as adduced on the motion for summary judgment, demonstrates that plaintiff will not at trial be able to make out at least a *prima facie* case, defendant is entitled to summary judgment. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). In such cases there is no genuine issue of material fact. *Moore v. Fieldcrest Mills, Inc., supra.*

In order at trial to make out a *prima facie* case for a resulting trust plaintiff must rebut the presumption of gift by

evidence that he intended no gift. *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222 (1957). "[T]he presumption is one of fact and not of law, and may be rebutted by evidence of circumstances tending to show a contrary intent or that the purchaser did not intend the ostensible grantee . . . to take beneficially." *Creech v. Creech*, 222 N.C. 656, 662, 24 S.E. 2d 642, 646 (1943). Plaintiff's evidence must be "clear, cogent, and convincing." *Bass v. Bass*, *supra*, 229 N.C. at 173, 48 S.E. 2d at 49. "However, it is to be kept in mind that it is not the function of the presiding judge to apply this rule in the sense of passing upon the intensity of the proofs. That is a matter solely within the province of the jury." *Bowen v. Darden*, 241 N.C. 11, 14, 84 S.E. 2d 289, 292 (1954).

"[A] resulting trust arises, if at all, in the same transaction in which legal title passes, and by virtue of consideration advanced before or at the time legal title passes, and not from consideration thereafter paid." *Bryant v. Kelly*, 279 N.C. 123, 129, 181 S.E. 2d 438, 441 (1971), quoting *Rhodes v. Raxter*, 242 N.C. 206, 87 S.E. 2d 265 (1955); *cf. Cline v. Cline*, *supra*, 297 N.C. 336, 255 S.E. 2d 399. It is undisputed that plaintiff furnished from his separate funds the entire consideration for the real property before or at the time title passed. The only factual issue, therefore, is plaintiff's intent at the time he furnished the consideration. This Court said in *Waddell v. Carson*, *supra*, 245 N.C. at 674, 97 S.E. 2d at 226:

> " '[A] resulting trust does not arise where a purchaser pays the purchase price of property and takes the title to it in the name of another unless it can be reasonably presumed from the attending circumstances that the parties intend to create the trust at the time of the acquisition of the property.' *Lawrence v. Heavner*, *supra*. In the final analysis, whether or not a resulting trust arises in favor of the person paying the consideration for a transfer of property to another, depends on the intention, at the time of transfer, of the person furnishing the consideration, and such intention is to be determined from all the attendant facts and circumstances. 89 C.J.S., Trusts, p. 966. See 89 C.J.S., Trusts, Sec. 133, as to admissibility of evidence to establish a resulting trust."

If, therefore, plaintiff can prove at trial by clear, cogent, and convincing evidence that he did not intend to make a gift of an

entirety interest in the property to defendant, then he will have rebutted the presumption of gift. "[W]hen this is done, the parties then stand as if they were not man and wife, that is, they stand as other parties, and the general rule prevails." *Bass v. Bass*, 229 N.C. 171, 172, 48 S.E. 2d 48, 49 (1948). When the presumption of gift is rebutted the effect is "automatically to create a resulting trust" in favor of the party furnishing the purchase price. Scott, § 443 at 3345; *accord*, Tiffany, *supra*, § 272 at 463.

To show his intent at the time of the transaction, plaintiff is entitled to rely on "all the attendant facts and circumstances" of the transaction. *Waddell v. Carson*, *supra*, 245 N.C. at 674, 97 S.E. 2d at 226. Thus plaintiff's intent may be shown by evidence "of facts and statements of the parties, which happened or were made contemporaneously with the purchase, [except] that the declarations of the trustee may be received in evidence, if made at any time, to establish the trust." *Wise v. Raynor*, 200 N.C. 567, 570, 157 S.E. 853, 855 (1931), *quoting* 26 R.C.L. 1230 (1920); *Williams v. Honeycutt*, 176 N.C. 102, 96 S.E. 730 (1918); 76 Am. Jur. 2d Trusts, § 632 (1975). Thus declarations of the party claiming a resulting trust made at or before, but not after, title passes are admissible. Bogert, *supra*, § 459 at 717-20. Admissions, however, of the grantee and the parties' conduct both before and after title passes are admissible to show the intent of the payor at the time the deed was made. Restatement (2d) Trusts, § 443, Comment 9 (1959); *see also Hinton v. Pritchard*, 107 N.C. 128, 12 S.E. 242 (1890). In summary, "[t]he proofs, except as to acts or declarations of the party to be charged, must be of facts antecedent to or contemporaneous with the purchase, or so immediately afterwards as to form a part of the res gestae." *Herbert v. Alvord*, 75 N.J. Eq. 428, 429-30, 72 A. 946, 947 (1909).[10]

Shotwell v. Stickle, *supra*, 83 N.J. Eq. 188, 90 A. 246, is instructive. There John A. Stickle and Martha Stickle were hus-

10. In North Carolina except in cases of fraud, mistake or undue influence, a trust may not be shown by parol evidence in favor of the grantor in a deed conveying absolute title to the grantee. *Tire Co. v. Lester*, 192 N.C. 642, 135 S.E. 778 (1926). However, in cases in which the grantee takes title and holds for someone other than the grantor, the trust whether resulting or express, may be established by parol evidence. *Wise v. Raynor*, 200 N.C. 567, 157 S.E. 853 (1931); *Shelton v. Shelton*, 58 N.C. [5 Jones Eq.] 292 (1859); 76 Am. Jur. 2d Trusts, §§ 194 & 629 (1975). *Accord, Bryant v. Kelly*, *supra*, 279 N.C. 123, 181 S.E. 2d 438.

band and wife. During their marriage John's father, Isaac, died testate naming John as one of his executors. John agreed with his two brothers that he would purchase land from Isaac's estate. Being advised, however, that he could not take title in his own name because he was an executor of the estate, John had title to the property made to his wife, Martha; but John furnished the entire purchase price. Martha later died and her heirs brought the action against John to partition the property. The Court held that evidence of the reason why title to the property was placed in Martha's name together with evidence that Martha at the time the deed was delivered and thereafter made statements that she intended to deed the farm to her husband and would eventually do so when it became convenient, was enough to rebut the presumption of gift and create a resulting trust in John's favor.

In light of these principles, the evidentiary forecast on summary judgment indicates that plaintiff will be able to rebut the presumption of gift and make out, at trial, a *prima facie* case for a resulting trust in his favor. It shows that plaintiff supplied the entire purchase price for the property from money he received from his father and grandfather. He at all times intended for the property to be his alone and so advised the defendant at and before the closing. Defendant "agreed with me that this real estate was mine and mine alone." Plaintiff acquiesced in placing title in both his and defendant's names only because he was advised by his real estate agent that North Carolina law so required.

IV

[3] Plaintiff is not precluded from relying on a resulting trust because of deficiencies in his complaint. Although plaintiff does not expressly refer to a resulting trust in his complaint, and prays for reformation of the deed on the ground of mutual mistake, he has pled sufficient facts to state a claim giving rise to a resulting trust.

Plaintiff alleged in his complaint that before the closing "plaintiff told the defendant that he would be furnishing all of the consideration for the purchase of this realty, that he was therefore buying it in his own right as his sole and individual property, and that it would be his and his alone." At the closing, "plaintiff again told the defendant and others that he was furnishing the consideration for the purchase of this realty, and that

he alone would own the realty." Plaintiff further alleges that "[t]hese declarations and statements made by the plaintiff were agreed upon by the defendant" and that he, in fact, paid all of the purchase price. The deed was made to both parties as grantees "[b]y mutual mistake." When shown the deed at the closing, plaintiff again told everyone present "including the defendant, that he was furnishing the consideration for the purchase of the realty, that it was to be owned by him individually, and his and his alone" and that the defendant "agreed to these declarations and representations by the plaintiff." Since the closing, plaintiff has continued to assert his sole ownership of the property in the presence of defendant and others and at these times "defendant agreed with the plaintiff." Plaintiff prays for the Court to reform the deed on the ground of mutual mistake and for a declaratory judgment that he is sole owner of the property.

Although plaintiff has denominated his claim as one based on mutual mistake, no recovery may be had on that theory. Both plaintiff and defendant understood that the deed would in fact be made to both parties as husband and wife both before and at the time of the closing. The only mistake supported by the evidence is plaintiff's erroneous understanding of North Carolina law governing deeds and perhaps his misunderstanding of the legal effect of having the deed made to both him and his wife as grantees.

"[M]ere ignorance of law, unless there be some fraud or circumvention, is not a ground for relief in equity whereby to *set aside* conveyances or avoid the legal effect of acts which have been done." *Foulkes v. Foulkes*, 55 N.C. (2 Jones) 260, 263 (1855) (Emphasis original). In *Wright v. McMullan*, 249 N.C. 591, 107 S.E. 2d 98 (1959), plaintiff brought a declaratory judgment action to determine the ownership of certain Series "E" United States Savings Bonds. Plaintiff had caused the bonds to be registered respectively in the names of his two sons both of whom predeceased plaintiff. Plaintiff had maintained exclusive possession of the bonds and alleged that he had not intended to vest title to the bonds in his sons. Plaintiff claimed ownership of the bonds. Summary judgment for defendant was affirmed on appeal. This Court noted that the law applicable to the bonds provided that ownership was fixed in the name of the person to whom the bonds were registered. The Court said that plaintiff's "mistake as

to the legal consequences flowing from his deliberate and intentional act cannot destroy the force and effect of the law." 249 N.C. at 595, 107 S.E. 2d at 101.

The parties' mistake as to the legal consequences of naming them both as grantees, or as to the legal necessity for doing so assuming that plaintiff's evidence of such a mistake is believed, is not the kind of mistake for which reformation of the instrument may be granted. Both parties deliberately and intentionally approved the form of the deed. There is no suggestion in the evidence that plaintiff's approval was due to any fraud or circumvention on the part of the defendant. *Cf. Lawrence v. Heavner*, 232 N.C. 557, 560, 61 S.E. 2d 697, 699 (1950) (plaintiff entitled to reformation of a deed if "because of a mistake on his part super-induced by fraud on [his purported wife's] part," both parties were named as grantees in a deed).

Plaintiff's incorrect choice of legal theory, however, is not fatal to his claim because even in the context of a motion to dismiss for failure to state a claim, "when the allegations in the complaint give sufficient notice of the wrong complained of an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory." *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E. 2d 611, 625 (1979). Here, of course, we are dealing with a motion for summary judgment at which a forecast of the evidence available for trial has been presented. In this context, particularly, "the nature of the action is not determined by what either party calls it." *Dickens v. Puryear*, 302 N.C. 437, 454, 276 S.E. 2d 325, 336 (1981), *quoting Hayes v. Ricard*, 244 N.C. 313, 320, 93 S.E. 2d 540, 545-46 (1956). At summary judgment the nature of the action is determined not only by the pleadings and the nature of the relief sought, but also by the facts "which, on motion for summary judgment, are forecast by the evidentiary showing." *Dickens v. Puryear*, 302 N.C. at 454, 276 S.E. 2d at 336. As already set forth, plaintiff has presented a sufficient evidentiary showing to allow him at trial to prove that defendant holds on resulting trust for him.

V

Finally, plaintiff's claim is not barred by laches. Plaintiff remained in possession of the contested property from the original

purchase until the time suit was brought. For laches to bar his claim "there must be something on his part which looks like an abandonment of the right, or an acquiescence in its enjoyment by another, inconsistent with his own claim or demand." *Stith v. McKee*, 87 N.C. 389, 392 (1882). No such abandonment appears here.

For the reasons stated, the decision of the Court of Appeals upholding summary judgment for defendant is

Reversed.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA, APPLICANT FOR AUTHORITY TO INCREASE RATES FOR WATER AND SEWER UTILITY SERVICE IN BENT CREEK/MT. CARMEL SUBDIVISIONS, BUNCOMBE COUNTY, NORTH CAROLINA v. INTERVENOR RESIDENTS OF BENT CREEK/MT. CARMEL SUBDIVISIONS

No. 90

(Filed 27 January 1982)

1. **Utilities Commission § 38— public utility rates—charges by affiliated companies—contracts not filed with Commission**

The Supreme Court concurs in the holding of the Court of Appeals that G.S. 62-153 does not prohibit the Utilities Commission from considering fees owed to affiliated corporations under unfiled contracts as expenses of the public utility for purposes of ratemaking so long as the Commission does determine in the ratemaking procedure that the agreements between the utility and the affiliated corporations are just and reasonable and it does not appear that their purpose is to conceal or divert profits from the public utility to an affiliate.

2. **Utilities Commission § 51— review of decision of Utilities Commission**

The appellate court may reverse or modify a decision of the Utilities Commission if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are unsupported by competent, material and substantial evidence in view of the entire record as submitted, and an appellant may show on appeal that the Commission's order is not so supported.

3. **Utilities Commission § 38— water and sewer utility—charges by affiliated companies—reasonableness**

Evidence presented by a water and sewer utility and by the Public Staff supported the findings and conclusions of the Utilities Commission that

operating and general expenses allocated to the utility from affiliated corporations were reasonable. Therefore, the Commission could properly approve increased water and sewer rates for the utility based in part on the expenses allocated during the test year from the affiliated corporations.

4. **Utilities Commission § 38— utility rates—expenses charged by affiliated companies—duty of Commission to inspect books of affiliated companies**

While the Utilities Commission always has the authority and right to inspect the books and records of affiliated companies, to investigate contracts and practices between a utility and its affiliated companies, and to cause a utility to offer affirmative evidence of the reasonableness of expenses charged or allocated to the utility by affiliated companies or risk their disapproval, the Commission has the *duty* to test the reasonableness of such expenses only when they are properly challenged or contradicted by any party to the proceeding. G.S. 62-51.

5. **Utilities Commission § 38— utility rates—reasonableness of expenses charged by affiliated companies—burden of going forward with evidence**

The burden on a utility of going forward with evidence of reasonableness and justness of expenses charged or allocated to the utility by an affiliated company arises only when the Utilities Commission requires it or when affirmative evidence is offered by a party to the proceeding that challenges the reasonableness of such expenses on the basis that they are exorbitant, unnecessary, wasteful, extravagant, or incurred in abuse of discretion or in bad faith or that such expenses exceed either the cost of the same or similar goods or services on the open market or the cost similar utilities pay to their affiliated companies for the same or similar goods or services.

APPEAL as of right by Carolina Water Service, Inc. of North Carolina pursuant to G.S. § 7A-30(3) from a decision of the Court of Appeals reported at 52 N.C. App. 222, 278 S.E. 2d 761 (1981), reversing the Order of the North Carolina Utilities Commission approving a rate increase in Docket No. W-354, Sub 6, a general rate-making case.[1]

On 2 July 1979 Carolina Water Service, Inc., of North Carolina (hereinafter the "Company") filed an application with the Utilities Commission (hereinafter "Commission") for authority to increase its rates for water and sewer service for the Bent Creek

1. During the course of the hearings in the general rate case, it was discovered that certain of the Company's service contracts with an affiliated company had not been approved by the Commission as required by G.S. § 62-153. As a result of this discovery, a petition was filed with the Commission by Carolina Water Service for approval of those service contracts. The Court of Appeals affirmed the Order approving the utility's contracts with its affiliated company in No. 8010 UC 1060. No appeal was taken from that decision.

and Mt. Carmel Acres subdivisions in Buncombe County. After appropriate public notice, interventions and hearings before a Hearing Examiner and the Commission, the Commission on 17 April 1980 entered its final order approving a rate increase. The Intervenor/Residents appealed to the Court of Appeals. That court reversed the Order of the Commission granting the rate increase, and the Company now appeals from that decision.

Multiple issues are presented by this appeal but all involve the question of the burden of proof of a petitioning utility and the duties of the Commission in a general rate case as to the reasonableness of expenses charged to that utility by affiliated companies. For the reasons stated herein, we reverse the decision of the Court of Appeals and reinstate the order of the Utilities Commission granting the rate increase.

Hunton & Williams, by Edward S. Finley, Jr., Attorneys for Carolina Water Service, Inc. of North Carolina, plaintiff-appellant.

Robert F. Orr, Attorney for Intervenor/Residents of Bent Creek/Mt. Carmel Subdivisions, defendant-appellees.

MEYER, Justice.

In its application filed with the Commission on 2 July 1979, the Company sought to increase its rates for water and sewer service for the Bent Creek and Mt. Carmel Acres subdivisions in Buncombe County. The Company proposed an annual increase in gross revenues of $34,370 based upon a test year ending 31 December 1978.

The Company's income statement for the year ended 31 December 1978, filed as a part of its application, indicated an actual net operating loss of $31,652 which, after *pro forma* adjustments, decreased to a loss of $7,851. Under the requested increase of $34,370 the *pro forma* net operating income would have become $14,843, providing a rate of return on original cost net investment of approximately 7.66%. Prior to the hearing of the case which began on 6 November 1979, the Public Staff of the Commission and residents of Bent Creek and Mt. Carmel Acres subdivisions intervened. Accounting and engineering personnel of the Public Staff conducted audits and investigations into the Company's application, its service area, and its books of account.

At the conclusion of the hearing, the Hearing Examiner, on 19 February 1980, issued a Recommended Order and held that while the 7.66% rate of return requested by the Company would otherwise have been appropriate, the Company should be penalized 2.02% for inadequate service and should therefore receive only a 5.64% rate of return or an increase of $25,784 in annual revenues. Rates approved by the Hearing Examiner as just and reasonable had the effect of increasing the monthly charge for water to an average customer using 496 cubic feet of water per month from $9.40 to $11.00 and increasing the flat monthly sewer charge from $8.00 to $11.00. Intervenor/Residents filed exceptions to the Recommended Order and orally argued the issues before the Commission. The Commission, finding that the Recommended Order of the Hearing Examiner should be approved, filed its "Final Order Overruling Exceptions and Affirming Recommended Order" on 17 April 1980.

I

[1] Intervenor/Residents' first argument before the Court of Appeals was the the Commission, in establishing new rates, should not have considered certain expenses allocated to the Company because they reflected charges for services rendered by affiliated companies pursuant to contracts not filed with and approved by the Commission as required by G.S. § 62-153. Intervenor/Residents argued that failure to file the contracts and seek Commission approval should result in the disallowance of expenses incurred pursuant to such contracts. The Court of Appeals, noting that because of the poor financial condition of the Company few payments had been made to affiliated companies,[2] concluded that once the Commission found the contracts to be just and reasonable there was no reason to disregard expenses incurred under such contracts. The Court of Appeals held that G.S. § 62-153 does not prohibit the Utilities Commission from considering fees owed to affiliated corporations under unfiled contracts as expenses of the public utility for purposes of ratemaking so long as the Commission does determine in the ratemaking procedure that the agreements between the utility and the affiliated corporations are

2. We note that the Hearing Examiner stated in the Evidence and Conclusions For Finding of Fact Nos. 10-13 that "the Applicant has operated at a deficit and did not pay any service fees during the test period."

just and reasonable and it does not appear that their purpose is to conceal or divert profits from the public utility to an affiliate. For the reason stated by the Court of Appeals, we concur in that holding and deem it unnecessary to comment further on that aspect of this appeal.

II

The central issue raised on this appeal is whether the Commission erred in approving the Company's increased rates for water and sewer service based in part on $27,661 of operating and general expenses allocated during the test year from affiliated companies. Resolution of this issue requires a review of the evidence presented in the ratemaking proceeding before the Commission.

Utilities, Inc., of Northbrook, Illinois, has no employees and is a holding company whose sole function is to own the capital stock of its approximately thirty-five subsidiary water and sewer operating companies located in nine states. All of the employees and the operation of all the approximately thirty-five subsidiary companies are directed by another wholly owned subsidiary, Water Service Corporation (hereinafter "Service Corporation") also located in Northbrook, Illinois. One of the wholly owned subsidiaries of Utilities, Inc., is Carolina Water Service, Inc. of North Carolina, a North Carolina corporation, which owns and operates the systems in the Lee's Ridge, Bent Creek and Mt. Carmel Acres subdivisions in Buncombe County as well as systems in subdivisions at Pine Knoll Shores located near Morehead City, North Carolina, and Whispering Pines, located near Southern Pines, North Carolina. Another of Utilities, Inc.'s, subsidiaries is Carolina Water Service, Inc., a Delaware corporation (hereinafter "CWS") which owns and operates systems in South Carolina. Another such subsidiary is Sugar Mountain Utilities, Inc. (hereinafter "Sugar Mountain") which operates a subdivision system in Sugar Mountain, Avery County, North Carolina.

The Company serves approximately 470 homes in the Bent Creek and Mt. Carmel subdivisions. To maintain the water and sewer systems and provide customer assistance, the Company employs two operating personnel who reside in that area. Service complaints from that area are handled via a toll-free telephone call by a full-time administrative secretary employed by Sugar Mountain at its office in Avery County where the manager and

assistant manager of Sugar Mountain are also located. The Company's office in the Bent Creek/Mt. Carmel Acres area consists of a mobile home adapted for use as an office, for record-keeping, and for basic lab tests. CWS provides administrative and secretarial services to the Company from its offices in South Carolina. Service Corporation, from its offices in Northbrook, pays the salaries and employee benefits such as life insurance and pension plans, etc., of all employees involved in the operation of all the affiliated companies including the two parties employed directly by the Company as well as the salaries of employees of the affiliated companies which furnish administrative, billing, computer, auditing, engineering, personnel, and accounting functions for the Company. Service Corporation furnishes such services to the Company pursuant to a contract now filed with and approved by the Utilities Commission.[3]

Among the various items of the test-year operating expenses of the Company in its application before the Commission was the $27,661 of operating and general expenses previously referred to which included the $19,471 share of the operating expenses of Service Company and the $8,190 share of the operating expenses of CWS allocated to the Company. The Company presented extensive evidence of the method by which the expenses of the affiliates were allocated as expenses of the Company and that such allocation represented a fair proportion of the costs of the affiliates. The Hearing Examiner concluded in his Recommended Order that "the allocation methods actually applied were reasonable and that the allocated general and operating and maintenance expenses derived by such allocations were reasonable, including those paid to [Service Company]." The Commission found and concluded that the Hearing Examiner's findings and conclusions "are all fully supported by the record" and affirmed the Recommended Order. Intevenor/Residents argued in the Court of Appeals that the order of the Commission approving the rate increase was unsupported by competent, material, and substantial evidence as to the reasonableness of expenses allocated to the Company by these affiliated companies. They contended that such allocated expenses could not properly be included in the Company's operating expenses because the evidence in

3. See footnote 1.

the record did not show that the affiliated companies incurred the allocated expenses in a reasonable manner.

While the Court of Appeals recognized that there was evidence in the record that Service Company and CWS "actually incurred these expenses," that "the Commission appears to have considered the reasonableness of the method of allocation . . .," and "that the amounts allocated to the Company was a fair proportion of the whole,"[4] that court held in effect that there was no evidence whatsoever that the expenses incurred by those affiliated companies in providing the services were just and reasonable. For reasons subsequently stated, we cannot agree.

The Commission is vested with full power to regulate the rates charged by utilities. G.S. § 62-2.

> The General Assembly has delegated to the Commission, and not to the courts, the duty and power to establish rates for public utilities. *Utilities Commission v. Telephone Co.*, 266 N.C. 450, 146 S.E. 2d 487 (1966), *citing Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890 (1963). The rates fixed by the Commission must be just and reasonable. G.S. §§ 62-130 and 131. *See Telephone Co. v. Clayton, Comr. of Revenue*, 266 N.C. 687, 147 S.E. 2d 195 (1966). Rates fixed by the Commission are deemed *prima facie* just and reasonable. G.S. § 62-94(e).

Utilities Commission v. Duke Power Co., 305 N.C. 1, 10, --- S.E. 2d ---, --- (1982).

All findings of fact made by the Commission, which are supported by competent, material, and substantial evidence, are conclusive. On appeal, the authority of the reviewing court, whether the Court of Appeals or this Court, to reverse or modify the Order of the Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in G.S. § 62-94. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 336, 189 S.E. 2d 705, 717 (1972).

G.S. § 62-94 specifies the standard of judicial review. Justice Carlton succinctly summarized the standard of review in such cases in *Utilities Comm. v. Oil Co.* as follows:

4. 52 N.C. App. 222, 230, 278 S.E. 2d 761, 766-67.

> [G.S. § 62-94] provides, *inter alia*, that the reviewing court may (1) affirm, (2) reverse, (3) declare null and void, (4) modify, or (5) remand for further proceedings, decisions of the Commission. The Court's power to affirm or remand is not specifically circumscribed by the statute. However, the power of the court to reverse or modify and, *a fortiori*, to declare null and void, is substantially circumscribed to situations in which the court must find (a) that appellant's substantial rights, (b) have been prejudiced, (c) by Commission findings, inferences, conclusions or decisions which are
>
> (1) in violation of constitutional provisions; or
>
> (2) in excess of statutory authority or jurisdiction of the Commission, or
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> (3) made upon unlawful proceedings, or
>
> (4) affected by other errors of law, or
>
> (5) unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) arbitrary or capricious.

302 N.C. 14, 19-20, 273 S.E. 2d 232, 235 (1981).

[2] Pursuant to G.S. § 62-94(b)(5), the Court may reverse or modify the decision of the Commission if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are unsupported by competent, material, and substantial evidence in view of the entire record as submitted. An appellant may show on appeal that the Commission's order is not so supported. *Utilities Comm. v. Duke Power Co.*, 305 N.C. 1, --- S.E. 2d --- (1982); *Utilities Comm. v. Edmisten, Attorney General*, 291 N.C. 424, 230 S.E. 2d 647 (1976); *Utilities Commission v. Coach Co.*, 261 N.C. 384, 134 S.E. 2d 689 (1944); *Utilities Commission v. R.R.*, 238 N.C. 701, 78 S.E. 2d 780 (1953). This the Intervenor/Residents attempted to do before the Court of Appeals with regard to costs allocated to the Company by affiliated companies. The Court of Appeals concluded that "the Commission's order granting the requested rate increase was based in part on expenses [charged to the Company by affiliated companies] which were unsupported by competent, material, or substantial evidence as to their reasonableness," 52 N.C. App. at 232, 278 S.E. 2d at 768, reversed the Commission, and remanded the cause for further hearing.

This Court's review of the decision of the Court of Appeals is to determine whether there is error of law in that decision.[5] Upon our review of the decision of the Court of Appeals, we are required to review the whole record of the proceedings before the Commission. If upon our review we conclude, as did the Court of Appeals, that the Commission's findings and conclusions with respect to the Company's expenses charged by affiliated companies are not properly supported by evidence in the record, we will affirm that court's decision. If, however, upon that review, we find that the facts found by the Commission are in fact supported by competent, material, and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn, and that the Commission's decision is not otherwise affected by error of law, we must affirm the Commission's order and reverse the Court of Appeals.

[3] We believe that the following summary of the evidence presented by the Company and the Public Staff supports the Commission's findings and the conclusion that such expenses were reasonable. Schedules and exhibits setting forth and identifying the amount of the Company's expenses for the test year, including those allocated by affiliated companies in question here, accompanied the Company's application for a rate increase which was verified by an officer acquainted with the facts appearing therein as required by Commission Rule R1-5. These schedules and exhibits were identified and admitted into evidence at the hearing. Also, well after the hearings began, and in response to a Commission order resulting from a Motion to Produce filed by Intervenor/Residents, the Company prepared and produced additional exhibits and schedules dealing with its transactions with affiliated companies. The Public Staff's engineers and auditors examined the data originally submitted by the Company and requested and received additional data from the parent company's offices. Mr. Jessie Kent, a Public Staff auditor, testified that he conducted audits of the Company both in this case and in another case approximately one year earlier. He requested and received various work papers from the Company in order to prepare his study of the case. Although he made numerous adjustments to other items, he made no adjustment in the Company's figures

5. *See* Rule 16 of the North Carolina Rules of Appellate Procedure.

with regard to expenses for outside services by Service Corporation.

Millard B. Shriver, Vice President and Manager of CWS, whose salary is partially allocated to the Company testified that he routinely visits the service area and is called in when the system must be changed or when facilities operate improperly. He oversees all procedures followed by the Company's operating personnel and solves problems that arise from time to time, such as engineering and treatment problems. He spot checks minor expenditures and specifically approves major ones. He considered the expenditures made by Mt. Carmel and Bent Creek to be reasonable. The Hearing Examiner concluded "that the allocation methods actually applied were reasonable and that the allocated general and operating and maintenance expenses derived by such allocations were reasonable, including those paid to [Service Corporation]." The Commission found this conclusion to be fully supported by the record and affirmed it.

During the course of the hearing on this matter, Patrick J. O'Brien, Corporate Treasurer of the Company, testified in support of the application and sponsored the exhibits and schedules that supported the relief requested. Mr. O'Brien testified that the rates under consideration were approved by the Commission on 15 November 1978 but resulted in a loss for the Company during the test year. Mr. O'Brien testified that those rates were confiscatory because they were insufficient to allow the Company to pay the interest on all of its debt, much less to provide a rate of return on the equity to the investors. Mr. O'Brien testified that operating and maintenance expenses totalling $27,661 were allocated to the Company from Service Corporation and CWS.

Mr. O'Brien testified that due to the negative rate of return experienced during the test year the Company made insufficient money to repay all of the allocated expenses. Even though the service corporation was not paid for all its services rendered, the service company did not reduce the amount of services provided. During the test year the operating loss prevented the Company from paying interest on its debt capital. He testified that the allocation *procedures* were reasonable and that operating expenses allocated from affiliated companies were reasonable and properly allocated and enabled the Company to provide service

more cheaply than if the Company had operated independently. Mr. O'Brien testified that the scheme of providing services through affiliates resulted in economies of scale that inured to the benefit of the Company.

The Intervenor/Residents offered no evidence to contradict the foregoing. We find that this evidence was competent, material, and substantial and fully supports the findings and conclusions of the Commission that the allocated expenses in question were reasonable. Having so concluded, we now examine the law applicable to this evidence.

Neither Service Corporation nor CWS carry out public utility functions in this State and are themselves neither parent nor subsidiary of the Company as those terms are defined in G.S. § 55-2 but merely affiliated companies, and, therefore they are not public utilities pursuant to G.S. § 62-3(23)(c). Neither the Commission nor the courts can constitute them as such. It follows that the Commission may not fix or control prices that Service Corporation and CWS charge their customers, including their affiliated companies. The Commission may, however, in a proper case, refuse to allow the Company to include in its operating expenses the full price it actually paid or, as the case here incurred, for services supplied by Service Corporation and CWS. *See Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 344, 189 S.E. 2d 705, 722.

[4] Within its proper rate-making authority, the Commission is expressly authorized to inspect the books and records of affiliated companies and to investigate contracts and practices between the petitioning utility and its affiliated companies including parent corporations and subsidiaries of parent corporations. The authority of the Commission to inspect books and records and to make investigations into transactions between affiliates, as conferred by statute, is quite broad:

> G.S. § 62-51. *To inspect books and records of corporations affiliated with public utilities.*
>
> Members of the Commission, Commission staff, and public staff are hereby authorized to inspect the books and records of corporations affiliated with public utilities

> regulated by the Utilities Commission under the provisions of this Chapter, including parent corporations and subsidiaries of parent corporations. This authorization shall extend to all reasonably necessary inspection of all books and records of account and agreements and transactions between public utilities doing business in North Carolina and their affiliated corporations where such records relate either directly or indirectly to the provision of intrastate service by the utility. The right to inspect such books and records shall apply both to books and records in the State of North Carolina and such books and records located outside of the State of North Carolina. If any such affiliated corporation shall refuse to permit such inspection of its books and records and its transactions with public utilities doing business in North Carolina, the Utilities Commission is empowered to order the public utility regulated in North Carolina to show cause why it should not secure from its affiliated corporation such books and records for inspection in North Carolina or why their franchise to operate as a public utility in North Carolina should not be cancelled.

Thus the authority or *right* of the Commission to make such inspections and investigations is beyond question. It is the *duty* of the Commission in this regard which is at issue here. This Court is not inadvertent to the substantial risk that inflated charges by affiliated companies may improperly increase the allowable revenue of petitioning utilities and thereby raise the costs to consumers. Progressive integration of utility services under holding companies, while offering the potential for savings to the customers of subsidiary companies, at the same time offers opportunities to inflate charges for services in order to produce unwarranted profits for the holding company. Here, the Company, Service Corporation, and CWS are subsidiaries of the same holding company, Utilities Inc. of Northbrook, Illinois. We would observe, as did the New York Court of Appeals, in *General Tel. Co. of Upstate N.Y. v. Lundy,* 17 N.Y. 2d 373, 378, 218 N.E. 2d 274, 277 (1966), that:

> When such materials and services are obtained through contracts which are the result of arm's-length bargaining in the open market, the contract price is usually accepted as the proper cost. However, when a utility and its suppliers are

> both owned and controlled by the same holding company, the safeguards provided by arm's-length bargaining are absent, and ever present is the danger that the utility will be charged exorbitant prices which will, by inclusion in its operating costs, become the predicate for excessive rates.

The fact that services are furnished to a utility by an affiliated company does not, however, alter the ultimate question for the Commission, to-wit, whether the prices paid by the utility are reasonable. Obviously, a utility may not inflate its operating expenses recoverable through rates by paying unreasonable fees or charges for services furnished by an affiliated company. As was said by Justice Lake in *Utilities Comm. v. Telephone Co.*, citing numerous authorities, "The only effect of the affiliation between the utility and its supplier is that such relationship calls for a close scrutiny by the Commission of the price paid by the utility." 281 N.C. 318, 345-46, 189 S.E. 2d 705, 723. Justice Lake also quoted Justice Stone (later Chief Justice) from his opinion in *United Gas Co. v. R.R. Comm'n.*, 278 U.S. 300, 320-21, 49 S.Ct. 150, 156, 73 L.Ed. 390, 401 (1929), as observing:

> We recognize that a public service commission, under the guise of establishing a fair rate, may not usurp the functions of the company's directors and in every case substitute its judgment for theirs as to the propriety of contracts entered into by the utility; and common ownership is not of itself sufficient ground for disregarding such intercorporate agreements when it appears that, although an affiliated corporation may be receiving the larger share of the profits, the regulated company is still receiving substantial benefits from the contract and probably could not have secured better terms elsewhere.

The uncontradicted testimony of the Company's treasurer, Mr. Patrick J. O'Brien, was that the operating and maintenance expenses totaling $27,611 which were allocated to the company from Service Corporation and CWS were reasonable, were properly allocated, and enabled the Company to provide service more cheaply than if the Company had operated independently. He also testified that the scheme of providing services through affiliates resulted in economies of scale that inured to the benefit of the

Company. This evidence was not contradicted or even challenged[6] by any other witness. No party offered any evidence to refute this testimony nor even any evidence tending to show that the costs allocated to the Company were unusual in any way or unreasonable or that affiliation in any way raised costs to the ratepayers or resulted in unreasonable profits to the affiliated companies, Service Corporation, and CWS.

The Commission must always determine that expenses paid to affiliated companies are reasonable and the burden of persuasion on that issue always rests with the utility. The Commission, of course, has the right to test the reasonablenes of such expenses. If there is an absence of data and information from which either the propriety of incurring the expense or the reasonableness of the cost can readily be determined, the Commission may require the utility to prove their propriety and reasonableness by affirmative evidence.

As was said by the Pennsylvania intermediate appellate court in *Solar Electric Co. v. Pennsylvania Public U. Com'n*:

> Charges arising out of intercompany relationships between affiliated companies should be scrutinized with care (citations omitted); and if there is an absence of data and information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such services by the servicing companies can be ascertained by the commission, allowance is properly refused. (Citations omitted.)

137 Pa. Super. Ct. 325, 373-74, 9 A. 2d 447, 473 (1939).

Although it always has the authority to do so, in the absence of contradiction or challenge by affirmative evidence offered by any party to the proceeding, the Commission has no affirmative duty to make further inquiry or investigation into the reasonableness of charges or fees paid to affiliated companies. While affiliation calls for close scrutiny, affiliation alone does not impose an additional burden of proof or require the presentation of additional evidence of reasonableness.

6. Intervenor/Residents did cross-examine the witness O'Brien but simply questioning the Company's witness is insufficient to raise the issue of harmful consequences of affiliation.

With regard to purchases from an affiliated company, Justice Lake said in *Utilities Comm. v. Telephone Co.*, "Where the purchase is made from an affiliated company, the bargaining is not at arm's length and *when the transaction is called in question*, the burden is upon the utility to show that the price it paid was reasonable." 281 N.C. 318, 346, 189 S.E. 2d 705, 723 (emphasis added).

The Kansas Supreme Court has said, "The fact that transactions take place between affiliated Companies is a matter justifying close scrutiny, but the matter should not be given any consideration in the absence of evidence of unfair dealing." *Southwestern Bell Tel. Co. v. State Corp. Com'n*, 192 Kan. 39, 83, 386 P. 2d 515, 552 (1963). The Supreme Court of Ohio, in this same context, stated:

> At the outset, it must be observed that, although the relationship of American, Western, and the company, as herein disclosed, calls for scrutiny as to whether the relationships and intercompany transactions of these companies result in unfairness, exploitation, and unconscionable gains at the expense of the public, the mere existence of such relationship cannot stand as proof of such facts. If there is such unfairness or exploitation it must be shown by evidence in the case.

City of Columbus v. Public Utilities Commission, 154 Ohio St. 107, 114, 93 N.E. 2d 693, 698 (1950).

The Commission has the authority and the *right* at all times to test the reasonableness of expenses paid to affiliated companies (or allocated by them) and to cause the petitioning utility to offer affirmative evidence of their reasonableness or risk their disapproval. The Commission has the *obligation* to test the reasonableness of such expenses whenever they are properly challenged.

[5] The burden of going forward with evidence of reasonableness and justness arises only when the Commission requires it or affirmative evidence is offered by a party to the proceeding that challenges the reasonableness of expenses allocated to it by an affiliated company on the basis that they are exorbitant, unnecessary, wasteful, extravagant, or incurred in abuse of discre-

tion or in bad faith or that such expenses exceed either the cost of the same or similar goods or services on the open market or the cost similar utilities pay to their affiliated companies for the same or similar goods or services. *See Alabama Public Service Com'n v. Southern Bell T. & T. Co.*, 253 Ala. 1, 23-24, 42 So. 2d 655, 674 (1949); *City of Norfolk v. Chesapeake & Potomac Tel. Co.*, 192 Va. 292, 64 S.E. 2d 772 (1951). *See also Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 685-86, 208 S.E. 2d 681, 690 (1974). Reasonableness may be tested, as the Court of Appeals has stated, on the basis of (1) the cost of the same services on the open market, (2) the cost similar utilities pay to their service companies, or (3) the reasonableness of the expenses incurred by the affiliated company in generating the service.

CONCLUSION

The Utilities Commission, upon adequate findings of fact, concluded that "the allocation methods actually applied were reasonable and that the allocated general and operating and maintenance expenses derived by such allocations were reasonable . . . ." Upon our review of the entire record of the proceedings before the Commission, we conclude that the Commission's findings and conclusions with respect to the Company's expenses charged to it by affiliated companies is indeed properly supported by competent, material, and substantial evidence in the record and therefore must be affirmed. The decision of the Court of Appeals is reversed and the Commission's Final Order is reinstated.

Reversed.

STATE OF NORTH CAROLINA v. EZEKIEL HALL

No. 101

(Filed 27 January 1982)

1. Kidnapping § 1— indictment—absence of allegation of lack of consent

An indictment which failed to specify that the kidnapping with which defendant was charged was without the victim's consent was not fatally defective.

2. Kidnapping § 1.2— variance between indictment and proof

There was not a fatal variance between indictment and proof where the defendant was charged in the indictment with asportation of the victim to facilitate the commission of the felony of armed robbery and where the evidence tended to show the kidnapping was also for the purpose of facilitating flight. So long as the evidence proved the purpose charged in the indictment, the fact that it also showed the kidnapping was effectuated for another purpose enumerated in G.S. 14-39(a) was immaterial and could be disregarded.

3. Assault and Battery § 14.3— assault with a deadly weapon with intent to kill inflicting serious injury—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious injury on the theory that defendant aided and abetted Johnny Hyman, the trigger man who actually shot the victim. The evidence tended to show that the defendants acted in concert to rob a service station, passing a pistol back and forth as necessary to guard the victim; that there was no discussion over what to do with the victim; one of the defendants told the victim they would drive down the road a short way and drop him off; as they drove they insulted and intimidated the victim; defendant stopped the car after checking to see that there was no traffic; when Hyman shot the victim, defendant waited for Hyman to reenter the car, and they drove away, leaving the victim to die beside the road.

4. Assault and Battery § 16.1— refusal to submit lesser offense proper

The trial court correctly refused to instruct the jury on the lesser included offense of assault with a deadly weapon inflicting serious injury where the evidence tended to show that the victim was shot in the back from a distance of a few feet, and the only legitimate inference arising from the evidence was that defendants intended to kill the victim.

5. Criminal Law § 114.2— jury instructions—no expression of opinion

The trial court did not impermissibly express an opinion in its instructions as to defendant's guilt of assault with a deadly weapon with intent to kill inflicting serious injury, as the jury properly had before it the question of the purpose of defendant's acts and whether they were undertaken with the requisite criminal intent.

6. Criminal Law § 126; Robbery § 2— variance between charge, indictment and proof—two distinct offenses of robbery—no denial of right to unanimous verdict

In a prosecution upon an indictment charging defendant with an armed robbery in which he took cash from the victim's person and cash, cigarettes and wine belonging to the service station where the victim worked, there was no merit in defendant's contention that the trial court's instruction that "the State must prove that the defendant, individually or acting together with another, took property from the person of [the victim] or in his presence" denied defendant his right to an unanimous verdict because a portion of the jurors could have found defendant guilty of robbery related to money in the victim's pocket and another portion could have found him guilty of the robbery related to the property of the service station, since the compelling inference is

that the jury found that defendant took property belonging both to defendant and to the service station, and even if the evidence showed that defendant committed two separate robberies and got a free ride for one of them, such result was favorable to him and affords no ground for complaint. G.S. 15A-1235 and Article I, section 24 of the N.C. Constitution.

Justice BRITT dissenting in part.

Chief Justice BRANCH *and Justice* EXUM *join in this dissent.*

DEFENDANT appeals from judgments of *Clark, J.*, 16 March 1981 Criminal Session, CUMBERLAND Superior Court.

Defendant was charged in a three-count bill of indictment with the following offenses on 3 July 1980 in Cumberland County: (1) the armed robbery of Thomas Lee Thompson in violation of G.S. 14-87, (2) the kidnapping of Thomas Lee Thompson in violation of G.S. 14-39, and (3) the felonious assault of Thomas Lee Thompson in violation of G.S. 14-32(a).

On 2 July 1980 at about 7 p.m., Thomas Lee Thompson arrived at Wright's Texaco Station on Gillespie Street in Fayetteville to begin his 12-hour shift. Thompson, forty-nine, had been the night attendant at Wright's for approximately two and a half months. Toward the end of his shift, around 3:30 a.m., a large late model car, perhaps a Buick, pulled up to the full service gas pumps. In it were two black men.

The full service lead-free pumps were not working, so Thompson walked out of the station to ask the driver to pull up to the self-service pumps. As he approached, he noticed the car had New York license tags and a decal on the back bore the slogan, "I'll try anything once, twice if I like it."

The men drove up to the self-service pumps and began pumping gas. Thompson left briefly to put oil in another customer's car. When he returned, eighteen dollars was registered on the pump. Thompson checked the oil but the car needed none. The man Thompson identified as defendant Hall gave Thompson a Texaco credit card and Thompson filled out the ticket, including the license number of the car: 192-JOG. Hall signed the ticket.

Thompson went back into the station. One of the two men opened the trunk of the car briefly, and they both stepped into the restroom. Hall came out in a few minutes and brought a bag

of ice into the station. "How much do I owe you for this, pardner?" he asked. Thompson replied, "About forty cents would be right." Hall handed Thompson some change and Thompson reached for the cash register.

Suddenly the other man appeared, pointing a pistol at Thompson. "This is no toy; this is a holdup." The man stepped around the counter. "Now, you do exactly what we tell you to do and you won't get hurt." Thompson obeyed.

The man with the pistol, Johnny Hyman, led Thompson out to the parked car. Hyman placed Thompson in the back seat and handed the pistol to Hall, who got behind the steering wheel. Hall guarded Thompson with the pistol while Hyman went back into the station. Hyman returned shortly and took Thompson into the station to open the cash register. Hyman emptied the register and led Thompson out to the car, where Hall again guarded him with the pistol. Hyman returned to the station and brought out fifty to sixty cartons of cigarettes and three bottles of Riunite wine. He searched Thompson and took $40 from his right front pocket.

Hall started up the car and told Thompson they would drop him off a few blocks down the street so he couldn't get to a telephone for awhile. Hall asked for directions south and Thompson directed him down a service road out I-95 south. Hall turned and looked back over the seat at Thompson. "You crackers think you're always on top, but I'll show you crackers who's on top now." Hall added an obscene proposal and persisted in making Thompson repeat, "No, sir."

Nearly five miles down the interstate, Hall pulled the car over to the side of the road and told Thompson to get out. While he was opening the door and stepping out, Hyman held Thompson's hand pinned between the front seat and the side of the car. Hyman let go, opened the front door and Thompson realized what was about to happen. Thompson leaped as far away from the car as he could. The gun went off behind him and he was slammed to the ground. Still conscious, he heard the car drive away.

After the car left, Thompson tried to get up. He then realized he could not move his legs. He lay beside the road, screaming at passing cars, and eventually the sun rose. He continued to scream

for help. Toward noon, the July sun became excruciatingly hot and he passed out. He regained consciousness during a rainstorm later that afternoon. Around 7 p.m., fifteen hours after he was shot, a deputy sheriff found him.

Thompson suffered total paralysis of his legs and loss of all effective use of his hands and arms.

Defendants were arrested on 4 July 1980 in Horry County, South Carolina. The license number of their brown Oldsmobile was 192-JOG, State of New York. A bumper sticker on the rear bumper stated: "I'll try anything once, twice if I like it." The trunk of the car was full of cigarettes. A Texaco credit card found on Hall was the one used at Wright's Texaco in the robbery. Hyman's fingerprints were found on cigarette cartons left at the service station. Hall's signed confession to the robbery was admitted at trial.

Defendant offered no evidence.

Rufus L. Edmisten, Attorney General, by Robert R. Reilly and Sarah C. Young, Assistant Attorneys General, for the State.

Adam Stein, Appellate Defender, by Malcolm R. Hunter, Jr., Assistant Appellate Defender, for defendant appellant.

HUSKINS, Justice.

[1] Defendant first assigns as error the failure of the indictment to specify that the kidnapping was without the victim's consent. We have held this term that such a contention has no merit.

> The term 'kidnap,' by itself, continues to have a precise and definite legal meaning under G.S. 14-39(a), to wit, the unlawful seizure of a person against his will. . . . In short, common sense dictates that one cannot unlawfully kidnap or unlawfully restrain another with his consent. This being so, we hold that the indictment adequately alleged the essential elements of kidnapping.
>
> . . . We hold that the instant indictment reasonably notified defendant of the crime for which he was being charged by plainly describing *who did what and when* and by indicating which statute was violated by such conduct. In such

> circumstances, it would not favor justice to allow defendant to escape merited punishment upon a minor matter of form.

State v. Sturdivant, 304 N.C. 293, 310-11, 283 S.E. 2d 719, 731 (1981) (emphasis in original).

[2] Defendant's second assignment of error is that the evidence fails to support his kidnapping conviction in that the State did not prove the theory charged in the indictment: asportation of the victim to facilitate the commission of the felony of armed robbery. Defendant contends that since the evidence shows the crime of armed robbery was complete at the time the victim was taken from the service station to a point on I-95, the kidnapping was for the purpose of facilitating flight, not for the purpose of facilitating armed robbery. Therefore, according to defendant, there is a fatal variance between indictment and proof. Defendant relies on *State v. Faircloth*, 297 N.C. 100, 253 S.E. 2d 890, *cert. denied*, 444 U.S. 874, 62 L.Ed. 2d 102, 100 S.Ct. 156 (1979), where we held that evidence which showed a kidnapping for the purpose of facilitating a rape would not support a kidnapping conviction upon an indictment charging kidnapping to facilitate flight. Defendant argues in the instant case that the evidence shows he kidnapped the victim to facilitate his escape.

Faircloth involved a factual situation similar to the instant case. The gravamen of the *Faircloth* decision was that the evidence failed to prove *the crime charged*. The purposes specified in G.S. 14-39(a) are not mutually exclusive. A single kidnapping may be for the dual purposes of using the victim as a hostage or shield and for facilitating flight, or for the purposes of facilitating the commission of a felony and doing serious bodily harm to the victim. So long as the evidence proves the purpose charged in the indictment, the fact that it also shows the kidnapping was effectuated for another purpose enumerated in G.S. 14-39(a) is immaterial and may be disregarded.

So it is here. Defendant kidnapped Thomas Lee Thompson for the purpose of facilitating the armed robbery and also for the purpose of facilitating flight. Thus the evidence proved the *crime charged* in the indictment. Although defendant contends that the crime was "complete" when Hyman pointed his pistol at Thompson and attempted to take property by this display of force, the fact that all essential elements of a crime have arisen does not

mean the crime is no longer being committed. That the crime was "complete" does not mean it was completed. *See State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563, *cert. denied*, 434 U.S. 998, 54 L.Ed. 2d 493, 98 S.Ct. 638 (1977). There being no variance between indictment and proof, the assignment of error is overruled.

[3] As his third assignment of error, defendant challenges the sufficiency of the evidence to support his conviction of assault with a deadly weapon with intent to kill inflicting serious injury. This charge was submitted on the theory that defendant aided and abetted Johnny Hyman, the trigger man who actually shot Thompson. Defendant contends the evidence fails to show he had any prior knowledge that Hyman intended to shoot Thompson.

One who actually perpetrates a crime by his own hand is guilty as a principal in the first degree. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). A person who is actually or constructively present at the scene of a crime and aids, abets, or advises in its commission, or who is present for that purpose to the knowledge of the perpetrator, is a principal in the second degree. *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980); *State v. Brown*, 300 N.C. 41, 265 S.E. 2d 191 (1980). The communication of intent to aid if needed may be inferred from the aider's actions and from his relation to the actual perpetrator. *State v. Hargett*, 255 N.C. 412, 121 S.E. 2d 589 (1961).

From the evidence adduced at trial, the jury very easily could have inferred that defendant had the requisite criminal intent and that such intent was communicated to Hyman, the principal in the first degree. The evidence strongly indicates that these two roving robbers left New York with a loaded .38 caliber pistol and began wending their way south. At some point, they came into possession of a credit card bearing the name of Robert E. Clowes, which they used at least once to purchase gas. The two conferred over whether Wright's Texaco "looked like a good hit." They acted in concert to rob the station, passing the pistol back and forth as necessary to guard Thompson. There was no discussion over what to do with Thompson; one of the defendants merely told him they'd drive down the road a short way and drop him off. As Hall drove, he insulted and intimidated Thompson. Hall stopped the car after checking to see there was no traffic nearby. When Hyman shot Thompson, Hall waited for Hyman to

reenter the car, and they drove away together, leaving Thompson to die beside the road. It is ludicrous to say that the jury could not reasonably infer that Hall knew Hyman intended to shoot the victim. The evidence overwhelmingly supports the inference that Hall *did know* Hyman's intentions and acted in concert with him at all times. The felonious assault charge against Hall was properly submitted to the jury. *Compare State v. Birchfield*, 235 N.C. 410, 70 S.E. 2d 5 (1952).

[4] Defendant's fourth assignment of error stems from the trial court's refusal to instruct the jury on the lesser included offense of assault with a deadly weapon inflicting serious injury.

A trial court must submit a defendant's guilt of a lesser included offense of the crime charged in the bill of indictment when and only when there is evidence to sustain a verdict of guilty of the lesser offense. *State v. Jones*, 304 N.C. 323, 283 S.E. 2d 483 (1981); *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). When the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element, no instruction on a lesser included offense is required. *State v. Drumgold*, 297 N.C. 267, 254 S.E. 2d 531 (1979).

The State's evidence in this case tends to show Hyman shot Thompson in the back from a distance of a few feet. The only legitimate inference arising from the evidence is that Hyman intended to kill Thompson. Therefore, were the same evidence adduced at the trial of Hyman, no instruction on the lesser included offense of assault with a deadly weapon inflicting serious injury would be necessary or proper.

Although Hall incredibly contends he had no advance notice of Hyman's intentions, this is not determinative of the question of his guilt as an aider or abettor. Hall was present at the scene and assisting Hyman as necessary. From Hall's aid in perpetrating the robbery and continued association and assistance after the shooting, his intent to aid during the shooting, and communication of such intent to Hyman, may be inferred. *State v. Hargett*, 255 N.C. 412, 121 S.E. 2d 589 (1961). This satisfies the requisites of Hall's guilt as an aider or abettor. *State v. Brown*, 300 N.C. 41, 265 S.E. 2d 191 (1980). On the evidence before us here, the court

properly refused to submit, and instruct on, the lesser included offense. This assignment is overruled.

[5] Defendant's fifth assignment of error is that the trial court impermissibly expressed an opinion as to defendant's guilt of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant contends the court's instructions took from the jury the factual determination whether defendant's presence at the location of the assault and his assistance was for the purpose of aiding Hyman in the commission of the assault. This argument is unfounded. The instructions stated "and that in so doing, Ezekiel Hall knowingly encouraged and aided Johnny Hyman," and required a finding of "communicat[ion] to [the principal of] his intention to assist" in the commission of the crime. Thus the jury properly had before it the question of the purpose of Hall's acts and whether they were undertaken with the requisite criminal intent. The jury's decision will not be disturbed.

[6] Finally, defendant contends he was denied his right to a unanimous verdict in violation of G.S. 15A-1235 and Article I, section 24 of the Constitution of North Carolina.

G.S. 15A-1235(a) requires the trial judge, before the jury retires for deliberation, to instruct the jury that in order to return a verdict all twelve jurors must agree to a verdict of guilty or not guilty.

Article I, section 24 of our Constitution provides that no person shall be convicted of any crime "but by the unanimous verdict of a jury in open court."

Defendant was tried upon a three-count bill of indictment charging armed robbery, kidnapping and felonious assault, in that order. The first count charging armed robbery reads in pertinent part as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 3rd day of July, 1980, in Cumberland County Ezekiel Hall unlawfully and wilfully did feloniously having in his possession and with the use and threatened use of firearms, . . . to wit: a gun; whereby the life of Thomas Lee Thompson was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal and carry away approximately Forty Dollars

($40.00) in United States Currency, the personal property of Thomas Lee Thompson; Sixty-two (62) cartons of cigarettes including Kools, Pall Malls and Winstons; One Hundred Eighty-Nine Dollars ($189.00) in United States Currency; three (3) bottles, one-fifth (1/5) size, Riunite red wine, the property of William Aderitte Wright, doing business as Wright's Texaco Company, a sole proprietorship, having a total value of Five Hundred Five Dollars and Twelve cents ($505.12), from the presence, person and possession of Thomas Lee Thompson; in violation of North Carolina General Statutes Section 14-87.

With respect to the crime of armed robbery, the trial judge instructed the jury that if two or more persons act together with a common intent to commit a robbery with a firearm, then each is responsible for the acts of the other done in the commission of the robbery. The trial judge then instructed the jury, among other things, that "the State must prove that the defendant, individually or acting together with another, took property from the person of Thomas Thompson or in his presence." Defendant contends this was an erroneous instruction "because the indictment charges and the State's proof tends to show the commission of two distinct offenses of robbery with a firearm. The trial court's charge instructed the jury that they could return a verdict of guilty if they found that the defendant committed either of the distinct robbery offenses without requiring that all twelve agree as to the guilt on at least one of the offenses. . . . According to the testimony of Thompson, Hyman took $40 in cash from Thompson's pocket, *i.e.*, from Thompson's person, and cash, cigarettes and wine from the station, *i.e.*, property taken from Thompson's presence which belonged to the business where he worked."

Defendant now contends that under the armed robbery count in the bill of indictment and the evidence offered by the State, two armed robberies occurred—one from Thompson's person when the robbers took $40 in cash and the other from Thompson's presence when the robbers took cash, cigarettes and wine from the Texaco station. Defendant says the instruction as given left open the possibility "that six of the jurors found defendant guilty of the robbery related to the money in Thompson's pocket and six of them found defendant guilty of the robbery related to the prop-

erty of the service station." Hence defendant's ingenious argument that submission of the two offenses of armed robbery deprived him of his right to a unanimous verdict and to due process as well. We find the assignment imaginative but wholly unpersuasive.

In his final mandate to the jury, the trial judge instructed that "a verdict is not a verdict until all twelve jurors agree unanimously as to what your decision shall be." This complied with G.S. 15A-1235(a). The jury unanimously convicted defendant of armed robbery and that verdict must stand because the evidence overwhelmingly supports it and nothing indicates any confusion, misunderstanding or disagreement among the jurors with respect to the unanimity of the verdict. The compelling inference is that, rather than reaching a verdict based upon partial agreement that Hall took $40 from Thompson's pocket and partial agreement that he took cash, cigarettes and wine from the Texaco station, the jury unanimously agreed that he did both.

We held in *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974), that the gunpoint taking of the employer's property from two store clerks is a single offense of armed robbery. In *Potter* we expressed no opinion as to a factual situation in which, in addition to the theft of the employer's property, the robber takes money or property of an employee. *Ibid.* at 253, 204 S.E. 2d at 659.

The Court of Appeals held in *State v. Johnson*, 23 N.C. App. 52, 208 S.E. 2d 206, *cert. denied*, 286 N.C. 339, 210 S.E. 2d 59 (1974), that the armed robbery of two persons at the same time and place in which the money or property of each victim was taken constitutes two armed robberies and the accused may be separately prosecuted and punished for each.

In *State v. Gibbs*, 29 N.C. App. 647, 225 S.E. 2d 837 (1976), the evidence showed that one defendant forced a store clerk at knife point to a back room in the store where he took her pocketbook and then returned her into the store where he took the store's money while a codefendant held a second clerk on the floor at gunpoint. Held: Defendants were properly convicted of two *separate* counts of armed robbery.

In *State v. Sellars*, 52 N.C. App. 380, 278 S.E. 2d 907 (1981), the bill of indictment charged defendant with armed robbery of

the prosecuting witness and also with taking money from the Village Inn Motel where the witness worked, all in a single count. The Court of Appeals held that defendant was charged with only one offense, the armed robbery of the prosecuting witness, and the fact that in the robbery defendant obtained money both from the prosecuting witness and the motel where she worked did not create separate offenses.

The facts in the case before us are similar to the facts in *Sellars*, but we purposely express no opinion as to the correctness of the *Sellars* decision that only one robbery occurred. The bills of indictment here and in *Sellars* may, or may not, be similar. Here, regardless of whether defendant committed one armed robbery or two, the evidence amply sustains a conviction for either or both. Whether the verdict in this case was (1) a conviction for robbing Thomas Thompson of $40, or (2) a conviction for taking money and other property of Wright's Texaco Station from the presence of Thomas Thompson who was in possession of those goods and acting as the owner's alter ego, or (3) a conviction for both, is entirely immaterial. It is true that the bill of indictment does not contain separate counts charging separate armed robberies as required by G.S. 15A-924(a)(2); and the trial court charged the jury in the singular while narrating the facts showing the robbery of Thompson of $40 of his own funds and also the taking of money and other property belonging to Wright's Texaco Station. Even so, if it be conceded that defendant committed two armed robberies as argued in his brief and got a free ride for one of them, it was a result favorable to him and affords no ground for complaint.

For the reasons stated the verdicts and judgments upon the three counts in the bill of indictment must be upheld.

No error.

Justice BRITT dissenting in part.

I respectfully dissent from that part of the majority opinion concluding that there was no error in defendant's conviction of the offense of kidnapping. In my opinion, there was a fatal variance between the pleading and the proof on the kidnapping count.

The second count in the bill of indictment reads as follows:

AND THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 3rd day of July, 1980, in Cumberland County Ezekiel Hall unlawfully and wilfully did feloniously kidnap Thomas Lee Thompson, a person, who had attained the age of sixteen (16) years, by unlawfully removing him from one place in Cumberland County to another for the purpose of *facilitating the commission of a felony, to wit: Armed Robbery.* The person kidnapped was seriously injured during the kidnapping; in violation of North Carolina General Statutes Section 14-39; . . . . (Emphasis added.)

G.S. 14-39, our kidnapping statute, provides in pertinent part:

"Kidnapping.—(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person * * * shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person."

The evidence in the case at hand showed that defendant and his accomplice robbed Mr. Thompson at the Wright's Texaco Station on Gillespie Street in Fayetteville; that thereafter, at gunpoint, they forced Mr. Thompson into the automobile they were driving; that they then transported their victim some 5 miles to a point on I-95 near Rockfish Creek; that they then stopped the car and ordered the victim to get out; that after Mr. Thompson got out of the car, the accomplice shot him in his back; and that the two robbers then drove away.

With respect to the kidnapping charge, the trial judge instructed the jury as follows:

Now, in the second count, the defendant has been charged with the offense of kidnapping. Now I charge that for you to find the defendant guilty of kidnapping, the State must prove to you four things beyond a reasonable doubt.

First, the State must prove that the defendant unlawfully, that is, without legal justification or excuse, removed Thomas Lee Thompson from one place to another.

Secondly, the State must prove that Thomas Lee Thompson did not consent to this removal.

Now, members of the jury, the consent that is referred to here means free and voluntary consent. Consent which is obtained or induced by fear, violence, or threats of violence is not consent in law.

And, third, the State must prove that the defendant *removed Thomas Lee Thompson for the purpose of facilitating his commission of a robbery with a firearm.* (Emphasis ours.)

And, fourth, the State must prove that the removal was a separate complete act independent of and apart from the offense of robbery with a firearm.

* * *

So it is, that on the count wherein the defendant is charged with the offense of kidnapping, that I instruct you that if you find from the evidence in this case beyond a reasonable doubt that on or about July 3, 1980, the defendant, Ezekiel Hall, acting either by himself or together with Johnny Hyman, unlawfully removed, that is, carried Thomas Lee Thompson from Wright's Texaco station on Gillespie Street in the city of Fayetteville, a distance of some four or five miles to a location on Interstate 95 near Rockfish Creek; and that Mr. Thompson did not consent to this removal; *and that this was done for the purpose of facilitating the defendant's commission of a robbery with a firearm of Thomas Lee Thompson*; and that this removal was a separate complete act independent of and apart from the robbery with a firearm, I say, if you so find as to these things, it would then be your duty to return a verdict of guilty of kidnapping. (Emphasis ours.)

> However, if you do not so find or if you have a reasonable doubt as to any one or more of these things, it would then be your duty to return a verdict of not guilty as to the charge of kidnapping.

I am unable to reconcile the holding of the majority in this case with our decision in *State v. Faircloth*, 297 N.C. 100, 253 S.E. 2d 890, *cert. denied*, 44 U.S. 874, 62 L.Ed. 2d 102, 100 S.Ct. 156 (1979). In that case the indictment charged that the defendant kidnapped the victim by "removing her from one place to another *for the purpose of facilitating flight* following the commission of the felony of rape." The evidence showed that the defendant, with a knife in his hand, entered the victim's car, made her move from the driver's seat to the passenger's seat, drove the car several miles to a remote area, and forced the victim to have sexual intercourse with him.

In a unanimous decision we held in *Faircloth* that there was a fatal variance between the indictment and the proof and that the trial court erred in denying the defendant's motion to dismiss the kidnapping charge. We noted that if the defendant had been tried on an indictment alleging that he restrained or removed the victim from one place to another for the purpose of facilitating the commission of the felony of rape, the conviction could be upheld. "But, the evidence does not support the charge as laid in the indictment."

In *State v. Law*, 227 N.C. 103, 40 S.E. 2d 699 (1946), in an opinion by Chief Justice Stacy, we find:

> The question of variance may be raised by demurrer to the evidence or by motion to nonsuit. "It is based on the assertion, not that there is no *proof* of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed. *In other words, the proof does not fit the allegation, and, therefore, leaves the latter without any evidence to sustain it.* It challenges the right of the State to a verdict upon its own showing, and asks that the court, without submitting the case to the jury, decide, as matter of law, that the State has failed in its proof"—Walker, J., in *S. v. Gibson*, 169 N.C., 318, 85 S.E., 7. To like effect are the decisions in *S. v. Weinstein*, 224 N.C., 645, 31 S.E. (2d), 920; *S. v. Jackson*, 218 N.C., 373, 11

S.E. (2d), 149; *S. v. Harris*, 195 N.C., 306, 141 S.E., 883; *S. v. Harbert*, 185 N.C., 760, 118 S.E., 6; *S. v. Nunley*, 224 N.C., 96, 29 S.E. (2d), 17; *S. v. Davis*, 150 N.C., 851, 64 S.E., 498; *S. v. Hill*, 79 N.C., 656. 227 N.C. at 104, 105. (Emphasis ours.)

If defendant in the case at hand had been tried on an indictment alleging that he restrained or removed Mr. Thompson from one place to another for the purpose of facilitating flight following the commission of the felony of armed robbery, I would vote to uphold the conviction. Unfortunately, the evidence does not support the charge as laid in the indictment.

Chief Justice BRANCH and Justice EXUM join in this dissent.

IN THE MATTER OF: MARIO LOPEZ STEDMAN

No. 35

(Filed 27 January 1982)

1. Infants § 11 — jurisdiction of juvenile delinquent — exclusive in district court

Under both the old juvenile code and under the new juvenile code, Articles 41 through 57 of Chapter 7A of the General Statutes, the district court had exclusive original jurisdiction over respondent who was 15 years 9 months and 17 days old when the offenses described in four juvenile petitions were committed. For purposes of determining jurisdiction, the age of the juvenile at the time of the alleged offenses governs, G.S. 7A-523, and once the district court obtains jurisdiction over a juvenile, that jurisdiction continues until terminated by order of the court or until the juvenile reaches his eighteenth birthday. G.S. 7A-524.

2. Infants § 18 — juvenile proceedings — nontestimonial indentification order — fingerprinting — admissibility

Where a juvenile was charged with kidnapping, armed robbery, first degree rape and felonious assault, two nontestimonial identification orders issued pursuant to G.S. 15A-502(c) and G.S. 7A-596 were in all respects lawful and valid as there was probable cause to believe that (1) the offenses described in the juvenile petitions had been committed and would be punishable by imprisonment for more than two years if committed by an adult, (2) there were reasonable grounds to suspect that respondent committed them, and (3) taking respondent's fingerprints would be of material aid in determining whether respondent committed the offenses described. The three requisites specified in G.S. 7A-598 were thus satisfied.

3. Criminal Law § 84; Infants § 18— fingerprints not tainted under "fruit of poisonous tree"

Evidence of a juvenile's fingerprints which were taken pursuant to an order based on information obtained independently of an earlier unlawful fingerprinting was properly admissible and not tainted under the "fruit of the poisonous tree" doctrine. Further, the amendment of G.S. 15A-502(c) which allows fingerprinting of juveniles pursuant to G.S. 7A-596 constitutes a narrowing of an exclusionary rule of evidence, and the fact that G.S. 15A-502(c) was amended and G.S. 7A-596 was enacted after the alleged commission of the offenses set out in the juvenile petitions did not preclude the admission of fingerprints properly taken after the effective date of the amendment even though respondent's fingerprints could not legally have been taken at the time of the offense.

Justices EXUM and CARLTON concur in part and dissent in part.

ON certiorari to review an order by *Allen (J. B., Jr.), J.*, entered 16 February 1981 in ALAMANCE District Court, allowing respondent's motion to suppress fingerprint evidence and dismiss four juvenile petitions alleging the felonious offenses of kidnapping, rape, armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury.

Mario Lopez Stedman was born 16 February 1963 and was fifteen years, nine months and seventeen days of age on 3 December 1978, the date of the alleged offenses set forth in the juvenile petitions.

The four petitions alleged that Mario Lopez Stedman was a delinquent child as defined by G.S. 7A-278(2), now G.S. 7A-517(12), by reason of having committed the following offenses: (1) the kidnapping of Karen Farris on or about 3 December 1978, in violation of G.S. 14-39; (2) armed robbery of Karen Farris on the same day in violation of G.S. 14-87; (3) first degree rape of Karen Farris on the same day in violation of former G.S. 14-21; and (4) felonious assault on Karen Farris on the same day in violation of G.S. 14-32(a), by shooting her four times with a .25 caliber pistol with the intent to kill inflicting serious bodily injury.

The State's evidence at the hearing before Judge Allen tends to show the matters narrated in the following numbered paragraphs:

1. Karen Farris was a nineteen-year-old desk clerk at the Village Inn Motel in Graham, North Carolina. On 3 December

1978, she worked the second shift. At approximately 9 p.m. two black males entered the Village Inn Motel lobby, indicated they were having car trouble and asked to use the telephone. Don King, an employee at the motel, gave them a telephone number of a wrecker service to call for assistance. The two men left and returned at approximately 9:30 p.m. when Karen Farris was alone behind the counter in the motel lobby near the cash register. One of the men, whom she now recognizes as Kelvin Sellars, pointed a pistol at her and demanded the money from the cash register. At his direction she removed about $200 in cash and gave it to the robber. The other man picked up a grey metal box underneath the counter near the cash register, opened it but found nothing to take. This second man did not say anything and she did not see him touch anything except the metal box. Karen Farris has not been able to identify the second man, but described him as a tall, slender black male with short hair and medium skin color consistent with the appearance of Mario Lopez Stedman. She said he was "young, he was real jumpy and kind of hyperactive about the whole thing, he thought it was a game. He was right much younger than Sellars was."

2. When the robbers left, they forced Karen Farris to accompany them in their vehicle. They took her to a remote area of Alamance County about twelve miles from the Village Inn Motel, raped her, and shot her at close range with a .25 caliber pistol. After shooting her twice, the men started to leave but discovered she was still alive. As she begged for her life, they shot her twice more, once in the face. They left her for dead.

3. SBI Agent Sam Pennica went to the Village Inn Motel that evening and also drove to a location on a dirt road off Highway No. 62 approximately twelve miles from the Village Inn Motel. On that dirt road at the point indicated he found a small red wallet with identifiction bearing the name of Karen Farris and found certain other items, including a white slip and a bra. At the Village Inn Motel, Agent Pennica obtained latent fingerprint impressions from various areas of the lobby, counter and cash register. He took four latent fingerprint impressions from the above described grey metal box. Thereafter, SBI Agent Pennica located a 1963 blue Plymouth car parked in Yanceyville, North Carolina. Highway No. 62 runs directly into Yanceyville from the area of the rape scene. On 12 July 1979, Karen Farris identified

this 1963 Plymouth vehicle as the car in which she was raped. SBI Agent Pennica obtained eighteen latent fingerprint impressions from the vehicle and delivered them to SBI Agent Layton for comparison purposes.

4. On 6 August 1979, when Mario Lopez Stedman was sixteen years, five months and twenty-one days old, he was indicted in Alamance Superior Court for kidnapping, armed robbery, first degree rape and felonious assault of Karen Farris. Under those bills of indictment he was arrested on or about 14 September 1979 and fingerprinted pursuant to the procedures normally utilized for adults who are indicted by the grand jury.

5. On 30 October 1979, Judge Donald L. Smith, presiding over Alamance Superior Court, quashed the bills of indictment "for failure of the State to demonstrate that the superior court had proper jurisdiction over said offenses."

6. Stedman was detained under new juvenile petitions approved 30 October 1979 and filed 2 November 1979 alleging the same offenses contained in the bills of indictment. These juvenile petitions were dismissed by District Judge Thomas D. Cooper on 19 November 1979 upon a finding that the fingerprint evidence had been illegally obtained due to the fact that Stedman was fifteen years of age at the time the alleged crimes were committed. Therefore, due to Stedman's age, Judge Cooper found he was illegally fingerprinted pursuant to bills of indictment issuing out of the superior court "without fulfilling the requirements of [former] G.S. 7A-280 and G.S. 15A-502."

7. On 26 February 1980, Judge Thomas D. Cooper issued a nontestimonial identification order pursuant to G.S. 7A-596, which had been enacted as part of the North Carolina Juvenile Code effective 1 January 1980, requiring the fingerprinting and palm printing of Mario Lopez Stedman. When the order was served on Stedman, he fled the state and was eventually returned to North Carolina from Washington, D.C. on 14 January 1981 to show cause why he should not be held in contempt for failure to comply with Judge Cooper's order.

8. On 9 February 1981, Superior Court Judge McLelland issued a second nontestimonial identification order as authorized by G.S. 7A-596 and pursuant to that order the fingerprints of

Mario Lopez Stedman were taken on 12 February 1981 by SBI Agent Pennica in the presence of Stedman's attorney. These prints were delivered to SBI Agent Layton for comparison with the latent prints taken from the metal box at the Village Inn Motel and the latent prints taken from the 1963 Plymouth.

9. When SBI Agent Layton compared the latent fingerprints taken from the metal box and from the 1963 Plymouth automobile with the inked fingerprint impressions of Mario Lopez Stedman taken by SBI Agent Pennica pursuant to the non-testimonial identification order of Judge McLelland, it was the opinion of Agent Layton that one of the prints lifted from the metal box was the right thumbprint of Stedman and that six of the prints lifted from the 1963 Plymouth were prints of Mario Lopez Stedman.

The four juvenile petitions were refiled and came on for hearing before Judge Allen at the 16 February 1981 Juvenile Session of Alamance District Court. The State requested that the proceedings be treated as a probable cause hearing on the felony petitions and that Mario Lopez Stedman be bound over, *i.e.*, that the charges be transferred, to the Superior Court of Alamance for trial as in case of adults.

Stedman objected to the admission of the latent fingerprint impressions lifted from the grey metal box at the scene of the crime and lifted from the 1963 Plymouth and the comparison of same with his inked fingerprints taken by authority of the nontestimonial identification order issued by Judge McLelland on 9 February 1981. The motion to suppress such evidence was allowed. Judge Allen thereupon dismissed the petitions on the ground that the remainder of the evidence offered by the State was insufficient to support a finding of probable cause or to permit the charges to be transferred to the superior court for disposition as in case of adults. The State gave notice of appeal in open court and later petitioned this Court for certiorari to review that order. We allowed the petition, thus bypassing the Court of Appeals. The questions involved are now before this Court for initial appellate review.

Rufus L. Edmisten, Attorney General, by Donald W. Stephens, Assistant Attorney General, for the State, petitioner appellant.

Donnell S. Kelly, attorney for Mario Lopez Stedman, respondent appellee.

HUSKINS, Justice.

[1] On 3 December 1978 when the offenses described in the four juvenile petitions were committed, Mario Lopez Stedman was fifteen years, nine months and seventeen days old, and Article 23 of Chapter 7A of the General Statutes (G.S. 7A-277 through 7A-289), as contained in Volume 1B (replacement 1969) was in effect.

Effective 1 January 1980, Article 23 of Chapter 7A of the General Statutes (G.S. 7A-277 through 7A-289) was repealed by 1979 Session Laws, Chapter 815, section 1, and the North Carolina Juvenile Code, which includes Articles 41 through 57 of Chapter 7A of the General Statutes (Volume 1B, replacement 1981), was enacted in lieu thereof.

Former G.S. 7A-279 reads in pertinent part as follows:

> The court shall have exclusive, original jurisdiction over any case involving a child . . . who is alleged to be delinquent, . . . except as otherwise provided. This jurisdiction shall be exercised solely by the district judge.

Former G.S. 7A-280 reads in pertinent part as follows:

> *Felony cases.*—If a child who has reached his fourteenth birthday is alleged to have committed an offense which constitutes a felony, the judge shall conduct a preliminary hearing to determine probable cause after notice to the parties as provided by this article. Such hearing shall provide due process of law and fair treatment to the child, including the right to counsel, privately retained or at State expense if indigent.
>
> If the judge finds probable cause, he may proceed to hear the case under the procedures established by this article, or if the judge finds that the needs of the child or the best interest of the State will be served, the judge may transfer the case to the superior court division for trial as in

the case of adults. The child's attorney shall have a right to examine any court or probation records considered by the court in exercising its discretion to transfer the case, and the order of transfer shall specify the reasons for transfer.

If the alleged felony constitutes a capital offense and the judge finds probable cause, the judge shall transfer the case to the superior court division for trial as in the case of adults.

Likewise, the new Juvenile Code gives the district court exclusive original jurisdiction over any case involving a juvenile alleged to be delinquent. For purposes of determining jurisdiction, the age of the juvenile at the time of the alleged offense governs. G.S. 7A-523. Once the district court obtains jurisdiction over a juvenile, that jurisdiction continues until terminated by order of the court or *until the juvenile reaches his eighteenth birthday.* G.S. 7A-524.

Thus, under both the old law and the new, it is clear that on 3 December 1978 the district court had exclusive original jurisdiction over the cases involving Mario Lopez Stedman. Since the cases had not been transferred to the superior court for trial as in case of adults, the bills of indictment returned by the Alamance Grand Jury on 6 August 1979 were void for lack of jurisdiction; and Judge Donald L. Smith, presiding over Alamance Superior Court, properly quashed the bills of indictment on 30 October 1979.

[2] We note at this point that G.S. 15A-502, as written and in effect on 3 December 1978, read in pertinent part as follows:

(a) A person charged with the commission of a felony or a misdemeanor may be photographed and his fingerprints may be taken for law-enforcement records only when he has been:

(1) Arrested or committed to a detention facility, or

(2) Committed to imprisonment upon conviction of a crime, or

(3) Convicted of a felony.

(b) This section does not authorize the taking of photographs or fingerprints when the offense charged is a

misdemeanor under Chapter 20 of the General Statutes, 'Motor Vehicles,' for which the penalty authorized does not exceed a fine of five hundred dollars ($500.00), imprisonment for six months, or both.

(c) *This section does not authorize the taking of photographs or fingerprints of a 'child' as defined for the purposes of G.S. 7A-278(2), unless the case has been transferred to the superior court division pursuant to G.S. 7A-280.* [Emphasis added.]

(d) This section does not prevent the taking of photographs, moving pictures, video or sound recordings, fingerprints, or the like to show a condition of intoxication or for other evidentiary use.

(e) Fingerprints or photographs taken pursuant to subsection (a) may be forwarded to the State Bureau of Investigation, the Federal Bureau of Investigation, or other law-enforcement agencies.

Effective 8 June 1979 the General Assembly amended G.S. 15A-502(c) above quoted to read as follows: "This section does not authorize the taking of photographs or fingerprints of a juvenile except under G.S. 7A-596 through 7A-627." *See* Chapter 850 of the 1979 Session Laws.

G.S. 7A-596 provides in pertinent part:

Nontestimonial identification procedures shall not be conducted on any juvenile without a court order issued pursuant to this Article unless the juvenile has been transferred to superior court for trial as an adult in which case procedures applicable to adults as set out in Articles 14 and 23 of Chapter 15A shall apply. A nontestimonial identification order authorized by this Article may be issued by any judge of the district court or of the superior court upon request of a prosecutor. As used in this Article, 'nontestimonial identification' means identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar identification procedures requiring the presence of a juvenile.

A request for such nontestimonial identification order may be made before or after a juvenile is taken into custody and prior to the adjudicatory hearing. G.S. 7A-597.

A nontestimonial identification order may issue only upon sworn affidavit or affidavits establishing the following grounds: (1) that there is probable cause to believe that an offense has been committed which if committed by an adult would be punishable by imprisonment for more than two years; and (2) that there are reasonable grounds to suspect that the juvenile named or described in the affidavit committed the offense; and (3) that the results of specific nontestimonial identification procedures will be of material aid in determining whether the juvenile named in the affidavit committed the offense. G.S. 7A-598. When it is shown that the specified grounds exist the judge may issue the order following the same procedure as in case of adults. G.S. 7A-599. After a notice and hearing, if the court finds probable cause, it may transfer jurisdiction over a juvenile fourteen years of age or older to superior court if the juvenile was fourteen years of age or older at the time he allegedly committed an offense which would be a felony if committed by an adult. G.S. 7A-608.

We note parenthetically that a juvenile may request that nontestimonial identification procedures be conducted upon himself. If it appears that the results of such procedures will be of material aid to the juvenile's defense, the judge to whom the request is directed must order the State to conduct the identification procedures. *See* G.S. 7A-600.

It now becomes our duty to apply the foregoing legal principles to the facts in the case before us.

G.S. 15A-502(c) as amended by Chapter 850 of the 1979 Session Laws, effective 8 June 1979, permits the taking of fingerprints of a juvenile under G.S. 7A-596 through 7A-627. The procedure for fingerprinting a juvenile is thereby changed. Such fingerprinting is specifically authorized before the case is transferred to the superior court when a district or superior court judge issues a nontestimonial identification order upon sworn affidavits which establish the three grounds enumerated in G.S. 7A-598.

We hold that the requisites of G.S. 7A-598 were satisfied as a result of the affidavit of SBI Agent Pennica establishing the following:

1. On 3 December 1978 between 9 and 10 p.m., two black males entered the office of the Village Inn Motel, robbed Karen Farris at gunpoint, abducted her, took her fourteen and one-half miles north of Graham off Highway 62, raped her, shot her four times with a .25 caliber pistol, and left her for dead.

2. The two black males were driving a 1963 light blue Plymouth which the victim had positively identified as the automobile in which she was raped.

3. Miss Farris had described both black males and Mario Lopez Stedman fit the description of one of them.

4. Kelvin Wendell Sellars was positively identified as one of the black males who committed the offenses upon her.

5. Kelvin Wendell Sellars had testified under oath at his own trial that at 7:15 p.m. on the night of 3 December 1978 he allowed Mario Stedman and another black male to use the 1963 light blue Plymouth. Stedman returned the vehicle late in the evening of 3 December 1978, was in possession of it and had exclusive custody and control over it during the time the crimes were allegedly committed.

6. During the Sellars trial a witness named John Wiley had testified that he was present when Sellars allowed Mario Lopez Stedman and another black male to use the 1963 blue Plymouth. The vehicle was taken by Stedman around 7 p.m. and returned while Wiley was in the presence of Sellars that same evening about 10 p.m.

7. The affiant had been told by a girl named Debra Arnette Gwyn that she had taken Mario and DeCarlo Stedman to the bus station in Danville, Virginia to get a bus to New Jersey on 11 December 1978, the day after Sellars had been arrested. Miss Gwyn stated she heard Mario tell DeCarlo they needed money to get away and that she herself gave them $76. Miss Gwyn had further stated that she saw Mario with a small handgun at his residence on 11 December 1978 at which time Mario stated that "if the law came to his house he was going to shoot them."

8. The affiant had heard Karen Farris state under oath during a hearing in juvenile court that Mario Stedman resembled one of the men who attacked her on the night of 3 December 1978, but she was not positively sure that Stedman was one of the men; she was positive about the other man.

9. During the investigation of these offenses, officers took latent fingerprint impressions from the 1963 blue Plymouth and from the metal cash box located under the counter near the cash register at the Village Inn Motel where it is likely the perpetrators of these crimes left fingerprint impressions.

The affidavit before Judge McLelland was clearly sufficient to establish probable cause to believe that the offenses described in the juvenile petitions had been committed and would be punishable by imprisonment for more than two years if committed by an adult; that there were reasonable grounds to suspect that Mario Lopez Stedman committed them; and that taking Stedman's fingerprints would be of material aid in determining whether Stedman committed the offenses described. The three requisites specified in G.S. 7A-598 were thus satisfied.

As a matter of law, upon the establishment of the grounds enumerated in G.S. 7A-598, the nontestimonial identification order issued by Judge Cooper on 26 February 1980 pursuant to G.S. 15A-502(c) and G.S. 7A-596 was in all respects valid. Likewise, the nontestimonial identification order issued by Judge McLelland on 9 February 1981 was in all respects lawful. Therefore, the fingerprints of Mario Lopez Stedman taken pursuant to the latter order were legally obtained. Evidence of the fingerprints of Stedman taken on 12 February 1981 and the comparison of these prints with the latent fingerprints taken from the metal box at the crime scene and from the 1963 Plymouth automobile was competent and should have been considered at the 16 February 1981 hearing.

[3] Judge Allen suppressed such evidence on the ground that, since Stedman's fingerprints had been unlawfully obtained initially, these lawfully obtained fingerprints were tainted under the "fruit of the poisonous tree" doctrine enunciated in *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963). That doctrine, firmly rooted in the principle of the "exclusionary rule" prohibiting admission of evidence obtained by unlawful or

improper activity by the government, forbids the use of any evidence whose genesis can be traced directly or indirectly to an original invalid search or other illegal action by authorities. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L.Ed. 319, 40 S.Ct. 182 (1920). Not only the evidence initially wrongfully obtained, but its fruits—evidence resulting from the original wrongdoing—must be suppressed. *Alderman v. United States*, 394 U.S. 165, 22 L.Ed. 2d 176, 89 S.Ct. 961 (1969).

A prominent exception to the "fruit of the poisonous tree" doctrine is the "independent discovery" rule. If the evidence would likely have been discovered or obtained by valid means independent of the wrongdoing, the evidence is not inadmissible, even though under the particular circumstances it first came to authorities' attention as a result of some wrongful governmental activity. *Nardone v. United States*, 308 U.S. 338, 84 L.Ed. 307, 60 S.Ct. 266 (1939).

Stedman's fingerprints were taken pursuant to an order based on information obtained independently of, and not tainted by, the fact that Stedman was unlawfully fingerprinted on or about 14 September 1979 following his arrest under invalid bills of indictment. *See United States v. Crews*, 445 U.S. 463, 474-77, 63 L.Ed. 2d 537, 548-49, 100 S.Ct. 1244, 1251-53 (1980). The order was issued solely upon SBI Agent Pennica's affidavit which did not mention any previous fingerprinting of Stedman. The record does not indicate whether these earlier fingerprints were ever compared with the latent prints taken from the grey metal box and the 1963 Plymouth. Assuming, *arguendo*, that the prints matched and this evidence played a role in the State's determination to seek the nontestimonial identification order, the motivations of the prosecution are not germane to our inquiry. The question before us is whether the evidence the State presented to Judge McLelland satisfied the requisites of G.S. 7A-598; speculation regarding the factors which prompted the State to seek the nontestimonial identification order is irrelevant. Judge Allen erred in suppressing the evidence as "fruit of the poisonous tree."

The fact that the fingerprints could not legally have been taken at the time of the offense does not preclude their admission in this case. The amendment of G.S. 15A-502(c) to allow fingerprinting of juveniles pursuant to G.S. 7A-596 constitutes a nar-

rowing of an exclusionary rule of evidence. The fact that G.S. 15A-502(c) was amended and G.S. 7A-596 was enacted after the alleged commission of the offenses set out in the juvenile petitions is of no consequence.

G.S. 15A-502(c) and G.S. 7A-596 are procedural statutes. A change in the evidentiary or procedural law between the time of the offense and the time of trial does not preclude the State from utilizing the new procedure even though at the time of the offense it was unavailable. *See Dobbert v. Florida*, 432 U.S. 282, 53 L.Ed. 2d 344, 97 S.Ct. 2290 (1977); *Beazell v. Ohio*, 269 U.S. 167, 70 L.Ed. 216, 46 S.Ct. 68 (1925); *Thompson v. Missouri*, 171 U.S. 380, 43 L.Ed. 204, 18 S.Ct. 922 (1898); *Hopt v. Utah*, 110 U.S. 574, 28 L.Ed. 262, 4 S.Ct. 202 (1884).

In *Beazell* the Court said:

> [T]here may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition [against *ex post facto* laws]. . . . [S]tatutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited.

269 U.S. at 170, 70 L.Ed. at 218, 46 S.Ct. at 69.

Applying these legal principles, we discern no unconstitutional *ex post facto* ramifications here. G.S. 7A-596, authorizing the fingerprinting of minors on a nontestimonial identification order, does not deprive Mario Lopez Stedman of any defense which was available to him under the laws in force on 3 December 1978. Furthermore, G.S. 7A-596 does not create an offense *ex post facto* by altering any element of the crimes charged or the quantum of proof required for a conviction. Therefore, application of the provisions of G.S. 7A-596 and 7A-598 does not offend Article I, section 16 of the North Carolina Constitution which forbids the enactment of any *ex post facto* law or a like prohibition found in Article I, section 10 of the United States Constitution.

For the reasons stated Judge Allen's order dated 16 February 1981 (and apparently signed by him on 25 February 1981) is vacated.

Moreover, Judge Allen's order must be vacated for the additional reason that the District Court of Alamance had no jurisdiction over Stedman at the time of the 16 February 1981 hearing. G.S. 7A-524 provides: "When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until he reaches his eighteenth birthday." Stedman reached his eighteenth birthday at 12:01 a.m. on 16 February 1981. The quoted statute terminated the jurisdiction of the juvenile court over the juvenile and the subject matter of the juvenile petitions at that time.

Ordinarily this matter would be remanded to the District Court of Alamance for further proceedings in accordance with this opinion. However, since that court is now *functus officio* for lack of jurisdiction, Stedman may now be tried in Superior Court of Alamance the same as any other adult. No adjudicatory or dispositional hearing has been conducted in juvenile court. The district court has never decided whether Stedman was guilty of the offenses alleged in the petitions. In fact, the juvenile court has conducted a probable cause hearing only, and a probable cause hearing does not suffice to place the juvenile in jeopardy. It may not be equated with an adjudicatory hearing where jeopardy attaches when the judge begins to hear evidence. G.S. 7A-612; *In re Bullard*, 22 N.C. App. 245, 206 S.E. 2d 305, *appeal dismissed*, 285 N.C. 758, 209 S.E. 2d 279 (1974). *Compare State v. Neas*, 278 N.C. 506, 180 S.E. 2d 12 (1971).

Order vacated.

Remanded for trial as in case of adults.

Justices EXUM and CARLTON concur in part and dissent in part. They vote to remand to District Court of Alamance County for further proceedings in accordance with the opinion.

STATE OF NORTH CAROLINA v. DWAYNE TYRONE HUNTER

No. 73

(Filed 27 January 1982)

1. **Criminal Law § 75— confession—voluntariness**

In a prosecution for first degree murder, there was ample competent evidence to support the trial judge's findings of fact and the findings of fact in turn supported his conclusion that defendant's statement to police was freely, understandingly and voluntarily made.

2. **Criminal Law § 76.10— attack on confession—theory not used at trial**

When there is an objection to the admission of a confession or a motion to suppress a confession, counsel must specifically state to the court before voir dire evidence is received the basis for his motion to suppress or for his objection to the admission of the evidence. Therefore, where the record disclosed that, at the trial level, defendant did not attack the admission of his confession into evidence on the ground that he was illegally arrested, but rather attacked the voluntariness of his confession on grounds it had been coerced, he could not attack his confession on the illegal arrest theory on appeal.

3. **Criminal Law § 75.1— delay in taking defendant before judicial officer—no relationship to confession**

As there was no causal relationship between delay in taking defendant before a judicial officer and defendant's confession demonstrated, the delay did not render the confession inadmissible into evidence. G.S. 15A-974(2).

4. **Assault and Battery § 8— right to defend from forcible sexual assault—Pattern Jury Instructions—right of male to use**

The model jury instruction as worded, N.C.P.I. Crim. 308.70, entitling those of the feminine gender to an instruction to the jury on self-defense from sexual assault should be modified wherever necessary to allow a male defendant to present such a defense to the jury.

5. **Assault and Battery §§ 8, 15.1— sexual assault—not substantial feature where assault with deadly weapon**

Where, in a homicide case, an attempted sexual assault was not a separate substantial feature of a case, but was merely one aspect of an assault with a deadly weapon, the judge was not required to instruct the jury on it. When the deadly weapon was introduced, the fear of death or great bodily harm from the deadly weapon became the real and apparent danger from which defendant sought to protect himself.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Brewer, J.*, at the 2 February 1981 Session of ROBESON County Superior Court.

Defendant was charged in a bill of indictment with the first-degree murder of Theodore Roosevelt Mosby. He entered a plea of not guilty.

The State offered evidence tending to show that on 8 September 1980 neighbors discovered Mosby's body in his house trailer. He was nude and the body was in an upright position in a chair and a white cloth was grasped in his hand. When officers were summoned, they found the front door open. They entered by unlatching the screen door through a cut place in the screen. A window in the rear of the trailer was broken and pieces of glass were discovered the next day in a nearby field which "could have been" from the broken window. The officers took a window from the rear of Mosby's trailer and transported it to the S.B.I. office in Raleigh for fingerprint identification. At trial Special Agent Duncan of the S.B.I. testified that one of the fingerprints lifted from the window matched a fingerprint of defendant.

Deputy Sheriff Collins stated that he received an S.B.I. report on 19 September 1980. On the same day, Officer Mitchell "picked Mr. Hunter up." Defendant was carried to the Sheriff's office in Lumberton, where he was advised of his constitutional rights and placed under arrest. Defendant signed a waiver of his constitutional rights including right to have counsel present, and after about three hours of questioning signed the following inculpatory statement:

> On Saturday, 9-6-80, I went to the Mosby trailer. I went in and sat down. This must have been about 10:30 at night. When I got there, he was sitting there naked, so I asked him could I use the bathroom. So I went to the bathroom. So I cut on the light switch. They wouldn't come on. So he told me how to cut them on from the switch box in the room. So after I finished, I cut them out. Before I cut the lights out, I tried to close the window. It wouldn't completely close. So, after I left out of there, I went back in there and sat down. He started talking to me, asking me did I like men, and stuff like that, and so he asked me if I ever sucked anybody off, or had anybody ever sucked me off, so he started trying to feel of me, so I started pushing him away. So he went to the kitchen and when he came back, he was laughing and had a knife, so he grabbed me and was trying to make me mess with him. So

he stuck me with the knife. I grabbed his hand and took the knife. So I was scared. I started stabbing him with it. So after I struck him, he was standing up and he slapped me in the face. When I struck him that's when the knife broke. That was before he slapped me. So after he slapped me, I ran out of the trailer, and that was it. I went down to Sarah Lee McCallum's house and I stayed there awhile and after I left, I went home.

After making the statement, defendant led the officers to the place where he had disposed of the knife. He was carried before a magistrate after the knife was recovered.

At defendant's request prior to the introduction of the confession, Judge Brewer conducted a voir dire hearing at which the State and defendant offered evidence as to the voluntariness of defendant's confession. At the conclusion of this hearing, Judge Brewer after finding facts and entering conclusions of law ruled that the confession be admitted, if otherwise competent. The evidence of defendant's confession was admitted over his objection.

Defendant testified in his own behalf and denied that he stabbed the victim, Mosby, and gave testimony which tended to incriminate John Manning as the killer. Defendant admitted making a statement that he stabbed Mosby but testified that it resulted from the officers' threats and coercion.

The jury returned a verdict of guilty of second-degree murder, and the trial judge imposed a sentence of life imprisonment.

Rufus L. Edmisten, Attorney General, by David Roy Blackwell, Assistant Attorney General, for the State.

Malcolm R. Hunter, Jr., Assistant Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

Defendant assigns as error the trial judge's ruling admitting into evidence the incriminating statement made by him to police officers.

[1] In support of this assignment of error, defendant first argues that his confession and the seizure of the knife were inadmissible into evidence because they were tainted by a warrantless and illegal arrest.

When defense counsel requested a voir dire hearing, the trial judge properly excused the jury and heard evidence from the State and defendant concerning the voluntariness of defendant's confession. At the conclusion of the hearing, the court, *inter alia*, found and concluded:

> 3. Prior to the defendant being asked any questions by law enforcement officers, he was read the applicable Constitutional Rights relating to right to counsel and right against self-incrimination.
>
> Let's see. Did you introduce into evidence the signed waiver?
>
> MR. WEBSTER: Your Honor, we simply read the waiver into evidence. We did not introduce the signed waiver.
>
> COURT: Did you wish to introduce it into evidence?
>
> MR. WEBSTER: Yes, Your Honor, I would move to introduce the signed waiver.
>
> COURT: All right. Have the waiver marked for identification as State's Exhibit Number 1. State's Voir Dire Exhibit Number 1 will be received into evidence.
>
> MR. CHAVIS: OJECTION.
>
> COURT: OVERRULED.
>
> —as are fully set out in State's Voir Dire Exhibit 1, which is hereby incorporated by reference.
>
> 4. After these rights were read to the defendant, he was asked if he understood these rights and affirmatively stated that he did understand these rights. The defendant was further asked if he desired an attorney and specifically stated that he did not desire an attorney. The defendant was then asked if he would then answer the questions of law enforcement officers. The defendant answered that he would answer the questions of law enforcement officers.

* * *

6. The defendant thereafter was orally read the waiver portion of State's Voir Dire Exhibit 1, as fully set out in State's Voir Dire Exhibit 1, and, specifically asked if he understood the waiver portion, and the defendant indicated that he understood the waiver portion of State's Voir Dire Exhibit 1. The defendant further indicated his desire to waive his rights as set out in State's Voir Dire Exhibit 1, and talk to law enforcement officers. The defendant signed the waiver portion of State's Voir Dire Exhibit 1.

7. At all times during the interview process the defendant was rational, his responses to questions appropriate. The defendant did not exhibit the odor of alcohol or physical manifestations of intoxication.

8. At no time during the interview process was the defendant subjected to any promises—any threats, physical or mental, by law enforcement officers or other individuals. At no time during the interview process was the defendant made any promises, express or explicit, to induce the defendant to make a statement.

* * *

Conclusions of Law: The defendant's statement was freely, understandingly and voluntarily made after the defendant was fully informed of all applicable constitutional and statutory rights relating to self incrimination and right to counsel, and after knowing, voluntary and intelligent waiver of those rights.

The trial court then, treating defendant's motion for a voir dire as a motion to suppress, overruled the motion.

It is well established that when a trial court's findings of fact are supported by competent evidence, even though conflicting, such findings are conclusive and will not be disturbed on appeal. 4 Strong's, North Carolina Index 3d, Criminal Law § 76.10 (1976), and cases there cited.

There was ample competent evidence to support the trial judge's findings of fact and the findings of fact in turn support his conclusion of law and ruling as to the voluntariness of defendant's

confession. Being satisfied of the threshold requirement of voluntariness of defendant's confession, we turn to his argument that an illegal arrest so tainted the confession and seizure of the knife as to make this evidence inadmissible.

[2] This record discloses that defense counsel did not specifically question or object to the legality of the "pickup" or the arrest so as to place this contention at issue or before the trial judge at the voir dire hearing. Defendant did not object to testimony regarding the reason for the pickup and arrest offered prior to the voir dire. Neither did he object to the testimony concerning the discovery of the knife following the voir dire although he did object to its introduction as an exhibit. There is no indication in the record that a pretrial motion was made challenging the legality of the arrest as provided in G.S. 15A-975. Defendant did not raise a fourth amendment challenge to the arrest during the voir dire but rather generally attacked the voluntariness of his confession.

The only reference to his arrest or "pickup" is contained in the following quotes.

Defendant testified on voir dire:

> He [Officer Mitchell] did not, at that time [when defendant was picked up], tell me I was under arrest. . . . When he got me down there in that room he did not tell me that I was under arrest. . . . I was first told that I was under arrest after—I think after he fingerprinted me.

After the voir dire was concluded, defense counsel in his argument stated:

> [I]t's our contention that whenever the defendant was brought down that day he wasn't told whenever he was picked up he was under arrest. He wasn't told until sometime later. That whenever he got to the Courthouse down there in the room while interrogating him that no one told him that he was under arrest.

These statements do not point to probable cause for arrest or the legality of the arrest and the "pickup" but relate to the time when defendant was in custody or under such restraint as to make his inculpatory statements custodial in nature. Such evidence relates to the voluntariness of his statements.

The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions. Further, a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal. *State v. Dorsett*, 272 N.C. 227, 158 S.E. 2d 15 (1967); *State v. Grundler*, 251 N.C. 177, 111 S.E. 2d 1 (1959), *cert. denied*, 362 U.S. 917, 4 L.Ed. 2d 738, 80 S.Ct. 670 (1960).

Our examination of this record discloses that defendant did not attack the admission of his confession into evidence on the ground that he was illegally arrested or "picked up." The gravamen of his motion was the voluntariness of the confession and his challenge was based upon coercion. The evidence, the findings of the court, and the ruling of the court were obviously based on this theory.

A defendant, represented by counsel, cannot sit silently by at trial and object to the admission of evidence for the first time on appeal. *See State v. Richardson*, 295 N.C. 309, 326-27, 245 S.E. 2d 754, 765 (1978).

We held in *State v. Vickers*, 274 N.C. 311, 163 S.E. 2d 481 (1968), that a timely general objection was sufficient to challenge the *voluntariness* of a confession and require a voir dire hearing when the objection clearly called the matter to the trial judge's attention. *See also State v. Edwards*, 274 N.C. 431, 163 S.E. 2d 767 (1968). However, when a confession is challenged on other grounds which are not clearly brought to the attention of the trial judge, a specific objection or explanation pointing out the reason for the objection or motion to suppress is necessary. *State v. Richardson, supra.* In order to clarify any misunderstanding about the duty of counsel in these matters, we specifically hold that when there is an objection to the admission of a confession or a motion to suppress a confession, counsel must specifically state to the court before voir dire evidence is received the basis for his motion to suppress or for his objection to the admission of the evidence.

We are aware of defendant's reliance upon *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979); *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed. 2d 416, 95 S.Ct. 2254 (1975); and *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct.

407 (1963). Defendant's reliance on these cases is misplaced since the issue of an illegal arrest was not timely raised in this case.

[3] By this assignment of error, defendant also contends that his confession should have been suppressed because the officers acted in violation of G.S. 15A-501(2) by failing to take defendant before a judicial officer without unnecessary delay.

In *State v. Richardson, supra,* we considered the question here raised. There we noted that G.S. 15A-974(2) provides that evidence "obtained as a result" of a substantial violation of the provisions of Chapter 15A must be suppressed upon timely motion, and that the use of the term "result" in the statute indicated that a causal relationship between a violation of the statute and the acquisition of the evidence sought to be suppressed must exist. We reasoned that evidence will not be suppressed unless it has been obtained *as a consequence* of the violation. The evidence must be such that it would not have been obtained *but for* the unlawful conduct of the investigating officer. G.S. 15A-974(2) requires, at a minimum, this sort of causal connection between violations of Chapter 15A and the evidence objected to if such evidence is to be suppressed.

In the case before us, we find no such causal relationship between delay in taking defendant before a judicial officer and defendant's confession. Had he been taken before a judicial officer he would have been (1) advised of the charges against him, (2) his right to communicate with counsel and friends, and (3) the conditions upon which he could obtain pretrial release. This record discloses that (1) defendant was advised of his right to counsel before answering questions, (2) he was advised of the charges against him, and (3) he was advised that he would be furnished counsel if he were unable to employ one. Defendant does not take the position that this delay in furnishing him information as to his pretrial release or in failing to advise him that he might communicate with friends caused him to confess. We are of the opinion that the confession did not result from this delay. We therefore hold that defendant's confession did not result from a substantial violation of Chapter 15A so as to render it inadmissible into evidence.

[4, 5] Defendant next assigns as error the trial court's failure to instruct the jury concerning his right to defend himself from sexual assault.

The right to defend oneself from a forcible sexual assault, such as rape or sodomy, is recognized in other jurisdictions. *See* 40 Am. Jur. 2d *Homicide* § 166, p. 453 (1968); 40 C.J.S. *Homicide* § 101, p. 961 (1944). This Court has previously said in dictum that a female may use deadly force to protect herself from rape, *State v. Neville*, 51 N.C. 423, 433 (1859), and the Court of Appeals has recently held that for purpose of a claim of self-defense a male who is put in fear of homosexual assault is put in fear of great bodily harm. *State v. Molko*, 50 N.C. App. 551, 274 S.E. 2d 271 (1981). We agree with these holdings.

We note that the North Carolina Pattern Jury Instructions contain separate instructions for ordinary self-defense (N.C.P.I. Crim. 308.45) and defense from sexual assault (N.C.P.I. Crim. 308.70).* The instruction on defense from sexual assault is worded

* N.C.P.I. Crim. 308.70

SELF-DEFENSE TO SEXUAL ASSAULT—HOMICIDE.[1]

The defendant contends that there is evidence in this case that she acted in self-defense, defending herself from a sexual assault. The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. A killing would be entirely excused on the grounds of self-defense, if:

First, it appeared to the defendant and she believed it to be necessary to kill *(name victim)* in order to save herself from death, great bodily harm or sexual assault, and

Second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person or [sic] ordinary firmness. It is for you the jury to determine the reasonableness of the defendant's belief from the circumstances as they appeared to her at the time. In making this determination, you should consider the circumstances as you find them to have existed from the evidence (including the size, age and strength of the defendant as compared with that of *(name victim)* (the fierceness of the assault upon the defendant, if any) (whether or not *(name victim)* had a weapon in his possession) (and) (the reputation, if any, of *(name victim)* for danger, violence and/or sexual attacks (upon females)), and

Third, the defendant was not the aggressor. (If the defendant voluntarily and without provocation entered the [fight] [encounter], she was the aggressor unless she thereafter attempted to abandon the [fight] [encounter] and gave notice to *(name victim)* that she was doing so),

And fourth, the defendant did not use excessive force, that is, more force than reasonably appeared to be necessary to the defendant at the time. Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to her at the time.

1. Sexual assault would include rape, attempted rape, any forcible crime against nature or attempted forcible crime against nature.

from the perspective of a female defendant. We see no reason why such an instruction should not be modified to allow a male defendant to make use of such an instruction where the circumstances justify its submission to the jury. Neither sex is free from the threat of forcible sexual assault and therefore both males and females are entitled to forcibly repel sexual assault where the circumstances warrant it. The model jury instruction as worded entitling those of the feminine gender to instruct the jury on self-defense from sexual assault should be modified wherever necessary to allow a male defendant to present such a defense to the jury.

A defendant is entitled to a charge on every substantial feature of the case. *State v. Jones*, 300 N.C. 363, 266 S.E. 2d 586 (1980); *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978); *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973).

In our opinion the substantial feature of this case was the assault with a deadly weapon which overrode and subordinated the attempted sexual assault. The attempted sexual assault was not a separate substantial feature of the case, rather it was merely one aspect of the assault with a deadly weapon and the judge was not required to instruct the jury on it. *State v. Ward*, 300 N.C. 150, 266 S.E. 2d 581 (1980). Had no deadly weapon been involved defendant would have been entitled to use reasonable force to protect himself from the possibility of death, great bodily harm, or sexual assault and would have been entitled to such a charge. *State v. Molko, supra.* However, according to defendant's confession, his claim of self-defense arose when Mosby introduced a knife and attacked defendant with it. At that point, defendant was put in fear of death or great bodily harm from the paramount threat posed by the knife and not from an attempted sexual assault. When the deadly weapon was introduced, the fear of death or great bodily harm from the deadly weapon became the real and apparent danger from which defendant sought to protect himself. Thus, under the facts and circumstances of this case, we find no prejudicial error in the judge's charge.

No error.

STATE OF NORTH CAROLINA v. RAYMOND CRANFORD CLONTZ

No. 120

(Filed 27 January 1982)

Criminal Law § 89.7; Witnesses § 1— psychiatric examination of witness—no power to compel

In a prosecution for second-degree rape, there was no error in the denial of defendant's pretrial motion that the prosecutrix, a twenty-year-old woman who was affected with cerebral palsy and possessed an I.Q. of approximately sixty, be ordered to undergo a psychiatric examination. The Court adopted the rationale of *State v. Looney*, 294 N.C. 1 (1978) and held that a trial judge does not have the discretionary power to compel an unwilling witness to submit to a psychiatric examination.

Justice EXUM dissenting.

Justices COPELAND and CARLTON join in this dissent.

ON certiorari to review decision of Court of Appeals' opinion by Judge Vaughn, Judge Wells concurring, and Judge Becton dissenting, reported in 51 N.C. App. 639, 277 S.E. 2d 580 (1981), finding no error in trial before *Albright, J.*, at the 12 May 1980 Session of CABARRUS County Superior Court. Defendant did not perfect his appeal of right in due time, and we allowed his petition for certiorari to permit him to perfect his late appeal on 31 August 1981.

Defendant was charged with second-degree rape in an indictment which alleged:

> that on or about the 2nd day of February, 1980, in Cabarrus County Raymond Cranford Clontz unlawfully and wilfully did feloniously rape, ravish, carnally know, and engage in vaginal intercourse with Donna Safrit by force and against her will while the said Donna Safrit was mentally defective, mentally incapacitated and physically helpless and while the said Raymond Clontz knew and should reasonably have known that Donna Safrit was mentally defective, mentally incapacitated and physically helpless.

Defendant's pretrial motion for a psychiatric examination of the prosecuting witness, Donna Safrit, was denied.

The State offered evidence which tended to show that on 2 February 1980 David Clontz invited Donna Safrit to have dinner at his brother's house trailer in Cabarrus County on the Old Charlotte Road. Ms. Safrit was a twenty-year-old woman who was afflicted with cerebral palsy which had impaired the use of the right side of her body. She had completed the ninth grade in school and possessed an I.Q. of approximately sixty. Before dinner defendant and Donna Safrit were left alone in the trailer when his brother David went to the store to purchase some groceries. After David left, defendant locked the doors to the trailer and forced the prosecuting witness into a bedroom where he had sexual intercourse with her against her will.

In corroboration of the testimony of the prosecuting witness, her brother-in-law Joe Salcedo testified to statements made to him by the prosecuting witness within a few days after the alleged rape.

Defendant did not testify but offered testimony by Sherry Almond and David Hargett which tended to show that at the time the rape allegedly occurred Hargett was present in defendant's trailer during the entire time that David Clontz was absent and that during that time defendant engaged in a telephone conversation with Almond. Hargett testified that no rape occurred during the evening of 2 February 1980.

The jury returned a verdict of second-degree rape. The trial judge imposed a prison sentence of twenty years minimum, twenty years maximum. Defendant appealed.

Rufus L. Edmisten, Attorney General, by J. Chris Prather, Assistant Attorney General, for the State.

James H. Carson, Jr., and Cecil R. Jenkins, Jr., for defendant-appellant.

BRANCH, Chief Justice.

Defendant assigns as error the trial judge's denial of his pretrial motion that the prosecutrix, Donna Safrit, be ordered to undergo a psychiatric examination.

Defendant's pretrial motion for a psychiatric examination was aimed toward determining the prosecutrix's competence and reliability as a witness.[1]

After his motion for a psychiatric examination was denied, defendant by a trial motion sought to have the prosecutrix's testimony suppressed. In support of this motion, defendant offered the testimony of Dr. Peter Crombes. Dr. Crombes, a clinical psychologist, testified at the pretrial hearing that on 9 August 1979, six months before the alleged rape and nine months before the trial, he tested Ms. Safrit in conjunction with her application to the North Carolina Department of Vocational Rehabilitation. Dr. Crombes gave several psychological tests to Ms. Safrit in order to evaluate her employment ability and provide recommendations as to the most suitable way in which to assist her in obtaining employment. Dr. Crombes' psychological examination revealed that Ms. Safrit had a tendency to project blame onto others and was afraid of men believing them to be people who "come to get you or hurt you, rape you;" however, he also testified that:

> Basically she has sufficient understanding to be capable of giving a correct account as to what she's seen or heard with respect to a question at issue. She is capable of giving a correct account as to what she's seen or heard, to the extent that she can accurately remember details and so on which is limited by her ability to understand and remember. She would be capable of giving a correct account of what she has seen or heard. She has sufficient understanding to com-

1. On oral argument before this Court on 8 December 1981, defendant's counsel argued that defendant was entitled to have his motion for a psychiatric examination of the prosecuting witness granted in order to determine whether she was in fact "mentally defective, mentally incapacitated, or physically helpless" as required for prosecution pursuant to G.S. 14-27.3(a)(2). At no point during the pretrial proceedings, at trial or before the Court of Appeals, did defendant question the prosecutrix's incapacity in terms of the statutory requirements upon which the indictment was drawn pursuant to G.S. 14-27.3(a)(2). Instead, defendant sought to have the prosecutrix examined in order to question her credibility and competence as a witness. Since defendant did not raise the question of whether he was entitled to determine if the prosecutrix was in fact "mentally defective, mentally incapacitated, or physically helpless" in order to support an indictment based upon G.S. 14-27.3(a)(2) at the trial level or in the Court of Appeals he is precluded from now raising that issue in this Court for the first time. *State v. Dorsett*, 272 N.C. 227, 158 S.E. 2d 15 (1967).

prehend the obligations of an oath to tell the truth. In my professional opinion Donna Safrit does have sufficient understanding to comprehend the meaning of an oath to tell the truth. In my opinion she has sufficient mental ability to understand and relate under oath the facts which she has observed as will assist the jury in determining the truth of what happened in the incident wherein the defendant is charged here in Court.

In addition to the testimony of Dr. Crombes, the trial judge heard testimony from the prosecuting witness and considered an affidavit executed by defendant's attorney. At the conclusion of the hearing, the trial judge found facts consistent with the evidence before him and concluded:

(a) That the witness, Donna Safrit has the capacity to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth with respect to the ultimate facts which it will be called upon to decide in this case, and,

(b) That the witness, Donna Safrit, is a competent witness.

The majority in the Court of Appeals, relying upon our case of *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978), found no error in the trial judge's denial of defendant's motion for a compulsory psychiatric examination of the prosecuting witness. Judge Becton, in his dissent, took the position that the opinion in *Looney* was inconclusive and was distinguishable from instant case. He espoused the view taken by Justice Exum in his concurring opinion in *Looney*.

In *Looney* Justice Lake, speaking for the Court, after extensive review of the decisions from other jurisdictions, in part, stated:

To hold that a trial court in this State may require a witness, against his will, to subject himself to a psychiatric examination, as a condition to his or her being permitted to testify, is also a serious handicap to the State in the prosecution of criminal offenses. If the witness simply refuses, there may well be nothing the prosecuting attorney can do to induce the witness to comply with the order. In many instances, a material witness for the State is none too eager to testify under any circumstances. To permit the defendant to

> obtain a court order, directing him or her to submit to a psychiatric examination as a condition precedent to his testifying, may well further chill his or her enthusiasm for taking the stand or at least give him a way out of doing so. In many cases, there would be no insurmountable difficulty in the way of a hard-pressed defendant's obtaining such an order and bringing this escape route to the attention of the witness.
>
> In our opinion, the possible benefits to an innocent defendant, flowing from such a court ordered examination of the witness, are outweighed by the resulting invasion of the witness' right to privacy and the danger to the public interest from discouraging victims of crime to report such offenses and other potential witnesses from disclosing their knowledge of them.
>
> We think that so drastic a change in the criminal trial procedure of this State, if needed, should be brought about, as was done in Massachusetts, by a carefully considered and drafted statute, not by our pronouncement leaving the matter to the unguided discretion of the trial judge.

294 N.C. at 28, 240 S.E. 2d at 627.

Justice Exum, concurring, concluded that "our trial judges have the power, to be carefully used in the exercise of their sound discretion, to order in appropriate circumstances the psychiatric examination of any witness as a condition to receiving the testimony of that witness." 294 N.C. at 29, 240 S.E. 2d at 628.

It is well established in this jurisdiction that the *competency* of a witness is a matter for the trial judge and is not reviewable absent a clear showing of abuse of discretion or when the ruling is based upon a misapprehension of the law. 1 Stansbury's N.C. Evidence § 55 at 160-63 (Brandis Rev. 1973); *State v. Cooke*, 278 N.C. 288, 179 S.E. 2d 365 (1971). The *credibility* of the evidence is a matter for the jury. *State v. Squires*, 272 N.C. 402, 158 S.E. 2d 345 (1968). In connection with this division of power, we reiterate with approval the observations of Judge Duniway in *United States v. Barnard*, 490 F. 2d 907, 912-13 (9th Cir. 1973), *cert. denied*, 416 U.S. 959, 40 L.Ed. 2d 310, 94 S.Ct. 1976 (1974), concerning the possible effect of psychiatric testimony upon the trial of a case, as previously quoted by Justice Lake in *Looney*, to wit:

> As we have seen, competency [of a witness] is for the judge, not the jury. Credibility, however, is for the jury — *the jury is the lie detector in the courtroom.* * * * It is now suggested that psychiatrists and psychologists have more of this expertise than either judges or juries, and that their opinions can be of value to both judges and juries in determining the veracity of witnesses. *Perhaps.* The effect of receiving such testimony, however, may be two-fold: first, it may cause juries to surrender their own common sense in weighing testimony; second, it may produce a trial within a trial on what is a collateral, but still an important matter. For these reasons we, like other courts that have considered the matter, are unwilling to say that when such testimony is offered, the judge must admit it.

294 N.C. at 26, 240 S.E. 2d 626.

We are aware that many jurisdictions have adopted the view that a trial judge may in his discretion order an unwilling prosecutrix in a sex offense case to submit to psychiatric examination. *See State v. Jerousek*, 121 Ariz. 420, 590 P. 2d 1366 (1979); *Thompson v. State*, 399 A. 2d 194 (Del. 1979); *State v. Filson*, 101 Idaho 381, 613 P. 2d 938 (1980); *State v. Gregg*, 226 Kan. 481, 602 P. 2d 85 (1979); *Washington v. State*, 608 P. 2d 1101 (Nev. 1980); *State v. Boisvert*, 119 N.H. 174, 400 A. 2d 48 (1979); *State v. Romero*, 94 N.M. 22, 606 P. 2d 1116 (1980); and *State v. Demos*, 94 Wash. 2d 733, 619 P. 2d 968 (1980). The most extreme view that we find in our research is Dean Wigmore's statement that:

> No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to be a qualified physician.

3A Wigmore, Evidence § 924a (Chadbourn rev. 1970). *See also*, McCormick, Handbook of the Law of Evidence § 45 at 95-96 (2d Ed. 1972). We reject this view without discussion. However, we agree with Dean Wigmore's recognition that a rule requiring any complaining witness in a sex offense case to undergo a psychiatric examination to determine her competency or credibility would require a legislative mandate. 3A Wigmore, Evidence § 924B at 747-48 (Chadbourn rev. 1970). This view is in accord with the holding in *Looney*. *See also People v. Lewis*, 25 Ill. 2d 442, 185

N.E. 2d 254 (1962); *Wedmore v. State*, 237 Ind. 212, 143 N.E. 2d 649 (1957); *Commonwealth v. Gibbons*, 393 N.E. 2d 400 (Mass. 1979); *State v. Walgraeve*, 243 Or. 328, 412 P. 2d 23 (1966). We have no such legislative mandate in North Carolina. The Court in *Looney* noted that if there be such a drastic change as would permit a court-ordered psychiatric examination, it should be done by carefully considered and drafted legislation. The legislature has not seen fit to follow that course. Just prior to *Looney* the legislature enacted G.S. 8-58.6 commonly known as "the Rape Victim Shield Law."[2] Enactment of this law amounted to a declara-

2. G.S. 8-58.6 became effective 1 January 1978. *State v. Looney, supra*, was filed 24 January 1978. G.S. 8-58.6 states:

(a) As used in this section, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complaint [sic] and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) No evidence of sexual behavior shall be introduced at any time during the trial of a charge of rape or any lesser included offense thereof or a sex offense or any lesser included offense thereof, nor shall any reference to any such behavior be made in the presence of the jury, unless and until the court has determined that such behavior is relevant under subsection (b). Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A-952, or during the trial at the time when the proponent desired [sic] to introduce such evidence. When application is made, the court shall conduct an in-camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the arguments of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibili-

tion by the legislature that it is the policy of this State to prevent unnecessary intrusion into the privacy of victims of sex crimes which are irrelevant to the prosecution of an individual charged with such crimes. Should we recede from our holding in *Looney* we would be acting contrary to this announced public policy.

To order the victim of a sex crime to unwillingly submit to a psychiatric examination would result in a profound invasion of her privacy which, in our opinion, would deter innocent victims of such crimes from ever making complaints. This conclusion is not without foundation. Indeed, as Justice Carlton pointed out in *State v. Fortney*, 301 N.C. 31, 269 S.E. 2d 110 (1980):

> Rape is one of the most underreported of crimes. Estimates are that from 3 ½, *President's Commission on Law Enforcement and Administration of Justice, The Challenges of Crimes in a Free Society* 21-22 (1967) to 20, *Berger, supra* at 5, times the number of rapes reported actually occur. Only 60% of those arrested are charged and conviction rates for those charged are low compared to other crimes, *Berger, supra* at 6 (35% for rape as compared to 70% for other crimes). *See also* National Institute of Law Enforcement, U.S. Department of Justice, *Forcible Rape: An Analysis of Legal Issues* 3 (1978) (3% of 635 rape complaints in the sample resulted in convictions of rape or some lesser crime). *Part of the reluctance of victims to report and prosecute rape stems from their feeling that the legal system harasses and humiliates them.*

Id. at 42, 269 S.E. 2d at 116. (Emphasis added.)

For reasons here stated, we adopt the rationale of *Looney* and hold that a trial judge does not have the discretionary power

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ty of such evidence. If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.

(d) The record of the in-camera hearing and all evidence relating thereto shall be open to inspection only by the parties, the complainant, their attorneys and the court and its agents, and shall be use only as necessary for appellate review. At any probable cause hearing, the judge shall take cognizance of the evidence, if admissible, at the end of the in-camera hearing without the questions being repeated or the evidence being resubmitted in open court.

to compel an unwilling witness to submit to a psychiatric examination.

The decision of the Court of Appeals is

Affirmed.

EXUM, Justice, dissenting.

The indictment against defendant for second degree rape rests on two alternative theories: (1) Defendant had vaginal intercourse with Donna Safrit by force and against her will, G.S. 14-27.5(a)(1). (2) Defendant had vaginal intercourse with Donna Safrit who at the time was either "mentally defective, mentally incapacitated, or physically helpless." G.S. 14-27.5(a)(2). The state relied entirely on the testimony of Donna Safrit (corroborated by evidence of her pre-trial statements to another witness) to establish what happened on the occasion in question. There is little in her testimony to support the theory that defendant forcibly engaged in vaginal intercourse with her. The state seems primarily to have relied on the theory that Donna Safrit was "mentally defective" or "mentally incapacitated" at the time of the alleged offense.[1] It offered the testimony of Dr. Peter Crombes to establish this element of the offense.

Defendant's pre-trial motion for a mental examination of Donna Safrit was summarily denied by Judge Albright who interpreted *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978), to mean that trial judges have no authority to order such examinations. The majority's decision confirms that Judge Albright properly interpreted *Looney*. The law in this area was carefully canvassed in Justice Lake's opinion for the majority in *Looney*. I continue to hold to the view I expressed in my concurring opinion in *Looney*, 294 N.C. at 29, 240 S.E. 2d at 628:

> "As have most of the well-considered decisions on the subject, to which the majority refers, I would conclude that our trial judges have the power, to be carefully used in the

1. Judge Albright's jury instructions are not in the record, but on oral argument defendant's counsel stated that the case was submitted to the jury on both theories.

exercise of their sound discretion, to order in appropriate circumstances the psychiatric examination of any witness as a condition to receiving the testimony of that witness. In this case the denial of defendant's motion for such an examination was well within the discretion of the trial judge and should not be held for error.

As the majority wisely recognizes the witness' rights must be given due consideration. Defendant should be required to make a strong showing that the witness' mental make up is such that a psychiatric examination would probably reveal either that the witness is incompetent or that the witness' credibility may be subject to serious question. Situations calling for the entry of such an order would, it seems, be rare indeed. But if called for, our judges should have the power to enter the order."

This view is bolstered not only by the authorities cited in the majority opinion here and in *Looney*, but by the well-considered dissenting opinion of Judge Becton in the Court of Appeals.

My view is also bolstered by the compelling facts of this case. For here the state relies largely on its contention that the prosecuting witness is "mentally defective" or "mentally incapacitated" in order to convict defendant of the crime charged. Particularly under these circumstances, the trial judge should be permitted in his discretion to order a mental examination of the prosecuting witness to determine whether the witness is so mentally defective or incapacitated as to be incompetent as a witness.

Indeed where the prosecuting witness' lack of mental capacity is one of the elements of the crime which the state must prove, I believe the defendant has a right to a mental examination of the witness by his own expert or an expert appointed by the court in order properly to explore a possible defense based on the absence of this element.

The majority does not reach this question on the ground that defendant's motion for a mental examination of the prosecuting witness was made in order to determine only whether she was competent as a witness and not whether she was in fact "mentally defective" or "mentally incapacitated." The majority correctly characterizes the basis for defendant's pre-trial motion

and seems to be on sound ground under our cases in refusing to consider this question on appeal.

The majority's reliance on the statement of Judge Duniway in *United States v. Barnard*, 490 F. 2d 907 (9th Cir. 1973), expressing concern for the possible effect of expert psychological testimony on the jury, seems to be misplaced. The rule for which I argue would not permit such testimony to go before the jury. It would only be offered before the trial judge to assist him in determining the witness' competence to testify. This would exhaust the uses to which such testimony could be put.

For the reasons stated, therefore, I vote to give defendant a new trial at which the trial court would be permitted to exercise its discretion in determining whether to allow defendant's motion for a mental examination of the prosecuting witness.

Justices COPELAND and CARLTON join in this dissent.

STATE OF NORTH CAROLINA v. RONNIE RAY OXENDINE

No. 92

(Filed 27 January 1982)

1. **Arson § 1— elements of arson**

In order to constitute arson, some portion of the dwelling itself, rather than its mere contents, must be burned; however, the least burning of any part of the building, no matter how small, is sufficient, and it is not necessary that the building be consumed or materially damaged by the fire.

2. **Arson § 4.1— burning or charring of building—sufficiency of evidence**

The evidence in an arson case was sufficient for the jury to find that defendant actually burned or charred the structure of an inhabited dwelling where the owner testified that she saw fire and smoke coming from a bedroom and that the house was still "burning, slowly" when the fire truck arrived; the evidence tended to show that the fire was visible from a nearby highway and was responsible for the loosening of electrical wiring in the building; and an officer testified that there were dark or burned patches over the wall, the wallpaper was burned, there was a heavy odor of kerosene, and "the main house was or had been on fire."

3. **Arson § 4.1— evidence that wallpaper burned—charring element of arson**

Where the evidence discloses that the wallpaper in a dwelling has been burned, it completely substantiates the charring element of arson.

4. Arson § 5— attempted arson—instruction not required

The trial court in an arson case was not required to instruct the jury upon the lesser included offense of attempted arson where the State's evidence that parts of the structure of the dwelling in question were burned to the requisite degree to constitute arson was essentially uncontradicted.

5. Arson § 5— instructions on burning

The trial court in an arson case was not required *ex mero motu* to instruct the jury that there must be a partial burning or slight charring of some portion of the building to constitute arson and that a mere scorching or discoloration thereof is not arson where uncontraverted evidence showed that the house itself had been burned, including several patches on one wall and some wallpaper, defendant relied on an alibi defense and no serious question concerning the nature of the damage caused by the fire was raised during the trial.

6. Arson § 5— burning of personal property not arson—instruction not required

The trial court in an arson case did not err in failing *ex mero motu* to instruct the jury that the burning of personal property within the dwelling did not constitute arson where the court in its instructions stressed that the dwelling house or the building itself had to be burned to constitute arson.

7. Criminal Law § 75.10— confession—waiver of constitutional rights—voluntariness

The evidence presented at a voir dire hearing supported a determination by the trial court that defendant knowingly waived his constitutional rights at an in-custody interrogation and voluntarily made a subsequent statement to law officers.

8. Criminal Law §§ 76.10, 146.1— attack upon admissibility of confession—theory not raised in trial court

The appellate court will not entertain a theory of attack upon the admissibility of defendant's confession which is different from that specifically advanced by defense counsel at trial.

ON appeal as a matter of right from the judgment of *Small, J.*, entered at the 23 February 1981 Criminal Session, ROBESON Superior Court, imposing a life sentence for defendant's conviction of arson. Defendant was also convicted of the felonious burning of a building, and the trial court imposed a judgment of ten years' imprisonment. Defendant's motion to bypass the Court of Appeals, for review of his additional conviction, was allowed on 4 August 1981.

Defendant was charged in separate indictments, proper in form, with arson, the unlawful burning of a building and willful and wanton injury to real property in violation of G.S. 14-58, 14-62, and 14-127. Defendant pleaded not guilty to all of the charges.

In brief and pertinent part, the State's evidence, which included defendant's pre-trial confession, tended to show that defendant engaged in unlawful incendiary activities at the home and property of his aunt, Miss Pyree Locklear, on 9 December 1980. Miss Locklear and her minor son were in the house when defendant set it aflame using kerosene (after breaking out a window with an oak stick). Defendant also ignited an outbuilding used for storage. The fire in the house was quickly contained; however, the outbuilding and its contents were consumed by the blaze.

Defendant presented an alibi defense. He said that he was in bed at his home at the time the fire began. His mother corroborated his alibi. Defendant further stated that he had not been on his aunt's property at any time within the past two years. [Defendant had been previously convicted for trespassing at his aunt's residence.] With respect to his confession, defendant denied that he had admitted his guilt of these crimes, or made any incriminating statement regarding the incident, to the investigating officer. Among other things, defendant said that he was intoxicated when he was being questioned and that he did not understand the explanation of his constitutional rights.

Upon presentation of all of the evidence, the jury found defendant guilty of arson and felonious burning of a building.

The facts shall be further summarized in the opinion to the extent required by our review and discussion of defendant's specific assignments of error.

Attorney General Rufus L. Edmisten, by Assistant Attorney Generals Thomas B. Wood and Robert G. Webb, for the State.

Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant-appellant.

COPELAND, Justice.

Defendant argues five assignments of error which he believes require either a reversal of his arson conviction or a new trial. We disagree and affirm.

Defendant first contends that the trial court erred in overruling his motion to dismiss the arson charge. It is well established that a successful arson prosecution requires proof that defendant

maliciously and willfully burned the dwelling house of another. *State v. White*, 288 N.C. 44, 215 S.E. 2d 557 (1975); *State v. Arnold*, 285 N.C. 751, 208 S.E. 2d 646 (1974). In the instant case, defendant challenges the sufficiency of the State's evidence upon the "burning" element of the offense. He complains that the evidence adduced against him was too meager to convince a rational trier of fact that he actually *burned* the *structure* of an inhabited dwelling. Under the circumstances of this case, defendant's position is indefensible.

[1, 2] The law is clear that some portion of the dwelling itself, in contrast to its mere contents, must be burned to constitute arson; however, the least burning of any part of the building, no matter how small, is sufficient, and it is not necessary that the building be consumed or materially damaged by the fire. *State v. Mitchell*, 27 N.C. 350, 353 (1845); *State v. Sandy*, 25 N.C. 570, 574 (1843); *see* Annot., "Burning as element of offense of arson," 1 A.L.R. 1163, 1166 (1919). The accepted legal definition of "burning," for purposes of an arson case, is best stated in *State v. Hall*, 93 N.C. 571, 573 (1885):

> The crime of arson is consummated by the burning of any, the smallest part of the house, and it is burned within the common law definition of the offense when it is charred, that is, when the wood is reduced to coal and its identity changed, but not when merely scorched or discolored by heat.

Applying these principles to the case at bar, we hold that the State's evidence was sufficient to authorize a reasonable conclusion that the building in question had been *burned*.

Miss Locklear, owner of the dwelling, testified that, after hearing her son exclaim, "Fire!", she went into the bedroom "where the fire was at" and saw fire and smoke coming out of it. She said that the house was still "burning, slowly" when the fire truck arrived. [By this time, Miss Locklear and four of her neighbors had essentially doused the blaze.] Miss Locklear further stated that, during the fire, the "current had burned loose" in the house.[1] Myrtle E. Blanton testified that she drove by the Locklear house on 9 December 1980 and saw "a fire and a lot of smoke." Mrs. Blanton then commented to defendant, who was riding with

1. The witness was obviously referring to some type of electrical wiring in the building.

her on the way to the bus station, "your Aunt's house is on fire, everything she owns is burning up."[2] From the testimony of these two witnesses alone, one could reasonably infer that the fire inside the house was substantial enough to cause *at least some charring* of the structure, since the fire was accompanied by a great deal of smoke, was visible from the outside (the highway) and was responsible for the loosening of electrical wiring in the building. *See State v. Hall, supra*, 93 N.C. at 573. *See also State v. Mitchell, supra*, 27 N.C. at 353 ("fire set to combustible materials will naturally consume them").

[3] Nevertheless, the State's case upon this essential element was further strengthened by the testimony of Officer William Halstead who described the subsequent condition of the residence as follows: "the curtains were burned and there was dark or burned patches over the wall; the wallpaper was burned and there was a heavy odor of kerosene. Smoke was throughout the house. . . . [T]he main house was or had been on fire." Surely, this evidence plainly showed that the dwelling itself, and not merely something in it (the curtains), had been burned. It is difficult to perceive how dark, *burned* patches could appear on a wall absent the prior incidence of at least minor charring of that wall's substantive material. Defendant's additional argument that the presence of burnt wallpaper in the dwelling had no rational tendency to indicate the charring of the building's structure simply defies good sense and logic. Wallpaper affixed to an interior wall is unquestionably a part of the dwelling's framework.[3] If the wallpaper is burning, it would perforce suggest that the house is also burning. Hence, we hold that where, as here, the evidence discloses that the wallpaper in a dwelling has

2. We note that defendant's only reaction to this stimulus, according to Mrs. Blanton, was his response, "[s]he ain't no Aunt of mine." He did not even look in the direction of the fire but "just kept staring straight ahead."

3. Once it is affixed to the house, wallpaper is generally immovable and permanently attached thereto and as such becomes part of the realty. For definitions of fixtures, real estate and real property, *see* Black's Law Dictionary 574, 1096, 1137 (5th ed. 1979); Ballentine's Law Dictionary 480, 1059 (3d ed. 1969). *See also* 1 Thompson on Real Property §§ 6, 55 (Grimes ed. 1980).

been *burned*, it competently substantiates the charring element of arson. *Compare State v. Kelso*, 617 S.W. 2d 591, 594 (Mo. App. 1981), where the Court, in dictum, recognized that, although the mere scorching or discoloration of wallpaper on a wall did not constitute arson, arson would certainly occur if the fire spread to the wooden structure no matter how small the damage.

Considering all of the foregoing evidence in the light most favorable to the State with the benefit of every reasonable inference, it was sufficient to permit the jury to find that defendant burned (charred) parts of his Aunt's house to the necessary degree. Contrary to defendant's position, the State's witnesses were not required to use the specific legal term "charred" in describing the structural damage caused by the unlawful fire. In commonly understood language, the witnesses testified that the *house* had been on fire and that parts of it had been *burned*. In his inculpatory statement to the police, even defendant described the progress of the fire, which he "had started *on* the front of the *house*," in terms of how well it was *burning*. In fact, the sufficiency of the burning element of the offense was never contested at any time during the trial of this case. Defendant relied entirely on an alibi defense. Thus, the real question here was not whether Miss Locklear's house was unlawfully burned, but whether defendant unlawfully set that fire.

[4] Next, defendant contends that the trial court should have instructed upon the lesser included offense of attempted arson. A trial judge is required to instruct upon a lesser included offense, even absent a special request therefor, if there is some evidence in the record which supports the less serious criminal charge. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976); *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *see, e.g., State v. Green*, 298 N.C. 793, 259 S.E. 2d 904 (1979). It necessarily follows then that the judge is not obligated to give such an instruction if the record is devoid of evidence which might convince a rational trier of fact that defendant was at most guilty of the less grievous offense. *State v. Wright*, --- N.C. ---, 283 S.E. 2d 502 (1981); *State v. Gadsden*, 300 N.C. 345, 266 S.E. 2d 665 (1980). Such is the case here. We have already determined, *supra*, that the State's evidence that parts of the dwelling's structure were burned to the requisite legal degree was essentially *uncontradicted*. The

crime of arson was, therefore, plainly consummated. That being so, the evidence in the instant case could not be reasonably interpreted as *also* showing the commission of a mere attempted arson. *State v. Moore*, 300 N.C. 694, 700, 268 S.E. 2d 196, 201 (1980). In sum, once the jury believed beyond a reasonable doubt that defendant maliciously and willfully perpetrated these unlawful incendiary deeds, it could only properly return a verdict of guilty of arson.

Defendant also argues that the trial court's final charge to the jury was deficient in two other respects: (1) the omission of a legal definition of burning (as it is stated in *State v. Hall, supra*, 93 N.C. 571) and (2) the absence of a direct admonishment that the burning of personal property within the dwelling did not constitute arson. We hold that defendant was not entitled upon this record to additional instructions absent specific and timely requests therefor.

[5] First, we find that Judge Small correctly delineated the elements of arson in his charge to the jury, see *infra*. In fact, he repeated almost verbatim the patterned instructions for the offense. *See* N.C.P.I. — Crim. § 215.10 (1981). Nevertheless, defendant now maintains that the judge should have told the jury *sua sponte* that there must be a partial burning or slight charring of some portion of the building and that a mere scorching or discoloration thereof would not suffice as arson. *See* N.C.P.I., *supra*, at note 1. To the contrary, we believe that a trial court is not obligated *ex mero motu* to make this distinction for the jury where, as here, no serious question concerning the nature of the damage caused by the fire is ever raised during trial. *See id.* We must again emphasize that defendant relied on an alibi defense and did not challenge the State's evidence that an arson had been committed. More particularly, the testimony concerning smoke damage to the paint on various walls in the dwelling did *not*, as defendant seems to believe, negate the occurrence of at least some burning or charring of the building.[4] Such testimony cannot

4. The two Texas cases cited by defendant in his brief, *Woolsey v. State*, 30 Tex. Crim. 346, 17 S.W. 546 (1891) and *Van Morey v. State*, 112 Tex. Crim. 439, 17 S.W. 2d 50 (1929) are clearly inapposite upon this basis. In both *Woolsey* and *Van Morey*, there was *conflicting* testimony about whether the fire had merely scorched or smoked parts of the house, instead of burning its structure. The Texas Court of Criminal Appeals held in both instances that the trial court had committed prej-

be reasonably deemed as anything more than a description of *additional* damage caused by the fire since other independent and uncontroverted evidence showed that the house itself had been burned, including several patches on one wall and some wallpaper, to the extent that certain electrical wiring in the structure was loosened. There being no affirmative evidentiary conflict regarding the legal application of the term "burned" to the facts of this case, we hold that the judge did not have to explain its meaning absent a request, to the jury, as it is a plain, simple word commonly understood by people of average intelligence. *State v. Witham*, 281 S.W. 32, 34 (Mo. 1926).

[6] Second, we find that Judge Small correctly characterized and stressed the type of property that had to be burned by the fire to constitute arson. In pertinent part, he charged the jury as follows:

> As to the case where the defendant is charged with the crime of arson, I instruct you that in order for you to find the defendant guilty, the State must prove three things beyond a reasonable doubt: First, that the defendant *burned a dwelling house;* Second, that the dwelling house at the time it was burned, was inhabited by Pyree Locklear; Third, that the defendant in burning the dwelling house acted maliciously. That is, he intentionally *burned the building* without lawful excuse or justification.
>
> . . . .
>
> So I instruct you as to the charge of arson, that if you should find from the evidence beyond a reasonable doubt, that on or about December nine, 1980, Ronnie Ray Oxendine, maliciously *burned the dwelling house* of Pyree Locklear, which was inhabited by Pyree Locklear by pouring kerosene on the house or around the window to the bedroom and igniting it with his cigarette lighter, or some other means, and thereby *burning the house*, it would be your duty to return a verdict of guilty of arson.

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udicial error in failing to give the *specially requested* instructions regarding the necessity for an actual burning of the building to sustain a conviction of arson. [Defendant did not tender a similar request in the instant case.]

(Emphases added.) The judge did not once suggest to the jury that the burning of personal property inside the dwelling could suffice as arson. In fact, the only evidence in the entire record of fire damage to personal property within the dwelling was Officer Halstead's solitary statement that the curtains had been burned. In such circumstances, we fail to see how the jury could have been misled or confused. *But see State v. Schenk*, 100 N.J. Super. 122, 241 A. 2d 267 (1968). In any event, if defendant had been genuinely worried about this possibility at trial, he could have, and he should have, requested a specific instruction upon the matter.

[7] Defendant finally contends that the trial court erred in allowing the admission of his custodial statement. That signed statement read, in part, as follows:

> Then about dark I went to my Aunt Pyree Locklear's home. I found some kerosene in a building behind her home. I took and poured some of it on a window in front of her house. I broke the window out with a oak stick. I then took my cigarette lighter and set the curtains on fire. I then went back to the building behind her house and poured the rest of the kerosene on it and set it on fire. I threw the can into the fire. I went back to check the fire I had started on the front of the house. It was not burning too good. I then took a stick and broke the windows out of the house. I then went into the house and turned over the couch, chairs and table. . . . I left and walked to Miss Blanton's. I got her to bring me to the bus station in Lumberton. . . . I have been having trouble with my Aunt for about two years. I believe that she had my home burned and stole my dog.

Prior to the introduction of the confession, defense counsel generally requested a *voir dire* hearing. He did not, however, specifically object to the statement's admission, and he did not state his reasons for requesting the *voir dire* hearing. Nevertheless, the trial court honored the obscure motion and conducted a prompt hearing upon the matter. All of the evidence adduced at the hearing was directed at determining whether defendant knowingly waived his constitutional rights and voluntarily made the subsequent statement. For instance, defendant testified that he had been drinking prior to the questioning, that he could not read, that he did not understand what he was signing when he

wrote his name on the statement, and that he did not, in fact, make the inculpatory remarks included therein.

At the conclusion of the *voir dire* hearing, the judge entered an order for admission of the confession.[5] In the order, the judge made findings of fact supporting the following conclusions of law:

> There was no offer of reward, hope of reward or other inducement made by any officer to persuade the defendant to make a statement against his will.
>
> There was no threat of violence, show of violence or suggestion of violence to coerce the defendant to make a statement against his will.
>
> The defendant fully understood his Constitutional rights to remain silent and his rights to an attorney, and all other rights explained to him by Officer Collins.
>
> The defendant perfectly, freely, voluntarily, knowingly and understandingly, waived each of these rights and thereupon made a statement to the Officers.
>
> The statement made by the defendant to Officer Raymond . . . Roland Collins, on December ninth, 1980, was made freely, voluntarily, knowingly, understandingly, and the same was admitted into evidence.

Defendant did not except to any of the findings of fact. Nonetheless, in our discretion, we have reviewed those findings. We hold that there was ample competent evidence in the record to support them; thus, they are binding in this appeal. *State v. Thompson*, 303 N.C. 169, 277 S.E. 2d 431 (1981); *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. denied*, 386 U.S. 911, 87 S.Ct. 860, 17 L.Ed. 2d 784 (1967).

[8] Nevertheless, defendant *now* asserts as error *in this Court* the admission of the confession upon the ground that it was obtained by an exploitation of his illegal arrest and detention. The legality of defendant's seizure and detention was not, however, a subject of inquiry during the *voir dire* hearing or at any time during trial. We have this very day filed another decision involving

5. Defense counsel did not make a formal motion to suppress the confession either before or during trial.

virtually identical procedural facts. *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982). The issue concerning the scope of appellate review in these circumstances has been fully and carefully addressed in the well reasoned opinion of Chief Justice Branch in *Hunter*. We shall not plow that same ground again here. It suffices to say that, *Hunter* being sound and binding authority, we shall not entertain in this appeal a theory of attack upon the admissibility of defendant's confession which is different from that specifically advanced by defense counsel at trial. The assignment of error is overruled.

In defendant's trial and convictions, we find no error.

No error.

BARBARA LARKINS WARD TYSON v. NORTH CAROLINA NATIONAL BANK

No. 123

(Filed 27 January 1982)

1. **Appeal and Error § 2— question presented to Court of Appeals—properly before Supreme Court**

Where defendant contended in the Court of Appeals that plaintiff's claim was barred by the statute of limitations but that court upheld summary judgment for defendant on other grounds, defendant did not have to cross appeal from the Court of Appeals' disposition of the limitations issue. Under App. R. 16(a), as the defendant presented the statute of limitations question to the Court of Appeals, upon plaintiff's appeal, it was also entitled to present that question to the Supreme Court.

2. **Limitation of Actions § 4.3; Executors and Administrators § 39— actions against executors for breach of fiduciary duty—statute of limitations**

In an action by plaintiff alleging defendant breached certain fiduciary duties as executor of her husband's estate and as trustee of two testamentary trusts by failing to exercise reasonable care in marshaling the assets of the estate, her action was essentially grounded in contract and was subject to the three-year limitation of G.S. 1-52(1). G.S. §§ 1-50(2), 1-56 and 28A-13-10(c).

ON appeal of right pursuant to G.S. 7A-30(2) (1981) of the decision of the Court of Appeals, one judge dissenting, reported at 53 N.C. App. 189, 280 S.E. 2d 478 (1981), affirming summary judgment in favor of defendant.

Susan H. Lewis and Donald H. Beskind for plaintiff-appellant.

Helms, Mulliss & Johnston, by E. Osborne Ayscue, Jr., and Nancy Black Norelli, for defendant-appellee.

CARLTON, Justice.

I.

Plaintiff initiated this action by complaint filed 11 July 1979 alleging that defendant had breached certain fiduciary duties as executor of her husband's estate and as trustee of two testamentary trusts. Defendant's answer asserted that plaintiff had failed to state a claim for which relief could be granted, denied that it had breached any duties owed plaintiff, and asserted as defenses the statute of limitations, estoppel, laches, and that plaintiff's action constituted an impermissible collateral attack on a prior adjudication.

The essential facts of the controversy are not in dispute: Defendant's predecessor, State Bank and Trust Company, was named executor in the will of plaintiff's husband who died on 28 September 1968.[1] Decedent's will established two trusts, both of which were for the primary benefit of plaintiff. The will named defendant's predecessor as trustee of these trusts.

At the time of his death plaintiff's husband owned a considerable amount of real estate. His holdings included a tobacco farm, two commercial lots on Cotanche Street (Cotanche property), three residential lots in the Sedgefield subdivision, and undivided half-interests in eighteen lots, also in the Sedgefield subdivision. Decedent also owned the home in which he, his wife and their three children had lived. (Decedent did not make a disposition of the home in his will, apparently because he believed that it was owned by himself and his wife as tenants by the entirety.) At the time of decedent's death he had incurred debts amounting to approximately $82,268, a substantial part of which were owed to State Bank. The will directed that the debts be paid out of the principal of the estate.

Because defendant believed that the homeplace had been owned by the decedent and plaintiff as tenants by the entirety, it

1. State Bank and Trust Company and defendant North Carolina National Bank entered into a merger agreement on 28 March 1969.

was not initially included in the estate. Of the other real property owned by decedent only the tobacco farm and the commercial lots on Cotanche Street were readily marketable. At the time of decedent's death the tobacco farm was valued at approximately $74,940 and the Cotanche Street property was appraised at $8,500. In December 1969 the defendant sold the tobacco farm and the Cotanche Street property. The properties were sold for $74,940.00 and $8,500.00 respectively. Plaintiff, acting as guardian for her children, purchased the tobacco farm with money from their separate estates.

Approximately one year later plaintiff attempted to sell the family home and discovered that the title was in decedent's name alone. In December 1970, after learning that the home had been owned by the decedent alone and was part of his estate, defendant sold the home for $60,000.

The tobacco farm was the only significant income-producing asset in the estate. In the accounting period immediately following decedent's death the tobacco farm had a gross income of approximately $25,000, and, in the years following the sale was alleged to have yielded an average yearly income to its owners of $8,400.

Plaintiff's complaint alleges that the tobacco farm's value has increased to over $1,000,000 and that the Cotanche Street property is presently worth $80,000. After the sale of the tobacco farm the yearly income receipts of the two trusts were alleged to have been approximately $2,000 and the value of the assets held by the trusts has declined from approximately $245,000 at the end of 1973 to $95,000 as of 1 January 1978 because the principal had been invaded to provide support for plaintiff and her family.

Plaintiff's action is based primarily on the claim that the defendant should have discovered that the family home was in decedent's sole name. Had defendant known that the home was an estate asset, plaintiff argues, it would have or should have sold the home to pay the debts and retained the tobacco farm.[2] She

2. Plaintiff also claimed damages for sale of the Cotanche Street property, alleging that the sale constituted self-dealing. Because plaintiff did not brief this issue in this Court nor in the Court of Appeals, we deem that she has abandoned her second claim for relief.

prayed for damages in the amount of $625,000 and requested $500,000 in punitive damages for defendant's alleged breach of the fiduciary duty of loyalty.

Defendant moved for summary judgment on several grounds, including the statute of limitations, estoppel and laches. Plaintiff filed a motion for partial summary judgment on the statute of limitations question and, alternatively, to disallow defendant's assertion of the statute of limitations and laches on the ground of equitable estoppel. On 9 June 1980 Judge Rouse, after a hearing, denied plaintiff's motion and allowed defendant's motion. Plaintiff appealed.

The Court of Appeals affirmed in an opinion by Judge Arnold in which Judge Martin (Harry C.) concurred. It held that while the action was not barred by the statute of limitations, plaintiff had no claim because the undisputed facts showed that the total proceeds from the sale of the house and the Cotanche Street property would have been insufficient to pay the decedent's debts. That court rejected plaintiff's argument that the debts could have been satisfied by selling the home and the Cotanche Street property and mortgaging the tobacco farm. The court gave as its reason the provision in the will directing that debts be paid out of the principal of the estate. Judge Clark dissented.

II.

Plaintiff has raised several questions on appeal to this Court: (1) whether the incorporation by reference of the provisions of G.S. 32-27(1) to -27(30), which includes a provision allowing mortgaging of property, G.S. § 32-27(12), gave defendant the power to mortgage the tobacco farm, and (2) if defendant had such a power, whether plaintiff has shown sufficient questions of fact to defeat defendant's summary judgment motion. In light of our disposition of the statute of limitations question, discussed below, we find it unnecessary to address these issues and express no opinion on them.

III.

In its summary judgment motion, defendant raised the statute of limitations as a bar to plaintiff's action. Plaintiff took exception to the trial court's entry of summary judgment for

defendant and contended in the Court of Appeals that the action was not barred. Although the Court of Appeals decided this issue in plaintiff's favor, see 53 N.C. App. at 191, 280 S.E. 2d at 479-80, it affirmed the entry of summary judgment on other grounds.

[1] Plaintiff contended on oral argument that because defendant did not cross appeal from the Court of Appeals' disposition of this issue, it has waived its right to assert that ground before this Court. We disagree. Defendant was the appellee both in the Court of Appeals and in this Court. Rule 16(a) of the Rules of Appellate Procedure (1981) defines the scope of review of decisions of the Court of Appeals and provides, "A party who was an appellee in the Court of Appeals and is an appellee in the Supreme Court may present any questions which . . . he properly presented for review to the Court of Appeals." Defendant's brief before the Court of Appeals included the argument that "THIS SUIT IS BARRED BY THE RUNNING OF THE STATUTE OF LIMITATIONS." In its brief before this Court defendant responded to the questions raised in the appellant's brief and asserted additional arguments in support of the entry of summary judgment: "II. IN ADDITION, SEVERAL OTHER DEFENSES RAISED BY DEFENDANT BUT ERRONEOUSLY REJECTED OR NOT REACHED BY THE COURT OF APPEALS WERE SUFFICIENT TO DISPOSE OF THIS CLAIM ON SUMMARY JUDGMENT . . . . B. This suit is barred by the running of the statute of limitations." Thus, defendant presented the statute of limitations question to the Court of Appeals and, under Rule 16(a) of the Rules of Appellate Procedure, is entitled to present that question to this Court.

[2] Defendant contends that the limitation of this action is governed by G.S. 1-52(1) (Supp. 1981),[3] a three-year statute of limitations, and that plaintiff's action is barred. Alternatively, defendant contends that the six-year statute of limitations, G.S. § 1-50(2) (Supp. 1981),[4] bars this action. Plaintiff, in her Court of

3. That statute provides: "Within three years an action—. . . (1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections or in G.S. 1-53(1)."

4. G.S. 1-50(2) provides: "Within six years an action—. . . (2) Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law."

Appeals' brief, argued that neither of the above statutes applied and that the ten-year statute of limitations, G.S. § 1-56 (1969)[5], applied and did not bar her action. The Court of Appeals agreed with plaintiff.

Our research reveals that the issue of which statute of limitations applies to an action against an executor for breach of fiduciary duty has never been considered by this Court. Defendant cites us to numerous cases which hold that the three-year statute applies to actions for breach of an express trust, *e.g.*, *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E. 2d 8 (1957); *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938), and plaintiff cited in her Court of Appeals' brief numerous cases applying the ten-year statute to actions seeking to impose a constructive trust, *Jarrett v. Green*, 230 N.C. 104, 52 S.E. 2d 223 (1949); *Moore v. Bryson*, 11 N.C. App. 149, 180 S.E. 2d 437 (1971).

The remedy sought by this action is not to impose a constructive trust or to seek an accounting, as in *Jarrett*, but is to recover *damages* for breach of fiduciary duty. Actions seeking to impose a constructive trust or to obtain an accounting involve conduct which approaches the level of fraud, *see Jarrett v. Green*, 230 N.C. 104, 52 S.E. 2d 223 (executor sold stock at greatly less than its fair market value to himself and associates), and for that reason the ten-year statute, G.S. § 1-56, applies. In this case, however, plaintiff's complaint is essentially grounded on defendant's alleged failure to exercise reasonable care in marshaling the assets of the estate. There is no allegation that the price received for the tobacco farm was anything less than its then fair market value or that the farm was sold to a friend or associate of the executor. Indeed, plaintiff herself, acting as guardian of her minor children, purchased the farm.

The instant case, therefore, is more nearly akin to *Teachey*, in which this Court properly concluded that an express trust should be assumed from the facts. The three-year statute was held applicable and the Court stated, "In such instances the breach of the trust is in effect and, usually, in fact a breach of

5. That statute provides: "An action for relief not otherwise limited by this subchapter may not be commenced more than ten years after the cause of action has accrued."

contract, express or implied. Actions thereon are necessarily based on the contract and the breach thereof." 214 N.C. at 293, 199 S.E. at 87. That we should treat the situation disclosed by the record before us as one of express trust and therefore apply the three-year statute is also supported by the statutes. G.S. 28A-13-10(c) provides in pertinent part that, "If the exercise of power concerning the estate is improper, the personal representative is liable for breach of fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an *express trust.*" G.S. § 28A-13-10(c) (1976) (emphasis added).

Plaintiff argued in her Court of Appeals' brief that the obligations and duties of an executor do not arise out of a contract between plaintiff and defendant and, for that reason, the three-year limitation provided by G.S. 1-52(1) is inapplicable here. While we agree with plaintiff that there exists no contract, either express or implied, between the parties to this action, this is not determinative. The duties and obligations of defendant with regard to the estate arose upon its qualification as executor and trustee. Defendant's acceptance of those positions created the fiduciary duties which plaintiff claimed it has breached. Defendant received certain consideration for its acceptance of those duties, its commissions or fees as executor and trustee. The overall transaction, and the attendant rights and duties, is clearly contractual in nature. Defendant agreed with the decedent and the court that it would carry out the directions of the will. Such an agreement establishes the fiduciary duties as essentially contractual in nature and any failure to perform in compliance with the duties as a fiduciary is tantamount to a breach of contract.

Plaintiff's posture as a beneficiary of the will is analogous to that of a third party beneficiary to a contract between defendant and the court (as decedent's representative). As such, she is entitled to enforce the terms of the arrangement and to recover damages sustained by reason of defendant's breach of fiduciary duty. Her action, however, being essentially grounded in contract, is subject to the three-year limitation of G.S. 1-52(1).

5. That statute provides: "An action for relief not otherwise limited by this subchapter may not be commenced more than ten years after the cause of action has accrued."

Plaintiff's action accrued, at the latest, on the date she discovered that the family home had been the property of the decedent alone.[6] That date was sometime late in 1970. Thus, for her action to be timely, it would have to have been filed on or before 31 December 1973. Plaintiff's complaint was filed on 11 July 1979, some five and one-half years after the expiration of the limitations period. Because her action was not timely instituted, it is now barred, and the entry of summary judgment for defendant was proper.

Although we are in disagreement with the Court of Appeals as to which statute of limitations controls, that court's result was proper. Because our decision is based on the statute of limitations, it is unnecessary to reach other questions discussed by the Court of Appeals and argued by the parties in brief.

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

Modified and affirmed.

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

STATE OF NORTH CAROLINA v. KEVIN E. LAKE

No. 82

(Filed 27 January 1982)

1. Criminal Law § 92.5— antagonistic defenses of two defendants—denial of motion for severance

The trial court did not abuse its discretion in the denial of defendant's motion for severance from a joint murder trial with a codefendant, although the testimony of defendant and the codefendant was conflicting upon material facts and their defenses were admittedly antagonistic, where the codefendant was subjected to vigorous cross-examination by defendant's counsel, the State

6. For the purposes of this decision, it is not necessary to decide whether plaintiff's cause of action accrued when the breach occurred, *i.e.*, when the tobacco farm was sold, or when the breach was discovered, *i.e.*, when plaintiff attempted to sell the home.

offered other sufficient evidence of defendant's guilt of the murder, and the codefendant could have testified about the very same incriminating matters at defendant's separate trial.

2. **Bills of Discovery § 6— written statement of witness not subject to discovery**

In a prosecution for murder, a written statement of a State's witness who was also charged with the murder was not discoverable by defendant under provisions of G.S. 15A-903(b)(2) requiring the disclosure of statements of a codefendant where the witness was not a codefendant being jointly tried with defendant. Nor was the statement discoverable under G.S. 15A-903(d) as a document or tangible object material to the preparation of a defense since the State could properly resist discovery of its witness's statement under G.S. 15A-904(a).

3. **Criminal Law § 128.2— questioning of defense witness by police officers—motion for mistrial**

The trial court in a first degree murder case did not err in the denial of defendant's motion for mistrial made on the ground that a defense witness was improperly questioned on the night before trial by two police detectives at the police department where the court found upon supporting voir dire evidence that the two detectives interviewed the witness to determine what testimony the witness was prepared to give in the case with respect to statements made by defendant to the witness while in jail, and that the officers did not threaten or intimidate the witness.

4. **Criminal Law §§ 102.3, 128.2— improper jury argument by prosecutor—curative instructions—mistrial denied**

The trial court did not abuse its discretion in denying defendant's motion for a mistrial because the district attorney in his jury argument attempted to discredit two defense witnesses by asserting certain facts which were not included in the evidence presented at trial where the court immediately sustained defendant's objection to the challenged argument and plainly instructed the jury to disregard the inappropriate statements in its deliberations.

ON appeal as a matter of right from the judgment of *Rouse, J.*, entered at the 10 September 1980 Criminal Session, ONSLOW Superior Court. Defendant received a sentence of life imprisonment for his conviction of first degree murder.

Defendant was charged in an indictment, proper in form, with the first degree murder of Vincent H. Tubby. Defendant pleaded not guilty to the charge.

In pertinent part, the State's evidence tended to show the following. Vincent Tubby was arrested for possession of marijuana and placed in the Onslow County jail on the evening of 5 March 1980. Tubby was released a short while later, at about

10:30 p.m., after he posted a cash bond. During this time, defendant and several of his friends, including Peter Abrams, Toby Locke and Kirby Warren, were also present at the jail. All of these men, including the defendant, were Marines. They had been drinking at some bars and, according to Abrams' testimony, smoking some of defendant's marijuana. They had come to the jail to post bail for another Marine companion. As the group waited in the magistrate's office for this purpose, Vincent Tubby sat nearby.

A personal skirmish developed between defendant and Tubby after Tubby spat on the floor twice. Defendant grabbed Tubby by the shirt, and the two engaged in a face-to-face confrontation. At that point, a police officer told them "to take it elsewhere." Tubby and defendant, followed by Warren, left the jail building. Abrams also went outside a few minutes later.

When Abrams located defendant and Warren, he found them kicking Tubby, who was lying on the ground. Abrams asked what was going on, and defendant responded that "he was teaching a punk a lesson . . . this M.F. deserves to get his ass beat." Abrams then joined in kicking Tubby about his head and groin (in the process, Abrams' sneakers and socks became bloody). During this attack, defendant took some money from Tubby's pocket. Tubby did not resist his assailants; consequently, Abrams and Warren discontinued their assault upon him and left the immediate area. However, defendant remained with Tubby.

When Abrams went back to get defendant, he saw defendant "crouching down over Tubby, making a pushing motion toward his chest." When defendant stood up, Abrams saw a knife in his hand. Defendant, Abrams and Warren left the vicinity and returned to Locke's jeep to go back to the base. Abrams later asked defendant if he had killed Tubby, and defendant replied, "dead men don't talk."

During the drive back to the base, Locke heard Abrams ask defendant "how much he got," and defendant say "a couple of bucks." Defendant also said that "he stabbed the guy good" and had "killed a couple of Negroes in Boston and got away with that." Defendant further boasted to his companions that "[h]e would get away with this" and warned them not to say anything about the incident because they were accessories, and he would "get" them for it. While defendant made these statements, Locke

saw him flipping and playing with his knife, a knife which he always carried upon his person.

Sometime after their return to the base, defendant gave Locke his pants and told him to throw the clothing in the dumpster. As Locke was doing so, a wallet and some papers fell out of the pants. Locke ripped up the papers and threw them, along with the wallet, into a nearby wooded area.

The body of Vincent Tubby was discovered at 2:00 a.m. on 6 March 1980. An autopsy later disclosed that he had died as a result of multiple stab wounds to the back and chest. Defendant, Abrams, Locke and Warren were all subsequently arrested for Tubby's murder.

When defendant was arrested, his boots and knife were taken and subjected to laboratory analysis. Tests indicated the presence of blood on these items. It was also established that a boot print at the scene of the homicide could have been made by defendant's boot.

On 11 August 1980, the trial court, over defendant's objection, granted the State's motion to join defendant and Abrams for trial. Defendant later moved for severance of the cases, but the court denied the motion on 2 September 1980.

At their joint trial, both defendant and Abrams testified; however, their individual versions of the events surrounding the encounter with decedent were quite different. For instance, defendant testified that he had not smoked any marijuana that night; that he merely had a fist fight with the victim; that he did not kick, rob or stab the victim; that he was not carrying his knife on that occasion; that he left the scene while Abrams, Warren and Locke were still kicking the victim; that when the others came back to the jeep, Locke said to him, "We took care of him;" and that he did not ask Locke to dispose of a pair of his pants after the group returned to the base. Defendant also denied that he made any incriminating statements concerning the assault to either Locke or Abrams.

Upon all of the evidence presented, the jury found defendant guilty as charged. He was sentenced to life imprisonment.

Other facts, which become relevant to defendant's specific assignments of error, shall be incorporated into the opinion below.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

Cameron and Cameron, by William M. Cameron, Jr., R. Lynn Coleman and W. M. Cameron, III, for defendant-appellant.

COPELAND, Justice.

Defendant argues four assignments of error in his brief. Our review of the factual circumstances of this record and the law applicable thereto does not, however, disclose prejudicial error requiring a new trial. We therefore affirm defendant's conviction for first degree murder.

[1] Defendant first contends that the trial court erred in failing to grant his motion for severance from a joint murder trial with Abrams. We disagree.

To begin with, we hold that the cases of defendant and Abrams were properly joined for trial pursuant to G.S. 15A-926(b)(2) since both were charged with accountability for the same offense. That being so, it is clear that the disposition of defendant's subsequent motion for a separate trial was a matter governed by the judge's sound discretion. *State v. Allen*, 301 N.C. 489, 272 S.E. 2d 116 (1980); *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). Our Court has held repeatedly that the ruling upon a motion for severance shall not be disturbed on appeal unless defendant demonstrates an abuse of judicial discretion which effectively deprived him of a fair trial. *See, e.g., State v. Porter & Ross*, 303 N.C. 680, 281 S.E. 2d 377 (1981); *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *see* G.S. 15A-927(c)(2). We find no such abuse here.

It is true that the testimony of Abrams and defendant was conflicting upon material facts, and their defenses were admittedly antagonistic. However, Abrams was subjected to vigorous cross-examination by defendant's counsel, and, more importantly, the State offered other sufficient evidence of defendant's guilt of the crime (in particular, the testimony of Toby Locke). It is also plain that Abrams could have testified about the very same in-

criminating matters at defendant's separate trial.[1] Under these circumstances, we cannot say, as a matter of law, that the antagonistic defenses of the co-defendants converted this joint trial into an impermissible evidentiary contest or combative spectacle which prevented the jury from rendering a fair adjudication of defendant's individual guilt. *See State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied*, 446 U.S. 929, 100 S.Ct. 1867, 64 L.Ed. 2d 282 (1980); *State v. Cook*, 48 N.C. App. 685, 269 S.E. 2d 743, *petition for discretionary review denied*, 301 N.C. 528, 273 S.E. 2d 456 (1980). As there is an insufficient basis for finding that the judge abused his discretion in denying severance, the assignment of error is overruled.

[2] Defendant additionally argues that the trial court should have suppressed the State's evidence of Toby Locke's written statement because he was not afforded, as requested, an opportunity for pre-trial discovery of its contents pursuant to G.S. 15A-903(b) and (d). Defendant's position is untenable. We agree that G.S. 15A-903(b) and (d) generally require the State to disclose the statements of a co-defendant and documents or tangible objects which are material to the preparation of the defense. However, neither of these discovery provisions applies in the instant case. First, the State did not have to reveal the statement's contents under G.S. 15A-903(b)(2) because Locke, although charged with the same murder, was not a co-defendant being *jointly* tried with defendant. *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980). Second, the State had no statutory duty to divulge the prior recorded statement of Locke under G.S. 15A-903(d) because Locke was testifying for the prosecution (under an offer of immunity), and the State could properly resist discovery of its witness's statement under G.S. 15A-904(a). *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978); *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). In sum, we hold that Locke's statement was not discoverable by defendant under G.S. 15A-903; consequently, the statement was correctly admitted into evidence to corroborate Locke's in-court testimony.

1. Defendant made a subsidiary argument concerning the trial court's failure to limit the admissibility of Abrams' pre-trial statement. However, defendant did not request a limiting instruction; thus, he is not entitled to complain of its omission on appeal. *See State v. Case*, 253 N.C. 130, 137, 116 S.E. 2d 429, 434 (1960), *cert. denied*, 365 U.S. 830, 81 S.Ct. 717, 5 L.Ed. 2d 707 (1961).

Defendant's next assignment of error states that "[t]he trial judge abused his discretion by denying defendant's *numerous motions for mistrial* due to improper conduct on the part of the district attorney." (Emphasis added.) The record shows that defendant specifically moved for a mistrial only *twice*, yet this assignment attempts to incorporate, for our consideration, *seventeen* exceptions taken by defendant at various times throughout the trial. Only two of those exceptions, nos. 3 and 22, were directed to the denial of defendant's motions for a mistrial. It is, therefore, appropriate that we limit our review of this assignment of error to the specific matters challenged by exceptions 3 and 22. *See* North Carolina Rules of Appellate Procedure, Rule 10(a) ("no exception . . . which is not made the *basis* of an assignment of error may be considered on appeal"); Rule 10(c) ("[e]ach assignment of error . . . shall, so far as practicable, be confined to a single issue of law"); Rule 28(b)(3) (content of appellant's brief: "[i]mmediately following each question shall be a reference to . . . exceptions *pertinent* to the question").

[3] With regard to exception no. 3, defendant essentially contends that the trial court should have ordered a mistrial upon the ground that a defense witness had been improperly questioned, on the night before trial, by two detectives of the Jacksonville Police Department at the behest of the district attorney. We disagree. The trial court conducted a prompt and thorough *voir dire* hearing investigating defendant's allegation. The two detectives involved and the witness interviewed by them were subjected to full examination by both the defense and prosecution. At the conclusion of its investigation, the court entered the following order:

> From the evidence offered on the voir dire the Court makes the following findings of fact: Ronnie Guthrie, a witness under subpoena by the defendant, was returned from the Department of Correction to the Onslow County Jail on Tuesday, September 2, and has remained there since that time.
>
> 2. At the request of the District Attorney, Detectives Delma Collins and W. T. Whitehead interviewed Guthrie in the Onslow County Jail on the night of Wednesday, September 3.

> The purpose of the interview was to determine what testimony Guthrie was prepared to give in this case with respect to what one Kevin Lake had said at the time that Guthrie was in the Onslow County Jail with Lock (sic) and the defendant Lake. Guthrie did talk to the officers in the conference room at the Onslow County Jail. The officers did not threaten or intimidate Guthrie. The motion for mistrial is denied.

It is axiomatic that the trial court's findings entered upon a *voir dire* hearing are conclusive and binding on appeal if they are supported by competent evidence. *See State v. Thompson*, 303 N.C. 169, 277 S.E. 2d 431 (1981); *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. denied*, 386 U.S. 911, 87 S.Ct. 860, 17 L.Ed. 2d 784 (1967). It would serve no useful purpose for us to recap the content of the witnesses' testimony[2] heard by the judge. It suffices to say that we have carefully reviewed the pertinent portions of the record and find therein ample competent evidence to sustain the judge's findings; therefore, it does not affirmatively appear that the judge abused his discretion in denying the motion for a mistrial in this respect.

[4] With regard to exception no. 22, defendant essentially maintains that he was entitled to the declaration of a mistrial because the district attorney, in his closing argument to the jury, attempted to discredit two defense witnesses by asserting certain facts which were not included in the evidence presented at trial. It is, of course, well established that, although wide latitude is permitted in jury argument, counsel may not transcend the bounds of fundamental fairness and argue extraneous facts or law *not* properly in evidence. *State v. Wright*, 304 N.C. 349, 283 S.E. 2d 502 (1981); *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980). The district attorney committed this very transgression in the instant case. However, the judge immediately sustained defendant's objection to the challenged argument and plainly instructed the jury to disregard the inappropriate statements in its deliberations. This curative instruction adequately averted any possible prejudice to defendant. *State v. Sanders*, 303 N.C. 608, 281 S.E. 2d 7 (1981); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).

2. This evidence consumes fifteen pages of the printed record on appeal.

For this reason, we conclude that the judge did not abuse his discretion in failing to grant a mistrial for the district attorney's impropriety.

Defendant finally contends that the cumulative effect of various errors at trial, including those we have discussed, resulted in the denial of a fair trial; thus, the trial court erred in denying his motion for appropriate relief. This contention lacks merit and is overruled.

In conclusion, we find no prejudicial error in defendant's trial, and the judgment of life imprisonment is affirmed.

No error.

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

AIRPORT AUTHORITY v. IRVIN

No. 150 PC.

Now No. 19 PA 82.

Case below: 54 N.C. App. 355.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 27 January 1982.

CHINAULT v. PIKE ELECTRICAL CONTRACTORS

No. 67 PC.

Now No. 17 PA 82.

Case below: 53 N.C. App. 604.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 27 January 1982.

DEESE v. LAWN AND TREE EXPERT CO.

No. 42 PC.

Now No. 16 PA 82.

Case below: 53 N.C. App. 607.

Petition by plaintiff Deese for discretionary review under G.S. 7A-31 allowed 27 January 1982.

HARRELL v. STEVENS & CO.

No. 177 PC.

Case below: 54 N.C. App. 582.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 January 1982.

HARRIS v. GUYTON

No. 156 PC.

Case below: 54 N.C. App. 434.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 January 1982.

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

JENKINS v. JENKINS

No. 141 PC.

Now No. 18 PA82.

Case below: 54 N.C. App. 693.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 27 January 1982.

JOHNSON v. DUNLAP

No. 10 P 82.

Case below: 53 N.C. App. 312.

Petition by defendants for writ of certiorari to North Carolina Court of Appeals denied 27 January 1982.

POPE v. PETERS

No. 155 PC.

Case below: 54 N.C. App. 493.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 January 1982.

POYTHRESS v. J. P. STEVENS

No. 158 PC.

Case below: 54 N.C. App. 376.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 January 1982.

STATE v. ASHLEY

No. 152 PC.

Case below: 54 N.C. App. 386.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1982.

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

STATE v. CAUDLE

No. 164 PC.

Case below: 54 N.C. App. 693.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1982.

STATE v. HARRELSON

No. 131 PC.

Case below: 54 N.C. App. 349.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 January 1982.

STATE v. MOORE

No. 6P82.

Case below: 55 N.C. App. 268.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1982.

STATE v. OVERTON

No. 15P82.

Case below: 52 N.C. App. 735.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 27 January 1982.

STATE v. OWEN

No. 7P82.

Case below: 51 N.C. App. 429.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 27 January 1982.

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

STATE v. REVELL

No. 153 PC.

Case below: 54 N.C. App. 694.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1982.

STATE v. ROSEBORO

No. 19P82.

Case below: 55 N.C. App. 205.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 January 1982.

STATE v. SAMUELS

No. 129 PC.

Case below: 54 N.C. App. 493.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1982.

STATE v. SUMMERS

No. 157 PC.

Case below: 54 N.C. App. 493.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 January 1982.

NOVA UNIVERSITY v. THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA[1]

No. 110A81

(Filed 3 March 1982)

Colleges and Universities § 2— Florida institution—teaching program in N.C.—degrees granted in Florida—no right of U.N.C. Board of Governors to regulate

The Board of Governors of the University of North Carolina is not authorized by G.S. 116-15 to regulate through a licensing procedure teaching in North Carolina by Nova University when the teaching leads to Nova's conferral of academic degrees in Florida pursuant to Florida law.

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

Justice CARLTON dissenting.

Justice COPELAND joins in this dissent.

ON defendants' petition for discretionary review under General Statute 7A-31(a) of a Court of Appeals' decision[2] reversing the denial of plaintiff's motion for summary judgment by *Judge Hamilton Hobgood* on 15 October 1979 in WAKE Superior Court. This case was argued as No. 51, Spring Term 1981.

Powe, Porter and Alphin, by E. K. Powe and Charles R. Holton; Glassie, Pewett, Dudley, Beebe and Shanks, by Hershel Shanks and Michael A. Gordon, for plaintiff Nova University.

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting and Marvin Schiller, Assistant Attorneys General, for defendant Board of Governors.

1. Individual members of the University's Board of Governors, the University itself, and Mr. William Friday, President of the University, have also been named as defendants. Because this litigation is essentially between Nova University and The University of North Carolina's Board of Governors, and because of our disposition of the case, we think it unnecessary formally to list these parties in the caption of the case.

2. 47 N.C. App. 638, 267 S.E. 2d 596 (1980). The opinion is by Judge Webb with Judges Parker and Clark concurring. We allowed defendants' petition on 16 September 1980, 301 N.C. 94, 273 S.E. 2d 299.

EXUM, Justice.

The question dispositive of this litigation is whether General Statute 116-15[3] authorizes the Board of Governors of the University of North Carolina (herein "Board") to regulate through a licensing procedure teaching in North Carolina by Nova University (herein "Nova") when the teaching leads to Nova's conferral of academic degrees in Florida and pursuant to Florida law. The Court of Appeals concluded that the statute contains no such authorization. We agree and affirm.

Defendant Board, acting under G.S. 116-15 and various regulations adopted by it pursuant to the statute, denied plaintiff Nova, a Florida nonprofit corporation, a license to teach in North Carolina curricula designed by Nova to lead to its conferral in Florida of certain academic degrees. Nova has challenged this ruling by filing in superior court what it denominates a "Petition and Complaint." Its petition is filed pursuant to G.S. 150A-45, the section of our Administrative Procedure Act (herein "APA") which provides that "judicial review of a final agency decision" may be obtained through "a petition" filed in Wake Superior Court. By its complaint, or civil action, Nova seeks both a declaratory judgment that the Board has no authority to license its teaching in North Carolina or its conferral of degrees in Florida under Florida law and injunctive relief against the Board's attempt at this kind of regulation. In superior court Nova filed both a motion for summary judgment and a motion for extension of time to conduct discovery. Both motions appear to be related to Nova's civil action, rather than its APA petition for review; but the Board resisted only Nova's motion to extend time for discovery on the ground that Nova's relief, if any, from the Board's decision was via its APA petition for review. The Board argued that the superior court could not entertain a separate civil action and Nova had no right to discovery in a proceeding to review an administrative decision.

Judge Hobgood, after a hearing, denied Nova's motion for summary judgment "without prejudice" to Nova's having its "appeal from an adverse ruling of an administrative agency heard pursuant to [the APA]." Concluding, however, that Nova had a

3. Pertinent provisions of the statute are set out, *infra*, in text.

right to conduct discovery, Judge Hobgood allowed Nova's motion to extend time for discovery.

The Court of Appeals allowed both Nova's and the Board's petitions for certiorari, each party having sought review of the ruling adverse to it. The Court of Appeals, after concluding that under G.S. 116-15 the Board "does not have the power to license or regulate Nova University in its teaching program in this state so long as Nova does not confer degrees in this state," reversed Judge Hobgood's denial of Nova's summary judgment motion and remanded for entry of a judgment consistent with its opinion. The Court of Appeals did not, therefore, reach the discovery question raised by the Board's petition for certiorari.

Before us the Board has not sought to sustain the denial of Nova's summary judgment motion on the ground that the superior court had no jurisdiction to entertain it. It continues to argue that Nova's exclusive judicial remedy is under the APA only as a challenge to the superior court's ruling on Nova's discovery motion. Both parties have before us treated the case as if Nova's motion for summary judgment was procedurally a proper way to raise the question of the Board's authority to act. Both have vigorously and ably argued this question here and in the Court of Appeals on the basis that a conclusion that the Board lacked such authority would effectively terminate the litigation in Nova's favor whether the matter is considered as a petition under the APA or civil action against the Board, or both. We approach this aspect of the case as have the parties.

We now proceed to the question at hand.

General Statute 116-15 provides:

"Licensing of nonpublic educational institutions; regulation of degrees.—(a) *No nonpublic educational institution created or established in this State after December 31, 1960,*[4] *by any*

4. The date of "December 31, 1960," both here and in sub-section (b), was substituted for "April 15, 1923" by Act of June 14, 1977, ch. 563, §§ 1 & 2, 1977 N.C. Sess. Laws 665 (1st Sess.). According to the Board's brief, which is supported by the record, this updating of the grandfather clause was suggested to the 1977 General Assembly by Dr. Cameron West, then President of the North Carolina Association of Independent Colleges and Universities, in order to remove from the Board's regulatory power four private North Carolina institutions, Methodist Col-

person, firm, organization, or corporation shall have power or authority to confer degrees upon any person except as provided in this section. For the purposes of this section, the term 'created or established in this State' or 'established in this State' shall mean, in the case of an institution whose principal office is located outside of North Carolina, the act of issuance by the Secretary of State of North Carolina of a certificate of authority to do business in North Carolina.[5] The Board of Governors shall call to the attention of the Attorney General, for such action as he may deem appropriate any institution failing to comply with the requirements of this section.

(b) *The Board of Governors, under such standards as it shall establish, may issue its license to confer degrees in such form as it may prescribe to a nonpublic educational institution established in this State after December 31, 1960,* by any person, firm, organization, or corporation; but no nonpublic educational institution established in the State subsequent to that date shall be empowered to confer degrees unless it has income sufficient to maintain an adequate faculty and equipment sufficient to provide adequate means of instruction in the arts and sciences, or in any other recognized field or fields of learning or knowledge.

(c) All nonpublic educational institutions licensed under this section shall file such information with the President as the Board of Governors may direct, and the said Board may evaluate any nonpublic educational institution applying for a license to confer degrees under this section. If any such nonpublic educational institution shall fail to maintain the required standards, the Board shall *revoke its license to confer degrees,* subject to a right of review of this decision in the manner provided in Chapter 150A of the General Statutes." (Emphasis supplied.)

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lege, Mount Olive College, North Carolina Wesleyan College and St. Andrews Presbyterian College, "which were established after April 15, 1923, but which had enjoyed a long and stable tenure in this State and which had academic programs of high quality." Board's brief, p. 5.

5. This sentence was also added by Act of June 14, 1977, ch. 563, *supra,* § 3. Although it does not appear in the record, the parties in oral argument agreed that Nova was certified by the Secretary of State to do business in North Carolina.

Acting pursuant to subsection (b) of the statute, the Board adopted "Rules and Standards for Licensing Non-Public Educational Institutions To Confer Degrees."[6] (Herein "Standards.") These Standards provide for a number of "minimum standards" with which "a non-public degree-granting educational institution operating wholly or in part in North Carolina" must comply. They relate, in part, to "the quality and content of each course or program of instruction"; the adequacy of "space, equipment, instructional materials, and personnel"; the qualifications of administrators and instructors; financial soundness; and absence of discriminatory practices. "Accreditation by the appropriate accrediting agency . . . may be accepted by the Board . . . as evidence of compliance with [the] minimum standards." The Standards then provide for a procedure whereby an institution may apply for a license. After application, an "examination visit" to the applicant institution's campus by a "team of examiners" is conducted. The Team then files its report and recommendations with the President of the University of North Carolina. After opportunity is given to the applicant to discuss and make additions to the report of the examining team, the matter is submitted to the Board for its "decision and final disposition of the institution's request for licensing." The Rules provide for judicial review of the Board's decision pursuant to Article 4 of G.S. 150A.

In addition to its Standards, the Board on 13 February 1976 adopted revised "Guidelines for Interpretation and Implementation" of its Standards (herein "Guidelines"). The Guidelines are expressly designed to "interpret the rules and minimum standards under which the Board . . . issues licenses to non-public educational institutions *to confer degrees in North Carolina.*" (Emphasis supplied.) The Guidelines, after stating the Board's conception of the "broad purpose of higher education," outline in detail requirements for an acceptable "educational program" for each of several types of academic degrees.[7] After stating the Board's conception of the capacities of "[a] generally educated person" and how these capacities are generally developed, the Guidelines provide:

6. According to admissions in the pleadings these rules were first adopted on 8 February 1974, but were later revised on 13 February 1976. It is the revised version of the rules which is pertinent to this case.

7. The Guidelines provide program specifications for the associate and baccalaureate degrees and the master's, intermediate, and doctor's graduate degrees.

> "*Extension work Offered by Out-of-State Institutions.* Any institution legally operating in another state that wishes to offer in North Carolina courses leading to a degree is to apply in the same manner *for a license to grant degrees*, and is to be judged by the same standards as institutions applying for initial licensure in North Carolina." (Emphasis supplied.)

The Guidelines close with a section on how an educational institution should be organized and administered.

It is against this legislative and regulatory backdrop that the dispute before us arose.

It is undisputed that Nova is a nonprofit corporation organized and existing under the laws of Florida with its principal place of business in Fort Lauderdale, Florida. In addition to undergraduate, graduate and professional curricula taught at its 200 acre campus in Fort Lauderdale, Nova, beginning in 1972 and thereafter, instituted various "non-resident" curricula designed to lead to the conferral by Nova in Florida of various degrees for professional persons.[8] Candidates for these degrees are not required to fulfill traditional residence requirements at the Nova campus in Fort Lauderdale. Instead, they form "clusters" of 25 to 30 persons who meet regularly at a site in the state where they live. They are taught by professors, most of whom also teach at universities with traditional residency requirements and who are flown in for weekend sessions with the candidates. The candidates listen to lectures, take notes, have class discussions and undergo examinations. In addition, candidates are required to attend summer institutes at Nova's home campus. Courses and research projects required for the degrees usually require three or more years to complete. Successful candidates receive their degrees in Florida by virtue of Nova's charter under the laws of that state. Nova is and has been since 1971 fully accredited by the Southern Association of Colleges and Schools, the officially recognized accrediting association of the southeastern United States. Nova's accreditation was most recently affirmed for a ten-year period after a review in 1974-75 of its educational programs

8. The degrees of concern here are (1) the Doctor of Education Degree for "educational leaders"; (2) the Doctor of Education Degree for "community college faculty"; (3) master's and doctor's degrees in public administration; (4) a master's degree in "criminal justice."

including its extension courses such as those here at issue. Nova offered its first nonresident curriculum leading to the Doctor of Education Degree for community college faculty in North Carolina in the fall of 1973.

According to Nova's complaint, it did not believe that it was subject to the jurisdiction of the Board; but with confidence in the quality of its curriculum and desire to cooperate with North Carolina authorities, it applied to the Board on 19 November 1976 for licensure.

This application was processed according to the Board's Standards and Guidelines. After reviewing documentary material, contacting persons familiar with Nova's curriculum and making site visits both to the North Carolina "clusters" and to the Fort Lauderdale campus, a team of examiners appointed by the Board recommended on 31 October 1977 denial of Nova's license application. This recommendation was seconded by staff personnel of the University of North Carolina; and on 7 December 1978 the Board's Committee on Educational Planning, Policies and Programs recommended that the Board deny Nova's license application. The Board by resolution on 8 December 1978 denied the application. According to the Board's resolution it found that the curriculum leading to the degrees in question lacked "sufficient depth and extensiveness in terms of time and effort required of students," lacked "an adequate faculty in terms of faculty members' contact with and accessibility to their students" and lacked "equipment in terms of libraries and instructional facilities sufficient to provide adequate means of instruction in any of the fields of learning in which" Nova proposed to confer degrees. The Board apparently had no dispute with the qualifications of the faculty generally.

In due time Nova brought this proceeding in Wake Superior Court challenging the Board's action on a multitude of grounds.[9]

9. Grounds other than the one discussed in the text are the contentions that if G.S. 116-15 is construed to permit the Board to regulate Nova's teaching in North Carolina, then the statute violates the Interstate Commerce and Free Speech Clauses of the United States Constitution and the Free Speech, Law of the Land, Anti-monopoly and Equal Protection Clauses of the North Carolina Constitution. Nova also argues that G.S. 116-15 is an unconstitutional delegation of authority to the Board because it fails to provide any legislative standards for the Board's exercise of its administrative discretion.

Nova's most compelling argument, and the one with which we agree, is that G.S. 116-15 expressly authorizes the Board to license only the conferral of degrees. The statute, therefore, should not be interpreted beyond its terms to authorize the Board to license teaching even though the teaching is designed to lead to a degree conferral.

The Board argues to the contrary. It agrees that the statute by its terms speaks only of the Board's authority to license degree conferrals. The Board argues, however, that because the statute authorizes the Board to license degree conferrals, the power to license teaching designed to lead to degree conferrals is necessarily implied.

The Court of Appeals answered the Board's argument by stating "[t]he difficulty we have with the Board's position is that the statute does not specifically grant the power it seeks. What they ask is the power to regulate and license Nova's right to teach which is a restriction on freedom of speech. As Nova points out, other constitutional questions would also arise if we interpreted the statute as contended by the Board. We do not believe we should find a power in the statute by implication which could lead to such constitutional problems. If the General Assembly wants to give the Board the power to so restrict teaching in this state, it may do so specifically and the constitutional questions may then be raised. The statute is not clear in giving the Board the power it seeks. We do not believe we should find this power by implication."

We agree essentially with these conclusions. Insofar as the statute is susceptible to two reasonable interpretations, the one proffered by the Board and the other by Nova, the Board is met head-on by the canon of statutory construction that "[w]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question shall be adopted." *In re Arthur*, 291 N.C. 640, 642, 231 S.E. 2d 614, 616 (1977); *accord, In re Dairy Farms*, 289 N.C. 456, 223 S.E. 2d 323 (1976); *see also State Education Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E. 2d 551 (1970); *North Carolina Milk Commission v. National Food Stores, Inc.*, 270 N.C. 323, 154 S.E. 2d 548 (1967); *City of Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E. 2d 902 (1966).

All that Nova does in North Carolina is teach. Teaching and academic freedom are "special concern[s]" of the First Amendment to the United States Constitution, *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967); and the freedom to engage in teaching by individuals and private institutions comes within those liberties protected by the Fourteenth Amendment to the United States Constitution. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *State v. Williams*, 253 N.C. 337, 117 S.E. 2d 444 (1960).

State v. Williams, supra, dealt with G.S. 115-253 then a part of Article 31, Chapter 115, of our statutes, which provided generally for the regulation of business, trade and correspondence schools, *i.e.*, certain private schools. The statute in question required persons soliciting students in North Carolina for schools "located within or without the State" to secure a license from the State Board of Education. A representative of a Virginia school solicited a North Carolina high school teacher to take a course of instruction by correspondence from the Virginia school. The representative was prosecuted for the misdemeanor of soliciting the student "without first having secured a license from the State Board of Education" in violation of the statute making such act a crime. She defended on the ground that the statute was unconstitutional. This Court sustained her defense. In a thorough opinion, canvassing the law from both the United States Supreme Court and our sister jurisdictions, this Court held that the state had "a limited right, under the police power, to regulate private schools and their agents and solicitors, provided: (1) there is a manifest present need which affects the health, morals, or safety of the public generally, (2) the regulations are not arbitrary, discriminatory, oppressive or otherwise unreasonable, and (3) adequate legislative standards are established." 253 N.C. at 345, 117 S.E. 2d at 450. Noting that the need in the case before it for regulation was "meager at best," the Court also pointed out, *id.* at 345-46, 117 S.E. 2d at 450:

> "But it should be remembered that, though the schools involved are not of equal dignity with many old and revered private institutions of learning in our State, the same law applies to all. The principles the Legislature may follow in regulating one, it may apply to all. *Standardization and regimentation in the field of learning is contrary to the*

> *American concept of individual liberty.* It would be difficult to over-estimate *the contribution of private institutions of learning to the initiative, progress and individualism of our people. Regulation should never be resorted to unless the need is compellingly apparent.*" (Emphasis supplied.)

The Court ultimately concluded that G.S. 115-253 was clearly "an unwarranted delegation of legislative power . . . violat[ing] the 'law of the land' section of the Constitution of North Carolina." *Id.* at 347, 117 S.E. 2d at 451. The Court closed its opinion by saying, "it might be well to point out that it appears settled that statutes such as G.S. 115-253, insofar as they attempt to regulate solicitors for nonresident schools, burden interstate commerce and are unconstitutional (Citations omitted)." *Id.* at 347-48, 117 S.E. 2d at 452.

In *Keyishian v. Board of Regents of New York, supra,* the Supreme Court struck down a New York regulatory scheme designed to prevent the hiring and retention in state employment of "subversive" personnel. Those challenging the regulations in the case were faculty members of the State University of New York. Insofar as the regulations applied to these teachers the Supreme Court had occasion to note, 385 U.S. at 603:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton v. Tucker, supra,* at 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States v. Associated Press,* 52 F Supp 362, 372. In *Sweezy v. New Hampshire,* 354 US 234, 250, we said:
>
> 'The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by

those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are acquired as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.' "

Were we, therefore, to interpret G.S. 116-15 as the Board suggests, serious constitutional questions arising under the First Amendment and the Interstate Commerce and Fourteenth Amendment Due Process Clauses of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution would arise.

Further, we do not think the Board's proffered interpretation of G.S. 116-15 is a reasonable one. The Board argues as follows: The legislature has made clear in other provisions of Chapter 116, dealing with higher education in North Carolina, that the Board is to preside over the planning and development of a coordinated system of higher education in this state.[10] In order to accomplish

10. The Board notes particularly, the following provisions of Chapter 116:

"§ 116-1. *Purpose.—In order to foster the development of a well-planned and coordinated system of higher* education, to improve the quality of education, to extend its benefits and to encourage an economical use of the State's resources the University of North Carolina is hereby redefined in accordance with the provisions of this Article.

"§ 116-11. *Powers and duties generally.*—The powers and duties of the Board of Governors shall include the following:

(1) *The Board of Governors shall plan and develop a coordinated system of higher education in North Carolina.* To this end it *shall govern the 16 constituent institutions* [defined in G.S. 116-4], subject to the powers and responsibilities given in this Article to the boards of trustees of the institutions, *and* to this end it *shall maintain close liaison with* the State Board of Education, the Department of Community Colleges and the *private colleges and universities of the State. The Board, in consultation with representatives of the State Board of Education and of the private colleges and universities, shall prepare and from time to time revise a long-range plan for a coordinated system of higher education,* supplying copies thereof to the Governor, the members of the General Assembly, the Advisory Budget Commission and the institutions. . . ." (Emphasis supplied.)

this broad legislative purpose the Board argues that it must have the power not only to license degree conferrals, but also the teaching of curricula which lead to such conferrals. Thus, argues the Board, citing *Board of Education v. Dickson*, 235 N.C. 359, 70 S.E. 2d 14 (1952), the meaning of this statute is to be found in what it necessarily implies as much as in what it specifically expresses. The Board reminds us that "[w]e are not at liberty to give a statute a construction at variance with [the legislature's] intent, even though such construction appears to us to make the statute more desirable and free it from constitutional difficulties." *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E. 2d 338, 350 (1978).

It is true that portions of Chapter 116 do purport to give the Board broad powers in the planning and coordination of a system of higher education in North Carolina. These powers of planning and coordination are granted to the Board in a number of subsections of G.S. 116-11, each of which deals with a specific power. These grants of power, however, are expressly relative to the Board's governance of the constituent institutions of the University of North Carolina.[11] Only G.S. 116-15, dealing specifically with the licensing of degree conferrals, purports to give the Board authority over private educational institutions, and even this authority is severely limited by the grandfather clause exempting all institutions established before 31 December 1960.

Neither does the Board need, by implication or otherwise, the power to license teaching leading to degree conferrals apart from and in addition to its power to license those conferrals made by North Carolina colleges and universities in order to accomplish the purpose of the legislation. Although a private North Carolina

11. In addition to subsection (1), quoted at n. 10, *supra*, some of the other subsections provide in pertinent part as follows:

"(2) The Board of Governors shall be responsible for the general determination, control, supervision, management and governance of all affairs of *the constituent institutions.*"

"(3) The Board shall determine the functions, educational activities and academic programs of *the constituent institutions.*"

"(6) The Board shall approve the establishment of any new *publicly supported institution* above the community college level."

"(8) The Board shall set enrollment levels of *the constituent institutions.*" (Emphasis supplied.)

educational institution may remain free to teach what it will without the Board's sanction, it cannot, under the statute,[12] grant a degree based on such instruction unless the Board approves. Inherent in the power to license degrees is the power to establish minimum criteria which a North Carolina institution must meet in order to be licensed to grant degrees. This is sufficient power for the Board to ensure that degrees conferred by North Carolina institutions are backed by curricula meeting the minimum standards of quality prescribed by the Board's regulations. We believe it is all the power the legislature intended to confer.[13]

The difficulty, of course, is that the Board cannot regulate Nova's degree conferrals made in Florida under the auspices of Florida law. The Board concedes that it does not have this extraterritorial jurisdiction. Therefore, the Board argues, the power to license teaching conducted by Nova in North Carolina leading to a degree from the Florida institution must necessarily be implied if the Board is properly to guard against the possibility that

12. We assume for purposes of argument, but without deciding, that the legislature may constitutionally give the Board the power to license degree conferrals made by North Carolina institutions.

13. We are satisfied that the legislature had in mind only North Carolina institutions when it enacted in 1971 those provisions of G.S. 116-15 now under consideration. In the Act of October 30, 1971, ch. 1244, § 1, 1971 N.C. Sess. Laws (1st Sess.), the legislature spoke of "non-public educational institution[s] created or established in this State" without assigning any meaning to "created or established" other than their ordinary connotation. It was not until 1977, four years after Nova offered its first external program in North Carolina and seven months after it applied for a license, that the legislature amended G.S. 116-15(a) to define the phrase "created or established." It was then that the legislature first mentioned out-of-state institutions in connection with "[l]icensing of nonpublic educational institutions" and "regulation of degrees." The amendment stated: "For the purposes of this section, the term 'created or established in this State' or 'established in this State' shall mean, in the case of an institution whose principal office is located outside of North Carolina, the act of issuance by the Secretary of State of North Carolina of a certificate of authority to do business in North Carolina." Act of June 14, 1977, ch. 563, *supra*, § 3. Thus, it is apparent that the legislature did not even contemplate out-of-state schools like Nova when the licensing provisions of the statute were designed. Even after the 1977 amendment purporting to bring out-of-state institutions within the statute's ambit, the legislature did not broaden the reach of the licensing scheme itself. The Board's power remained limited to the licensing of "degree conferrals." Whether a statute could be constitutionally designed to regulate in-state teaching or even in-state degree conferrals by out-of-state schools operating under the laws of other states is a question not now before us and one which we do not now decide.

this state's citizens will be awarded degrees which are not, in the Board's view, supported by adequate academic preparation.

The Board, however, may not exercise more licensing power over Nova than it has over North Carolina institutions. *State v. Williams, supra*, 253 N.C. at 345, 117 S.E. 2d at 452. Thus, the Board cannot be given authority to license Nova's teaching in North Carolina when it has no authority to license teaching by a North Carolina institution. Since the statute gives the Board no such authority, either expressly or by necessary implication, to license teaching by North Carolina private institutions, even when such teaching may lead to a degree conferral, it likewise gives the Board no authority to license this kind of teaching on the part of Nova.[14]

Indeed the Board in its Brief concedes, "Nova is free to teach what it . . . wishes to teach, and its students are entitled to learn the same. This remains true even though Nova was denied a license to offer degree programs and confer degrees in this state." If this is true, and we agree that it is, then Nova must prevail. For, by whatever name it is called, all that Nova does in North Carolina is teach. To say that it is conducting a "degree program" which is somehow different from or more than mere teaching, as the Board would have it, is nothing more than the Board's euphemization. Teaching is teaching and learning is learning notwithstanding what reward might follow either process. The Board's argument that the power to license teaching is necessarily implied from the power to license degree conferrals simply fails to appreciate the large difference, in terms of the state's power to regulate, between the two kinds of activities. The Board accuses Nova of trying to accomplish an "end run" around the statute. In truth, the Board, if we adopted its position, would be guilty of an "end run" around the statutory limits on its licensing authority.

Finally, the Board's proffered canons of statutory construction, including the canon that "[t]he construction of statutes

14. To say, as we do, that the Board has no power under the statute to license teaching, whether by an out-of-state or an in-state institution, is not to say, as the dissenters contend, that the Board has no power to regulate degree conferrals by in-state institutions operating under North Carolina law if they occur outside the state. This again is a question not now before us and one which we do not now decide.

adopted by those who execute and administer them is evidence of what they mean," *Commissioner of Insurance v. Automobile Rate Office*, 294 N.C. 60, 67, 241 S.E. 2d 324, 329 (1978), are designed to help courts construe statutes where the statute is susceptible to construction. When the language of the statute is unambiguous and the meaning clear, there is no room for judicial construction. *Phillips v. Shaw*, 238 N.C. 518, 520, 78 S.E. 2d 314, 315 (1953). "[T]he province of construction lies wholly within the domain of ambiguity, and . . . if the language used is clear and admits but one meaning, the Legislature should be taken to mean what it has plainly expressed." *Asbury v. Town of Albemarle*, 162 N.C. 247, 250, 78 S.E. 146, 148 (1913).

Here the legislature has clearly authorized the Board to license only degree conferrals, not teaching. Because of the statute's clear language limiting the Board's authority to license only degree conferrals and not separately to license the teaching which may lead to the conferral, the statute is simply not reasonably susceptible to a construction which would give the Board the power to license such teaching.

Since this determination effectively ends this litigation, we, like the Court of Appeals, need not reach the question of whether Judge Hobgood erred in granting Nova an extension of time to conduct discovery.

The decision of the Court of Appeals is, for the reasons stated,

Affirmed.

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

Justice CARLTON dissenting.

I respectfully dissent from the majority opinion. Its interpretation of G.S. 116-15 as applying only to the physical conferral in this state of academic degrees emasculates that statute and seriously erodes the power of the Board of Governors in carrying out its statutory mandate to plan and develop a coordinated system of higher education in this state. The law created by the majority would allow any private organization which teaches in

this state to avoid regulation and minimum standards of quality by simply stepping a few feet across the state line on graduation day and handing out diplomas to its North Carolina students. Such a result could not possibly have been the intent of our Legislature. In order to accomplish its statutorily expressed purposes,[1] the Board must have the power to license all degree conferral programs offered within this state, regardless of where the graduation ceremony is held. I believe it does have that power.

I cannot argue with the majority's statement that G.S. 116-15 expressly mentions only the regulation of degree conferrals; our disagreement lies in whether this statute *implicitly* authorizes the licensing or regulation of the programs which lead to degree conferrals. In my opinion, the power to regulate or license degree conferral programs is essential to the power to regulate degree conferral itself and is necessarily implied by the statute. My conclusion is based on two grounds: (1) the language of G.S. 116-15 itself and (2) the purpose and function of the Board of Governors.

(1) In pertinent part, G.S. 116-15 provides:

> § 116-15. Licensing of nonpublic educational institutions; regulation of degrees.—(a) No nonpublic educational institution created or established in this State after December 31, 1960, by any person, firm, organization, or corporation shall have *power or authority to confer degrees* upon any person except as provided in this section.
>
> (b) The Board of Governors, under such standards as it shall establish, may issue its license to confer degrees in such form as it may prescribe to a nonpublic educational institution established in this State after December 31, 1960, by any person, firm, organization, or corporation; but *no nonpublic educational institution established in the State subsequent to that date shall be empowered to confer degrees unless it has income sufficient to maintain an adequate faculty and equipment sufficient to provide adequate means of instruction in the arts and sciences, or in any other recognized field or fields of learning or knowledge.*

1. See G.S. § 116-11 (Supp. 1981).

> (c) All nonpublic educational institutions licensed under this section shall file such information with the President as the Board of Governors may direct, and the said Board may evaluate any nonpublic educational institution applying for a license to confer degrees under this section. If any such nonpublic educational institution shall fail to maintain the required standards, the Board shall revoke its license to confer degrees, subject to a right of review of this decision in the manner provided in Chapter 150A of the General Statutes.

(Emphasis added.) From the emphasized portions of this statute it is obvious that the Legislature intended that licensure to confer degrees depend upon "income sufficient to maintain an adequate faculty and equipment sufficient to provide adequate means of instruction" in the fields of knowledge in which a degree is sought. This language clearly evinces a legislative concern over the quality of a program leading to the conferral of a degree. Hence, inherent in the authority to license private entities to confer degrees is the power to license the programs leading to those degrees. To separate the physical act of bestowing a diploma from the program which leads to the degree is to exalt form above substance. The concern of the Legislature that degree programs be sufficiently funded and equipped to provide adequate means of instruction shows that it considered the degree conferral program to be an inherent and inseparable part of the ability and authority to confer degrees.

(2) The purpose of the Board of Governors is to plan and develop a coordinated system of higher education in North Carolina. G.S. § 116-11(1) (Supp. 1981). To this end it is authorized to license private institutions to confer degrees. If the licensing requirement can be met by side-stepping the statute, literally, then the Board of Governors has few means available to accomplish its purposes.

If this loophole exists in G.S. 116-15, all institutions now subject to the licensing requirement and the minimum standards and regulations attendant to it may escape the coverage of the statute by holding their graduation ceremonies just across the state line. It will not matter that their students are North Carolina citizens who are solicited and taught in this state and that their graduates will remain in North Carolina to use their degrees. In truth, these

students will have acquired their knowledge through programs conducted in this state, and those programs, good or bad, will be part of the system of higher education in this state. Under the majority's decision, these institutions will be immune from any licensing requirement and cannot be part of the plan for a coordinated system of higher education. Such an exception, grounded on the geographical location of the graduation ceremony, cannot have been within the legislative intent. Both the language of the licensing statute indicating a concern with the adequate funding and facilities and the statutorily stated purpose of the Board of Governors evince a clear legislative intent that the "power or authority to confer degrees" implicitly includes the power or authority to offer degree conferral curricula within this state. Because the former is expressly required to be licensed, then the latter must also be licensed.

Although the majority makes much of the canon of statutory construction that " '[w]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question shall be adopted,' " (quoting *In re Arthur*, 291 N.C. 640, 642, 231 S.E. 2d 614, 616 (1977)), I find it unpersuasive. The intent of the Legislature is the polar star which guides the courts in determining the meaning of a statutory provision. *Underwood v. Howland*, 274 N.C. 473, 164 S.E. 2d 2 (1968). In ascertaining the legislative intent a court 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). As stated above, the language, purpose and spirit of the statutory scheme in question, in my opinion, clearly indicate a legislative intent to require that programs leading to degree conferral, and not just the handing out of a diploma, be licensed by the Board of Governors. That this construction of the statute raises numerous constitutional questions is of no consequence: if such is found to be the legislative intent, this Court "[is] not at liberty to give to a statute a construction at variance with [the legislative] intent, even though such construction appears . . . to make the statute more desirable and to free it from constitutional difficulties." *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E. 2d 338, 350 (1978).

The majority's adoption of a literal construction of G.S. 116-15 is premised on the assumption that the interpretations

proffered by Nova and by the Board of Governors are both reasonable. I submit that the interpretation adopted by the majority is not reasonable and renders the statutory scheme devoid of rhyme or reason.

The majority makes much of the distinction between teaching and the conferral of degrees. According to the majority, Nova merely teaches within North Carolina. Because teaching is a right protected by the first amendment, it cannot be regulated. G.S. 116-15 does not purport to regulate mere teaching. Thus, the majority concludes, because Nova's activities in this state are confined to teaching, those activities cannot be regulated:

> [B]y whatever name it is called, all that Nova does in North Carolina is teach. To say that it is conducting a "degree program" which is somehow different from or more than mere teaching, as the Board would have it, is nothing more than the Board's euphemization. Teaching is teaching and learning is learning notwithstanding what reward might follow either process. The Board's argument that the power to license teaching is necessarily implied from the power to license degree conferrals simply fails to appreciate the large difference, in terms of the state's power to regulate, between the two kinds of activities.

I must confess that I also fail to appreciate the "large difference, in terms of the state's power to regulate, between [teaching and degree conferral]." Assuming, as does the majority, that the Board constitutionally may license degree conferral by private institutions within this state, I am at a loss to understand how the licensing of degree conferrals differs, in practical terms, from the licensing of the program. In considering whether to grant a private institution a license to confer degrees, the Board considers such factors as years in operation, safety and health standards, maintenance of records, financial soundness, reputation of officers and staff, admissions policies, adequacy of facilities for classes and study, adequacy of faculty, and academic quality of the programs offered. Appellant's Brief, at 11-12. Most of these factors deal with adequacy of educational resources and the degree to which the school's environment is conducive to learn-

ing, *not with what is taught or how it is taught.*[2] To the degree that these factors concern the teaching or learning in the case of an institution which confers degrees in North Carolina, they regulate, *to the same extent and no more,* the teaching of degree conferral programs designed to lead to conferral of degrees outside the state. In asserting that Nova is subject to the licensing requirement contained in G.S. 116-15, the Board is attempting to assert *exactly the same* authority it does over institutions operating wholly within this state.

That the Board attempts to evaluate only the ability to teach or opportunity for and sufficiency of learning and not what is taught is reflected in its evaluation of Nova. Nova was found to have satisfied the following criteria:

(1) It was properly chartered and had been in operation for at least two years;

(2) Its safety and health standards were adequate;

(3) Its record-keeping system was adequate;

(4) It was financially sound;

(5) Its officers and staff had good reputation and character;

(6) Its admissions policies were nondiscriminatory.

Deficiencies were found, however, in the requirements of adequate facilities and adequate faculty. Nova was found to have no formal arrangements for facilities in which to hold classes or for access for its students to library facilities. One cluster group was holding its meetings in a motel. The lack of specific arrangments for meeting and library space did not ensure continuity of the program nor did it provide an academic setting conducive to the in-depth study and research required for graduate degrees. Deficiencies were also noted in specific degree programs. These deficiencies concerned mainly the inadequacy of testing, little opportunity for in-depth study, insufficient amount of material, and little opportunity to interact with faculty.

2. In its evaluation of Nova, the investigative team did find inadequacies in the amount of material covered. This, however, does not regulate *what* is taught, but sets minimim standards of coverage for degree recognition.

I wish to make it clear that I agree that Nova is free to teach anything it wants to teach without a license from the Board of Governors. However, the factor which makes Nova subject to the licensing requirement is that *it does not merely teach*; the programs it offers in this state are advertised and do indeed lead to conferral of a degree. It is not the fact of teaching that makes Nova subject to licensure, it is the offering of a degree program, the promise of a degree.

I freely admit that the construction urged by the Board and which I find persuasive is not free from constitutional difficulties. Those presented to us are infringement on freedom of speech, violation of the commerce clause, equal protection and invalid delegation of legislative authority. I do not purport by this dissent to deal with those issues. My purpose in writing this dissent is to state what I believe to be the clear legislative intent and to emphasize that this Court should not shirk its responsibility to interpret statutes according to the legislative intent even when complex constitutional issues loom on the horizon. I leave for another day and another majority, one in which I will gladly participate, the task of determining whether the mandatory licensing of degree conferral programs by a legislatively created administrative agency is constitutionally permissible. For now, it is enough to say that I believe our statutory scheme passes constitutional muster.

I also leave untouched the question of whether Nova's exclusive remedy is under the APA or whether it may initiate a separate action under the Declaratory Judgment Act and, thus, obtain discovery. I do, however, wish to make this observation: questions of law or assignments of error which, because of their nature, can be adequately handled by a reviewing court on the basis of the record of the proceedings before the administrative agency ought to be reviewable solely under the APA; claims which, by their nature, cannot be substantiated or challenged on the basis of the "cold record" ought not to be ignored merely because the APA does not provide for discovery. These latter claims, I believe, fall outside the intended coverage of the APA and may be brought under the Declaratory Judgment Act.

In conclusion, I cannot accept the majority's construction of the application of G.S. 116-15 to be dependent upon the location of

the graduation ceremony and not on the location of the teaching which forms the basis for the degree. Such a construction places form above substance, contravenes the clear legislative intent, and creates a gaping loophole in the statutory scheme for a coordinated system of higher education in this state.

Justice COPELAND joins in this dissent.

HENRY B. ROWE v. MARY W. ROWE

No. 96A81

(Filed 3 March 1982)

1. **Divorce and Alimony § 19.5— consent order—proviso that G.S. 50-16.9 not apply**

Usually, public policy requires that a consent order be modifiable in spite of a proviso that G.S. 50-16.9, dealing with modification of alimony orders, would not apply; however, an exception exists where support payments are not alimony within the meaning of the statute and the payments and other provisions for a property division between the parties constitute reciprocal consideration for each other.

2. **Divorce and Alimony § 19; Evidence § 32— evidence of negotiations pursuant to consent order—parol evidence rule not violated**

In an action in which plaintiff filed a motion seeking modification of a consent order so as to terminate or reduce his alimony obligation, the trial court erred in failing to allow defendant to introduce evidence of negotiations between the parties in an effort to show that the consent order and property settlement were reciprocal agreements. Evidence of the negotiations and contemporaneous property settlements of the parties was admissible to clarify the uncertainty created when a non-modification provision of the order appeared to be void as a matter of law. Further, the consent order presented only a part of the total settlement agreement between the parties, and as such, parol evidence was admissible to show the balance of the transaction.

3. **Compromise and Settlement § 6; Divorce and Alimony § 19.5— modifiability of consent order—evidence of compromise admissible**

The trial court erred in failing to allow defendant wife to prove that a consent order was an integral part of a property settlement by introducing a letter written by plaintiff's attorney to defendant's attorney, prior to entry of the consent order, offering a settlement. The letter was admissible as evidence of the reciprocity of the consent judgment and property settlement.

4. Divorce and Alimony § 19.4— modification of alimony award—evidence of changed circumstances sufficient

The evidence of changed circumstances was sufficient to warrant modification of an alimony decree where the evidence tended to show that when the consent order was entered, defendant's expenses exceeded her income; that she sold her stock in a company and reinvested the proceeds resulting in a non-alimony income in excess of $54,000 in 1979; and that expenses that year were $32,400 leaving defendant with more than $21,000 in income over expenses. When defendant changed her financial holdings from a passive investment to an investment actively producing income, she changed her need for maintenance and support.

5. Divorce and Alimony § 20.3— attorney fees—award of unnecessary

Where defendant was clearly able to defray the expenses of litigation concerning modification of an alimony award, defendant was correctly denied an award of attorney fees.

Justice COPELAND concurring in part, dissenting in part.

Justices CARLTON and MEYER join in this dissenting opinion.

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from decision of the Court of Appeals affirming in part and vacating in part order entered by *McHugh, Judge*, in District Court, SURRY County. This case was argued as No. 96 at the 1981 Fall Term.

Plaintiff and defendant, formerly husband and wife, were divorced in 1976 in an action instituted by plaintiff-husband. At or about the same time the divorce was granted, on 6 December 1976 an order was entered by Foy Clark, Judge, containing the following provisions:

> 1. THAT the parties stipulate and agree that the Plaintiff is a supporting spouse; that the Defendant is a dependent spouse; that the Defendant is entitled to alimony under the provisions of North Carolina General Statutes 50-16.2; that the sum of $2,500.00 per month is an appropriate amount of alimony; that the Plaintiff has the assets and earning capacity to generate sufficient income to enable the Plaintiff to pay to the Defendant the sum of $2,500.00 per month as permanent alimony and that the parties desire that an Order be entered in accordance with their stipulations providing for the payment by Plaintiff to Defendant of permanent alimony in the sum of $2500.00 per month and subject to the further condition that the Order for alimony shall not be subject to modification upon a showing of change of circumstances by

either party or anyone interested as is provided by North Carolina General Statutes 50-16.9(a); and

2. THAT the Court does find as fact that the Defendant is a dependent spouse actually substantially dependent upon the Plaintiff for her maintenance and support and that the Plaintiff is a supporting spouse; that the defendant is entitled to permanent alimony from the Plaintiff; that the sum of $2,500.00 per month is a reasonable and proper amount of permanent alimony for the Plaintiff to pay to the Defendant; that the Plaintiff has assets and earning capacity to generate sufficient income to enable the Plaintiff to pay the Defendant the said sum of $2,500.00 per month as permanent alimony; and that the parties desire that the within order for alimony shall not be subject to modification upon a showing of change of circumstances by either party or anyone interested as is provided in North Carolina General Statutes 50-16.9(a).

NOW, THEREFORE, by consent of the parties it is hereby ordered that the Plaintiff pay to the Defendant for permanent alimony the sum of $2,500.00 per month, said payments to be due on or before the 5th day of each and every calendar month and to terminate only upon the death of either of the parties or the remarriage of the Defendant, whichever event shall first occur, and it is further ordered that the within order shall not be subject to the provisions of North Carolina General Statutes 50-16.9(a).

The order was consented to, in writing, by the parties and their attorneys.

On 19 October 1979 plaintiff filed a motion asking that the above order be modified so as to terminate or reduce his alimony obligation. Plaintiff alleged that there had been a material change in circumstances; that since the entry of said order, defendant had acquired substantial property; that her needs had materially decreased; that plaintiff's financial burdens had increased; and that his ability to make the monthly payments was steadily decreasing.

On 13 November 1979 defendant moved for judgment on the pleadings or, in the alternative, for summary judgment. One week later, and before a ruling on her motions, defendant filed a

response to plaintiff's motion. In her response, defendant alleged that plaintiff had waived his right to seek modification; that he was estopped from seeking a modification; that the order of 6 December 1976, as a consent order, constituted a contract between the parties which the court could enforce but not modify; and that the court was prohibited by its own order from modifying the order. The response further denied that the circumstances of the parties had changed.

On 11 December 1979 Judge Clark, after a hearing, entered an order denying defendant's motion to dismiss, or, in the alternative, for summary judgment. However, in the order the court concluded that the 6 December 1976 order "is modifiable as provided by G.S. Sec. 50-16.9(a) . . . ." Defendant excepted to the entry of this order.

Thereafter, defendant supplemented her response to allege that the 6 December 1976 order was not modifiable because it was an inseparable part of the property settlement entered into by the parties. Defendant also amended her estoppel defense to allege the existence of a letter from plaintiff's attorney to her attorney which would establish plaintiff's estoppel by contract.

Plaintiff's motion for modification was heard by Judge McHugh. The evidence necessary to the decision of this appeal is not in conflict. The findings of fact made by Judge McHugh to which there was no exception are summarized in pertinent part as follows:

At the time of the entry of the 6 December 1976 consent order, defendant had a net worth of approximately $1.1 million. While she had no substantial income at that time, she owned 66.91% of the outstanding capital stock of a closely held corporation, Northwestern Equipment Company (Northwestern) which stock had an approximate fair market value of $847,000. Unappropriated retained earnings in Northwestern were, at or about the time of the entry of the consent order, approximately $698,000 and the assets of said corporation included cash in the approximate amount of $179,000. At or about the time said order was entered, plaintiff offered to purchase defendant's stock in Northwestern for at least the sum of $600,000.00, an offer which defendant declined to accept. Both parties were aware of Northwestern's financial condition at that time.

Defendant's present reasonable living expenses are greater than her reasonable living expenses were at the time of the entry of the consent order. At that time, plaintiff had a net worth of approximately $1.2 million and had a gross annual income of approximately $105,000. His living expenses at that time were approximately $6,100 per month.

On or about 1 September 1978, defendant sold her stock in Northwestern to H. B. Rowe & Co., Inc., a closely held corporation substantially owned by plaintiff and controlled by him, for the sum of $700,000 cash. From the sale's proceeds, defendant paid approximately $250,000 in taxes, fees, and other expenses associated with the sale. She immediately converted the net proceeds of approximately $450,000 into bonds and securities. "This entire transaction did not constitute the acquisition of an asset by the defendant; rather, it amounted to the liquidation or conversion of an asset."

Defendant's present net worth is approximately $850,000. The decrease in her net worth from December of 1976 is substantially attributable to (1) the decline in the fair market value of her Northwestern stock between December of 1976 and 1 September 1978, and (2) the tax consequences and other expenses incidental to the sale of her Northwestern stock. Aside from her alimony income from plaintiff, defendant's present income is derived almost entirely from the bonds and securities which she purchased with the liquidation proceeds obtained from the aforesaid stock sale. Defendant's non-alimony income in 1979 was approximately $54,000.

Plaintiff presently has a net worth in excess of $2 million. In addition, his taxable income has increased since 1976, and for the calendar year ending 31 December 1979 was approximately $160,000. While his monthly living expenses have increased from $6,100 per month in December 1976 to $8,100 at the present time, approximately $1,800 per month of that increase is directly attributable to support of his new wife and her adult children.

Defendant offered into evidence her affidavit of financial standing in which she averred that her financial needs as of 10 April 1980 amounted to $2,720.59 per month which would amount to $32,647.08 per year; that she had an income of $7,000 per

month ($84,000 per year) including $2,500 per month ($30,000 per year) in alimony from plaintiff.

In her testimony at the hearing, defendant stated that without any alimony being paid by plaintiff, her separate income is "well over what I spend for living expenses"; that this was not true on 6 December 1976; and that she had no appreciable income prior to said date.

The trial court entered an order concluding that there had been no change of circumstances sufficient to warrant modification of the 6 December 1976 order. The court also concluded that defendant was not entitled to attorney fees for defending against plaintiff's motion in the cause. Both parties appealed.

In an opinion by Judge Edward B. Clark, with Judge Wells concurring, the Court of Appeals held (1) that the 6 December 1976 order is modifiable, (2) that the determination by the trial court that there was no change in circumstances is not supported by the evidence, (3) that as a matter of law there was a change of circumstances as envisioned by the statute, and (4) that defendant is not entitled to recover attorney fees.

The Court of Appeals concluded that the trial court erred in not making more specific findings of fact relative to defendant's costs in maintaining her accustomed standard of living; that such findings of fact would provide a basis for determining in the future if there were a change of circumstances after entry of a modified order should defendant thereafter seek alimony on the grounds that changed circumstances had again made her a dependent spouse; and that these corrections can adequately be made by the court without further hearing, since it appears from the record that the uncontradicted evidence before the trial court is sufficient to support modification of the order. The Court of Appeals remanded the cause for findings and entry of an order consistent with its opinion.

Judge Vaughn dissented. Defendant appealed as a matter of right pursuant to G.S. 7A-30(2).

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd and Jeri L. Whitfield, for plaintiff.

Tuggle, Duggins, Meschan, Thornton & Elrod, P.A., by David F. Meschan, for defendant.

BRITT, Justice.

We agree in part, but disagree in part, with the decision of the Court of Appeals. While we agree that a new hearing must be conducted by the trial court, we hold that the scope of the hearing must be extended beyond that ordered by the Court of Appeals.

I.

[1] The primary question presented in this appeal is whether the consent order of 6 December 1976 is modifiable.

In *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1965), this court, in an opinion by Justice (later Chief Justice) Sharp, held that there are two types of consent judgments which provide for payment of support to a dependent spouse. One is simply a contract that is approved by the court. The payments specified therein are not technically alimony. This type of consent judgment is enforceable only as an ordinary contract and the parties are not subject to the contempt power of the court for its breach. Consent of both parties is required for modification. *Id.*

In the second type of consent judgment, the court adopts the agreement of the parties as its own and *orders* the supporting spouse to pay the amounts specified as alimony. This second type of order is enforceable by the court's contempt powers. *Id.* Ordinarily it is also modifiable. Bunn, *supra.*

In the case at hand, were it not for the proviso in the 6 December 1976 consent order that G.S. 50-16.9 would not apply, *Bunn* no doubt would control this case. Usually, public policy would require that the consent order be modifiable in spite of this proviso.

Our legislature in 1967 codified the principles enunciated in *Bunn* by enacting G.S. 50-16.9. This statute provides in pertinent part:

> (a) An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested . . . .

By enacting this statute, the legislature has clearly expressed that it is the public policy of this state that consent orders to pay alimony are modifiable. In the usual case a proviso in an order purporting to waive applicability of G.S. 50-16.9 would be contrary to this policy and, therefore, without force and effect.

Nevertheless, this court in *Bunn* and in *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979) recognized an exception to the rule just stated. We quote from the opinion by Justice Exum in *White*:

> Even though denominated as such, periodic support payments to a dependent spouse may not be alimony within the meaning of the statute and thus modifiable if they and other provisions for a property division between the parties constitute reciprocal consideration for each other.

296 N.C. at 666.

For purposes of determining whether a consent judgment may be modified under the statute, there is a presumption that the provisions for property division and support payments are separable. *Id.* The burden of proof rests on the party opposing modification to show that the provisions are not separable. *Id.*

[2] At the hearing before Judge McHugh, defendant attempted on two occasions to introduce evidence of the negotiations between the parties in an effort to show that the consent order and property settlement were reciprocal agreements. First, on cross-examination of plaintiff, and referring to the proviso on non-modification, defendant's attorney asked: "How do you recall that provision got into that order in the negotiating process?" Plaintiff objected to the question and his objection was sustained by the trial judge. The Court of Appeals found no error in this ruling on the ground that admitting evidence relating to the negotiations would violate the parol evidence rule that any or all parts of a transaction prior to or contemporaneous with a writing intended to record them are superseded and made legally ineffective by the writing. *Tomlinson v. Brewer*, 18 N.C. App. 696, 197 S.E. 2d 901 (1973); 2 Stansbury's N.C. Evidence § 251 (Brandis Rev. 1973).

We disagree with the trial court and the Court of Appeals that the testimony defendant sought to elicit on cross-examination would violate the parol evidence rule.

Generally, evidence of prior and contemporaneous negotiations and agreements are not admissible to vary, add to, or contradict a written instrument. *Bailey v. Westmoreland*, 251 N.C. 843, 112 S.E. 2d 517 (1960); 2 Stansbury's § 251. However, when the court finds a contract to be ambiguous, evidence of prior negotiations is admissible to show the intent of the parties. *Root v. Ins. Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968). Further, the rule is intended to apply only to final, totally integrated writings; that is, those writings relating to a transaction which are intended to supersede all other agreements regarding that transaction. If the writing supersedes only a part of the transaction, it is a partial integration and other portions of the transaction may be shown by parol evidence. 2 Stansbury's § 252.

Turning to the case at bar, we reiterate that ordinarily the proviso in the 1976 consent order regarding non-modification would be without force or effect. In accord with G.S. 50-16.9, the consent order may be modified unless defendant can show that it was an integral part of the property settlement. *White v. White, supra.* The intention of the parties regarding the reciprocity of the agreements is not evident from a reading of the consent order. Therefore, evidence of the negotiations and contemporaneous property settlement agreements of the parties are admissible to clarify the uncertainty created when the non-modification provision of the order appears to be void as a matter of law. We also note that defendant does not seek to vary, add to or contradict the terms of the consent order. Indeed, she is merely trying to enforce the entire agreement as written.

Further, it is clear that the consent order represents only part of the total settlement between the parties. As such, it is only a partial integration of the total agreement and parol evidence is admissible to show the balance of the transaction. 2 Stansbury's § 252.

[3] The second effort made by defendant to prove that the consent order was an integral part of the property settlement was an attempt to introduce a letter written 18 November 1976[1] by plaintiff's then attorney to defendant's then attorney offering a settlement.

1. It will be noted that the consent order was entered on 6 December 1976.

The letter begins "I have talked with Henry Rowe again in an effort to settle all matters existing between Henry and Mary. At this time, by way of offer of compromise and settlement on Henry's behalf, I wish to advise the following . . . ." The letter lists eleven items including "3. Henry will pay to Mary alimony at the rate of $2,500 per month until her death or remarriage . . . ." Judge McHugh ruled that the letter was inadmissible because it was an offer of compromise or settlement. The Court of Appeals agreed with Judge McHugh's ruling. We disagree.

North Carolina follows the rule that an offer of compromise, as such, is never admissible *as an admission* of the party making it. *See Mahaffey v. Sodero*, 38 N.C. App. 349, 247 S.E. 2d 772 (1978); 2 Stansbury's § 180.

The reason for the rule excluding offers of compromise as evidence of liability is one of sound public policy encouraging the settlement of disputes out of court. In addition, although a consciousness of liability may be inferred from such an offer, an offer of compromise is also consistent with the desire of an offeror to buy his peace. 2 Stansbury's § 180. However, the fact that evidence is incompetent for one purpose will not affect its admissibility for other proper purposes. Relevant evidence will be admitted if competent for any purpose. 1 Stansbury's § 79; McCormick on Evidence § 59 (2nd Ed. 1972).

The letter of 18 November 1976 is obviously inadmissible as proof of plaintiff's liability to pay defendant alimony. The issue of defendant's entitlement to alimony was determined in the consent order and is *res judicata*. Further, defendant's entitlement is not in dispute. The question at bar is the modifiability of the consent order requiring plaintiff to pay alimony. Modifiability of the consent order depends on whether the order was an integral part of the entire property settlement.

We hold that the letter of 18 November 1976 is admissible as evidence of the reciprocity of the consent judgment and property settlement, an issue separate and independent from that of plaintiff's liability to pay alimony. We caution, however, that the letter is not in itself proof of defendant's contention. Defendant has the burden of showing by a preponderance of the evidence that the provisions of the consent order and property settlement were inseparable. *White v. White, supra.*

We hold that this case must be remanded for a hearing on the issue of whether the provision for alimony was an integral part of the parties' property settlement.

II.

[4] We next address the question whether there has been a change in circumstances sufficient to warrant modification of the alimony decree. Addressing this question becomes necessary in the event it is determined that the consent order was not an integral part of the parties' property settlement. On this point we agree with the Court of Appeals.

As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay. *See Britt v. Britt*, 49 N.C. App. 463, 271 S.E. 2d 921 (1980); *Stallings v. Stallings*, 36 N.C. App. 643, 244 S.E. 2d 494, *cert. denied*, 295 N.C. 648, 248 S.E. 2d 249 (1978). Our primary concern on this appeal is the change in financial needs of the defendant as a dependent spouse.

To determine whether a change of circumstances under G.S. 50-16.9 has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded under G.S. 50-16.5. That statute requires consideration of the estates, earnings, earning capacity, condition, accustomed standard of living of the parties and other facts of the particular case in setting the amount of alimony.

Defendant argues that there is a distinction between G.S. 50-16.9 and G.S. 50-16.5 and that the above interpretation allows the trial court to retry the issues tried at the original hearing. This argument is not valid. The statutes codified as G.S. 50-16.1 through G.S. 50-16.10 all deal with the same subject matter, alimony, and are to be construed *in pari materia*. *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980). So construed, the change in circumstances in G.S. 50-16.9 logically refers to those circumstances set forth in G.S. 50-16.5. Plaintiff's status as the supporting spouse, defendant's status as the dependent spouse and her entitlement to alimony were permanently adjudicated by the original order.

The uncontested facts in this case show that when the consent order of 6 December 1976 was entered, defendant's expenses exceeded her income of less than $9,000. Her net worth at that time was approximately $1.1 million. After the sale of her Northwestern stock and reinvestment of the proceeds, her non-alimony income in 1979 exceeded $54,000.00. Defendant's expenses that year were $32,400.00 leaving her more than $21,000 in income over expenses exclusive of any alimony. We agree with the Court of Appeals that under these facts, there has been a change of circumstances as a matter of law.

Defendant's change in her financial holdings from a passive investment in Northwestern to investments actively producing income was voluntary. When she did this, defendant changed her need for maintenance and support. Defendant is not depleting her estate to meet her living expenses. Her income derives almost exclusively from interest earned on her investments. Defendant herself admitted that "my separate income is well over what I spend for living expenses. No, that was not true on December 6, 1976."

In *Williams v. Williams, supra,* we said:

> Nothing in this decision is designed to allow plaintiff to increase her wealth at the expense of defendant. Under the guidelines established, plaintiff would be required to continue in expending *all* of her annual income if she desires to maintain her present standard of living. Should the wife's capital assets increase in value, through inflation, prudent investment or otherwise, and results in an increase in her income, defendant would, of course, be entitled to petition the court for modification of the alimony order under G.S. 50-16.1.

299 N.C. at 184. *See also Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218 (1966).

If it is determined that the consent order was not an integral part of the property settlement, plaintiff is entitled to a modification of the order requiring him to pay $2,500.00 per month in alimony. We emphasize, however, that defendant can rely on the original finding of entitlement in the consent order.

III.

[5] Defendant lastly contends that she is entitled to attorney fees incurred in resisting plaintiff's motion in the cause. To be entitled to attorney fees it must be shown that they were necessary to enable the dependent spouse, as litigant on substantially even terms by making it possible for her to employ counsel. *Williams v. Williams, supra.* The dependent spouse must be unable to defray the necessary expenses of the litigation. *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980). Considering defendant's current financial status we find her argument without merit. She is clearly able to defray the expenses of the litigation. An award of attorney fees in this case is not necessary to enable defendant as litigant to meet plaintiff as litigant on substantially even terms.

IV.

This cause is remanded to the Court of Appeals. That court will vacate the order appealed from and will remand the cause to the trial court (1) for further hearing and determination of the issue of whether the consent order was an integral part of the parties' property settlement; (2) for specific findings relative to defendant's costs in maintaining her accustomed standard of living as ordered by the Court of Appeals; and (3) for entry of a new order consistent with this opinion.

Affirmed in part; reversed in part and remanded.

Justice COPELAND concurring in part, dissenting in part.

I initially concur with the majority's conclusion that the defendant-wife would not be entitled to attorney fees in this action because of her ample individual financial resources. As a subsidiary position only, I additionally agree that, at the very least, the case must be remanded to the trial court "for further hearing and determination of the issue of whether the consent order was an integral part of the parties' property settlement. . . ." However, I must firmly dissent from the majority's decision upon the more important threshold issues presented in this appeal. In so doing, I join ranks with Judge Vaughn, who dissented in this case at the Court of Appeals, for the same fundamental reasons he stated at 52 N.C. App. 646, 662, 280 S.E. 2d 182, 191 (1981).

I.

The majority holds that the alimony provisions of the consent judgment in question are generally modifiable pursuant to G.S. 50-16.9 despite the parties' express agreement therein to the contrary. This holding is premised only upon a notion of implied statutory public policy. To the contrary, I am persuaded that the basic principles of common sense, fundamental fairness and freedom of contract oppose the result reached by the majority whereby this husband is given an opportunity to benefit at the expense of his former wife's detrimental reliance upon his original *absolute* promise to pay the specified alimony irrespective of the future financial circumstances of *either* party.[1] I vote to enforce the plain unambiguous terms of the consent judgment as it stands and would hold that the plaintiff-husband is thereby estopped from seeking *any* reduction in the alimony obligation he incurred just one day prior to his receipt of an uncontested divorce from the defendant-wife.

As a general matter, I agree that where, as here, a consent judgment is adopted by a court order, its alimony provisions *may be* judicially modified upon a subsequent demonstrated change in circumstances. G.S. 50-16.9; *Holsomback v. Holsomback*, 273 N.C. 728, 161 S.E. 2d 99 (1968); *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964). Even so, it must be remembered that a consent judgment, regardless of its legal setting, is still contractual in nature; consequently, its terms should be interpreted according to: (1) the parties' expressed intent in light of the surrounding circumstances existing at the time of entry and (2) the obvious purposes intended to be accomplished by its entry. *Any* consent judgment should be construed as it is written, and our courts should refrain from actions which effectively ignore or nullify the language or

1. It is to be noted that the combined holdings of the majority opinion completely remove the burden of proof from the plaintiff-husband and place the onerous duty of justifying her entitlement to future alimony upon the defendant-wife. The husband is permitted to seek modification, and he is simultaneously relieved, *as a matter of law*, from the further obligation of showing, as the movant in the cause, the existence of a *bona fide* change in circumstances requiring a reduction in alimony. The only option graciously left to the former wife, who could not have possibly anticipated that an essential part of the marital agreement was void (the anti-modification provision), is for *her* to shoulder the burden of presently proving that the fixed alimony award was an integral part of the overall settlement of the marital property.

provisions included therein. *See Spruill v. Nixon*, 238 N.C. 523, 78 S.E. 2d 323 (1953); *Webster v. Webster*, 213 N.C. 135, 195 S.E. 362 (1938); *Jones v. Jones*, 42 N.C. App. 467, 256 S.E. 2d 474 (1979); *Price v. Horn*, 30 N.C. App. 10, 226 S.E. 2d 165, *discretionary review denied*, 290 N.C. 663, 228 S.E. 2d 450 (1976); *Martin v. Martin*, 26 N.C. App. 506, 216 S.E. 2d 456 (1975). *See generally* 8 Strong's North Carolina Index 3d, Judgments § 10, at 28; 47 Am. Jur. 2d, Judgments §§ 1085, 1087 (1969). I simply fail to understand why the judicial adoption of a consent judgment entered in a marital dispute is such a unique event that it *automatically* negates the contractual ability and manifested mutual intent of the parties to forbid specifically any future modification of their private alimony award.

Moreover, I can perceive no inherent statutory offense in permitting marital parties to stipulate, if they so wish, that the amount of designated alimony shall never be increased or decreased (except in the case of death or remarriage). In any situation, people enjoy the sense of inner security that comes from knowing that something cannot be changed—that no matter how the winds of future fortune blow, something essentially relied upon will remain the same and can be counted upon. Why then should it be objectionable for marital parties to ensure their financial status and to settle *everything* between them once and for all by joining in a consensual provision against modification of the agreed amount of alimony? After all, the parties themselves are best qualified to deal with a division of their marital property and a settlement of their marital rights in the first instance. When the parties are willing and able to negotiate about these matters on a comprehensive level, our courts should, so far as it is practicable and reasonable, encourage them to do so on their own without impeding their progress with artificial and unnecessary legal hindrances. Indeed, an *implicit and absolute* statutory prohibition, like the one read into G.S. 50-16.9 by the majority, against the *final* settlement of an alimony issue by the parties primarily concerned, would almost seem tantamount to an invasion of marital privacy without sufficient rhyme or reason.

I believe that the parties to the marriage should, as ordinary bargaining agents, be able to reach a complete agreement about their affairs, satisfactory to themselves, which includes a safeguard provision against future alimony modification. Whether

or not that agreement is incorporated into a judicially-adopted consent judgment is, to me, irrelevant. Our courts should have the power to declare a consensual anti-modification provision null and void on a case-by-case basis *only, i.e.*, when it is affirmatively proven by the *movant* that the provision is unconscionable because it was not supported by adequate consideration or it was not freely, voluntarily or intelligently assented to due to duress, overbearing, fraud, or lack of legal representation. Such is clearly not the case here. These wealthy parties were individually represented by two reputable law firms. As an intricate and inextricable part of the underlying bargaining process concerning their impending divorce, the parties mutually consented to an explicit, plainly worded contractual limitation of a legal remedy, that of future judicial modification of the alimony award, which was duly supported by reciprocal consideration. The record refutes the plaintiff-husband's contention that alimony modification was necessary because he no longer had the actual financial ability to pay the specified sum.[2] Despite his prior agreement, he really sought a reduction of his former wife's alimony upon the mere ground that, due to a stock transaction *between them*, she had an increased cash income.[3] Under these circumstances, enforcement of the anti-modification provision in the consent judgment could not possibly cause insult or injury to the letter and spirit of the legislative directive in G.S. 50-16.9.

II.

My second bone of contention with the majority opinion is its further holding that the facts of this case disclose a change in circumstances sufficient to warrant a major modification (a complete reduction) of the alimony provided in the consent order *as a mat-*

2. Obviously, the court's contempt powers could not be used to enforce an absolute alimony obligation in an adopted consent judgment when it appears that the party to be charged actually lacks the financial ability to pay the agreed sum. Inability to pay would perforce negate the existence of a willful or intentional refusal to obey a court order.

3. In the improperly excluded evidence regarding the parties' negotiations, see Part I of the majority opinion, it appears that Mr. Rowe knew what the consent order said when he signed it and consequently did not intend at that time ever to seek a modification of its provisions. In fact, Mr. Rowe stated that "[i]t first occurred to [him] to seek a modification of this Order after H. B. Rowe & Co. bought Mrs. Rowe's stock in Northwestern Equipment Company in September of 1978." Record at 47.

ter of law. In dissenting upon this point, I am guided by three basic legal principles: (1) the party seeking modification of an order of support has the burden of proving, by a preponderance of the evidence, the occurrence of the requisite change in circumstances; (2) the legal standard of changed circumstances only encompasses material or substantial factual differences which presently make it unduly burdensome for the movant to comply with the original order; and (3) the trial court's initial determinations in these kinds of matters, if supported by competent evidence in the record, should be accorded great weight on appeal and not disturbed absent a clear abuse of discretion. *See Clark v. Clark*, 301 N.C. 123, 128-29, 271 S.E. 2d 58, 63 (1980); *Sayland v. Sayland*, 267 N.C. 378, 382-83, 148 S.E. 2d 218, 221-22 (1966); *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E. 2d 921, 926 (1980); 2 Lee, North Carolina Family Law § 152, at 237 (4th ed. 1980). On this record, I find that plaintiff did not fulfill *his burden* of demonstrating a *substantial* change in circumstances, and therefore I would vote to affirm Judge McHugh's order of 29 April 1980 in which he concluded that there had *not* been "a change in the circumstances of the parties which would warrant or justify modification in the plaintiff's favor of the December 6, 1976 Consent Order."

Judge McHugh's legal conclusion, *supra*, was based upon the following pertinent findings of fact, which were amply supported by the evidence: (1) that defendant's reasonable living expenses had increased since the original order; (2) that her net worth during the period had decreased due to the decline in value of her Northwestern stock; (3) that her conversion of the net proceeds from the sale of her Northwestern stock into income-yielding bonds and securities was merely the liquidation of an asset, not the acquisition of an asset; and (4) that apart from her alimony income, her present income was derived solely from the foregoing bonds and securities. On the other hand, Judge McHugh found that plaintiff's net worth had increased by approximately one million dollars, his taxable income had increased, and his reasonable living expenses had increased only due to the support of a new wife and her adult children. Balancing all of these circumstances together, I am not persuaded, as the majority apparently is, that Judge McHugh abused his discretion as a matter of law by failing to *single out* the stock transfer between the par-

ties, and defendant's subsequent income from investment of the proceeds therefrom, as a sufficient change in circumstances for modification of the alimony award in the consent order.

At most, the stock transaction between these parties, which involved a company then jointly owned by them, was an *exchange of* circumstances, not a *change in* circumstances. In fact, it was not an unanticipated exchange—this precise stock transfer was originally contemplated by both parties before the consent judgment was entered. Record at 35-36, 53. More importantly, it was an exchange which was financed in large part by the very asset the defendant-wife transferred to her former husband. After the 1976 divorce, defendant did not receive any dividends whatsoever from Northwestern although such cash was certainly available to her as a substantial stockholder for a reasonable return upon her investment. Record at 54-56. Nevertheless, the plaintiff later withdrew $300,000 in cash from the company itself to enable him to buy out defendant for the total price of $700,000. Record at 36. Ironically then, and I believe unfairly so, defendant was essentially paid in part for her stock with her own money. As if this were not enough, the majority finds that, as a result of the stock transaction, the defendant is no longer entitled to receive any alimony from the plaintiff.

In addition, I am not convinced, as apparently the majority is, that defendant's decision to convert her asset into an income-producing form was entirely voluntary. Consider her following testimony:

> As to why I sold my stock in Northwestern, well, I had—had not—had refused a previous offer because I felt like that was, really, my only ace in the hole was the equipment company if I ever needed money or cash or anything like that. So I wanted to keep my stock. But then I realized that it was not being—no new equipment was being purchased for them. I had no way of knowing when it was being used, how it was being used, what hours it was being used, if it was being repaired or—I had no rental contracts; I had one customer. And I felt like that since that customer was somewhat angry and upset with me, that it possibly was not being run as it should have been run, and that—its net income dropped drastically. And so I felt like that the time had

> come when I'd better get out, because depreciation and disuse, and I had no use for a pile of scrap iron. Record at 53-54.

The true nature of the situation was that plaintiff continued to manage Northwestern after the divorce, and Northwestern's only "customer" was another company wholly owned and operated by the plaintiff. Surely, it is understandable that, after the divorce, plaintiff and defendant were unwilling partners, and effective business communication between them was difficult. Can it then be doubted that defendant acted prudently, and not necessarily voluntarily, in eventually selling out to her former husband when she began to note a dramatic decrease in the company's net income?[4]

For the foregoing reasons, I strongly disagree that this record demonstrates a *bona fide* change in circumstances which justifies plaintiff's entitlement to modification as a matter of law. Under these facts, the majority effectively penalizes the defendant for investing wisely the cash proceeds of a sale which she was practically forced to make to her former husband in the exercise of sound business judgment. I assume that, under the majority opinion, the plaintiff would have had no basis for modification of alimony if defendant had simple-mindedly and wastefully stuffed her mattress with the cash proceeds of the sale and as a result produced no additional income thereby. *Compare* with the biblical parable of the talents, Matthew 25:14-30. In sum, I would not rob defendant of the fruits of her exchange and unjustly give them to plaintiff by nullifying his obligation to pay $30,000 a year in alimony.[5]

Justices CARLTON and MEYER join in this dissenting opinion.

4. Certainly, the evidence suggests that the defendant was the victim of a classic corporate "squeeze play."

5. It is a minor consolation indeed that defendant *may* avoid alimony modification at the rehearing if *she* can prove that the specified amount was an integral part of the overall marital settlement. Under the facts of this case, she clearly should not have to bear that burden. *See* note 1, *supra*.

STATE OF NORTH CAROLINA v. DEAN TAYLOR DARROCH

No. 102A81

(Filed 3 March 1982)

1. **Criminal Law § 14— jurisdiction—accessory before the fact—acts in another state—felony committed within this State**

Former G.S. 14-5, which asserted jurisdiction over the crime of accessory before the fact whenever the principal felony occurred in this State, did not violate the Sixth Amendment to the U. S. Constitution; therefore, the State could constitutionally assert jurisdiction over a defendant who committed the crime of accessory before the fact to a murder committed within this State when the counseling, procuring or commanding of another to commit the murder took place in Virginia.

2. **Criminal Law § 14— jurisdiction—accessory before the fact to murder—murder committed within this State—sufficiency of evidence**

In a prosecution for accessory before the fact to a murder by hiring others in Virginia to commit the murder, the evidence was sufficient to show that the murder was committed in North Carolina so as to give the courts of this State jurisdiction over defendant where one witness testified that the victim was killed in his home in Harnett County and another witness testified that the victim was killed in his home in Bunnlevel, since the appellate court will take judicial notice of the fact that Bunnlevel is in Harnett County and that Harnett County is located in this State.

3. **Criminal Law § 14— theory of jurisdiction challenged—question of law for court**

In a prosecution for accessory before the fact to murder by hiring others in Virginia to commit a murder in North Carolina, the trial court properly refused to instruct the jury that the State had the burden of proving beyond a reasonable doubt that North Carolina had jurisdiction over the offense where defendant challenged only the *theory* of jurisdiction relied on by the State and not the *facts* which the State contended supported jurisdiction, since the question of whether the theory supported jurisdiction was a matter of law for the court.

4. **Criminal Law § 10; Homicide § 2— accessory before the fact to second degree murder**

Defendant could properly be convicted of being an accessory before the fact to second degree murder.

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

ON appeal of right pursuant to G.S. 7A-27(a) from life sentence imposed by *Farmer, Judge*, on verdict of guilty of accessory before the fact to murder. The judgment was entered at

the 30 March 1981 Criminal Session of Superior Court, HARNETT County.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Sarah C. Young, for the State.

DeMent, Askew & Gaskins, by Johnny S. Gaskins, for defendant-appellant.

CARLTON, Justice.

The State's evidence tended to show that defendant, a Virginia resident, while in Virginia, hired two persons to murder her estranged husband and that he was murdered in this state by the persons so hired. Defendant was convicted as an accessory before the fact to the murder. The most important question raised by this appeal is whether the State of North Carolina may constitutionally assert jurisdiction over a defendant who commits the crime of accessory before the fact to a felony committed within the state when the counselling, procuring or commanding took place without the state. We affirm the trial court's ruling that such an assertion of jurisdiction is constitutional. We also address other arguments presented by defendant and find no error in her trial for the crime of accessory before the fact to murder.

I

At trial the State presented the testimony of the two principals to the crime. Defendant's sister, Barbara Jean Crowder, and nephew, James Donald Wells, testified pursuant to an arrangement which allowed each of them to plead guilty to second degree murder. Crowder was told she would receive a forty-year prison sentence and Wells was told he would receive a sixty-year sentence for murder and a concurrent ten-year sentence for conspiracy.

At the time of the murder defendant and her husband, Raeford Mitchell Darroch, were separated. Defendant lived in Danville, Virginia, and her husband lived in Bunnlevel, North Carolina. Mr. Darroch was killed on or about 10 November 1979.

In September of 1979 defendant asked Wells if he would kill her husband. She told Wells that she wanted him killed because he had a drinking problem and was harassing her and her boy-

friend. She also mentioned that he had not been paying child support, that he was going to lose his job, and that if he lost his job he would lose his life insurance. Wells told her that he would do it. Some two weeks later, defendant and Wells again discussed the matter and Wells told defendant that if she got some Valium that he would use it to kill Mr. Darroch. This conversation took place at defendant's home in Danville.

On the Tuesday following this conversation, Wells went to defendant's home. She gave him twenty Valium pills which she had obtained from a doctor. Wells purchased two pint bottles of liquor. He poured out half of one of the bottles, put the Valium in that bottle of liquor and drove to Mr. Darroch's house in Harnett County. He and Mr. Darroch drank the liquor from the full bottle and watched a ball game. When the ball game was over, Wells poured out the liquor containing the Valium because he "just couldn't kill Raeford." He drove back to Virginia that night. A few days after his return he informed defendant that he had gone to Mr. Darroch's home but couldn't do it.

Wells saw defendant again during the first weekend in November of 1979. He, defendant and Crowder took a drive and discussed killing Mr. Darroch. Wells again agreed to kill him and Crowder agreed to help. They decided to use a shotgun so the projectile could not be traced. Defendant stated that the killing of her husband would be "profitable for everybody." Defendant mentioned that she was going to give Wells an acre of land.

Wells obtained a .12 guage shotgun from a friend. On Friday night, 9 November 1979, after talking with defendant, Wells and Crowder drove to Mr. Darroch's home in Bunnlevel. They left Danville at approximately 11 p.m. They stopped near Fuquay-Varina to call defendant to ask if she still wanted Mr. Darroch killed. She told them that she still wanted it done. They drove on to Mr. Darroch's house. He was asleep on the living room sofa. Wells entered the house by climbing through a kitchen window and Crowder handed him the shotgun. Crowder waited in the car while Wells shot Mr. Darroch in the head. Wells exited the house with the shotgun and Mr. Darroch's wallet.

He and Crowder then drove back to Danville to the motel where defendant was working. They arrived at approximately

5:30 or 6:00 a.m. and told defendant that Wells had killed her husband.

Wells was arrested on 28 April 1980 and Crowder on 6 August 1980. They were both charged with first degree murder of Raeford Darroch and with conspiracy and were told that they faced the death penalty. Both were allowed to plead guilty to second degree murder in exchange for their testimony against defendant; Wells also pleaded guilty to the charge of conspiracy.

Raeford Darroch's life was insured by a policy obtained through his employer in the amount of $27,000 which provided double indemnity benefits for a violent death other than one self-inflicted. Had Mr. Darroch lost his job, the policy would have terminated thirty-one days after his last day of employment. By the terms of the policy the benefits were payable to the insured's widow, the defendant. Defendant applied for those benefits on 27 November 1979.

The personnel manager for defendant's employer testified that the deceased had worked only two weeks between June 1979 and the date of his death. A conference had been held with Mr. Darroch to discuss his attendance and he was told that if he did not return to his job he would be terminated.

Defendant took the stand in her own behalf. She denied that she had ever talked with Wells or Crowder about killing her estranged husband. She testified that she knew that her husband had some life insurance but that she did not learn until after his death that she was entitled to the benefits.

Defendant was found guilty by a jury of accessory before the fact to murder, G.S. § 14-5 (1969),[1] and was given the mandatory life sentence, G.S. § 14-6 (Cum. Supp. 1979).[2]

1. This statute was repealed effective 1 July 1981 by Law of June 25, 1981, ch. 686, 1981 N.C. Sess. Laws --- (1981). G.S. 14-5.2 now defines the criminal liability of accessories before the fact:

> All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony. However, if a person who heretofore would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based sole-

II

[1] Defendant's primary contention on this appeal is that a portion of the statute under which she was convicted, former G.S. 14-5,[3] is unconstitutional because it purports to assert jurisdiction over actions which occur outside the state in violation of the sixth amendment to the United States Constitution. Defendant timely raised this issue by a motion to dismiss in the trial court prior to trial.

Former G.S. 14-5 made criminal in this state the counselling, procuring or commanding *outside the state* of another to commit a felony *within the state.* Thus, under this statute, a person could

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ly on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a Class B felony.

2. This statute was repealed effective 1 July 1981 by Law of June 25, 1981, ch. 686, 1981 N.C. Sess. Laws --- (1981). Persons who counsel, procure or command another to commit a felony are now principals and are punished as such. G.S. § 14-5.2 (1981).

3. Former G.S. 14-5 provides:

> If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. *The offense of the person so counseling, procuring or commanding, howsoever indicted, may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offense had been committed at the same place as the principal felony or where the principal felony is triable, although such offense may have been committed at any place within or without the limits of the State.* In case the principal felony shall have been committed within the body of any county, and the offense of counseling, procuring or commanding shall have been committed within the body of any other county, the last-mentioned offense may be inquired of, tried, determined, and punished in either of such counties: Provided, that no person who shall be once duly tried for any such offense, whether as an accessory before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offense.

(Emphasis added.) This statute was repealed effective 1 July 1981. See note 1, *supra.*

be guilty of the crime of accessory before the fact within this state if the principal offense occurred here. According to defendant, this result contravenes the sixth amendment, which provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI. The thrust of defendant's argument is that this state, by virtue of the sixth amendment, cannot exercise jurisdiction over crimes occurring beyond its territorial limits. Since all of her acts on which the charge of accessory before the fact is based took place in Virginia, defendant contends, this state had no jurisdiction to try her for her crime. We disagree and hold that regardless of where the accessorial acts take place this state may constitutionally assert jurisdiction over that crime as long as the principal felony occurs here.

A.

Defendant's argument that this state may not assert jurisdiction over her crime is based on the territorial principle of jurisdiction. Under this theory, a state's jurisdiction over criminal matters cannot extend beyond its territorial boundaries. The Apollon, 22 U.S. (9 Wheat.) 362, 370, 6 L.Ed. 111, 113 (1824); Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 Mich. L. Rev. 238 (1932). Under the historical strict territorial principle, a state court had jurisdiction only over those crimes which occurred entirely within that state's boundaries; if any essential element occurred in another state, neither possessed jurisdiction over the criminal offense. 1 M. Hale, *The History of the Pleas of the Crown* 426 (1778); *see United States v. McGill*, 4 U.S. (4 Dall.) 426 (1806). Under this view of jurisdiction, only one state could have jurisdiction over a particular crime. *See Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136, 3 L.Ed. 287, 293 (1812).

This strict theory of territorial and exclusive jurisdiction has been gradually relaxed by appellate courts over the years to afford a more elastic, and more practical, jurisdictional theory. One such example of relaxation is the localization theory.

When faced with a situation in which the constituent acts of a crime occur in different states, many courts have sought to "localize" the entire crime in the state where the ultimate harm occurred. In *People v. Adams*, 3 Denio (N.Y.) 190 (1846), *aff'd*, 1

Comstock (N.Y.) 173 (1848), defendant was charged with obtaining money and property by false pretenses. In *Adams*, defendant through innocent agents in New York made false representations to a New York business and thereby fraudulently obtained money. Defendant admitted the false pretenses but contended that the courts of New York had no jurisdiction over his crime because he was at all relevant times in the State of Ohio. Although the supreme court agreed that its jurisdiction was limited to crimes committed within the State of New York, it held that personal presence of the defendant was not indispensable. The court reasoned that the crime had been committed in New York because it was there that defendant's scheme came to fruition and that jurisdiction over the crime necessarily implied jurisdiction over the criminal.

Courts in other jurisdictions have predicated jurisdiction over a nonresident defendant on the theory of constructive presence. Under this theory, the defendant is deemed to accompany the force which causes the actual harm which occurs in the forum state. Traditionally, constructive presence has been confined in two situations: (1) when the defendant is deemed to have accompanied the instrumentality, *e.g.*, *Simpson v. State*, 92 Ga. 41, 17 S.E. 984 (1893), and (2) when the defendant is deemed to have accompanied the agent, *e.g.*, *Strassheim v. Daily*, 221 U.S. 280, 31 S.Ct. 558, 55 L.Ed. 735 (1911). In *Simpson*, the defendant, while in South Carolina, fired across the state line at a person in Georgia. In affirming the conviction for assault with intent to commit murder, the Georgia court stated:

> Of course, the presence of the accused within this State is essential to make his act one which is done in this State; but the presence need not be actual. It may be constructive. The well established theory of law is, that where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. . . . So, if a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and being represented by it, up to the point where it strikes. . . .
>
> . . . [T]he act of the accused did take effect in this State. He started across the river with his leaden messenger, and

> was operating it up to the moment when it ceased to move, and was therefore, in a legal sense, after the ball crossed the State line up to the moment that it stopped, in Georgia.

92 Ga. at 43, 46, 17 S.E. at 985, 986. Unlike the New York court in *Adams*, the Georgia court considered presence within the state as necessary to jurisdiction. It found that presence through use of a legal fiction: constructive presence.

In *Strassheim*, defendant challenged the jurisdiction of the Michigan courts to try him for obtaining funds from the state by false pretenses. At the time the money was obtained in Michigan, defendant was outside the state. The person who obtained the funds in Michigan, one Armstrong, had agreed to participate in defendant's plan to defraud the state. In holding that Michigan courts had jurisdiction to try the defendant the Supreme Court stated:

> If a jury should believe the evidence and find that Daily did the acts that led Armstrong to betray his trust, deceived the Board of Control, and induced by fraud the payment by the State, the usage of the civilized world would warrant Michigan in punishing him, although he never had set foot in the State until after the fraud was complete. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.

221 U.S. at 284-85, 31 S.Ct. at 560, 55 L.Ed. at 738. This Court made clear that one who procures a guilty agent to commit a crime in another state may be punished as a principal to the crime in the other state and that there is no constitutional prohibition to such an assertion of jurisdiction.

Still another method employed to support the finding of jurisdiction when some elements of the crime occur outside the state is the expanded definition of the crime. In *Worthington v. State*, 58 Md. 403 (1882), the defendant stole goods in West Virginia and brought them into the State of Maryland. He was arrested there and charged with larceny. The supreme court affirmed his conviction of that crime, reasoning that larceny is a continuing offense and that every asportation of the property was

a new offense. Because the act of bringing stolen goods into Maryland was an asportation constituting a new offense, the court reasoned that defendant had committed a larceny within Maryland and was punishable there. *Id.* at 409. *Contra, e.g. Strouther v. Commonwealth*, 92 Va. 789, 22 S.E. 852 (1895) (rejecting this definition of larceny). This Court has also rejected the Maryland court's definition of larceny, refusing to impose punishment for larceny of a horse when the animal was stolen in Ohio and was later brought into this state. *State v. Brown*, 2 N.C. (1 Hayw.) 100 (1794).

The cases discussed above concern prosecution for the principal offense, and we are here concerned with prosecution as an accessory. At the time of defendant's actions, the crime of accessory before the fact was a separate substantive offense under North Carolina law. *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980).[4] Defendant contends that this distinction is important because under our definition of the substantive crime of accessory before the fact, the crime must occur, and therefore jurisdiction must exclusively vest, in the state where the accessorial acts were committed.

Defendant is not without case law support for her argument. Indeed, in *Johns v. State*, 19 Ind. 421 (1862), the court was faced with facts similar to those now before us and held that Indiana had no jurisdiction over defendant's crime of accessory before the fact when the accessorial acts occurred outside the state and the principal felony occurred within the state. This case, however, was not decided on constitutional grounds but on the basis of a strict territorial approach to jurisdiction. Excerpts from *Johns* are illustrative of that court's reliance on the territorial principle:

> It may be assumed, as a general proposition, that the criminal laws of a State do not bind, and can not affect, those out of the territorial limits of the State.
>
> Each State, in respect to each of the others, is an independent sovereignty, possessing ample powers, and the exclusive right, to determine, within its own borders, what shall be tolerated, and what prohibited; what shall be deemed

4. As stated above in note 1, an accessory before the fact is now guilty and punishable as a principal by virtue of G.S. 14-5.2.

innocent, and what criminal; its powers being limited only by the Federal Constitution, and the nature and objects of government. While each State is thus sovereign within its own limits, it can not impose its laws upon those outside the limits of its sovereign power. Our own constitution has expressly fixed the boundaries of its sovereignty. It provides, after having defined the geographical boundaries of the State, that "The State of *Indiana* shall possess jurisdiction and sovereignty coextensive with the boundaries declared in the preceding section; and shall have concurrent jurisdiction, in civil and criminal cases, with the State of *Kentucky* on the *Ohio* river, and the State of *Illinois* on the *Wabash*, so far as said rivers form the common boundary between this State and the said States respectively." Constitution, art. 14, sec. 2.

But, while it is clear that the criminal law of a State can have no extra-territorial operation, it is equally clear that each State may protect her own citizens in the enjoyment of life, liberty, and property, by determining what acts, within her own limits, shall be deemed criminal, and by punishing the commission of those acts. And the right of punishment extends not only to persons who commit infractions of the criminal law *actually* within the State, but also to all *persons who commit* such infractions as are, in *contemplation of law*, within the State.

. . . .

. . . Two circumstances may be noticed in reference to all the cases that have come under our observation: 1. The crime has been deemed, in law, to have been committed in the State where it was punished, although the perpetrator, at the time of its commission, may have been personally out of the State; and 2. The party punished has been held to be the person who *committed* it; that is, he has been held to be the principal, and not merely an accessory before the fact. Indeed, in no justly legal sense can it be said, that a man who, in one State, procures a responsible party to go out of that State into another, and there commit a crime, *commits* any crime *within the latter State.*

Id. at 423-24, 426-27. (Emphasis in original.)

Similarly, the court in *State v. Sigh*, 38 Del. 362, 192 A. 682 (1937), held that one whose accessorial acts occurred outside the state could not be tried in the state where the principal felony occurred. The Delaware court considered presence within the state to be essential to jurisdiction. Although it recognized that constructive presence was sufficient to give jurisdiction, the court considered that defendant's procuring of a guilty agent to commit the felony was not such an act as would establish constructive presence. By its reliance on presence, actual or constructive, as a prerequisite to jurisdiction this court revealed its view of jurisdiction as being essentially and strictly territorial.

Under the strict territorial approach, it became the generally accepted law that one who procures the commission of a felony in another state by use of an inanimate object or through an innocent agent was liable as a principal in the state where the principal felony occurs; if the agent who commits the act constituting the felony shared in the guilty plan, the procurer was deemed an accessory before the fact over whom the state where the principal crime occurred had no jurisdiction. *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786 (1925); W. La Fave & A. Scott, *Criminal Law* 117-21 (1972); 21 Am. Jur. 2d Criminal Law §§ 343-47 (1981); Berge, *supra*, 30 Mich. L. Rev. 238. Thus, under the majority rule, this state would have no jurisdiction to try this defendant because her accessorial acts occurred in another state.

Despite the support for defendant's argument, we are not persuaded. In our opinion, the Constitution requires only that the state have a legitimate interest peculiar to itself in punishing the accessorial offense. Former G.S. 14-5 is not violative of the sixth amendment guarantee because it requires that the principal felony occur within the boundaries of this state. As stated by Justice Holmes in *Strassheim*, "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within, justify a State in punishing the cause of the harm as if [the defendant] had been present at the effect . . . ." 221 U.S. at 284-85, 31 S.Ct. at 560, 55 L.Ed. at 738. Former G.S. 14-5 does no more than allow this state to punish the cause, the accessorial acts, of the harm occurring in this state.

That *Strassheim* involved punishment of the out-of-state defendant as a principal rather than as an accessory is not determi-

native. The relation of the defendant in *Strassheim* to the forum jurisdiction is the same as that of the defendant here to this state. Both, while outside the state, procured an agent who shared in the guilty plan to commit a felony within the state. Neither defendant was present within the state at the time the principal crime was committed. See *Strassheim*, 221 U.S. at 281, 84, 31 S.Ct. 559-60, 55 L.Ed. at 736-38. The United States Supreme Court decided that such facts were sufficient to allow the state in which the principal felony was committed constitutionally to punish as a principal the defendant who remained outside the state. We can see no reason why these facts would not also justify punishment as an accessory. Defendant's contention that a contrary result would render meaningless the law in this jurisdiction that accessory before the fact is a separate substantive offense from the principal act is simply not persuasive. How a state chooses to label a crime cannot be relevant to jurisdiction. To conclude otherwise would be to place form above substance.

Although we adhere to the territorial principle of jurisdiction, we think that a flexible, rather than a strict, approach is necessary. In our opinion, the cases which utilize the "localization," constructive presence and expanded definition of crime rationales, while perhaps reaching the correct results, fail to recognize that it is the relationship of the defendant's acts to the forum state which justifies the assertion of jurisdiction.

The desirability of recognizing the legal fictions for what they are in favor of a frank recognition of the relevant factors has long been urged by members of the judiciary and by commentators. In *Hyde v. United States*, 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912), the Supreme Court upheld the right of the courts of the District of Columbia to try all participants in a conspiracy even though not all had been within its territorial limits. The justification for the jurisdiction was constructive presence based on the liability of all conspirators for the overt acts of coconspirators committed in the District in furtherance of the object of the conspiracy. Justice Holmes, in dissent, argued against the use of constructive presence to find jurisdiction:

> To speak of constructive presence is to use the language of fiction, and so to hinder precise analysis. When a man is said to be constructively present where the consequences of

> an act done elsewhere are felt, it is meant that for some special purpose he will be treated as he would have been treated if he had been present, although he was not. For instance, if a man, acting on one State sets forces in motion that kill a man in another, or produces or induces some consequence in that other that it regards as very hurtful and wishes to prevent, the latter State is very likely to say that if it can catch him it will punish him, although he was not subject to its laws when he did the act. *Strassheim v. Daily*, 221 U.S. 280, 285. But as States usually confine their threats to those within the jurisdiction at the time of the act, . . . the symmetry of general theory is preserved by saying that the offender was constructively present in the case supposed. *Burton v. United States*, 202 U.S. 344, 389. We must not forget facts, however. He was not present in fact, and in theory of law he was present only so far as to be charged with the act.

Id. at 386, 32 S.Ct. at 809, 56 L.Ed. at 1133.

In his article on criminal jurisdiction, Wendell Berge argued for "a frank acceptance of elastic jurisdictional principles which are adaptable to the realities of modern crime situations." Berge, *supra*, 30 Mich. L. Rev. at 239. In his conclusion he stated:

> From the study herein made the conclusion is irresistible that if the constituent acts of a given crime occur in more than one state, each such state has an equally valid claim to jurisdiction over the whole crime. Such extra-territorial elements should be frankly recognized by courts and no attempt should be made to cover them with legal fictions.
>
> It has been seen that the trend is unmistakably away from absolutely logical territorial restrictions on criminal jurisdiction, and toward a realistic treatment of the problem. This must lead and is leading to more elastic jurisdictional principles to apply to modern crime situations. Accepting the territorial principle, still it should be pragmatically applied. As noted above, policy has dictated certain exceptions to the territorial principle. Policy also dictates that the territorial principle should be liberalized whenever real situations in a world of rapid change demand such liberalization.

Id. at 269.

A need for relaxation of the strict territorial principle of criminal jurisdiction was recognized as early as 1880. In that year, Francis Wharton argued for modification of the territorial theory. He reasoned that modern developments rendered obsolete the traditional importance assigned to boundaries:

> The great discoveries of recent days, by which the obstacles of space are surmounted, call for a reconsideration of our old conceptions of criminal jurisdiction. In the early period of English common law, all business transactions were by word of mouth, or by tokens or writings exchanged between the immediate parties, face to face. Agencies, indeed, might be constituted, but agents traveled slowly, and carried with them explicit limitations of their powers. Commercial paper was next introduced; but this, also, was subject to the slow transit of those days; and if a forgery was concocted in one country for operation in another, such an occurrence was too rare to make it the object of any modification of the existing law. Now, however, there is scarcely a business transaction which is not more or less affected by information conveyed instantaneously from a foreign land; information as to which fraud is always possible, and concerned in the concoction or transmission of which there may be always persons, resident in other countries, who may do acts violating the penal laws of the country in which the information is to operate. In old times, also, almost the only way of inflicting a physical injury on another was by direct personal attack. Now there are many ways in which such an injury may be inflicted, when the aggressor is in one land and the victim in another. When lines separating states are so purely formal as are those of the American Union, there are innumerable cases in which a pistol shot in one state may inflict an injury in another state. And even where the most formidable natural boundaries interpose between state and state, these boundaries may be readily surmounted by adventurous crime.

Wharton, *Conflict of Criminal Laws*, 1 Criminal Law Magazine, 687, 689-90 (1880).

The commission of the principal felony within this state's territorial boundaries at the behest of the defendant is sufficient to support this state's jurisdiction over her acts. The harm sought

by this defendant took place in this state and punishment of the person who procured it is a legitimate interest peculiar to this state. Whether defendant is also punishable under the laws of the state where her accessorial acts occurred is of no consequence to the issue of this state's jurisdiction. Thus, we hold that former G.S. 14-5, which asserts jurisdiction over the crime of accessory before the fact whenever the principal felony occurs here, is constitutional. Our rationale and holding do not abrogate the territorial principle but, rather, view the theory as flexible and adaptable to modern crime situations. Defendant's crime here did have a territorial relationship to this state: the murder which she counselled, procured and commanded was committed within its boundaries.

G.S. 14-5 permits a constitutional assertion of jurisdiction over the crime of accessory before the fact, and there is sufficient territorial relationship between defendant's accessorial acts and the State of North Carolina.

III

[2] Defendant's next contention on appeal is that the trial court erred in refusing to dismiss the charge against her. This assignment is based on two jurisdictional contentions: (1) the offense of accessory before the fact occurred, if at all, in Virginia and that state has exclusive jurisdiction over her crime; (2) North Carolina has no jurisdiction over her crime because there is no evidence that the principal offense occurred in North Carolina.

Defendant's first contention was disposed of above; the commission of the principal offense in this state is sufficient to support jurisdiction over the crime of accessory before the fact to that offense.

Defendant's second contention is likewise without merit. Although neither State witness Crowder nor Wells stated directly that they had murdered defendant's husband in North Carolina, there is ample evidence that the murder occurred in this state in Harnett County. Crowder testified that Mr. Darroch was living in Harnett County at the time of his death and that Mr. Darroch was shot in his home. Wells testified that Mr. Darroch lived in Bunnlevel and that he was killed at his, Mr. Darroch's, home. This Court may, and does, take judicial notice of the fact that Bunn-

level is in Harnett County and Harnett County is located in this state. *See State v. Glasgow*, 1 N.C. (Cam. & Nor.) 264 (1800). Thus, contrary to defendant's assertion, there is ample evidence that the principal offense occurred in North Carolina.

IV

[3] By her next assignment defendant contends that the trial court erred in failing to instruct the jury that the State had the burden of proving beyond a reasonable doubt that North Carolina had jurisdiction over the offense.

This assignment is based on trial court's refusal to give the following instruction to the jury:

> Ladies and Gentlemen of the jury, the State is further required to prove beyond a reasonable doubt that it has jurisdiction to try the defendant for the offense of accessory before the fact of murder. The State must satisfy you beyond a reasonable doubt that the substantive offense of accessory before the fact of murder occurred in North Carolina. The burden is on the prosecution to prove that each element of the offense of accessory before the fact of murder occurred in North Carolina. The Court does not have jurisdiction to try the defendant for the offense with which she is charged unless the prosecution satisfies you beyond a reasonable doubt that the offense of accessory before the fact of murder occurred in North Carolina.

Defendant argues that because jurisdiction was in issue and the jury was not told that the State had the burden of proof on that issue, she is entitled to a new trial. We reject her argument.

In *State v. Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977), this Court recognized that the criminal jurisdiction of the state is territorially restricted. We held that in cases where this state's jurisdiction is challenged, the State must prove beyond a reasonable doubt that the crime with which the accused is charged occurred in North Carolina. Defendant in *Batdorf* was charged with murder of a truck driver. The only evidence presented by the State on the question of where the murder occurred was that the body was found in North Carolina. The evidence showed that the truck driver initiated his final trip in Ohio and that his truck had been driven into North Carolina.

Defendant took the stand in his own behalf, admitted the killing but claimed that the murder took place within a few hours after leaving Ohio and long before he came into North Carolina. This Court held that under those facts the State had not carried its burden of proving that the crime occurred within the state's territorial limits. Unlike the situation in *Batdorf*, we are here concerned with where the principal offense, the basis of jurisdiction, occurred, not where this defendant's acts occurred. Also unlike *Batdorf*, in this case there was no dispute as to where the principal offense, the murder, occurred. Because the locus of the principal offense was not challenged, no instruction on the burden of proof on that issue was required.

Additionally, defendant's proffered instruction bases the jurisdiction of this state on where her accessorial acts occurred, a basis we have previously discussed and rejected.

While *Batdorf* still represents the law in this state on the burden of proof on jurisdiction, it is applicable only when the facts on which the State seeks to base jurisdiction are challenged. In this case, defendant challenged not the *facts* which the State contended supported jurisdiction, but the *theory* of jurisdiction relied upon by the State. Whether the theory supports jurisdiction is a legal question; whether certain facts exist which would support jurisdiction is a jury question.

For the reasons set out above we find this assignment of error to be without merit.

V

In a related assignment defendant contends that the jury should have been allowed to return a special verdict indicating that North Carolina had no jurisdiction. As discussed above, the fact on which jurisdiction was based—the commission of the principal felony in this state—was not in issue. Defendant's challenge goes to the theory of jurisdiction, a question for the courts. Because there was no factual issue existing as to the basis of jurisdiction, there was no need to allow the jury to return a special verdict.

VI

[4] Defendant's final assignment alleges that the trial court erred in instructing the jury because the instructions allowed the

jury to convict her of being an accessory before the fact to second degree murder. The argument that there cannot be an accessory before the fact to second degree murder was addressed and rejected in *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). Defendant now requests that we reverse the *Benton* decision arguing only that the "logic" of that decision "is not sound." It is enough to say that we find nothing illogical in the reasoning supporting the decision in *Benton* and decline defendant's request to change the law of this state for her benefit.

VII

In conclusion, we hold that the portion of G.S. 14-5 in question represents a constitutional assertion of jurisdiction and that this defendant was properly brought before the courts of this state to answer for her crime. She received a fair trial, free from prejudicial error. In all respects, we find in her trial and conviction

No error.

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

STATE OF NORTH CAROLINA v. LISTON LEGGETT, JR.

No. 95A81

(Filed 3 March 1982)

1. Criminal Law § 111.1— indictment not read to jurors

The trial court did not violate G.S. 15A-1213 and G.S. 15A-1221(b), prohibiting reading the indictment to the jury, when it drew information from the bills of indictment to the extent necessary to identify the defendant and explain the charges against him and the circumstances under which he was being tried as required by G.S. 15A-1213.

2. Criminal Law §§ 66.4, 66.5— lineup identification—no suggestiveness—right to counsel not attached

There was no error in the trial court allowing testimony concerning the victim's identification of defendant during a pretrial lineup which was conducted according to the following procedures: (1) six black males approximately the same size, shape and age as the defendant were assembled in front of an

elevator door, (2) the victim was put into the elevator and taken to the floor where these males were lined up, (3) the victim viewed the lineup for approximately a minute and a half, (4) the males in the lineup were each holding a card bearing a number from 1 through 6, (5) individuals were asked to turn to the right, to the left and then back to a position facing directly toward the victim, and (6) the victim was taken to another floor where she identified the man holding the number 3 as her assailant. Defendant's right to counsel had not attached at the time of the lineup as no prosecution had been commenced against the defendant with regard to the cases upon review. Further, there was no merit to defendant's argument that the counsel who had been appointed for him in another case was incapable of effectively representing him at the lineup in the present case.

3. **Criminal Law § 66.8— photographic identification—testimony properly admitted**

The trial court did not err in allowing testimony and other evidence concerning a photographic identification of the defendant by the victim where the evidence showed six or seven photographs of black males were shown to the victim on two occasions, on each occasion the victim selected the defendant's photograph, and defendant's photograph was the only one in both groups of photographs shown to the victim.

4. **Criminal Law § 34.5— evidence of prior offenses—admissible to show identity**

In a prosecution for kidnapping, first-degree sexual offense and attempted first-degree rape, the trial court did not err in allowing evidence of a separate offense of attempted rape where the principal issue in the case was the identity of the defendant as the perpetrator of the crimes charged, and where the manner in which the perpetrator in each situation exposed himself to the young woman while holding a knife on her as well as the manner of his demands that they commit sexual acts with him were substantially the same. The evidence of the separate attack was properly admissible as tending to identify defendant as also being the perpetrator of the attack against the victim for which he was presently being tried.

APPEAL by the defendant from *Seay, J.*, 4 May 1981 Criminal Session of FORSYTH Superior Court.

The defendant was charged in separate bills of indictment with kidnapping, first-degree sexual offense and attempted first-degree rape. The defendant entered a plea of not guilty to each charge.

At trial the State's evidence tended to show that on 7 December 1980 Elizabeth Kay Martin was an 18 year old female student at the North Carolina School of the Arts in Winston-Salem, North Carolina. On that date she left the school and walked to the center of the city, arriving in the area of the Forsyth County Courthouse about 4:00 p.m. After passing the courthouse, her at-

tention was attracted to a Presbyterian Church on Third Street. Finding the doors locked, she walked around the churchyard for approximately 10 to 15 minutes and then returned to Third Street to begin the walk back to school. It was still light at this time. As she walked along Third Street, the defendant, Liston Leggett, Jr., came out of a parking deck, grabbed her around the throat and held a knife against her.

Upon being grabbed from behind by the defendant, she asked him if he would please let her go. The defendant then told her to come with him and began dragging her through the parking lot to an alley nearby. She began trying to free herself, and grabbed the defendant's knife with her hand. At the same time she continued to ask the defendant to let her go, indicating that she had done nothing to him and asking why he was doing this to her. During the course of this struggle, she was cut on the hand and on the forearm.

The defendant dragged her through the alley until they reached an adjacent alcove. The defendant was still dragging her by the neck with one hand and carrying the knife in the other hand. After they reached the alcove, the defendant demanded that she "give me what I want." He then told her to take her pants down. The defendant was standing directly before her, and she saw his face plainly for a minute or two while he threatened her with the knife. The defendant took his pants down and told her that he wanted her to "have oral sex with him." Miss Martin, who was bleeding from her cuts at the time and could still see the knife in the defendant's hand, took his penis into her mouth for a few seconds.

The defendant then lay down on top of Miss Martin. She testified that he "tried to insert his penis into my vagina at that time but was unsuccessful. The knife was in his possession. He reached a climax while laying on top of me. He never entered my vagina, but he climaxed on me."

She told the defendant to go ahead and she would stay in the alcove. He indicated that he did not believe her, and she repeated her statement again. The defendant left the alcove by going down the alley in the same direction he had entered with the victim earlier. She dressed herself and left the alley hurriedly in the opposite direction.

She ran back to Main Street and in the general direction of her school. When she reached Old Salem she stopped Officer David D. McKnight of the Winston-Salem Police Department and told him what had happened to her. He noted a large amount of blood on the jersey she was wearing but determined that her bleeding appeared to have stopped. The officer took her immediately to the alley she had described. He drove up the alley with her in his vehicle and stopped at the alcove she pointed out. The officer then got out of his car and entered the alcove. There was still sufficient daylight to allow him to see blood in the alcove. At that time he detected what appeared to him to be fresh blood on the cement in the alcove.

Officer McKnight then took the victim directly to a nearby hospital. A physician administered four stitches applied deeply and twenty-five stitches in the skin to close the wound on her forearm. He applied eight other stitches to two wounds in her hand.

The State in presenting its evidence introduced photographs and testimony with regard to photographic line-ups, each of which resulted in Miss Martin identifying the defendant as the perpetrator of the crimes charged. The State also introduced testimony concerning the victim's identification of the defendant at an in-custody physical line-up. The State further presented testimony of the prosecuting witness and the investigating officer from another criminal case against the defendant. This evidence and testimony is examined in greater detail hereinafter.

The defendant offered evidence in the nature of alibi evidence. He testified that he did not see Miss Martin on 7 December 1980 or at any other time and had not in any way assaulted her.

The jury found the defendant guilty of kidnapping, first-degree sexual offense and attempted first-degree rape. The defendant appealed directly to this Court from the trial court's judgment sentencing him to life imprisonment for first-degree sexual offense. On 21 August 1981, we allowed the defendant's motion to bypass the North Carolina Court of Appeals with regard to his appeals from the judgments of the trial court sentencing him to a maximum term of life imprisonment and a minimum term of 25 years imprisonment for kidnapping and a

maximum and minimum term of 20 years imprisonment for attempted first-degree rape. These sentences were "to begin at expiration of sentence in case #81CRS1079 entered in Forsyth Superior Court 16 March 1981" arising from an assault on one Porshe Mosely discussed hereinafter.

Rufus L. Edmisten, Attorney General, by Robert G. Webb and Thomas B. Wood, Assistant Attorneys General, for the State.

David V. Liner and Zachary T. Bynum, III, Attorneys for the defendant-appellant.

MITCHELL, Justice.

[1] The defendant first contends that the trial court committed reversible error by reading the bills of indictment against him to prospective jurors. The defendant asserts that the trial court thereby violated the express terms of G.S. 15A-1213 and G.S. 15A-1221(b). We do not agree.

G.S. 15A-1221(b) prohibits the reading by any person of bills of indictment against the defendant to prospective jurors or to the jury during jury selection or trial. G.S. 15A-1213 provides:

> Prior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice. The judge may not read the pleadings to the jury.

The defendant specifically complains that the trial court by its opening statement to prospective jurors in the present case violated both statutes. The trial court's opening statement was as follows:

> During the course of this trial when I use the word defendant, I will be referring at all times to Liston Leggett, Jr. He has come into court and has entered pleas of not guilty to a charge of first-degree sexual offense, specifically that on December 7th, 1980, he did with force and arms, commit a first-degree sexual offense upon Elizabeth Kay Martin, that

he did this by force and against her will, and employed in the course thereof a dangerous or deadly weapon, and he is further charged and has entered a plea of not guilty to the felony of kidnapping in that he's charged with kidnapping Elizabeth Kay Martin on December the 7th, 1980, and he has come into court and also entered a plea of not guilty to a charge of attempting to rape Elizabeth Kay Martin by force and against her will, employing a deadly weapon, a knife, on December 7th, 1980.

The State has correctly pointed out that the three bills of indictment against the defendant, exclusive of captions and signature lines, constitute twenty-seven lines in the printed record. That portion of the statement by the trial court complained of by the defendant consists of thirteen lines in the printed record. Clearly the trial court did not read the indictments to the jury as prohibited by G.S. 15A-1213 and G.S. 15A-1221(b). By its previously quoted statement to prospective jurors, the trial court merely drew information from the bills of indictment to the extent necessary to identify the defendant and explain the charges against him and the circumstances under which he was being tried. In so doing, the trial court did not commit error. *See State v. McNeil*, 47 N.C. App. 30, 266 S.E. 2d 824, *appeal dismissed*, 301 N.C. 102, 273 S.E. 2d 306 (1980), *cert. denied*, 450 U.S. 915, 67 L.Ed. 2d 339, 101 S.Ct. 1356 (1981). To the contrary, this statement by the trial court was necessary to inform the prospective jurors of the circumstances surrounding the cases against the defendant as required by the specific terms of G.S. 15A-1213.

Additionally, we think the statement of the trial court was consistent with the spirit of each statute in question. The legislature apparently intended that jurors not be given a distorted view of the case before them by an initial exposure to the case through the stilted language of indictments and other pleadings. The statement by the trial court in the present case entirely complied with this intent and was not error.

[2] The defendant next contends that the trial court erred by allowing the State to introduce evidence that Miss Martin identified him as the perpetrator of the crimes charged by choosing him from a physical line-up in which he was required to participate. This contention is without merit.

We note at the outset that the record on appeal does not reflect any motions for *voir dire* hearings or any objections taken to the victim's in-court identification of the defendant or objections to the victim's testimony relating to her pretrial line-up or photographic identifications of the defendant. Therefore, the defendant failed to preserve his right to except to such evidence and effectively waived his right to raise any contentions concerning it on appeal. *State v. Hedrick*, 289 N.C. 232, 234, 221 S.E. 2d 350, 352 (1976); *Gasque v. State*, 271 N.C. 323, 339, 156 S.E. 2d 740, 751 (1967), *cert. denied*, 390 U.S. 1030, 20 L.Ed. 2d 288, 88 S.Ct. 1423 (1968); Rules 9 and 10, North Carolina Rules of Appellate Procedure. Nevertheless, due to the gravity of the offenses and the lengths of the sentences involved here, we elect to review the defendant's assignments of error on the various identification questions set forth in his brief as though they had not been waived.

In support of his contention that the trial court erroneously admitted the victim's identification of him at an in-custody physical line-up, the defendant first argues that he was denied the right to counsel during the line-up. At the time of the physical line-up in question, the defendant was in custody in connection with an unrelated charge. No prosecution had been commenced against the defendant with regard to the cases before us on this appeal. Therefore, the defendant's right to counsel had not attached. *State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128, 59 L.Ed. 2d 90, 99 S.Ct. 1046 (1979); *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976). The mere fact that a defendant is under arrest and in custody on charges unrelated to the crimes being investigated when he is required to participate in a physical line-up does not constitute the initiation of "adversary judicial proceedings" and does not create an adversarial relationship between the State and the defendant sufficient to require the assistance of counsel. *State v. Matthews*, 295 N.C. at 285, 245 S.E. 2d at 739, and cases cited therein.

Additionally, the defendant in fact was represented by counsel who had been appointed for him in another case during the physical line-up in which he participated in the present case. The defendant argues that this counsel, not having been appointed for the specific cases here on appeal, would not have been familiar with the facts or circumstances surrounding the alleged

attack by the defendant in these cases and was incapable of effectively representing him at the line-up. As no adversary judicial proceedings had been initiated against the defendant in these cases, we find it hard to imagine how counsel who in fact represented the defendant at the line-up could have been more handicapped than one appointed especially to represent him at that line-up. In either event counsel would have been entering the case for the first time and would not have the opportunity to be fully informed about the case prior to the line-up. The purpose of counsel at a line-up is to insure that the line-up is not unncessarily suggestive and does not create a substantial likelihood of misidentification. Such purpose was served by counsel here, and it was not required that he be as prepared as if going to trial. We find this argument to be without merit.

Due process forbids an out-of-court confrontation which is so unnecessarily "suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 19 L.Ed. 2d 1247, 1253, 88 S.Ct. 967, 971 (1968). Therefore, in cases in which such issues are properly raised, we must examine the reliability of any identification of the defendant during out-of-court confrontations without regard to the presence of counsel or whether formal prosecution against the defendant had been initiated.

As we have previously stated, "The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." *State v. Henderson*, 285 N.C. 1, 9, 203 S.E. 2d 10, 16 (1974), *death penalty vacated*, 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3202 (1976). In evaluating such claims of denial of due process, this Court employs a two-step process. First, we must determine whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification. If this question is answered in the negative, we need inquire no further. If it is answered affirmatively, the second inquiry we must make is whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification. *State v. Headen*, 295 N.C. 437, 439, 245 S.E. 2d 706, 708 (1978).

The defendant has presented no specific assertions as to why he contends the procedures employed during the pre-trial line-up in which he participated were unduly suggestive. Our independent review of the evidence clearly indicates that no suggestive procedures were employed. All of the participants in the line-up were black males of approximately the same size, shape and age as the defendant. An attorney who had previously been appointed to represent the defendant in another case was with the defendant throughout the line-up procedures and rejected several males the officers proposed to use in the line-up. Those used in the line-up were acceptable to the attorney. The six black males chosen to constitute the line-up were placed in a foyer area in city hall in a line in front of an elevator door. The victim was put into the elevator and taken to the floor where these males were lined up. When the door to the elevator opened, she viewed the line-up for approximately a minute and a half. The six individuals were asked to turn to the right, to the left and then back to a position facing directly toward the victim. She was approximately ten to fifteen feet from them at the time. Each person in the line-up was holding a card bearing a number from 1 through 6. They were lined up consecutively 1 through 6. The victim was told to view the line-up to determine whether the man who had assaulted her was present. If he was, she was to remember the number he was holding. No other instructions were given her. After she had viewed the line-up and the elevator door had closed, she was taken to another floor. She was interviewed there and definitely identified the man holding the number 3 as her assailant. The defendant, Liston Leggett, Jr., was holding card number 3.

We find no hint of impermissible suggestiveness in the line-up procedures employed here. In fact, it is difficult to imagine how a less suggestive line-up could have been conducted. Having found no impermissible suggestiveness in the procedures employed, we need not consider whether they resulted in a substantial likelihood of irreparable misidentification. *State v. Davis*, 297 N.C. 566, 572, 256 S.E. 2d 184, 187 (1979). We find no error in the action of the trial court in allowing testimony concerning the victim's identification of the defendant during the pretrial line-up.

[3] The defendant further contends that the trial court erred in allowing the State to present evidence of a pretrial photographic identification of him by the victim. We have reviewed carefully all

of the evidence in the record concerning each of the two occasions during which the victim positively identified the defendant by the use of photographs. On both occasions the six or seven photographs used were all of black males. No suggestion was made to the victim that she pick any of the photographs. Instead, she was simply given the photographs and asked to tell the officers if she saw anyone who resembled the man who had attacked her. On each occasion she selected the defendant's photograph.

The defendant was the only person whose photograph was in both groups of photographs shown to the victim. He asserts that this fact made the procedure impermissibly suggestive. We find this argument without merit. The fact that a defendant's photograph is the only one common to two groups of photographs shown a victim is not sufficient, standing alone, to support a determination that pretrial photographic identification was conducted in an impermissibly suggestive manner. The totality of the procedures employed during the photographic identification by the victim here clearly indicates that the procedures were not impermissibly suggestive. The trial court committed no error in allowing testimony and other evidence, through the victim and the officer conducting the procedures, concerning these photographic identifications of the defendant by the victim.

[4] The defendant further contends that the trial court erred in allowing into evidence the testimony of the victim and the investigating officer in another criminal action against the defendant for assault. We find no error in the admission of this evidence.

In the case of *State v. McClain*, 240 N.C. 171, 173, 81 S.E. 2d 364, 365 (1954), Justice Ervin stated for this Court, "The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense." The opinion in *McClain* enumerates eight exceptions to this general rule. Exception number 4 is that, "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." *Id.* at 175, 81 S.E. 2d at 367.

In the cases presently under review, the principal issue was the identity of the defendant as the perpetrator of the crimes charged. Although Miss Martin positively identified the defendant as the perpetrator, his evidence of alibi made the issue of whether he was, in fact, the perpetrator "the very heart of the case." *State v. Freeman*, 303 N.C. 299, 302, 278 S.E. 2d 207, 208-09 (1981). If the evidence complained of tended to show that the attack on Miss Martin and another offense were committed by the same person, evidence that the defendant committed the other offense was admissible to identify him as Miss Martin's attacker.

The evidence of a separate crime objected to by the defendant at trial and assigned as error here tended to show the following:

Miss Porshe Mosely was fifteen years old on 10 January 1981. At 10:00 o'clock p.m. on that date she went to a cousin's house to get some of her personal belongings. She stayed approximately ten minutes and left the house. She first saw the defendant in these cases, Liston Leggett, Jr., upon leaving her cousin's house. He was coming from Eighteenth Street through a parking lot. He offered to buy her a drink, but she declined the offer. She then ran to the nearby porch of a friend and knocked on the door. When no one answered, she again attempted to run. The defendant grabbed her, held a knife to her throat and began to drag her behind some apartments. After dragging Miss Mosely behind the apartments, the defendant continued to hold the knife to her throat and hit her twice in the mouth, causing her mouth to bleed. While holding the knife to Miss Mosely's throat the defendant took his penis out of his pants. She testified that, "He said if I didn't give him some he was going to kill me."

After the defendant exposed himself he began dragging Miss Mosely to a nearby church field. At that point she saw a friend, Mr. James Lowery, who owned a store across the street from the church, and began screaming to him for help. Mr. Lowery stopped his truck and began to get out, at which point the defendant released Miss Mosely and ran down a nearby path.

Miss Mosely immediately reported the incident to police officers. She then went with them to point out the defendant's home. Upon arriving there, she saw officers knock on the defendant's door. At that time she could see the defendant standing

against a wall inside the house and told the officers that he was the man who had attacked her. Evidence corroborative of Miss Mosely's testimony was offered through the investigating officers.

The accounts by Miss Martin and Miss Mosely of the attacks against them revealed many similarities in the manner in which each of them was attacked, even though the attacks occurred one month apart. In each case the perpetrator came from a parking area in the vicinity of a church and grabbed a teen-age woman on the public streets. In each case the perpetrator held a knife on the victim and proceeded to drag her to a secluded area from which he had more than one route of escape. The manner in which the perpetrator in each situation exposed himself to the young woman while holding a knife on her as well as the manner of his demands that they commit sexual acts with him were substantially the same.

We find that the testimony of Miss Mosely, when compared to the testimony of Miss Martin, revealed circumstances tending to show that the crimes before us here, which were committed against Miss Martin, and the attack against Miss Mosely were committed by the same person and that the defendant committed the attack upon Miss Mosely. Therefore, the evidence of the separate attack upon Miss Mosely was properly admissible as tending to identify the defendant as also being the perpetrator of the attack against Miss Martin for which he was convicted here. *State v. McClain*, 240 N.C. 171, 175, 81 S.E. 2d 364, 367 (1954). We conclude, therefore, that there was no error in the admission of Miss Mosely's testimony as tending to identify the defendant as the perpetrator of the attack upon Miss Martin.

Additionally, we note that the defendant in the present case took the stand and testified. During his direct testimony he stated that he had been convicted of assaulting Porshe Mosely and was currently in prison for that offense. During cross examination the defendant admitted that he hit Miss Mosely on the night in question in January of 1981 but stated that he did not hold a knife on her or drag her anywhere. He also testified concerning the police officers coming to his door that night. As the defendant on direct examination volunteered information about his assault on Miss Mosely and additionally volunteered the information that he had been convicted and was serving a prison

sentence for that assault, the admission of Miss Mosely's testimony was harmless. *State v. McDaniel*, 274 N.C. 574, 164 S.E. 2d 469 (1968).

The defendant's final contention is that the trial court erred in allowing into evidence a statement made by him to law enforcement officers. The defendant contends that his statement was prejudicial to him primarily because he indicated that he had had a haircut since the attack on Miss Martin. There was some evidence tending to indicate that, when Miss Martin first described her attacker to the police, she described him as having hair longer than the defendant's. The defendant asserts that the admission of his statement that he had had a haircut was prejudicial to his case. He further asserts that he was in such an obvious state of mental imbalance at the time that he could not knowingly waive his rights or make a voluntary statement.

The trial court conducted a *voir dire* hearing on this issue and heard evidence from the State. The defendant offered no evidence. At the conclusion of the hearing the trial court made findings of fact and concluded that the defendant freely, understandingly, and voluntarily made the statement in question. There was ample evidence to support the trial court's findings, and those findings in turn support the trial court's conclusions. The trial court did not err by allowing an officer to testify as to the statement by the defendant.

In the defendant's trial, we find

No error.

STATE OF NORTH CAROLINA v. ULYSEES PERRY

No. 59A81

(Filed 3 March 1982)

1. Larceny § 9— acquittal of breaking or entering—absence of finding as to value of stolen property—felonious larceny conviction improper

G.S. 14-72(b)(2) does not permit a defendant's conviction of felonious larceny merely because he committed the larceny pursuant to or after a breaking or entering by some stranger, and it is improper, absent the jury's finding that the property stolen exceeded the amount set forth in G.S. 14-72(a), for

the trial judge to accept a verdict of guilty of felonious larceny where the jury has failed to find the defendant guilty of the felonious breaking or entering pursuant to which the larceny occurred.

2. **Criminal law § 26.5; Larceny § 1— punishment for larceny and possession of stolen property—no double jeopardy**

The offenses of larceny and possession of the property which was the subject of the larceny are two separate and distinct offenses, and double jeopardy considerations therefore do not prohibit punishment of the same person for both offenses.

3. **Larceny § 1; Receiving Stolen Goods § 1— larceny, receiving, and possession of stolen goods—conviction of only one offense**

While the crimes of larceny, receiving, and possession of stolen property are separate and distinct offenses, the Legislature did not intend to punish a defendant for receiving or possessing the same goods that he stole. Therefore, though a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses. G.S. 14-71.1; G.S. 14-72.

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

Justice CARLTON concurring in result only.

THE State of North Carolina appeals as of right pursuant to G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals reported at 52 N.C. App. 48, 278 S.E. 2d 273 (1981).

The defendant was charged in a bill of indictment, proper in form, with felonious breaking or entering with intent to commit larceny, felonious larceny after breaking and entering, felonious receipt of stolen property knowing it to be stolen, and felonious possession of stolen property knowing it to be stolen. His case came on for trial at the 30 June 1980 Session of Superior Court, Wayne County. The evidence showed that on Sunday afternoon, 11 May 1980, the Reverend Willard Carlton locked and secured the Moye Memorial Free Will Baptist Church building in Goldsboro after that day's services. Sometime between that afternoon and Monday, 19 May 1980, there was a breaking and entering at the church and three gas heaters were taken. On 19 May 1980 Reverend Carlton discovered the doors of the church open with their latches broken and the heaters missing. He immediately notified the sheriff's department. On or about the 26th day of May, Reverend Carlton observed two of the heaters in Williams' Used Furniture and notified the sheriff of their location. The

sheriff's investigation disclosed that on 16 May 1980, Woodrow Williams, the owner of Williams' Used Furniture, purchased the two heaters from a black male who identified himself as Ulysees Perry. Mr. Williams paid for the heaters by check payable to Ulysees Perry in the amount of $35.00. The check was endorsed "Ulysees Perry" and was cleared through Williams' bank account. Mr. Williams made an in-court identification of the defendant as the man who sold him the heaters. Williams testified that in his opinion the fair market value of the heaters was $75.00 each and that this was the price he put on them for sale in his store.

For proof of the larceny charge the State relied solely on the doctrine of recent possession. The judge submitted to the jury three counts: felonious breaking or entering, felonious larceny pursuant to a breaking or entering, and felonious possession of stolen property. The charge of felonious receiving was not submitted. The jury returned verdicts of not guilty on the breaking or entering charge, guilty of felonious larceny and guilty of felonious possession. The defendant moved to set aside the jury's verdict on the grounds that it was not supported by the evidence and that it was inconsistent. The judge denied the motion on both grounds and sentenced the defendant to three to six years imprisonment on the larceny conviction and two years imprisonment on the possession conviction. The defendant appealed to the Court of Appeals. That court, for the trial judge's failure to submit for jury determination the value of the property stolen, vacated the felonious larceny conviction, and remanded the case to the trial court for entry of judgment as upon a verdict of guilty of misdemeanor larceny. It also, because of double jeopardy considerations, vacated the possession conviction, and remanded the case to the trial court for dismissal. One judge dissented as to vacating the possession conviction citing the decision by a different panel of the Court of Appeals in the case of *State v. Andrews*, 52 N.C. App. 26, 277 S.E. 2d 857 (1981), as setting forth the applicable law on the question of former jeopardy.

Rufus L. Edmisten, Attorney General, by Evelyn M. Coman and Charles M. Hensey, Assistant Attorneys General, for plaintiff-appellant.

John W. Dees, attorney for defendant-appellee.

MEYER, Justice.

The State's appeal sets forth two issues: (I) whether the Court of Appeals erred in vacating the felonious larceny conviction and directing entry of a judgment based upon misdemeanor larceny, and (II) whether the Court of Appeals erred in vacating the possession conviction and ordering the charge dismissed because of double jeopardy considerations.

(I)

[1] In support of its contention that the Court of Appeals erred in reducing the felonious larceny conviction to a misdemeanor, the State argues that G.S. § 14-72 will support the interpretation that a defendant can be found guilty of felonious larceny after a breaking or entering without the necessity of a finding either (1) that the defendant personally committed the breaking or entering or that he was an accessory or aider and abetter to the principal who committed the breaking or entering, or (2) that the property stolen had a value of more than $400.00. The thrust of the State's argument is that a defendant can be found guilty of *felonious* larceny regardless of the value of the goods involved, if his act of larceny occurs pursuant to or after a breaking or entering by anyone and, therefore, the conviction of the defendant here of felonious larceny pursuant to a breaking or entering is neither inconsistent with nor contradictory to his acquittal of breaking or entering charges. We cannot agree.

G.S. § 14-72, as it existed at the time of this offense, provided in pertinent part as follows:[1]

> § 14-72. *Larceny of property; receiving stolen goods or possessing stolen goods not exceeding $400.00 in value.*—(a) Except as provided in subsections (b) and (c) below, the larceny of property, the receiving of stolen goods knowing them to be stolen or the possessing of stolen goods knowing them to be stolen, of the value of not more than four hundred dollars ($400.00) is a misdemeanor punishable under G.S. 14-3(a). In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.

1. The Legislature amended subsection (a) of G.S. § 14-72 to become effective subsequent to the date of the offense here charged.

(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is:

(1) From the person; or

(2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57; or

. . . .

This statute provides, *inter alia*, that the larceny of property of the value of not more than $400.00 is a misdemeanor unless the larceny fits into one or the categories enumerated in subsection (b).

The defendant was convicted of felonious larceny under section (b)(2) upon the theory that *he* stole the heaters pursuant to a breaking or entering in violation of G.S. § 14-54. However, the jury acquitted the defendant of the actual breaking or entering. The trial judge did not submit for jury determination the value of the property stolen.

All of the evidence showed that the three heaters had a value of $75.00 each or an aggregate value of less than $400.00. In vacating the felonious larceny conviction, the Court of Appeals relied on *State v. Keeter*, 35 N.C. App. 574, 241 S.E. 2d 708 (1978), cases cited therein, and *State v. Cornell*, 51 N.C. App. 108, 275 S.E. 2d 857 (1981). The cases cited set forth the rule that it is improper, absent the jury's finding that the property stolen exceeded the diacritical amount set forth in the statute, for the trial judge to accept a verdict of guilty of felonious larceny where the jury has failed to find the defendant guilty of the felonious breaking or entering pursuant to which the larceny occurred.

> 'Our courts have repeatedly held that where a defendant is tried for breaking or entering and felonious larceny and the jury returns a verdict of not guilty of felonious breaking or entering and guilty of felonious larceny, it is improper for the trial judge to accept the verdict of guilty of felonious larceny unless the jury has been instructed as to its duty to fix the value of the property stolen; the jury having to find that the value of the property taken exceeds $200.00 for the larceny to be felonious.'

(Citation omitted.) G.S. 14-72 was amended, effective 1 January 1980, to increase from $200 to $400 the value which stolen property must exceed in order to constitute a felony. 1979 Sess. Laws, ch. 408.

State v. Perry, 52 N.C. App. 48, 52-53, 278 S.E. 2d 273, 277.

Although the State urges us to overrule as unsound the prior cases establishing the rule set out above, we decline to do so. We believe that the statute cannot reasonably be interpreted to permit the defendant's conviction of felonious larceny merely because he committed the larceny pursuant to or after a breaking or entering by some stranger. The only case upholding a felonious larceny conviction following the defendant's acquittal of breaking or entering is *State v. Curry*, 288 N.C. 312, 218 S.E. 2d 374 (1975). There, this Court held that on the special facts in that case, a not guilty verdict on the breaking or entering count was not necessarily a finding by the jury that the larceny was not committed by the defendant pursuant to a breaking or entering. The Court reasoned that, given the facts produced at trial, the instructions of the trial judge and the verdicts, the jury in *Curry* must have found that the defendant aided and abetted two other men in a larceny *they* committed pursuant to a breaking or entering by *them*, but did not aid or abet them in the breaking or entering. Thus, the two verdicts were logically reconciled. Here, the State did not contend, nor was any evidence presented which would permit the jury to find, that Perry had aided or abetted another's larceny pursuant to a breaking. We agree with the decision of the Court of Appeals that the case must be remanded to the superior court for vacation of the felonious larceny conviction and for the pronouncement of judgment as upon a verdict of guilty of misdemeanor larceny.[2]

(II)

The State next contends that the Court of Appeals erred in vacating the defendant's possession conviction and in ordering

2. The Court of Appeals noted, and we agree, that, but for our ruling on the second issue, the trial court's failure to instruct the jury to fix the value of the stolen property and to submit an issue of *misdemeanor possession* would likewise require vacating the *felony possession* conviction for the same reason the defendant's conviction of felonious *larceny* must be reduced.

that charge dismissed because of double jeopardy considerations. The Court of Appeals in effect held that the defendant's conviction of possession of stolen goods must be vacated because he could not be convicted of both larceny of the property and possession of the same stolen property which was the subject of the larceny. That court reasoned, first, that the Legislature did not intend for there to be two separate and distinct offenses, and second, that double jeopardy considerations preclude conviction of both offenses. We cannot concur in the first reason expressed and, because of our disposition on other grounds, we do not reach the second.

While we believe that the Court of Appeals was correct in its ultimate conclusion that the defendant could not be convicted of both possession of the stolen property and of the larceny of the same property, we do so for reasons different than those expressed in that court's opinion.

We reason first, that larceny and possession of the property stolen in the larceny are separate and distinct offenses and therefore double jeopardy considerations do not prohibit punishment of the same person for both offenses; and second, that although it could have done so, the Legislature, by creation of the statutory offense of possession of stolen property, did not intend to punish an individual for both offenses.

(1)

[2] We find it unnecessary to engage in a lengthy discussion of double jeopardy considerations as did the panel below. The language employed in our North Carolina cases to define the test for double jeopardy is set out in *State v. Cameron*, 283 N.C. 191, 198, 195 S.E. 2d 481, 486 (1973), as follows:

> 'The test of former jeopardy is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. Hence, the plea of former jeopardy, to be good, must be grounded on the 'same offense' both in law and in fact, and it is not sufficient that the two offenses grew out of the same transaction. If evidence in support of the facts alleged in the second indictment would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise not. However,

> if proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of former jeopardy cannot be sustained . . . .'

Our language follows closely the test employed by the United States Supreme Court to determine whether certain activity constitutes two offenses or only one as set out in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.[3]

As pointed out in a recent United States Supreme Court decision, "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed." *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed. 2d 275 (1981). Thus, at issue here is whether the Legislature intended the offenses of larceny of property and possession of that property to be separate and distinct offenses. We believe that it did.

The majority of the panel of the Court of Appeals treated the possession incident to the larceny as a punishable offense and held that:

> Evidence establishing commission of the offense of larceny necessarily also establishes commission of the offense of possession of the stolen property which was the subject of the larceny. It is impossible to take and carry away the goods of another without in the process possessing those goods with knowledge that they are stolen. There are no facts to be proven in establishing possession of stolen goods which are not also proven in establishing the larceny of those goods. The prosecutor who has made out a case of larceny *ipso facto*

3. While *Blockburger* involved two provisions which were both statutory and we are here concerned with one statutory offense (possession) and one common law offense (larceny), the principle is the same.

> has also made out a case of possession of the stolen goods which were the subject of the larceny. '[I]t is clearly *not* the case that "each [statute] requires proof of a fact which the other does not." '

52 N.C. App. 48, 57, 278 S.E. 2d 273, 280.

We cannot agree.

Contrary to the majority of the panel below, we conclude that the offenses of larceny and possession of the property which was the subject of the larceny are two separate and distinct offenses. The essential elements of possession of stolen property are:[4]

(1) possession of personal property;

(2) which has been stolen;

(3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and

(4) the possessor acting with a dishonest purpose.

See G.S. §§ 14-71.1, 14-72; *State v. Davis*, 302 N.C. 370, 373, 275 S.E. 2d 491, 493 (1981); N.C.P.I.—Crim. § 216.46.

The essential elements of larceny are that the defendant:

(1) took the property of another;

(2) carried it away;

(3) without the owner's consent; and

(4) with the intent to deprive the owner of his property permanently.

See State v. Booker, 250 N.C. 272, 108 S.E. 2d 426 (1959); G.S. § 14-72(a); N.C.P.I.—Crim. § 216.05.

Proof only that one is in possession of personal property of a certain value which has been stolen, knowing the same has been stolen, and with a dishonest purpose, will not satisfy all of the

4. The principle is the same whether the offenses are both misdemeanors or both felonies.

elements required for proof of larceny.[5] Clearly, in order to convict an individual of possession of stolen property, the State is not required to prove the asportation, that is, that he took and carried away the property. Conversely, in order to convict an individual of larceny, the State is not required to prove that he possessed the stolen property after the larceny was completed. Simply put, proof of asportation is required for the larceny charge but not for the possession charge, while proof of possession after the larceny is complete is required for the possession charge but not for the larceny charge. Each crime "requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 184, 76 L.Ed. 306, 309. Larceny and possession of property stolen in the larceny are separate crimes.[6] Nothing in the United States Constitution or in the Constitution of North Carolina prohibits the Legislature from punishing a defendant for both offenses.

(2)

[3] The fact that larceny and possession of property stolen in that larceny are two separate and distinct offenses, for which a defendant *may be* punished does not mean however that he is so punishable under our statutes.

Unlike larceny, which is a common law offense, possession of stolen property is a statutory crime created by the Legislature and is of recent vintage. 1977 N.C. Sess. Laws, c. 978. By enactment of the provisions constituting possession of stolen property a crime, we do not ascribe to the Legislature the intent to punish a defendant for possession of the same property which he himself stole in the larceny.

5. While the doctrine of recent possession, by way of reasonable legal inferences, supplies presumptive evidence of the acts making up the elements of the crime of larceny, we note that the doctrine requires the additional proof that the possession occurred so soon after the goods were stolen and under such circumstances as to make it unlikely that the defendant obtained the possession of them honestly.

6. We are fortified in our conclusion by the fact that the Legislature has now provided that possession and larceny carry the same punishment. G.S. §§ 14-71.1, 14-72. This is a clear indication of the Legislature's intention that these two offenses be separate crimes of equal punishment rather than that the former be a lesser included offense of the latter. The same punishment is provided for receiving. G.S. § 14-71. *See State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491.

While, as asserted by the Court of Appeals, it may be impossible to take and carry away goods without possessing them, it does not follow that our Legislature intended to punish a defendant for that possession as a separate crime. The intent of the Legislature controls the interpretation of a statute. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980); *Burgess v. Brewing Co.*, 298 N.C. 520, 259 S.E. 2d 248 (1979). Our review of the legislative history and case law background against which our possession statutes were enacted and our analysis of its internal provisions lead us to the conclusion that, by its enactment, the Legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole.

Prior to the enactment of our statutes creating the statutory offense of possession of stolen property, the mere possession of such property was not a crime. Then, as now, upon evidence *only* that an individual was found to be in possession of stolen property, if the State could not prove possession so recent after the larceny as to raise the presumption that that individual stole it, he could not be convicted of larceny.[7] If the State could not prove that someone else stole it, he likewise could not be convicted of receiving stolen property as our Court decisions had established that recent possession did not permit a presumption of receiving.[8] In that situation, many individuals found in possession of stolen property, including known dealers in such goods, were going unprosecuted. We believe it was with this background in mind that the Legislature enacted our possession statutes.

In *State v. Kelly*, 39 N.C. App. 246, 249 S.E. 2d 832 (1978), the Court of Appeals held that possession, unlike receiving, does not require proof that someone else stole the property. We agree with the rationale set forth in *Kelly* by Judge Harry Martin that the possession statutes were passed to provide protection for society in those incidences where the State does not have sufficient evidence to prove who committed the larceny, or the

7. In order to convict a defendant of the crime of larceny, there must be proof of each of the elements previously set forth herein, to wit, that defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent, and (4) with the intent to deprive the owner of his property permanently.

8. *State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214 (1971), *cert. denied*, 406 U.S. 974, 92 S.Ct. 2409, 32 L.Ed. 2d 674, *rehearing denied*, 409 U.S. 898, 93 S.Ct. 99, 34 L.Ed. 2d 157 (1972), *citing State v. Neill*, 244 N.C. 252, 93 S.E. 2d 155 (1956).

elements of receiving. As Judge Martin pointed out, this could occur where the State has no evidence as to who committed the larceny and has, by the passage of time, lost the probative benefit of the doctrine of recent possession. We agree in this respect with the reasoning of the majority below that:

> The apparent intent was to provide for the State a position to which to recede when it cannot establish the elements of breaking and entering or larceny but can effect proof of possession of the stolen goods.

52 N.C. App. 48, 54, 278 S.E. 2d 273, 278.

The same might be said of possession as has often been said of receiving—it is a "sort of secondary crime based upon a prior commission of the primary crime of larceny." *State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214 (1971), *cert. denied*, 406 U.S. 974, 92 S.Ct. 2409, 32 L.Ed. 2d 674, *rehearing denied*, 409 U.S. 898, 93 S.Ct. 99, 34 L.Ed. 2d 157 (1972), *citing State v. Neill*, 244 N.C. 252, 93 S.E. 2d 155 (1956).

In the interest of judicial economy, we have chosen to consider the obvious question of whether a defendant may be convicted and punished for both receiving and possession of the same stolen property. We conclude that he may not.

In *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491, this Court held that receiving and possession are distinct and separate crimes. While the two are separate crimes for which the Legislature could have provided punishment for the same individual, we do not believe such was intended by the enactment of the possession statutes. Our reasoning is the same as we have expressed as to larceny and possession. The possession statutes were enacted to plug a loophole in the law as it then existed when one was found in possession of stolen goods and the State was unable to prove either the larceny or receiving.

The prosecutor may of course go to trial against a single defendant on charges of larceny, receiving, and possession of the same property. However, having determined that the crimes of larceny, receiving, and possession of stolen property are separate and distinct offenses, but having concluded that the Legislature did not intend to punish an individual for receiving or possession of the same goods that he stole, we hold that, though a defendant

may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses.[9] *See State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491; *State v. Goings*, 98 N.C. 766, 4 S.E. 121 (1887)

In summary, we affirm the action of the Court of Appeals in remanding the larceny case for resentencing as upon a verdict of guilty of misdemeanor larceny and we affirm, for different reasons, the action of the Court of Appeals in vacating the conviction for possession of stolen property and remanding the possession case for dismissal of the charges.

As to the larceny charge—affirmed.

As to the possession charge—modified and affirmed.

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

Justice CARLTON concurring in result only.

I disapprove of section II(1) of the majority opinion and consider it dictum. It is well-established in this jurisdiction that appellate courts will not pass on a constitutional question, even when properly presented, if there is some other ground on which the case may be disposed. *E.g.*, *State v. Blackwell*, 246 N.C. 642, 99 S.E. 2d 867 (1957); *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129 (1955). Here, the majority has disposed of the appeal on the grounds of legislative intent. Any discussion about double jeopardy is wholly unnecessary to the disposition of this case and may come back to haunt this Court in the future.

Otherwise, I do concur in the result reached by the majority.

9. There have been conflicting results in the decisions of the Court of Appeals on this question, particularly when the prosecutor has relied in whole or in part on the doctrine of recent possession to prove larceny. Compare in addition to *Perry*, *State v. Andrews*, 52 N.C. App. 26, 277 S.E. 2d 857, and *State v. Carter*, --- N.C. App. ---, --- S.E. 2d --- (1981). *See also State v. Kelly*, 39 N.C. App. at 248, 249 S.E. 2d at 833. Our holding here is intended to provide a "bright line" rule which will be readily understood and applied by law enforcement personnel, prosecutors, and defense counsel alike and will avoid much of the confusion now extant in this area of the law.

Our holding here does not impair the exclusive or nonexclusive reliance upon the doctrine of recent possession to prove larceny.

STATE OF NORTH CAROLINA v. MICHAEL EUGENE HUNT

No. 62A81

(Filed 3 March 1982)

1. **Criminal Law § 102.6— district attorney's argument to jury—proper**

Where the sum and substance of a district attorney's argument was that the testimony of the State's chief witness was credible in light of the overall facts and circumstances of a murder as depicted and corroborated by other independent evidence, there was no error or impropriety in it.

2. **Criminal Law § 53.1— expert testimony—suicides committed by slashing wrists**

Where defendant failed to make a specific objection about a doctor's expertise in identifying wounds which were characteristic of a suicide, and where it was clear that the doctor was properly qualified to state an opinion as to whether the slashing marks he observed on deceased were similar to other self-inflicted wounds of this type which he had seen before, the trial court did not err in allowing the doctor to render an opinion about suicides committed by slashing the wrists.

3. **Criminal Law § 53.1— medical expert testimony—opinion concerning wounds of victim—relaxation of rules governing medical expert opinion**

A doctor did not state an opinion upon the "ultimate" issue concerning the commission of a homicide or a suicide when he testified that the body of the deceased did not bear the customary "hesitation marks" which he had personally observed in his examination of other persons who had attempted suicide by slashing their wrists. Further, there is some question about the continuing validity of *State v. Carr*, 196 N.C. 129 (1928) in light of more recent authoritative decisions of this Court where the rules governing expert medical opinion have been substantially relaxed and expanded.

4. **Criminal Law § 34.4— evidence of other offenses—admission proper**

The trial court did not err in admitting evidence of (1) defendant's intent to rob the deceased just two weeks prior to his death, (2) defendant's assault upon a young girl who refused to assist him in an earlier larcenous plan, and (3) defendant's aiding and abetting his girlfriend in her flight from prosecution after her release from jail upon the bond arranged by defendant the day following the murder since the offenses variously tended to prove defendant's motive, intent and design in committing the murder. Further, admission of evidence about defendant's attempted suicide in jail and his escape and flight therefrom prior to trial was admissible as implied admissions of guilt.

5. **Criminal Law § 42.4— identification of weapons connected with crime**

There was no error in the admission of a pocketknife and a .25 caliber pistol since both items were properly and positively identified by witnesses at trial.

ON appeal by defendant as a matter of right from the judgment of *Allsbrook, Judge*, entered at the 15 September 1980 Criminal Session, VANCE Superior Court. Defendant was charged in an indictment, proper in form, with the first degree murder of Walter Ray. Defendant pleaded not guilty. The jury subsequently found him guilty as charged. Upon the jury's recommendation at the sentencing phase, the trial court imposed the punishment of life imprisonment for defendant's murder conviction.

Viewing it in its most favorable light with the benefit of all reasonable inferences, the State's evidence tended to show the following. The deceased, Walter Ray, lived alone in a trailer in Henderson, North Carolina. Ray was an alcoholic who sold whiskey from his trailer. He usually kept large sums of cash on his premises.

Prior to 26 February 1979, defendant had been to Ray's trailer at least two times. On one particular occasion, that of 21 February 1979, defendant, his girlfriend and three teenagers went to Ray's trailer where they all drank and watched television for three hours. During the course of that evening, defendant tried to coax one of his female teenaged companions into taking Ray back to the bedroom and keeping him "occupied" so he could "rip off" Ray. The girl refused, whereupon defendant grabbed her from behind and beat her in the face.

Five days later, defendant returned to the trailer intending to steal some money from Ray for the bail of his girlfriend. [She had been arrested on a probation violation and jailed in the interim. Her bond had been set at $500.00.] As Ray was closing up his (illegal) residential bar in the early morning hours, defendant put on some gloves, walked up behind Ray, grabbed him and put a knife against his throat. Defendant then forced Ray back to the bedroom. Defendant searched a closet and removed approximately $400.00 and a pistol from it. As defendant prepared to shoot Ray with the pistol, Ray begged him not to kill him that way. Defendant agreed to employ another murderous method.

Defendant forced Ray to drink a pint of liquor and a couple of beers and allowed him to take some pills. When Ray became weak from the ingestion thereof, defendant slashed one of Ray's forearms near the wrist with a knife. Later he slashed him again near the original cut and waited while Ray slowly bled to death

from the wounds. Defendant then left the trailer carrying the pistol and the money with him.

Ray's body was discovered by a friend later that same night. The deceased was lying on his bed and appeared to be "cut all to pieces." A pocketknife was in his right hand, and his mouth contained the pink-colored residue of some sort of tablet. The investigating officers initially concluded that the death-causing wounds were self-inflicted.

On the day following Ray's death, defendant paid $40.00 to a professional bondsman, and his girlfriend was released from jail. A day or two later, defendant visited William Thomas Edwards and sold him a .25 caliber pistol. Defendant told Edwards that he had taken the gun from Ray and further informed Edwards that he had killed Ray. Defendant explained to Edwards the precise details concerning the murder's accomplishment and the reasons for its commission. Edwards did not, however, convey this incriminating information to law enforcement officials until 8 August 1979. [At that time, Edwards was serving a thirty-day jail sentence.]

Upon the foregoing information, defendant was subsequently arrested on 20 August 1979. He escaped from jail prior to his indictment in October 1979. He was eventually recaptured and brought to trial in September 1980.

Defendant offered no evidence in his own behalf.

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

George T. Blackburn II for the defendant-appellant.

COPELAND, Justice.

Defendant brings forward five arguments in his brief wherein he contends that he is entitled to a reversal of his conviction for the trial court's alleged errors in admitting various types of evidence or testimony. To the contrary, we find that, in each instance complained of, the challenged matters were properly admitted for the jury's consideration. We further conclude that defendant received a fair trial free from prejudicial error.

I.

[1] Defendant maintains that, in his closing argument to the jury, the district attorney improperly gave unsworn testimony which tended to bolster the credibility of the chief prosecution witness, William Thomas Edwards. We find no merit in defendant's position. First, defendant's complaint on appeal is not well taken when he failed to make an appropriate objection at trial and did not thereby afford the judge an opportunity to correct the alleged impropriety before the case was submitted to the jury. *See State v. Morgan*, 299 N.C. 191, 207, 261 S.E. 2d 827, 837, *cert. denied*, 446 U.S. 986, 100 S.Ct. 2971, 64 L.Ed. 2d 844 (1980); 4 Strong's N.C. Index 3d, Criminal Law § 102.3 (1976). Second, the record prepared by defendant does not include the entire content of the closing arguments made by both sides, and it is therefore difficult for us to examine, fully and fairly, the context of the isolated statements presented for our determination of the existence of possible prejudice. *See State v. Hunter*, 297 N.C. 272, 277, 254 S.E. 2d 521, 524 (1979). Third, even putting aside the foregoing inadequacies in the record, it is clear beyond the shadow of any doubt that the district attorney's remarks did not transcend the established boundaries of permissible jury argument. As our Court stated in *State v. Lynch*, 300 N.C. 534, 551, 268 S.E. 2d 161, 171 (1980):

> Argument of counsel is largely within the control and discretion of the trial judge. Counsel must be allowed wide latitude in the argument of hotly contested cases. Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom. *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980). . . . (Citation omitted.)

Here, the sum and substance of the district attorney's argument was that the testimony of the State's chief witness was credible in light of the overall facts and circumstances of the murder as depicted and corroborated by other independent evidence. We can perceive no error or impropriety in this. *See State v. Thompson*, 293 N.C. 713, 239 S.E. 2d 465 (1977); *see also State v. Mullis*, 233 N.C. 542, 64 S.E. 2d 656 (1951).

II.

Defendant's next assignment of error concerns the admission of medical opinion testimony concerning the nature of self-inflicted wounds. In pertinent part, Dr. Michael Jones testified, and defendant objected and took exception thereto, as follows:

Q. Prior to February 26, 1979, have you had an occasion to examine and study the death of persons as a result of slashing their wrists?

MR. SMITH: Object, Your Honor.

THE COURT: Overruled.

A. No, sir, this is the first successful case of sui—well, death by slashing the wrist that I have encountered. . . .

Q. Now, Dr. Jones, have you had an occasion prior to February 26, 1979 to examine patients who have slashed their wrists?

MR. SMITH: Object, Your Honor.

THE COURT: Overruled.

A. Yes, I have.

Q. (Mr. Waters) And in the examination of patients who have slashed their wrists, have you observed anything different in your observations of those patients as compared to your observation of Walter Ray?

MR. SMITH: Object, Your Honor.

THE COURT: Well, sustained as to the form of the question. Restate your question.

Q. (Mr. Waters) Dr. Jones, in your practice of medicine, have you had an occasion to examine patients who have attempted suicide by slashing their wrists?

MR. SMITH: Object, Your Honor.

THE COURT: Overruled.

EXCEPTION NO. 22.

A. Yes.

Q. (Mr. Waters) And in your examination of those persons, have you observed wounds which are associated with that effort that you did not observe in the body of Walter Ray?

A. Yes.

Q. And what sort of wounds have you observed in your experience of persons who have attempted to commit suicide by slashing their wrists that you did not observe about the body of Walter Ray?

A. Most people who try to end their life by slashing their wrist with any variety of objects will have a series of small shallow superficial marks or cuts that we call hesitation marks. It is most unusual for someone to be able to successfully commit suicide this way in spite of widespread popular belief. These types of marks were not present in Mr. Ray.

[2] Defendant contends that Dr. Jones "was not sufficiently qualified as an expert to render an opinion about suicides committed by slashing the wrist." An objection to a witness's qualifications as an expert in a given field or upon a particular subject is waived if it is not made in apt time upon this special ground, and a mere general objection to the content of the witness's testimony will not ordinarily suffice to preserve the matter for subsequent appellate review. *See* 1 Stansbury's N.C. Evidence § 133, at 431 (Brandis rev. 1973). Defendant failed to make a specific objection about Dr. Jones' expertise in identifying wounds which were characteristic of a suicide. Our Court has adhered to the position that, in the absence of a special request by the defense for qualification of a witness as an expert, such a finding will be deemed implicit in the trial court's admission of the challenged opinion testimony. *State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973); *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969). In any event, it is clear in this case that Dr. Jones was, in fact, properly qualified to state an opinion as to whether the slashing marks he observed on the deceased were similar to other self-inflicted wounds of this type which he had seen before. Prior to stating such an opinion, Dr. Jones testified to the following: (1) that he had received his medical degree in 1966 and had completed a four-year residency in anatomic and clinical pathology in 1971; (2) that

he had been licensed to practice medicine in this State in 1974 and had, since that time, engaged in the private practice of pathology; (3) that he was the regional medical examiner in February 1979 when he examined the body of the victim; and (4) that he had previously examined patients who had attempted suicide by slashing their wrists. The fact that Dr. Jones had not examined the body of a person who had *succeeded* in committing suicide through this type of injury did not diminish his general expertise upon the usual characteristics of such wounds.[1] Dr. Jones' lack of actual experience in that respect was merely a factor to be considered by the jury in evaluating the weight and credibility of his testimony.

[3] Defendant additionally argues that admission of the foregoing testimony by Dr. Jones (*supra*) was erroneous because it effectively invaded the province of the jury. It must be noted at once that defendant did not object at trial or enter exception in the record to the precise portion of Dr. Jones' testimony challenged herein. Moreover, it appears that substantially the same evidence was thereafter admitted, again without objection, in the testimony of Dr. Jerome Tift of the office of the Chief Medical Examiner. *See State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). Despite these obvious waivers of the complaint now presented on appeal, we have elected in our discretion to consider the merit of defendant's contention because of the serious crime involved and the substantial penalty imposed.

To put the matter plainly, defendant believes that Dr. Jones improperly answered the ultimate issue to be decided by the jury in this case, to wit, whether Walter Ray's death was a homicide or a suicide. In his brief, defendant relies solely upon the case of *State v. Metcalf*, 18 N.C. App. 28, 195 S.E. 2d 592 (1973). In *Metcalf*, the expert witness affirmatively stated that, in his opinion, the deceased could not have shot herself twice. The Court of Appeals held that admission of the opinion was error according to this Court's decision in *State v. Carr*, 196 N.C. 129, 144 S.E. 698 (1928). *Carr* was another homicide prosecution in which the defense was suicide. At trial, a medical expert for the State was

1. In essence, this fact only tended to demonstrate the relative difficulty in the accomplishment of suicide by this method.

allowed to testify that he did not believe it was possible for the deceased to have fired the gun which inflicted the fatal wound he had examined. In finding this to be reversible error, the Court stated that the expert's answer had invaded the province of the jury and added the admonition that "the opinion or inference of the witness must not be an answer to the exact issue which the jury is to determine." *Id.* at 132, 144 S.E. at 700.

Both *Carr* and its progeny *Metcalf, supra,* are inapposite to the case at bar because Dr. Jones did *not* state an opinion upon the "ultimate" issue concerning the commission of a homicide or a suicide. Although he did say that it was difficult to commit suicide by slashing one's own wrists, Dr. Jones did not attempt to negate, much less affirmatively rule out, the possibility of suicide as an explanation for the victim's death. To the contrary, Dr. Jones only testified that the body of the deceased did not bear the customary "hesitation marks" which he had *personally* observed in his examinations of other persons who had attempted suicide in the same manner. Evidence from which *the jury* may *infer* that the death in question was not a self-inflicted event is entirely competent. *State v. Atwood,* 250 N.C. 141, 146, 108 S.E. 2d 219, 222-23 (1959); *State v. Metcalf, supra,* 18 N.C. App. at 31, 195 S.E. 2d at 594. Defendant's assignment of error is consequently overruled.

Moreover, though we need not decide the point in this case, we would note for future reference that there is some question about the continuing validity of *State v. Carr, supra,* 196 N.C. 129, 144 S.E. 698 (1928), in light of the more recent authoritative decisions of this Court wherein the rules governing expert medical opinion have been substantially relaxed and expanded. *See, e.g., State v. Miller,* 302 N.C. 572, 580, 276 S.E. 2d 417, 422 (1981); *State v. Powell,* 238 N.C. 527, 530, 78 S.E. 2d 248, 250-51 (1953). Admissibility of expert medical opinion is no longer strictly viewed through the narrow focus provided by the technical and vague concepts of invasion of the jury's province and the answer of an ultimate issue; rather, admissibility is evaluated primarily according to whether or not "the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson,* 295 N.C. 559, 568-69, 247 S.E. 2d 905, 911 (1978); *see State v. Brown,* 300 N.C. 731, 733, 268 S.E. 2d 201, 202-03 (1980). Applying similar standards of admis-

sion, a majority of jurisdictions have held that "the subject of self-inflicted wounds is not one of such common experience that laymen may not be assisted by the opinion of a doctor, who has special knowledge regarding anatomy and injuries to the human body." *State v. Campbell*, 146 Mont. 251, 258, 405 P. 2d 978, 983 (1965); *see* Annot., 56 ALR 2d 1447 (1957). We perceive no *current or defensible* obstacle in our case law to the adoption of that position in North Carolina.

III.

[4] Defendant makes a sweeping assertion, consisting of two paragraphs in his brief, that the trial court erred in admitting evidence of his commission, or attempted commission, of crimes other than that with which he was actually charged and tried. Our Court has recently reiterated the pertinent principles in this regard in *State v. Shane and Williams*, 304 N.C. 643, 653-54, 285 S.E. 2d 813, 820 (1982):

> By virtue of a sound legal axiom, substantive evidence of a defendant's past, and distinctly separate, criminal activities or misconduct is generally excluded when its only logical relevancy is to suggest defendant's propensity or predisposition to commit the type of offense with which he is presently charged. *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978); 1 Stansbury's North Carolina Evidence § 91 (Brandis rev. 1973). "Logical relevancy" is capably demonstrated whenever such evidence has some bearing upon genuine questions concerning knowledge, identity, intent, motive, plan or design, connected crimes, or consensual illicit sexual acts between the same parties. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); 1 Stansbury, *supra*, § 92; *see, e.g., State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981) (motive, intent); *State v. Freeman*, 303 N.C. 299, 278 S.E. 2d 207 (1981) (identity).

Applying the foregoing rules here, it is obvious that defendant's contentions are specious at best. The evidence concerning defendant's intent to rob the deceased just two weeks prior to his death was competent to show defendant's motive, intent and design in committing the subsequent murder. The testimony about defendant's assault upon the young girl who refused to assist him in his earlier larcenous plan was also admissible as evidence of a

connected crime and defendant's overall violent intent to pursue an evil course of action which eventually culminated in murder. Similarly, evidence that defendant aided and abetted his girlfriend in her flight from prosecution, after her release from jail upon the bond arranged by defendant the day following the murder, properly corroborated the State's other evidence about motive and was additionally admissible as evidence of a connected crime.

Within this same argument heading in his brief, defendant brings forward the unrelated exceptions entered to the admission of evidence about his attempted suicide[2] in jail and his escape and flight therefrom prior to trial. These acts constituted implied admissions of guilt, and evidence of their occurrence was properly introduced. Attempted suicide by the accused: *see State v. Marsh*, 234 N.C. 101, 66 S.E. 2d 684 (1951); *State v. Exum*, 213 N.C. 16, 195 S.E. 7 (1938); Annot., 22 ALR 3d 840 (1968). Flight by the accused: *see State v. Jones*, 292 N.C. 513, 234 S.E. 2d 555 (1977); 2 Stansbury's N.C. Evidence § 178 (Brandis rev. 1973).

IV.

[5] Defendant assigns error to the admission of two prosecution exhibits, a pocketknife and a .25 caliber pistol, upon the ground that a continuous chain of custody thereof was not adequately demonstrated. The assignments of error are devoid of merit. A deputy sheriff testified that the pocketknife was the same one he had removed from the hand of the deceased during the initial investigation of his death. The witness Edwards testified that the pistol was the same one sold to him by defendant shortly after the murder. Upon proper and positive identifications by these witnesses, both items were correctly admitted as relevant real evidence in the case. *State v. Allen*, 301 N.C. 489, 272 S.E. 2d 116 (1980); *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980); *State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977).

V.

Defendant finally contends that the prior statements of two witnesses were erroneously admitted as corroborative evidence

2. North Carolina no longer recognizes the common law offense of suicide. G.S. 14-17.1. Thus, testimony about such an act is not properly characterized as evidence of another distinct crime.

because those statements were not consistent with the witnesses' testimony at trial in certain respects. We disagree. *See generally* 1 Stansbury's N.C. Evidence §§ 50-52 (Brandis Rev. 1973).

Defendant did not, by timely objection, direct the trial court's attention to the portions of the corroborative testimony which he now complains of on appeal. The assignment of error thus lacks a sufficient foundation in the record. *See State v. Britt*, 291 N.C. 528, 536, 231 S.E. 2d 644, 650 (1977). In any event, it suffices to say that the disputed prior *consistent* statements contained no prejudicial variations from the testimony at trial, and the differences therein to which defendant alludes were indeed minor and inconsequential in nature. *State v. Moore*, 301 N.C. 262, 274, 271 S.E. 2d 242, 250 (1980); *State v. Easterling*, 300 N.C. 594, 603, 268 S.E. 2d 800, 806 (1980).

VI.

In conclusion, we recommend that defendant's appellate counsel pay particular attention in the future to Rules 10 and 28 of the N.C. Rules of Appellate Procedure in his preparation of records and briefs submitted to this Court. We have nonetheless carefully considered every argument (or exception) presented in order "[t]o prevent manifest injustice" to the defendant. Rule 2.

Our thorough review of the case discloses no sufficient cause or reason for a new trial or reversal, and the judgment imposed upon defendant's conviction of first degree murder is hereby affirmed.

No error.

TOWN OF SPRING HOPE, A MUNICIPAL CORPORATION v. BEN T. BISSETTE

No. 98A81

(Filed 3 March 1982)

Municipal Corporations § 4.4— increase in water and sewer rates—payment for plant not yet in operation

The Town of Spring Hope acted within its statutory authority when it increased water and sewer charges to pay for a new waste water treatment plant prior to the time the new plant began operation. G.S. 160A-314(a).

Justice MEYER concurring.

Justices COPELAND, CARLTON and MITCHELL join in the concurring opinion.

Justice EXUM dissenting.

APPEAL by defendant Ben T. Bissette from the decision of the Court of Appeals reported at 53 N.C. App. 210, 280 S.E. 2d 490 (1981), reversing and remanding the judgment of *Ezzell, Judge*, entered at the 20 March 1980 Civil Session of District Court, NASH County, in favor of defendant Bissette. The case was argued in the Supreme Court as No. 98, Fall Term 1981.

The facts of the case are not in dispute. The Town of Spring Hope has for some time maintained a water and sewer system for its residents. In 1971 the Town was informed by the State Department of Water and Air Resources that its waste water treatment facility was inadequate to protect the receiving waters of Hendricks and Sapony Creeks, into which the treated water was discharged, and that the Town must take remedial action. The Town was notified that its permit to discharge waste into Hendricks Creek had expired and was granted a temporary permit to discharge waste into Hendricks Creek after it had submitted a time schedule for upgrading the facilities to meet current Water and Air Resources standards.

In order to meet State standards it was necessary for the Town to construct a new waste water treatment facility. Government grants paid for a large portion of the project, and most of the remainder of the cost was defrayed by the issuance by the Town of sanitary sewer bond anticipation notes. In June of 1979 the Town increased its water and sewer rates "to finance the new water treatment plant, both its construction, operation and maintenance."

Appellant operated a launderette in the Town of Spring Hope during the first month in which the new rates took effect. During that month the new waste water treatment facility, although substantially completed, had not yet begun operation. Appellant paid that portion of his bill denominated as the charge for water service. He refused to pay the portion of the bill denominated as the charge for sewer service, contending that only users of the new facility should be required to pay. Since he did not use the

new facility during the billing period (and, indeed, never used the facility because he went out of business before the facility began operation), appellant felt he should not have to pay the increased billing rates.

The Town brought this action to recover $306.00 from appellant representing the sewer charges which he had refused to pay. The District Court found facts substantially in accord with the facts above recited and concluded:

> 3. The Town has complied with all laws in connection with the increase of rates, but since the increase in rates was made necessary to finance new waste water treatment facilities and since the defendant was not a user of the new waste water facility during the time covered by the bill, he is not required to pay the sewer portion of the bill.

Plaintiff Town appealed and the Court of Appeals, speaking through Judge Wells with Judge Vaughn concurring and Judge Clark dissenting, reversed holding "that the trial court entered its judgment under a misapprehension of applicable law." *Town of Spring Hope v. Bissette*, 53 N.C. App. 210, 213, 280 S.E. 2d 490, 493 (1981). Defendant Bissette appealed as of right pursuant to G.S. 7A-30(2).

Valentine, Adams & Lamar, by Stephen M. Valentine, for plaintiff-appellee.

Ben T. Bissette, defendant-appellant, pro se.

BRANCH, Chief Justice.

The Town of Spring Hope was authorized to establish and revise rates for water and sewer services under the following statutory language:

> A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise. Schedules of rents, rates, fees, charges, and penalties may vary according to classes of service, and different schedules may be adopted for services provided outside the corporate limits of the city.

G.S. 160A-314(a). This rate-making function is a proprietary rather than a governmental one, limited only by statute or contractual

agreement. *Aviation, Inc. v. Airport Authority*, 288 N.C. 98, 215 S.E. 2d 552 (1975). *See also Sides v. Hospital*, 287 N.C. 14, 213 S.E. 2d 297 (1975); *Woodie v. North Wilkesboro*, 159 N.C. 353, 74 S.E. 924 (1912). Appellant does not allege any contractual limitations on the Town's authority to raise sewer rates, but argues that the rate increase in instant case exceeds the authority granted the Town under the above-quoted statute.

In its opinion below, the Court of Appeals noted:

> The great weight of authority is to the effect that in the setting of such rates and charges, a municipal body may include not only operating expenses and depreciation, but also capital cost associated with actual or anticipated growth or improvement of the facilities required for the furnishing of such services. *See generally* Annot., 61 A.L.R. 3d 1236 (1975); 12 McQuillin, Municipal Corporations, § 35.37c., at 488 (3d Ed. 1970); C. Rhyne, Municipal Law § 23-7, 500-501 (1957); 3 Yokley, Municipal Corporations § 503, at 214-19 (1958).

Spring Hope v. Bissette, 53 N.C. App. at 213, 280 S.E. 2d at 492-93. It is in light of this general authority that we proceed to consider whether our statute authorized the Town to charge an increased sewer rate based upon the expense of replacing an outmoded component of that system prior to the time the new component began operation.

Appellant argues that G.S. 160A-314(a) does not authorize the Town of Spring Hope to increase its charge for sewer services to reflect the cost of the new waste water treatment plant until such time as the new plant begins operation. Appellant relies on the language of the statute which speaks only of "services furnished" and does not specify that a municipality can charge for services "to be furnished." *Cf.* G.S. 162A-9. The dissent in the Court of Appeals adopts this position.

While we agree that under this statute a municipality may not charge for services "to be furnished," we fail to see how that proposition governs this case. Appellant was charged for sewer service, a service he received during the period for which he was billed and now refuses to pay. Construction of the new water treatment plant was not intended to, nor did it result in, providing a new or a higher level of service to the sewer system's

customers. When the new plant went into operation, the customers received nothing they had not theretofore received; thus, the increase in the rate did not reflect any services yet to be furnished, but merely the same service which had previously been furnished, *i.e.*, the efficient removal of waste water. The increase in the rate, far from being a charge for a new service not yet provided by the Town, represented the cost of a necessary improvement to the already existing sewer system without which the Town could not continue to provide sewer service.

The Town of Spring Hope acted well within its statutory authority when it increased water and sewer charges to pay for the new waste treatment facility. The Town was not required by the language of G.S. 160A-314(a) to wait until the plant began operations to institute such increases.

Neither were the increases unreasonable. Raising the rates was necessary to service the debt created by the bonds the Town issued to finance construction of the plant. Without the new facility the Town would not have been allowed to continue to discharge its waste into Hendricks Creek and, without this outlet for waste water, the Town would have been unable to continue to provide sewer service. Obviously the temporary permit was granted upon the Town's assurances that the treatment facilities were being upgraded. Without this temporary permit, the Town would not have been able to provide to appellant the full benefit of sewer service, which he admits he received.

The Town's action in raising the rates was of necessity, and we agree with the Court of Appeals that appellant has made "no showing of arbitrary action in the case now before us . . . ." *Town of Spring Hope v. Bissette*, 53 N.C. App. at 213, 280 S.E. 2d at 493.

The decision of the Court of Appeals is

Affirmed.

Justice MEYER concurring.

I concur in all aspects of the majority opinion and desire to respond to the dissent filed herein by Justice Exum. The dissent concludes that the Town of Spring Hope's rates were increased solely to pay for "maintaining" the new water treatment facility,

and because this maintenance service could not begin until the new plant *went on line*, it was this point in time that "marks the moment at which the town was actually 'furnishing' the service (maintenance) for which the increased water and sewer charges were being collected." Finding of Fact No. 5 is a finding that the water and sewer rates were increased to help pay for "the new water treatment facility." This cannot be interpreted as a finding that the increase was for "maintenance" only of the new facility. This finding is supported by the very testimony relied upon by the dissenter to show that the increase was due *solely* to "maintenance" of the new plant. The mayor's testimony is indeed uncontradicted as pointed out in the dissent. The testimony of the mayor in the record before us is more fully set out in pertinent part as follows:

> The minutes of the Town Board Meeting increasing the rates made no mention of the reason for the increase, but the increased rates were made necessary at least in part by the need *to finance the new water treatment plant*, both *its construction*, operation and maintenance. When the rate increase was voted in June, 1979, the new waste water treatment plant was nearly completed, but not then in operation. The new plant was put into operation in December, 1979.
>
> . . . .
>
> It was apparent to all that *a substantial part of the cost of the new facility would have* [to] *be borne or paid by the Town and that this cost would come from increased water and sewer rates or the additional revenues would be produced by water and sewer rates* and in compliance with instructions we received from other governmental authorities as to how the Town would manage the extra expense, on May 21, 1974, the Town adopted a resolution concerning water and sewer rates setting out that the Town of Spring Hope proposed to improve and/or enlarge its *waste water treatment facilities* and that *the Town's share of the costs would be produced from water and sewer rates.* The Town resolved to adopt such necessary water and sewer rates as may be required to fund the operating and maintenance costs, capital reserve costs and *other applicable costs of its water and sewer systems.*

. . . .

> Throughout preparation for and work on the improved facilities the Town officials were advised by state and federal agencies that the *Town's part of the cost of improvements could and should be financed by increased rates or charges to users of the Water-sewer system.*

R. pp. 4, 6-7, 8 (emphasis added).

This testimony makes it amply clear that the rate increase was for financing the construction as well as the operation and maintenance of the facility. I frankly fail to understand the dissenter's conclusion that the rate increase was imposed solely for "maintenance."

I hasten to point out however that even if I could agree with the dissenter that the rate increase was solely for maintenance of a new facility, I believe that such increase is authorized by our statute even though it becomes effective prior to the time the new facility comes on line.

Justices COPELAND, CARLTON, and MITCHELL join in this concurring opinion.

Justice EXUM dissenting.

Both the majority and I agree that G.S. 160A-314(a) authorizes a municipality to increase rates, not for services to be furnished, but only for services which are being furnished. I disagree with the majority's conclusion that this proposition does not govern disposition of the case.

It cannot be questioned that the town's increased sewer rates contested here were made necessary by the construction of a new sewage disposal plant designed to replace, not to expand, its old existing system. The uncontested findings of the trial judge were:

> "3. Prior to July 1, 1979, it became necessary for the Plaintiff Town to improve and update its water and sewer system, particularly its waste water disposal facilities to meet federal and state guidelines and requirements and this necessitated a considerable outlay of capital.

4. Construction was commenced prior to July 1, 1979, on a new waste water treatment facility which was not completed and placed in operation until December, 1979.

5. *The plaintiff increased its water and sewer rates to help pay for the new water treatment facility.* The rates were increased effective July 1, 1979, and the defendant was sent a bill for $414.00 covering the period from June 25th through August 31, 1979." (Emphasis supplied.)

The majority argues that because the town would have been authorized to increase its water and sewer rates in any event notwithstanding the construction of a new plant, the limitation in G.S. 160A-314(a) has no application. Thus the majority, in effect, decides a case that is not before the Court. *This* increase in *this* case, everyone concedes, was due solely to anticipated new costs relative to the operation of the new plant. But for the new plant, there would have been no increase. The question for decision is therefore whether the increased charges were for services *being* furnished within the meaning of the statute.

The problem in the case stems from the ambiguity in the emphasized portions of Finding 5. If this finding means that the increased rates were used to finance construction of the new plant, as the Court of Appeals' majority thought, then I would have less difficulty agreeing with that court's majority that the increased rates were for services being furnished within the meaning of the statute as of 1 July 1979 when construction was under way. The question would be more difficult, though, than the one actually before us.

On oral argument defendant contended strongly that the increased charges were not for plant construction costs. They were instead for the purposes of maintaining the new plant and creating a capital reserve fund which would be sufficient to replace the plant when it became necessary to do so because of anticipated ordinary wear and tear. Plaintiff's counsel was less sure about this fact. Evidence in the record seems to support defendant's view of the facts. The town's mayor testified that in anticipation of constructing the new sewage disposal facility the town resolved to increase "its water and sewer rates as may be required to fund the operating and maintenance costs, capital reserve costs, and other applicable costs of its water and sewer

systems." The town also resolved to apply for state and federal grants to construct the facility and to finance itself whatever construction costs were not covered by the grants. According to the mayor, the new plant cost "approximately" $1,100,000 to build. The town received federal and state grants totaling $962,000. It then obtained authorization to issue sanitary sewer bonds and bond anticipation notes to a maximum of $250,000. As of the date of trial, 20 March 1980, the mayor testified that bond anticipation note proceeds had amounted to $137,500. It is true that at one point in his testimony the mayor mentioned "construction" as being one of the purposes for the increased rates. The figures he gave, however, seem to me to establish that the increased rates were actually for maintenance and a capital reserve fund.

Given this evidence, Finding 5 should be interpreted to mean that plaintiff increased its water and sewer rates to pay for *maintaining* "the new water treatment facility" and to provide a capital reserve fund for eventually replacing the plant. If Finding 5 is so interpreted, then I am satisfied the town had no statutory authority to increase its water and sewer rates until the new plant actually went into service in December 1979. The moment at which the plant went on line marks the moment at which the town was actually furnishing the services for which the increased water and sewer charges were being collected. For it is not until this moment that costs relating to maintaining the plant and creating a capital reserve fund for the plant's replacement due to normal wear and tear begin to be incurred.

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

F & D COMPANY v. AETNA INSURANCE COMPANY

No. 105A81

(Filed 3 March 1982)

Insurance §§ 3.1, 143— period for filing suit under marine insurance policy—conflict with statute

A provision in a marine insurance policy providing that the insured must commence its suit against the insurance company "within the twelve months next following the date of the physical loss or damage out of which such claim

arose," conflicts with the provision of G.S. § 58-31 which provides a suit or action may be commenced within one year after the cause of action accrues. Therefore, where a vessel suffered damage as a result of its partial sinking on 9 October 1976, a marine survey was requested by defendant on 8 February 1977, and, from the record, it appeared possible plaintiff's cause of action did not accrue until 30 days after the marine survey was conducted, it was also possible that plaintiff's action filed on 2 March 1978, was within the limitation period prescribed by G.S. § 50-31, and the trial court erred in dismissing plaintiff's action.

THE plaintiff appeals pursuant to G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals reported at 53 N.C. App. 92, 280 S.E. 2d 34 (1981). Plaintiff instituted this action for declaratory relief in the Superior Court, NEW HANOVER County, on 2 March 1978 seeking a declaration of the respective rights and duties of the plaintiff-insured and the defendant-insurer under a marine insurance policy issued by the defendant insuring the plaintiff's vessel, a 31-foot Chris Craft Commander. The parties stipulated, *inter alia*, that the vessel suffered damage as a result of its partial sinking on 9 October 1976.

Based on the stipulations entered by the parties, the trial court found that the plaintiff instituted this action more than twelve months after the date of the loss or damage in violation of the policy provisions and entered judgment for the defendant, dismissing the plaintiff's action. Plaintiff appealed to the Court of Appeals. That court affirmed the trial court's dismissal of plaintiff's action, one judge dissenting.

The main question presented by this appeal is whether the provision of the policy of marine insurance requiring suit to be brought within one year of the date the loss occurs is void because it conflicts with the provision of G.S. § 58-31 which voids any policy provision which provides a lesser period of time for filing suit than one year from the date the cause of action accrues. We hold that the provision of the policy does in fact conflict with the statute and is therefore void.

Sperry, Scott & Cobb, by Herbert P. Scott and John P. Swart for Plaintiff-Appellant.

Marshall, Williams, Gorham & Brawley, by William Robert Cherry, Jr., for Defendant-Appellee.

MEYER, Justice.

The marine insurance policy issued to the plaintiff by the defendant insures against physical loss or damage and contains the following provisions under the section entitled "General Conditions":

8. Notice of Accident, Claim or Suit.

(a) In the event of any occurrence which may result in loss, damage or expense for which the Company is or may become liable, the *Insured shall give immediate written notice thereof to the Company.*

. . . .

10. Payment of Loss. In case of loss, *such loss shall be paid within thirty days after written proof of loss* and proof of interest in the Yacht *shall have been given to the Company;* all indebtedness of the Insured to the Company being first deducted.

11. Limit of Time for Suit. No suit or action against *the Company shall be maintainable* in any court *unless, as a condition precedent* thereto, the *Insured shall have complied with all of the* warranties, *terms and conditions contained in this policy and unless:*

(a) In respect of any claim for physical loss or damage to the property insured under this policy or any charge or expense incurred under Sections "A", "E" or "F" of this policy, *such suit or action is commenced within the twelve months next following the date of the* physical *loss* or damage *out of which such claim arose.*

. . . .

Provided that *where any of the above limitations of time is prohibited or invalid by or under any applicable law, then and in that event no suit or action shall be commenced or maintainable unless commenced within the shortest limitation of time permitted under such law.*

(Emphasis added.)

The vessel in question sank on 9 October 1976. The plaintiff's action was not filed until 2 March 1978, almost one year and five

months after the date of the loss. The defendant's answer set forth nine defenses, including the plaintiff's failure to institute suit on the policy within twelve months following the date of the physical loss or damage out of which its claim arose as required by Paragraph 11 of the General Conditions of the Policy. The plaintiff contends that the provisions of Paragraph 11(a) of the policy of insurance are void under G.S. § 58-31 which provides as follows:

> *No company* or order, domestic or foreign, authorized to do business in this State under this Chapter, may make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit or action thereon may be brought, nor *may* it *limit the time within which such suit or action may be commenced to less than one year after the cause of action accrues* or to less than six months from any time at which a plaintiff takes a nonsuit to an action begun within the legal time. All conditions and stipulations forbidden by this section are void.

(Emphasis added.)

The Court of Appeals held that Paragraph 11(a), requiring suit to be brought within one year of the date of the loss, does *not* conflict with G.S. § 58-31, and therefore, because plaintiff did not commence its action within twelve months following the date the vessel sank, the action is barred by the provisions of Paragraph 11 of the policy's General Conditions. By reason of the dissent below, the same assignment of error is before this Court as was before the Court of Appeals, *i.e.*, whether the trial court erred in finding as a fact and concluding as a matter of law that the action was barred by limitations set forth in the policy of insurance and, further, by entering judgment based upon such finding and conclusion.

The plaintiff contends that its cause of action accrued only after the damage estimates became known to the defendant, and defendant, at the end of thirty days thereafter, failed or refused to pay the amount to which plaintiff claimed to be entitled.

Paragraph 8(a) of the General Conditions of the policy provides: "In the event of any occurrence which may result in loss, damage or expense for which the Company is or may become

liable, the Insured shall give immediate written notice thereof to the Company." Paragraph 10 provides: "In case of loss, such loss shall be paid within thirty days after written proof of loss and proof of interest in the Yacht shall have been given to the Company; all indebtedness of the Insured to the Company being first deducted." Reading these two policy provisions together, the plaintiff says it had twelve months from the thirtieth day following notice of the loss within which to bring its action.

Apparently, the plaintiff argues that its claim arose thirty days after the marine survey of 8 February 1977 was performed at defendant's request,[1] to wit, on 10 March 1977. The plaintiff contends that it was not at liberty to file any action against the defendant, and therefore no cause of action "accrued" until the conditions of Paragraph 8(a) and Paragraph 10 of the General Conditions of the policy were met. Contrary to the holding of the majority of the panel of the Court of Appeals, the plaintiff argues that, read in conjunction, the two provisions require that written proof of loss and ownership be filed and that the Company be given thirty days within which to make payment or deny coverage before any cause of action can be maintained against the company. Therefore, the plaintiff's cause of action could not have "accrued" until 10 March 1977, thirty days after the marine survey of 8 February 1977.

In summary the plaintiff contends: (1) using 8 February 1977, the date of the marine survey requested by Aetna, as the date notice of the loss was given to the insurer and allowing thirty days within which the insurer was permitted to pay the loss before suit could be brought, the plaintiff's cause of action accrued on 10 March 1977; (2) plaintiff's suit, filed on 2 March 1978, was instituted within the time permitted by G.S. § 58-31, to wit, within one year of the date the cause of action accrued; (3) the plaintiff's action having been instituted within the time permitted by the statute, the provisions of Paragraph 11(a) are void because they provide a shorter time within which the action must be brought than is permitted by G.S. § 58-31, therefore, (4) the Court of Appeals erred in affirming the trial court's dismissal of plaintiff's action as being time barred.

1. Plaintiff apparently treats the marine survey of 8 February 1977 as the proof of loss which begins the running of the 30-day period.

Our review of the policy of insurance reveals no internal inconsistency among the various requirements of Paragraphs 8, 10 and 11 in the policy's General Conditions. They provide that in order to maintain suit against the company, the insured must (1) give immediate written notice to the company of any occurrence which may result in loss, damage or expense, (2) provide written proof of loss and proof of interest in the insured property to the company, and (3) commence the action within twelve months of the date of the physical loss or damage out of which the claim arose.

Taken alone, subparagraph (a) of Paragraph 11 of the policy clearly requires the insured to commence its action within one year after the physical loss occurs. Just as clearly G.S. § 58-31 provides that if that policy provision provides a lesser period within which suit must be brought than twelve months after the insured's "cause of action accrues" that policy provision is void.

The question is whether there is inconsistency between the requirements of Paragraph 11(a) of the policy and the provisions of G.S. § 58-31. Does the policy require the insured to commence this action within less than one year after its cause of action accrues? We hold that it does, and therefore the policy provision setting the lesser period is void.

Prior to the Revisal of 1905, the wording of the predecessor of G.S. § 58-31 was as follows:

> No person licensed to do insurance business under this chapter shall limit the term within which any suit shall be brought against such person to a period less than one year *from the time when the loss insured against shall accrue.*

1883 N.C. Code § 3076 (emphasis added).

Beginning with the Revisal of 1905, the emphasized language was changed, and reads now as it has since 1905: "after the cause of action accrues." We find no marine insurance case directly on point, so we look to other insurance cases based upon statutes having the same language as that of G.S. § 58-31. Our examination of those cases reveals inconsistencies which can best be explained by occasional reliance on authority of cases decided prior to the change in the statute. The case most often cited for the proposition that the provision limiting the time within which

suit may be brought to one year from the date of loss does not conflict with the statute is *Muse v. Assurance Co.*, 108 N.C. 240, 13 S.E. 94 (1891). *See Avis v. Insurance Co.*, 283 N.C. 142, 195 S.E. 2d 545 (1973) (all risks policy); *Beard v. Sovereign Lodge*, 184 N.C. 154, 113 S.E. 661 (1922) (life insurance).[2] We point out that in *Muse*, the statute at issue contained the old language, and therefore there was no conflict between that statute and the policy provision. The apparent conflict was created by the language of the statute contained in the Revisal of 1905.

The Court was faced with this apparent conflict in the case of *Heilig v. Insurance Company*, 152 N.C. 358, 67 S.E. 927 (1910). the accident insurance policy in *Heilig* contained a stipulation requiring that suit be brought within one year of the date of the accident. The Court held that the stipulation did not contravene the provisions of Section 4809 of the Revisal of 1905 (predecessor of G.S. § 58-31) requiring that the action be commenced within one year after the cause of action accrues "for the fair and equitable construction of the stipulation is to give the plaintiff twelve

2. Several cases cite *Muse* as authority for upholding the validity of the contractual provision at issue in fire insurance policies. See, for example, *Zibelin v. Insurance Co.*, 229 N.C. 567, 50 S.E. 2d 290 (1948); *Tatham v. Ins. Co.*, 181 N.C. 434, 107 S.E. 450 (1921); *Holly v. Assurance Co.*, 170 N.C. 4, 86 S.E. 694 (1915). We find fire insurance cases unpersuasive for an additional reason. Fire insurance policies are standardized and adopted by the Legislature. *See* G.S. § 58-176. They have been so since 1899. North Carolina Insurance Act of 1899, ch. 54, § 43, 1899 N.C. Sess. Laws. In *Boyd v. Insurance Co.*, 245 N.C. 503, 96 S.E. 2d 703 (1957), the Court based its decision that there was no conflict between the contractual provision and the statute on the language in Chapter 378, section 2, of the 1945 Session Laws repealing all "laws and clauses of laws in conflict" with the enactment of the "Standard Fire Insurance Policy of the State of North Carolina."

We also note that one of the required provisions in accident and health insurance policies is that "No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished." G.S. § 58-251.1(a)(11). By Act of 28 April 1953, ch. 1095, § 2, 1953 Sess. Laws, the Legislature enacted *required* provisions for accident and health insurance policies, and changed the time limit in which suit could be brought on such policies from two years from the time proof of loss is required to three years therefrom. Section 12 of that Act contains the same repealer language for laws inconsistent with its provisions as did the enactment of the standard fire insurance policy.

Unlike fire insurance or accident and health insurance, the policy provisions in marine insurance policies are not "standardized" or "required" by the Legislature. This being so, there is of course no "repealer doctrine" to be applied to marine insurance.

months or one year after his right of action accrued, in which to bring his action." While in that case the policy was not sent up as part of the record on appeal, the Court said, "Assuming that the policy allows sixty days in which proofs of injury are to be filed, it stipulates that the company shall have ninety days to determine its action upon them, and the insured, under the construction we place upon the stipulation, would have one year thereafter in which to bring his action." In effect, the Court ruled that the insured's cause of action did not accrue until the expiration of the time period allowed for the insured's filing of proofs of loss and the insurer's determining its action upon them. Thus, the Court placed an interpretation upon the contractual provision requiring that suit be commenced within one year of the date of loss which would prevent its conflicting with the statutory prohibition against reducing the statute of limitations to less than one year. We recognize that some courts, like our Court in *Heilig*, interpret such policy provisions as those in Paragraphs 8, 10 and 11 to mean that the twelve-month period begins only after proofs of loss are filed and payment thereof becomes due. *See Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc.*, 514 P. 2d 223 (Alaska 1973); *Fireman's Fund Ins. Co. of California v. Buckstaff*, 38 Neb. 150, 56 N.W. 697 (1893); *Kirk v. Firemen's Ins. Co. of Newark, N.J.*, 107 West Virginia 666, 150 S.E. 2 (1929); 20A Appleman, Insurance Law and Practice §§ 11611, 11612 (1980) and cases cited therein. *But see Johnson v. Humboldt Ins. Co.*, 91 Ill. 92 (1878); *Gremillion v. Travelers Indemnity Company*, 256 La. 974, 240 So. 2d 727 (1970), *overruling Finkelstein v. American Ins. Co. of Newark, N.J.*, 222 La. 516, 62 So. 2d 820 (1952). *See generally* 18 Couch on Insurance 2d §§ 75:91, 75:92 (1968); *see also* Annot., 95 A.L.R. 2d 1023 (1964).

We decline to adopt that strained interpretation of the contractual provisions before us. In plain and unambiguous language the contract provides that the insured must commence any suit against the insurance company "within the twelve months next following the date of the *physical loss or damage* out of which such claim arose." (Emphasis added.) In this case, this language clearly means within twelve months of the date on which the vessel sank. We deem it unwise to resort to any other construction of that language. The simple fact is that this policy provision conflicts with the provisions of G.S. § 58-31, for plaintiff's cause of

action "accrues" only after the filing of his proofs of loss and interest and the elapse of the thirty-day period for the insurance company's rendering its decision on whether to pay the loss. Under the policy before us, the insured is required to give immediate written notice to the company of the occurrence resulting in its loss and file a written proof of loss and proof of interest. These requirements must be construed in accord with their purpose and with the reasonable expectations of the parties, and the insured is allowed a reasonable period in which to fulfill these requirements. *See Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981); *Henderson v. Insurance Co.*, 254 N.C. 329, 118 S.E. 2d 885 (1961). If, at the end of the 30-day period after the proofs are filed, the company has not paid the insured's loss, its cause of action accrues. Of course, if, during the 30-day period within which the company has to pay the claim, the company notifies the claimant that it will not pay, the insured's cause of action accrues immediately upon receipt of that refusal.

Although the provision in Paragraph 11(a) attempting to restrict the time in which plaintiff may bring suit to twelve months from the date of loss is voided by G.S. § 58-31, Paragraph 11 also contains the following clause:

> Provided that where any of the above limitations of time is prohibited or invalid by or under any applicable law, then and in that event no suit or action shall be commenced or maintainable unless commenced within the shortest limitation of time permitted under such law.

We find no reason to deny the effect of that clause. Thus, here the insured must bring its claim within twelve months of the date on which its cause of action accrues, *i.e.*, the shortest period of time permitted by G.S. § 58-31.

In the record before us, we find an estimate of the cost of repairs on the engines made by Bradley Creek "66" Marina, Inc., on 1 November 1976, apparently at plaintiff's request. We cannot determine from the record when, if ever, this estimate was delivered to defendant. We also find in the record a survey by M. B. Ward & Son, Marine Surveyors, made at the request of Aetna dated 8 February 1977. While we cannot determine from the record the precise date on which plaintiff gave notice of its loss to the defendant, it is obvious that the defendant had notice

of the loss at least by the time it requested the survey by M. B. Ward & Son dated 8 February 1977. If the company first received plaintiff's proof of loss on 8 February 1977, the 30-day period allowed for payment of the claim would have expired on 10 March 1977, and upon failure of defendant to pay the claim on or before that date, 10 March 1977 would be the date plaintiff's cause of action accrued under G.S. § 58-31. If these are the facts, the contractual provision requiring plaintiff to bring its action within twelve months of the loss would violate G.S. § 58-31, assuming of course that such notice by plaintiff was "timely" given or given within a "reasonable time." However, if by reason of the earlier estimate by Bradley Creek "66" Marina, Inc., the plaintiff gave written proof of loss to defendant on 1 November 1976, the 30-day period would have expired on 1 December 1976, and plaintiff's suit, instituted on 2 March 1978, would not have been instituted within one year after his cause of action accrued, and plaintiff would have no right of recovery under the policy. Moreover, we cannot determine from the record whether there was an even earlier estimate or some other notice of the loss delivered to defendant which would have made the time period allowed by G.S. § 58-31 expire even earlier.

We conclude that the trial court erred in concluding as a matter of law that plaintiff's action was barred by the time limitation set forth in the policy of insurance and in dismissing plaintiff's action. Since we are unable to say from the record when notice of the loss was provided to Aetna, we are unable to determine when plaintiff's cause of action accrued. We must remand to the trial court for this finding.

We reverse the decision of the Court of Appeals and remand this cause to that court for further remand to the Superior Court, New Hanover County for further proceedings consistent with this opinion.

Reversed and remanded.

JANET CHRISTINE McPHERSON v. GUY T. ELLIS

No. 147A81

(Filed 3 March 1982)

1. **Physicians and Surgeons §§ 11.1, 17.1 — remoteness of risks in procedure — standard among profession — instructions improper**

The trial court erred in instructing the jury in a malpractice case to consider the remoteness of the risks of paralysis resulting from arteriogram procedures and to determine whether relating such a risk was required under the standard of medical practice in the professions of neurology and neuroradiology since the uncontraverted evidence indicated that the standard of care required advisal of the risks of paralysis.

2. **Physicians and Surgeons § 17.1 — informed consent — responsibility of doctors — instructions improper**

The trial court erred in instructing the jury that it could find that the responsibility of informing the plaintiff was solely that of one doctor where the uncontraverted evidence tended to show that another doctor had a duty to explain the risks of paralysis to a prospective arteriogram subject.

3. **Physicians and Surgeons § 17.1 — informed consent — proximate causation — instructions proper**

The trial court in an informed consent case properly instructed the jury that it should consider what the patient's decision would have been had she been properly informed of the risks of paralysis in arteriogram procedures. The subjective test, as opposed to the objective test, is the proper standard to apply in determining whether a patient would have undergone treatment had he known the risks the physicians neglected to relate to him.

THE plaintiff petitioned for discretionary review of the decision of the North Carolina Court of Appeals reported at 53 N.C. App. 476, 281 S.E. 2d 94 (1981) affirming the judgment entered by *Thornburg, J.*, in accordance with the jury verdict rendered at 8 February 1980 Civil Session, BUNCOMBE Superior Court. The petition was allowed 3 November 1981.

The plaintiff originally brought this negligence action for medical malpractice against Dr. John Ledbetter, a neurologist, and Dr. Guy T. Ellis, a radiologist. She alleged that they had failed to warn her of the risk of paralysis before obtaining her consent to perform a radiological diagnostic procedure known as an arteriogram.

During the spring of 1975, Janet McPherson was an athletic, healthy, college freshman, proficient at horseback riding, swim-

ming and riflery. She was often plagued by severe headaches, a recurrent ailment extending back approximately to her twelfth birthday in 1968. At that time, she had undergone surgery to implant a shunt inside her cranium. This surgical implant drained fluid from her head into the lower portion of her body and successfully alleviated her headaches for a year. In 1969, she suffered a concussion in a bicycle accident which resulted in the resumption of headaches.

Late in 1974, she consulted Dr. John W. Ledbetter, the physician who had recommended her original surgical implant in 1968. As a result of Dr. Ledbetter's diagnosis and unsuccessful attempts to allay the headaches by medication, she entered St. Joseph's Hospital on 2 March 1975 for a brain scan and an arteriogram.

The brain scan, performed on 3 March 1975, indicated the presence of a mass around her brain. Dr. Ledbetter, a neurologist, explained to Ms. McPherson that she possibly had a subdural hematoma, but that his diagnosis could not be definite until the arteriogram was administered. Dr. Ledbetter advised her that the procedure for the arteriogram involved invading the body and injecting a foreign substance; therefore, some degree of risk was involved. Dr. Ledbetter never informed Ms. McPherson of any specific risk of paralysis. The defendant, Dr. Guy T. Ellis, came by Ms. McPherson's hospital room on the evening of 3 March 1975. Dr. Ellis, the neuroradiologist who was to perform the arteriogram, explained the procedure to Ms. McPherson. He advised her that an arteriogram is a special x-ray for examining blood vessels. A contrast material is introduced into the blood vessels through a catheter placed in an artery in the groin area and the blood vessels are studied by television monitor in an adjoining room.

Dr. Ellis warned her that the arteriogram involved the risk of a blood clot at the site of the catheter entry and the possibility of severe headaches following the operation. Dr. Ellis testified that he advised Ms. McPherson that there was a 1 in 500 chance of "severe complication or permanent neurologic deficit" (meaning blindness or paralysis); Ms. McPherson testified that he did not so advise her.

Ms. McPherson became concerned about the risk of blood clots and headaches and expressed her doubts to her mother. She considered the possibility of cancelling the operation, but agreed to wait until again speaking with Dr. Ledbetter. Dr. Ledbetter assuaged her fears by assuring her that the risk of blood clots existed primarily in older people with circulatory problems and that any possible headaches would disappear if she lay down after the procedure was completed. She thereupon agreed to submit to the arteriogram by signing a consent form provided by the hospital.

The arteriogram was performed on 4 March 1975. During the course of the operation, Ms. McPherson felt hot flashes and went blind. Dr. Ellis said, "Don't worry about it; it is the result of the dye. It will pass." She did not regain her vision during the operation, however. He continued with the procedure, and she felt a shove in the back of her neck. Suddenly, her arms, legs and trunk became paralyzed.

Ms. McPherson is now permanently paralyzed over 45% of her entire body, with a 40% disability of her upper extremities and a 5% disability of her lower extremities.

The plaintiff, Ms. McPherson, brought suit against Dr. Ledbetter and Dr. Ellis, for their alleged negligent failure to inform her of the full extent of the risks of the arteriogram procedure. The jury found in favor of each defendant. Plaintiff submitted to a voluntary dismissal of her claim against Dr. Ledbetter, and appealed from the judgment entered in favor of Dr. Ellis.

The North Carolina Court of Appeals affirmed the judgment entered by the trial court in accordance with the jury's verdict.

Wade and Carmichael, by J. J. Wade, Jr. and R. C. Carmichael, Jr., Attorneys for plaintiff-appellant.

Harrell and Leake, by Larry Leake, Attorney for defendant-appellee.

MITCHELL, Justice.

[1] The plaintiff first assigns as error the Court of Appeals' holding that the trial court properly instructed the jury that it could consider the relative percentage chance of paralysis in

determining whether Dr. Ellis had the duty to inform the plaintiff of the risk of paralysis when all of the medical expert testimony indicated that Dr. Ellis did have such a duty.[1]

1. Effective 1 July 1976, the General Assembly enacted specific legislation, codified as G.S. 90-21.13, which controls in cases involving informed consent to health care treatment or procedures on or after that date. 1975, 2nd Sess. c. 977, s. 4. Several of the principles set forth in this opinion are superseded by this statute which states in its entirety the following:

§ 90-21.13. *Informed consent to health care treatment or procedure.*—

(a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or the patient's spouse, parent, guardian, nearest relative or other person authorized to give consent for the patient where:

(1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and

(2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or

(3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

(b) A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact.

(c) A valid consent is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give consent.

(d) No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

(e) In the event of any conflict between the provisions of this section and those of Article 7 of Chapter 35 and Articles 1A and 19 of Chapter 90, the provisions of those Articles shall control and continue in full force and effect. (1975, 2nd Sess., c. 977, s. 4.)

A physician or surgeon who undertakes to render professional services must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and he must use his best judgment in the treatment and care of his patient. *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E. 2d 762 (1955). He is held to the standard of professional competence and care customary in similar communities among physicians engaged in his field of practice. *Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973).

Adherence to a minimal standard of care ordinarily requires a physician or surgeon to secure consent of an individual before providing him treatment. Consent to a proposed medical procedure is meaningless if given without adequate information and understanding of the risks involved. Therefore, the standard of professional competence prescribes that a physician or surgeon properly apprise a potential patient of the risks of a particular treatment before obtaining his consent.

The seminal case requiring a physician to obtain his patient's "informed consent" is *Salgo v. Leland Stanford, Jr. University Board of Trustees*, 154 Cal. App. 2d 560, 317 P. 2d 170 (1957). There the court held that a physician "violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment." *Id.* at 578, 317 P. 2d at 181.

A major issue in informed consent cases is whether a plaintiff must present expert medical testimony to establish the existence and scope of a physician's duty to disclose risks of a proposed treatment. *See* Annot., 52 A.L.R. 3d 1084 (1973). The Court of Appeals apparently proceeded under the theory that such testimony is not required when it concluded that, "We believe with this information [the mathematical probability of paralysis resulting from an arteriogram] laymen are capable of determining whether good medical practice requires a physician to inform his patient of the possibility of paralysis as a result of an arteriogram." 53 N.C. App. at 479, 281 S.E. 2d at 96. The determination of this issue is not essential to the resolution of this case; therefore, we express no opinion as to the merits of the Court of Appeals' *sub silentio* decision.

The question of the necessity of expert testimony need not be reached in this case because seven medical experts in fact expressed their opinions on the duty to advise a patient of the risk of paralysis in an arteriogram procedure. These witnesses, experts in the fields of neurology, neurological surgery, or radiology, all testified that the standard of good medical practice in Buncombe County in March, 1975 would be met by explaining to an arteriogram patient the risks of paralysis. Three witnesses, including the defendant Dr. Ellis, testified that failure to advise of the risks of paralysis would not conform to such standards of medical practice. No witnesses testified that failure to advise of the risks of paralysis was consistent with good medical practice in Buncombe County in March, 1975.

The expert medical witnesses based their opinions, in part, on evidence of the incidence of paralysis resulting from arteriogram procedures. Defendant contends, and the Court of Appeals held, that the chance of paralysis, approximately 1 in 500, in itself was evidence from which a jury could determine whether good medical practice required advisal of the risk. We disagree. Evidence of the remoteness of a particular risk, mathematically expressed as a ratio or percentage, is not sufficient, standing alone, to permit a jury to establish independently a standard of care for advisal of that risk in the face of uncontroverted expert medical testimony as to the existence and scope of the physician's duty. *Cf. Starnes v. Taylor*, 272 N.C. 386, 158 S.E. 2d 339 (1968) (remoteness of the risk considered in the absence of expert medical testimony as to the proper standard).

The trial court therefore erred in instructing the jury to consider the remoteness of the risk of paralysis and to determine whether relating such a risk was required under the standard of medical practice in the professions of neurology and neuroradiology in March, 1975 in Asheville or similar communities. The uncontroverted evidence indicated that the standard of care required advisal of the risk of paralysis. "When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner." *Chisholm v. Hall*, 255 N.C. 374, 376, 121 S.E. 2d 726, 728 (1961). The trial court should have instructed the jury that if it found that the standard of

medical practice in the professions of neurology and neuroradiology in March, 1975 in Asheville or similar communities required that an individual undergoing an arteriogram be advised of the risk of paralysis, *as all the evidence tended to show*, failure to adhere to that standard would result in civil liability.

[2] The plaintiff next assigns as error the instructions of the trial court that if the jury found that the referring neurologist Dr. Ledbetter had the sole responsibility of informing plaintiff of the risk of paralysis, then they should find Dr. Ellis not liable to the plaintiff. The instruction was not supported by the evidence. No witness testified that Dr. Ledbetter had the *sole* responsibility of advising plaintiff of the risks. It was at most his primary responsibility. The uncontroverted evidence tended to show, if the jury chose to believe it, that Dr. Ellis had a duty to explain the risks of paralysis to a prospective arteriogram subject. Therefore, the trial court erred in instructing the jury that it could find that the responsibility of informing the plaintiff was solely that of Dr. Ledbetter.

[3] The plaintiff's third assignment of error stems from the trial court's instruction that if the jury found Dr. Ellis had not properly informed the plaintiff of the risk of paralysis, she still would not be entitled to recover if they also found that, had she been so informed, she would nevertheless have consented to the arteriogram. A requisite of a cause of action for negligence is that the alleged negligent act or omission by the defendant be the proximate cause of the injury. *Meyer v. McCarley & Co., Inc.*, 288 N.C. 62, 215 S.E. 2d 583 (1975). If the plaintiff would have consented even after being apprised of all the facts, the failure to inform her was not a cause in fact of her undergoing the operation, and was thus not a cause of her injury. Therefore, the jury was properly instructed that it should consider what her decision would have been had she been properly informed of the risk of paralysis.

A major issue in informed consent cases is what standard to use in determining proximate causation. Note, *Informed Consent—A Proposed Standard for Medical Disclosure*, 48 N.Y.U.L. REV. 548 (1973). A subjective standard requires the jury to determine whether, if informed, this particular patient would have foregone treatment. *Id.* at 550. An objective standard requires the

jury to determine whether, if informed, a reasonable, prudent person under all the surrounding circumstances would have foregone treatment. *Id.*

The problem with a subjective standard is that the only evidence usually available is the plaintiff's bald assertion, tempered by hindsight, as to what he would have done had he known all the facts. The apparent inequity of a jury basing its decision solely on such testimony has troubled courts, once even to the extreme of excluding the plaintiff's testimony on this issue. *Watson v. Clutts*, 262 N.C. 153, 160-61, 136 S.E. 2d 617, 622 (1964).

The detriments of the objective standard are more severe, however.[2] In determining liability by whether a reasonable person would have submitted to treatment had he known of the risk that the defendant failed to relate, no consideration is given to the peculiar quirks and idiosyncracies of the individual. His supposedly inviolable right to decide for himself what is to be done with his body is made subject to a standard set by others. The right to base one's consent on proper information is effectively vitiated for those with fears, apprehensions, religious beliefs, or superstitions outside the mainstream of society.

Therefore, we hold that the subjective test is the proper standard to apply in determining whether a patient would have undergone treatment had he known of the risks the physician neglected to related to him. To the extent that *Watson v. Clutts*, 262 N.C. 153, 136 S.E. 2d 617 (1964) conflicts with this decision by requiring exclusion of a patient's testimony as to what he would have done had he known of the risks, that case is disapproved. The trial court properly instructed the jury that it should consider whether Ms. McPherson would have undergone the arteriogram had she known of the risk of paralysis.

Remanded to the Court of Appeals for further remand to Buncombe Superior Court for a

New trial.

2. G.S. 90-21.13(a)(3) requires that the objective standard be applied to claims arising on or after 1 July 1976.

STATE OF NORTH CAROLINA v. ARDELL RICHARD JORDAN

No. 76A81

(Filed 3 March 1982)

1. **Criminal Law § 80.1— identification of letter later ruled inadmissible—failure to suppress identification**

In a prosecution for burglary, attempted rape and first degree sexual offense, the trial court did not commit prejudicial error in failing to suppress the victim's identification of a letter as one she received from an unknown person approximately a year prior to the offenses charged when the court later ruled that the letter itself was inadmissible because it had not been connected to defendant since (1) defendant failed to preserve his objection by moving to strike the earlier testimony at the time the letter was ruled inadmissible and (2) the failure to suppress was not prejudicial to defendant in light of the victim's positive identification of defendant and the overwhelming evidence of defendant's guilt.

2. **Criminal Law § 93— refusal to change order of proof—no abuse of discretion**

In a prosecution for burglary, attempted rape and first degree sexual offense in which the victim positively identified defendant as her assailant, the trial court did not abuse its discretion in refusing to permit defendant to depart from the order of proof and introduce into evidence during cross-examination of the State's witnesses a lamp which provided the only light in the victim's bedroom and a picture of the victim wearing glasses where it appears that defendant was fully able to assail the victim's identification testimony through cross-examination, and his defense was not prejudiced because he was required to wait his turn to introduce the exhibits and pass them to the jury.

3. **Burglary and Unlawful Breakings § 6.3; Constitutional Law § 58; Criminal Law § 126— right to unanimous jury verdict—use of disjunctive for requisite intent for burglary**

Defendant was not denied his constitutional right to a unanimous verdict in a prosecution for first degree burglary by the trial court's instruction that defendant must have intended "to commit rape and/or first degree sexual offense" at the time of the breaking and entering where it is obvious, when the charge is read as a whole, that the court conveyed to the jury that the verdicts must be unanimous as to every essential element and that the instruction containing the disjunctive was a shorthand statement that the jurors must all find that defendant had the intent to commit rape or that they must all find that defendant had the intent to commit a first degree sexual offense.

4. **Criminal Law § 102.8— jury argument—no comment on defendant's failure to testify**

The district attorney's jury argument that defendant had not produced any alibi witnesses and his question, "Where are the witnesses who can put him anywhere else?" did not constitute an impermissible comment on defendant's failure to testify.

State v. Jordan

ON appeal from judgments imposed by *Strickland, Judge,* at the 30 March 1981 Criminal Session of Superior Court, NEW HANOVER County.

Defendant was charged in indictments, proper in form, with first degree burglary, G.S. § 14-51 (1981), attempted first degree rape, G.S. § 14-27.2, .6 (1981), first degree sexual offense, G.S. § 14-27.4 (1981), and crime against nature, G.S. § 14-177 (1981). He was convicted by a jury of first degree burglary, assault on a female, and first degree sexual offense and was sentenced to ten years, two years and life imprisonment, respectively. He appeals his conviction of first degree sexual offense to this Court as of right pursuant to G.S. 7A-27(a). We allowed his motion to bypass the Court of Appeals on the burglary and assault convictions on 23 October 1981.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Charles J. Murray and Associate Attorney K. Michele Allison, for the State.

Appellate Defender Adam Stein and Assistant Appellate Defender Marc D. Towler for defendant-appellant.

CARLTON, Justice

I

On 29 December 1980 at about 4:30 a.m. Robin Wellington was awakened in her bedroom by a man, whom she identified as defendant, who was holding a razor to her throat. He told her not to move. Defendant was also armed with a gun. He forced Wellington to perform fellatio on him. After the oral sex act had been completed, defendant put a nylon stocking over his head and forced Wellington out of bed and into the living room, where Angela Moore was sleeping. Defendant woke Moore up and told her that he would blow her away if she resisted. The two women were forced to remove their clothing, and defendant touched their breasts and genital areas.

Defendant told Wellington that he had entered the house by placing an oil drum under the bathroom window, breaking the window and cutting the venetian blinds. He told them not to report the incident. After defendant left, Wellington discovered that the bathroom window had been broken and the blinds torn.

When Wellington had gone to bed that night the window and blinds were undamaged.

Wellington reported the incident to the police two days later. She identified her assailant by name and gave a detailed description of him. Although Wellington positively identified defendant as the man who had broken into her home and assaulted her, Moore was unable to make a positive identification.

Defendant presented three character witnesses who testified to his good character.

At the close of the evidence the case was submitted to the jury, which returned the verdicts set out above.

II

[1] Defendant first assigns error to the identification of a letter received by Wellington nearly a year prior to the offenses charged. During direct examination Wellington identified a document marked as State's Exhibit Number 1 as a letter she had received in January of 1980. She testified that at the time she received it she did not know who had written it. Later in the State's case, the trial judge ruled that the letter was inadmissible, and the letter was never shown nor were its contents related to the jury.

Defendant argues that the trial judge's failure to suppress the earlier references to the letter at the time he ruled that the letter itself was inadmissible constitutes reversible error. We disagree for two reasons. First, defendant failed to preserve his objection by moving to strike the earlier testimony at the time the letter was ruled inadmissible and, second, defendant has not met his burden of proving that failure to suppress the contested evidence prejudiced him.

The testimony of Wellington concerning the letter had no apparent relevance to the case unless and until the letter was somehow linked or "connected up" to defendant. Wellington's testimony was properly admitted pending the admission of evidence that would tie the letter to defendant. *See State v. Black*, 51 N.C. (6 Jones) 510 (1859); *McCormick on Evidence* § 58 (2d ed. 1972). When it later became obvious, by virtue of the ruling that the letter itself would not be admitted, that the State

could not "connect up" the earlier testimony to the defendant, it was the defendant's duty to move to strike the earlier testimony. *Id.* By failing to make such a motion, he has waived his objection to the challenged testimony.

Even were we to conclude that defendant had not waived his objection to this evidentiary matter, he would still have to show that he was prejudiced, *i.e.*, that there is a reasonable possibility that a different result would have been reached had the alleged error not been committed. G.S. § 15A-1443(a) (1978). He has not met that burden here. Wellington testified only that she had received a letter in January of 1980 and that she did not then know who had sent it. Defendant argues that the jurors were likely to have deduced that defendant had sent the letter and that they were likely to have speculated about the letter's contents to defendant's prejudice. We refuse to indulge in the presumption, based on Wellington's testimony that she had received a letter from an unknown person, that the jurors would range so far afield in their beliefs as to what the evidence showed. Wellington's positive identification of defendant and overwhelming evidence of defendant's guilt compels the conclusion that there is no reasonable possibility that a different result would have been reached had the letter never been shown to the witness.

III

[2] During cross-examination of State witness Wellington, defendant sought to discredit her identification testimony by questioning the sufficiency of the lighting in the bedroom where the assault occurred and by questioning Wellington's eyesight. Additionally, he sought to introduce into evidence the lamp which provided the only light in Wellington's bedroom and a picture of Wellington wearing glasses. The trial judge refused to admit these exhibits into evidence because they were tendered during the presentation of the State's case. Defendant contends that the trial court's refusal to allow these exhibits into evidence during the cross-examination of the State's witness constitutes an abuse of discretion and entitles him to a new trial.

Defendant accepts the general rule that a criminal defendant has no right to introduce exhibits into evidence during the presentation of the State's case, *State v. Knight*, 261 N.C. 17, 134

S.E. 2d 101 (1964), but contends that the trial court may, in its discretion, admit the exhibits, citing *State v. Temple*, 302 N.C. 1, 273 S.E. 2d 273 (1981). Under the facts of this case, defendant argues, the trial court abused its discretion in refusing to allow the exhibits into evidence during the State's case.

Temple stands for the proposition that the order of presentation or proof at a criminal trial is a rule of practice, not of law, and may be altered when the trial court, in its discretion, considers a departure necessary to promote justice. *See also State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977); *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972); *State v. Thomas*, 244 N.C. 212, 93 S.E. 2d 63 (1956). Defendant contends that the trial court abused its discretion here because the exhibits defendant sought to have admitted could have their "designed effect" in assailing Wellington's testimony only during defendant's cross-examination of that witness. Additionally, defendant argues, departing from the order of proof would not have disrupted the trial. Our task is to determine whether the trial court's refusal to depart from the order of proof so handicapped the defendant in the presentation of his defense as to amount to a denial of justice. Only then would the trial court's ruling amount to an abuse of discretion.

The "designed effect" of the exhibits proffered by defendant was to attack Wellington's identification testimony. Defendant elicited on cross-examination of Wellington an admission that the only light in her bedroom on the night of the burglary was a small lamp with a blue bulb positioned about twenty feet from her bed and that defendant stood so that only one side of his face was illuminated. Wellington also identified a picture of herself wearing glasses but claimed that they were "shades," non-prescription sunglasses. It appears to us that defendant was fully able to assail Wellington's identification testimony through cross-examination and we perceive no prejudice to his defense by requiring him to wait his turn to introduce the exhibits and pass them to the jury. We conclude that the trial court's decision not to allow the defense exhibits during the State's case was well within its discretion. Defendant's failure to introduce these exhibits during presentation of his defense was his own choice, and not a source of error.

IV

[3] Defendant also alleges error in the trial court's instructions on first degree burglary. He contends that by instructing the jury that defendant must have intended "to commit rape and/or first degree sexual offense" at the time of the breaking and entering, the trial court denied defendant his constitutional right to a unanimous jury verdict.

The North Carolina Constitution guarantees a criminal defendant the right to a unanimous verdict. N.C. Const. art. I, § 24; *accord, State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975). To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged. *See In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). Defendant contends that the use of the disjunctive in describing the requisite intent for burglary created the possibility that less than all the jurors could agree which felony the defendant intended to commit although they might all agree that defendant did have the intent to commit one of the felonies and convict him of burglary.

While defendant's argument is not unreasonable, we are not persuaded. The trial court repeatedly instructed the jury that its verdict must be unanimous. When the charge is read as a whole, as it must be, it is obvious that the trial court conveyed to the jury that the verdicts must be unanimous as to every essential element and that the instruction containing the disjunctive was a shorthand statement that the jurors must all find that defendant had the intent to commit rape or that they must all agree that defendant had the intent to commit a first degree sexual offense. While defendant is correct as to the technical meaning of the instruction, this Court must neither forget nor discount the common sense and understanding of the trial court and the jurors. From our examination of the charge we are satisfied that defendant was not deprived of his constitutional right to a unanimous jury verdict.

V

[4] In his closing argument to the jury the district attorney noted that defendant had not produced any alibi witnesses and stated, "Where are the witnesses who can put him anywhere

else?" Defendant assigns error to this statement and argues that it amounted to an impermissible comment on defendant's failure to testify. Although defendant admits that the prosecutor did not comment directly on defendant's silence, he argues that the absence of any indication in the evidence that there existed any alibi witnesses amounts to a comment on defendant's failure to place himself away from the scene of the crime.

We are not persuaded. Although the defendant's failure to take the stand and deny the charges may not be the subject of comment, the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument. *State v. Tilley,* 292 N.C. 132, 232 S.E. 2d 433 (1977); *see State v. Bryant,* 236 N.C. 745, 73 S.E. 2d 791 (1953). The prosecutor's remark here was directed solely toward the defendant's failure to offer evidence to rebut the State's case, not at defendant's failure to take the stand himself; as such, the statement did not constitute an impermissible comment on defendant's failure to testify. *State v. Stanfield,* 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. Tilley,* 292 N.C. 132, 232 S.E. 2d 433.

VI

In conclusion, we find that defendant had a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JAMES LAMAR FOX

No. 139A81

(Filed 3 March 1982)

1. Criminal Law §§ 76.10, 158— failure to suppress confession—testimony not in record—presumptions

Where defendant failed to include in the record on appeal the substance of the testimony presented to and heard by the trial judge at a suppression hearing, the Supreme Court must presume that the trial court's factual findings concerning defendant's confession were supported by competent evidence. The state of the record precluded the Court from determining whether the trial court's findings were erroneous on the basis that no evidence was adduced at

the hearing which tended to show that defendant knowingly and intelligently waived his constitutional rights.

2. **Criminal Law § 76.5— confession—sufficiency of findings**

A finding that defendant understood his rights when he waived them was sufficient to support a legal conclusion that defendant knowingly and intelligently executed those waivers, and an express factual finding as to the extent and level of defendant's education or intelligence was not required.

ON appeal by defendant as a matter of right from the judgments of *Martin, Judge*, entered at the 26 May 1981 Criminal Session, CHATHAM Superior Court. Defendant was charged in indictments, proper in form, with the first-degree murder and kidnapping of Jean Bateman Gaines and the commission of an armed robbery connected therewith on 10 March 1981. The jury found defendant guilty as charged on each count. Upon the jury's recommendation, the trial court imposed a sentence of life imprisonment for the murder conviction. The trial court sentenced defendant to a term of life imprisonment for the kidnapping to commence at the expiration of the previous sentence for the murder and imposed a prison term of thirty years for the armed robbery to commence at the expiration of the kidnapping sentence. Defendant's motion to bypass the Court of Appeals on the robbery conviction was allowed on 15 October 1981.

Briefly, and viewing it in its most favorable light with the benefit of all reasonable inferences, the State's evidence tended to show that Jean Gaines, a cashier clerk, was working the 3:00 to 11:00 p.m. shift at the Stop and Save Mini-Mart in Goldston, North Carolina on 10 March 1981. Between 7:30 and 8:00 p.m. that evening, a young black male was sitting in a blue Chevrolet parked near the store. A person driving by the store recognized the occupant of the parked vehicle as James Lamar Fox, the defendant. While Mrs. Gaines was alone in the store, defendant went inside with an opened knife and forced her to give him $455.00 from the cash register. Defendant then made her leave the premises with him in his blue Chevrolet. He took her to a spot five miles outside Goldston on a dirt road, stabbed her with a knife, and fled from the scene. Mrs. Gaines died as a result of internal bleeding from the stab wounds.

Later that same evening, police officers went to the Fox residence, where defendant lived with his parents, to speak to de-

fendant about the armed robbery and kidnapping at the Stop and Save Mini-Mart. Defendant came outside to see the officers. He was advised of his *Miranda* rights, affirmed that he understood what those rights meant and signed a waiver form. Defendant then admitted that he had been to the store earlier, but he denied any knowledge of an armed robbery or kidnapping there. The officers then obtained permission from defendant and his parents to search their blue Chevrolet automobile and home. A spot of wet blood was discovered on one of the car doors. Defendant was immediately arrested and placed in a police vehicle to await completion of the searches. The officers found a bloody knife and a large sum of money under the mattress in defendant's bedroom. They also found a bloody washcloth in the bathroom. Defendant was again advised of his constitutional rights, and he once more denied complicity in the robbery, kidnapping and murder. A few minutes later, however, defendant confessed to the crimes as he still sat in a police vehicle parked at his residence. Defendant waived his *Miranda* rights again the very next day when he made similar incriminating statements to an agent of the State Bureau of Investigation.

The defendant offered no evidence during the guilt determination phase of the trial proceedings.

Other relevant facts shall be summarized in the opinion.

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

Robert L. Gunn for the defendant-appellant.

COPELAND, Justice.

Defendant brings forward five assignments of error for our review which concern the admission of his inculpatory statements, the propriety of the District Attorney's argument to the jury, and the correctness of the trial court's recapitulation of the evidence in its instructions to the jury. After a thorough and careful consideration of defendant's contentions, we conclude that he received a fair trial free from prejudical error.

[1] Defendant first argues that evidence of his pre-trial confessions to the charged crimes should have been suppressed. We disagree. Upon defendant's pre-trial motion to suppress his in-

culpatory statements, the trial court found *inter alia* that defendant was fully advised of his constitutional rights three times, that he acknowledged his understanding of those rights on each occasion, that he voluntarily elected to forego his privileges and signed the required waiver forms, and that he seemed coherent and sober during his interrogation and conversation with the various police officers. Defendant did not except to any of the trial court's findings of fact in its order denying the motion to suppress. Nevertheless, he now maintains that the trial court's findings were erroneous because no evidence was adduced at the hearing which tended to show that defendant knowingly and intelligently waived his constitutional rights. The state of the record on appeal precludes our consideration of this contention. Defendant has failed to include in the record the substance of the testimony presented to and heard by the trial judge at the suppression hearing. All we have before us is the judge's final order upon the matter. It is plain that we cannot engage in speculation and assume error in the suppression ruling when no aberration can be fairly and affirmatively ascertained from the record.

> [I]t is well recognized that a silent record supports the presumption that the proceedings in the court below were regular and free from error. *State v. Mullis*, 233 N.C. 542, 64 S.E. 2d 656. Further, it was the duty of the defendant to see that the record was properly made up and transmitted, and when the matter complained of does not appear of record, defendant has failed to show prejudicial error. *State v. Childs*, 269 N.C. 307, 152 S.E. 2d 453. . . .

State v. Cutshall, 278 N.C. 334, 346, 180 S.E. 2d 745, 752 (1971) (citation omitted). Presuming then, as we must in this case, that the trial court's factual findings, *supra*, were supported by competent evidence, we are also compelled to conclude that those findings adequately supported the corresponding legal determinations that defendant "freely, *knowingly, intelligently* and voluntarily waived [his constitutional] rights and thereupon made the statements to the officer" on the occasions in which he admitted his guilt.[1] (Emphases added.)

1. We also note that the State's evidence in chief at trial clearly demonstrated the fact that defendant forewent his constitutional protections with a sufficient understanding of the significance of his relinquishments. Indeed, the uncontradicted

[2] In addition, we are not persuaded that the foregoing legal conclusion was deficient in any respect due to the absence of an *express* factual finding as to the extent and level of defendant's education or intelligence. The trial court found that defendant affirmed his *understanding* of his rights prior to each waiver. The ability to understand ordinarily implies the possession of the minimal amount of intelligence required for making independent, rational decisions. Nothing in this record indicates that defendant was an exception to this rule or that an issue to this effect was ever raised at the hearing. In fact, defendant presented no evidence whatsoever at the hearing. In these circumstances, we decline to hold that a finding that defendant understood his rights when he waived them was insufficient to support a legal conclusion that defendant knowingly and intelligently executed those waivers.

Defendant next maintains that the district attorney improperly argued his personal beliefs to the jury by insinuating that the people of the county expected a conviction. We find that the statements of the district attorney to which defendant excepted were not reasonably susceptible to such an interpretation. The district attorney was merely thanking the jury for its attentiveness during the trial and expressing additional gratitude to the State's witnesses and the law enforcement officials who assisted in the preparation and presentation of the case. We perceive no transgression in this and hold that such expressions were well within the permissible bounds of jury argument. *See State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980); *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980).

Defendant finally argues that the trial court incorrectly summarized certain evidence in its instructions. Defendant has, however, waived his right to complain of the alleged "misstatement" on appeal because he did not make a timely objection thereto at trial and thereby provide the court with an opportunity to correct itself, if necessary, before the jury retired. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981); *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). Notwithstanding this, there is

evidence strongly suggests that defendant confessed in enlightened surrender to the overwhelming reality of being caught red-handed with the instrumentalities and fruits of the crimes so quickly after their commission.

simply nothing to complain about here. The trial judge said in his summary that the evidence for the State tended to show that defendant "told the lady to go with him because he didn't want her to tell on him." This recapitulation of the evidence was fully supported by the testimony concerning defendant's admissions that, after he robbed the store, he told the clerk "you have got to go with me" and that he later "stabbed the victim to keep her quiet and to keep her from identifying him." Record at 89, 91. The assignment of error lacks merit and is overruled.

In sum, our review of the record and defendant's assignments on appeal discloses no error or prejudice requiring a new trial of this matter. Consequently, defendant's convictions are affirmed.

No error.

STATE OF NORTH CAROLINA v. ARCHIE RAY MASH

No. 65A81

(Filed 3 March 1982)

Criminal Law § 46.1— flight of defendant—competency of evidence concerning

The trial court did not err in admitting evidence of defendant's flight where the evidence tended to show that, after having been given his *Miranda* warnings, defendant left the sheriff's office on the pretext of telling his brother that he would be detained awhile; that defendant did not return to the sheriff's office, but left the scene in his truck at a high rate of speed pursued by deputies with blue lights flashing; and that upon abandoning his truck, defendant led law enforcement officials and a bloodhound on a seven hour foot chase through the mountains of North Carolina. The fact that defendant did not flee for several days after the commission of the crime, and the fact that defendant had not been taken into custody or formally arrested before his hasty departure affected the weight and not the admissibility of the evidence.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Long, J.*, at the 17 February 1981 Criminal Session of WILKES County Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the first-degree murder of Willard Ray Hamby. Defendant entered a plea of not guilty.

The State offered evidence tending to show that on 16 October 1980, Willard Ray Hamby was found dead from a single gunshot wound to the head at his combination residence and store. The State offered evidence through defendant's in-custody statement that a few days before 15 October 1980, defendant and Hamby had words over money allegedly owed by defendant to Hamby. According to defendant's statement, he took his rifle and fired into Hamby's dwelling on 15 October 1980 in order to "scare him." Defendant fired one shot and Hamby fell. Defendant entered Hamby's residence, saw that Hamby had been hit by the rifle shot, took some money out of Hamby's wallet, and left.

On 21 October 1980 law enforcement officials questioned defendant about the Hamby case. During the course of three meetings with law enforcement officials on that date, defendant allowed his rifle to be examined and talked to an S.B.I. agent for one to two hours.

On 22 October 1980 defendant appeared at the Ashe County Sheriff's Department to talk about the Hamby case. Upon being informed of his *Miranda* rights, defendant left the sheriff's office on the pretext of telling his brother that he would be detained awhile. Instead of returning to the sheriff's office, defendant left the scene in his truck at a high rate of speed. Sheriff's deputies pursued defendant with blue lights flashing, but defendant refused to stop and he abandoned his truck about ten miles from the sheriff's office. Defendant then led law enforcement officials and a bloodhound on a seven hour foot chase through the mountains before he was apprehended.

Defendant offered no evidence.

The trial court instructed the jury that they could consider defendant's actions of "flight" as evidence of "consciousness of guilt" of the crime charged.

The jury returned a verdict of guilty of first-degree murder on the theory of felony murder by discharging a firearm into occupied property. The trial court imposed a judgment of life imprisonment.

Rufus L. Edmisten, Attorney General, by Donald W. Stephens, Assistant Attorney General, for the State.

Malcolm R. Hunter, Jr., Assistant Appellate Defender, for defendant.

BRANCH, Chief Justice.

Defendant contends that the trial court erred by instructing the jury on "flight." He argues that he was not under arrest or in custody at the time he left the Sheriff's Department and that his actions could not be considered an "admission or show of consciousness of guilt" but rather were "insolubly ambiguous."

The well-settled rule in North Carolina is that evidence of flight of an accused may be admitted as some evidence of guilt. In *State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973), we find the following:

> The rule in North Carolina is that flight of an accused may be admitted as some evidence of guilt. However, such evidence does not create a presumption of guilt, but may be considered with other facts and circumstances in determining whether all the circumstances amount to an admission of guilt or reflect a consciousness of guilt. Proof of flight, standing alone, is not sufficient to amount to an admission of guilt. An accused may explain admitted evidence of flight by showing other reasons for his departure or that there, in fact, had been no departure.

Id. at 523, 196 S.E. 2d at 698.

We have also held:

> An accused's flight is "universally conceded" to be admissible as evidence of consciousness of guilt and thus of guilt itself. . . . In North Carolina it has long been held that "[s]ubsequent acts, including flight . . . are competent on the question of guilt. [Citations omitted.] The basis of this rule is that a guilty conscience influences conduct." [Citations omitted.]

State v. Jones, 292 N.C. 513, 525, 234 S.E. 2d 555, 562 (1977).

Defendant's argument that the evidence of flight was incompetent because he had not been taken into custody or formal-

ly arrested before his hasty departure is without merit. The cases in which evidence of flight has been declared competent when the flight occurred before arrest or before the accused was in custody are legion. *State v. Jones, supra; State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976); *State v. Self*, 280 N.C. 665, 187 S.E. 2d 93 (1972); *State v. Downey*, 253 N.C. 348, 117 S.E. 2d 39 (1960); *State v. Payne*, 213 N.C. 719, 197 S.E. 573 (1938); *State v. Bittings*, 206 N.C. 798, 175 S.E. 299 (1934); *State v. Parker*, 45 N.C. App. 276, 262 S.E. 2d 686 (1980); *State v. Wilson*, 23 N.C. App. 225, 208 S.E. 2d 393 (1974); *State v. McKinney*, 19 N.C. App. 177, 198 S.E. 2d 241 (1973); *State v. Kirby*, 7 N.C. App. 366, 172 S.E. 2d 93 (1970). *See also* 2 Stansbury's N.C. Evidence § 178 (Brandis rev. 1973) and the cases there cited.

Further, the fact that a defendant does not flee for several days after the commission of the crime charged affects the weight and not the admissibility of such evidence. *State v. Murvin*, 304 N.C. ---, 284 S.E. 2d 289 (1981).

Here after having been given his Miranda warnings, defendant's flight from law enforcement officers, by way of a speeding motor vehicle with officers in close pursuit followed by a seven hour trek across mountainous terrain with police officers and a bloodhound on his trail, presents a classic example of acts motivated by a "consciousness of guilt."

By his next assignment of error, defendant argues that this Court should adopt the "merger doctrine" to bar application of the felony-murder rule to homicides committed during the perpetration of the felony of discharging a firearm into occupied property. For the reasons stated in *State v. Wall*, --- N.C. ---, --- S.E. 2d --- (1982), we decline to change the existing law.

We have carefully examined the entire record and find no error warranting that the verdict returned or the judgment imposed be disturbed.

No error.

STATE OF NORTH CAROLINA v. JOHNNY DAWKINS

No. 126A81

(Filed 3 March 1982)

Burglary and Unlawful Breakings § 5.11— insufficient evidence of intent to rape as alleged—verdict treated as for misdemeanor

The evidence in a first degree burglary case was insufficient to permit the jury to infer that defendant broke into the victim's house with the intent to commit the felony of rape therein as charged in the indictment where the only evidence relevant to intent tended to show that defendant was wearing shorts, a raincoat, a knee-length cast and a gym shoe. However, when the jury found defendant guilty of burglary, it necessarily found facts which would support a conviction of misdemeanor breaking and entering, and the verdict will be treated as a verdict of guilty of misdemeanor breaking and entering.

THE defendant appeals from judgment of *Rousseau, J.*, 20 April 1981 Criminal Session, GUILFORD Superior Court. Upon his conviction of first degree burglary in violation of G.S. § 14-51, the defendant was sentenced to life imprisonment.

The State's evidence adduced at trial indicates that Ms. Alta Johnson, 64 years old, was asleep in her home in Greensboro during the early morning hours of 1 January 1981. At approximately 4:00 a.m., she was awakened by the sound of breaking glass. She arose to investigate, and discovered a man in a blue coat reaching through a broken window to unlatch her back door. As he shoved against the back door, Ms. Johnson ran out her front door.

She awakened a neighbor, Mr. Ricky Cooper, and pointed out the intruder, who was then exiting her front door. The man wore a blue raincoat and a knee-high cast on one leg.

Cooper approached the man, who fled. Cooper gave chase, dropped him with a "flying karate kick," and held him until police arrived.

The man was discovered to be wearing only a gym shoe, shorts, and the raincoat. Both Ms. Johnson and Cooper identified him at trial as the defendant, Johnny Dawkins.

The defendant offered no evidence.

Rufus L. Edmisten, Attorney General, by Isham B. Hudson, Jr., Special Deputy Attorney General, for the State.

A. Wayland Cooke, Assistant Public Defender, for defendant-appellant.

MITCHELL, Justice.

The question dispositive of this appeal is whether the State's evidence was sufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that the defendant broke into Ms. Johnson's house with the intent to commit the felony of rape therein. The only evidence relevant to the element of intent was circumstantial: the mode of dress of the defendant. The evidence that the defendant was wearing shorts, a raincoat, a knee-length cast and a gym shoe is too ambiguous, standing alone, to do more than raise a possibility or conjecture that the defendant had the intent to commit rape as charged in the bill of indictment. Thus, it was an insufficient foundation upon which to permit a trier of fact to infer that he intended to commit the felony of rape once he broke into the house. *See State v. Gaskins*, 252 N.C. 46, 112 S.E. 2d 745 (1960).

Ordinarily evidence of an unexplained breaking and entering into a dwelling house in the nighttime is in itself "sufficient to sustain a verdict that the breaking and entering was done with the intent to commit larceny rather than some other felony. The fundamental theory, in the absence of evidence of other intent or explanation for breaking and entering, is that the usual object or purpose of burglarizing a dwelling house at night is theft." *State v. Hedrick*, 289 N.C. 232, 236, 221 S.E. 2d 350, 353 (1976); *State v. Accor*, 277 N.C. 65, 175 S.E. 2d 583 (1970). The State chose to indict the defendant for breaking and entering with the intent to commit rape rather than larceny; therefore the State became obligated to prove the specific felonious intent to commit rape, as alleged. *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977). The State having failed to carry the burden, the defendant's burglary conviction must be reversed.

The intent to commit a felony following a breaking and entering distinguishes burglary from the lesser included offense of misdemeanor breaking and entering prohibited by G.S. § 14-54(b). When the jury found the defendant guilty of burglary, it

necessarily found facts which would support a conviction of misdemeanor breaking and entering. The defendant's counsel conceded as much during oral argument. Therefore, because there is not sufficient evidence of intent to commit the felony of rape within Ms. Johnson's house, we recognize the jury's verdict as a verdict of guilty of misdemeanor breaking and entering under G.S. § 14-54(b). *See State v. Barnette*, 304 N.C. 447, 284 S.E. 2d 298 (1981); *State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979). The judgment upon the verdict of first degree burglary is vacated and the cause remanded to the Superior Court of Guilford County for imposition of a judgment as upon a verdict of guilty of misdemeanor breaking and entering.

Remanded for judgment as for verdict of guilty of misdemeanor breaking and entering.

TAROKH TAEFI v. VERNON R. STEVENS AND JOANNE B. STEVENS

No. 148A81

(Filed 3 March 1982)

Vendor and Purchaser § 8— breach of contract to purchase—measure of damages—pertinent time

In an action for breach of a contract to purchase real estate, the vendor is entitled to recover items of damages which were within the contemplation of the parties at the time the contract was entered rather than at the time of the breach.

ON defendants' petition for discretionary review, pursuant to G.S. § 7A-31, of a decision of the Court of Appeals, 53 N.C. App. 579, 281 S.E. 2d 435 (1981), reversing the action of the trial judge in setting aside a verdict for the plaintiff and entering judgment notwithstanding the verdict in favor of the defendants at the 7 July 1980 Session of Superior Court, MECKLENBURG County.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr., Attorneys for Plaintiff-Appellee.

Richard A. Cohan, Attorney for Defendant-Appellants.

PER CURIAM.

The facts are adequately stated in the opinion of the Court of Appeals. Defendants contend that the Court of Appeals has incorrectly stated the rule for damages in a breach of contract for the sale of real estate. We do not agree. We have carefully reviewed the opinion of that court and the briefs and authorities relating to defendants' contentions. We conclude that the result reached by the Court of Appeals, its reasoning, and the legal principles enunciated by it are correct and adopt that opinion as our own with a single minor modification. After correctly quoting the rule stated in 77 Am. Jur. 2d *Vendor and Purchaser* § 489 (1975) to the effect, in pertinent part, that the compensation to which the vendor is entitled is "limited to such damages as may reasonably be supposed to have been within the contemplation of the parties *when they made the contract* . . ." (emphasis added), the writer of the opinion, in subsequently stating that court's belief that the jury could find that certain items of damages could have been within the contemplation of the parties at the pertinent time, used the words "*at the time of the breach of the contract.*" (emphasis added). We believe this was obviously inadvertent and that the writer intended the proper time of determination to be when the contract to purchase was entered into.

Except as herein modified, the decision of the Court of Appeals is affirmed.

Modified and affirmed.

VIRGINIA L. CURTIS CHANDLER, WIDOW AND GUARDIAN AD LITEM FOR ELIZABETH ANN CURTIS, MINOR DAUGHTER, AND WALTER MASON CURTIS, IV, MINOR SON, AND WALTER MASON CURTIS, III, DECEASED EMPLOYEE v. NELLO L. TEER COMPANY, EMPLOYER AND UNITED STATES FIDELITY AND GUARANTY INSURANCE COMPANY, CARRIER

No. 140A81

(Filed 3 March 1982)

ON appeal of right by defendants from the decision of the Court of Appeals, reported at 53 N.C. App. 766, 281 S.E. 2d 718

(1981), which reversed the opinion and award of the Industrial Commission denying plaintiff worker's compensation benefits for her husband's death.

Plaintiff's husband was killed on 17 June 1976 in an automobile accident in Malawi, Africa. He was employed by defendant Nello L. Teer Company (Teer) as an internal auditor and had been sent to Malawi by Teer to audit its Malawi operations. He arrived at Teer's Chikwawa project in Ngabu, Malawi, on 14 June 1976.

The Chikwawa project was located in an isolated part of Malawi in southeast Africa, and Teer had had to build facilities to provide living quarters and dining and recreational facilities for its employees. On the evening of 16 June 1976 the electricity failed at the project, and Curtis and Thomas P. Smith, an employee of an engineering firm hired by Teer, left the camp to go to a nearby sugar plantation. The apparent purpose of the trip was for Smith to arrange a softball game between the American sugar plantation employees and Teer employees. Curtis went along to keep Smith company. They traveled in a truck owned and maintained by Teer, but which had been leased to Smith's firm.

At the sugar plantation, Smith and Curtis played darts and had several drinks. Sometime after midnight they left the sugar plantation, took a friend home and had a drink with him there. They left the friend's home to return to camp about one o'clock in the morning.

On the way back to camp, but within the confines of the Chikwawa project, the truck driven by Smith collided head-on with another truck. Both Smith and Curtis were killed. Evidence showed that the truck driven by Smith had crossed over the center line prior to the collision.

Plaintiff filed a Notice of Accident with the Industrial Commission in July of 1977 and on 30 May 1980, a deputy commissioner filed an opinion and award which concluded that Curtis's accident arose out of and in the course of his employment and awarded benefits. Teer appealed, and the full Commission reversed and denied benefits, finding that Curtis was not acting within the scope of his employment at the time of the accident.

Plaintiff appealed to the Court of Appeals. That court, in an opinion by Judge Becton in which Judge Vaughn concurred, reversed the opinion and award of the Commission and ordered the reinstatement of the opinion and award of the deputy commissioner. Judge Arnold dissented.

Defendant appealed of right to this Court pursuant to G.S. 7A-30(2).

Maxwell, Freeman & Beason, P.A., by James B. Maxwell and Mark R. Morano, for plaintiff-appellees.

Walter L. Horton, Jr., for defendant-appellants.

PER CURIAM.

We have carefully examined the Court of Appeals' opinion and the briefs and authorities on the points in question. We find that the result reached by the Court of Appeals, its reasoning, and the legal principles enunciated by it to be altogether correct and adopt that opinion as our own. Its decision is, therefore,

Affirmed.

STATE OF NORTH CAROLINA v. JOHN RHODES

No. 152A81

(Filed 3 March 1982)

DEFENDANT appeals from a decision by a divided panel of the Court of Appeals[1] affirming his conviction of resisting an officer in violation of G.S. § 14-223 upon which he was sentenced to a term of six months imprisonment at the 3 November 1980 Session of Superior Court, GUILFORD County.

Rufus L. Edmisten, Attorney General by Daniel F. McLawhorn, for the State.

Malcolm R. Hunter, Jr., Assistant Appellant Defender, for the Defendant-Appellant.

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1. *State v. Rhodes*, 54 N.C. App. 193, 282 S.E. 2d 809 (1981).

PER CURIAM.

An adequate review of the evidence is contained in the opinion by the Court of Appeals. Defendant contends that the trial court erred in (1) failing to instruct the jury on the defendant's right to resist an arrest pursuant to an illegal entry into his home, (2) instructing the jury that the defendant's right to resist excessive force was conditioned on their finding that both Officer Hastings and Officer Workman used excessive force against the defendant, and (3) failing to instruct the jury on defendant's right to resist an arrest by an officer who does not inform the defendant that he is under arrest.

We have carefully reviewed the opinion of the Court of Appeals and the briefs and authorities relating to the defendant's contentions set out above. We conclude that the result reached by the Court of Appeals, its reasoning, and the legal principles enunciated by it are correct and adopt that opinion as our own.

The decision of the Court of Appeals is affirmed.

STATE OF NORTH CAROLINA v. JIMMY MUSSELWHITE

No. 153A81

(Filed 3 March 1982)

APPEAL from a decision of the Court of Appeals finding no error in the judgment entered by *Battle, J.*, at the 27 October 1980 Criminal Session of ROBESON Superior Court. The Court of Appeals' opinion, 54 N.C. App. 68, --- S.E. 2d --- (1981), is by *Judge Robert M. Martin* with *Judge Harry C. Martin* concurring. *Judge Becton* dissented and defendant appealed to this court pursuant to G.S. 7A-30(2).

Defendant was convicted of the offense of discharging a firearm into an occupied dwelling in violation of G.S. 14-34.1. The trial judge entered judgment imposing a prison sentence of not less than three nor more than five years.

Attorney General Rufus L. Edmisten, by Associate Attorney Walter M. Smith and Assistant Attorney General Reginald L. Watkins, for the State.

Adam Stein, Appellate Defender, and James H. Gold, Assistant Appellate Defender, for defendant.

PER CURIAM.

Defendant contends that the Court of Appeals erred in holding (1) that defendant was not entitled to a jury instruction on self-defense, and (2) that the trial court adequately explained the principles of acting in concert as they applied to the evidence in this case.

We have carefully reviewed the opinion of the Court of Appeals and the briefs and authorities relating to defendant's contentions. We conclude that the result reached by the Court of Appeals, its reasoning, and the legal principles enunciated by it are correct and adopt that opinion as our own.

The decision of the Court of Appeals is

Affirmed.

CULLEN WALSTON, EMPLOYEE, PLAINTIFF v. BURLINGTON INDUSTRIES, EMPLOYER AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 116A81

(Filed 8 March 1982)

THIS cause is before us upon plaintiff's petition to rehear and reconsider the decision of this Court rendered in this case on 12 January 1982.

The petition to rehear is allowed for the limited purpose of entering this order in the cause:

Plaintiff contends that the following statement contained in the opinion filed on 12 January 1982 is erroneous:

"Disability caused by and resulting from a disease is compensable when, and only when, the disease is an occupational disease, or is aggravated or accelerated by an occupational disease."

Plaintiff's contention has merit. The statement is hereby corrected to read as follows:

"Disability caused by and resulting from a disease is compensable when, and only when, the disease is an occupational disease, or is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment."

This order will be printed in the official reports of decisions of this Court.

Done by the Court in Conference, this 8th day of March 1982.

MITCHELL, J.
For the Court

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

CHESHIRE v. POWER & LIGHT CO.

No. 154 PC.

Case below: 54 N.C. App. 467.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 March 1982.

CLARK v. CLARK

No. 24 P 82.

Case below: 55 N.C. App. 267.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 March 1982.

COMR. OF INSURANCE v. RATE BUREAU

No. 159 PC.

Case below: 54 N.C. App. 601.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 March 1982. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 3 March 1982.

ELEC-TROL, INC. v. CONTRACTORS, INC.

No. 170 PC.

Case below: 54 N.C. App. 626.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 March 1982.

EPTING-BALLENGER v. BENTON

No. 151 PC.

Case below: 54 N.C. App. 693.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 March 1982.

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

GODLEY v. COUNTY OF PITT

No. 140 PC.

Now No. 87 PA 82.

Case below: 54 N.C. App. 324.

Petition by defendants (Town of Winterville and Great American Insurance) for discretionary review under G.S. 7A-31 allowed 3 March 1982.

GRAHAM v. CITY OF RALEIGH

No. 28 P 82.

Case below: 55 N.C. App. 107.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 3 March 1982.

GREESON v. BYRD

No. 172 PC.

Case below: 54 N.C. App. 681.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 March 1982.

HARRINGTON MFG. v. LOGAN TONTZ CO.

No. 171 PC.

Case below: 54 N.C. App. 693.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982.

HOFFMAN v. TRUCK LINES, INC.

No. 148 PC.

Now No. 89 PA 82.

Case below: 54 N.C. App. 643.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 3 March 1982.

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

IN RE FORECLOSURE OF DEED OF TRUST

No. 5 P 82.

Case below: 55 N.C. App. 68.

Petition by petitioners for discretionary review under G.S. 7A-31 denied 3 March 1982.

IN RE FORECLOSURE OF DEED OF TRUST

No. 4 P 82.

Case below: 55 N.C. App. 132.

Petition by petitioners for discretionary review under G.S. 7A-31 denied 3 March 1982.

KIDDIE KORNER v. BOARD OF EDUCATION

No. 34 P 82.

Case below: 55 N.C. App. 134.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 3 March 1982. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 3 March 1982.

LACKEY v. DEPT. OF HUMAN RESOURCES

No. 147 PC.

Now No. 88 PA 82.

Case below: 54 N.C. App. 57.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 3 March 1982.

LENZ v. RIDGEWOOD ASSOCIATES

No. 35 P 82.

Case below: 55 N.C. App. 115.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 March 1982.

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

LESSLIE v. CAROLINAS CORP.

No. 31 P 82.

Case below: 55 N.C. App. 267.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982.

McCALL v. HARRIS

No. 54 P 82.

Case below: 55 N.C. App. 390.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 March 1982.

McKEE v. SPINNING COMPANY

No. 168 PC.

Case below: 54 N.C. App. 558.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 March 1982.

McLEAN v. SALE

No. 181 PC.

Case below: 54 N.C. App. 538.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 3 March 1982. Cross petition by plaintiff for writ of certiorari on the issue of punitive damage denied 3 March 1982.

MOORE v. INSURANCE CO.

No. 160 PC.

Case below: 54 N.C. App. 669.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 March 1982.

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

NATIONWIDE INSURANCE CO. v. TAYLOR

No. 186 PC.

Case below: 55 N.C. App. 76.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 March 1982.

N.C. EX REL. v. RATE BUREAU

No. 65 P 82.

Case below: 55 N.C. App. --- (8110INS327).

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 March 1982.

PROPERTY OWNERS ASSOC. v. CURRAN

No. 36 P 82.

Case below: 55 N.C. App. 199.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 March 1982.

PUBLISHING CO. v. HOSPITAL SYSTEM, INC.

No. 162 PC.

Case below: 55 N.C. App. 1.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982.

SMITH v. McRARY

No. 180 PC.

Now No. 91 PA 82.

Case below: 56 N.C. App. 634.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 3 March 1982.

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

STATE v. ADAMS

No. 20 P 82.

Case below: 55 N.C. App. 267.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 March 1982.

STATE v. BEAN

No. 182 PC.

Case below: 55 N.C. App. 247.

Petition by State for discretionary review under G.S. 7A-31 denied 3 March 1982.

STATE v. BRANCH

No. 37 PA 82.

Case below: 54 N.C. App. 693.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 3 March 1982.

STATE v. CARVER

No. 117 PC.

Case below: 54 N.C. App. 365.

Petition by defendant Carver for discretionary review under G.S. 7A-31 denied 3 March 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 March 1982.

STATE v. CONARD

No. 11 P 82.

Case below: 55 N.C. App. 63.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 March 1982.

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

STATE v. DAVIS

No. 178 PC.

Case below: 54 N.C. App. 596.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982.

STATE v. DOVE

No. 161 PC.

Case below: 54 N.C. App. 692.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982.

STATE v. FAULKNER

No. 179 PC.

Case below: 55 N.C. App. 267.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 March 1982.

STATE v. GREEN

No. 13 A 82.

Case below: 55 N.C. App. 255.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 March 1982.

STATE v. GRIMMETT

No. 175 PC.

Case below: 54 N.C. App. 494.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 March 1982.

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

STATE v. HAWLEY

No. 142 PC.

Case below: 54 N.C. App. 293.

Petition by defendants Hawley and Cook for discretionary review under G.S. 7A-31 denied 3 March 1982.

STATE v. HOWARD

No. 80 P 82.

Case below: 56 N.C. App. --- (8120SC842).

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 March 1982.

STATE v. LEAK

No. 40 PA 82.

Case below: 55 N.C. App. 481.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 3 March 1982.

STATE V. McLEAN & McFAYDEN

No. 17 P 82.

Case below: 54 N.C. App. 191.

Application by defendants for further review denied 3 March 1982.

STATE v. McNEIL

No. 180 A 81.

Case below: 55 N.C. App. 132.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 March 1982.

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

STATE v. REID

No. 16 P 82.

Case below: 55 N.C. App. 72.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982.

STATE v. ROTENBERRY

No. 41 P 82.

Case below: 54 N.C. App. 504.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 3 March 1982.

STATE v. SCOTT & SELLERS

No. 173 PC.

Case below: 55 N.C. App. 268.

Petition by defendant Sellers for discretionary review under G.S. 7A-31 denied 3 March 1982.

STATE v. SHELTON

No. 64 PC.

Case below: 53 N.C. App. 632.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 March 1982.

STATE v. STEBBINS

No. 176 PC.

Case below: 55 N.C. App. 268.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982.

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

STATE v. SURLES

No. 27 P 82.

Case below: 55 N.C. App. 179.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 March 1982.

STATE v. WADE

No. 14 A 82.

Case below: 55 N.C. App. 258.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 March 1982.

STILLEY v. AUTOMOBILE ENTERPRISES

No. 184 PC.

Case below: 55 N.C. App. 33.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 March 1982.

TEACHY v. COBLE DAIRIES, INC.

No. 174 PC.

Now No. 90 PA 82.

Case below: 54 N.C. App. 688.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 3 March 1982.

WACHOVIA BANK v. LIVENGOOD

No. 115 PC.

Now No. 86 PA 82.

Case below: 54 N.C. App. 198.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 3 March 1982.

STATE OF NORTH CAROLINA v. LARRY WAYNE POOLE

No. 48A81

(Filed 30 March 1982)

1. **Constitutional Law § 46— motion to remove counsel—duty of trial court**

The trial court's sole obligation when faced with a request that counsel be withdrawn is to make sufficient inquiry into defendant's reasons to the extent necessary to determine whether defendant will receive effective assistance of counsel.

2. **Constitutional Law § 46— motion to remove appointed counsel—denial by trial court—sufficiency of court's inquiry**

In an armed robbery case in which defendant moved to dismiss his court-appointed attorney on the grounds that the attorney was inexperienced, defendant was able to employ his own attorney, and there was a conflict between defendant and his attorney because the attorney had indicated he would withdraw if defendant took the witness stand, the trial court adequately inquired into the reasons for defendant's dissatisfaction with his attorney and properly concluded that defendant was unable to employ counsel of his own choosing, that no conflict existed between defendant and his attorney which would render the attorney's representation ineffective, and that the attorney could provide defendant with the effective assistance of counsel.

3. **Criminal Law § 91.4— denial of continuance to obtain new counsel**

The trial court did not err in the denial of a continuance to a defendant who was represented by court-appointed counsel so that defendant might obtain counsel of his own choosing where the trial court properly concluded that defendant was in no financial position to employ counsel, defendant made an insufficient showing of necessity for substitution of new counsel, and defendant failed to show prejudice because of the representation he received from his appointed counsel.

4. **Judges § 5— denial of motion to recuse—failure to have motion considered by another judge**

The trial court in an armed robbery case did not err in refusing to recuse itself upon motion of the defendant or in failing to have the motion to recuse considered by another judge since (1) the motion was not in writing, accompanied by supporting affidavits and timely filed as required by G.S. 15A-1223(c) and (d), and (2) defendant's unsupported assertion that the trial judge had made remarks out of his presence did not demonstrate "sufficient force" to require that findings of fact be made.

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

The constitutional and statutory rights of an indigent defendant charged with armed robbery were not violated by the trial court's denial of his pretrial motion for funds to hire an investigator to locate and interview the witnesses since the determination of the names and locations of the key witnesses should

have been little problem for any attorney, and defendant failed to suggest any witnesses or evidence that a private investigator could have reasonably expected to discover.

6. Criminal Law § 114.3— instruction—no expression of opinion

The trial judge did not express an opinion in violation of G.S. 15A-1232 when he referred to "the taker, that is, the defendant" while defining armed robbery where it is clear that the trial judge did not convey to the jury that he felt defendant was the taker when the charge is read as a whole.

7. Criminal Law § 134.2— sentencing—right of allocution

While it may be the better practice for the trial court specifically to inquire if the defendant wishes to speak prior to sentencing, G.S. 15A-1334(b) does not command this practice.

BEFORE *Rousseau, Judge,* at the 23 February 1981 Criminal Session of Superior Court, GUILFORD County.

Defendant was tried on indictments, proper in form, for three armed robberies. He was found guilty by a jury and received two concurrent life sentences and a consecutive sentence of forty years imprisonment. Defendant appeals the life sentences to this Court as a matter of right. We allowed his motion to bypass the Court of Appeals for the forty-year sentence on 7 October 1981.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Harry H. Harkins, Jr., for the State.

Adam Stein, Appellate Defender, and Malcolm R. Hunter, Jr., Assistant Public Defender, for the defendant.

CARLTON, Justice.

I

In light of the contentions presented by defendant on this appeal, an extensive recitation of the evidence is unnecessary. Briefly, evidence for the State tended to show that at approximately 11:20 p.m. on 17 December 1980 defendant and an accomplice accosted Delores Greeson, the manager of the Steak and Ale Restaurant on Teague Street in Greensboro, as she was entering the back door of the restaurant. Defendant and his accomplice were armed. Defendant, with pistol in hand, took Greeson into the main area of the restaurant and, using profane and vulgar language, announced to the approximately thirteen persons, including employees and customers present, that, "This is a

hold-up." Michael Holden, a district manager for Steak and Ale, was able to slip out the front door. He ran to a nearby house and called the police for assistance. Meanwhile, defendant ordered some of the persons in the restaurant to get down on the floor and to give him their money. Defendant's accomplice held a gun on the persons on the floor. Defendant took Greeson to the cash register and told her to open the safe. She gave him money from the cash register. Roger Hamill, a customer in the restaurant, was forced to give up his wallet. Another customer, Clifton Kimball, was robbed of approximately $600. Defendant then ordered all of the occupants of the restaurant into the ladies' rest room and told them that he was going to remove the meat from the freezer and that they should remain in the rest room at least twenty minutes; that if he heard any sound out of them he would "blow [their] brains out."

As a result of Holden's call, four police cars responded and sealed off the ends of the street which ran by the restaurant. Officers Deich and Allen observed a car coming from the front of the restaurant with its lights out and proceeding in their direction on Teague Street. They turned their headlights and blue lights on and the approaching car immediately was put in reverse and began to proceed backwards at a high rate of speed. Officers Deich and Allen pursued and the car was forced to a stop near the Steak and Ale Restaurant. Defendant and his accomplice were ordered out of the car and over $1400 which had been taken from Greeson and Kimball was recovered. Hamill's wallet, containing $222, was also found. A search of the car yielded two guns, one a .32 caliber long weapon and the other a .22 caliber revolver.

Defendant offered no evidence and was found guilty of all three charges of armed robbery. He received the sentences set out above and appeals his convictions to this Court. Other facts necessary to an understanding of this case are set out in the opinion below.

II

Defendant first assigns error to the trial court's alleged failure to resolve the issues raised by defendant's pretrial motion to dismiss his court-appointed counsel, Wendell H. Sawyer. Defendant contends that the trial court's inquiry into the reasons behind defendant's motion was insufficient to allow it to conclude

that Sawyer could provide effective assistance of counsel and that no conflict existed between defendant and Sawyer which would render Sawyer's representation ineffective. In order to answer these arguments, it is necessary summarily to review the colloquy which followed defendant's request that Sawyer be dismissed and that defendant be allowed to hire private counsel or represent himself.

On the morning of 24 February 1981, when the case was called for trial, Sawyer, defendant's trial counsel, informed Judge Rousseau that his client had just told him that he, defendant, wanted another lawyer. Judge Rousseau then began questioning defendant about the reasons for his dissatisfaction with Sawyer. Defendant's reasons were basically three:

(1) that Sawyer was too inexperienced, having practiced law only since the summer;

(2) defendant obtained some money with which he planned to hire private counsel and had talked with a lawyer about representing him; and

(3) defendant and Sawyer had a conflict of interest because Sawyer had indicated that he would withdraw from the case if defendant took the witness stand.

In addition to requesting that his court-appointed counsel be dismissed, defendant made clear that if his motion were granted he would have to be granted a continuance in order to prepare for trial.

[1] Defendant contends that when faced with reasons such as these for requesting dismissal of counsel, the trial judge should conduct extensive inquiry and make findings of fact. The established law, however, is that the trial judge must satisfy himself only that the "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." *State v. Thacker*, 301 N.C. 348, 353, 271 S.E. 2d 252, 256 (1980). "[T]he obligation of the court [is] 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." *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E. 2d 788, 797 (1981). Once it

becomes apparent that the assistance of counsel has not been rendered ineffective, the trial judge is not required to delve any further into the alleged conflict. The trial court's sole obligation when faced with a request that counsel be withdrawn is to make sufficient inquiry into defendant's reasons to the extent necessary to determine whether defendant will receive effective assistance of counsel.

[2] The inquiry into defendant's reasons for wanting Sawyer dismissed, as set forth by the record, reveals that Judge Rousseau adequately inquired into the reasons for defendant's dissatisfaction and properly concluded that Sawyer could provide effective assistance of counsel. We will review the reasons given by defendant to dismiss Sawyer *seriatim* and show that none was sufficiently detrimental to the attorney's ability or to the attorney-client relationship to justify dismissal of court-appointed counsel.

Defendant told Judge Rousseau, "Your Honor, my attorney has been practicing law since this summer. We have no defense whatsoever. I don't feel that he is really capable or able to do anything about the charges. I don't think he has had enough experience." Mere inexperience is not sufficient in itself to render the assistance of counsel ineffective. *E.g., United States ex rel. Williams v. Twomey,* 510 F. 2d 634 (7th Cir.), *cert. denied,* 423 U.S. 876 (1975). As stated in *Twomey:*

> [T]he mere inexperience of trial counsel is not in itself enough to establish want of effective assistance of counsel.
>
> Necessarily, every lawyer must begin his career without experience. His first case is not inevitably so ill-prepared or poorly presented as to justify a finding of his incompetence. Portia without experience was a remarkably successful representative of Antonio. In estimating counsel's performance, the issue is not how much experience he has had, but how well he acted.

Id. at 638-39.

While the record discloses no specific questions from the trial court to defendant's counsel as to the amount of time he had spent in the trial court since receiving his law degree, we think the lengthy colloquy was clearly sufficient to satisfy the trial

court that Sawyer was competent to proceed in defendant's behalf. The very manner in which defense counsel handled this portion of the proceedings along with other pretrial proceedings already handled was sufficient to give the trial court sufficient indication of defense counsel's ability. The trial court was in a position far superior to ours to observe Sawyer's abilities and we are not prone to find an abuse of the trial court's discretion when nothing more than the defendant's naked assertion that his trial counsel was inexperienced is placed before us.

Moreover, a review of the entire record before us discloses that defendant had the benefit of a most able member of our bar. Every witness who testified for the State was thoroughly cross-examined and defense counsel successfully challenged the State's attempt to have different items admitted into evidence. He asked for and received voir dire hearings at every opportunity to challenge the State's evidence and was successful in excluding an eyewitness identification and certain damaging statements made by defendant to an officer. Numerous pretrial and post-trial motions and an articulate plea on defendant's behalf at the sentencing hearing indicate representation by most competent counsel. Indeed, we do not believe defendant could have been more ably represented, especially in light of the overwhelming evidence of guilt against him.

Defendant's second reason for wanting his counsel dismissed was that he had managed to get some money and had spoken with a private attorney about representing him. With regard to this reason, we also find that the trial court's inquiry was more than adequate to ensure that defendant would receive effective assistance. The colloquy discloses that defendant first told the trial court that "I have managed to get some money, and I have been in touch with Mr. Calhoun who told me just now that he would come and talk to me. And I spoke with him yesterday." Later, defendant's statements were such as to lead the trial court to disbelieve any claim that defendant was in a position to retain counsel of his own choosing. At a later point, defendant stated to the court, "I am indigent." Later, defendant stated, "I do want to be represented by counsel, and I am entitled to counsel by the State of North Carolina, as an indigent *because I have no money.*" (Emphasis added.) From the foregoing, the trial court clearly had sufficient information before it to determine that defendant's

assertion that he was able to employ counsel of his own choosing was nothing more than a spurious attempt to have his case continued. We note that defendant continues to be represented by appointed counsel on this appeal.

Defendant also contends that the trial court failed to make sufficient inquiry to determine whether a conflict of interest existed between defendant and his lawyer in that defendant wanted to testify and Mr. Sawyer had told him that he would withdraw from the case if the defendant did testify. This contention is clearly without merit. While Mr. Sawyer did initially state to the trial court that he might have to withdraw for ethical reasons without stating what the ethical reasons were, he subsequently provided Judge Rousseau with a copy of *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976). *Robinson* involved a dilemma faced by a defense attorney in a situation almost identical to that disclosed by the record before us. In *Robinson*, the defendant indicated to his trial counsel that he wished to take the witness stand in his own behalf and that he intended to call a witness and elicit testimony which would be perjured. The trial court denied defendant's motion to discharge his counsel because of the trial counsel's refusal to follow the defendant's suggested trial tactics. In affirming, this Court stated:

> A mere disagreement between the defendant and his court-appointed counsel as to trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney. Trial counsel, whether court-appointed or privately employed, is not the mere lackey or "mouthpiece" of his client. He is in charge of and has the responsibility for the conduct of the trial, including the selection of witnesses to be called to the stand on behalf of his client and the interrogation of them. He is an officer of the court and owes duties to it as well as to his client. In this there is no conflict of interest. Clearly, the client has no right to insist that counsel assist him by presenting in evidence testimony which counsel knows, or reasonably believes, constitutes perjury. This was the sole basis for the discord between the defendant and his court-appointed trial counsel, Mr. Burns. Mr. Burns' refusal to be a party to the introduction of what he reasonably believed to be perjured testimony and his

> in bringing this to the attention of the trial court was commendable, not basis for his removal as a disloyal counsel.
>
> The existence of such a conflict of wills between the defendant and his court-appointed counsel did not require the trial court to replace such counsel with another attorney. Under these circumstances, the appointment of another attorney rested in the sound discretion of the trial court and we find in this record no indication of abuse of that discretion. See: *United States v. Young*, 482 F. 2d 993 (5th Cir. 1973). There was, therefore, no error in the denial of the defendant's motion for the appointment of another counsel.

Id. at 66, 224 S.E. 2d at 179-80.

Clearly, the trial court's perusal of *Robinson* was sufficient inquiry into the defendant's contention concerning defendant's alleged conflict of interest with his attorney. With the facts in *Robinson* so similar to those involved in the present case, any further inquiry by the trial court into this particular matter would obviously have been useless.

We hold, therefore, that the trial court made adequate inquiry into all the reasons given by defendant for wanting substitute counsel. As we stated in *Thacker*,

> While some situations may indeed require an in-depth inquiry and detailed findings of fact, the conflict in the case *sub judice* is clearly not one of them. The trial court made sufficient inquiry to learn that the conflict here was not such as to render the public defender's assistance ineffective. Having so learned, his failure to inquire further was entirely proper.

301 N.C. at 353, 271 S.E. 2d at 256.

Finally, under this first question presented for review on appeal, defendant contends that the trial court erred by failing "after proper inquiry by the court and specific requests by the defendant, to allow the defendant to represent himself." There is no basis for this contention. While defendant at one point during the lengthy colloquy with the trial court indicated that he could defend himself, it is clear from a reading of the colloquy that defendant really wanted the trial court to grant him a continuance so that he could seek counsel to be privately employed.

These statements made by defendant to the trial court best reveal his true intentions:

> You're telling me that I am to represent myself, although I am not an attorney. I don't even have a high school education. You, as a Judge, say that I have to defend myself.
>
> . . . .
>
> . . . I am entitled to counsel by the State of North Carolina, as an indigent because I have no money.
>
> . . . I do not have the counsel. And I definitely do not have the education to represent myself.

We also note that the trial court on at least three occasions advised the defendant that he had the right to represent himself. Our review of the record discloses that the closest defendant came to requesting that he represent himself was in the following statement: "If I had time to work on the case and you will grant me a continuance of thirty days, then I will represent myself in the case." Following this statement, the trial court instructed Mr. Sawyer to be prepared to represent defendant for trial at 2:00 p.m. that afternoon. We do not agree with defendant that his latter statement constitutes a specific request that he be allowed to represent himself. Read contextually, defendant's plea was obviously for a continuance in order that he might make what the trial court had properly concluded would be futile efforts to retain counsel of his own. The thrust of defendant's statements throughout this colloquy indicate clearly that defendant not only did not wish to represent himself but realized that he was unqualified to do so.

State v. Gray, 292 N.C. 270, 233 S.E. 2d 905 (1977), involved facts strikingly similar to those disclosed by this record. In *Gray*, both defendant and his counsel moved on the morning of trial that counsel be withdrawn from the case. The trial court denied both motions. The grounds given by defendant in support of his motion were that the attorney had, on several occasions, urged defendant to plead guilty to first degree burglary, and had "misled" defendant, his wife and mother, and had "put distrust" in his witnesses' hearts. Defendant also complained that he and his attorney had not been able to communicate because the attorney had come

to see him infrequently and only to get him to plead guilty. The trial court questioned defendant thoroughly and also questioned defense counsel to determine his qualifications. This Court, speaking through Justice Exum, stated:

> It is clear that defendant had no reasonable objection to his attorney's conduct or preparation of his case. His complaints are general and vague, and the emphasis of his objections shifted during the hearing. His counsel, as appears from the record, was well qualified and did, in fact, represent defendant in an exemplary fashion. Defendant's assertion that he wished to employ his own counsel, made as it was, on the day trial was to begin . . ., was no ground for the dismissal of his court-appointed counsel. Defendant did not claim he had the funds to employ counsel. There is not a scintilla of evidence indicating defendant's intention or desire to represent himself; indeed, he seems to have been more than usually aware of the critical role played by counsel in criminal trials.
>
> While 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. *See State v. Robinson, supra*, [290 N.C.] at 66-67, 224 S.E. 2d at 179-80. . . . To have allowed the motions to remove counsel would have significantly delayed defendant's trial without the slightest demonstration of any potential benefit to his case.

Id. at 281-82, 233 S.E. 2d at 913. So it is here. The trial court made more than adequate inquiry into defendant's complaints. The trial court, as noted above, had ample information before it to conclude that defendant had no real basis for wanting his counsel withdrawn. Defendant's counsel was well-qualified and the record discloses that he represented defendant in an exemplary fashion. There is no real evidence to indicate that defendant wanted to represent himself or that he had sufficient funds to employ counsel of his own choosing. He was clearly aware of the critical role played by counsel in criminal trials. Here, as in *Gray*, there is absolutely no indication that a delay in defendant's trial would have resulted in the slightest benefit to his case.

III

[3] Defendant next contends that the trial court erred by refusing to allow him a reasonable opportunity to retain a private attorney. We find no merit to this contention.

It is well-established that a motion to continue is ordinarily addressed to the trial judge's sound discretion and his ruling thereon will not be disturbed except upon a showing of abuse of discretion. *E.g., State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970). However, when a motion to continue is based on a constitutional right, the question presented is a reviewable question of law. *Id.; accord, State v. Smathers*, 287 N.C. 226, 214 S.E. 2d 112 (1975). Both the state and federal constitutions secure to every man the right to be defended by counsel in all criminal prosecutions. N.C. Const. art. I, § 23; U.S. Const. amend's VI & XIV.

Relying on these principles, defendant contends that he demonstrated compelling reasons to the trial court for the continuance of his case in order that he might retain counsel of his own choosing. We disagree. As noted in the preceding section of this opinion, we think the trial court properly concluded from its lengthy inquiry that defendant was in no financial position to employ counsel of his own choosing. Indeed, a reading of the colloquy compels the conclusion that defendant was requesting that the court appoint substitute counsel or simply continue the case for whatever reason defendant felt might be beneficial to him.

A defendant's right to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same. *Lee v. United States*, 235 F. 2d 219 (D.C. Cir. 1956). It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusors and witnesses against him that an accused and his counsel shall have reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case. *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977). After reviewing other factors revealed by the record before us we determine that defendant has not been denied any constitutional guarantees in the trial court's failure to continue his case. We note that although the in-

dictments under which defendant was convicted were returned on 19 January 1981, he was first indicted on 5 January 1981 under the name which he had given to the officers at the time of his arrest. In light of his misrepresentation to the police, defendant cannot complain that he had "been indicted only about thirty days prior to trial." Defendant was arrested on 18 December 1980 and received notice of the charges against him when he was originally indicted on 5 January 1981. Additionally, defendant had previously been granted a continuance of his trial. The trial was originally calendared for 3 February 1981, and, when it was called, was continued at defendant's request to 23 February 1981. His argument, therefore, is based on a denial of his motion for a *second* continuance of his trial.

In *United States v. Hampton*, 457 F. 2d 299, 301-02 (7th Cir.), *cert. denied*, 409 U.S. 856 (1972), the seventh circuit stated:

> [T]he trial court was justified in denying the motion to withdraw when defendant was not prepared to substitute new counsel, and further, that it was proper for the trial judge to contest the bona fides of defendant's last-minute request for a delay in the trial by requiring him to retain new counsel on the same day. . . . On the record before us, however, . . . the trial court was justified in ruling that the prompt administration of justice outweighed defendant's meager showing of necessity for substitution of a hypothetical new attorney. On appeal, defendant has again been represented by court-appointed counsel. He has failed to put forward any indicia of prejudice because of his appointed representation. Therefore, we feel no justifiable basis exists for a substitution of his attorney on the day of his trial. Without any such justifiable basis, there is no constitutional right under the Sixth Amendment to a continuance to enable defendant to seek new counsel on the day of the trial.

(Footnote omitted.) These statements apply with equal force to the factual circumstances now before us. Defendant's meager showing of necessity for substitution of new counsel and a complete lack of prejudice because of defendant's appointed representation fully support the trial court's conclusion that a continuance under the circumstances was not justified.

IV

[4] Defendant next contends that the trial court erred by refusing to recuse itself on motion of the defendant and by failing to have the motion to recuse considered by another judge.

During the lengthy colloquy with defendant prior to trial, the trial judge indicated at one point that he would not rule favorably on defendant's request for substitute counsel. Defendant then stated, "Well, then I move that as a Judge you're biased against us. You have made remarks out of my presence. And I move that you should be taken off the bench on this trial." The trial court inquired as to what remarks it had made and the defendant replied,

> You made the statement the other day during a motion, I think, that you were told something about a knife incident, and you made a statement, something about you were not going to protect criminals in the dark. I haven't been to trial, and I think under due process I am not guilty as of now. I think that is enough.

G.S. 15A-1223(b) (1978) provides in pertinent part:

> (b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:
>
> (1) Prejudiced against the moving party or in favor of the adverse party; or
>
> . . . .
>
> (4) For any other reason unable to perform the duties required of him in an impartial manner.

Moreover, it is well-established in this jurisdiction that a trial judge should either recuse himself or refer a recusal motion to another judge if there is "sufficient force in the allegations contained in defendant's motion to proceed to find facts," *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E. 2d 375, 380 (1976), or if "a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner," *McClendon v. Clinard*, 38 N.C. App. 353, 356, 247 S.E. 2d 783, 785 (1978); *accord, State v. Hill*, 45 N.C. App. 136, 141, 263 S.E. 2d 14, 17, *cert. denied*, 300 N.C. 377, 267 S.E. 2d 680 (1980).

We find no merit to defendant's contention that the trial judge either should have disqualified himself or should have referred the motion for recusal to another judge. We note first that G.S. 15A-1223(d) requires that a motion to disqualify a judge be filed no less than five days before the time the case is called for trial unless "good cause is shown for failure to file within that time." The motion must also be in writing and accompanied by supporting affidavits. G.S. § 15A-1223(c) (1978). Neither requirement was met here and we find no good cause to excuse the failure to comply.

We also do not find "sufficient force in the allegations" made by defendant to require that Judge Rousseau either should have disqualified himself or should have referred the motion to another trial judge. It is clear from the record before us that defendant's motion was a hasty response to a ruling by the trial court with which he was dissatisfied. Defendant's unsupported assertion that a trial judge had made remarks out of his presence does not demonstrate "sufficient force" in defendant's allegations. The record on appeal contains no remarks made by the trial court out of defendant's presence. Moreover, the trial judge indicated that he had made no such comment. We do not believe that "a reasonable man knowing all of the circumstances would have doubt about the judge's ability to rule on the motion to recuse in an impartial manner." This assignment of error is overruled.

V

[5] Defendant next contends that the trial court erred by denying his pretrial motion for funds to hire an investigator. In support of his motion, defendant alleged that there were approximately fourteen witnesses to the alleged crimes, that the State refused to reveal the names and addresses of the witnesses to the crimes, that counsel for defendant was not an expert in criminal investigation, that counsel for defendant did not have the time to find and interview the witnesses and that locating and interviewing the witnesses was essential to "providing the defendant with an adequate defense."

The rules applicable to this contention were well-stated by Justice Copeland, speaking for a unanimous Court, in *State v. Parton*:

> 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. (Citations omitted.) 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. (Citations omitted.) 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. (Citations omitted.) 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*, [291 N.C. 73, 229 S.E. 2d 562 (1976)]. Likewise, this Court has interpreted our state statutes, G.S. 7A-450(b) and 7A-454, 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 or that without such help it is probable that defendant will not receive a fair trial." (Citations omitted.) 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. (Citations omitted.) Thus, there is no constitutional or statutory requirement that the State provide an indigent defendant with investigative assistance merely upon the defendant's request.

303 N.C. 55, 66-67, 277 S.E. 2d 410, 418-19 (1981) (footnote omitted). Here, we find that defendant failed to demonstrate such a necessity for the assistance of an investigator that to deny his request would amount to a violation of his constitutional or

statutory rights. The indictments returned against the defendant gave the names of those persons who would undoubtedly be testifying against him. The arrest warrants indicated the names of the arresting officers. Determination of the names and location of the key witnesses to these crimes should have been little problem for any attorney. While defendant complains that the State refused to disclose its list of witnesses to him, there exists no statutory or common law right to discover the names and addresses of State's witnesses. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). Defendant fails to suggest any witnesses or evidence that a private investigator could have been reasonably expected to discover. In light of the overwhelming evidence of guilt of this defendant, we find that there was "no reasonable likelihood that an investigator could discover evidence favorable to the defendant." As Justice Lake stated in *State v. Montgomery*:

> Nothing whatever in the record, suggests the existence of any person who might be able or willing to testify that the alleged offense did not occur, or that it was perpetrated by someone other than the defendant. Consequently, there is nothing to indicate that the employment of an investigator would have been of any assistance whatever to counsel appointed by the court to represent the defendant in this matter.

291 N.C. 91, 97, 229 S.E. 2d 572, 577 (1976).

This assignment of error is overruled.

VI

[6] Defendant next contends that the trial court erred by expressing an opinion to the jury, in violation of G.S. 15A-1232, indicating that it felt that defendant was the robber. We find the trial court's mere slip of the tongue to be without any conceivable prejudicial error.

While defining armed robbery, the trial court stated,

> Now, as I have said, there are three cases, members of the jury, wherein the defendant has been accused of robbery with a firearm or armed robbery, which is the taking and carrying away the personal property of another from that person's person or in that person's presence, without his con-

sent, by endangering or threatening the person's life with a firearm, *the taker, that is, the defendant* knowing that he was not entitled to take the property and intending at the time to deprive the owner of its use permanently, or someone else of its use permanently.

(Emphasis added.) Defendant contends that the underlined portion of the charge indicates that the trial judge stated as a fact to the jury that defendant *was* the taker and therefore expressed an opinion in violation of our statutes.

It is well established in this jurisdiction that a charge is to be construed as a whole and isolated portions of a charge will not be held prejudicial where the charge as a whole is correct and free from objection. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). "It is not sufficient to show that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression may be inferred." *State v. Gatling*, 275 N.C. 625, 633, 170 S.E. 2d 593, 598 (1969). In *Slade*, the trial court in its charge to the jury referred to one defendant as an "aider and abettor" and another as a "principal." This Court found no error, citing the rules stated above.

Here, reading the charge as a whole, it is clear that the trial judge did not convey to the jury that he felt defendant was the taker. Indeed, in the very sentence in which the trial judge committed this *lapsus linguae*, the trial court stated that defendant had "been accused" of the three charges of armed robbery. Moreover, the trial court gave, at the appropriate place in its instructions, the usual disclaimer that it had no opinion as to what the jury's verdict should be and that anything said by the trial court should not be considered by the jury as any expression of opinion.

This assignment of error is overruled.

VII

[7] Defendant finally contends that the trial court erred in sentencing him without first affording him an opportunity to make a statement pursuant to the provisions of G.S. 15A-1334(b). That statute provides in pertinent part that "the defendant at the [sentencing] hearing may make a statement in his own behalf."

Just prior to sentencing, the trial court stated, "Anything before I pass sentence?" Trial counsel then proceeded to appeal for defendant prior to imposition of sentence. The record reflects no attempt by defendant to make any additional statement. Defendant contends, however, that G.S. 15A-1334(b) codifies the common law right of allocution, which recognized that the court's failure to ask defendant if he had anything to say before sentence was imposed required reversal. Put another way, defendant contends it is mandatory under G.S. 15A-1334(b) that he be allowed to speak and that it is not sufficient that his counsel spoke on his behalf.

We find no support for the proposition of law argued by defendant. While it is true that the United States Supreme Court has held that Rule 32(a) of the Rules of Federal Criminal Procedure requires a district judge before imposing sentence to afford every convicted defendant an opportunity personally to speak in his own behalf, *Green v. United States*, 365 U.S. 301, 81 S.Ct. 653, 5 L.Ed. 2d 670 (1961), that same court has held that the failure of a trial court to ask defendant represented by counsel whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. "It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed. 2d 417, 421 (1962). No constitutional right being involved in the question before us, we turn to an interpretation of our own statute.

A clear distinction exists between the federal statute and G.S. 15A-1334(b): The federal statute requires the district court affirmatively to afford a defendant an opportunity to speak before sentencing while G.S. 15A-1334(b) provides simply that a defendant "may make a statement in his own behalf." Had our Legislature intended for our statute to impose the same requirement as the federal statute, we think it would have plainly said so. While it may be the better practice for the trial court specifically to inquire if the defendant wishes to speak prior to sentencing, our statute does not command this practice. *State v. Martin*, 53 N.C. App. 297, 280 S.E. 2d 775 (1981).

It should be noted that we are not dealing here with a situation in which defendant was affirmatively denied an opportunity to speak during the sentencing hearing. Nor is it suggested that in imposing sentence the trial court was either misinformed or uninformed as to any relevant circumstances. It appears from the record that trial counsel had been fully coaxed by defendant as to those matters defendant wanted brought to the trial court's attention. Indeed, there is no claim that defendant would have had anything at all to say if he had formally been invited to speak.

This assignment of error is overruled.

We have found no merit in any of the contentions presented to us by this defendant. Even had we done so, it is difficult to think that any prejudice could have resulted to this defendant in light of the overwhelming evidence of guilt against him. Numerous eyewitnesses recounted in detail the terroristic tactics used by this defendant in accomplishing these robberies, including threats against the lives of the innocent victims which were made in a vulgar, crude and callous manner, with total disregard for their lives and safety. Diligent police response to the call for help brought about defendant's apprehension as he was fleeing the scene of the crime. All monies stolen were then found in his pocket and pistols in his car. As the trial judge stated to trial counsel, "I don't know when I have heard a more open and shut case."

The record also reflects that defendant's attitude toward the trial court was impertinent and that he fully intended to halt the trial proceedings if at all possible. He frequently interrupted his counsel and constantly coaxed him into making statments unnecessary to these trial proceedings. We commend trial counsel and the trial court for exhibiting extraordinary patience with a defendant who was, as defendant's appellate counsel concedes, "admittedly contentious."

We think it not inappropriate to note that this defendant's constitutional rights have been protected at every stage of these proceedings. He has had the benefit of free and able counsel, both in the trial court and before this Court, at great cost to the taxpayers of North Carolina. We find that defendant had a fair trial free from prejudicial error.

No Error.

STATE OF NORTH CAROLINA v. MORRIS LEE SHAW

No. 5A81

(Filed 30 March 1982)

1. **Criminal Law § 82.2— physician-patient privilege does not extend to optometrists**

The statutorily created physician-patient privilege is limited to those authorized to practice medicine or surgery and does not apply to optometrists. Therefore, in a prosecution for arson, the trial court erred in excluding testimony by an optometrist concerning the eyesight of a prosecuting witness. G.S. 8-53.

2. **Arson § 1— dwelling of "another" element satisfied by showing of joint occupants, including defendant**

The common law arson requirement that the dwelling burned be that of "another" is satisfied by a showing that some other person or persons, together with defendant, were joint occupants of the same dwelling unit. Therefore, where defendant resided in a home with his wife, three children and his wife's father; the dwelling was rented by defendant's father-in-law; and, at the time of the fire, defendant had been forced at gunpoint to leave the house by his father-in-law, the requirement that the dwelling burned be that of "another" was satisfied.

3. **Arson § 5— failure to instruct on attempted arson proper**

In a prosecution for first degree arson, the trial judge properly declined to instruct on the lesser offense of attempted arson where there was positive testimony that some of the wooden parts of a dwelling were actually burned or charred, and where there was no evidence of an attempt to burn which failed. G.S. § 15-170.

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

APPEAL by defendant from judgment of *Godwin, J.* entered at the 8 December 1980 Criminal Session of Superior Court, ALAMANCE County, imposing a sentence of life imprisonment upon defendant's conviction of first degree arson.

Upon a plea of not guilty, defendant was tried on a bill of indictment, proper in form, charging him with willfully and maliciously burning the dwelling of Thomas Boswell which was occupied at the time of the burning, that being punishable by life imprisonment. G.S. § 14-58—subsequently amended effective 1 July 1981. The jury returned a verdict of guilty of arson as charged in the bill of indictment and defendant was sentenced to life

imprisonment. Defendant appealed. For error committed during the course of the trial, we reverse defendant's conviction and remand the case for a new trial.

Rufus L. Edmisten, Attorney General by Douglas A. Johnston, Assistant Attorney General and Lucien Capone III, for the State.

Adam Stein, Appellate Defender, by James H. Gold, Assistant Appellate Defender, for Defendant-Appellant.

MEYER, Justice.

I

[1] The basic question for review on this appeal is whether the physician-patient privilege against disclosure of confidential communications and information extends to optometrists. We conclude that it does not. Because of the trial judge's erroneous exclusion of testimony of the prosecuting witness's optometrist proffered by defendant, as privileged, defendant is entitled to a new trial.

The evidence in brief summary tended to show that on the late night and early morning of 22-23 September 1980 the defendant lived with his wife Glenda and three of her sister's children in the home of her father, Thomas Boswell, age 62. The home was a six-room wood frame single-family house rented by Mr. Boswell located at 645 Elizabeth Street in Burlington. While defendant had his personal possessions there, he stayed there sometimes and sometimes he did not. After the defendant and his wife retired to their bedroom on the night of 22 September, they became embroiled in a heated argument. The argument was so loud that Glenda's father, Mr. Boswell, was disturbed and went to their room, and finding them fighting on the bed, admonished them to be quiet so that he could sleep and so as not to disturb the neighbors. Boswell then went back to his bed, but in about five minutes Glenda started shouting again and continued to shout, asking her father to make the defendant leave her alone.

Mr. Boswell tried to ignore the shouting but finally got his single-barrel shotgun from beneath the head of his bed, went to Glenda's door and fired a shot into the floor. He then reloaded his

shotgun and threw Glenda's door open and told defendant to get out of the house. He then shut the door. While close to the door, he overheard defendant say to Glenda, "If I can't stay here, I'll fix this mother so can't nobody else stay here." He heard the front door slam and things got quiet. This occurred around midnight. About 12:30 a.m., the defendant came back and crept in through a window and was discovered in the kitchen. He came out of the kitchen with "one of these little box opener tricks with a blade on it" in his hand. Mr. Boswell, shotgun in hand, backed up and told defendant to "get out of here." After some discussion and further shouting, defendant sped away in his burgundy 1978 Thunderbird.

Mr. Boswell ordered one of the grandchildren to call the police and then went outside. He saw defendant's car come back up the street and park with its lights off in a church drive behind Boswell's home. About five minutes later defendant drove away with his lights off. Boswell, shotgun still in hand, then crept along the fence of the schoolhouse next door finally to a point about 36 to 40 feet from his back porch. He heard a neighbor's dog barking and saw someone at the porch strike a match which lit a gasoline trail that ran up on the back porch. Flames enveloped that area of the house. This was about 1:15 a.m. or a little before. Boswell testified that he could see the defendant there "just as plain as day" when defendant lit the fire. Defendant was facing him. Then defendant ran and disappeared into the darkness. Boswell testified that he was shocked to see defendant burning the house. Glenda and the children got out of the house. The police arrived. The whole back porch was in a blaze. Firemen arrived later. A one-gallon plastic container with gasoline in it was found at the scene. Other witnesses corroborated much of Boswell's testimony.

Boswell testified that he had no trouble with his vision in spite of being blind in his right eye. He wore glasses all the time and was wearing them at the time of the fire. He got them from Dr. Virgil Mewborn.

Burlington Police Officer John Gibson testified to the effect that from his home he saw a 1978 or 1979 Thunderbird pull into the church yard which adjoins Boswell's house with its lights off. The car door opened and the interior light came on. The occupant

of the car placed an object on the ground and drove away. The officer called headquarters and then investigated and found that the object was a one-gallon plastic container with an orange colored liquid in it that smelled like gasoline. He returned to his home and continued to watch it. He saw a black male walk to the container, pick it up, and walk off into the darkness. Within just two or three minutes, the fire began at Boswell's house. The container found at the fire scene was the one Officer Gibson saw in the church yard. The liquid in the container was subsequently analyzed and determined to be gasoline.

A Burlington Fire Department employee took samples of wood from the house and they were analyzed and found to have gasoline on them. There was evidence from several witnesses that wood on the porch and around the window had actually burned or was charred.

The defendant testified that he never threatened to burn the house, that he did not set the fire, had nothing to do with the incident, and was, in fact, some twenty or more miles away at the time of the fire. He also offered witnesses who corroborated his alibi evidence. The trial judge refused to allow the defendant to put on certain evidence concerning Boswell's eyesight by way of Boswell's optometrist as hereinafter set forth. The jury returned a verdict of guilty of arson in the first degree and defendant was sentenced to life imprisonment.

The defendant attempted to impeach Mr. Boswell's credibility through the testimony of Boswell's optometrist, Dr. Virgil Mewborn.[1] The pertinent part of the defendant's questioning of Dr. Mewborn, to which the State's objections were largely sustained, was as follows:

> Q. Dr. Mewborn, in connection with your practice of optometry, did you have occasion to see as a patient one Thomas Lee Boswell?
>
> COURT: Aren't you going to run into some confidentiality?

1. Dr. Mewborn, a licensed optometrist in North Carolina since 1967, testified that he never studied medicine.

MR. JOHNSON: There would be an objection interposed at the appropriate time if he asks a question leading to that, your Honor.

MR. MOSELEY: Well, your Honor, would you like to debate this issue then out of the presence of the jury?

COURT: No, sir, I don't see anything to debate.

Q. Dr. Mewborn, did you have occasion to examine Thomas Lee Boswell?

COURT: The OBJECTION has been interposed and is SUSTAINED.

A. Yes, I've seen him.

MR. JOHNSON: Move to strike the answer.

COURT: You will not consider the witness's testimony that he has examined Thomas Boswell.

MR. MOSELEY: May it please the Court I would like his testimony on the record.

COURT: You may at a subsequent time. If you have concluded your examination of this witness, you may get his answer to that question on the record.

I am familiar with the frames marked Defendant's Exhibit No. 2. Those frames are made by Swank Optical Company. It is a frame we use occasionally in our practice. I could not tell you if the lenses contained in those frames were prescribed by me or not. I can tell you what the prescription is. It is a hyperopic lens. It's a plus lens. It's approximately three diopters in power with a crook-top bifocal. These glasses correct farsightedness.

Q. In—layman's terms, I would ask how strong are the lenses?

A. Okay.

COURT: Can you say in layman's terms how strong or weak a lens is?

A. It's difficult, yes, sir.

COURT: How strong is strong.

A. Right. 20/20 vision is considered normal. These lenses would correct someone that had vision of approximately 20/200.

Q. All right. Do you know if Thomas Lee Boswell had vision in his left eye of 20/200?

MR. JOHNSON: OBJECTION.

COURT: The OBJECTION is SUSTAINED.

Q. Dr. Mewborn, I would ask you to assume these facts. I would ask you to assume that an individual sixty-two years of age was blind in his right eye and was wearing the lenses that are marked Defendant's Exhibit 1 and to assume that that individual was wearing those lenses and viewing an object at nighttime. Do you have an opinion satisfactory to yourself as to the vision of that individual compared with the normal of 20/20?

MR. JOHNSON: OBJECTION.

COURT: SUSTAINED.

The left lens on Defendant's Exhibit No. 2 is scratched pretty badly. It has some foreign substance on it. It is pitted in some way. I don't know if he has been working around machinery or has just abused them. Whatever is on the lenses will come off. The lens itself doesn't look like it's scratched too bad. It's just pretty dirty.

Q. Do you know if his vision would be impaired looking through the lens as you find it now?

A. Yes, sir, it would.

MR. JOHNSON: OBJECTION.

COURT: SUSTAINED.

Ladies and gentlemen, you will not consider the witness's answer to the last question as evidence.

. . . .

Record at pages 47-49.

In order to preserve the record, Dr. Mewborn testified out of the presence of the jury in summary as follows: He examined Boswell

once in November 1975 and again in April 1979. In November 1975 Mr. Boswell's eyesight was corrected to 20/20 in both eyes by glasses. When he saw him on 9 April 1979, Boswell told Dr. Mewborn that he had lost the sight in his right eye three days earlier. That eye had only light perception and was functionally blind. Boswell's vision in his left eye or with both eyes was 20/200 without corrective lenses. Even with glasses, the best vision possible for Boswell through his left eye was between 20/25 and 20/30. With both eyes it was the same. Boswell's night vision would be somewhat reduced. He could not say how much it would be reduced at night. Dr. Mewborn also testified that it would be very difficult to see through Boswell's left lens at night because there was a foreign substance on that lens that would block light from coming through. He also testified that he had nothing in his records signed by Mr. Boswell authorizing the release of any information about Boswell's treatment.

The trial court denied the defendant's motion that the jury be allowed to hear Dr. Mewborn's voir dire testimony. The defendant contends that the trial court committed reversible error in denying this motion and in sustaining the State's objections to Dr. Mewborn's testimony. We agree. In spite of defense counsel's repeated effort to get the trial judge to stake himself out on the record as to his reason for excluding Dr. Mewborn's testimony, he refused to do so. However, we must conclude from the judge's question to counsel, "Aren't you going to run into some confidentiality?" that his reason was his belief that the testimony was barred by a confidential privilege.[2]

We do not find in our reports any case in which a privilege has been found to exist in the optometrist-patient relationship. No such privilege existed at common law. In *People v. Baker*, 94 Mich. App. 365, 288 N.W. 2d 430 (1979), the Michigan Court of Appeals reversed the defendant's murder conviction based on the trial court's refusal to allow an optometrist to testify as to the

2. Even if such a privilege existed we fail to find in the record any claims of privilege by Mr. Boswell or any inquiry by the court or the District Attorney of Mr. Boswell as to whether he claimed the privilege. The privilege is that of the patient alone and cannot be asserted by any other person. The individual to whom the privilege belongs may of course waive it, either expressly or by implication. *Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E. 2d 137, 140 (1960); *see also State v. Martin*, 182 N.C. 846, 109 S.E. 74 (1921).

results of an eye examination he performed on the only eyewitness to the shootings. That court said:

> There is no common law optometrist-patient privilege. Nor does the statutorily created physician-patient privilege apply; that privilege applies to persons duly authorized to practice medicine or surgery. M.C.L. § 600.2157; M.S.A. § 27A.2157. An optometrist is not duly authorized to practice medicine or surgery. The trial court should not have excluded this testimony.

94 Mich. App. 365, 368, 288 N.W. 2d 430, 431.

No privilege was recognized at common law even for communications between physician and patient. *State v. Martin*, 182 N.C. 846, 109 S.E. 74 (1921). *See also In re Farrow*, 41 N.C. App. 680, 255 S.E. 2d 777 (1979); 1 Stansbury's North Carolina Evidence § 63 Physician and Patient (Brandis rev. 1973). Like numerous other states, North Carolina has by statute created such a privilege. G.S. § 8-53 provides as follows:[3]

> § 8-53. *Communications between physician and patient.*
>
> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin; provided, that the court, either at the trial or prior thereto, or the Industrial Commission pursuant to law may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

The physician-patient privilege is limited to those authorized to practice physic (*i.e.*, medicine) or surgery. An optometrist is not a licensed physician and is not authorized to practice medicine or surgery. *See* G.S. § 90-18. The practice of optometry is clearly defined in G.S. § 90-114 as follows:

3. For a general synopsis, see 50 N.C. L. Rev. 630 (1972).

§ 90-114. *Optometry defined.*

Any one or any combination of the following practices shall constitute the practice of optometry:

(1) The examination of the human eye by any method, other than surgery, to diagnose, to treat, or to refer for consultation or treatment any abnormal condition of the human eye and its adnexa; or

(2) The employment of instruments, devices, pharmaceutical agents and procedures, other than surgery, intended for the purposes of investigating, examining, treating, diagnosing or correcting visual defects or abnormal conditions of the human eye or its adnexa; or

(3) The prescribing and application of lenses, devices containing lenses, prisms, contact lenses, orthoptics, vision training, pharmaceutical agents, and prosthetic devices to correct, relieve, or treat defects or abnormal conditions of the human eye or its adnexa.

Provided, however, in using or prescribing pharmaceutical agents, other than topical pharmaceutical agents within the definition hereinabove set out which are used for the purpose of examining the eye, the optometrist so using or prescribing shall communicate and collaborate with a physician duly licensed to practice medicine in North Carolina designated or agreed to by the patient.

The practice of optometry as therein defined specifically excludes surgery and does not in any sense include the practice of medicine as that term is defined in G.S. § 90-18. Even in the use or prescription of pharmaceutical agents,[4] other than topical pharmaceutical agents used for the purpose of examining the eye, an optometrist is required to communicate and collaborate with a physician, designated or agreed to by the patient, who is duly licensed to practice medicine in North Carolina. By statutory

4. By the enactment of Chapter 482 of the 1977 Session Laws, the Legislature authorized optometrists, *inter alia*, to employ pharmaceutical agents for the purpose of "investigating, examining, treating, diagnosing or correcting visual defects or abnormal conditions of the human eye or its adnexa."

definition the practice of optometry by a legally licensed optometrist does *not* constitute the practice of medicine or surgery. G.S. § 90-18 provides in pertinent part as follows:

> Any person shall be regarded as practicing medicine or surgery within the meaning of this Article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another person: Provided, that the following cases shall not come within the definition above recited:
>
> . . . .
>
> (6) The practice of optometry by any legally licensed optometrist engaged in the practice of optometry.

We hold that the statutorily created physician-patient privilege is limited to those authorized to practice medicine or surgery and does not apply to optometrists. The State gave no other reason for the objection to Dr. Mewborn's testimony and we find none. We therefore conclude that the learned trial judge erred in denying the defendant's motion to admit the testimony of Dr. Mewborn taken on voir dire and in sustaining the State's objections to that testimony.

Of the other questions brought forward on this appeal, only two present matters which are likely to recur on retrial. First, defendant contends that he was entitled to a directed verdict because he cannot be guilty of arson for the reason that he lived in the dwelling he is accused of burning—that is, that the dwelling was not the "dwelling of another." Second, he contends that the trial judge erred in not charging the jury on attempt to commit arson. He argues that he was entitled to such an instruction because there was evidence of that lesser included offense from which the jury could find that, though he attempted to burn the dwelling, no part of the dwelling was ever actually "burned." We will now address those contentions for the benefit of the court and the parties on the retrial.

II

Common law arson is the willful and malicious burning of the dwelling house of another person. *State v. White*, 288 N.C. 44, 215

S.E. 2d 557 (1975). 3 C. Torcia, Wharton's Criminal Law § 345 (14th ed. 1980); A. Curtis, The Law of Arson § 1 (1936).

[2] Was the dwelling here "the dwelling house of another person"? We conclude that it was. The fact that defendant resided in the house does not, under the circumstances here, prevent his conviction for the arson of that dwelling. The dwelling in question was rented by Thomas E. Boswell. Mr. Boswell lived there with his twenty-two year old daughter, who is defendant's wife, and his three female grandchildren. "Sometimes [the defendant] was there and sometimes he wasn't." Defendant was living there on the evening of the fire and had all of his personal effects in the house. At best defendant can be considered no more than a joint occupant of the Boswell house. Moreover, at the time of the fire defendant had been forced at gunpoint to leave the house by Mr. Boswell. The defendant testified that, after leaving the Boswell house to avoid the police, he "was going to go out to my mother's house because I didn't have anywhere to stay that night."

In *State v. Jones*,[5] Justice Exum said:

> [T]he main purpose of common law arson is to protect against danger to those persons who might be in the dwelling house which is burned. Where there are several apartments in a single building, this purpose can be served only by subjecting to punishment for arson any person who sets fire to any part of the building.

296 N.C. 75, 77-78, 248 S.E. 2d 858, 860 (1978). *See also State v. White*, 288 N.C. 44, 215 S.E. 2d 557.

The rationale expressed by Justice Exum in *Jones*, to wit, the protection of persons who might be in the dwelling, is equally applicable to joint occupancy of a single dwelling unit as to separate apartments in the same building. The need for protection of Mr. Boswell, Glenda Shaw, and the three grandchildren was just as compelling, and perhaps more so, in this joint occupancy situation as it would have been had they been occupants of an adjoining apartment. The wisdom of applying that rationale

5. In *Jones*, defendant was convicted of arson for the burning of his own apartment, which he shared with another man in a homosexual relationship, and which was located in a building in which there were three other occupied apartments.

to joint occupancy situations is highlighted by the facts of this case. At the time defendant is alleged to have set the fire and the entire rear of the house became engulfed in flames, it was occupied by Glenda Shaw and Boswell's three grandchildren. They were able to escape by running out the front door. Fortunately, police officer Mark Adams saw several females screaming and running towards him, called for help, and used his fire extinguisher in an attempt to extinguish the blaze until fire department personnel arrived.

While there is some authority in older cases from other jurisdictions to the contrary,[6] we find the need for protection from willful and malicious burning of a dwelling house so compelling that we hold that the common law arson requirement that the dwelling burned be that of "another" is satisfied by a showing that some other person or persons, together with the defendant, were joint occupants of the same dwelling unit.

III

[3] The defendant contends that he is entitled to a new trial because the trial judge failed to charge the jury on *attempted* arson despite defendant's request that he do so.

Where there is evidence of defendant's guilt of a lesser degree of the crime set forth in the bill of indictment, the defendant is entitled to have the question submitted to the jury even in the absence of a specific prayer for the instruction. *State v. Moore*, 300 N.C. 694, 268 S.E. 2d 196 (1980). The felony of attempt to commit arson is a lesser included offense of the crime of arson.

G.S. § 15-170 provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." The provisions of this statute in regard to conviction of a lesser degree of the same crime charged in the bill of indictment applies only where there is some evidence that a less degree of the crime has been committed.

6. *See* A. Curtis, The Law of Arson §§ 42, 43, 49 (1936); R. Perkins, On Criminal Law, ch. 3, § 2 at 226 (2d. ed. 1969); Annot., 17 A.L.R. 1168, 1169 (1922); *State v. Young*, 153 Mo. 445, 55 S.W. 82 (1900); *Shepherd v. The People*, 19 N.Y. (5 Smith) 537 (1859). *See also People v. De Winton*, 113 Cal. 403, 45 P. 708 (1896); *State v. Kenna*, 63 Conn. 329, 28 A. 522 (1893).

If there was sufficient evidence from which the jury could find that there was an actual "burning" of the Boswell house, and if there is *no* credible evidence from which the jury could find an attempt to burn which failed, defendant would not be entitled to an instruction on the lesser included offense of attempt to commit arson.[7]

The evidence as to the burning came from several sources.[8]

Thomas Boswell testified, *inter alia*, that:

> [The match] lit that gas under his feet, come down the edge of the porch and run back in there. When he put the match down, it lit the ground afire around his feet, come up to the edge of the porch, and went back in by the bathroom. It might have made a big whoosh.
>
> . . . .
>
> It was—all the back part was just in a light blaze.
>
> . . . .
>
> . . . It was something up there that would burn because the whole back porch was in a blaze.
>
> . . . that fire leaped from the—going on up in the back porch, going up around by the bathroom and came around the porch and met back there in the corner and it made a noise like it was trying to explode.
>
> . . . .
>
> It went off in a flash like that and stayed like that until the firemen put it out. It went whoosh—
>
> . . . .

7. We find too frequently that the question of whether a part of the structure was actually consumed by the flames arises for the first time in the appellate courts. This could easily be avoided by the prosecutor's eliciting direct testimony that a part of the structure was in fact consumed by the flames, charred, or terms of like meaning.

8. While all of the quoted testimony relates to the fire, those portions underlined refer specifically to areas of the house actually "burned" or "charred."

John N. Gibson, a Burlington police officer, testified:

As I saw the flame, a police car was coming . . . . I told him to call the fire department because there was a fire in the next block . . . .

I went in the direction of where the fire was coming from. As I approached the fire, it was a house . . . . The whole back area of the house was engulfed in flames.

Craig Yarborough, a Captain of the Burlington Fire Department, who examined the house the following morning, testified:

I observed that *the back porch of the house had been on fire.*

. . . .

. . . We collected samples of wood and debris off the back porch and the fire area . . . .

. . . .

We were looking at the *charred material around the window.*

. . . .

Where the wall around *the bedroom window had been burned,* the areas where the—it was wet.

When asked by the Court "*What was burned?*" Captain Yarborough answered, "*The wall boarding,*" and also testified:

. . . .

We picked places around the area where they were the worst. We moved away from *where the fire actually had burned* and picked pieces around it to collect our samples.

. . . Yes, there had not been a complete ignition of the floor area of the back porch. From the back porch floor area up to the windowsill on the back porch had not been burned. *The area had burned from the base of the window upward.*

. . . .

Fire damage is where the fire actually charred into the wooden boards on the back porch.

. . . .

The curtains on the windows were burned, yes, sir, *on the inside of the windows were burned.*

. . . .

[Referring to photographs] State's Exhibit No. 4 . . . is a picture of *a burned area around the bedroom window. There is a burned area under the window* and a blistering effect on the right and left side of the window.

State's Exhibit No. 5 is a photograph which *shows a burned area of the ceiling of the back porch area* . . . .

. . . State's Exhibit No. 6 is a picture that describes *a burned area that would be directly opposite the bedroom window* . . . the inside portion of the outside wall of the back porch.

Mark Adams, a Burlington police officer, testified:

I looked to my right and there was a residence with the back covered with flames . . . .

. . . .

. . . the exterior wall of the porch where the screen would stop was in flames. *The floor of the porch and the wall around the rear window* and some of the items on the back porch *were burning*, ...

Specifically with regard to the necessity of showing an actual burning, the trial judge correctly charged the jury in part as follows:

Now the law does not require that the fire completely consume the dwelling house, that it completely consume any particular part of the dwelling house. A partial burning or the slightest charring is sufficient under the law to constitute the burning of a dwelling house contemplated by the law. A mere discoloration, smoke, stains, does not constitute a burning. Charring does. The slightest charring is sufficient to constitute burning under this law.

To satisfy the proof of a "burning" it is not necessary that the building be wholly consumed or even materially damaged. It is sufficient if any part, however small, is consumed. A building is

burned within the common law definition of arson when it is charred. *State v. Rogers*, 168 N.C. 112, 83 S.E. 161 (1914); *State v. Hall*, 93 N.C. 571 (1885); *State v. Sandy*, 25 N.C. (3 Ired.) 570 (1843). *See also* 6A C.J.S. Arson § 10; 5 Am. Jur. 2d, Arson and Related Offenses § 7; Annot., 1 A.L.R. 1163 (1919); 5A Words and Phrases, "Burning" at 590.

In the case before us, we find positive testimony that some of the wooden parts of the dwelling were actually burned or charred.

If there is no evidence from which a jury could reasonably find that there was an attempt to burn which failed, defendant is not entitled to an instruction on attempted arson.

> The trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees.

4 N.C. Index 3d, Criminal Law § 115 (1976).

The principle was very well expressed by Justice Lake in *State v. Lampkins*[9] as follows:

> When, upon all the evidence, the jury could reasonably find the defendant committed the offense charged in the indictment, but could not reasonably find that (1) he did not commit the offense charged in the indictment and (2) he did commit a lesser offense included therein, it is not error to restrict the jury to a verdict of guilty of the offense charged in the indictment or a verdict of not guilty, thus withholding from their consideration a verdict of guilty of a lesser included offense. Under such circumstances, to instruct the jury that it may find the defendant guilty of a lesser offense included within that charged in the indictment is to invite a compromise verdict whereby the defendant would be found guilty of an offense, which he did not commit, for the sole

9. In *Lampkins*, the prosecutrix testified that she had been raped and the defendant testified he had never had intercourse with her, and that he never touched her after leaving the house at which they were party guests. The Court there held that this was evidence that the defendant committed neither the crime of rape nor any lesser included offense.

> reason that some of the jurors believe him guilty of the greater offense. The mere possibility that the jury might believe part but not all of the testimony of the prosecuting witness is not sufficient to require the Court to submit to the jury the issue of the defendant's guilt or innocence of a lesser offense than that which the prosecuting witness testified was committed.

286 N.C. 497, 504, 212 S.E. 2d 106, 110 (1975). *See also State v. Moore*, 300 N.C. 694, 268 S.E. 2d 196; *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111 (1972); *State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235 (1971); *State v. Murry*, 277 N.C. 197, 176 S.E. 2d 738 (1970); *State v. Smith*, 201 N.C. 494, 160 S.E. 577 (1931); 4 N.C. Index 3d, Criminal Law § 115.

Shaw's defense in this case was an alibi—that he was not present when the crime occurred. He testified that on the night in question, at the hour in question, he was at his mother's house, some twenty miles away and that he and his sister's boyfriend, James Graves, did not leave his mother's house until about 1:40 p.m., and then went to a private club in Hillsborough. James Graves took the stand and corroborated defendant's testimony in this regard. The defendant's mother testified that at the critical time he was at her home. His defense was that he could not have committed any degree of the crime charged because he was not even in the area when it happened. If the jury believed defendant's evidence, he could not be guilty of the crime of arson *nor* any lesser included offense.

In *State v. Noell*, the State's witness testified that the defendant had raped her. Noell testified that he had never even seen her prior to the trial. Justice Moore there said:

> In the present case defendant's defense was that of an alibi—that he was not present when the alleged offense occurred. He, therefore, completely denies assaulting the prosecutrix or forcing her to have sexual intercourse with him. The prosecutrix testified positively that after defendant had choked her and threatened to kill her, he forcibly and against her will had sexual intercourse with her, and that he did in fact penetrate her. Thus, there was no evidence of an assault

with intent to commit rape, and the trial court was not required to charge on the lesser included offense.

284 N.C. 670, 699, 202 S.E. 2d 750, 769.

State v. Green, 298 N.C. 793, 259 S.E. 2d 904 (1979), cited by the defendant, is clearly distinguishable. In *Green* the defendant told the police that he was at the scene of the fire and in fact attempted to set a fire at the front door of the house. The occupants testified that they discovered the fire at the back door on the porch and that they escaped through the front door. There was no evidence that any fire was found at or near the defendant's location, that is, at the front door.

While we find ample evidence of an actual burning, we find no evidence of an attempt to burn which failed. We therefore conclude that there is no evidence in the record from which the jury could have found that defendant was guilty of an attempt to commit arson, and therefore defendant was not entitled to a jury instruction on that lesser included offense.

The defendant cites two cases, *State v. Vesta Ray Arnold*, 285 N.C. 751, 208 S.E. 2d 646 (1974), and, *State v. Rudolph Arnold*, 264 N.C. 348, 141 S.E. 2d 473 (1965), for the proposition that defendant could be lawfully convicted of *attempted* arson under facts he considers similar to those of this case. In the *Rudolph Arnold* case, the defendant was charged only with attempted arson. In the *Vesta Ray Arnold* case, the defendant was charged with both offenses. The indictment for attempted arson was quashed for several technical errors and defendant was tried on the arson indictment. However, at the beginning of the trial the solicitor announced that the State would seek a verdict of guilty of only the lesser included offense of attempt to commit arson. Both of the *Arnold* cases concerned the crime of *attempt to commit arson.* That is not the question here and we do not find those cases apposite. Here we are concerned with whether the evidence supports the verdict of guilty of *arson.*

For the trial judge's error in excluding testimony of the prosecuting witness's optometrist proffered by the defendant to impeach the credibility of Mr. Boswell, the only eyewitness to the actual setting of the fire, defendant is entitled to a

New trial.

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

WAYNE R. WRIGHT v. KATHLEEN D. WRIGHT

No. 111A81

(Filed 30 March 1982)

Quasi Contracts and Restitution § 1.2— unjust enrichment alleged—distinguished from resulting trust cases—jury instructions proper

In an action in which plaintiff alleged his wife, defendant, was unjustly enriched by improvements he made upon defendant's home at the time the parties were married, the trial court correctly submitted the following issue to the jury: "*Did the defendant agree with the plaintiff to share in the ownership* of the real property?" Plaintiff rested his unjust enrichment claim upon his contention that he was induced to make improvements on defendant's property by defendant's express representations to him that he and she would own the property jointly, or as tenants by the entirety. Defendant denied making such representations and offered evidence to show that she never made them. Thus the factual issue determinative of the litigation was the issue submitted. In comparison with a resulting trust case, the focus in an unjust enrichment case is not on the intent of the party furnishing improvements to another's land but is, rather, on the circumstances, if any, which would render it unjust for the owner to keep the benefit of the improvements without compensating the improver. In an unjust enrichment case, plaintiff must prove defendant's alleged promise to permit plaintiff to share in the ownership of the land "by clear, strong and convincing evidence."

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

ON petition for further review[1] of a decision of the Court of Appeals, 47 N.C. App. 367, 267 S.E. 2d 61 (1980), vacating a jury verdict for defendant and a judgment entered pursuant to the verdict by *Judge Hairston*, presiding at the 13 August 1979 Session of FORSYTH Superior Court, and ordering a new trial. The case was argued as No. 58 at the Spring Term 1981.

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1. We allowed the petition on 7 October 1980, 301 N.C. 240, 283 S.E. 2d 136.

Alexander, Hinshaw and Schiro, by Robert D. Hinshaw, attorneys for plaintiff appellee.

Harper, Wood, Hux and Brown, by William Z. Wood, Jr., attorneys for defendant appellant.

EXUM, Justice.

Plaintiff furnished extensive improvements to land owned by his wife, the defendant. His claim is for a money judgment and an equitable lien pursuant to the doctrine of unjust enrichment. The principal question presented is whether Judge Hairston, under the pleadings and evidence before him, properly required plaintiff to prove by clear, cogent and convincing evidence that defendant expressly promised him an interest in the land. The Court of Appeals concluded not. We conclude to the contrary and reverse. We also conclude that the same presumption of gift should apply in these cases whichever spouse furnishes the consideration for improvements on the other spouse's land.

This is an action for a money judgment of $17,270.15 and for an equitable lien in that amount on property owned by defendant. Plaintiff alleged the following: The parties were married on 25 October 1975. "[O]n or about" 1 November 1975 defendant "made certain representations" to plaintiff that if plaintiff made and paid for certain improvements on defendant's real property, defendant would convey the property to the parties as tenants by the entirety. "[I]n reliance upon defendant's said representation," plaintiff spent $15,126.91 for materials and $2,143.24 for labor for permanent improvements on defendant's home. Defendant has refused to "fulfill her representation to reconvey said real property to defendant and plaintiff as tenants by the entirety." Plaintiff is therefore entitled to equitable relief "on the basis that defendant has breached the quasi-contractual relationship existing between the said parties and has become unjustly enriched."

In her answer defendant admits the allegations relating to the marriage and that plaintiff "did purchase certain materials and pay for certain labor to the defendant's house." Otherwise, she denies the allegations of the complaint.

The matter came on for trial before Judge Hairston. The evidence consisted solely of the testimony of the parties.

Plaintiff testified as follows: He is a carpenter. He met defendant on 4 July 1975 and married her on 25 October 1975. Before their marriage they discussed the fact that defendant's home was inadequate to house the five people, including defendant's daughter and plaintiff's two sons, who would live there after the marriage. They discussed buying a new home but instead decided that they would remodel defendant's home. Plaintiff, using his carpentry skills, made substantial improvements to defendant's home. He installed new carpet and a new heating and air conditioning system. He added a bedroom, bath, den, double carport with two utility rooms, and a front porch. Although the improvements were begun before the marriage, most of the work was actually accomplished after the marriage. All improvements and additions were the result of the parties' "joint decision." Plaintiff paid for the improvements out of savings "that I had accumulated throughout my life." He spent $15,544.37 for materials and valued his labor at $2,147. In his opinion the fair market value of the home increased from $19,000 before the improvements to between $38,000 and $40,000 after the improvements.

Plaintiff testified that as a result of discussions with his wife about how the improvements would be paid for, he "assumed" and "expected" to own the property jointly after the improvements were made. They discussed changing the deed to include his name. He requested that his name be put on the deed and his wife "informed me that she did have the deed changed." Later plaintiff discovered that defendant had merely changed her name on the deed from her prior married name to that of "Wright." Plaintiff, however, conceded that when he made the improvements he knew that the house was titled in his wife's name. Plaintiff also testified that "the statement about sharing the house was made before we were married." He said, "Our disagreement over the property did lead to our marital problems." Both went to marriage counseling sessions, but ultimately the parties separated on 24 November 1976.

Defendant testified that plaintiff "came up with the idea of remodeling my house to make it bigger" because they were unable to find another house that satisfied him. She told him, "Well if that is what you want, you know, okay." She denied ever promising him "anything concerning the house," saying, "No, I

never made any statement concerning joint ownership of the house." She executed a will devising the home to plaintiff for life with remainder to her daughter. When she showed plaintiff the will "he did not like the wording. He got mad about it. He complained that his boys would not get anything out of the house. He left me for the last time the day after Thanksgiving in 1976. When he left, he had 'cleaned house.' No, he did not take any of my things. Yes, he did take furniture." Defendant did not deny that plaintiff had made substantial improvements on her home. She did "agree with him to make the improvements . . . after we had discussed the possibility of purchasing a bigger house together," but she "did not promise him anything," and "he did not ask or mention anything about putting his name on the deed." She agreed, however, that the "main problem in the marriage concerned putting his name on the deed."

Judge Hairston, treating the claim as one sounding in unjust enrichment,[2] submitted and the jury answered three issues as follows:

1. Did the defendant agree with the plaintiff to share in the ownership of the real property?

ANSWER: No.

2. If so, was the defendant unjustly enriched?

ANSWER: _____

3. What amount, if any, is the plaintiff entitled to recover from the defendant?

ANSWER: _____

Judge Hairston instructed the jury on the first issue that the burden was upon the plaintiff "to prove by clear, strong and convincing evidence" that the defendant promised the plaintiff that if he would provide the improvements to her property she would

2. Judge Hairston instructed the jury at the outset as follows:

[T]he claim is not that she contracted with him, because a contract to part with title to a piece of property, as you know, must be in writing; the claim is that he paid money relying on the agreement which he claims she made, and that he paid money that improved her property, and therefore, enriched her unjustly. . . . But bear in mind, we are not trying a contract case here.

permit him to share in the property. Judge Hairston further instructed the jury that "there is a presumption in law that when a husband makes improvements or spends money on his wife's property, he makes a gift to her . . . unless it is shown, as I have said, by clear, strong and convincing evidence that some other arrangement was intended." Judge Hairston also instructed the jury that if they answered the first issue "no" that would end the lawsuit. He entered judgment on the verdict that plaintiff recover nothing of the defendant and dismissed plaintiff's action.

On appeal to the Court of Appeals, plaintiff contended that Judge Hairston erred in submitting the first issue. Plaintiff argued that the first issue should have been as tendered by him, *i.e.*, "Did the plaintiff intend to make a gift of the labor and materials in improving the home of his wife, the defendant?" The Court of Appeals agreed and ordered a new trial, saying:

> The trial court's substituted issue incorrectly states the law. Plaintiff is not required to show by clear, strong and convincing evidence that his wife '. . . promised to share in the property.' 'No contract, oral or written, enforceable or not, is necessary to support a recovery based upon unjust enrichment.' *Parslow v. Parslow*, 47 N.C. App. 84, 266 S.E. 2d 746 (1980). 'Such a recovery is founded on the equitable theory of estoppel and not on principles of quasi or implied contract.' *Clontz v. Clontz*, 44 N.C. App. 573, 578, 261 S.E. 2d 695 [, 698] (1980). If plaintiff had been successful in rebutting the presumption of gift, all he would have had to show was that the improvements were made *upon the good faith belief* that an estate in the property was promised him. *See Clontz, supra*, at 578 [, 261 S.E. 2d at 695]. That showing need not be made by clear, strong and convincing evidence.
>
> This case must be sent back for a new trial. At the conclusion of the evidence, in order to recover, plaintiff must first rebut the presumption that the improvements placed on the wife's house were intended as a gift. *See Shue v. Shue*, 241 N.C. 65, 67, 84 S.E. 2d 302 [, 303] (1954).

47 N.C. App. at 369-70, 267 S.E. 2d at 62-63.

We allowed defendant's petition for further review to consider the correctness of the Court of Appeals' decision in light of

our cases on the subject. We conclude that Judge Hairston's formulation of the first issue adequately and fairly put the dispute to the jury and that the jury's answer to that issue entitles defendant to a judgment in her favor. The Court of Appeals erred, therefore, in remanding for a new trial on this ground urged by plaintiff.

As both the Court of Appeals and Judge Hairston correctly noted, this is not an action on a contract. It is a claim based on the equitable doctrine of unjust enrichment. The theory, however, which plaintiff has invoked both in his pleadings and proof to support his claim is this: Knowing the realty to be owned by defendant, he nevertheless made and paid for improvements under the inducement of defendant's express promise that she would convey to him an entirety interest in the property. Although plaintiff does not seek to enforce such a promise, and could not because it is not in writing,[3] he seeks to recover his costs in making the improvements[4] on the ground that because he was induced by defendant's promise to make the improvements, it would be unjust to permit her to have the benefit of them without paying for them.

Not every enrichment of one by the voluntary act of another is unjust. "Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value." *Rhyne v. Sheppard*, 224 N.C. 734, 737, 32 S.E. 2d 316, 318 (1944). This rule is particularly applicable where a husband makes improvements to his wife's land because of the presumption that the improvements constitute a gift. *Shue v. Shue*, 241 N.C. 65, 84 S.E. 2d 302 (1954); *Anderson v. Anderson*, 177 N.C. 401, 99 S.E. 106 (1919); *Nelson v. Nelson*, 176 N.C. 191, 96 S.E. 986 (1918); *see also Eaton v. Doub*, 190 N.C. 14, 22-24, 128 S.E. 494, 498-99 (1925) (plaintiff not entitled to value of improvements made by him where there was "no conduct on the part of defendants to induce plaintiff to make the improvements").

3. *See* G.S. 52-10; G.S. 22-2.

4. *See Jones v. Sandlin*, 160 N.C. 150, 75 S.E. 1075 (1912), for the correct measure of damages. *But cf. Wells v. Foreman*, 236 N.C. 351, 72 S.E. 2d 765 (1952).

There must be some added ingredient in order to invoke the unjust enrichment doctrine. Insofar as the doctrine applies in cases in which one person makes improvements on land of another, the necessary added ingredients that, for example, have been recognized in our cases are as follows: (1) Improvements made in a good faith but mistaken belief that the improver owned the land and with the acquiescence of the true owner who knows of the mistake, *Rhyne v. Sheppard*, *supra* (principle of estoppel held applicable); (2) improvements made under a contract with owner's mother who improver mistakenly but in good faith believed was the owner where owner refused to permit removal of improvements, *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E. 2d 434 (1966) (estoppel not present because no allegation that owner had actual knowledge that improvements were being made); (3) improvements made under the inducement of the owner's unenforceable promise to convey the land or an interest therein to the improver, *Jones v. Sandlin*, *supra*, n. 4; *see also Union Central Life Insurance Co. v. Cordon*, 208 N.C. 723, 182 S.E. 496 (1935); *cf. Eaton v. Doub*, *supra* (value recoverable by improver when improvements were made " 'in good faith while in bona fide adverse possession of the land under color of title' ").[5]

It is clear from his pleadings and evidence that plaintiff has rested his unjust enrichment claim upon his contention that he was induced to make improvements on defendant's property by defendant's express representations to him that he and she would own the property jointly, or as tenants by the entirety. Plaintiff seeks to invoke the rule recognized in *Jones v. Sandlin*, *supra*, at 154, 75 S.E. at 1077, as follows:

> The general rule is that if one is induced to improve land under a promise to convey the same to him, which promise is void or voidable, and after the improvements are made [the promisor] refuses to convey, the party thus disappointed

5. Claims founded on unjust enrichment must be distinguished from defensive rights arising under the betterments statute, G.S. 1-340. Under this statute one who, under colorable title, and in a good faith but mistaken belief that he has good title, makes improvements on land is entitled to compensation for the enhanced value of the land due to the improvements when he is ejected by the true owner. *Beacon Homes, Inc. v. Holt*, *supra*, in text; *Rogers v. Timberlake*, 223 N.C. 59, 25 S.E. 2d 167 (1943); *Barrett v. Williams*, 220 N.C. 32, 16 S.E. 2d 405 (1941).

shall have the benefit of the improvements to the extent that they increased the value of the land.

Plaintiff alleged and sought to prove defendant's representations to him that they would jointly own the land. Defendant denied making such representations and offered evidence tending to show that she never made them. Her evidence tended to show that plaintiff made the improvements voluntarily for reasons satisfactory to himself without any inducement by defendant. Thus the factual issue determinative of the litigation was joined. Judge Hairston adequately submitted it to the jury in his formulation and submission of the first issue, which the jury answered against plaintiff.

Defendant's contention and the Court of Appeals' conclusion that the first issue should have been framed in terms of defendant's intention to make a gift seem to be based on a misunderstanding of the applicable law, or more specifically, a confusion of principles applicable to unjust enrichment cases with those applicable to resulting trust cases.

We recently had occasion fully to consider the law applicable to resulting trusts in *Mims v. Mims*, 305 N.C. 41, 46, 286 S.E. 2d 779, 783 (1982), where we said:

> A resulting trust arises 'when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. . . . A trust of this sort does not arise from or depend on any agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another.' *Teachey v. Gurley*, 214 N.C. 288, 292, 199 S.E. 83, 86-87 (1938). *The trust is created in order to effectuate what the law presumes to have been the intention of the parties in these circumstances—that the person to whom the land was conveyed hold it as trustee for the person who supplied the purchase money. Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222 (1957); *Bowen v. Darden*, 241 N.C. 11, 84 S.E. 2d 289 (1954); *Avery v. Stewart*, 136 N.C. 426, 48 S.E. 775 (1904); Bogert, The Law of Trusts and Trustees, § 454 (2d ed. rev. 1977) . . . . 'The classic example of a resulting trust is the purchase-money resulting trust. In such a situation,

> when one person furnishes the consideration to pay for land, title to which is taken in the name of another, a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration. The general rule is that the trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the time the legal title passes.' *Cline v. Cline*, 297 N.C. 336, 344, 255 S.E. 2d 399, 404-05 (1979). [Emphasis supplied.]

The resulting trust is an intent-effectuating device. Where one party furnishes the purchase price but has title placed in the name of another, these facts, standing alone, create a rebuttable presumption that a resulting trust was intended. The presumption may be rebutted by showing that, in fact, no trust was intended. *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222 (1957); *Lawrence v. Heavner*, 232 N.C. 557, 61 S.E. 2d 697 (1950). In a resulting trust case, consequently, the focus is on the intention of the party furnishing the purchase price. *Mims v. Mims, supra.* In an unjust enrichment case such as this one, however, the focus is not on the intent of the party furnishing improvements to another's land but is, rather, on the circumstances, if any, which would render it unjust for the owner to keep the benefit of the improvements without compensating the improver.

Neither is it enough, in such a case as this, for plaintiff to show merely that he had a "good faith belief" that the defendant induced him with a promise of an interest in the property, as the Court of Appeals seems to have indicated not only in its opinion in this case but in dictum in *Clontz v. Clontz*, 44 N.C. App. 573, 261 S.E. 2d 695, *cert. denied*, 300 N.C. 195, 269 S.E. 2d 622 (1980), which was later followed in *Parslow v. Parslow*, 47 N.C. App. 84, 266 S.E. 2d 746 (1980). In these cases the Court of Appeals seems to have misapplied the rule in those unjust enrichment cases in which the improver of the land had a good faith but mistaken belief that he owned it, *Rhyne v. Sheppard, supra*, 224 N.C. 734, 32 S.E. 2d 316, or a good faith but mistaken belief that he was authorized to improve it by the owner, *Beacon Homes, Inc. v. Holt, supra*, 266 N.C. 467, 146 S.E. 2d 434. In a case such as this one, however, where the claim of unjust enrichment rests upon the owner's express, unenforceable promise to convey an interest

in the land to the improver, the improver must prove the promise.[6] *See Anderson v. Anderson, supra,* 177 N.C. 401, 99 S.E. 106; *see also Bohannon v. Bohannon,* 249 S.W. 2d 544 (Ky. 1952).

Next, contrary to defendant's contention and the Court of Appeals' conclusion, Judge Hairston properly instructed the jury that plaintiff must prove defendant's alleged promise to permit plaintiff to share in the ownership of the land "by clear, strong and convincing evidence." Where a husband furnishes improvements to his wife's land, the presumption is that the improvements were a gift to her. *Anderson v. Anderson, supra; Nelson v. Nelson, supra,* 176 N.C. 191, 96 S.E. 986; *Kearney v. Vann,* 154 N.C. 311, 70 S.E. 747 (1911); *Arrington v. Arrington,* 114 N.C. 116, 19 S.E. 278 (1894). In cases where a presumption of gift arises when one spouse furnishes consideration for land titled in the name of the other spouse, the presumption must be rebutted, if at all, by clear, cogent and convincing evidence. *Mims v. Mims, supra,* 305 N.C. 41, 286 S.E. 2d 779. We conclude the same standard of proof should apply in order to rebut the presumption of gift arising when a husband makes improvements on his wife's property. *Shue v. Shue, supra,* 241 N.C. 65, 84 S.E. 2d 302, may be read to so hold. Plaintiff here sought to rebut the presumption of

6. This is so not only because plaintiff has both pleaded and attempted to prove an express promise but because of the relationship of husband and wife which exists between the parties. In cases not involving special relationships between the parties, the doctrine of unjust enrichment may be invoked upon a theory of an implied promise to pay.

> The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor. *Beacon Homes, Inc. v. Holt,* 266 N.C. 467, 146 S.E. 2d 434; *Dean v. Mattox,* 250 N.C. 246, 108 S.E. 2d 541.
>
> The action is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. However, the rule does not apply when the services are rendered gratuitously or *in discharge of some obligation. Twiford v. Waterfield,* 240 N.C. 582, 83 S.E. 2d 548; *Allen v. Seay,* 248 N.C. 321, 103 S.E. 2d 332; *Johnson v. Sanders,* 260 N.C. 291, 132 S.E. 2d 582.

Atlantic Coastline R.R. v. State Highway Commission, 268 N.C. 92, 95-96, 150 S.E. 2d 70, 73 (1966) (emphasis in original); *accord, Wells v. Foreman, supra,* n. 4, 236 N.C. 351, 72 S.E. 2d 765. "[T]he law will not imply a promise to repay the husband the sums he spent for repairing or improving his wife's property . . . ." *Bohannon v. Bohannon,* 249 S.W. 2d 544, 545 (Ky. 1952).

a gift and to establish an equitable lien under the doctrine of unjust enrichment by proving an express promise of defendant to convey to him an interest in the land. *See Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965). He was required, therefore, to prove the promise by clear, cogent and convincing evidence as Judge Hairston instructed.

Finally, plaintiff argues that it is a violation of the Equal Protection Clauses of our state and federal constitutions to invoke a presumption of gift when a husband furnishes improvements on his wife's land, but not when a wife furnishes improvements on her husband's land. Unlike the resulting trust cases involving spousal transactions, with which we dealt fully in *Mims*, we have been cited to no case, nor have we found one, which holds that no presumption of gift arises when a wife furnishes improvements on her husband's land. The only case we have located which deals with a wife's improvements on her husband's land is *Fulp v. Fulp, supra*. In *Fulp*, plaintiff wife's evidence tended to show that she paid for improvements on her husband's land in consideration of her husband's express promise to convey her an interest in the land. The question was whether this evidence was sufficient to survive defendant's motion for nonsuit in the wife's claim to establish an equitable lien on her husband's land. The Court held that it was, saying, 264 N.C. at 23, 140 S.E. 2d at 712:

> Here, there is no question of a gift, for plaintiff has testified that defendant expressly promised to convey her an interest in the land in consideration of the money she advanced. In reviewing the motion of nonsuit we accept this testimony as true. Therefore, defendant had the duty to restore plaintiff her funds. Since she is able to trace the money into the improvements which defendant made on the land, any judgment obtainable would qualify as an equitable lien.

Without reaching the constitutional question we conclude, nevertheless, because of all the reasons we gave in *Mims*, that the same presumption of gift should apply whichever spouse furnishes improvements on the other spouse's land.

Defendant is, therefore, entitled to have the judgment entered by Judge Hairston reinstated. The decision of the Court of Appeals remanding for a new trial is

Reversed.

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

STATE OF NORTH CAROLINA v. THOMAS TURNER, JR.

No. 166A81

(Filed 30 March 1982)

1. **Criminal Law § 149— order suppressing evidence—appeal by State—time for filing prosecutor's certificate**

In order for the State to appeal a pretrial order allowing a motion to suppress evidence, the prosecutor's certificate required by G.S. 15A-979(c) stating that the appeal is not taken for the purpose of delay and that the evidence is essential to the case is timely filed if it is filed prior to the certification of the record on appeal to the appellate division.

2. **Criminal Law § 66.1— identification testimony—finding unsupported by evidence—remand for new determination**

The evidence did not support a finding by the trial court that a witness "was unable to recognize the face of the individual to the point of making an identification of the face" where the witness testified that, although she did not recognize defendant while she was struggling with him, she recognized him prior to the struggle when he was near her bed, and that although she did not know defendant's name, she knew him as her friend's uncle and her brother provided the name. Therefore, where the trial court's order suppressing the witness's identification testimony was based upon such finding, the order must be vacated and the cause remanded to the trial court for another determination of defendant's motion to suppress the identification testimony.

3. **Criminal Law § 148.1—denial of motion to suppress identification testimony—no right of immediate appeal**

Defendant had no right to an immediate appeal from the trial court's order denying his pretrial motion to suppress identification testimony. G.S. 15A-979(b).

4. **Criminal Law § 66.1— identification testimony—opportunity for observation**

The evidence showed that a witness had a reasonable possibility of observation of the defendant sufficient to permit his in-court identification testimony where the witness testified on voir dire that, although lighting conditions were poor, he recognized the defendant as the intruder in his house; he knew defendant by sight and name as they lived in the same neighborhood; defendant ran through the living room and jumped out the window, passing two to three feet from where the witness was hiding; and when defendant stepped into the light at the window, the witness knew it was him.

5. Criminal Law § 66.11— showup identification—reliability—admissibility

Evidence of a witness's pretrial identification of defendant at a one-man showup was sufficiently reliable to be admissible despite any suggestiveness of the procedure, although the witness's observation of defendant was brief and made under poor lighting conditions, where the witness knew defendant from having seen him in the neighborhood; the witness's degree of attention was high; he had just heard his sister scream and had seen a man come running through his house and jump out the window; he identified the defendant by name; and the confrontation between the witness and defendant occurred within fifteen minutes from the time the intruder left the witness's residence.

APPEAL by the state pursuant to G.S. 7A-30(2), and cross-appeal by defendant, from decision of the Court of Appeals [54 N.C. App. 631, 284 S.E. 2d 142 (1981)] dismissing appeals from order of *Johnson, J.*, entered on 29 December 1980 in MECKLENBURG Superior Court.

In a two-count bill of indictment defendant was charged with (1) the first-degree burglary of a dwelling house occupied by Bernadine, Aleasia, and Eddy Mungo with the intent to commit the felony of larceny or the felony of rape, or both; and (2) the larceny of $50.00 pursuant to said burglary.

Prior to trial, defendant moved to suppress the identification testimony of Aleasia and Eddy Mungo on the grounds that he was illegally arrested and subjected to an unconstitutional identification procedure. After a hearing on the motion, the trial judge entered an order granting defendant's motion to suppress the identification testimony of Aleasia Mungo and denying the motion to suppress the identification testimony of Eddy Mungo.

The state appealed to the Court of Appeals from that part of the order adverse to it. Defendant cross-appealed from that part of the order adverse to him.

For reasons hereinafter stated, the Court of Appeals, Judge Robert M. Martin with Judge Wells concurring, dismissed the appeal. Judge Webb dissented.

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

Ellis M. Bragg for defendant.

BRITT, Justice.

We conclude that the Court of Appeals erred in dismissing the state's appeal. We also conclude that the trial judge erred in granting defendant's motion to suppress the identification testimony of Aleasia Mungo. With respect to defendant's cross-appeal, we agree with the Court of Appeals that defendant had no right to appeal. However, we treat the papers filed by defendant as a petition for a writ of certiorari to review the part of the trial court's order adverse to him, and allow the petition. We conclude that the trial judge did not err in denying defendant's motion to suppress the identification testimony of Eddy Mungo.

STATE'S APPEAL

[1] The Court of Appeals dismissed the state's appeal for the reason that the state failed to file the certificate required by G.S. 15A-979(c) within 10 days after the entry of the judgment.

G.S. 15A-1445(b) provides: "The state may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979."

G.S. 15A-979(c) provides in pertinent part:

> An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.

The Court of Appeals reasoned that the statute last quoted must be read in conjunction with G.S. 15A-1448(a)(1) which provides that "[a] case remains open for the taking of an appeal to the appellate division for a period of 10 days after the entry of judgment"; that, construed as a whole, these statutes mandate that the state pursue its right to appeal by submitting to the trial judge the certificate required by G.S. 15A-979(c) within the time period the case remains viable for appeal under G.S. 15A-1448(a)(1) or the order will not be held appealable; that the legislature has accorded to the state a specific procedure for appeal of this particular type of order granting a motion to suppress prior to trial; and that the burden is on the state to demonstrate that it has fully complied with all statutory requirements.

In the case at hand, the appeal entry states that the prosecution gave oral notice of appeal in open court on 9 December 1980. The record on appeal includes a document entitled "Certification by Prosecutor" signed by the Attorney General on behalf of the district attorney and is dated 16 February 1981. The Court of Appeals held that the state had failed to properly perfect its appeal, therefore, the appellate court has no jurisdiction.

In its challenge to the holding of the Court of Appeals, the state argues that since the statutes do not expressly provide when the certificate envisioned by G.S. 15A-979(c) must be filed, thus giving rise to an ambiguity, the court should look to the purpose of the statute's provisions in determining timing. The state then argues that two obvious purposes of the certificate are to require the prosecutor to certify that the appeal is not taken for purpose of delay, and that the suppressed evidence is essential to the case; that the certificate should not be filed by the district attorney until he has had an opportunity to review the transcript and the judge's findings to decide whether an appeal might be fruitful or would, in fact, be a futile gesture which might be construed as an effort to delay final disposition of the case; that the district attorney should have adequate time to reevaluate his case in light of the order suppressing evidence; and that to require the certificate within 10 days of entry of judgment would not advance the purposes of the certificate.

We find the state's argument persuasive. We hold that the certificate envisioned by G.S. 15A-979(c) is timely filed if it is filed prior to the certification of the record on appeal to the appellate division. In the case at hand, since the certificate was served as a part of the record on appeal on 16 February 1981, and the record was certified by the clerk of superior court to the appellate division on 24 April 1981, the certificate was timely served.

[2] We now reach the question whether the trial judge erred in suppressing the identification testimony of Aleasia Mungo. The state contends first that the following finding of fact made by the trial judge pursuant to the hearing on defendant's motion to suppress is not supported by the evidence:

> . . . . That shortly thereafter she got out of her bed and went to her bedroom door at which time someone grabbed her . . . . That although she struggled with the individual in

her bedroom, *she was unable to recognize the face of the individual to the point of making an identification of the face.* (Emphasis added.)

At the hearing, Aleasia testified, in pertinent part, that on the night of 3 September 1980 she was 17 years old and living with her mother; that her brother Eddy also lived there; that on the early morning of that day she was asleep alone in her bedroom when "I felt somebody looking at me"; that she then turned around, looked and saw Thomas (defendant) standing by her bed; that the person standing by her bed was a black male with broad shoulders, short hair and a goatee; that the intruder started going out the door leading to her bedroom; that she got out of her bed; that she did not quite get out to the door of the bedroom when the intruder tried to grab her "as if he was trying to grab my mouth"; that "he just grabbed my hands"; that she started calling her mother as loud as she could; that the intruder then let her go, ran and she fell to the floor; that she did not recognize defendant at the time he grabbed her but she did recognize him when he first came into her room and she saw him; that she knew defendant because she had seen him walking around in the community; that although she had never spoken with him she had seen him on more than one occasion; that when the police came to her home she pointed out to the police where defendant lived (this being less than two blocks from her home); that a short while after she pointed out to the police where defendant lived, the police brought defendant back to her home in a police car; that it was probably 15 minutes between the time when she first saw defendant inside her home and when the police brought him back to her home in a police car; that she identified defendant at that time as the person who was in her bedroom; and that she could see the back of the house where defendant lived from the front yard of her home.

On cross-examination, Aleasia repeated that she had seen defendant in the neighborhood prior to the morning in question; that while she did not know him, she knew where he lived because his niece, Barbara Mack, was her friend; that when she first woke up and saw the intruder, she thought it was her brother; that after thinking about it for a few seconds, she realized the intruder was not her brother because the intruder had broad shoulders and was larger than her brother; that although

she did not know defendant's name at the time she saw him in her bedroom, she recognized him as her friend's uncle; that her brother told police defendant's name and she pointed out where defendant lived.

It is well-settled that when the trial judge's findings of fact are supported by competent evidence, they are conclusive on the appellate court. *State v. Dunlap*, 298 N.C. 725, 259 S.E. 2d 893 (1979); *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972). It is also true that when the findings are not supported by the evidence, they are not binding on the appellate court. *See State v. Sadler*, 40 N.C. App. 22, 251 S.E. 2d 902 (1979).

We agree with the state that the key finding of fact underlined above is not supported by the evidence. As we read the record, while Aleasia testified that she did not recognize defendant while she was struggling with him, she stated that she recognized him prior to the struggle when he was near her bed. Although she stated that she did not know defendant's name, she knew him as her friend Barbara Mack's uncle and her brother provided the name.

Since it appears that the trial court's conclusion that Aleasia's testimony identifying defendant is based on the quoted finding of fact, we hold that the part of the order suppressing her testimony must be vacated and the cause will be remanded to the trial court for another determination of defendant's motion to suppress her identification testimony.

DEFENDANT'S APPEAL

[3] The Court of Appeals correctly held that defendant had no right to appeal from that part of the trial court's order denying his motion to suppress the identification testimony of Eddy Mungo.

Ordinarily, a defendant in a criminal action may appeal to the appellate division as a matter of right only from a *final* judgment. G.S. 7A-27. An order dealing with a pretrial motion to suppress is clearly an interlocutory order. *See State v. Grogan*, 40 N.C. App. 371, 253 S.E. 2d 20 (1979). While G.S. 15A-979(c) accords the state the right to appeal from a pretrial order *granting* a motion to suppress, the statute does not accord a defendant the right to appeal

from an order *denying* the motion. G.S. 15A-979(b) provides that an order denying a motion to suppress evidence may be reviewed upon an appeal from a *judgment of conviction*, including a judgment entered upon a plea of guilty.

Even so, since the case is here on the state's appeal, we have elected to consider whether the trial court correctly denied defendant's motion to suppress Eddy Mungo's identification testimony. We hold that the trial court ruled correctly.

[4] Defendant argues first that the trial court erred in making the following finding of fact:

> 8. That the pretrial and in-court identifications of the defendant by Dwayne Eddy Mungo are reliable and are purely the product of Dwayne's recollection of the defendant on September 3, 1980, and derived only from having observed the defendant as he ran through the living room at 645 Dunbrook Lane on the morning of September 3, 1980. Said identifications are admissible.

Defendant asserts that the evidence presented on voir dire regarding the circumstances under which Eddy Mungo observed the defendant rendered Mungo's identification of defendant so inherently incredible and impossible that it should have been suppressed.

As a general rule, the credibility of witnesses and the proper weight to be given their identification testimony is a matter for jury determination. *State v. Green*, 296 N.C. 183, 250 S.E. 2d 197 (1978); *State v. Orr*, 260 N.C. 177, 132 S.E. 2d 334 (1963); *State v. Bowman*, 232 N.C. 374, 61 S.E. 2d 107 (1950). An exception to this rule, however, was set forth in the case of *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967). *Miller* involved a trial court's ruling on a motion for nonsuit on the grounds that the identification evidence was inherently incredible.

In *Miller* we held that the rule providing for jury assessment of the credibility of witnesses and weight of the evidence does not apply "where the only evidence identifying the defendant as the perpetrator of the offense is inherently incredible because of undisputed facts, clearly established by the state's evidence, as to the physical conditions under which the alleged observation occurred." 270 N.C. at 731. The identification of defendant in *Miller*

was based on the observation by the state's witness of a man at the scene of the crime. The observation was made at night and at a distance of 286 feet. Prior to that incident the witness had never seen defendant and the description he gave police was different from the defendant's actual appearance. This identification testimony was the only evidence the state presented tending to show defendant's guilt. Under such circumstances, this court held that the motion for nonsuit should have been allowed.

According to *Miller*, the test to be employed to determine whether the identification evidence is inherently incredible is whether "there is a reasonable possibility of observation sufficient to permit subsequent identification." 270 N.C. at 732. Where such a possibility exists, the credibility of the witness' identification and the weight given his testimony is for the jury to decide. 270 N.C. at 732.

The case at bar presents a factual situation far different from the one described above. Although the record reveals that lighting conditions were poor, Eddy Mungo's testimony on voir dire indicated that he recognized the defendant as the intruder. Defendant was known by sight and name to Eddy as they lived in the same neighborhood. This situation sharply contrasts with circumstances where a witness trys to make an identification based on an observation of a stranger made under unfavorable viewing conditions.

Eddy Mungo also testified that defendant ran through the living room and jumped out the window, passing two to three feet from where he was hiding. Additionally, Eddy testified that when defendant stepped into the light at the window he knew it was him. We hold that the trial court correctly found that the identification was admissible. The evidence presented shows that Eddy Mungo had a reasonable possibility of observation of the defendant sufficient to permit subsequent identification. The credibility of and weight to be given his testimony will be a matter for the jury to determine. *See also State v. Green, supra; State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977).

Where findings of fact are supported by competent evidence, such findings are conclusive on appeal. *State v. Harris*, 279 N.C. 177, 181 S.E. 2d 420 (1971). Since there is sufficient evidence in the record supporting the trial court's findings with respect

to Eddy's identification testimony, those findings will not be disturbed.

[5] Lastly, defendant contends that the trial court erred in making the following finding and conclusion:

> 9. That as to Dwayne's pretrial identification of the defendant at the one-man show-up, the one-man show-up was not so unnecessarily suggestive and conducive to an irreparable mistaken identification as to violate defendant's right to due process of law.

Show-ups, the practice of showing suspects singly to witnesses for purposes of identification, have been criticized as an identification procedure by both this court and the U.S. Supreme Court. *Stovall v. Denno*, 388 U.S. 293 (1967); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1980). This identification procedure may be inherently suggestive for the reason that witnesses would be likely to assume that the police presented for their view persons who were suspected of being guilty of the offense under investigation. *State v. Oliver, supra; State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128 (1979).

Pretrial show-up identifications, however, even though suggestive and unnecessary, are not *per se* violative of a defendant's due process rights. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Stanley v. Cox*, 486 F. 2d 48 (4th Cir. 1973), *cert. denied*, 416 U.S. 958 (1974). The primary evil sought to be avoided is the substantial likelihood of irreparable misidentification. *Neil v. Biggers*, 409 U.S. 188 (1972); *Simmons v. U.S.*, 390 U.S. 377 (1968). Where the pretrial identification procedures have created a likelihood of irreparable misidentification, neither the pretrial nor the in-court identification is permissible. *Neil v. Biggers, supra; State v. Oliver, surpa.* An unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability. *Manson v. Brathwaite*, 432 U.S. at 106; *State v. Oliver*, 302 N.C. at 45. In reaching its conclusion in *Manson*, the U.S. Supreme Court reasoned:

> [R]eliability is the linchpin in determining the admissibility of identification testimony . . . . The factors to be considered

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

Manson v. Brathwaite, 432 U.S. at 114.

Applying these factors to the case at bar we conclude, from the totality of the circumstances, that evidence of Eddy Mungo's pretrial identification of defendant at a one-man show-up was sufficiently reliable to be admissible despite any suggestiveness of the procedure. The admissibility of Aleasia Mungo's pretrial identification of defendant will depend on the findings of the trial judge on remand as to whether Aleasia's identification testimony must be suppressed.

Although Eddy Mungo's observation of defendant was brief and made under poor lighting conditions, he stated he knew defendant from having seen him in the neighborhood; his degree of attention was high; he had just heard his sister scream and had seen a man come running through his house and jump out the window. While Eddy's physical description of the intruder was general, he identified the defendant by name. Finally, the confrontation between Eddy and defendant occurred within 15 minutes from the time the intruder left the Mungo's residence. Both Eddy and his sister were quite certain in their identification of defendant.

We hold, therefore, that Eddy Mungo's identification testimony is admissible at trial, and the part of Judge Johnson's order relating to this testimony is affirmed.

Affirmed in part, reversed in part and cause remanded.

HAROLD E. LOWE v. JAMES L. BRADFORD AND WIFE, JOY S. BRADFORD

No. 157A81

(Filed 30 March 1982)

1. **Rules of Civil Procedure § 56.4— opposition to motion for summary judgment —conclusory allegations insufficient**

G.S. 1A-1, Rule 56(e) precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts.

2. **Easements § 8— tenants in common in easement—alterations by one tenant**

An owner in common in an easement is not entitled to make alterations which will make the easement appreciably less convenient to a co-tenant.

3. **Easements § 8.4— interference with use of easement—summary judgment for defendant**

In an action to recover damages for the decline in market value of plaintiff's lot allegedly caused by defendants' construction of a driveway over an access easement shared by the parties as tenants in common, summary judgment was properly entered for defendants where defendants presented evidence that the driveway did not restrict plaintiff's use of the easement for access to his lot and did not diminish the fair market value of the lot, and plaintiff responded by filing an affidavit which contained only conclusory allegations but gave no specific facts to show how the driveway has interfered with use of his easement or how it has impaired the value of his lot.

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 54 N.C. App. 319, 283 S.E. 2d 410 (1981), one judge dissenting, reversing the trial court's entry of summary judgment in favor of defendants. The trial court order was entered by *Davis, Judge,* on 15 October 1980 in Superior Court, DAVIDSON County.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for plaintiff.

Ted S. Royster, Jr., for defendants.

CARLTON, Justice.

The sole question presented by this appeal is whether the trial court properly allowed defendants' motion for summary judgment.

I.

Plaintiff filed suit on 17 June 1980 to recover damages for the decline in market value of his property allegedly caused by defendants' interference with plaintiff's use, benefit and enjoyment of an easement appurtenant to his land. Plaintiff and defendants own adjoining lots in the Sapona Subdivision in Davidson County. Their lots are located on Indian Wells Circle. Although defendants' lot fronts on Indian Wells Circle, access is provided to that street across an unpaved cul-de-sac, which is the sole means of access to plaintiff's lot. The cul-de-sac also provides access to another lot which is not involved in this suit. Plaintiff's lot lies between the others, and it has no direct frontage on Indian Wells Circle. Each of these lots was sold with an easement appurtenant in the cul-de-sac. This unpaved semi-circular area is not a cul-de-sac in the normal usage of that term because it is not located at the end of a street. Instead, it is located on the side of a paved street and was obviously designed, due to the peculiar triangular shape of the lots, to provide better access for all three lot owners to the paved street.

Sometime during the summer of 1979 defendants had constructed across the cul-de-sac a sixteen-foot wide concrete driveway which connected their lot with Indian Wells Circle. Defendants did not obtain plaintiff's consent before constructing the driveway, and plaintiff alleged that the concrete driveway deprived him of his use of the easement and, therefore, his access to his lot and rendered his lot worthless. He prayed for damages in the amount of the fair market value of the lot before the driveway was constructed and asked that defendants be enjoined from obstructing the easement.

Defendants' answer admitted construction of the driveway across the cul-de-sac but alleged that the cul-de-sac had been dedicated to public use. Defendants denied that their driveway restricted plaintiff's access to his lot or caused a diminution in the value of plaintiff's lot. Defendants also claimed that plaintiff's suit was a "spite action" filed against them to retaliate for their refusal to buy plaintiff's lot.

Defendants filed a motion for summary judgment and averred in a supporting affidavit that no obstruction to plaintiff's access to his lot resulted from paving of the driveway because any

portion of the driveway located in the cul-de-sac was dedicated to public use and plaintiff had the same use of the cul-de-sac and that portion of the driveway in the cul-de-sac as defendants, and that plaintiff had suffered no damages. Defendants also submitted the affidavits of two experienced realtors who averred that no damage to plaintiff's lot resulted from the construction of the driveway.

Plaintiff also moved for summary judgment. Plaintiff filed an affidavit which repeated in substance the allegations of his complaint: (1) that the driveway is constructed across the cul-de-sac and has decreased and restricted his access from the street to the extent that he does not have reasonable and adequate access to his property and (2) that due to the lack of access his lot is practically worthless. Other affidavits submitted by plaintiff concerned the location of the driveway and whether the cul-de-sac had been dedicated to public use.

On the basis of the pleadings and affidavits submitted in support of the summary judgment motions, the trial court found that no genuine issue of material fact existed and that defendants were entitled to judgment as a matter of law and allowed defendants' motion for summary judgment. Plaintiff appealed to the Court of Appeals. That court, in an opinion by Judge Hill in which Judge Whichard concurred, reversed the entry of summary judgment and remanded for trial. The majority believed that plaintiff had "forecast a genuine issue of material fact as to the change in access and its attendant effect upon the value of plaintiff's lot." Judge Hedrick dissented. He noted that plaintiff's forecast of evidence contained no allegations or evidence of *specific* facts "as to how the concrete driveway . . . interferes with plaintiff's use of the easement." Judge Hedrick concluded, therefore, that the general allegation that the driveway interfered with plaintiff's use of the cul-de-sac was insufficient to create a genuine issue as to a material fact. We agree with Judge Hedrick and reverse.

II.

Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted "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 judgment as a matter of law."

The purpose of the rule is to eliminate formal trials where only questions of law are involved. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The procedure under the rule is designed to allow a preview or forecast of the proof of the parties in order to determine whether a jury trial is necessary. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). Put another way, the rule allows the trial court "to pierce the pleadings" to determine whether any genuine factual controversy exists. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or a defense. *Bone International, Inc. v. Brooks*, 304 N.C. 371, 283 S.E. 2d 518 (1981).

A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). Generally this means that on "undisputed aspects of the opposing evidential forecast," where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. 2 McIntosh, *North Carolina Practice and Procedure* § 1660.5, at 73 (2d ed. Supp. 1970). If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so. *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. at 470, 251 S.E. 2d at 421-22; *Zimmerman v. Hogg & Allen*, 286 N.C. at 29, 209 S.E. 2d at 798. If the moving party fails to meet his burden, summary judgment is improper regardless of whether the opponent responds. 2 McIntosh, *supra*. The goal of this procedural device is to allow penetration of an unfounded claim or defense before trial. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

[1] If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to "set forth *specific facts*

showing that there is a genuine issue for trial." Rule 56(e), Rules of Civil Procedure (emphasis added). The nonmoving party "may not rest upon the mere allegations of his pleadings." *Id.*

Subsection (e) of Rule 56 does not shift the burden of proof at the hearing on motion for summary judgment. The moving party still has the burden of proving that no genuine issue of material fact exists in the case. However, when the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own. If he rests upon the mere allegations or denial of his pleading, he does so at the risk of having judgment entered against him. The opposing party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists. *See* Shuford, *N.C. Civil Practice and Procedure*, § 56-9 (2d ed. 1981). *However, subsection (e) of Rule 56 precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts. Nasco Equipment Co. v. Mason*, 291 N.C. 145, 152, 229 S.E. 2d 278, 283 (1976). And, subsection (e) clearly states that the unsupported allegations in a pleading are insufficient to create a genuine issue of fact where the moving adverse party supports his motion by allowable evidentiary matter showing the facts to be contrary to that alleged in the pleadings.

[2] In the case at bar plaintiff alleged that he and defendants were tenants in common in an easement appurtenant to their lots and that defendants had interfered with his use of the easement. An owner in common in an easement is not entitled to make alterations which will make the easement appreciably less convenient to a co-tenant. 25 Am. Jur. 2d *Easements and Licenses* § 88 (1966). Each owner in common is entitled to free use and may not act so as to obstruct a co-tenant's use. 28 C.J.S. *Easements* § 96 (1941). Defendants admitted the construction of the driveway over the cul-de-sac. They denied, however, that the driveway restricted plaintiff's use of the cul-de-sac, that it in any way deprived plaintiff of access to his lot and that the driveway had caused any decrease in the fair market value of plaintiff's lot.

[3] In support of their summary judgment motion, defendants submitted affidavits averring that the driveway did not restrict

plaintiff's access, that the driveway was available for plaintiff's use and, through the affidavits of two experienced realtors, that the fair market value of plaintiff's lot had not been diminished by construction of the driveway. Exhibits given the trial court showed that the driveway caused no restriction of access to plaintiff's lot. By this evidence, defendants showed that essential elements of plaintiff's claim, restriction of access and damage to the value of the property, were non-existent.

At this point, the burden shifted to plaintiff to show the existence of a genuine issue of material fact or to provide an excuse for not so doing. We must determine whether, in the face of defendants' successful showing on their summary judgment motion, plaintiff set forth specific facts showing that there existed a triable issue of fact as required by Rule 56(e) or whether he merely rested on his pleadings. In other words, we must determine whether plaintiff took affirmative steps sufficient to defend his position by proof of his own.

We conclude that plaintiff failed to comply with the response requirements of Rule 56(e). Plaintiff did file a verified affidavit to support his unverified complaint. However, it merely repeated the essential allegations of his complaint, *i.e.*, that access to his lot had been restricted and the value of his lot had been impaired. It added nothing to his complaint. It gave no *specific facts* which indicated in what manner the driveway interfered with plaintiff's access to his lot. The surveys submitted by plaintiff also failed to reveal any obstruction to plaintiff's lot by the driveway. Indeed, they revealed that plaintiff had full and free access to his lot across the portion of the cul-de-sac unaffected by the driveway and, as Judge Hedrick concluded, it appears from the exhibits that plaintiff's access to his lot has been enhanced by construction of defendant's driveway.

In a word, plaintiff has failed to present any *specific facts* to show how the driveway has interfered with use of his easement or how it has impaired the value of his property; his allegations are merely conclusory. "Rule 56(e) clearly precludes any party from prevailing against a motion for summary judgment through reliance on such conclusory allegations unsupported by facts." *Nasco Equipment Co. v. Mason*, 291 N.C. at 152, 229 S.E. 2d at 283; *see also Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 242 S.E. 2d 785 (1978).

We finally address plaintiff's contention that the opinion testimony of the two realtors was improperly considered by the trial court in ruling on defendants' motion for summary judgment. Consideration of these affidavits was clearly proper. One with knowledge of value gained from experience, information and observation may give an opinion on the value of specific real property. 1 *Stansbury's North Carolina Evidence* § 128 (Brandis Rev. 1973). Rule 56(e) provides in pertinent part that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein." The affidavits of the realtors fully complied with the rule. Each affidavit stated, *inter alia*, that the affiant was a realtor and had been for a stated number of years, that his work was in Davidson County, that he had personally viewed the property in question including the disputed driveway, and that no damage had been done to the fair market value of plaintiff's lot. Each affiant then gave his opinion that the fair market value of plaintiff's lot was between nine and ten thousand dollars. This opinion testimony was properly admitted at the summary judgment hearing.

In summary, plaintiff has failed adequately to support his conclusory allegations by the specific factual showing required to oppose defendants' affidavits under Rule 56. There are, therefore, no genuine issues of "material fact" to be found in this record and the trial court properly granted summary judgment for defendants. 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, Davidson County, for reinstatement of the trial court order of 15 October 1980 entering summary judgment for defendants.

Reversed and remanded.

INTERCRAFT INDUSTRIES CORP. v. KAREN M. MORRISON AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 154A81

(Filed 30 March 1982)

Master and Servant § 108.1— unemployment compensation—absence caused by failure to find child care not "willful misconduct"

In an action concerning unemployment compensation benefits, the evidence was sufficient to permit the Commission to find that claimant's unexcused absence because she "just couldn't find child care" was for good cause and did not constitute "misconduct" connected with her work so as to disqualify her for unemployment compensation benefits. G.S. 96-14(2).

Justice CARLTON dissenting.

Justices COPELAND and MEYER join in this dissenting opinion.

APPEAL by plaintiff employer pursuant to G.S. 7A-30(2) from the decision of the North Carolina Court of Appeals (*Whichard, J.*, with *Hill, J.*, concurring and *Hedrick, J.*, dissenting) reported at 54 N.C. App. 225, --- S.E. 2d --- (1981), affirming a judgment by *Lee, J.*, at the 8 September 1980 Session of WAKE County Superior Court which affirmed a decision by defendant Employment Security Commission that defendant employee, claimant Karen M. Morrison, was not disqualified from receiving unemployment compensation benefits.

Testimony and evidence taken by an Employment Security Commission Appeals Referee on 15 April 1980 tended to show that the employer's absentee policy, of which the claimant was advised, permitted a maximum of six days of unexcused absence within a twelve month period and that a total of ten days of unexcused absences would result in termination of employment. Claimant was hired by employer on 4 September 1979.

On 22 January 1980, claimant was informed by written notice that if she incurred one more unexcused absence in the next thirty days she would be subject to further discipline. On 15 February 1980, claimant was advised by written notification that her absence on 7 February 1980 was unexcused and that another unexcused absence within thirty days would result in job termination. On Saturday, 16 February 1980, claimant was absent from "mandatory overtime" work of which she had notice. Claimant

notified the employer that she could not work that day because she couldn't find child care, and she testified at the hearing that "I couldn't work on Saturday because I didn't have a babysitter and that was the only reason." She admitted that most of her absences were from Saturday work.

The Commission made three findings of fact, to-wit:

1. Claimant last worked for Intercraft Industries on February 18, 1980. From February 17, 1980 until February 23, 1980, claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a).

2. Claimant was discharged from this job for being absent on February 16, 1980, a scheduled day of overtime work. She was absent because she had no child care that day. The absence was not excused.

3. The claimant had been warned, and was aware, that ten (10) unexcused absences within a twelve-month period would result in her discharge. The absence on February 16, 1980, was her tenth unexcused absence.

The Commission then concluded that "the employer has the responsibility to show that a claimant for benefits was discharged for misconduct within the meaning of the law" and that the employer failed to show that the employee was disqualified for benefits "because the evidence fails to show that claimant was discharged from the job for misconduct connected with the work."

The Wake County Superior Court judgment affirmed the Commission's decision in its entirety based upon a review of the competent evidence contained in the record.

Pope, McMillian, Gourley & Kutteh, by William H. McMillian, for plaintiff.

Employment Security Commission of North Carolina, by T. S. Whitaker, Acting Chief Counsel, V. Henry Gransee, Jr., Staff Attorney, and Thelma M. Hill, Staff Attorney, for defendant-appellant.

BRANCH, Chief Justice.

The question presented by this appeal is whether claimant's unexcused absence from work on 16 February 1980, which

violated her employer's rule and which was due to her inability to secure child care, constituted "misconduct" connected with her work so as to disqualify her for unemployment compensation benefits.

G.S. 96-14(2), in part, provides:

> An individual shall be disqualified for benefits . . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work.

This Court has not defined "misconduct" in the context of the statute. However, the rule recognized by our Court of Appeals and the majority of the courts of other jurisdictions is that misconduct sufficient to disqualify a discharged employee from receiving unemployment compensation is conduct which shows a wanton or wilful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent. *See In re Collingsworth*, 17 N.C. App. 340, 194 S.E. 2d 210 (1973), and cases there cited, 76 Am. Jur. 2d, *Unemployment Compensation* § 52 (1975); *Beaunit Mills, Inc. v. Division of Employment Security*, 43 N.J. Super. 172, 128 A. 2d 20 (1956); *Checker Cab Co. v. Industrial Comm.*, 242 Wisc. 429, 8 N.W. 2d 286 (1943). *See also* Annot., Unemployment Compensation - Misconduct, 26 A.L.R. 3d 1356, § 3 at 1359 (1969). We adopt this majority rule.

The obvious reasons for such a rule are to prevent benefits of the statute from going to persons who cause their unemployment by such callous, wanton, and deliberate misbehavior as would reasonably justify their discharge by an employer, and to prevent the dissipation of employment funds by persons engaged in such disqualifying acts.

Our research discloses that it is generally recognized that chronic or persistent absenteeism, in the face of warnings, and without good cause may constitute wilful misconduct. *See* Annot., Unemployment Compensation - Absenteeism, 58 A.L.R. 3d 674, § 3 at p. 685 (1974); Annot., Unemployment Compensation -Absences, 41 A.L.R. 2d 1158, § 3 at p. 1160 (1955). However, a violation of a work rule is not wilful misconduct if the evidence shows that the employee's actions were reasonable and were taken with good cause. *In re Collingsworth, supra; Kindrew v.*

Unemployment Comp. Bd., 37 Pa. Commw. Ct. 9, 388 A. 2d 801 (1978); *Unemployment Comp. Bd. v. Iacano*, 30 Pa. Commw. Ct. 51, 357 A. 2d 239 (1976); *Boynton Cab. Co. v. Neubeck*, 237 Wisc. 249, 296 N.W. 636 (1941). This Court has defined a "good cause" to be a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968); *see also*, *In re Clark*, 47 N.C. App. 163, 266 S.E. 2d 854 (1980).

Ordinarily a claimant is presumed to be entitled to benefits under the Unemployment Compensation Act, but this is a rebuttable presumption with the burden on the employer to show circumstances which disqualify the claimant. *Kelleher Unemployment Comp. Case*, 175 Pa. Super. 261, 104 A. 2d 171 (1954). *See also* Annot., Unemployment Compensation - Absenteeism, 58 A.L.R. 3d 674 (1974). We note in passing that the employer did not except to or attack the statement of the Commission in its decision that the employer had the responsibility to show that a claimant for benefits was discharged for misconduct within the meaning of the law.

G.S. 150A-1 exempts the Employment Security Commission from the provisions of Chapter 150A, the Administrative Procedure Act. However, our case law recognizes that an appeal from an administrative decision constitutes an exception to the judgment and presents the question whether the facts found are sufficient to support the judgment, *i.e.*, whether the court correctly applied the law to the facts found. *In re Burris*, 261 N.C. 450, 135 S.E. 2d 27 (1964). In considering an appeal from a decision of the Employment Security Commission, the reviewing court must (1) determine whether there was evidence before the Commission to support its findings of fact and (2) decide whether the facts found sustain the Commission's conclusions of law and its resulting decision. *Employment Security Comm. v. Jarrell*, 231 N.C. 381, 57 S.E. 2d 403 (1950).

On the question of "good cause" for claimant's unexcused absence on 16 February 1980, the record discloses a showing by claimant that she "just couldn't find child care" on that date. This evidence was sufficient to permit, but not require, the Commission to find that claimant's unexcused absence was for good cause. *Kelleher Unemployment Comp. Case*, 175 Pa. Super. at 264, 104 A. 2d at 173.

We wish to make it clear that it is our opinion that, depending on circumstances disclosed by the evidence, the lack of child care may or may not be "good cause" for an unexcused absence from work. This is a matter for the factfinder, here the Commission, to decide.

In instant case, the claimant offered uncontroverted evidence tending to show good cause. Employer, who had the burden of showing claimant to be disqualified to recieve benefits under the Act, offered nothing to refute claimant's showing. Thus, there was competent evidence to support the Commission's findings favorable to claimant, and these findings are conclusive on appeal. *In re Thomas*, 281 N.C. 598, 189 S.E. 2d 245 (1972). We are of the opinion that the findings, though sparse, support the Commission's conclusions of law and the conclusions of law sustained the Commission's decision. We note parenthetically that had employer offered any evidence to negate claimant's evidence of "good cause" the Commission should have made a specific finding as to whether "good cause" existed.

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

Affirmed.

Justice CARLTON dissenting.

I respectfully dissent from the majority opinion for the same reasons given by Judge Hedrick in his dissent in the Court of Appeals' opinion. 54 N.C. App. 225, --- S.E. 2d --- (1981).

Justices COPELAND and MEYER join in this dissenting opinion.

STATE OF NORTH CAROLINA v. JAMES RODNEY EDWARDS

No. 156A81

(Filed 30 March 1982)

1. **Rape and Allied Offenses § 3— first degree sexual offense—sufficiency of indictment**

An indictment which is drafted pursuant to G.S. 15-144.2(b) without specifying which "sexual act" was committed is sufficient to charge the crime of first degree sexual offense and to inform a defendant of such accusation. If a defendant wishes additional information on the nature of the specific "sexual act" with which he stands charged, he may move for a bill of particulars.

2. **Criminal Law § 73.2; Rape and Allied Offenses § 4.1— accusation of sexual advances by another—testimony not hearsay—exclusion as harmless error**

In a prosecution for first degree sexual offense, the trial court erred in ruling that the hearsay rule required the exclusion of cross-examination of the prosecutrix about an incident in which a man purportedly made a sexual advance toward her in a neighborhood store. However, such error was not prejudicial where the trial court permitted cross-examination concerning three other similar incidents, and such evidence was placed before the jury by the mother of the prosecutrix.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Johnson, J.*, at the 15 June 1981 Criminal Session of MECKLENBURG County Superior Court.

Defendant was charged with first-degree sexual offense. He entered a plea of not guilty.

The State offered evidence tending to show that on three or four occasions over a period of four to eight weeks beginning in November, 1980, defendant engaged in sexual acts with Diana Lynn Austin, his stepdaughter. Diana was under the age of twelve at the time of the incidents and was more than four years younger than the 36-year-old defendant.

The prosecutrix testified that while her mother and two other adults living in the mobile home with the family in Charlotte were out washing clothes at the laundromat, she and two younger children were left in the care of defendant. Defendant entered the bathroom while she was in the bathtub and ordered her to go into her bedroom and lie down upon the bed. After Diana went to the bedroom, defendant followed and began to rub a mole on her body telling her he could make it go away.

Thereafter, defendant put his mouth on the prosecutrix's breasts and later performed cunnilingus upon her.

On a later date, defendant instructed the prosecutrix to lie nude upon the bed while he lay nude upon her and ejaculated on her. On another occasion, defendant inserted his penis into the prosecutrix's mouth.

The State offered the testimony of a Mecklenburg County social worker from child protective services and a county police officer in corroboration of the prosecutrix's testimony. The State also offered evidence of flight by defendant following the removal of the prosecutrix from his home by county authorities.

Defendant denied ever having any sexual contact with his stepdaughter. He offered evidence tending to show that the prosecutrix had previously made false accusations of sexual advances toward her by her natural father, a next door neighbor, a bus driver, and a man at a neighborhood store. In addition, defendant offered the testimony of an attorney consulted regarding child custody, the prosecutrix's mother (defendant's wife), the prosecutrix's natural father, and defendant's mother which tended to show inconsistencies contradicting the prosecutrix's in-court testimony.

The jury returned a verdict of guilty of first-degree sexual offense, and the trial court imposed a judgment of life imprisonment.

Rufus L. Edmisten, Attorney General, by Evelyn M. Coman, Associate Attorney, for the State.

Fritz Y. Mercer, Jr., Public Defender, for defendant.

BRANCH, Chief Justice.

[1] Defendant first assigns as error the trial court's failure to grant his motion to quash the indictment. He contends that the indictment was defective in that it did not allege that he committed a "sexual act" with the victim. He argues that since a "sexual act" is an essential element of first-degree sexual offense it must be alleged in the bill of indictment.

Defendant was tried under G.S. 14-27.4(a)(1), which states that:

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(1) With a victim who is a child of the age of 12 years or less and the defendant is of the age of 12 years or more and is four or more years older than the victim.

The indictment in instant case reads as follows:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 31st day of October, 1980, in Mecklenburg County, James Rodney Edwards, did unlawfully, wilfully and feloniously commit a sexual offense with Diana Lynn Austin, a child 11 years 10 months old and thus of the age of 12 years or less.

G.S. 15-144.2(b) provides the approved "short form" essentials of a bill for sex offense, to-wit:

If the victim is a person of the age of 12 years or less, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child of 12 years or less, naming the child, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a sex offense against a child of the age of 12 years or less and all lesser included offenses.

While it is essential that the State prove a "sexual act" as defined by G.S. 14-27.1(4) in order to convict a defendant under G.S. 14-27.4, an indictment which is drafted pursuant to the provisions of G.S. 15-144.2(b) without specifying which "sexual act" was committed is sufficient to charge the crime of first-degree sexual offense and to inform a defendant of such accusation. *See State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980). If a defendant wishes additional information in the nature of the specific "sexual act" with which he stands charged, he may move for a bill of particulars. *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978).

The indictment in instant case complies with the statutory language of G.S. 15-144.2(b).

[2] Defendant next assigns as error the action of the trial judge in limiting his cross-examination of the prosecuting witness.

A hearing was conducted in the absence of the jury to determine the admissibility of certain questions which defense counsel proposed to ask on cross-examination of the prosecuting witness. At that hearing, defense counsel questioned the prosecutrix about four separate accusations she had made against other men concerning sexual advances. She denied making three of the accusations but admitted one incident in which a man made a sexual advance toward her in or near a neighborhood store. In connection with the admitted incident at the neighborhood store, she testified that defendant told her that when he made inquiry at the store, the owner said that he would never let it happen again.

At the hearing, defense counsel stated that he would not call the storekeeper, but that defendant would testify that he asked the storekeeper about the accusation and was told that such an incident never took place.

The trial judge ruled that he would permit cross-examination of the prosecuting witness as to all the incidents except the one at the neighborhood store. He based the exclusion of this evidence on the hearsay rule.

"Evidence, oral or written, is called 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." 1 Stansbury's N.C. Evidence § 138 (Brandis rev. 1973) and cases there cited.

In instant case, we are of the opinion that the trial judge should have permitted defense counsel to cross-examine the prosecuting witness as to the neighborhood store incident. The hearsay rule did not apply to the question to be asked her since this was a matter that was within her own knowledge and the probative force of her testimony did not depend upon the competency or credibility of any other person.

We turn to the question of whether the erroneous ruling constituted prejudicial error.

The trial judge has wide discretion in controlling the scope of cross-examination. He sees and hears the witnesses, knows the background of the case, and is in a favorable position to control the proper bounds of cross-examination. Since the limit of legitimate cross-examination is a matter largely within the trial

judge's discretion, his rulings thereon will not be held to be prejudicial error in absence of a showing that the verdict was improperly influenced by the ruling. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977). *See also State v. Lindley*, 23 N.C. App. 48, 208 S.E. 2d 203, *aff'd.* 286 N.C. 255, 210 S.E. 2d 207 (1974). Further, when an erroneous ruling is made excluding cross-examination testimony and evidence of like import is thereafter admitted, any error resulting from the ruling becomes harmless. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978).

In instant case, defendant would have been hard pressed to have contradicted the testimony of the prosecuting witness since under the facts of this case defendant's testimony as to statements made by the storekeeper would have been clearly barred by the hearsay rule. Additionally, the trial judge permitted cross-examination concerning three other similar incidents. The very evidence upon which this assignment of error is based was placed before the jury by the prosecuting witness's mother, who testified before the jury that her daughter made an accusation of sexual advances against someone at or near a local store, and when defendant made inquiry at the store, he was told that the person accused had not even been there.

For reasons stated, we hold that the erroneous ruling in not permitting cross-examination of the prosecuting witness as to the neighborhood store incident did not amount to prejudicial error so as to improperly influence the jury's verdict.

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

No error.

STATE OF NORTH CAROLINA v. DEREK HARRISON METTRICK AND CLAUDE DALTON VICKERS

No. 150A81

(Filed 30 March 1982)

Constitutional Law § 32; Criminal Law § 101.4— right to impartial jury—contact with State's witnesses

Where a witness for the State acts as a custodian or officer in charge of the jury in a criminal case, prejudice is conclusively presumed. Therefore, where the State's two principle witnesses, a sheriff and deputy sheriff, transported prospective jurors in two activities buses from one county to another county for defendant's trial; where the witnesses were alone in a bus with the jurors for as much as three and one-half hours; and where the sheriff testified five times in the presence of the jury and the deputy testified three times in the presence of the jury, the sheriff and deputy were deemed to have acted as custodians or officers in charge of the jury and prejudice was conclusively presumed despite the fact that the evidence revealed no hint of malice or misconduct by the officers.

APPEAL by the State as a matter of right, pursuant to G.S. 7A-30(2), of the decision by a divided panel of the Court of Appeals reported at 54 N.C. App. 1, 283 S.E. 2d 139 (1981), reversing the judgments of conviction entered by *Washington, Judge* during the 19 May 1980 Session of Superior Court of ASHE County and awarding a new trial for the defendants.

The defendant Derek Harrison Mettrick was tried on indictments proper in form and found guilty of conspiracy to sell or deliver marijuana feloniously, conspiracy to possess marijuana feloniously, felonious possession of marijuana and felonious delivery of marijuana. The defendant Claude Dalton Vickers was tried on indictments proper in form and found guilty of conspiracy to sell or deliver marijuana feloniously, conspiracy to possess marijuana feloniously and felonious possession of marijuana. Both defendants were sentenced to active terms of imprisonment.

Rufus L. Edmisten, Attorney General, by Henry T. Rosser, Assistant Attorney General and Steven F. Bryant, Associate Attorney for the State.

Vannoy & Reeves, by Wade E. Vannoy, Jr., for defendant-appellee Mettrick.

Moore & Willardson, by Larry S. Moore and John S. Willardson, for defendant-appellee Vickers.

MITCHELL, Justice.

The defendants in this consolidated appeal contend that two State's witnesses acted as custodians or officers in charge of the jury and that they are entitled to a new trial as a result. We agree and affirm the decision of the Court of Appeals awarding the defendants a new trial.

Only a brief summary of the evidence introduced at trial is necessary for an understanding of the issues giving rise to this appeal. In summary, the evidence for the State tended to show that, on 16 January 1980, a DC-6 airplane piloted by the defendant, Derek Harrison Mettrick, landed at the Ashe County Airport. The crew of the plane unloaded its cargo into two trucks which immediately departed the airport. Although less than five grams of marijuana seeds, stems and other fragments were found by law enforcement officers in or about the airplane, evidence was introduced tending to show that the cargo of the airplane was 5,000 to 10,000 pounds of marijuana in burlap bales. Evidence was also introduced tending to show that the defendant, Claude Dalton Vickers, supervised the loading of the trucks and drove one of them away from the airport.

Prior to trial, the trial court ordered that these cases be consolidated for trial and that a special venire of jurors be drawn from another county. Ashe County Sheriff Richard Waddell and J. D. Parsons, one of his deputies, transported the prospective jurors in two activity buses from Caldwell County to Ashe County on 19 May 1980, the opening day of the defendants' trial. Deputy Parsons also transported the jurors to lunch that day. After the jury was selected on the afternoon of 19 May 1980, Parsons drove one of the buses transporting the jurors on the trip returning them to Caldwell County for the evening. The following day, Sheriff Waddell transported eleven of the fourteen people chosen as jurors and alternates from Caldwell County to Ashe County.

After the opening of court on 20 May 1980, the trial court learned for the first time that these two witnesses for the State had been transporting the jury. Each of the defendants made a timely motion for a mistrial contending that these actions by the witnesses for the State constituted prejudicial error.

The uncontested evidence on *voir dire* indicated that no one was present on any of the bus trips except the jurors and the

named officers. Each juror stated that neither officer mentioned the cases against the defendants. All of the jurors stated that their ability to render an impartial decision would not be impaired in any way by the fact that the two officers who had transported them would be testifying for the State. The trial court made appropriate findings based upon this evidence and denied the motions of the defendants for mistrial.

For purposes of this appeal, we assume, as the uncontested evidence tended to show, that the witnesses for the State who transported the jurors did not discuss the charges against the defendants and that their association with the jurors while transporting them did not enhance the credibility of these witnesses for the State in the jurors' eyes. Whether the charges against the defendants were discussed or the credibility of the officers with the jury enhanced is irrelevant to the issue before us.

We have previously held that, where a witness for the State acts as a *custodian* or *officer in charge* of the jury in a criminal case, prejudice is conclusively presumed. *State v. Macon*, 276 N.C. 466, 473, 173 S.E. 2d 286, 290 (1970); *Compare Turner v. Louisiana*, 379 U.S. 466, 13 L.Ed. 2d 424, 85 S.Ct. 546 (1965). In such cases the appearance of a fair trial before an impartial jury is as important as the fact of such a trial. The integrity of our system of trial by jury is at stake. No matter how circumspect officers who are to be witnesses for the State may be when they act as custodians or officers in charge of the jury in a criminal case, cynical minds often will leap to the conclusion that the jury has been prejudiced or tampered with in some way. If allowed to go unabated, such suspicion would seriously erode confidence in our jury system. For this reason we have adopted the rule that prejudice is conclusively presumed in such cases.

Thus, we must determine whether either witness for the State acted as "custodian" or "officer in charge" of the jury here. The State contends that neither officer acted in either capacity. The State emphasizes the fact that the jury was not sequestered in the present case, and the jurors were not dependent upon the sheriff or the deputy to provide their meals or lodging or to provide for any other needs on a twenty-four hour a day basis. The defendants, on the other hand, emphasize the fact that the jurors were alone for various periods of time with either the sheriff or

the deputy who drove them in buses over mountain roads. The jurors' lives, safety and comfort were in these officers' hands during such times.

In determining whether the officers who testified for the State were "custodians" or "officers in charge" of the jury as we employ those terms here, we look to factual indicia of custody and control and not solely to the lawful authority to exercise such custody or control. Obviously, the mere fact that the elected sheriff of a county has certain responsibilities for and obligations to jurors and prospective jurors in his county does not make him a custodian or an officer in charge of the jury for purposes of invoking the conclusive presumption of prejudice and, thereby, prevent him from testifying in all criminal cases tried before juries in the county. Instead, we must look to the relationship existing in fact between the witness for the State and the jurors in any given case in order to determine whether the witness has acted as a custodian or officer in charge of the jury so as to raise the conclusive presumption of prejudice.

In the present case, Sheriff Waddell was called to testify five times in the presence of the jury. He was alone with jurors in a bus for a total of at least three and one-half hours as he drove them at various times through the mountains. The same is true of Deputy Parsons who testified three times in the presence of the jury. The jurors, in fact, were in these law enforcement officers' custody and under their charge out of the presence of the court for protracted periods of time with no one else present. Without question, the jurors' safety and comfort were in the officers' hands during these periods of travel. We find that the sheriff and the deputy who were witnesses for the State also acted as custodians or officers in charge of the jury in the present case. Therefore, prejudice is conclusively presumed despite the fact that the evidence reveals no hint of malice or misconduct by the officers. The defendants are entitled to a new trial.

The defendants have brought forward several other assignments of error which were heard and decided by the Court of Appeals. As the issues raised by those assignments are unlikely to arise during the new trial of these cases, we find it unnecessary to reach them.

The decision of the Court of Appeals requiring a new trial for the defendants is

Affirmed.

STATE OF NORTH CAROLINA v. JAMES F. DUKES, JR.

No. 171A81

(Filed 30 March 1982)

1. **Indictment and Warrant § 5— irregularity in return of bill of indictment by grand jury**

The trial court properly denied defendant's motion to quash the bill of indictment because a witness who appeared before the grand jury was indicated with a checkmark and not with an "X" as stated in the foreman's certification since, under G.S. 15A-623(c), the indictment would not be subject to quashal even if there had not been any indication at all.

2. **Constitutional Law § 30— failure to disclose pretrial identification procedure during discovery—no abuse of discretion**

The trial court did not abuse its discretion in denying defendant's motion for a mistrial for the district attorney's failure to disclose the pretrial identification procedure during discovery. The failure to provide discovery was inadvertent, no objection was made when defense counsel learned of the failure to provide discovery and defense counsel fully cross-examined the witness concerning the information not discovered.

ON appeal from judgment imposed by *Braswell, Judge,* at the 13 July 1981 Criminal Session of Superior Court, CUMBERLAND County.

Defendant was charged in an indictment, proper in form, with armed robbery, a violation of G.S. 14-87. He was tried before a jury and found guilty as charged. From a sentence of life imprisonment, he appeals to this Court as of right pursuant to G.S. 7A-27(a).

Attorney General Rufus L. Edmisten, by Assistant Attorneys General Robert R. Reilly and Thomas G. Meacham, Jr., for the State.

Blackwell, Thompson, Swaringer, Johnson & Thompson, P.A., by E. Lynn Johnson, for defendant.

CARLTON, Justice.

I.

On 16 February 1981, at approximately 6:20 p.m., defendant and an accomplice entered the Athletic World store in the Westwood Shopping Center in Fayetteville. The store was empty except for two clerks, Daniel Hinds (Daniel) and his brother, Sidney Hinds (Sidney). Defendant walked toward the counter, pulled a double-barreled, sawed-off shotgun from his coat, and said, "All right, boys, this is it. This is the real thing." Defendant then walked over to Sidney, pointed the gun in his face, and said, "Open the cash register." Defendant's accomplice, one Owens, went behind the counter and forced Daniel to open the cash register. Owens then removed all the money except for the dimes, nickels and pennies. He also took Daniel's wallet and a watch belonging to the daughter of the storeowner. Owens left the store while defendant ordered the clerks to walk toward the back of the store. Daniel heard the jangle of clothes hangers being pulled off a rack and turned and saw defendant fleeing the store with several warm-up suits in hand. Daniel ran toward the front of the store. Defendant turned, saw Daniel and shot his shotgun through the pocket of his coat. Daniel grabbed a pistol from underneath the counter. He heard a second shotgun blast and ran outside the store to chase defendant, who fled across the parking lot toward Shoney's Restaurant. Hinds yelled for help, and Captain Kershaw, who had just exited Shoney's, heard the shouts and saw defendant running toward him. Defendant dropped the shotgun as he was running and Kershaw picked it up. He chased defendant around the back of Shoney's to a grassy knoll where he caught defendant. Kershaw held defendant on the ground until help arrived.

II.

[1] Defendant first assigns error to the trial court's denial of his motion to quash the bill of indictment because the witness who was sworn and examined before the grand jury was indicated with a "check mark" on the indictment and not with an "X" as stated in the foreman's certification.[1] This assignment is patently

1. On the bill of indictment, after the statement of the charge, appeared the following:

without merit. G.S. 15A-623(c) provides that "[t]he foreman must indicate on each bill of indictment . . . the witness or witnesses sworn and examined before the grand jury." That provision, however, is merely directory and "[f]ailure to comply with [it] does not vitiate a bill of indictment . . . ." G.S. § 15A-623(c) (1978). The foreman is not required to indicate which witness or witnesses were heard in any particular manner. Here, the witness who appeared before the grand jury was indicated, albeit with a checkmark and not with an "X" as stated in the foreman's certification. Even had there been no indication, however, the indictment would not, by virtue of G.S. 15A-623(c), be subject to quashal. The indication of which witness was heard by a checkmark and not an "X" is not grounds for quashal.

III.

[2] By his second and third assignments, defendant contends that the trial court erred in denying his motion for a mistrial made during trial and renewed after the verdict. During direct examination by the State, Daniel Hinds testified without objection that he had identified defendant and his accomplice in a book of photographs given him by the police. He had been given two books of photographs and picked out pictures of defendant and his accomplice from the first book, which was about two inches thick. Defendant fully cross-examined Daniel on his observation of defendant during the crime and on the pretrial identification procedure. After Daniel left the stand defendant moved for mistrial for the district attorney's failure to disclose the pretrial identification procedure during discovery. The failure to apprise the defendant of this information was apparently inadvertent. The trial judge denied defendant's motion, noting that no objection was entered or voir dire requested when this information came

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WITNESSES:
S. Stankiewiez
~~M. J. Phillips~~, FPD

The witnesses marked "X" were sworn by the undersigned foreman and examined before the Grand Jury, and this bill was found to be X, a true bill with twelve or more jurors concurring.

This 30th day of March, 1981.

s/CONNIE M. MANGUM
Grand Jury Foreman

out on direct and that defendant had cross-examined Hinds on the pretrial procedure.

Failure to provide discovery is governed by G.S. 15A-910. That statute provides that a court, upon determining during the course of proceedings that a party has failed to provide the required discovery, may, in addition, to exercising its contempt powers: "(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." This statute, however, is permissive and not mandatory, and the remedy for failure to provide discovery rests within the trial court's discretion. As such, its ruling is not reviewable on appeal absent an abuse of discretion. *E.g., State v. Thomas*, 291 N.C. 687, 231 S.E. 2d 585 (1977). Where, as here, the failure to provide discovery was inadvertent, no objection was made when defense counsel learned of the failure to provide discovery and defense counsel fully cross-examined the witness concerning the information not discovered, we are unable to find an abuse of discretion. Additionally, we note that defendant has made no contention that the pretrial identification was impermissibly suggestive or that it tainted the in-court identification.

Given the unlikelihood that the pretrial procedure had any impact on the in-court identification, the failure immediately to object and the full cross-examination, we can find no abuse of discretion in the trial court's denial of defendant's motions for mistrial.

IV.

For the reasons stated above we find in defendant's trial and conviction

No error.

STATE OF NORTH CAROLINA v. ROBERT EDWARD YOUNG

No. 169A81

(Filed 30 March 1982)

1. **Criminal Law § 115— conviction of "less degree" of crime charged—meaning of "less degree"**

As used in the statute permitting a defendant to be convicted of the crime charged in the indictment or of a "less degree" of the same crime, G.S. 15-170, a crime of "less degree" is not exclusively one which carries a less severe sanction than the crime formally charged in the indictment.

2. **Criminal Law § 115— conviction of "less degree" of crime charged—same penalties for both crimes—due process**

The submission of a crime which carries the threat of identical punishment as a lesser included offense of the crime charged in the indictment pursuant to G.S. 15-170 does not violate constitutional due process.

3. **Larceny § 4— indictment for common law robbery—conviction of larceny from the person**

A defendant who has been formally charged with common law robbery may be convicted of the "lesser included" offense of larceny from the person pursuant to G.S. 15-170 upon proper instructions to the jury by the trial court.

APPEAL by defendant as a matter of right, pursuant to G.S. 7A-30(2), from the decision of the Court of Appeals (*Judge Robert Martin*, with *Judge Harry C. Martin* concurring, and *Judge Becton* dissenting) reported at 54 N.C. App. 366, 283 S.E. 2d 812 (1981). The Court of Appeals affirmed the judgment of conviction entered by *Clark, Judge*, at the 24 November 1980 Criminal Session of Superior Court, WAKE County.

Defendant was charged in a bill of indictment with the offense of common law robbery. In pertinent part, the evidence for the State tended to show that defendant snatched fifty dollars from the hand of James Blue who was walking on a street in Raleigh on 22 September 1980. At the close of all of the evidence, the trial court granted defendant's motion to dismiss for the insufficiency of the evidence upon the charge of common law robbery.[1] However, the trial court submitted to the jury a charge of

1. There was no evidence that the theft was accomplished or accompanied by an assault upon the person. Common law robbery is the felonious taking of money or goods of any value from the person or presence of another against his will by means of violence or fear. *State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971).

larceny from the person, G.S. 14-72(b)(1), as a lesser included offense. The jury found defendant guilty of larceny from the person, and the trial court thereupon sentenced defendant to a term of imprisonment for seven to ten years.

Other facts, which are not relevant to the single issue presented in this Court, may be gleaned from the opinion of the Court of Appeals at 54 N.C. App. 366, 283 S.E. 2d 812 (1981).

Attorney General Rufus L. Edmisten, by Associate Attorney Michael Rivers Morgan, for the State.

Assistant Appellate Defender Marc D. Towler for the defendant-appellant.

COPELAND, Justice.

The sole question presented for our review is whether the trial court erred in submitting the crime of larceny from the person as a lesser included offense of common law robbery, the crime charged against defendant in the bill of indictment. A majority of the Court of Appeals held that the trial court did not err in this respect, and we agree with that conclusion.

Our courts have consistently considered robbery to be merely an aggravated larceny and thus have held that a defendant may be properly convicted of larceny from the person upon an indictment for common law robbery. *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966); *State v. Lawrence*, 262 N.C. 162, 136 S.E. 2d 595 (1964) (and cases there cited); *State v. Moore*, 211 N.C. 748, 191 S.E. 840 (1937); *State v. Cody*, 60 N.C. 197 (1864); *State v. Kirk*, 17 N.C. App. 68, 193 S.E. 2d 377 (1972); *see State v. Bell*, 228 N.C. 659, 46 S.E. 2d 834 (1948); *accord* 67 Am. Jur. 2d, Robbery § 7 (1973). Nevertheless, defendant essentially asks us to reexamine the validity of the foregoing precedent in light of his contentions that: (1) larceny from the person is not a crime of "less degree" of common law robbery, under G.S. 15-170, because both crimes are felonies carrying the same penalties (maximum imprisonment of ten years); and (2) the submission of a crime which carries the threat of identical punishment as a lesser included offense of the crime charged in the indictment would violate con-

stitutional due process.[2] These arguments are meritless, and we shall not belabor the obvious at length.

[1] In pertinent part, G.S. 15-170 provides that "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime. . . ." This Court has construed G.S. 15-170 to refer to both "included" and "lesser" offenses of the indicted charge. *State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974); *State v. Rorie*, 252 N.C. 579, 114 S.E. 2d 233 (1960); *see State v. Wenrich*, 251 N.C. 460, 111 S.E. 2d 582 (1959). An offense is "included" in the crime formally charged if all of its essential elements are also averred in the indictment. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). There is no requirement in our law that an included offense must also be one which is subject to less punishment than the "greater offense" charged in the indictment. *Cf. State v. McLawhorn*, 43 N.C. App. 695, 260 S.E. 2d 138 (1979), *discretionary review denied*, 299 N.C. 123, 261 S.E. 2d 925 (1980). Thus, we hold that a crime of "less degree" under G.S. 15-170, *supra*, is not, contrary to defendant's contention, exclusively one which carries a less severe sanction than the crime formally charged in the indictment.

[2] Since defendant cites no authority in his brief to support his naked assertion regarding due process, *supra*, we summarily reject his claim that G.S. 15-170 is unconstitutional. Defendant's constitutional rights to be informed of the nature of the accusation against him and to prepare for his defense were adequately enforced by means of an indictment charging an offense which necessarily included all of the "essential constituents" of another offense, which also arose upon the same criminal facts. *See State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525 (1968); *State v. Rorie*, *supra*.

[3] In sum, we reaffirm today an established line of precedent in our state and hold that a defendant, who has been formally charged with common law robbery, may be convicted of the "lesser included" offense of larceny from the person pursuant to G.S. 15-170 upon proper instructions to the jury by the trial court.

2. Judge Becton dissented in the Court of Appeals upon the same grounds urged by defendant in this Court for a reversal of his conviction.

The decision of the Court of Appeals is affirmed.

Affirmed.

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

ANDREWS v. PETERS

No. 33P82.

Case below: 55 N.C. App. 124.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 March 1982.

BROWN v. VANCE

No. 57P82.

Case below: 55 N.C. App. 387.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 30 March 1982.

CULLEN v. CULLEN

No. 83P82.

Case below: 56 N.C. App. --- (8110DC583).

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 March 1982.

HIATT v. BURLINGTON INDUSTRIES

No. 81P82.

Case below: 55 N.C. App. --- (8118SC268).

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 30 March 1982.

IN RE CONSTRUCTION OF HEALTH CARE FACILITY

No. 55P82.

Case below: 55 N.C. App. 313.

Petition by Wilkesboro Limited for discretionary review under G.S. 7A-31 denied 30 March 1982.

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

IN RE FORECLOSURE OF DEED OF TRUST

No. 56PA82.

Case below: 55 N.C. App. 373.

Petition by Robinsons for discretionary review under G.S. 7A-31 allowed 30 March 1982. Motion of respondents to dismiss appeal for lack of significant public interest denied 30 March 1982.

JENKINS v. JENKINS

No. 18PA82.

Case below: 54 N.C. App. 693.

Motion of plaintiff to dismiss appeal of defendant for failure to comply with Rule 15(g)(4) allowed 30 March 1982.

KENNEDY v. WHALEY

No. 60P82.

Case below: 55 N.C. App. 321.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 30 March 1982.

STATE v. BROWN

No. 169 PC.

Case below: 54 N.C. App. 693.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 March 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 March 1982.

STATE v. CASS

No. 39P82.

Case below: 55 N.C. App. 291.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 March 1982.

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

STATE v. CHINN

No. 62P82.

Case below: 47 N.C. App. 207.

Application by defendant for further review denied 30 March 1982.

STATE v. CURRIE

No. 69P82.

Case below: 55 N.C. App. --- (813SC690).

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 March 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 March 1982.

STATE v. FRONEBERGER

No. 32 PC.

Case below: 55 N.C. App. 148.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied and appeal dismissed 30 March 1982.

STATE v. HAMRICK

No. 166 PC.

Case below: 55 N.C. App. 132.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 March 1982.

STATE v. HODGEN

No. 127 PC.

Case below: 47 N.C. App. 329.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals dismissed for lack of timely filing 30 March 1982.

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

STATE v. JEFFRIES

No. 59P82.

Case below: 55 N.C. App. 269.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 March 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 March 1982.

STATE v. JOHNSON

No. 53P82.

Case below: 55 N.C. App. 481.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 March 1982.

STATE v. McGRAW

No. 44PA82.

Case below: 55 N.C. App. 481.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 30 March 1982.

STATE v. MOORE

No. 139 PC.

Case below: 54 N.C. App. 365.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 March 1982.

STATE v. REDDICK

No. 101P82.

Case below: 55 N.C. App. --- (813SC705).

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 March 1982.

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

STATE v. STALLINGS

No. 38P82.

Case below: 55 N.C. App. 268.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 March 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 March 1982.

WEEKS v. HOLSCLAW

No. 58PA82.

Case below: 55 N.C. App. 335.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 30 March 1982.

STATE OF NORTH CAROLINA v. JAMES EDWARD DAVIS

No. 60A81

(Filed 4 May 1982)

1. **Criminal Law § 75.7— confession—no custodial interrogation—Miranda inapplicable**

In a prosecution for first degree murder, *Miranda's* commandment that questioning cease when a suspect indicates he intends to exercise his Fifth Amendment privilege, did not apply where defendant was not taken into custody or otherwise deprived of his freedom of action in any significant way until after he had confessed to the murder in question. Defendant initially came to the detective offices voluntarily and unescorted; he was asked questions concerning the murder under investigation and made an exculpatory statement; defendant was offered a polygraph examination which he at first agreed to take but later refused, terminated the interview, and was given a ride home. Testimony further revealed that the officers asked to see the defendant at the detective offices again at approximately 10:00 in the evening; that defendant agreed to meet with them at that time; that the officers offered defendant a ride to the offices; that defendant was again interviewed in comfortable circumstances and his physical needs were cared for. The fact that on two occasions when defendant went to the bathroom during the second period of questioning, he was accompanied by a detective does not alter the overall conclusion that a reasonable person in defendant's position would have believed he was free to go at will. Nor did the failure to specifically advise defendant during either the first or second periods of questioning that he was free to go at any time indicate that he was not free to go at will. Further, the same facts which led to the conclusion that defendant was not taken into custody or otherwise deprived of his freedom of action in any significant way for purposes of the Fifth Amendment also lead to the conclusion that the defendant was not restrained in such a manner as to amount to being seized for purposes of Fourth Amendment analysis.

2. **Criminal Law §§ 80, 88— victim's diary—admissibility—no denial of right to confront witnesses**

The trial court properly admitted into evidence the diary of the deceased victim in which she stated "I got up at 8:15" since the diary entry was offered into evidence for the purpose of tending to show that the deceased was still alive at 8:15 a.m. on the day her body was found. The failure of the State to call the victim's grandson to testify that he saw his grandmother alive on the morning she was murdered had no relevance to the issue of the admissibility of the diary entry and did not deprive defendant of the right to confront witnesses against him.

3. **Criminal Law § 102.7— prosecutor's argument to jury—credibility of law enforcement officers**

Where the defense counsel in his argument to the jury attacked the credibility of the law enforcement officers testifying, the prosecutor was justified in responding to defense counsel and in defending the performance of

the investigating officers and the manner in which the State presented its case. Further, the defendant did not object to the challenged portion of the prosecutor's closing argument, did not take exception to it before the jury rendered its verdict, and the trial court did not have a duty to act *ex mero motu*.

4. **Homicide § 30.1— felony murder in the second degree—failure to instruct proper**

The trial court properly failed to instruct on the offense of felony murder in the second degree as this jurisdiction does not recognize such an offense. The sentence in G.S. 14-17 which states "all other kinds of murder, including (those proximately caused by the distribution of controlled substances) shall be deemed murder in the second degree" requires only that all intentional and unlawful killings with malice aforethought be classified as murder in the second degree, unless they have for one or more reasons been declared murder in the first degree by the express terms of the statute.

5. **Homicide § 24.1— instructions concerning use of deadly weapon—presumptions arising therefrom—proper**

The trial court's instructions concerning presumptions arising from the use of a deadly weapon did not deny the defendant the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, § 24 of the Constitution of North Carolina.

6. **Criminal Law § 135.4— G.S. 15A-2000(a)(2)—constitutionality**

The procedure set out in G.S. 15A-2000(a)(2) for death qualifying a jury prior to the guilt phase of a trial and requiring the same jury to hear both the guilt phase of the trial and the penalty phase of the trial is constitutional.

APPEAL from *Judge Lacy H. Thornburg*, presiding at the 23 February 1981 Criminal Session of BUNCOMBE Superior Court. Judgment was entered 6 March 1981.

The defendant was charged by bill of indictment, proper in form, with first-degree murder. Upon his plea of not guilty, a jury was impaneled as required in a capital case. The jury found the defendant guilty of murder in the first degree. During the sentencing phase of the trial, the State submitted as an aggravating circumstance that the murder was heinous, atrocious and cruel. The jury found that the aggravating circumstance was present but was insufficient to call for the death penalty. The defendant was sentenced to a maximum and minimum term of life imprisonment and appeals to this Court as of right pursuant to G.S. 7A-27.

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

Adam Stein, Appellate Defender, and Ann B. Petersen, pro hac vice, for defendant-appellant.

MITCHELL, Justice.

The defendant assigns error in the admission of his inculpatory statement to police, and in the refusal of the trial court to submit to the jury the possible verdict of felony murder in the second degree. For the reasons enunciated herein, we find that the defendant received a fair trial, free of prejudicial error.

The evidence for the State at trial tended to show that the body of Mrs. Myrtle Wilder was found in her home at approximately 6:00 p.m. on 16 August 1980. The deceased was found on her bed fully clothed but with her underpants around her knees. An initial examination of the body revealed seven or eight stab wounds, bruise marks at the base of the neck, slashed wrists and hemorrhages under the eyelids.

A later autopsy revealed that Mrs. Wilder had suffered eight stab wounds to the abdominal area, some as deep as five inches. The area around her neck was bruised with bruising and hemorrhaging into some of the organs around the neck and larynx. Her face was bruised and scraped, her wrists slashed and her neck broken.

Dr. John D. Butts, Senior Associate Chief Medical Examiner for the State of North Carolina and a forensic pathologist, testified that the hemorrhages under Mrs. Wilder's eyelids were consistent with death by asphyxiation through smothering or strangling. In his opinion, her broken neck would not have caused this condition, nor would strangulation ordinarily cause a broken neck. The manner in which Mrs. Wilder's neck had been broken was more consistent with a whiplash type injury. In Dr. Butts' opinion, the victim was alive when all of the injuries described were inflicted upon her. Due to the advanced age of the deceased and the condition of the body, Dr. Butts could not give an approximate estimate as to the time of her death. The examination of the deceased revealed no evidence of a sexual assault.

An investigation of the crime scene revealed a towel containing a portion of screen wire immediately outside the home. One of the windows in the home showed evidence of forced entry or exit. The screen had been torn off and the sliding window was open.

Mrs. Wilder's purse was found in the home but contained no money. The body was found on Saturday, 16 August 1980. Mrs. Wilder's daughter testified that she went grocery shopping with Mrs. Wilder every Sunday, and Mrs. Wilder customarily paid for her groceries in cash. She usually spent from $20.00 to $25.00 on such occasions. When Mrs. Wilder's body was found, she was still wearing her rings.

A diary written and kept by the deceased was found in the home. The diary contained an entry in her hand indicating that she made the entry on the morning of 16 August 1980. Friends and relatives tried to contact Mrs. Wilder after 9:00 a.m. on that morning and received no response. Her body was discovered at approximately 6:00 p.m.

Sometime on or before 2 September 1980, Detective Lee Warren of the Asheville Police Department received information leading him to consider the defendant as a possible suspect in the murder of Mrs. Wilder. He left a note at the home of the defendant's grandmother on 2 September 1980 and indicated that he would like to talk to the defendant. The defendant's grandmother lived two houses away from Mrs. Wilder's home.

Sometime prior to 5:55 p.m. on 4 September 1980, the defendant came into the Asheville Police Department and asked for Detective Warren. Detective Warren was contacted by radio and came into the detective offices of the police department to talk to the defendant. Having given the defendant the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), Detective Warren questioned him about the murder of Mrs. Wilder. The defendant claimed no knowledge of the crime. The defendant agreed to take a polygraph examination but, once inside the polygraph room and informed of the questions to be asked, declined to take the test.

Detective Warren offered the defendant a ride home at approximately 8:00 p.m. which the defendant accepted. Detective

Warren asked the defendant if he would return to the police station at 10:00 p.m. The defendant indicated that he would.

That evening the defendant was again given his *Miranda* warnings in the police station and confessed to the murder of Mrs. Wilder. The facts surrounding this confession will be discussed in greater detail at a later point in this opinion. The defendant stated that he went to his grandmother's home on 16 August 1980. After staying there for a short while, he went to an abandoned house and drank liquor. He returned past Mrs. Wilder's home and decided to break into her house. He knocked at the front and back door and received no answer. He then went to a window of the house, took out the screen and went inside. When he entered Mrs. Wilder's house, her dog began barking and attempted to bite him. He kicked the dog. Mrs. Wilder, who had apparently been in the house all the time, hit the defendant and he hit her back. She fell. The defendant picked Mrs. Wilder up and took her to her bed. He placed her on the bed, then went to the kitchen and got a knife. When he returned to the bedroom, Mrs. Wilder was regaining consciousness. He began stabbing her. After stabbing Mrs. Wilder, the defendant wrapped the knife in a towel and went out the back window. He threw the knife in a garbage can, but later retrieved it and threw it in a river when he saw the police at Mrs. Wilder's home.

Kenneth S. Fritz testified tht he lived near the deceased and arrived home at approximately 7:45 p.m. on 16 August 1980. He observed activity around Mrs. Wilder's home at that time and saw and spoke to the defendant. The defendant told him that Mrs. Wilder had been murdered and that she had been stabbed eight times. The defendant told Fritz that he had not discussed the murder with anyone. Mrs. Frances Barbour testified that she also had seen the defendant at the home of the deceased from about 7:15 p.m. to 9:00 p.m.

During the course of the trial, the defendant overpowered a law enforcement officer who was opening his cell door, took the officer's pistol from him and escaped. He was recaptured a short time later.

Based upon the foregoing evidence, the jury found the defendant guilty of premeditated murder in the first degree. During

the sentencing phase, the jury recommended a sentence of life imprisonment. The trial court entered the sentence recommended.

The defendant assigns as error the admission into evidence of his confession to the crime charged. In support of this assignment, he contends that the confession was taken in a manner violative of several of his constitutional rights.

During the trial, and in response to a pretrial motion to suppress by the defendant, the trial court conducted a *voir dire* hearing on the admissibility of the defendant's confession. At that time the trial court heard the testimony of three police detectives, Lee Warren, Bill Dayton and Walt E. Robertson. Their testimony for the State tended to show that Officer Warren left a business card containing his name and title with the defendant's grandmother at her home on 2 September 1980 and asked her to have the defendant contact him. Two days later, on 4 September 1980, the defendant came into the detective office of the Asheville Police Department. Officer Warren was not present in the office at that time but was informed by radio that someone was waiting in the office to see him. He returned to the office at approximately 5:45 p.m. and found the defendant waiting for him.

At approximately 5:55 p.m. on 4 September 1980 the defendant was given the *Miranda* warnings and signed a written waiver of his rights. At that time he also indicated orally that he did not wish to have an attorney present during questioning and that he was prepared to answer questions.

The defendant was questioned concerning the murder of Mrs. Wilder and made an exculpatory statement. This interview took place in a carpeted, well-lighted and air conditioned office which was approximately 14′ x 14′ in size. During the questioning the defendant was given a soft drink on at least one occasion. During this visit to the detective offices, the defendant was given the opportunity to take a polygraph examination. He indicated he would take the examination. He and Detective Warren then went to the polygraph room in the police station, where Detective Warren prepared the machine and formulated the questions to be asked of the defendant. The defendant asked what questions were to be asked of him, and Detective Warren read or showed them to him. The defendant then stated that he was not going to take the polygraph examination. After the defendant declined to take the

polygraph examination, he was offered and given a ride home by the detective a little after 7:00 p.m. The entire time involved in the defendant's first contact with the detectives was from two hours and ten minutes to two and one half hours.

When the officers took the defendant home, they indicated to him that they would like to meet with him again at 10:00 p.m. that evening. The defendant agreed to meet the detectives at the appointed time, and the detectives went to a restaurant for the evening meal. At approximately 10:00 p.m. the detectives were preparing to return to the office and called to determine whether the defendant had arrived there. They were informed that he had not. They drove through the general area of his residence to see if he was already walking toward the detective offices and to offer him a ride if he was. On their way to their offices, the detectives saw the defendant and asked him if he wanted a ride. He got into the car with the three officers at approximately 10:05 p.m. The group then proceeded to the detective offices. During the ride to the offices, Detective Robertson discussed the defendant's "curly kit" or "jelly curl" which is apparently a hairstyle. Detective Robertson complimented the defendant on his hairstyle, said he had been considering having his hair styled similarly and inquired as to who "put it in for him." The two men also discussed mutual friends and made other small talk. The criminal investigation was not mentioned during the ride to the offices.

Upon reaching the police station, the defendant was taken to a carpeted air conditioned room approximately 24′ x 12′ in size. He was again advised of his *Miranda* rights both orally and in writing. He executed a second written waiver of rights at approximately 10:14 p.m. He also affirmatively indicated orally that he wished to proceed to answer questions without an attorney present. One of the officers began to question him about the crime under investigation. Detective Robertson or Detective Warren placed before the defendant several photographs of the crime scene including photographs of the body of the deceased. The defendant indicated he did not wish to discuss the case and stated he could not look at the photographs. He began to cry and turned the photographs near him face down or pushed them away. The defendant asked to go to a bathroom. Detective Robertson took him to a nearby bathroom and they then returned to the conference room.

When they returned the defendant took the same seat at the table. The photographs were still where he had left them. At this time the defendant began to cry and stated that whenever he tried to sleep, all he could see was Mrs. Wilder's face and that he had not been able to sleep since it happened. He stated that, "I need to talk to somebody about this." Detective Robertson then told the defendant, "Well, James, you can talk to us about it." The defendant then made the oral confession previously outlined in this opinion. At some point during this latter exchange the defendant again asked to go to the bathroom and again was taken by Detective Robertson. He was also given a soft drink.

Detective Warren testified that he handed the defendant the *Miranda* rights waiver he had already signed to read again just before the defendant made his confession. The defendant looked at it and appeared to read it, but did not read the document aloud.

After the defendant gave his oral confession to the detectives, a stenographer was called at her home and came to the detective offices in the police department. The defendant repeated his confession to the stenographer who reduced it to writing. The defendant signed the written confession.

The defendant offered no evidence during the *voir dire* hearing. At the conclusion of the hearing on *voir dire*, the trial court made findings of fact and conclusions of law and admitted evidence relating to the defendant's confession.

[1] By his first assignment of error, the defendant contends that his station house confession was coerced and was taken in violation of his right to due process of law and to be free from self-incrimination. The defendant readily concedes that he was twice given the *Miranda* warnings and signed a waiver of his rights on both occasions. He does not contend that the warnings were either absent or inadequate. Instead, he contends that he was not heeded when he stated that he did not want to talk about the case under investigation and that any statement taken after he expressed this desire to the officers was a product of compulsion and involuntary as a matter of law. In the context of the case before us, we do not agree with the defendant's contention.

In support of this contention the defendant points out the statement in *Miranda v. Arizona*, 384 U.S. 436, 473-74, 16 L.Ed. 2d 694, 723, 86 S.Ct. 1602, 1627-28 (1966) that:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

The narrow issue before the Court in *Miranda*, however, was precisely stated as "the admissibility of statements obtained from an individual who is subjected to custodial police interrogation." *Id.* at 439, 16 L.Ed. 2d at 704, 86 S.Ct. at 1609; *State v. Martin*, 294 N.C. 702, 242 S.E. 2d 762 (1978). The Court also stated in the opinion that: "The constitutional issue we decide . . . is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 445, 16 L.Ed. 2d at 707, 86 S.Ct. at 1612.

In more recent cases, the Supreme Court of the United States has specifically rejected arguments that the principles of *Miranda* should be extended to cover interrogation in non-custodial circumstances after a police investigation has focused on the suspect and has stated that such arguments go "far beyond the reasons for that holding and such an extension of the *Miranda* requirements would cut this Court's holding in that case completely loose from its own explicitly stated rationale." *Beckwith v. United States*, 425 U.S. 341, 345, 48 L.Ed. 2d 1, 7, 96 S.Ct. 1612, 1615 (1976). The Court in Beckwith rejected the petitioner's argument that he was "interrogated" by Internal Revenue Service agents in surroundings where, as in the case of a subject in custody, the practical compulsion to respond to questions about his tax returns was comparable to the psychological pressures described in *Miranda*. In rejecting his argument that he was placed in a setting which was the functional equivalent of the setting in *Miranda* and that he should have been given the *Miranda* warnings, the Court found that although the focus of an investiga-

tion may indeed have been on Beckwith at the time of the interview in the sense that it was his tax liability which was under scrutiny, *Miranda* specifically defined "focus" for its purposes as questioning initiated by law enforcement officers when the suspect is in custody or has been otherwise deprived of his freedom of action in any significant way. *Id.*, at 347, 48 L.Ed. 2d at 8, 96 S.Ct. at 1616.

From the foregoing authorities, it readily can be seen that the warnings required by *Miranda* need only be given to an individual who is subjected to custodial police interrogation. "Interrogation," for purposes of invoking the *Miranda* requirements, only occurs when a defendant is in custody, as "[t]he concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Rhode Island v. Innis*, 446 U.S. 291, 299, 64 L.Ed. 2d 297, 306, 100 S.Ct. 1682, 1688 (1980). Additionally, the "interrogation" which brings into play the requirements of *Miranda*, "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 300, 64 L.Ed. 2d at 307, 100 S.Ct. at 1689. Thus, if it be concluded that a defendant was not "in custody" at the time of questioning, a reviewing court need not consider whether he was subjected either to express questioning or its equivalent, as such considerations come into play only for the purpose of determining whether a person has been "interrogated" after it has been concluded that he was "in custody" at the crucial time. If it be determined that he was not in custody, then it may be concluded *ipso facto* that he was not interrogated for *Miranda* purposes, and the reviewing court is not required to consider whether the respondent waived his rights under *Miranda*. His confession will be admissible without regard to whether he waived those rights. *Id.* at 298 n. 2, 64 L.Ed. 2d at 306 n. 2, 100 S.Ct. at 1688 n. 2.

Our analysis requires that we now consider whether the defendant was in custody or otherwise deprived of his freedom of action in any significant way at the time he confessed to the crime charged. Both the State and the defendant readily conceded that in the present case there was no probable cause to arrest the defendant or take him into custody prior to his confession. Further, the uncontroverted evidence clearly indicates that, had the

defendant chosen to get up and leave the detective offices at the time he gave his confession rather than stay and make that confession, no effort would have been made to stop him.

In determining whether a defendant is "in custody" for *Miranda* purposes, however, the reviewing court may rely upon neither the subjective intent of the police to restrain him nor the subjective belief of the defendant as to what the police would do if he attempted to leave. Instead, the reviewing court must determine whether the suspect was in custody based upon an objective test of whether a reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way or, to the contrary, would believe that he was free to go at will. *See United States v. Mendenhall*, 446 U.S. 544, 554, 64 L.Ed. 2d 497, 509, 100 S.Ct. 1870, 1877 (1980).

With these rules in mind we review the record before us. The trial court's findings of fact after a *voir dire* hearing concerning the admissibility of the confession are conclusive and binding on the appellate courts when supported by competent evidence. *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977). In the present case, the trial court heard the uncontroverted evidence of the State on *voir dire*, a part of which has been previously set forth herein. Based upon this evidence, the trial court made the following findings and conclusions:

> That Myrtle Wilson Wilder was killed in her home on August 16, 1980, and was discovered in the late afternoon or early evening hours of that date as having died from multiple stab wounds; that an immediate effort was made on the part of law enforcement officers to determine who might be responsible for the death; and on September 4, 1980, after Officer Warren had left a card with the Defendant's grandmother and requested that he come by to discuss the matter —with the Defendant's grandmother on September 2, 1980, requesting that he come by and discuss the matter, the Defendant did in fact arrive at the Asheville Police Station and was seen by Officer Warren and Officer Dayton shortly before 6:00 p.m. That at that time he was not in custody, was advised that the officers wished to discuss with him the killing of Mrs. Wilder, and the Defendant was read his rights as

follows: 'Before we ask you any questions, you must understand your rights. You have a right to remain silent and not to make any statement. Anything you say can and will be used against you in Court. You have the right to talk to a lawyer and have him present while you are being questioned. If you cannot afford a lawyer, you have the right to request the Court to appoint one for you before you answer questions. If you decide to answer questions now without a lawyer present, you will have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.' That immediately following the rights appears a Waiver of Rights, reading as follows: 'I have read this statement of my rights, and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me, and no pressure or coercion of any kind has been used against me by anyone.' That after the rights and waiver of rights were read to the Defendant, he was asked to read and sign the Waiver, read the Rights and Waiver form and sign the Waiver, if he understood his rights. That he did in fact sign the Waiver of Rights, and his signature was witnessed by Officer Dayton, the time being approximately 5:56 p.m.

That at that time, in response to questions from the officers, he stated that he had known Mrs. Wilder for about 10 years, and at one time was a piano student of hers, and had last seen her as he walked out of her drive, at which time she addressed him indicating that she thought he was in Florida. That sometime before that he had been in her home and helped move boxes for her, but that he knew nothing about her murder; that he was then advised by Officer Warren that he would like to question the Defendant later that evening around 10:00 o'clock. That he was then taken back to his residence in Asheville.

That at one point prior to being taken back to his residence and after having denied any knowledge of the murder about which he was being questioned, he was offered a Polygraph test, which he agreed to take. That he was in the Polygraph room while the machine was being prepared

for use during the test, and at that time asked Officer Warren what questions would be asked of him. That when he was advised by Officer Warren what questions would be asked, he declined to take the test, and that it was following this refusal that he was taken home; that throughout this initial period he did not have any odor of alcohol about his person, he did not appear to be under the influence of any alcohol or drugs, his answers to questions asked were responsive, and while nervous and depressed, there was nothing to indicate that he did not know and understand the purpose of his being at the police station or the rights about which he had been advised.

That thereafter during the early evening hours, Officer Dayton, Robertson and Warren had dinner, after which a call was made to determine whether or not the Defendant had returned to the Police Station around 10:00 o'clock. Learning that he had not, the officers drove to the area of the Defendant's home; that he came out of his or someone's apartment, came to the police cruiser, and on being asked if he wanted a ride, got in the cruiser. That on the way to the Police Station no one discussed the case with him, and he was not asked any questions concerning the case, and he was not placed under arrest.

That after getting to the Police Station around 10:00 o'clock, he was again advised of his rights and signed a Waiver of Rights, after having same read to him and tendered for his reading. That this Rights Waiver was witnessed by Officers Dayton and Robertson. That the first warning concerning his rights has been offered and admitted into evidence as State's Exhibit 16, and the second as State's Exhibit 17. That the Defendant knowingly, willingly and understanding and voluntarily signed both Rights Waiver forms, after having full knowledge and understanding of his rights, and at all times fully cooperated with the officers. That after signing the second Rights Waiver and when the officers began discussing the case with him, he first stated that he did not want to talk about the case, but was taken to the restroom at his request, returned, and after looking at some pictures of the deceased, he stated that he had trouble sleeping, that he could only see Mrs. Wilder's face, and he

needed to talk to someone about what happened. That on being told by Officer Robertson that he could talk to the officers about what happened, he gave a complete detailed statement of what occurred, said statement being offered and admitted into evidence as State's Exhibit 18.

That it was only after the statement was given that a Warrant was obtained and the Defendant was taken to the Magistrate's Office, that the Defendant was placed under arrest. That he was at no time promised anything or threatened in any way. That on both occasions his answers to questions asked were responsive, and the statement made about what occurred was largely made on Defendant's own part, with very few if any questions being asked. That no promise or threat of any kind was ever made to the Defendant; that no food nor drink was ever denied to the Defendant; that the Defendant never indicated any desire to stop talking during the questioning and never made any request for an attorney or indicated in any way that he did not fully understand his rights, and so indicated affirmatively that he did by signing two Rights Waiver forms. That the statement given in final form was as given by him and taken by Mrs. Stover and indicates an articulate, understandable, comprehensive version of events discussed in detail and in an intelligent manner; that while the Defendant was nervous and depressed, there was nothing to indicate that he was confused or incoherent. His physical condition was good. He seemed to understand the questions asked and responded appropriately and never complained of any problem, mental or physical. That there is absolutely no evidence of any threats, suggestion of violence or show of violence by law enforcement officers to induce the Defendant to make a statement; and that, in fact, all of the evidence is to the contrary; that when the Defendant asked for a Coke, he received one. When he wanted to go to the bathroom, he was permitted to go; and the interrogation occurred in a well lighted, well appointed, air conditioned room.

That the age and educational background of the Defendant has not been given, but that he appears to the Court from personal observation to be a young adult black male of better than average intelligence and in good physical condition at this time, and according to the officers, in good mental

and physical condition at the time of the questioning. That although the Defendant became extremely nervous, upset, and cried on at least two occasions as he related the events that took place on the morning of the 16th of August, 1980, he clearly was not confused, remained coherent, understood what he was doing and saying, and gave a detailed, believable account of the incidents occurring on the morning of 16 August, 1980. That Defendant knew at all times during questioning that he was a suspect in the case involving a murder—the murder of Myrtle Wilson Wilder, understood that this could be—could result in a first degree murder charge and a possible death verdict.

That the initial interrogation involving possible taking of a Polygraph involved approximately two hours to two-and-a-half hours, and the second interrogation and statement lasted for an even lesser time, as will be revealed by the record.

Based upon the foregoing findings of fact, the Court concludes as a matter of law that there was no offer of hope, reward or inducement to the Defendant to make a statement; that there was no threat or suggestion of violence or show of violence to persuade or induce the Defendant to make a statement; that the statement made by the Defendant—that both statements made by the Defendant on September 4, 1980 were made voluntarily, knowingly, understandingly and independently; that the Defendant was in full understanding of his Constitutional Rights to remain silent and right to counsel and all other rights on both occasions, and so indicated by signing Waiver of Rights forms, as will appear of record; and that he purposely, freely, knowingly and voluntarily waived each of those rights and thereupon made statements to the officers above mentioned.

The defendant quite correctly points out in his brief that the trial court found as a fact that the defendant was not in custody on the first occasion during which he was questioned in the detective offices and that the trial court failed to make any conclusion as to whether the defendant was in custody during the second and crucial period of questioning. The determination whether an individual is "in custody" during an interrogation so as to invoke the requirements of *Miranda* requires an application of fixed rules

of law and results in a conclusion of law and not a finding of fact. To the extent that our prior opinion in *State v. Clay*, 297 N.C. 555, 256 S.E. 2d 176 (1979) may be taken as indicating that this determination is a finding of fact, that case is disapproved.

The defendant further contends, and we agree, that these circumstances do not prevent us from determining the admissibility of the defendant's confession in the present case. Since the legal significance of the findings of fact made by the trial court is a question of law, these findings are sufficient to allow us to resolve the issue presented. *See State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981). Further, where the historical facts are uncontroverted and clearly reflected in the record, as in the present case, we may review the trial court's ruling on the admissibility of a confession in the absence of complete findings of fact and conclusions of law and even in the absence of a ruling by the trial court on the admissibility of the confession. *See State v. Pearce*, 266 N.C. 234, 145 S.E. 2d 918 (1966).

It is clear that the trial court's findings were amply supported by the uncontroverted testimony presented on *voir dire* and previously set forth in part herein. Those findings are, therefore, binding upon us on this appeal. When viewed either in light of the facts found by the trial court or independently in light of the uncontroverted evidence offered on *voir dire*, it is apparent that the defendant was not taken into custody or otherwise deprived of his freedom of action in any significant way until after he had confessed to the murder in question.

The uncontroverted evidence reveals that the defendant initially came to the detective offices voluntarily and unescorted in response to a request left with his grandmother two days previously. At that time he was asked questions concerning the murder under investigation and made an exculpatory statement. This interview took place in comfortable surroundings in which the defendant was given soft drinks and in no way deprived of any physical necessities. During this first visit to the detective offices on 4 September 1980, the defendant was offered a polygraph examination. He agreed to take the test. Upon asking and being told what questions he would be asked in the course of the polygraph examination, the defendant stated that he would not take the polygraph examination. The defendant thus terminated

the interview, was allowed to leave at will and was given a ride home. Nothing in the conduct of the law enforcement officers during the first interview of the defendant would have indicated to a reasonable person in the defendant's position that he had been taken into custody or otherwise deprived of his freedom of action in any way significant or otherwise. *See Oregon v. Mathiason*, 429 U.S. 492, 50 L.Ed. 2d 714, 97 S.Ct. 711 (1977) (per curiam). To the contrary, every indication given the defendant was to the effect that he could terminate the questioning by leaving at any time. He in fact exercised this freedom by stating that he was not going to take the polygraph test and by leaving the police station.

The uncontroverted testimony on *voir dire* further reveals that the officers asked to see the defendant at the detective offices again at approximately 10:00 p.m. on the evening of 4 September 1980. The defendant agreed to meet with them at that time. After the officers had eaten their evening meal they called their office to determine whether the defendant had arrived. Having determined that the defendant had not yet arrived at their offices, the officers drove through his neighborhood to see if he was walking in that direction. They did not know at that time precisely which house or apartment the defendant lived in but were familiar with the general neighborhood in which he lived. During their drive through the neighborhood, the officers saw the defendant and offered him a ride to the offices. He got into the car with them and they proceeded to the detective offices. The defendant was again interviewed in comfortable circumstances and his physical needs were cared for. When he wanted a soft drink he was given one. When he wanted to go to the bathroom he was allowed to go.

The defendant emphasizes that on the two occasions he went to the bathroom during the second period of questioning he was accompanied by Detective Robertson. He contends that this would have caused a reasonable person in his position to believe that he was not free to go at will. We do not think that this fact can be viewed in isolation so as to mandate the conclusion that the defendant was in custody or otherwise deprived of his freedom in any significant way.

The record before us is silent as to the specific reason for which Detective Robertson accompanied the defendant to the

bathroom. The record does indicate that this questioning occurred in the evening hours after most of the doors to the police station had been locked. We are unable to ascertain from the record, however, whether Detective Robertson was required to unlock any doors in order to allow the defendant to use the bathroom. At least on the initial trip to the bathroom, it is as reasonable to believe that Detective Robertson was simply showing the defendant where the bathroom was as to believe that his presence was intended or acted as any restraint upon the defendant. In the context of this record, the reason Detective Robertson accompanied the defendant to the bathroom simply cannot be determined. In any event, when the fact relied upon by the defendant is viewed together with the other indicia upon which a reasonable person in his position would have formed a belief, we think it was insufficient to support the conclusion that a reasonable person would have believed that he was other than free to go at will. Our conclusion that a reasonable person in the defendant's position would have believed he was free to go at will is buttressed by the fact that on the same day and under very nearly identical circumstances, the defendant had in fact exercised his right to terminate questioning by the simple expedient of saying no and leaving the detective offices.

Similarly, we do not think that in the context of these facts the failure specifically to advise the defendant during either the first or second periods of questioning that he was free to go at any time would have indicated to a reasonable person in the defendant's circumstances that he was not free to go at will. The defendant once exercised his right to leave, and we do not believe the conduct of the officers during the second period of questioning differed from that employed during the first period of questioning in any manner so substantial as to indicate to a reasonable person that there had been any significant change in his status which would deprive him of his freedom of action in any way. We conclude that the defendant was not in custody or deprived of his freedom of action in any significant way and that *Miranda* is not applicable.

As we have indicated, *Miranda* was designed to provide an effective method by which a suspect could exercise his Fifth Amendment privilege to be free from answering questions when he was in custody and had no other manner in which to exercise

this privilege. *Miranda's* commandment that questioning cease when a suspect indicates he intends to exercise his Fifth Amendment privilege does not apply, however, in situations such as this where the defendant has available the easier and more effective method of invoking the privilege simply by leaving. Neither *Miranda* nor *Michigan v. Mosely*, 423 U.S. 96, 46 L.Ed. 2d 313, 96 S.Ct. 321 (1975), also relied upon by the defendant on this point, requires any such result. Nothing in the Constitution prevents a policeman from addressing questions to anyone not in custody or deprived of his freedom of action in any significant way. *See United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d 497, 100 S.Ct. 1870 (1980). Law enforcement officers enjoy the same liberty as every other citizen to address questions to other persons. When those persons are not in custody or deprived of their freedom of action in any significant way, they have an equal right to ignore such questions and walk away and do not need the protection of *Miranda*. *Id.* The defendant in the present case was one of the class of people entitled to walk away rather than answer questions and was not in need of or entitled to the protections of *Miranda*.

Additionally, strong considerations of public policy convince us that we should not adopt the defendant's position that, once *Miranda* warnings have been given unnecessarily to a defendant who has not been subjected to custodial interrogation, the requirements of *Miranda* apply with full force as though he had been subjected to custodial interrogation. We fear that to do so would, in many cases, discourage officers from giving the *Miranda* warnings where the issue of custody of the suspect was close. We would not wish to cause any such result.

Our review of the defendant's assignment of error and contentions raises another issue not specifically articulated therein. Although we are not required to consider an issue not squarely presented by an assignment of error, due consideration for the proper administration of justice leads us to conclude that the defendant's assignment here presents the contention that his confession was obtained as the result of an unconstitutional seizure of his person in violation of the Fourth and Fourteenth Amendments. Although a confession "may be found 'voluntary' for purposes of the Fifth Amendment, this type of 'voluntariness' is merely a 'threshold requirement' for Fourth Amendment analysis

. . . . Indeed, if the Fifth Amendment has been violated the Fourth Amendment issue would not have to be reached." *Dunaway v. New York*, 442 U.S. 200, 217, 60 L.Ed. 2d 824, 839, 99 S.Ct. 2248, 2259 (1979). The test to be employed in determining whether a person is "seized" for purposes of the Fourth Amendment has been specifically set forth by the Supreme Court of the United States as follows:

> We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

United States v. Mendenhall, 446 U.S. 544, 554, 64 L.Ed. 2d 497, 509, 100 S.Ct. 1870, 1877 (1980) (citations omitted). There is no foundation whatsoever for invoking Fourth Amendment safeguards absent such restraint. *Id.* The same facts which lead us to conclude that the defendant was not taken into custody or otherwise deprived of his freedom of action in any significant way for purposes of the Fifth Amendment lead us to conclude that the defendant was not restrained in such manner as to amount to being seized for purposes of Fourth Amendment analysis. *See Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979); *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981); *and, State v. Reynolds*, 298 N.C. 380, 259 S.E. 2d 843 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 795, 100 S.Ct. 2164 (1980).

The ultimate test of the admissibility of a confession is whether the statement was in fact voluntarily and understandingly made. *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976). This remains true despite the fact that in a particular case there has been compliance with the procedural requirements of the Fourth and Fifth Amendments. Such procedural compliance standing alone will not necessarily suffice in all cases. It remains for us to make an independent determination of the ultimate issue of volun-

tariness based upon our examination and consideration of the entire record on appeal. *Beckwith v. United States*, 425 U.S. 341, 48 L.Ed. 2d 1, 96 S.Ct. 1612 (1976); *Davis v. North Carolina*, 384 U.S. 737, 16 L.Ed. 2d 895, 86 S.Ct. 1761 (1966); *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976). Our review of the entire record leads us to conclude that the trial court's findings were supported by competent and uncontroverted evidence. Those findings in turn support the trial court's conclusion that the defendant's confession was voluntarily, knowingly, understandingly and independently made with full understanding of his constitutional rights. We agree and concur in the trial court's conclusion and find that the admission of the defendant's confession into evidence was free of prejudicial error.

[2] The defendant next assigns as error the action of the trial court in admitting into evidence the diary of the deceased and contends that this deprived him of his right under the Sixth and Fourteenth Amendments to confront the witnesses against him. The last entry in Mrs. Wilder's diary on the page offered into evidence was "Johnny came about 3:30 this a.m. I let him and went back to sleep. He left at 7:15 p.m. I guess breakfast begins at 7:30 on Saturday. I got up at 8:15. Going to be another hot day." Indications in the diary were to the effect that this entry was made on 16 August 1980. The "Johnny" referred to in the diary entry was apparently the grandson of the deceased who lived with her. The diary entry was offered into evidence by the State for the purpose of tending to show that the deceased was still alive at 8:15 a.m. on the day her body was found.

Assuming *arguendo* that the diary entry was offered to prove the matters asserted therein, we find it to be hearsay evidence exceptionally admissible. "The twofold basis for exceptions to the rule excluding hearsay evidence is necessity and a reasonable probability of truthfulness." *State v. Vestal*, 278 N.C. 561, 582, 180 S.E. 2d 755, 769 (1971), *cert. denied*, 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157 (1973). The death of Mrs. Wilder established necessity as she was the declarant and unavailable as a witness. *Id.* We think that the reasonable probability of truthfulness of the diary entry is clear. It is obvious that Mrs. Wilder had to be alive in order to make the entry in her diary, and there is simply no reason whatsoever to believe that a woman would lie in her personal diary about a matter so mun-

dane as the time at which she got out of bed. This evidence was properly admitted.

The defendant's real complaint concerning the introduction of the diary entry seems to be that it saved the State the necessity of calling Johnny Randolph, the grandson of the deceased, to testify that he saw his grandmother alive on the morning she was murdered and denied the defendant the opportunity to cross-examine Randolph in an attempt to show that he too should have been a suspect. The failure to call Randolph was not relevant to the admissibility of the evidence in question. He did not make the diary entry and presumably was not competent to testify as to most of its contents. If the defendant wished to examine Randolph, the defendant had an opportunity equal to that of the State to call him as a witness and examine him as thoroughly as desired. But the failure of the State to call Randolph as a witness simply has no relevance to the issue of the admissibility of the diary entry. This assignment of error is without merit.

[3] The defendant next assigns as error comments made by the prosecutor in his closing argument to the jury which the defendant contends were grossly improper expressions of personal opinion concerning matters not in evidence. The assignment of error is directed to the following portion of the prosecutor's closing argument to the jury:

> You know, this case is completely uncontroverted. The facts in this case are completely uncontroverted. When I took this job over two years ago, I came into this Courtroom, put my hand on this Bible right over there, and I took an oath that I would see that justice was done in this county. Every one of these officers in this courtroom are sworn law enforcement officers. Ladies and gentlemen, we have brought the truth into this courtroom. I ask, who is being honest with you? Who is being honest with you.

The defendant did not object to this portion of the prosecutor's closing argument to the jury and did not take an exception to it before the jury rendered its verdict. When counsel makes an improper remark in arguing to the jury, an exception must be taken before the verdict or the impropriety is waived. *State v. Morgan*, 299 N.C. 191, 261 S.E. 2d 827, *cert. denied*, 446 U.S. 986, 64 L.Ed. 2d 844, 100 S.Ct. 2971 (1980). But when a prosecutor's comments

stray so far from the bounds of propriety as to impede the defendant's right to a fair trial, the trial court has the duty to act *ex mero motu*. *Id.* Our examination of the record in the present case leads us to conclude that the quoted portion of the argument of the prosecutor did not stray so far from the bounds of propriety as to require action by the trial court *ex mero motu*.

Even had the argument of the prosecutor been properly objected to and a timely exception taken, the remarks complained of were not so prejudicial as to require a new trial. The record clearly reveals that defense counsel in his argument to the jury attacked the credibility of the law enforcement officers testifying in the case and made veiled implications that evidence was being withheld. In the portion of the prosecutor's argument to which the assignment of error is directed, the prosecutor merely attempted to respond to defense counsel and to defend the performance of the investigating officers and the manner in which the State presented its case. This response by the prosecutor to the arguments of the defendant's attorney was justified. *State v. McCall*, 289 N.C. 512, 223 S.E. 2d 303, *death penalty vacated*, 429 U.S. 912, 50 L.Ed. 2d 278, 97 S.Ct. 301 (1976).

[4] The defendant next assigns as error the failure of the trial court to instruct the jury that they could return a verdict of felony murder in the second degree. We conclude that the law of this jurisdiction recognizes no offense of felony murder in the second degree. The failure to instruct the jury on this theory was correct.

Prior to 1893 any intentional and unlawful killing of a human being with malice aforethought, express or implied, constituted murder punishable by death. *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899); *State v. Boon*, 1 N.C. (Tay.) 191. In 1893 the General Assembly adopted 1893 N.C. Pub. Laws ch. 85, the terms of which are now embodied in G.S. 14-17, dividing murder into two degrees. From that day to the present, this statute has not given any new definition of murder, but permits that to remain as it was at common law. *State v. Streeton*, 231 N.C. 301, 56 S.E. 2d 649 (1949). The statute merely selects from all murders denounced by the common law those deemed most heinous by reason of the mode of their perpetration and classifies them as murder in the first degree, for which a greater punishment is prescribed. *Id.*

Any other intentional and unlawful killing of a human being with malice aforethought, express or implied, remains murder as at common law, but is classified by the statute as murder in the second degree and a lesser sentence is prescribed. *State v. Smith*, 221 N.C. 278, 20 S.E. 2d 313 (1942). The murders classified as murder in the first degree by the 1893 enactment were divided into three basic categories: (1) murders perpetrated by means of poison, lying in wait, imprisonment, starving, or torture, (2) premeditated murder, and (3) killings occurring in the commission of certain specified felonies "or other felony." The third category has frequently been referred to as "felony murder" although that term is not used in the statute and we have discouraged its use in issues submitted to juries. *State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977). This Court construed the phrase "or other felony" employed in the statute to include at least those killings committed during the commission of "any other felony inherently dangerous to life" as murder in the first degree, but we specifically reserved for a later time any opinion as to whether the words "or other felony" included any statutory felony not inherently dangerous to life. *State v. Streeton*, 231 N.C. 301, 305, 56 S.E. 2d 649, 652 (1949).

In 1977 the General Assembly, in apparent response to holdings such as in *Streeton*, amended the statute to substitute for the phrase "or other felony" the phrase "or other felony committed or attempted with the use of a deadly weapon." 1977 N.C. Sess. Laws, ch. 406. As a result of the 1977 amendment, our holdings interpreting the former phrase "or other felony" as including those killings committed during the commission of felonies inherently dangerous to life retain validity only with regard to murders committed prior to the amendment's effective date of 1 June 1977 and should be disregarded on this point in cases involving murders committed after that date. *E.g., State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977); *State v. Shrader*, 290 N.C. 253, 225 S.E. 2d 522 (1976); *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975), *death penalty vacated*, 428 U.S. 903, 49 L.Ed. 2d 1208, 96 S.Ct. 3207 (1976); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972); *State v. Maynard*, 247 N.C. 462, 101 S.E. 2d 340 (1958); *State v. Streeton*, 231 N.C. 301, 56 S.E. 2d 649 (1949). From the effective date of the 1977 amendment, a killing occurring during the commission of a felony not specified in the statute is

murder in the first degree only if the felony was committed or attempted with the use of a deadly weapon.

The statute, including the 1977 and subsequent amendments now states in its entirety:

> § 14.17. Murder in the first and second degree defined; punishment.—
>
> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class C felon.

As can readily be seen from the face of the statute, murders commonly referred to as "felony murders" now include killings occurring during the commission or attempted commission of a felony with the use of a deadly weapon and killings occurring during the perpetration or attempted perpetration of the specified felonies of arson, rape or a sex offense, robbery, kidnapping, or burglary, without regard to whether these specified felonies were perpetrated or attempted with the use of a deadly weapon. All such murders are deemed by the statute to be murder in the first degree. Conversely, killings occurring during the commission or attempted commission of a felony *not* committed or attempted with the use of a deadly weapon *and not* one of the felonies specified in the statute are, *nothing else appearing*, not murder in either the first or second degree.

If the State is to carry its burden of proof on a charge of murder in cases in which a killing occurs during the commission

of a felony committed or attempted *without* the use of a deadly weapon *and not* one of the felonies specified in the statute, it must show that the killing was murder as at common law by proof beyond a reasonable doubt that it was an intentional and unlawful killing with malice aforethought. In such cases the State will have borne the burden of proof necessary to sustain a conviction of murder in the second degree. If the State additionally can prove beyond a reasonable doubt that the murder was premeditated and deliberate, it will have borne its burden of proving the offense was murder in the first degree.

The definitions of the terms "malice aforethought" and the terms "premeditation" and "deliberation" as previously applied in this jurisdiction remain unchanged by our holding in this case. *See State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). Additionally, our holding today does not affect cases involving deaths arising by means of poison, lying in wait, imprisonment, starving or torture, which continue to the same extent as before to be classified by the statute as murder in the first degree.

We are aware of the fact that the North Carolina Pattern Jury Instructions frequently employed by our trial courts in instructing juries include an instruction relative to "Second Degree Murder in Perpetration of Felony." N.C.P.I.—206.31. As we have indicated that no such crime is a part of the law of this jurisdiction, the proposed instruction should not be used by trial courts.

Perhaps the apparent confusion in interpreting G.S. 14-17 arises from the current wording of the second sentence of the statute. From its enactment in 1893, the second sentence of the statute has stated: "All other kinds of murder shall be deemed murder in the second degree." This sentence of the statute was amended effective 1 July 1980. 1979 N.C. Sess. Laws, ch. 1251 (2nd Sess.). The sentence in pertinent part now states:

> All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, ...

G.S. 14-17. By including the language relative to murders proximately caused by the distribution of controlled substances in the

sentence declaring "all other kinds of murder" to be classified as murder in the second degree, we do not think the legislature intended to alter the law substantially. Instead, we think the legislature merely reaffirmed its desire that we not expand our former line of holdings interpreting the words "or other felony," as set forth in the first sentence of the statute prior to the 1977 amendment, so as to include within the definition of murder in the first degree those killings occurring during the commission or attempted commission of a felony not specified in the statute and not involving the use of a deadly weapon. We believe that our interpretation of the 1977 amendment addresses the same concern and that the cited amendment of 1979 relative to murders proximately caused by the unlawful distribution of controlled substances was intended to do no more. More specifically, we do not think the legislature intended to create a crime of murder in the second degree arising solely from the fact that a death results from the unlawful distribution of controlled substances without a showing of intent and malice aforethought. In light of our holding today, we construe the second and final sentence of the statute as requiring only that all intentional and unlawful killings with malice aforethought be classified as murder in the second degree, unless they have for one or more reasons been declared murder in the first degree by the express terms of the statute. Thus, in offering evidence of "all other kinds of murder" as that phrase is employed in the second sentence of the statute, the State must bear the burden of proving that the killing was intentional, unlawful and done with malice aforethought, even though it may have been proximately caused by the unlawful distribution of controlled substances or proximately caused by the commission or the attempted commission of any felony not specified in the first sentence of the statute and without the use of a deadly weapon. In other words, the final sentence of the statute merely indicates that all crimes *which were murder at common law* remain murder in the second degree, unless otherwise made murder in the first degree under one of the specific classifications of the statutes.

In the instant case, the trial court properly instructed the jury that it could return a verdict of guilty of murder in the first degree under the theory that the defendant acted with premeditation and deliberation. The trial court also properly instructed the jury that it could return a verdict of guilty of murder in the sec-

ond degree if it found the defendant killed the deceased intentionally and with malice but without premeditation and deliberation. If the jury failed to find the defendant guilty of either first or second-degree murder under these instructions, the trial court properly instructed that the verdict must be not guilty. As we today hold that the law of this jurisdiction recognizes no offense of felony murder in the second degree, the trial court correctly declined to charge on any such theory. The trial court's instructions concerning permissible verdicts were proper, complete and correct.

[5] The defendant's next assignment of error challenges the constitutionality of the following portion of the trial court's instructions to the jury:

> If the State proves beyond a reasonable doubt or it is admitted that the Defendant intentionally killed Myrtle Wilson Wilder with a deadly weapon, or intentionally inflicted a wound upon Mrs. Wilder with a deadly weapon that proximately caused her death, the law implies first that the killing was unlawful, and second, that it was done with malice.

The defendant contends that this portion of the instructions to the jury by the trial court created a conclusive presumption of malice and unlawfulness and denied him the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, § 24 of the Constitution of North Carolina. It is sufficient for us to point out that we have previously reviewed instructions to juries in other cases which employed the identical operative language employed in the portion of the instructions complained of here. In those cases we found no constitutional infirmity in instructions employing the identical operative language employed in the previously quoted portion of the instructions in the present case. *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981). *Cf. State v. White*, 300 N.C. 494, 268 S.E. 2d 481 (1980). This assignment of error is overruled.

[6] By his final assignment of error, the defendant contends that the procedure set out in G.S. 15A-2000(a)(2) for death qualifying a jury prior to the guilt phase of a trial and requiring the same jury to hear both the guilty phase of the trial and the penalty phase of the trial is unconstitutional. The defendant additionally contends that it is a violation of equal protection of the laws to deny him

the funds for an expert to testify as to the "guilt proneness" of jurors who are death qualified. It is the defendant's further contention that "death qualifying" the jury prior to the guilt phase of the trial resulted in a guilt-prone jury and denied him the right to a fair trial as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, § 19 of the Constitution of North Carolina. We have previously considered and rejected identical contentions in *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981) and *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1979). This assignment of error is without merit and is overruled.

The defendant received a full and fair trial in the trial court. He has had the further benefit of excellent appellate advocacy before this Court. His trial was free of prejudicial error, and we find

No error.

HOUSING, INC.; MERHA, LTD.; AND CARL W. JOHNSON, PLAINTIFFS v. H. MICHAEL WEAVER; W. H. WEAVER CONSTRUCTION COMPANY; AND ALVIN H. BUTLER, TRUSTEE, DEFENDANTS AND LANDIN, LTD., ADDITIONAL DEFENDANT

No. 161A81

(Filed 4 May 1982)

1. **Rules of Civil Procedure §§ 50.4, 59— adjournment of term—amendment of judgment—entry of judgment n.o.v.**

A trial court may alter or amend a judgment pursuant to G.S. 1A-1, Rule 59 and may enter judgment n.o.v. pursuant to G.S. 1A-1, Rule 50 (including the alteration of a judgment entered upon such a verdict) after the adjournment of the term during which the judgment was entered.

2. **Appeal and Error § 62.2— partial new trial on damages issue—liquidated damages—amendment of judgment**

The trial court could properly set aside the jury's verdict on the issue of damages and grant a partial new trial on the issue of damages only without altering the verdict as to liability where the jury found that plaintiff was liable to defendant but awarded defendant no damages; the trial court erroneously instructed the jury that it could independently fix the defendant's damages at any amount it deemed appropriate when in fact the damages were liquidated; the jury was instructed specifically to answer the question of liability before

considering the issue of the amount of damages; it appears that the jury followed the trial court's correct instructions on liability and its incorrect instructions on damages; and the court's erroneous instructions on damages and the verdict thereon did not affect the jury's consideration of the liability issue. Furthermore, since the parties agreed that defendant's damages were liquidated, the partial new trial was unnecessary, and the trial court could properly enter judgment for the amount of the liquidated damages.

3. Contracts § 3; Duress § 1— agreement to agree—threatened breach not economic duress

The trial court properly concluded that a letter from defendant to plaintiff relating to joint development and construction of low-income housing units was a mere agreement to agree and not an enforceable contract and that a breach or threatened breach of its terms would not constitute economic duress which would void a subsequent agreement for the sale of defendant's interest in the project to plaintiff where the letter stated that it was a preliminary agreement subject to a more definitive agreement, and the letter did not contain all material terms of an agreement and did not specify a mode for settlement of the unresolved terms.

ON discretionary review of the decision of the North Carolina Court of Appeals reported at 52 N.C. App. 662, 280 S.E. 2d 191 (1981). From a judgment entered by *Jolly, Judge* on 19 June 1980 amending a judgment entered at the 26 November 1979 Civil Session of GUILFORD Superior Court, the plaintiff appealed. The Court of Appeals affirmed and the plaintiff petitioned this Court for discretionary review. Review was denied on 3 November 1981 and the plaintiff petitioned for rehearing, pursuant to Rule 31, Rules of Appellate Procedure. The petition for rehearing was allowed on 1 December 1981.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd and Frank J. Sizemore III, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr., Edward C. Winslow III and John H. Small for defendant-appellee.

MITCHELL, Justice.

The plaintiff brought suit seeking, *inter alia*, to have a note declared void as the product of economic duress. The defendant counterclaimed for the value of the note, plus other damages. The jury found the plaintiff's defenses to liability under the note not to exist, yet awarded the defendant no damages. Following trial, the court set aside the verdict and the judgment it had entered

thereon, and entered judgment for the amount of the note plus other liquidated damages. The plaintiff contends that the Court of Appeals erred in affirming the trial court's judgment. For the reasons stated herein, we affirm.

This action was brought as a consequence of a dispute between two experienced and relatively sophisticated entrepreneurs who contemplated the joint development and construction of federally subsidized rental housing units in eastern North Carolina. The plaintiffs are Carl W. Johnson and two entities owned and controlled by him. Housing, Inc. is a corporation wholly owned by Johnson, and Merha, Ltd. is a limited partnership whose sole general partner is Housing, Inc. These entities collectively will be referred to hereinafter as "the plaintiff." The defendants include H. Michael Weaver and his corporation, W. H. Weaver Construction Company. These entities collectively will be referred to hereinafter as "the defendant."

In January of 1971, Carl Johnson became the sole owner of Housing, Inc. as a result of the severance of the interest of a former principal who had provided the corporation's construction capability. Housing, Inc. was left with four employees and less than $1500 in cash. The corporation had no working capital, no staff, no bonding capacity, and no construction capability. Housing, Inc.'s major asset was a letter of intent issued by the Mid-East Regional Housing Authority for the construction of 340 public housing units.

The Mid-East Regional Housing Authority was created to initiate and coordinate development of low-income housing through contracts administered and supported by the federal Department of Housing and Urban Development (HUD). The Regional Housing Authority performed its function by obtaining from HUD an Annual Contributions Contract which guaranteed annual payment of a fixed sum for a 20-year period following construction of the project. The Regional Housing Authority would then contract with a developer by means of a letter of intent. The developer's duty would be to locate and obtain appropriate land sites, obtain approval of sites, plans, and specifications, and build the project.

Housing, Inc. was incapable of completing the development of the 340 housing units in early 1971. In February, 1971, Johnson approached Weaver to propose that Weaver participate as a co-

owner and provide financing and construction capability in the Mid-East project. The parties negotiated through April, 1971 and specified their intentions in a letter from Weaver to Johnson on 21 April 1971. The letter, signed by Johnson as well as Weaver, provided:

> Mr. Carl W. Johnson
> President
> Housing, Inc.
> Greensboro, North Carolina
>
> Dear Mr. Johnson:
>
> This letter will constitute a memoranda of our understanding with respect to a proposed joint venture between W. H. Weaver Construction Company and Housing, Inc. for the development of housing for Mid East Regional Housing Authority. It is our intention to supplement this letter of understanding by a more definitive agreement as this matter develops, it being the intention of the parties that the problems which are incurred will be, within the framework of this understanding, worked out to the mutual benefit of the parties.
>
> We understand that Housing, Inc. has negotiated with Mid East Regional Housing Authority and that it has in hand letters of intention covering projects in Washington, Beaufort, Bertie, Hyde and Martin counties. We also understand that Housing, Inc. has secured options on lands in some or all of these counties covering lands which in your opinion will be suitable for the proposed housing.
>
> OWNERSHIP
>
> Housing, Inc. on the one hand and W. H. Weaver Construction Company, or its shareholders, on the other expect to form a joint venture. This joint venture may be in the form of a limited partnership or in the form of a corporation, as may be mutually agreed upon. The letters of intent and the options will be transferred by Housing, Inc. to the joint venture and the joint venture shall thereafter be the owner of the projects.

DIVISION OF RESPONSIBILITY

It is intended that both parties to the joint venture shall have active parts in the entire development of the projects and that both parties shall be kept informed of all developments and except as hereinafter agreed both parties shall sign all contracts and other agreements; however, it has been agreed that Housing, Inc. shall primarily be responsible for negotiation with Mid East Regional Housing Authority and that W. H. Weaver Construction Company shall be primarily responsible for the building of the projects. It is the intention of the parties that W. H. Weaver Construction Company will furnish all personnel required in the building of the projects, such as superintendents, and shall be responsible for the organization of the work with the sub-contractors and purchasing.

WORKING CAPITAL

(1) Prior to the closing of construction financing upon the property, working capital shall be contributed by W. H. Weaver Construction, or its shareholders, it being understood, however, that Housing, Inc. shall not be reimbursed for its predevelopment expenses until the closing of the construction loan. Housing, Inc. shall immediately, however, submit to W. H. Weaver Construction Company a statement of the expenses it has incurred to date together with a schedule of its outstanding commitments and obligations relative to the projects.

(2) Working capital after the execution of leases with Mid East Regional Housing Authority shall be furnished by borrowing from some bank or other financial institution which borrowing shall be arranged by and upon the credit of W. H. Weaver Construction Company. Working capital shall include all amounts expended under the provisions of subparagraph 1 of this section, all land costs and the sum of $50,000.00 which shall be advanced to Housing, Inc. upon the execution of the lease or leases as a part of its profit.

COMPENSATION OF W. H. WEAVER CONSTRUCTION COMPANY

W. H. Weaver Construction Company shall accomplish the building and shall be reimbursed for the actual costs of the project including job overhead and shall receive a fee of four (4%) per cent of the costs of construction, including job overhead to cover its home office overhead. This 4% shall be prior to the division of any profits.

PROFITS

Profits are hereby defined as the difference between the costs of all development and the amount which is borrowed upon the completed project. Profits shall be divided 30% to W. H. Weaver Construction Company and 70% to Housing, Inc.

LOSSES

Losses shall be divided 50% to W. H. Weaver Construction Company and 50% to Housing, Inc.

OWNERSHIP OF LAND

The completed projects shall belong one-half to W. H. Weaver Construction Company, or its shareholders, and one-half to Housing, Inc., or its shareholders.

POSSIBLE DIVISION OF PROPERTIES

It is the intention of the parties that after the projects have been completed and are being rented that the projects will be divided between the Weaver interests and the Johnson interests, so that the Weaver interests will own 100% of some of the projects and the Johnson interests will own 100% of the remainder of the projects, all within the framework that each is entitled to one-half of the completed projects.

WITHDRAWAL FROM VENTURE

Prior to May 15, 1971, either party may withdraw from this venture and all expenses incurred to the date of such withdrawal (not including land costs) shall be borne by the party which was advanced such expenses. In the event

Weaver interests have purchased lands for the project, Housing, Inc. shall have the right to purchase such lands from Weaver at costs plus any acquisition expenses, such as title fees, which have been advanced by Weaver.

SETTLEMENT

Upon the completion of the projects there shall be a complete financial settlement. In the event there be a loss, Housing, Inc. shall reimburse the joint venture for the initial advance of $50,000.00 plus its share of such loss.

In the event either party makes a disproportionate advance, which is not made good at such settlement, the party making such disproportionate advance shall be entitled to a lien upon the property of the joint venture for such sums so advanced.

Guarantees

Carl W. Johnson guarantees the obligations of Housing, Inc. and H. Michael Weaver guarantees the obligations of W. H. Weaver Construction Company.

If this memoranda is in accordance with your understanding, please indicate by signing in the lower left hand corner of this letter.

Yours very truly,

W. H. WEAVER CONSTRUCTION COMPANY
/s/ H. Michael Weaver

The above constitutes my understanding of the proposed joint venture.

/s/ Carl W. Johnson

Pursuant to the 21 April 1971 letter of intent, the parties cooperated on the Mid-East project throughout the summer. Both Johnson and Weaver attended a preliminary meeting with HUD officials in Atlanta. Johnson continued to maintain relations with HUD and to pursue acquisition of building sites. As options on the various sites became due, Weaver obtained financing and advanced funds to exercise Housing, Inc.'s options. Because the form of ownership of the joint venture had not been resolved, title to

the sites was taken in Weaver's name in his individual capacity. This simplified financing and security arrangements and avoided potentially unfavorable tax consequences. During the period extending from 14 June 1971 to 7 September 1971, Weaver took title to six of the eleven Mid-East sites in this manner.

While collaborating during the summer of 1971, the parties continued to negotiate the final form and terms of their relationship. They differed over three major items: (1) Weaver's compensation for construction of the project, (2) the nature of Weaver's obligation to obtain construction financing, and (3) the form of ownership of the project. Weaver propounded several proposals, each of which differed in some way from the 21 April 1971 letter. Johnson rejected all proposals and never made a counterproposal.

By late fall of 1971, both parties were cognizant of certain changes in their relative standings. Each re-evaluated his position *vis a vis* the other, and attempted to determine what action might be most lucrative. Johnson's position had improved in the sense that he had obtained sufficient working capital and potential investors to proceed without Weaver; yet his position had deteriorated in the sense that the Mid-East project was in jeopardy with HUD.

In December of 1971, Johnson began pressing for more favorable terms by consulting with another construction company and by demanding that Weaver return the land held in his name. Johnson was of the opinion that the land held in Weaver's name was being held in trust for Housing, Inc.; Weaver considered the land to be held in trust for a joint venture in which he owned a one-half interest. Beginning on 13 December 1971, Johnson directed the vendors of real estate subject to Housing, Inc.'s options to place the land titles in the name of Housing, Inc. instead of in the name of H. Michael Weaver. This reversal of prior practice was made without notice to Weaver.

The parties, continuing to reconsider their options, consulted their lawyers. The realization that the project would be more profitable for each without the other became more apparent. On 23 December 1971, Weaver signed a document granting Johnson the option to purchase Weaver's share of the project for $200,000. Johnson allowed this option to expire and offered Weaver $170,000 on 15 March 1972. On 25 April 1972, Weaver offered to

purchase Johnson's interest for $200,000. When Johnson declined, Weaver offered either to sell his interest or to buy Johnson's interest for $225,000. This offer Johnson also refused.

On 27 April 1972, the parties finally reached an agreement to sever their respective interests. Johnson agreed to purchase Weaver's portion of the venture for $212,500 plus Weaver's itemized costs of $58,421.94. Payment of the $212,500 was to be manifested by promissory notes of $70,000 and $122,500 and cancellation of a $20,000 debt. Notes and deeds of trust securing payment of the amounts specified in the 27 April 1972 agreement were executed on 14 July 1972 and, concurrently, title to the land held by Weaver was transferred to Housing, Inc.

Johnson's first payment of $20,000 was made 14 July 1972 by cancelling Weaver's remaining indebtedness on a project purchased from Johnson. Johnson paid Weaver $18,421.94 on 8 September 1972, and $83,333 on 3 October 1972. These payments cancelled the $70,000 promissory note and reduced the unpaid expenses to $26,667.

With Weaver out of the project, Johnson proceeded alone with development. Johnson formed a limited partnership, Merha, Ltd., on 22 June 1972. The sole general partner of Merha, Ltd. was Housing, Inc. Johnson sold half of the Mid-East project to Merha, Ltd. and marketed 95% of Merha, Ltd. to the limited partners for $250,000. As development proceeded, Johnson fell into disputes with his building contractor and his construction lender. The contractor walked off the project and the lender foreclosed. Johnson sued the contractor and collected $175,000. In response to foreclosure, he formed Landin, Ltd., a corporation in which he owned all the stock. Landin, Ltd. purchased Mid-East from Housing, Inc. for $1000 at foreclosure. Acting through Landin, Ltd., Johnson hired a new contractor and completed the Mid-East project at a substantial profit. Although Housing, Inc. reported a tax loss of $104,496 on the Mid-East project, Landin, Ltd. reported a taxable gain of $778,152 on the same project.

The final Housing, Inc. note for $122,500 payable to the defendant came due on 1 January 1974. Instead of paying off the note, the plaintiff sued the defendant on 31 December 1973.

The plaintiff sought damages of $63,333 (the amount already paid the defendant in excess of the defendant's actual expenses of

$58,421.94), and prayed that the note for $122,500 and the deed of trust securing it be set aside as null, void and of no legal effect. The plaintiff alleged that the defendant procured the 1972 agreement by means of duress and breach of an express trust. The defendant counterclaimed for recovery of $122,500 on the note and $76,667 (principal and interest) on the balance of the 27 April 1972 agreement.

The defendant moved for summary judgment on both the claim and counterclaim. The trial court, *Collier*, Judge, entered summary judgment in favor of defendant on 11 May 1977. The Court of Appeals reversed and remanded for trial. *Housing, Inc. v. Weaver*, 37 N.C. App. 284, 246 S.E. 2d 219 (1978). This Court, in a *per curiam* opinion, affirmed. *Housing, Inc. v. Weaver*, 296 N.C. 581, 251 S.E. 2d 457 (1979).

On remand, at the conclusion of an extensive trial, the trial judge informed the parties that he would not instruct the jury on breach or threatened breach of contract as a possible form of duress, because it had concluded as a matter of law that the 21 April 1971 letter was not an enforceable contract. Both parties filed proposed jury issues. Neither requested that an issue regarding the amount of the defendant's damages be submitted. Although the uncontradicted evidence indicated that the defendant's damages were liquidated at $149,167 (the $122,500 note plus $26,667 unpaid expenses), the trial court submitted an issue regarding the defendant's damages. The five issues submitted to the jury asked:

> 1. Prior to execution of the letter agreement dated April 27, 1972, was defendant H. Michael Weaver under a duty to convey to Housing, Inc., title to the lands acquired by him through the exercise of options owned by Housing, Inc.?
>
> 2. At the time of execution of the agreement dated April 27, 1972, and the promissory notes and assignment thereafter executed, were the plaintiffs Carl Johnson and Housing, Inc., acting under duress, coercion or business compulsion from defendant H. Michael Weaver, as alleged in the complaint?
>
> 3. If so, did plaintiffs Carl Johnson and Housing, Inc. ratify the April 27, 1972 agreement and the promissory notes and assignment thereafter executed, by their subsequent conduct?

4. If you have found in favor of the plaintiffs as to the foregoing issues, what amount of restitution are plaintiffs entitled to recover from defendant H. Michael Weaver?

5. If you have found in favor of the defendants as to the foregoing issues, what amount are the defendants entitled to recover of the plaintiffs?

The trial court instructed the jurors that they should answer the liability issues first, and then proceed to the damages questions. In regard to the fifth issue, the trial court instructed that the figure that all the evidence tended to show was $149,167. If the jury disbelieved the evidence, the trial court instructed that the jury could use any other figure it deemed appropriate.

The jury answered the first two issues in the negative, indicating that the plaintiff was liable to the defendant. On the fifth issue, the jury found that the defendant should recover no damages as a consequence of the plaintiff's liability.

The next day, after a discussion with both attorneys and at the insistence of the plaintiff's attorney, the trial court entered judgment in accordance with the jury's verdict. The trial judge stated that the judgment was being entered merely as a mechanical matter to avoid potential clerical problems, and that he had not yet determined what to do regarding the fifth issue relating to the amount of the defendant's damages. The judgment was filed 13 December 1979.

On 20 December 1979, the defendant filed motions for judgment notwithstanding the verdict, for amendment of the judgment, or for a new trial. The plaintiff filed a similar motion on the same day. The trial court entered a "final judgment" on 19 June 1980. This judgment denied both of the motions of the plaintiff. The jury verdict as to the fifth issue was vacated and set aside, and judgment was entered in favor of the defendant against the plaintiff in the amount of $215,866.57, representing the principal sum of the note of $122,500 plus interest specified in the note at the rate of 8-1/8 per cent, plus reimbursable expenses of $26,667. In the alternative, the trial court granted the defendant's motion for a partial new trial on damages only.

The Court of Appeals affirmed. *Housing, Inc. v. Weaver*, 52 N.C. App. 662, 280 S.E. 2d 191 (1981). This Court denied discre-

tionary review on 3 November 1981. The plaintiff petitioned pursuant to Rule 31, Rules of Appellate Procedure, for rehearing. The petition for rehearing was allowed 1 December 1981.

[1] Although not addressed by the parties in the briefs, an initial issue raised by the plaintiff in the petition for discretionary review was whether the trial court erred by amending a judgment after the adjournment of the term. The record does not indicate when the trial judge adjourned the 26 November 1979 Session of Guilford County Superior Court. He did hold court in New Hanover County the week following the 13 December 1979 judgment, so it must be presumed that he adjourned the term of court before 17 December 1979. The amended judgment was signed 19 June 1980 and filed 24 June 1980.

The unquestioned rule in this State has long been that, although during a term all judgments and orders are *in fieri* and may be amended, once a trial judge has adjourned court and left the bench for that term, he cannot modify a judgment entered during that term. *Shaver v. Shaver*, 248 N.C. 113, 102 S.E. 2d 791 (1958); *Pendergraph v. Davis*, 205 N.C. 29, 169 S.E. 815 (1933); A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1712 (T. Wilson and J. Wilson 2d ed. 1956). The parties attempted to stipulate that the judgment could be entered out of term. Although all parties to an action may consent to entry of a judgment out of term, once a judgment is entered and the term has expired, the judgment becomes final and cannot be amended out of term despite the parties' consent to entry out of term. *Crow v. McMullen*, 220 N.C. 306, 17 S.E. 2d 107 (1941). Since the court entered judgment 13 December 1979, the amendment of the judgment out of term on 19 June 1980 would have been void if the long-standing rule applied. It does not.

In 1967, the legislature enacted the North Carolina Rules of Civil Procedure. 1967 N.C. Sess. Laws, c. 954. Rule 50(b) of the North Carolina Rules of Civil Procedure, G.S. 1A-1, provides for judgment notwithstanding the verdict, and Rule 59(e) provides for altering or amending a judgment. The plaintiff's motions were couched in the alternative; therefore both rules will be considered. Rule 50(b) allows a party to move for judgment n.o.v. within 10 days after entry of judgment, or the judge on his own motion may grant judgment n.o.v. within 10 days after entry of

judgment. No time is specified for judicial action upon a timely motion by a party. Rule 59(e) requires a party to serve a motion to amend or alter a judgment within 10 days after entry of judgment. No time is specified for judicial action upon such a motion.

The failure to specify statutorily the time for judicial action on a motion for judgment n.o.v. or on a motion to amend a judgment has been the source of some confusion. If the old rule were still in effect, a motion within 10 days of judgment but after the adjournment of the term would be nugatory. Yet no other limitation can be found. The confusion has prompted one commentator to state that the old rule does not apply and the new time limit for judicial action is the same 10 day span given the parties to file their motions. W. SHUFORD, NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE § 59-18 (2d ed. 1981).

We do not think that the legislature, in delineating the precise time periods of Rule 50(b) and Rule 59(e), could have intended that these specific periods might be curtailed by the adjournment of the term of court at which judgment was rendered. To attribute any such intent to the legislature would vitiate the purpose of both rules. *Cf.* Rule 6(b) of the Rules of Civil Procedure, which expressly prohibits the *enlargement* by consent of the time periods specified in Rule 50(b) and Rule 59(e). Therefore, a trial court may alter or amend a judgment pursuant to Rule 59 and a trial court may enter judgment n.o.v. pursuant to Rule 50 (including the alteration of a judgment entered upon such a verdict) after the adjournment of the term during which the judgment was entered.

The time for judicial action upon a motion under Rule 50 and Rule 59 is not prescribed. We think the view expressed in W. SHUFORD, NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE § 59-18 (2d ed. 1981) misconstrues the language of Rule 59(e). This rule and Rule 6(b) do not circumscribe the trial court's authority to rule on a timely motion to alter or amend a judgment; they merely require that a party make such a motion within 10 days after judgment or require that a trial court acting on its own motion amend judgment within 10 days after its entry. The treatise's implication that a trial court's ruling on a timely motion by a party under these Rules must also be made within 10 days after entry of the original judgment must be discounted.

We find that the amendment of the 13 December 1979 judgment by entry of judgment on 19 June 1980 was not invalid on grounds that the subsequent judgment was entered out of term.

[2] The plaintiff first assigns as error the holding of the Court of Appeals that the trial court could vacate the jury verdict and amend the judgment as to the issue of damages without altering the verdict and judgment as to liability. The plaintiff cites *Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 234 S.E. 2d 605 (1977) and *Robertson v. Stanley*, 285 N.C. 561, 206 S.E. 2d 190 (1974) for the proposition that courts should not grant a new trial for damages alone "unless it is clear that the error in assessing damages did not affect the entire verdict." 292 N.C. at 561-62, 234 S.E. 2d at 607; 285 N.C. at 568, 206 S.E. 2d at 195. The plaintiff contends that when the liability and damages issues are interwoven, the trial court may not arbitrarily set aside the verdict and grant a new trial on solely the damages issue. Although the plaintiff's contention is certainly based upon an accurate recital of the law, the decisions cited do not mandate that this case be remanded for retrial on all issues.

Robertson v. Stanley, cited with approval in *Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 234 S.E. 2d 605 (1977) is the authoritative precedent regarding the granting of partial new trials. The initial observation of *Robertson* was that "it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial." 285 N.C. at 568, 206 S.E. 2d at 195. The trial court in *Robertson* had denied the plaintiff's motion for a partial new trial on grounds that the jury's verdict of liability but no damages was inconsistent and contrary to the instructions of the trial court. This Court, in reversing the trial court, then had to determine whether to grant a new trial on all issues or solely on the damages issue. It exercised its discretion to order a new trial on all issues. *Id.* at 569, 206 S.E. 2d at 196.

In contrast, the trial court exercised its discretion to set aside only the damages issue in the case *sub judice*. The issue before this Court is not whether it would have granted a new trial on one issue or on all issues had it confronted the question as it did in *Robertson*. In the instant case, the trial court has already answered this issue and our inquiry is limited to whether the trial court abused its discretion.

The trial court, by its own admission, erred in instructing the jury that it could find damages for the defendant at any "*such other figure as you deem appropriate.*" There was actually no question of fact concerning the amount of the defendant's damages. The damages due were the face amount of the note, plus interest as specified on the note, in addition to unpaid reimbursable expenses. Neither party requested that the jury be submitted an issue as to the amount of the defendant's damages, and the parties now agree that damages are liquidated. The jury should have been instructed to determine solely the liability issue or it should have been instructed to return damages of $149,167 plus interest in the event it found liability.

All parties concurring that there was error in the judge's instructions, the dispute centers on the propriety of the devised remedy of setting aside only the damages verdict. In determining whether the trial court abused its discretion, *Robertson v. Stanley* is instructive. A partial new trial should be ordered when the error "is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication." 285 N.C. at 568, 206 S.E. 2d at 195. Justice Huskins, writing for a unanimous Court, quoted with approval from 58 Am. Jur. 2d. *New Trial*, §§ 25, 27 (1971):

> As a condition to the granting of a partial new trial, it should appear that the issue to be tried is distinct and separable from the other issues, and that the new trial can be had without danger of complications with other matters. Particularly is this true where the error in the verdict relates to the amount of damages assessed and it appears that this error was not the result of any ruling by or charge from the trial judge, but was committed solely by the jury itself after retiring to consider its verdict; in such a case it is difficult to say that the entire verdict was not affected by the cause from which resulted the error in the amount of damages.
>
> Where it appears that the verdict was the result of a compromise, such error taints the entire verdict and requires a new trial as to all of the issues in the case. If the award of damages to the plaintiff is 'grossly inadequate,' so as to indicate that the jury was actuated by bias or prejudice, or that the verdict was a compromise, the court must set aside the verdict in its entirety and award a new trial on all issues.

285 N.C. at 568-569, 206 S.E. 2d at 195-96. Justice Huskins also quoted from Annot., 29 A.L.R. 2d 1199 (1953) that "[a] new trial as to damages alone should not be granted where there is ground for a strong suspicion that the jury awarded inadequate damages to the plaintiff as a result of a compromise involving the question of liability." 285 N.C. at 569, 206 S.E. 2d at 196.

Unlike the case at bar, in *Robertson* there were grounds for such a suspicion. In *Robertson* we were required to presume that the jury was instructed correctly because the instructions were not brought forward as a part of the record on appeal. Had the jury in *Robertson* followed the trial court's instructions it would have arrived at an internally consistent verdict. Therefore, the paradoxical verdict in that case was almost certainly the result of bias, prejudice or a jury compromise. In contrast, error in the portion of the trial court's instructions on the amount of the defendant's damages in the instant case is conceded by all parties and was recognized by the trial court itself after the verdict was returned. The jurors were instructed erroneously that they could independently fix the defendant's damages at any amount they deemed appropriate. The jurors were instructed further specifically to answer the question of liability *before considering the issue of the amount of damages.* They answered the first two issues by finding the defendant was under no duty to convey the property to the plaintiff prior to the 27 April 1972 agreement and that the plaintiff did not enter that agreement as a result of duress, coercion or business compulsion.

The jury reached a verdict entirely consistent with the trial court's instructions—both those correct and those erroneous. By so deciding the first two issues, the jury determined that the plaintiff was liable to the defendant and then considered the issue of the damages due the defendant. The trial court had instructed the jury erroneously that it could award any damages it deemed appropriate. This had the effect of allowing the jury to fix the amount of damages in its complete and unfettered discretion; it awarded zero damages.

The discrepancy between the portion of the verdict establishing the plaintiff's liability and the portion of the verdict awarding zero damages did not likely spring from a compromise verdict, bias or prejudice, as it did in *Robertson.* In contrast to

Robertson, the jury's verdict was compatible with the court's instructions. Under the peculiar facts of this case, the internally inconsistent verdict based upon an erroneous instruction does not imply that the jury acted improperly in resolving the issues. To the contrary, from all indications the jury diligently followed the trial court's correct instructions on liability, and just as diligently followed its incorrect instructions on damages.

The trial court had the opportunity to observe the jury and did not abuse its discretion by refusing to find under the facts of this case that the erroneous damages instruction and verdict thereon affected the jury's consideration of the liability issue and somehow "tainted" that portion of the verdict. The two issues, as presented to the jury, were not interwoven. The damages portion of the verdict was properly vacated and set aside and a new trial solely on that issue would have been appropriate. Since the parties agreed that the defendant's damages were liquidated, such a trial was unnecessary. The trial court correctly entered judgment for the liquidated damages.

[3] The plaintiff's second assignment of error stems from the trial court's refusal to submit to the jury the issue of breach or threatened breach of contract as a possible form of economic duress. The trial court concluded as a matter of law that the 21 April 1971 letter was an "agreement to agree" and thus did not constitute an enforceable contract. Threatened breach of its terms therefore would not rise to the level of legal duress necessary to void the 27 April 1972 contract.

Boyce v. McMahan, 285 N.C. 730, 208 S.E. 2d 692 (1974), is the definitive decision on agreements to agree. "A contract to enter into a future contract must specify all its material and essential terms." *Id.* at 734, 208 S.E. 2d at 695. "If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Id. Boyce* controls the case at bar. In both, the original agreements were embodied in documents which recited on their face that they were preliminary agreements subject to more definitive agreements to be executed subsequently. Both agreements specified the intentions and desires of the parties rather than their agreement. *Boyce's* requirement of agreement as to all material terms was not fulfilled by the document in this case. For example, the parties did not

agree on the form of ownership of the project. Neither did the 21 April 1971 letter specify a mode for settlement of these unresolved terms. The trial court thus correctly determined that the 21 April 1971 letter was a mere agreement to agree and breach of its terms would not rise to the level of economic duress necessary to void the 27 April 1972 agreement.

The plaintiff contends that the original decision of the Court of Appeals reversing summary judgment *a fortiori* held that there were questions of fact as to economic duress. The decision now under review, holding that the 21 April 1971 letter was no basis for submission to the jury of an issue of economic duress, thus presents at first glance an apparent inconsistency between two panels of the Court of Appeals. We note, however, that the decisions were based upon different records. The decision reversing summary judgment was grounded upon a mere forecast of evidence to be presented at trial. The latter decision, entered following a jury verdict, was based upon evidence actually admitted at the trial granted by the former decision. Therefore, the law of the case did not irrebuttably indicate the existence of a factual question as to economic duress.

The trial court correctly determined that the 21 April 1971 letter was a mere agreement to agree and breach of its terms would not amount to economic duress rendering the 27 April 1972 contract voidable. The court properly refused to submit a jury issue on breach or threatened breach of contract as a means of duress.

The plaintiff lastly assigns that the trial court's instructions on the liability issue erroneously (1) allowed the jury to find a joint venture implied-in-fact, (2) prevented jury consideration of a duty to reconvey in the event it found a joint venture implied-in-fact, and (3) prevented jury consideration of the equitable principles of restitution, constructive trust, and resulting trust. We have carefully examined the trial court's charge contextually and in its entirety, as is required of us, and find no error requiring reversal of the decision of the Court of Appeals.

Our review of the record impels the conclusion that the decision of the Court of Appeals affirming the judgment entered by the trial court must be, and the same is

Affirmed.

VERA H. QUICK v. W. B. QUICK

No. 163A81

(Filed 4 May 1982)

1. **Divorce and Alimony § 17.3; Rules of Civil Procedure § 52.1— sufficiency of order awarding permanent alimony—findings of fact supporting amount of alimony inadequate**

In an action concerning the amount of alimony to be awarded, the trial court's findings of fact were inadequate to support its conclusion under G.S. 1A-1, Rule 52(a). G.S. 50-16.5(a) lists a series of circumstances for the trial judge to consider in determining the amount of an alimony award, and the court's conclusions must be based upon factual findings sufficiently specific to indicate that the trial judge properly considered the six statutory factors enumerated and the rules which have evolved from our case law. Rule 52(a) requires *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached. Therefore, where there was (1) no finding as to the total value of either the plaintiff's or defendant's "estate," (2) inadequate findings concerning the "earnings" of the parties, (3) inadequate findings of fact about the earning capacities and conditions of the parties, (4) no mention of the accustomed standard of living of the parties, and (5) no findings to indicate whether the trial court believed that defendant was deliberately depressing his income or whether he was indulging in excessive spending in disregard of his marital obligation, the order of the trial court must be vacated and a new hearing held so that the trial court can make adequate and appropriate findings of fact and conclusions of law and can set the amount of permanent alimony. To the extent that *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975) indicates that Rule 52(a) does not apply to actions involving the *amount* of alimony, it is overruled. This holding also applies with equal force to actions involving determination of *amount* of both alimony *pendente lite* and child support.

2. **Process § 6— subpoena duces tecum—appropriateness for obtaining corporate records in divorce action**

A corporation, even one closely held, is recognized as a separate legal entity and parties engaged in litigation which is personal in nature should not be allowed to obtain corporate records which have no relation to the issues before the court. However, where a substantial portion of a party's total worth is stock in a closely held corporation, certain information from the corporation's business records may well be relevant to the personal litigation involving the party.

3. **Divorce and Alimony §20.3— insufficient findings to support award of attorney's fees**

Where the trial court concluded that plaintiff was unable to pay her attorney's fees but did not support the conclusion with findings of fact, the portion of the order awarding fees must be vacated and on rehearing, the trial

court must make sufficient findings of fact to support a conclusion whether plaintiff, as litigant, is able to meet defendant, as litigant, on substantially even terms with respect to representation by counsel.

4. Divorce and Alimony § 21— failure to make alimony payments—stay of contempt proceedings pending appeal

The Supreme Court is unable to hold a supporting spouse in contempt for violating a trial court order by failing to make alimony payments ordered therein since the Supreme Court does not hear matters requiring factual findings. The ultimate answer to a dependent spouse's dilemma concerning a supporting spouse's virtual immunity from support obligations while cases work their way through the appellate process must come from the legislature.

ON discretionary review of the decision of the Court of Appeals, 53 N.C. App. 248, 280 S.E. 2d 482 (1981), which affirmed the order of *Barnette, Judge*, entered at the 29 January 1980 Session of District Court, WAKE County. The order was signed out of term on 8 April 1980 by consent of the parties.

Our principal task on this appeal is to determine whether the trial court made findings of fact sufficient to support its order for permanent alimony.

Brenton D. Adams for plaintiff-appellee.

Tharrington, Smith & Hargrove, by J. Harold Tharrington and Carlyn G. Poole, for defendant-appellant.

CARLTON, Justice.

I.

Plaintiff and defendant were married in 1945, when they both were twenty years of age. Although they had few financial resources at the time of their marriage, defendant enjoyed tremendous success in his business and the parties later enjoyed an expensive standard of living. They were separated in 1978 and were divorced in 1979.

This appeal involves only plaintiff's claims for permanent alimony and attorney's fees. The propriety of a prior award of alimony *pendente lite* and attorney's fees is not before us.

A consent order was entered into by the parties and signed by Judge Parker on 8 March 1978, in which defendant agreed to pay plaintiff alimony *pendente lite* in the amount of $1,500.00 per

month beginning 19 September 1978. Defendant further agreed to pay plaintiff's attorney the sum of $1,000.00 for services rendered prior to the consent order.

In the trial court the parties stipulated (1) that plaintiff is substantially dependent upon defendant for maintenance and support and is a dependent spouse within the meaning of G.S. 50-16.1(3), (2) that defendant has sufficient means and income to provide support for plaintiff and is a supporting spouse within the meaning of G.S. 50-16.1(4), (3) that plaintiff has a ground for alimony as provided in G.S. 50-16.2, and (4) that plaintiff is entitled to recover judgment against defendant for permanent alimony in such amount as might be established by the court.

The matter came on for hearing before Judge Barnette on 29 January 1980. Various documents concerning the parties' financial affairs were introduced and five witnesses, including plaintiff, defendant and defendant's accountant, gave extensive testimony. After hearing all the evidence the trial judge made the following findings of fact:

1. That the plaintiff is unemployed and has been during the marriage with the defendant except as a part-time bookkeeper and clerical worker in the defendant's business.

2. That since the divorce the plaintiff is now entitled to $2,700.00 per year as her ½ share of rents from property she and the defendant own as tenants in common.

3. That the defendant and the plaintiff own their family residence on 310 Carmen Avenue, Jacksonville, N.C. as tenants in common. The value of this property is unknown.

4. That the plaintiff and the defendant also own two buildings on New Bridge Street in Jacksonville, North Carolina as tenants in common. The value of these buildings is unknown.

5. That the plaintiff owns one hundred shares of Carmen Realty Company. These shares are worth slightly in excess of $6,000.00.

6. That the plaintiff's reasonable monthly living expenses are $1,500.00 per month.

7. That the defendant has retired from active work in his business and is not presently employed. He retired for health reasons and has been retired for some time. This had nothing to do with the separation and subsequent divorce.

8. That the defendant now has a net monthly income of $2,151.00.

9. That the defendant's reasonable monthly living expenses are approximately $3,800.00.

10. That the defendant owns property mentioned in Findings of Fact Numbers 3 and 4 as tenants in common with the plaintiff.

11. That the defendant owns the remaining 2,900 shares of Carmen Realty Company. His shares are worth approximately $174,000.00.

12. The plaintiff needs and the defendant can afford to pay the plaintiff the sum of $1,275.00 per month as permanent alimony. Such sum is reasonable considering the respective incomes, estates and expenses of the parties.

13. That even with the alimony pendente lite she is receiving, the plaintiff is still unable to pay her attorney's fees.

14. That it has been reasonably necessary for the plaintiff's attorney to spend twenty hours in preparation for trial and in trial of this action for permanent alimony since March 8, 1979.

15. That the plaintiff's attorney has performed valuable services for the plaintiff including interviewing witnesses, conferences with the plaintiff, legal research, conducting deposition of the defendant, and appearing in Court on the plaintiff's behalf.

16. That the rate of $50.00 per hour is a reasonable rate for the plaintiff's attorney to charge.

Based on these findings Judge Barnette concluded that plaintiff was entitled to receive as permanent alimony the sum of $1,275.00 per month and to receive $1,000.00 for attorney's fees.

From the foregoing, defendant appealed to the Court of Appeals. That court, in an opinion by Judge Webb in which Judges Hedrick and Arnold concurred, affirmed the trial court. We allowed defendant's petition for discretionary review on 1 December 1981.

II.

[1] We are first concerned with the sufficiency of the trial court order awarding plaintiff permanent alimony. Specifically, we must examine the trial court's findings of fact to determine whether they are adequate to support its conclusion of law that plaintiff is entitled to receive $1,275.00 each month from defendant as permanent alimony.

Defendant contends that the trial court abused its discretion by ordering him to pay plaintiff an amount which, in addition to his own reasonable living expenses, will cause him to divide and deplete his estate within a short period of time, *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976). Plaintiff argues that the amount of alimony is a matter for the trial judge's sound discretion and is not reviewable on appeal absent a manifest abuse of discretion, citing *Sayland v. Sayland*, 267 N.C. 378, 148 S.E. 2d 218 (1966), and contends that this Court held in *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975), that no findings of fact are required to support the amount of alimony awarded.

We find the answer to this issue in our Rules of Civil Procedure (codified as Chapter 1A of our General Statutes). Rule 52(a)(1) requires that "in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." The amount of alimony is determined by the trial court without a jury. 2 R. Lee, *North Carolina Family Law* § 139 (4th ed. 1980). Our Rules of Civil Procedure apply to all cases of a civil nature brought in the superior and district courts unless a differing procedure is prescribed by statute. G.S. § 1A-1, Rule 1 (Cum. Supp. 1981). Actions for permanent alimony are unquestionably of a civil nature, and there is no "differing procedure" prescribed by statute which governs the action.[1] *Gardner v. Gardner*, 294 N.C. 172, 240 S.E. 2d

1. We are here concerned with an action for permanent alimony. A "differing procedure" for alimony *pendente lite* actions is discussed *infra*.

399 (1978). Under Rule 52(a), three separate and distinct acts are required of the trial court. It must (1) find the facts specially, (2) state separately the conclusions of law resulting from the facts so found, and (3) direct the entry of the appropriate judgment. *Cf. Woodard v. Mordecai*, 234 N.C. 463, 67 S.E. 2d 639 (1951) (similar duties under prior law). In this case we are concerned with the first of these requirements, the finding of facts.

Rule 52(a) does not, of course, require the trial court to recite in its order all evidentiary facts presented at hearing. The facts required to be found specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached. "Findings of fact may be defined as the written statement of the ultimate facts as found by the court, signed by the court, and filed therein, and essential to support the decision and judgment rendered thereon." 76 Am. Jur. 2d Trial § 1251 (1975). In other words, a proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment. 89 C.J.S. Trial § 627 (1955).

In *Woodard v. Mordecai*, 234 N.C. at 470, 472, 67 S.E. 2d at 644, 645, this Court explained:

> There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. (Citations omitted.) G.S. 1-185 requires the trial judge to find and state the ultimate facts only. (Citations omitted.)
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> . . . Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. (Citations omitted.) In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. (Citation omitted.) An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts.

(Citations omitted.) Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law. (Citations omitted.)

In summary, while Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

As stated by this Court, per Justice Exum, in *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980):

> The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for approximately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead "to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." *Montgomery v. Montgomery*, 32 N.C. App. 154, 158, 231 S.E. 2d 26, 29 (1977); *see, e.g., Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967).

The requirement of special fact-finding did not begin with implementation of our present Rules of Civil Procedure. In *Martin v. Martin*, 263 N.C. 86, 138 S.E. 2d 801 (1964) (per curiam), this Court reviewed a trial court order which directed alimony *pendente lite* and child support payments. The trial court made only limited findings of act about the defendant's financial circumstances. The hearing had been on affidavits and defendant submitted his own uncontradicted affidavit indicating his dire financial situation. However, no findings of fact concerning the matters in the affidavit were made. This Court stated, in remanding to the trial court:

> If the facts set out in defendant's affidavit are true, the payments required of defendant are clearly excessive, unrealistic and beyond the limits of judicial discretion. *The*

court made no specific findings with respect to the matters set out in the affidavit, and it does not appear whether they were considered.

263 N.C. at 87-88, 138 S.E. 2d at 802 (emphasis added).

The amount of alimony is determined by the trial judge in the exercise of his sound discretion and is not reviewable on appeal in the absence of an abuse of discretion. *Sayland v. Sayland*, 267 N.C. 378, 148 S.E. 2d 218. There can be no review of whether a trial judge abused his discretion other than by appeal. 2 R. Lee, *supra* at § 139. In determining the amount of alimony the trial judge must follow the requirements of the applicable statutes. Consideration must be given to the needs of the dependent spouse, but the estates and earnings of both spouses must be considered. "It is a question of fairness and justice to all parties." *Beall v. Beall*, 290 N.C. at 674, 228 S.E. 2d at 410. Unless the supporting spouse is deliberately depressing his or her income or indulging in excessive spending because of a disregard of the marital obligation to provide support for the dependent spouse, the ability of the supporting spouse to pay is ordinarily determined by his or her income at the time the award is made. If the supporting spouse is deliberately depressing income or engaged in excessive spending, then capacity to earn, instead of actual income, may be the basis of the award. *See Conrad v. Conrad*, 252 N.C. 412, 113 S.E. 2d 912 (1960); *Harris v. Harris*, 258 N.C. 121, 128 S.E. 2d 123 (1962).

The statute which controls the determination of alimony is G.S. 50-16.5. That statute provides that "[a]limony shall be in such amount as the circumstances render necessary, having due regard to the (1) estates, (2) earnings, (3) earning capacity, (4) condition, (5) accustomed standard of living of the parties, and (6) other facts of the particular case." G.S. § 50-16.5(a) (1976) (numbered parentheses added).

In other words, the statute requires a conclusion of law that "circumstances render necessary" a designated amount of alimony. Our case law requires conclusions of law that the supporting spouse is able to pay the designated amount and that the amount is fair and just to all parties. See *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980) for guidelines for determining whether a spouse is "dependent" or "supporting." All of these

conclusions must themselves be based upon factual findings sufficiently specific to indicate that the trial judge properly considered the six statutory factors enumerated above and the rules which have evolved from our case law. Without findings on the above-listed factors, an appellate court cannot review the amount of alimony awarded to determine whether the trial judge abused his discretion. There would be no way to know which factors the trial judge considered and which he did not consider. There would be no way to determine what evidence the trial judge believed and what evidence he found incredible.

As Justice Exum noted in *Coble*:

> In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence. *Crosby v. Crosby, supra.* It is not enought that there may be evidence in the record sufficient to support findings which *could have been made.* The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal. *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29 (1968); *Davis v. Davis,* 11 N.C. App. 115, 180 S.E. 2d 374 (1971).

300 N.C. at 712-13, 268 S.E. 2d at 189.

We now apply these principles to the case before us. The only facts found by the trial court which relate to the statutory factors listed above were: (1) Plaintiff presently has a yearly income of $2,700 from rental of property owned jointly with defendant. (2) Plaintiff's estate includes stock worth $6,000, rental property owned jointly with defendant, value unknown, and an interest in the family home, value unknown. (3) Plaintiff has reasonable monthly living expenses of $1,500 per month. (4) Defendant has a net monthly income of $2,151. (5) Defendant's estate includes stock, worth $174,000, rental property owned jointly with plaintiff, value unknown, and an interest in the family home, value unknown. (6) Defendant's reasonable monthly living expenses are $3,800. The trial court then concluded that "the defendant can afford to pay to the plaintiff the sum of $1,275 per month as permanent alimony. Such sum is reasonable considering the respective incomes, estates, and expenses of the parties." The

trial court made only limited findings concerning the estates of the parties, the first of the enumerated statutory factors.

There is no finding as to the total value of either the plaintiff's or defendant's "estate." It found that plaintiff and defendant owned certain real properties in Jacksonville as tenants in common, but then found that their value was "unknown." We note that there is testimony in the record concerning the value of these properties. Also, there is no finding concerning the likelihood that these properties might be sold or rented in order to provide funds for the use of both parties in meeting their living expenses. Finding of Fact No. 5 is that plaintiff owns 100 shares of stock in Carmen Realty Company, but there is no finding on whether this stock, being stock of a closely held corporation, is marketable and therefore of real value to plaintiff. Finding of Fact No. 11 is that defendant owns the remaining 2,900 shares in the corporation and that these shares have a value of $174,000. This finding is highly questionable in face of testimony that the corporation owned a certificate of deposit worth $108,000 and various other real properties which were apparently unencumbered. Additionally, there is no finding concerning the income-producing capability of defendant's corporate stock. There is no finding concerning the marketability of the stock or the ability of defendant to liquidate corporate assets and to use those funds to provide alimony. We also note that one exhibit indicated that the net worth of defendant and Carmen Realty in October of 1977 was $1,179,511.38 and that another indicated a net worth of approximately $642,305 in September of 1978. The findings made by the trial court do not reveal what the trial court considered to be the value of defendant's corporation.

Findings concerning the "earnings" of the parties are also inadequate. There are no findings that plaintiff is presently unemployed and that she will actually receive the rental payments. We note in the record some evidence to the effect that the property in question was not being rented at the time of the hearing. The mere finding of defendant's monthly net income is insufficient in light of the abundant testimony in the record concerning the various sources of his income. This is particularly true in light of some evidence that all of his income may not be permanent.

The findings of fact about the earning capacities and conditions of the parties are similarly inadequate. There is a finding that defendant retired from his business for health reasons unrelated to his marital problems, but there is no finding as to whether he might work again. We note some evidence in the record that defendant has lost the benefit of some permanent disability payments. As noted above, there is no finding to indicate whether defendant could arrange his corporate affairs in a way which would increase his personal earnings. Moreover, there are no findings at all concerning the plaintiff's earning capacity or health condition. There is also no finding about the plaintiff's living conditions. The record discloses that her adult daughter resided with her and that some of plaintiff's intemized living expenses were for the benefit of both. Without a factual finding about this condition, we are unable to determine whether the trial court gave this factor any consideration at all.

The fifth of the statutory factors, the accustomed standard of living of the parties, is not mentioned at all in the trial court's findings. We stressed the critical importance of this factor in determining whether a spouse is "dependent" in our recent opinion in *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849. It is no less important in determining the *amount* of alimony. In *Williams*, we said:

> The . . . phrase clearly means more than a level of mere economic survival. Plainly, in our view, it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed.

299 N.C. at 181, 261 S.E. 2d at 855. The trial court erred in omitting findings concerning this factor. This record is replete with testimony concerning both the expensive lifestyle of the parties just several years prior to the separation and their more modest living circumstances at the time of the hearing.

Finally, the order is without any findings of fact about several factors required for consideration by our case law. For example, there are no findings to indicate whether the trial court believed that defendant was deliberately depressing his income or

whether he was indulging in excessive spending in disregard of his marital obligation to support his dependent spouse. Absent those factors, our law requires that the ability of defendant to pay alimony is ordinarily determined by his income at the time the award is made.

The dearth of factual findings concerning defendant's estate is important for another reason. An alimony award must be fair and just to both parties. According to the findings made by the trial court defendant "can afford" to pay $1,275 in alimony out of his $2,151 monthly income. This leaves defendant only $876 with which to meet his reasonable monthly living expenses of $3,800. Under this set of facts, defendant must delve into his estate to make up the $2,924 monthly deficit and, within five years, will have depleted the "known value" of his estate. A spouse cannot be reduced to poverty in order to comply with an alimony decree. *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407. Under the limited facts found by the trial court, the setting of $1,275 as the amount of alimony appears to us to have been an abuse of discretion.

We hasten to add, however, that there is evidence in the record from which findings of fact *could* be made to support the amount awarded. There is also ample evidence which would support a lower award. What the evidence does *in fact* show is a matter for the trial court's determination, and its determination should be stated in appropriate and adequate findings of fact. Only when an appellate court knows what the facts are can it determine whether the amount awarded was within the trial court's discretion.

In light of the foregoing, it is necessary to order remand of this cause to the district court. As Justice (now Chief Justice) Branch observed in *Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E. 2d 77, 80 (1967), "when the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence . . ., then the order entered must be vacated and the case remanded . . . ."

In reaching our holding in this case, we are not inadvertent to the statement in *Eudy* that, "findings of fact are not required to support the trial judge's finding of the *amount* of alimony in actions for divorce from bed and board or in actions for alimony *pendente lite*." 288 N.C. at 80, 215 S.E. 2d at 788 (emphasis in

original). Suffice it to say that consideration of the application of G.S. 1A-1, Rule 52(a) to domestic actions was not given in that case. In light of our decision here to apply the rule to actions involving the *amount* of alimony, the quoted portion of the holding in *Eudy* is overruled.

We would also note that our holding here would apply with equal force to actions involving determination of *amount* of both alimony *pendente lite* and child support. It is true that Rule 52(a) does not apply in proceedings to determine the *amount* of alimony *pendente lite*. *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971); *Hatcher v. Hatcher*, 7 N.C. App. 562, 173 S.E. 2d 33 (1970). This is so because the Rules of Civil Procedure are of general application and do not abrogate the requirements of a statute of greater specificity. G.S. 50-16.8(f) sets out the procedure for applications for alimony *pendente lite*. It provides that, "When an application is made for alimony pendente lite, the party shall be heard orally, upon affidavit, verified pleading, or other proof, and *the judge shall find the facts from the evidence so presented.*" (Emphasis added.) Although Rule 52(a) does not apply to such an action, the fact-finding requirements of this statute are no less stringent than those required by Rule 52(a). Hence, our discussion here applies equally to proceedings for alimony *pendente lite*.

Our statement in *Coble* is especially pertinent here

> Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

300 N.C. at 714, 268 S.E. 2d at 190.

The findings of fact in the trial court order here are woefully inadequate; a serious "gap" exists. In order for the trial court ful-

ly to comply with the principles discussed in this opinion, the order of the trial court must be vacated and a new hearing held so that the trial court can make adequate and appropriate findings of fact and conclusions of law and can set the amount of permanent alimony. The stipulations of the parties of 28 December 1979—that plaintiff is the dependent spouse, that defendant is the supporting spouse, that plaintiff has a ground for alimony as provided in G.S. 50-16.2, and that plaintiff is entitled to permanent alimony—remain in full force and effect for the new hearing herein ordered.

In light of our disposition of this appeal, we need not consider other contentions argued by the parties. However, for the benefit of the trial court and parties on rehearing, we briefly discuss some of them below.

III.

[2] On 10 January 1980, prior to the hearing on 29 January 1980, the Clerk of Superior Court issued subpoenas for the production of documents on defendant and his accountant. They were served on 15 January 1980. The subpoenas directed that numerous financial records pertaining to defendant, Carmen Realty Company and other businesses be brought to the hearing. On 23 January 1980, defendant moved to quash the subpoenas on the grounds that the subpoenas were unreasonable and oppressive and that the materials requested were irrelevant, redundant, and confidential, and that the materials sought belonged to third parties not joined in the action. The motion also alleged that the subpoenas constituted a "fishing expedition." The trial court ruled on the motion to quash by allowing the motion as to certain materials requested and denying the motion as to others. The result of the trial court ruling, defendant contends, was to allow improper use of a subpoena *duces tecum* in that the evidence concerning internal corporate affairs was allowed into evidence at the hearing and unfairly prejudiced his case. Defendant also argues that "the subpoena's broad sweep" of corporate and personal business records amounted to an impermissible fishing expedition.

Since this matter must be heard anew, we issue no opinion of the propriety of the trial judge's rulings on each specific item presented at the previous hearing. Suffice it to say, when the trial judge acts as trier of fact it is presumed that in reaching his

decision he considered only such evidence as was relevant. *E.g.*, *Anderson v. Allstate Insurance Co.*, 266 N.C. 309, 145 S.E. 2d 845 (1966); *Woodard v. Mordecai*, 234 N.C. 463, 67 S.E. 2d 639. Because new subpoenas must be obtained for the new hearing and because a trial judge is presumed to consider only the relevant evidence in reaching his decision, we decline to rule on defendant's assignment.

We refer the trial court and counsel to the extensive and excellent discussion of this device by Justice (later Chief Justice) Sharp in *Vaughan v. Broadfoot*, 267 N.C. 691, 149 S.E. 2d 37 (1966). While our Rules of Civil Procedure have been implemented since the issuance of that opinion, the principles enunciated therein remain viable.

We would also add these general observations: A corporation, even one closely held, is recognized as a separate legal entity in this jurisdiction. Parties engaged in litigation which is personal in nature, as here, should not be allowed to obtain corporate records which have no relation to the issues before the court. Such an attempt would certainly constitute a "fishing expedition" and subpoenas seeking such information should be quashed.

However, where a substantial portion of a party's total worth is stock in a closely held corporation, certain information from the corporation's business records may well be relevant to the personal litigation involving that party. This is particularly true where, as here, the trial court must determine the true worth and income of the parties. In such instances, the corporate records may be directly relevant to the issues at trial and are appropriate objects of a subpoena *duces tecum*. Mere fishing expeditions, however, must not be allowed.

IV.

[3] We next address defendant's contention that the trial court erred in awarding plaintiff an attorney's fee of $1,000. "It is well-established in this jurisdiction that the purpose of the allowance of counsel fees is to enable the dependent spouse, *as litigant*, to meet the supporting spouse, *as litigant*, on substantially even terms by making it possible for the dependent spouse to employ adequate counsel." *Williams v. Williams*, 299 N.C. at 190, 261 S.E. 2d at 860 (1980) (emphasis in original).

For the same reasons discussed in section II of this opinion, we must also vacate this portion of the trial court order. The sole finding of fact to support the trial court determination of entitlement to counsel fees was, "That even with the alimony pendente lite she is receiving, the plaintiff is still unable to pay her attorney's fees." While denominated a finding of fact, this statement is really a conclusion of law. Hence, we are once again confronted with a conclusion of law and order unsupported by findings of fact. On rehearing, the trial court must make sufficient findings of fact to support a conclusion whether plaintiff, as litigant, is able to meet defendant, as litigant, on substantially even terms with respect to representation by counsel.

V.

[4] On 2 March 1982, just prior to oral arguments in this Court on 8 March 1982, plaintiff filed papers in this Court seeking to have defendant held in contempt for violating the trial court order by failing to make the alimony payments ordered therein. Since this Court does not hear matters requiring factual findings, plaintiff's petition was denied. Plaintiff correctly noted that the district court was without jurisdiction to hear the contempt matter by virtue of this appeal. "The appeal stays contempt proceedings until the validity of the judgment is determined." *Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E. 2d 724, 727 (1962).

On oral argument, counsel for plaintiff urged this Court to devise a means to resolve this impasse because it occurs frequently to the detriment of dependent spouses. Counsel correctly argued that supporting spouses have a lengthy period of virtual immunity from support obligations while cases work their way through the appellate process. While the ultimate answer to this dilemma must come from the Legislature, we are not insensitive to counsel's concern and turn to the prevailing applicable principles.

If the order from which an appeal is taken is upheld by the appellate court, wilful failure to comply with the order during pendency of the appeal is punishable by contempt on remand. *Joyner v. Joyner*, 256 N.C. 588, 124 S.E. 2d 724; *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407. It was said in *Joyner*, "taking an appeal does not authorize a violation of the order. One who wilfully violates an order does so at his peril. If the order is upheld by the

appellate court, the violation may be inquired into when the case is remanded to the [trial] court." 256 N.C. at 591, 124 S.E. 2d at 727.

It has also been held that an order for the payment of alimony, alimony *pendente lite*, child support and counsel fees is a money judgment under the provisions of G.S. 1-289. Therefore, an appeal does not stay execution against the defendant's property for the collection of judgment unless a stay or supersedeas is ordered. *Vaughan v. Vaughan*, 211 N.C. 354, 190 S.E. 492 (1937); *Joyner v. Joyner*, 256 N.C. 588, 124 S.E. 2d 724.

> An appeal does not stay execution on the judgment unless the supporting spouse puts up an execution bond. Where no stay of execution bond has been executed, apparently the dependent spouse may enforce the court order by ordinary execution against the property of the supporting spouse to collect the judgment even though the case has been appealed.

2 R. Lee, *supra* at § 147; *see also* G.S. § 50-16.7, .7k (1976).

As Justice Higgins noted in *Joyner*, "Surely, however, some more adequate provision [than execution] should be made . . . during the legal battle . . . . Frequently it is months after an appeal is taken until the record is seen here." 256 N.C. at 592, 124 S.E. 2d at 727.

We agree with counsel for plaintiff that a more satisfactory answer should be found, but that answer can come only from the Legislature.

Defendant, however, should find little consolation in our decision to vacate the trial court order. We have vacated only that portion of the trial court order dealing with the *amount* of alimony. The parties' stipulation that plaintiff is *entitled* to alimony is in no way disturbed and remains in full force and effect for the hearing on remand. On remand, with new evidence to be presented and new findings to be made, defendant will be ordered to make alimony payments in the trial court's discretion. These amounts may be more or less or the same as those ordered at the first hearing. Most importantly, whatever the amount determined by the trial court, it may order the payments retroactive to the date of the first hearing on permanent alimony. Whatever payments defendant may have made since that date

will, of course, be to his credit. On the other hand, should defendant fail to make alimony payments while the case is on appeal and prior to the new hearing, he runs a serious risk of facing an order for substantial arrearages.

There is one final reason defendant's failure to pay during this interim period is at his own peril. Should defendant's failure to pay during this period cause plaintiff's economic situation to be seriously impaired, such an occurrence would undoubtedly affect the trial court's evaluation of one or more of the factors considered in determining alimony. For example, if plaintiff's "estate" is reduced during this period due to failure of defendant to provide support, the trial court would undoubtedly give this serious consideration in setting the amount of alimony.

VI.

For the reasons stated above, the decision of the Court of Appeals is reversed. The order awarding plaintiff permanent alimony and attorney's fees is vacated. A new hearing shall be held in the trial court for determination of permanent alimony and counsel fees, if any, and the trial court shall make appropriate and sufficient findings of fact and conclusions of law to support its new determination. This cause is remanded to the Court of Appeals with instructions to remand to the District Court, Wake County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DAVID W. GREEN

No. 159A81

(Filed 4 May 1982)

1. Criminal Law § 89.3— corroboration—prior consistent statements

A nurse properly corroborated testimony that the prosecutrix told her that she had been raped although the prosecutrix did not testify that she had talked to the nurse. Furthermore, the trial court did not err in permitting the daughter of the prosecutrix to state for corroborative purposes that her mother had told her twice that she had been raped.

2. Criminal Law § 68; Rape § 4— hair found on rape victim—comparison with defendant's hair

An expert on hair identification and comparison was properly permitted to testify that a pubic hair found on the body of a rape victim which did not originate from her had the same microscopic characteristics as pubic hair taken from defendant and therefore could have come from the defendant.

3. Criminal Law § 68; Rape and Allied Offenses § 4— identification of bite mark on rape victim

An expert in forensic odontology and bite mark identification was properly permitted to state his opinion that a bite mark on a rape victim's arm was made by defendant based on his comparison of a photograph of the bite mark and impressions which he made of defendant's teeth.

4. Burglary and Unlawful Breakings § 1— first degree burglary—storage room as part of dwelling house

A storage room from which defendant stole a motorcycle was "appurtenant" to the victim's main dwelling and was thus a part of the victim's "dwelling house" within the purview of the first degree burglary statute, G.S. 14-51, where the storage room had been built at the back of the house just behind a bedroom occupied by the owner's mother; the storage room could be entered through an outside door or through a window in the bedroom; and defendant in fact did crawl through the bedroom to reach the storage room.

5. Larceny § 7.1— proof of intent

In a prosecution for larceny of a motorcycle, the State's evidence was sufficient to support a jury finding that defendant took the motorcycle in order to provide a means of escape after committing a rape and that he intended to keep the motorcycle permanently, although defendant's testimony that he went to the victim's home to borrow the motorcycle to ride home would have supported a contrary finding.

6. Larceny § 7.2— ownership of property stolen

The evidence in a larceny case was sufficient to support a finding that a stolen motorcycle was the "personal property of Robert Allen in the custody and possession of Margaret Osborne" as alleged in the indictment. However, even if there were no evidence that Robert Allen owned the motorcycle, the allegation and proof that the motorcycle was in Osborne's custody and possession was sufficient to support the charge of larceny.

7. Criminal Law § 111.1— identification testimony—failure to give requested instructions

The trial court did not err in failing to give defendant's tendered instruction concerning a rape victim's observation and identification of defendant where the instructions given by the court clearly emphasized the importance of proper identification of the defendant, emphasized that the burden of proving such identity beyond a reasonable doubt was on the State, adequately explained the various factors the jury could consider in evaluating the testimony of witnesses, and gave in substance that portion of the requested instruction which was correct in law.

8. Rape and Allied Offenses § 6.1— first degree rape—infliction of serious personal injury—instructions on lesser degrees of crime not required

In a prosecution for first degree rape pursuant to G.S. 14-27.2 which requires, *inter alia*, infliction of serious personal injury upon the victim, the evidence would not permit a jury finding that the victim did not suffer serious personal injury so as to require the court to submit the lesser included offenses of second degree rape and attempted second degree rape where the evidence established that the victim was severely beaten, resulting in multiple contusions and a large bite on her arm, multiple abrasions on her face, a one and one-half inch long laceration on the left side of her scalp, abrasions on both legs, and fractured ribs on her left side.

BEFORE *Braswell, Judge*, at the 29 June 1981 Criminal Session of Superior Court, CUMBERLAND County.

In a bill of indictment, proper in form, defendant was charged in separate counts with first degree burglary, first degree rape and felonious larceny. He was tried before a jury and was found guilty of each charge. He received sentences of life imprisonment for the rape and burglary convictions and of ten years' imprisonment for the larceny conviction. Defendant appeals the life sentences to this Court as a matter of right. On 15 December 1981 we allowed his motion to bypass the Court of Appeals to review the larceny conviction.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Assistant Public Defender James R. Parish for the defendant.

CARLTON, Justice.

I.

At trial, evidence for the State tended to show that on the night of 26 August 1980 Mary Shaw, a seventy-eight-year-old female, awoke from her sleep and saw a man standing in the doorway to her bedroom. Mrs. Shaw lived with her daughter and grandson in her daughter's home, but she was alone in the house that night. She recognized the intruder as the defendant, David Green, a friend of her grandson's. Defendant walked to her bed and hit her on the side of her head. He dragged her from the bed, forced her to the floor, and raped her. During the struggle, Mrs. Shaw begged him not to do it and called for her daughter. De-

fendant told her that if she didn't keep quiet he would kill her. Mrs. Shaw did not remember when or how defendant left the house.

After defendant left, Mrs. Shaw crawled into the living room, where she remained until found by her daughter, Margaret Osborne, shortly after midnight. When Ms. Osborne entered her home, she discovered her mother lying nude on the living room floor. Mrs. Shaw told her what had happened, and Ms. Osborne called the police. Ms. Osborne went into her mother's bedroom and saw blood on the floor and on the bed. She found her mother's nightgown at the foot of the bed. It, too, had blood on it. She later discovered that the storm window and screen had been removed from the window above her mother's bed. The storm window and screen were found under Mrs. Shaw's bed.

The window above Mrs. Shaw's bed opened into the storage room, where Terry Allen, Ms. Osborne's son, stored his two motorcycles. One of these, a Honda 70L, was missing from the storage room. The storage room was locked when Ms. Osborne left her home shortly after nine o'clock that evening. She had the only key. When Ms. Osborne left the house was locked and, when she returned, the side door was ajar.

After calling the police Ms. Osborne called defendant's home and spoke with his mother. She was told that defendant was not at home. Defendant called back a few minutes later and told Ms. Osborne that he "didn't do it" but that he had gone to her house and gotten a motorcycle from the storage room. He denied having gone into the house.

Mrs. Shaw was taken to the hospital. She was examined the next morning by Dr. Neil A. Worden. When Dr. Worden saw her, she appeared to have been beaten. There was a laceration on the right side of her scalp, and she had multiple contusions. On her left arm was a large bite mark. On the left side of her scalp was a laceration, measuring one and one-half inches in length. Both of her legs had abrasions. Dr. Worden discovered considerable bruising of the vulva, indicating severe trauma and found that her vagina was full of old, dark blood, although no gross lacerations were noted. X-rays revealed that several ribs on her left side were fractured.

Other evidence presented by the State tended to show that a fingerprint found on the storm window was made by the left middle finger of the defendant and that the bite mark on Mrs. Shaw's left arm was made by the defendant.

Susan Griffin of the Fayetteville City Police Department, an expert in fingerprint analysis and identification, testified that a latent fingerprint found on a storm window which had been placed under the bed in Mrs. Shaw's room was made by the left middle finger of the defendant. Dr. William P. Webster, qualified as an expert witness in forensic odontology, testified that bite marks photographed on Mrs. Shaw were made by the defendant.

Detective Sergeant E. E. Wiggs of the Cumberland County Sheriff's Department testified that he questioned the defendant after his arrest. After defendant was advised of his *Miranda* rights and had waived them, defendant stated that he had gone to the Osborne residence earlier that evening and had taken the motorcycle from the unlocked storage room. He initially denied having been inside the residence. Defendant then told Detective Wiggs that he had gone to the residence, entered it through an unlocked door and saw Mrs. Shaw lying nude on the floor. She called to him for help, but he did not go to her. Instead, he went down the hallway into Mrs. Shaw's bedroom and removed the storm window and screen from the window. He climbed through the window into the storage room, unlocked the storage room door, and left with the motorcycle. After being told that his story was not believable, defendant again denied hitting Mrs. Shaw but then admitted that he had in fact pulled her from the bed and had had sexual intercourse with her on the floor in the bedroom. He told Detective Wiggs that the motorcycle he had taken was at his home. Defendant was sixteen years of age at the time.

Evidence for the defendant tended to show that he was out drinking beer and smoking marijuana with some friends on the evening of 26 August 1980. Defendant testified that he drank about three and one-half six-packs. Defendant later rode a bicycle to the Osborne residence. He testified that he went to get the motorcycle and, upon arriving at the house, knocked on the door and entered. He saw Mrs. Shaw lying on the floor and sat her up against the wall of the bedroom and then left through the storage room window. He removed the storm window but did not take the screen off. He went into the storage room, took the motorcycle,

and, as he was leaving the backyard, heard a man's voice coming from the house. He went back toward the house and collided with a man who was coming out of the house. He recognized the man as "Steve," a man who defendant had been riding with earlier that evening. Steve threatened to kill defendant if defendant said anything. Defendant then left on the motorcycle and returned to his home. His mother told him to call the Osborne residence. He did so and denied the incident. Shortly after he talked to Ms. Osborne the police arrived and arrested him. He admitted to the police that he took the motorcycle but told them he did not rape Mrs. Shaw. He had been to the Osborne residence many times as a friend of Terry Allen. The first time he told anyone about seeing Steve leave the Osborne residence was while he was in jail when he told his brother and mother. Defendant testified that he did not know where Steve was.

Defendant's mother, Sandra Green, testified that defendant had been riding with Steve Craig and others earlier that evening. She saw them several times when they stopped at her house. Defendant returned home alone at 10:20 p.m. He was on a motorcycle. According to Mrs. Green, defendant was acting "crazy," and kept saying "that dude is going to kill me." She had never before seen defendant act this way. He had blood on his shirt and, after changing his clothes, left on the motorcycle.

Other evidence pertinent to this opinion will be noted below.

II.

A.

[1] Defendant first contends that the trial court erred in admitting certain corroborative testimony. A nurse on duty in the emergency room when Mrs. Shaw was brought to the hospital and the victim's daughter both testified, over objection, that the victim had told them that she had been raped. Ms. Osborne twice made this statement. In each instance, the trial court instructed the jury that the question and answer would be competent only for the purpose of corroborating the testimony of Mrs. Shaw. Defendant argues that the nurse's corroborative testimony should not have been allowed because Mrs. Shaw never testified that she had talked to the nurse and that allowing Ms. Osborne to so testify twice was improper because it sought to establish credibility by mere repetition.

Defendant's contention is plainly without merit. Testimony that a witness made a prior consistent statement is admissible as evidence tending to strengthen the witness's credibility. *E.g., 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). It is not a precondition to the admission of corroborative testimony for the witness to have testified that any statement was made to the corroborating witness. *State v. Norwood*, 303 N.C. 473, 483, 279 S.E. 2d 550, 556 (1981). Moreover, we can see no error in allowing Ms. Osborne to state that her mother told her twice that she, the mother, had been raped.

Mrs. Shaw testified that the defendant had raped her. Both the nurse and Ms. Osborne corroborated this testimony by testifying that Mrs. Shaw made the statements to them shortly after the occurrence. Such testimony was clearly admissible as corroborative testimony of a prior consistent statement and there was no error in its admission.

This assignment of error is overruled.

B.

[2] Defendant next contends that the trial court erred in failing to allow his motion to exclude the testimony of a forensic chemist who testified as an expert on hair identification and comparison. Pubic hair combings were taken from both Mrs. Shaw and the defendant. The chemist testified that his examination of the pubic hair combing from Mrs. Shaw revealed a pubic hair which did not originate from her. He compared this pubic hair to the known pubic hair of defendant and found it to be microscopically consistent and "accordingly this hair could have originated from him [defendant]."

Defendant contends that this testimony was improperly admitted because it fails to present reliable, relevant and nonprejudicial evidence. Defendant notes that the chemist testified that neither the age nor sex of the person from whom the hair came could be determined, that he could not tell how or when the hair was deposited, and that he could not positively state that the hair came from the defendant to the exclusion of all other persons of the same race and hair color as defendant. Defendant also argues that the state of the art of hair analysis has not reached an adequate level of certainty to permit this testimony.

It is unnecessary to discuss the state of the art in hair analysis. "Testimony is relevant if it reasonably tends to establish the probability or the improbability of a fact in issue," *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 304, 67 S.E. 2d 292, 300 (1951), the weight of the evidence being an issue for the jury, *e.g.*, *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. denied*, 384 U.S. 1020 (1966). This Court has previously approved of testimony similar to that employed in the case before us, *State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971), and we are not inclined to reverse that holding.

The testimony here was clearly relevant. It demonstrated that the hair found on Mrs. Shaw came from a person of defendant's race and hair color and therefore *could have* come from defendant. The testimony was merely another link in the chain of evidence presented by the State to establish that defendant was the perpetrator of the crime, and was properly submitted to the jury for its consideration.

We note also that the trial court read to the jury a cautionary instruction prepared by defense counsel. The court stated to the jury, "at most, in law, analysis of hair samples tends to identify the defendant as belonging to the class which the person whose hair sample he analyzed belonged. It is for you, the jury, to give such weight and credibility to this evidence as you determine is appropriate."

This assignment of error is overruled.

C.

[3] Grouping his next four contentions into one, defendant challenges the trial court's allowance of testimony from Dr. William Webster, an expert in the field of forensic odontology in bite mark identification. Dr. Webster testified that, based on his experience of examining the teeth of thousands of individuals for over twenty years, it was his opinion that each individual has distinctive dental characteristics of size, shape and arch form which cause each person to have a unique and distinctive set of teeth. Dr. Webster had been asked to determine whether the bite mark on the victim's arm had been made by defendant. Dr. Webster was given a picture of Mrs. Shaw's left arm, on which the bite mark appeared. He determined that the picture of the

arm was an approximate one-to-one scale representation of the actual arm and bite mark. Dr. Webster made impressions of defendant's upper and lower teeth and from these impressions made a plaster cast of defendant's teeth. A plastic overlay was placed over the plaster casts to mark the points of contact to form a representation of defendant's bite mark. The plastic overlays were compared to the bite mark depicted in the photograph. Based on this comparison, Dr. Webster testified that, in his opinion, the bite mark depicted in the photograph had been made by the defendant.

This Court recently approved for the first time the admission of expert testimony concerning the identity of the person who made a bite mark. In *State v. Temple*, 302 N.C. 1, 273 S.E. 2d 273 (1981), Justice Copeland, writing for the Court, reviewed the law in the several jurisdictions and held that such scientific evidence was properly admissible. Defendant acknowledges our recent holding but requests that we either reconsider it or distinguish it from the facts in the case at bar. Suffice it to say that we are presented with no persuasive reason to reconsider the holding in *Temple*, nor do we find it distinguishable.

The factual distinction urged by defendant is that in the instant case the expert formed his opinion on the basis of a comparison of defendant's dental impressions and a photograph of the victim's wound. In the leading case in this area, *People v. Marx*, 54 Cal. App. 3d 100, 126 Cal. Rptr. 350 (1975), a cast of the actual wound was used for the comparison. We disagree with defendant that this distinction precludes the admissibility of this testimony. The record before us reveals that a photograph of Mrs. Shaw's arm was made to approximate scale, with only a 0.4 millimeter discrepancy. Dr. Webster compared the enlarged photograph with the dental impression which he had made of defendant. Some fourteen common points of identification between defendant's teeth and the bite mark in the photograph were identified. We find no reason to suspect that the methodology employed by this expert witness was anything less than scientifically sound and reliable. We hold that this testimony was properly admitted.

We also note that the methodology here employed has been approved in other jurisdictions: *State v. Sager*, 600 S.W. 2d 541 (Mo. Ct. App. 1980), *cert. denied*, 450 U.S. 910 (1981); *People v.*

Smith, 443 N.Y.S. 2d 551, 110 (Misc. 2d 118) (1981); *State v. Jones*, 273 S.C. 723, 259 S.E. 2d 120 (1979).

D.

[4] By his eighth and nineteenth assignments of error defendant contends that the trial court erred in not granting his motion to dismiss the charge of first degree burglary on the grounds of insufficiency of the evidence and in denying his motion to set aside the verdict for first degree burglary. Defendant bases his contentions on the location of the storage room from which the motorcycle was taken. Specifically, he argues that the storage room was not within the "dwelling house or sleeping apartment" as required by G.S. 14-51, the first degree burglary statute. Defendant argues that the storage room, the scene of the larceny, was only within the curtilage of the dwelling house and his crime, if any, was second degree burglary, G.S. 14-51. The curtilage of a dwelling house, defendant contends, is covered only by second degree burglary.

We agree with defendant that the breaking and entering of a building located away from the dwelling house with intent to commit a felony therein does not constitute first degree burglary. However, the definition of a "dwelling house" is not limited to the house proper. As this Court stated in *State v. Jake*:

> The term "dwelling-house" includes within it not only the house in which the owner or renter and his family, or any member of it, may live and sleep, but all other houses appurtenant thereto, and used as part and parcel thereof, such as kitchen, smokehouse, and the like: provided they are within the curtilage, or are adjacent or very near to the dwelling-house. *S. v. Langford, ubi supra; S. v. Whit*, 49 N.C., 349. If the kitchen, smokehouse, or other house of that kind be placed at a great distance from the dwelling, and particularly if it stand outside of the curtilage or inclosed [sic] yard, it cannot be considered a part of the dwelling-house for the purpose of being protected against a burglary. The reason is that the law protects from unauthorized violence the dwelling-house and those which are appurtenant, because it is the place of the owner's *repose*; and if he choose to put his kitchen or smokehouse so far from his dwelling that his *respose* is not likely to be disturbed by the breaking into it at night, it is his own folly. In such cases the law will no

more protect him than it will when he leaves his doors or windows open. *S. v. Langford, ubi supra.*

60 N.C. (Win.) 471, 472-73 (1864). Our review of the record before us discloses that the storage room in question was "appurtenant" to the main dwelling. Ms. Osborne testified that the storage room had been built at the back of the house just behind the bedroom occupied by her mother. The storage room could be entered through an outside door or through a window in her mother's bedroom. The evidence discloses that defendant did indeed crawl through the bedroom to reach the storage room, and that he, in fact, entered the dwelling house with the intent to commit a felony therein.

These assignments of error are overruled.

E.

By his ninth and twenty-first assignments of error, defendant contends that the trial court erred in not granting his motion to dismiss the charge of larceny on the grounds of insufficiency of the evidence and in denying his motion to set aside the verdict for larceny. Defendant argues that (1) there was no evidence of the essential element of larceny that defendant intended permanently to deprive the owner of possession of the motorcycle, and (2) there was a fatal variance between the allegations of ownership in the indictment and the evidence introduced at trial. We disagree.

[5] Defendant bases his first argument primarily on his own testimony that he went to the Osborne home to borrow the motorcycle to ride home, that he did borrow the motorcycle and that he later told Ms. Osborne on the telephone that he had the motorcycle. It was found at his home the next day. We agree with defendant that the jury could have found that he did not intend permanently to deprive the owner of possession of the motorcycle. Likewise, it is clear that the jury could, as it did, find that defendant did intend to keep the motorcycle permanently. The jury could clearly have found from the evidence that defendant took the motorcycle in order to provide a means of escape and defendant's own witness testified that defendant stated that he had to "get out of here" immediately in order to keep from being killed. He was later seen by his family fleeing on the motorcycle. This portion of defendant's contention is plainly without merit.

[6] Likewise, we find no fatal variance between the bill of indictment and the evidence introduced at trial. The indictment charged that the motorcycle was "the personal property of Robert Allen in the custody and possession of Margaret Osborne." Clearly, the motorcycle was in the custody and control of Ms. Osborne. At the time of the incident, the motorcycle was in a locked storage room at her residence and she had possession of the only key to the room.

Nor is there a fatal variance between the indictment's allegation of ownership and that shown at trial. The record discloses that the motorcycle was purchased by Robert Allen, Terry Allen's father, in 1975. The motorcycle was kept in Lumberton at the home of Robert Allen until some three or four months prior to this incident, when Ms. Osborne brought it to Fayetteville. Based on the foregoing and the fact that Terry was only fifteen years of age at the time of trial, we disagree with defendant that the evidence showed conclusively that Terry Allen was the owner of the motorcycle.

Additionally, even if there were no evidence that Robert Allen owned the motorcycle, there would still be no fatal variance. In *State v. Smith*, 266 N.C. 747, 147 S.E. 2d 165 (1966), the indictment alleged that defendant committed felonious larceny of a pistol owned by Griggs. At trial, the evidence showed that the pistol belonged to Griggs's daughter but that the pistol was under his custody and control. This Court rejected defendant's claim that a fatal variance existed between the indictment and the proof, stating that Griggs's interest as the custodian and controller of the gun was sufficient to obviate a variance. Although the variance here, if any, is not the same as in *Smith*, the basic principle applies. The indictment here alleged that the motorcycle was under Osborne's control and was in her possession; the evidence at trial tended to show these facts. The allegation of ownership in the indictment, thus, was unnecessary to the charge and was mere surplusage. *See State v. Greene*, 289 N.C. 578, 223 S.E. 2d 365 (1976); *State v. Richardson*, 8 N.C. App. 298, 174 S.E. 2d 77 (1970).

These assignments of error are overruled.

F.

Grouping four of his contentions into one argument, defendant contends that the trial court erred in failing to instruct the jury (1) that if it found that the motorcycle belonged to Terry Allen the State would have failed to prove an element of the offense of larceny, (2) that if it found prior consent the State would have failed to prove an element of the offense of larceny, (3) that if it found that defendant took the motorcycle for transportation to his home but without intent permanently to deprive the owner of possession, the State would have failed to prove an element of the offense of larceny, and (4) that if the defendant mistakenly believed he was permitted to use the bicycle when he wanted, the State would have failed to prove an element of the offense of larceny.

The trial court instructed the jury that in order to find defendant guilty of felonious larceny it must find beyond a reasonable doubt that (1) the defendant took a Honda motorcycle belonging to Robert Allen which was in Ms. Osborne's custody and possession, (2) that defendant carried the motorcycle away, (3) that Ms. Osborne did not consent to the taking, (4) that at the time of the taking defendant intended permanently to deprive the possessor of the motorcycle, (5) that defendant knew he was not entitled to take the motorcycle and (6) that the motorcycle was taken during a burglary. The court further told the jury that if it had a reasonable doubt as to any one or more of the elements, then defendant would not be guilty of felonious larceny. These instructions, we think, give in substance, though not with the same specificity, the instructions requested by defendant and there was no error in refusing to give additional instructions.

These assignments of error are overruled.

G.

[7] Defendant next contends that the trial court erred in failing to give his tendered instruction concerning identification of the defendant. Defendant particularly wanted this sentence of the tendered instruction given by the trial court: "The main aspect of identification is the observation of the offender by the witness at the time of the offense." Other portions of the tendered instructions would have highlighted the mental state of Mrs. Shaw at

the time of the incident and the adequacy of her eyesight. The tendered instruction would also have told the jury that it must find that Mrs. Shaw's in-court identification of the defendant was purely the product of her recollection and was derived only from her observation at the time of the offense.

The trial court rejected the tendered instruction and gave the following instruction with respect to identification:

> I instruct you that the State has the burden of proving the identity of the defendant as the perpetrator of the crimes charged beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of each of the crimes charged before you may return a verdict of guilty as to that particular crime.

Additionally, the trial court instructed the jury on determining a witness's credibility:

> You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of what a witness has said while on the stand.
>
> In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your own everyday affairs. As applied to this trial, these tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrences about which he or she has testified; the manner and appearance of the witness. Any interest, bias, or prejudice the witness may have. The apparent understanding and fairness of the witness. Whether that witnesses [sic] testimony is reasonable and whether the testimony is consistent with other believable evidence in the case.
>
> You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable you must then determine the importance of that evidence in light of all other believable evidence in the case.

It is well established in this jurisdiction that the trial court is not required to give a requested instruction in the exact language

of the request. *E.g., State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973). However, when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance. *See State v. Howard*, 274 N.C. 186, 162 S.E. 2d 495 (1968). We think the trial court here gave in substance that portion of the requested instruction which was correct in law. The instruction clearly emphasized the importance of proper identification of the defendant and emphasized that the burden of proving such identity beyond a reasonable doubt was on the State. Read contextually, the charge adequately explained to the jury the various factors they should consider in evaluating the testimony of witnesses. The instructions given by the trial court adequately conveyed the substance of defendant's proper request; no further instructions were necessary. *State v. Silhan*, 302 N.C. 223, 252-53, 275 S.E. 2d 450, 472 (1981). Indeed, we tend to agree with the argument of the district attorney that the tendered instruction would have been practically tantamount to charging the jury that determination of the perpetrator of these crimes could only result from the testimony of Mrs. Shaw. As noted in other portions of this opinion, there was other testimony which tended to show that defendant was the perpetrator of these crimes, including defendant's own admission that he had been in the home that evening and had had sexual intercourse with Mrs. Shaw.

This assignment of error is overruled.

H.

[8] Defendant was indicted for first degree rape pursuant to G.S. 14-27.2 which requires, *inter alia*, infliction of serious personal injury upon the victim. Defendant contends that the trial court erred in not submitting the lesser included offense of second degree rape and attempted second degree rape because he believes that under the evidence presented, a jury could have found that a rape or attempted rape by force, against the victim's will and by physical abuse occurred, but that the injuries suffered by Mrs. Shaw were not the serious personal injuries required under the statute. We disagree.

The rule is well established in this jurisdiction that the court is not required to submit to the jury the question of defendant's guilt of a lesser degree of the crime charged in the indictment when the State's evidence is positive as to each and every ele-

ment of the crime charged and there is no conflicting evidence relating to any element of the charged crime. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). The State's evidence is positive and there is no conflicting evidence relating to the element of the crime of rape here referred to by defendant. That serious personal injury was inflicted upon Mrs. Shaw by this incident is left without question by the evidence presented. The evidence established that Mrs. Shaw had been severely beaten, resulting in multiple contusions and a large bite on her arm, multiple abrasions on her face, a one and one-half inch long laceration on the left side of her scalp, abrasions on both legs, and fractured ribs on her left side. Defendant's contention that such injury to a seventy-eight-year-old woman could be considered by anyone on any jury as anything less than "serious personal injury" as contemplated by the statute comes very close to insulting the intelligence of this Court. The trial court properly did not submit the lesser included offense of second degree rape. Likewise, defendant's contention that attempted second degree rape should have been submitted must also fail.

III.

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

No error.

BEN F. WORTHINGTON v. WILLIAM ANDERSON BYNUM

AND

JESSE COGDELL, JR. v. WILLIAM ANDERSON BYNUM

No. 125A81

(Filed 4 May 1982)

Rules of Civil Procedure § 59— new trial on ground damages awarded excessive— no abuse of discretion

A trial judge's *discretionary* order pursuant to G.S. 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown. Therefore, the Court of Appeals erred in reversing a Rule 59 order by using the standard in

Howard v. Mercer, 36 N.C. App. 67, 243 S.E. 2d 168 (1978) to find the verdicts for damages arising out of a motor vehicle accident were "within the maximum limits of a reasonable range." To the extent that *Howard v. Mercer* attempts to define what a reversible abuse of discretion is under Rule 59(a)(6), it is overruled. Further, the Court of Appeals erred in concluding that there was "no evidence to support or suggest" the existence of adequate grounds for the trial judge's exercise of his discretion to grant defendant's motion for a new trial.

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

Justice CARLTON concurring.

Justice MEYER joins in this concurring opinion.

Justice BRITT dissenting.

APPEAL by the defendant pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, (*Judge Becton*, with *Judge Whichard* concurring, and *Judge Robert Martin* dissenting), reported at 53 N.C. App. 409, 281 S.E. 2d 166 (1981). In a 2-1 decision, the Court of Appeals reversed an order by *Judge Peel*, entered at the 12 May 1980 Civil Session of Superior Court, PITT County, granting the defendant's motion under G.S. 1A-1, Rule 59, to set aside the jury verdicts for the plaintiffs and award a new trial.

Plaintiffs Worthington and Cogdell were passengers in a vehicle which collided with another vehicle driven by defendant Bynum on 23 May 1977. Plaintiffs subsequently filed separate complaints against defendant regarding their personal injuries arising out of the accident. Plaintiff Worthington sought $250,000 in compensatory damages, and plaintiff Cogdell likewise sought a recovery of $200,000. The two cases were consolidated for trial. Defendant's negligence in the tragic occurrence was stipulated.[1] The only issue for the jury's determination was what amount of damages the plaintiffs were entitled to recover. Defendant was represented by counsel at trial, but he did not personally appear in court during the proceedings.

1. Defendant was highly intoxicated at the time of the accident. A breathalyzer test administered to him three hours after the wreck showed defendant's blood alcohol content to be .21 percent. Prior to the trial of these civil cases, defendant had pleaded guilty to the criminal charges of failure to stop at a stop sign and death by motor vehicle. [The driver of the car in which plaintiffs were riding was killed in the collision.]

For five days, plaintiffs presented evidence to the jury about the nature and extent of their injuries. Six medical experts testified for plaintiffs. Defendant did not offer independent evidence at trial; however, his counsel did elicit evidence through the cross-examination of plaintiffs' witnesses.

After receiving instructions from the court, the jury deliberated for thirty minutes and returned verdicts against defendant of $175,000 for plaintiff Worthington and $150,000 for plaintiff Cogdell. Defendant thereupon moved, pursuant to Rule 59(a)(5), (6) and (7) of the Rules of Civil Procedure, for the trial court to set aside the verdicts and award a new trial in both cases. Judge Peel took the matter under advisement for a few days. He then heard arguments by counsel on the motion on 22 May 1980. At the conclusion of the hearing, Judge Peel stated the following:

> I have got a bunch of notes I made last night that I took from the evidence.
>
> Gentlemen, I don't intend to catalog, but time and again I tried to instruct that jury to disregard things that seemed to me to be improper that kept coming up. It was an extremely volatile situation. I am satisfied that the jury completely disregarded many of my instructions. I don't understand that in view of all the evidence. It is my opinion that the verdict in each of the cases was excessive and I am, therefore, ordering Mr. Gaylord to prepare an order preparing a new trial as to each plaintiff. [Record at 245.]

Defendant's counsel, Mr. Gaylord, thereupon prepared an order granting the Rule 59 motion, and Judge Peel signed it on 27 May 1980. In pertinent part, that order provided as follows:

> And it being made to appear to the Court and the Court in *its considered discretion* being of the opinion that the Motion filed by the defendant in each case under Rule 59 of the North Carolina Rules of Civil Procedure should be allowed and granted . . .
>
> . . . .
>
> NOW, THEREFORE, IN THE *DISCRETION* OF THE COURT, IT IS ORDERED, ADJUDGED AND DECREED:

FIRST: That the Motion made by defendant in each case pursuant to the provisions of Rule 59 of the North Carolina Rules of Civil Procedure be and the same is hereby granted.

SECOND: That the issue of damages in each of these cases and as answered by the jury is hereby set aside and a new trial is granted defendant in each case as to the issue of damages. [Record at 250-51 (emphases added).]

Plaintiffs excepted to the entry of the foregoing order and sought review in the Court of Appeals. The Court of Appeals, in an opinion by Judge Becton, reversed the trial court's grant of defendant's motion for a new trial and remanded the cause for entry of judgment in accordance with the jury verdicts. Defendant appeals from that decision.

James, Hite, Cavendish & Blount, by M. E. Cavendish and Marvin Blount, Jr., for plaintiff-appellees.

Gaylord, Singleton & McNally, by L. W. Gaylord, Jr., for defendant-appellant.

COPELAND, Justice.

A single question is presented for our review: Did the Court of Appeals err in reversing Judge Peel's order for a new trial? We hold that it did and reverse.

Defendant's counsel moved for a new trial upon the grounds that the jury manifestly disregarded the court's instructions, that the jury awarded excessive damages under the influence of passion and prejudice, and that the evidence was insufficient to justify the verdict or that the verdict was contrary to law. G.S. 1A-1, Rule 59(a)(5), (6) and (7). Judge Peel acknowledged the existence of those grounds in his oral ruling upon defendant's motion in open court. However, Judge Peel also said that he did not intend "to catalog" all of his reasons and expressed his opinion that the entire situation had been "extremely volatile." The nature of Judge Peel's ruling in defendant's favor was subsequently clarified in the written order which, after *reciting* defendant's grounds for the motion, stated that the court was awarding a new trial as a matter of "its considered discretion" (and thus not as a matter of law). This fact is significant for it controls the scope of our review of Judge Peel's action.

It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge. *Goldston v. Chambers*, 272 N.C. 53, 59, 157 S.E. 2d 676, 680 (1967); *see e.g., Bryant v. Russell*, 266 N.C. 629, 146 S.E. 2d 813 (1966); *Robinson v. Taylor*, 257 N.C. 668, 127 S.E. 2d 243 (1962); *Dixon v. Young*, 255 N.C. 578, 122 S.E. 2d 202 (1961); *Caulder v. Gresham*, 224 N.C. 402, 30 S.E. 2d 312 (1944). The legislative enactment of the Rules of Civil Procedure in 1967 did not diminish the inherent and traditional authority of the trial judges of our state to set aside the verdict whenever in their sound discretion they believe it necessary to attain justice for all concerned, and the adoption of those Rules did not enlarge the scope of appellate review of a trial judge's exercise of that power. *Britt v. Allen*, 291 N.C. 630, 634-35, 231 S.E. 2d 607, 611-12 (1977); *see also Insurance Co. v. Chantos*, 298 N.C. 246, 253, 258 S.E. 2d 334, 338-39 (1979) (Huskins, J., dissenting). The principle that appellate review is restricted in these circumstances is so well established that it should not require elaboration or explanation here. Nevertheless, we feel compelled by the Court of Appeals' disposition of the case before us to restate and reaffirm today the basic tenets of our law which would permit only circumscribed appellate review of a trial judge's discretionary order upon a Rule 59 motion for a new trial. Those tenets have been competently set forth in innumerable prior opinions of this Court, and, for instructive purposes, we provide the following sampling therefrom.

In *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915), the Court evinced a positive hesitancy to review such discretionary rulings by the trial court except in rare cases:

> While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited.

In *Bird v. Bradburn*, 131 N.C. 488, 489, 42 S.E. 936, 937 (1902), the Court espoused several sound reasons for leaving the discre-

tionary power to set aside a verdict almost exclusively in the hands and supervision of the judge presiding over the trial:

> The power of the court to set aside the verdict as a matter of discretion has always been inherent, and is necessary to the proper administration of justice. The judge is not a mere moderator, but is an integral part of the trial, and when he perceives that justice has not been done it is his duty to set aside the verdict. His discretion to do so is not limited to cases in which there has been a miscarriage of justice by reason of the verdict having been against the weight of the evidence (in which, of course, he will be reluctant to set his opinion against that of the twelve), but he may perceive that there has been prejudice in the community which has affected the jurors, possibly unknown to themselves, but perceptible to the judge—who is usually a stranger—or a very able lawyer has procured an advantage over an inferior one, an advantage legitimate enough in him, but which has brought about a result which the judge sees is contrary to justice. In such, and many other instances which would not furnish a legal ground to set aside the verdict, the discretion reposed in the trial judge should be brought to bear to secure the administration of exact justice.

In *Brink v. Black*, 74 N.C. 329, 330 (1876), the trial judge had set aside the verdict, "because in his opinion it was against the weight of the evidence," and had granted a new trial. The only question presented to our Court was whether review of the judge's order was available. Justice Reade answered that:

> When a Judge presiding at a trial below grants or refuses to grant a new trial because of some question of "law or legal inference" which he decides, and either party is dissatisfied with his decision of that matter of law or legal inference, his decision may be appealed from, and we may review it. But when he is of the opinion that, considering the number of witnesses, their intelligence, their opportunity of knowing the truth, their character, their behavior on the examination, and all the circumstances on both sides, the weight of the evidence is clearly on one side, how is it practicable that we can review it, unless we had the same advantages? And even if we had, we cannot try facts.

In *Edwards v. Upchurch*, 212 N.C. 249, 250, 193 S.E. 19 (1937), the Court reversed the lower court's failure to set aside the verdict and order a new trial and said that the trial judge had a *manifest duty* to exercise such power to prevent injustice "when in his opinion the verdict is not supported by the evidence or is against the weight of the evidence."

In *Boney v. R.R.*, 145 N.C. 248, 250, 58 S.E. 1082, 1083 (1907), our Court stated that the trial judge, "who heard the evidence," had the "corrective power" to set aside the verdict if he thought it was excessive even though "[t]he amount of damages was a matter of fact of which the jury were the judges."

In sum, it is plain that a trial judge's *discretionary* order pursuant to G.S. 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown. *See also Scott v. Trogden*, 268 N.C. 574, 151 S.E. 2d 18 (1966); *Sherrill v. Boyce*, 265 N.C. 560, 144 S.E. 2d 596 (1965); *Walston v. Greene*, 246 N.C. 617, 99 S.E. 2d 805 (1957); *Frye & Sons, Inc. v. Francis*, 242 N.C. 107, 86 S.E. 2d 790 (1955).

We have cited many decisions of this Court in support of this sound and settled proposition in order to demonstrate two other points which are pertinent to the case at bar. First, our Court has had many opportunities, if it were so inclined, to formulate a "precise" test for determining when an abuse of discretion has occurred in the trial judge's grant or denial of a motion for a new trial. Second, our Court has not, however, found it logically necessary or wise to attempt to define what an abuse of discretion might be in the abstract concerning any ground upon which a new trial may be granted.[2] For well over one hundred years, it has been a sufficiently workable standard of review to say merely that a manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an

2. It would be practically impossible to fashion a rule which could generally pinpoint where a trial judge's discretion in any matter ends and an abuse thereof begins. This was recognized long ago in *Armstrong v. Wright*, 8 N.C. 93, 94 (1820): "When we ask what the legal discretion is, we are as much at a loss as we were before the definition to declare the rules or laws by which the discretion shall be regulated. *To prescribe fixed rules for discretion is at once to destroy it.*" (Emphases added.)

abuse bearing that heavy burden of proof. The error in the Court of Appeals' decision in the instant case lies in its failure to apply this standard of review strictly and correctly.

In the first place, the Court of Appeals improperly subjected Judge Peel's discretionary order to much broader appellate scrutiny, in one respect, than that previously permitted in our jurisdiction. The Court of Appeals reversed the Rule 59 order in part because it found that the damages awarded to plaintiffs were not excessive since the amounts of "both verdicts were clearly within the maximum limits of a reasonable range." 53 N.C. App. at 414, 281 S.E. 2d at 171. In so doing, the Court of Appeals relied upon a prior opinion of its Court, *Howard v. Mercer*, 36 N.C. App. 67, 243 S.E. 2d 168, *discretionary review granted*, 295 N.C. 466, 246 S.E. 2d 9 (1978) (petition later withdrawn on defendant's motion), which had announced and applied the foregoing federal test for determining whether an abuse of discretion has occurred in the grant of a new trial under G.S. 1A-1, Rule 59(a)(6). *See Taylor v. Washington Terminal Co.*, 409 F. 2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835, 90 S.Ct. 93, 24 L.Ed. 2d 85 (1969). This federal precedent is, of course, not binding upon this Court in an interpretation of our own Rules of Civil Procedure, and it would serve no purpose to engage in great debate over the various policies which might or might not favor the adoption of a specific standard to evaluate and limit a trial judge's discretionary power to grant a new trial if he believes the jury has awarded inadequate or excessive damages. It suffices to say that the overwhelming precedent of this Court (see *supra*) discloses no compelling reason or need for the implementation of such a rule in North Carolina. Moreover, we are not persuaded that the appellate use of a vague test to measure the "reasonable range" of a given verdict's amount would provide a more effective, consistent or precise method of determining whether a trial judge has exceeded the bounds of discretion in the grant or denial of a new trial (see note 2, *supra*). Consequently, we overrule *Howard v. Mercer*, *supra*, to the extent that it attempts to define generally what a reversible abuse of discretion is under Rule 59(a)(6), and we hold that the Court of Appeals should not have applied that definition to find an abuse of discretion on Judge Peel's part in this case.

Secondly, the Court of Appeals erroneously concluded that there was "*no* evidence to support or suggest" the existence of

adequate grounds for Judge Peel's exercise of his discretion to grant defendant's motion for a new trial. *See* 53 N.C. App. at 418, 281 S.E. 2d at 173 (emphasis added). From our reading of the Court of Appeals' opinion, we are led to believe that that Court simply substituted what it considered to be its own better judgment concerning the need for a new trial in the case and did not strictly review the record for the singular cause of determining whether Judge Peel had clearly abused *his* discretion in that regard. It is true that plaintiffs presented much evidence which showed that their injuries from the accident were severe and substantial, and this evidence surely warranted a large recovery of damages by them. *See* 53 N.C. App. at 412-14, 281 S.E. 2d at 170-71. However, there was also evidence which suggested that a combined recovery of $325,000 for the plaintiffs was too much. For example, plaintiffs' total medical expenses were only $17,634.10, they did not lose any income during their absences from work, both continued to work for the same employer after their recovery and did not suffer a loss in pay or position due to the permanent, partial disabilities they received in the accident, and doctors testified that both plaintiffs had recovered well from their injuries, were experiencing little pain and should not have pain in the future. Viewed in this light, it seems that the jury awarded plaintiffs over $300,000 for pain, suffering and resulting disabilities. In these circumstances, we simply cannot say, as a matter of law, that Judge Peel went too far in finding that there was insufficient evidence to support the jury's award and that the award was too large. In addition, it is not inconceivable on this record that the jury awarded these damages "under the influence of passion or prejudice." G.S. 1A-1, Rule 59(a)(6). To start with, Judge Peel said that the trial had been "extremely volatile." Moreover, it must be remembered that this serious accident was caused by a drunk driver who did not even show up at trial. Thus, it is possible that the jury was trying to punish this absent defendant for his reprehensible conduct by over-compensating the innocent plaintiffs.[3] Finally, we find it practically impossible to second-guess Judge Peel about his belief that the jury must have disregarded many of his instructions in order to arrive at these

3. In this respect, we also note that, although the jury had listened to complex medical testimony for five days, they returned substantial verdicts against defendant in only thirty minutes.

verdict amounts. This is especially so since Judge Peel did not list what those instructions were. In any event, while we agree with the Court of Appeals that the loss of sexual function or teeth were proper elements of plaintiffs' damages,[4] the general rule is that a verdict which is contrary to the court's instructions can be set aside *even if* those instructions were "unsound in law." 66 C.J.S. New Trial §§ 68, 75 (1950). We therefore sustain Judge Peel's exercise of his discretionary power to order a new trial.

In conclusion, we note that the trial judges of this state have traditionally exercised their discretionary power to grant a new trial in civil cases quite sparingly in proper deference to the finality and sanctity of the jury's findings. We believe that our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case. Because of this, we find much wisdom in the remark made many years ago by Justice Livingston of the United States Supreme Court that "there would be more danger of injury in revising matters of this kind than what might result now and then from an arbitrary or improper exercise of this discretion." *Insurance Co. v. Hodgson*, 10 U.S. (6 Cranch) 206, 218 (1810). Consequently, an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice. We hold that this is not such a case.

For all the foregoing reasons, the decision of the Court of Appeals is reversed to the end that Judge Peel's original order for a new trial may be reinstated. The cause is remanded to the Court of Appeals for further proceedings not inconsistent with this opinion.

4. On re-trial, evidence of these matters should be admitted for the jury's evaluation and consideration.

Reversed and remanded.

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

Justice CARLTON concurring.

I concur in the result reached by the majority. I wish to add, however, that I do not necessarily agree that the damages awarded these plaintiffs were excessive. My vote is based on agreement with the majority that the trial judge should be entrusted with broad discretionary power in ruling on a Rule 59 motion. An appellate court, reviewing the case on the cold record before it, should not disturb an able trial judge's ruling on a discretionary matter merely because it believes some other award for damages would be more appropriate. Reversals of such rulings should occur only when it is clear that the trial judge manifestly abused his discretion.

I am sympathetic to the view expressed in dissent that a more specific standard of review would be preferable. The problem is that I have not seen a meaningful standard suggested. Until such time that someone can suggest a more meaningful standard than the nebulous one of determining whether an award was within "the maximum limit of a reasonable range," I would prefer to stay with the majority vote.

The only condition that I would place upon the exercise of the broad discretionary power approved by the majority would be to require the trial judge to specify the ground or grounds upon which his ruling is based. This requirement would amount to no real limitation of the trial judge's discretionary power and would, at the same time, enable appellate courts to determine more accurately whether an abuse of discretion has been committed.

Justice MEYER joins in this concurring opinion.

Justice BRITT dissenting.

I respectfully dissent from the majority opinion and vote to affirm the decision of the Court of Appeals.

The majority opinion begins with the premise that "it has been long settled in our jurisdiction that an appellate court's

review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge", citing numerous decisions of this court decided prior to 1 January 1970, the effective date of Chapter 1A of the General Statutes, the Rules of Civil Procedure. I agree that the quoted statement was the rule in this jurisdiction for more than 100 years. However, one of the objectives in the adoption of the new Rules of Civil Procedure was to update the operation of our courts in the trial of civil cases and, hopefully, to make them more efficient. *See generally* General Scope and Philosophy of the New Rules, 5 Wake Forest Intra. Law Rev. 1 (1969).

Very soon after the effective date of G.S. 1A, this court in *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), in an opinion by Justice (later Chief Justice) Sharp, observed that our rules are modeled after the federal rules of civil procedure, and that "in most instances they are verbatim copies with the same enumerations." The court further stated that

> Since the federal and, presumably, the New York rules are the source of NCRCP, we will look to the decisions of those jurisdictions for enlightment and guidance as we develop "the philosophy of the new rules."

277 N.C. at 101.

Since virtually all appeals in civil cases in this state first go to the Court of Appeals, that court has found it necessary in many cases to interpret and apply the new rules of civil procedure without guidance or precedent from this court. Of course, this court has the "final word" if the case reaches it.

The Court of Appeals in the case at hand followed very closely the decision of that court in *Howard v. Mercer*, 36 N.C. App. 67, 243 S.E. 2d 168 (1978). As a member of the Court of Appeals at that time, I was the author of the opinion in *Howard*. While this court granted a petition for discretionary review, the petition was withdrawn on motion of the petitioner before a decision was rendered by this court. In *Howard*, the court pointed out that "a review of the law in North Carolina does not reveal a standard for determining what is a sufficient abuse of discretion to warrant

a reversal of a trial court's ruling on a Rule 59 motion in which a new trial was granted." The court then elected to adopt a standard established in *Taylor v. Washington Terminal Co.*, 409 F. 2d 145 (D.C. Cir.), *cert. denied*, 90 S.Ct. 93, 396 U.S. 835, 24 L.Ed. 2d 85 (1969), decided under Federal Rule 59 which is similar to North Carolina Rule 59. We quote from the opinion in *Taylor*:

> Where the jury finds a particular quantum of damages and the trial judge refuses to disturb its finding on the motion for a new trial, the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial. However, where, as here, the jury as primary fact-finder fixes a quantum, and the trial judge indicates his view that it is excessive by granting a remittitur, the two factors oppose each other. The judge's unique opportunity to consider the evidence in the living courtroom context must be respected. But against his judgment we must consider that the agency to whom the Constitution allocates the fact-finding function in the first instance—the jury—has evaluated the facts differently.
>
> In this jurisdiction particularly, District Court judges have given great weight to jury verdicts. They have stated that a new trial motion will not be granted unless the "verdict is so unreasonably high as to result in a miscarriage of justice," or, most recently, unless the verdict is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate."
>
> At the appellate level, in reviewing a trial judge's grant of a new trial for excessive verdict, we should not apply the same standard. The trial judge's view that a verdict is outside the proper range deserves considerable deference. His exercise of discretion in granting the motion is reviewable only for abuse. Thus we will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was *clearly* within "the maximum limit of a reasonable range." 409 F. 2d at 148-149.

In *Howard*, the Court of Appeals concluded that the verdict was clearly within "the maximum limit of a reasonable range",

and that there was no appearance that the verdict was given under the influence of passion or prejudice; thereupon the court held that the trial judge abused his discretion in setting aside the verdict.

In the case at hand the majority concluded that the trial court awarded a new trial "as a matter of 'its considered discretion' (and thus not as a matter of law)." That being true it is clear that the trial court awarded a new trial under Rule 59(a)(6) for "excessive or inadequate damages appearing to have been given under the influence of passion or prejudice."

The majority concludes that while this court has had many opportunities to formulate a "precise" test for determining when an abuse of discretion has occurred "in the trial judge's grant or denial of a motion for a new trial", the court has not "found it logically necessary or wise to attempt to define what an abuse of discretion might be in the abstract concerning any ground upon which a new trial may be granted." Although I agree that this court has not formulated such a test, I do not agree that this court should not at this time establish a standard for reviewing this type of decision.

I fully agree with Judge Whichard's views expressed in his concurring opinion in the case at hand. He pointed out that *Howard* "establishes, as the standard for granting or denying a motion to set aside a verdict and order a new trial on the issue of damages, the test of whether the verdict was within the maximum limit of a reasonable range. If the verdict was within the maximum limit of a reasonable range, the motion should be denied. If not, the motion should be granted."

Applying the standard sought to be established in *Howard*, and followed by the Court of Appeals in the case at hand, Judge Becton meticulously enumerated the injuries sustained by plaintiffs and described the pain and discomfort they endured in receiving medical treatment. I agree that the verdicts were within the maximum limit of a reasonable range.

Judge Becton also addressed the concern that the conscientious trial judge indicated that errors of law had been committed during the trial. While that question is not presented, I agree with the Court of Appeals that it appears that any errors of law

were favorable to defendant, therefore, he is in no position to complain.

In my view, adoption of the standard discussed above would result in more even-handed justice to citizens of the various sections of North Carolina. The population of the counties of our state now vary from 3,975 in eastern, predominantly rural Tyrrell County to 404,270 in Piedmont, highly urbanized Mecklenburg County.[1] I believe that the standard would aid the appellate division in ascertaining that citizens from all areas of our state receive "the equal protection of the laws."

Finally, the majority suggests that in the case at hand "it is not inconceivable . . . that the jury awarded these damages 'under the influence of passion or prejudice' ", one of the grounds for awarding a new trial under Rule 59(a)(6). The record discloses that following the wreck in which plaintiffs were injured defendant's blood alcohol content was .21. Considering the carnage that intoxicated drivers are causing on the highways of our state, it is my hope that juries will never cease to view with some disfavor those who elect to drive motor vehicles while intoxicated.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. BETTY LACHMAN

No. 146A81

(Filed 4 May 1982)

1. State § 12— dismissal of Employment Security Commission employee—jurisdiction of State Personnel Commission over grievance appeal

An employee of the Employment Security Commission was a competitive service employee and thus was not required to have been continuously employed by the State for five years in order to avail herself of the grievance procedures established for State employees by G.S. Ch. 126. Therefore, the State Personnel Commission had jurisdiction under G.S. 126-34 and 126-39 to consider the employee's appeal from her dismissal by the Employment Security Commission although the evidence failed to show that she had been employed by the State for five years immediately preceeding her dismissal.

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1. *North Carolina Manual*, 1981, pp. 129-30.

2. State § 12— State employee—reason for dismissal—finding unsupported by record

The conclusion of the State Personnel Commission that defendant was fired as an employee of the Employment Security Commission solely for job abandonment was unsupported by substantial evidence in view of the entire record; rather, the evidence, including the letter of dismissal, showed that the dismissal was for both insubordination and job abandonment.

3. State § 12— dismissal of State employee—evidence of insubordination

A memorandum to defendant from her supervisor on 23 January 1978 concerning her attitude and language in the presence of tax auditors was relevant to the issue of insubordination on 23 February 1978 because it showed a recent pattern of an insubordinate and uncooperative attitude by defendant. However, an interoffice communication from defendant's supervisor on 29 July 1977, a note from defendant to her supervisor and testimony relating to defendant's language and actions on that date because she did not receive a pay increase was not competent to show defendant's insubordination on 23 February 1978.

4. State § 12— State employee—meaning of insubordination

The refusal of a State employee to accept a reasonable and proper assignment from an authorized supervisor must be willful in order to constitute insubordination. However, a hearing officer of the State Personnel Commission erred in ruling that in order for the choice not to obey the authorized supervisor's reasonable order to be willful it must be made "without such outside considerations as broken equipment, ill health, unavailability of necessary materials, etc.," since these considerations are factors in determining whether the order was reasonable, not whether the choice was willful.

ON defendant's petition for certiorari to review the decision of the Court of Appeals[1] which reversed the judgment of *Braswell, Judge*, entered 18 February 1980 in the Superior Court, WAKE County, affirming the order of the State Personnel Commission which required the Employment Security Commission (hereinafter ESC) to reinstate Betty Lachman to the position of records clerk with ESC from which she had been dismissed on 24 February 1978.

The primary issue in this case is whether the State Personnel Commission has jurisdiction to hear the grievance appeal of an employee of the ESC. We hold that it does. We also hold that for errors in the exclusion of certain evidence offered by the ESC and in the Conclusions made by the hearing officer, the decision

1. Reported at 52 N.C. App. 368, 278 S.E. 2d 307 (1981). We allowed defendant's petition on 3 November 1981.

of the Court of Appeals must be modified and the case remanded for a new hearing.

T. S. Whitaker and Garland D. Crenshaw, Attorneys for Plaintiff-Appellee, Employment Security Commission.

Blanchard, Tucker, Twiggs, Denson & Earls, P. A., by Irvin B. Tucker, Jr., Attorneys for Defendant-Appellant, Betty Lachman.

MEYER, Justice.

Betty Lachman was discharged from her job with the ESC by letter dated 24 February 1978. After exhausting all internal grievance procedures provided by the ESC, she appealed to the State Personnel Commission. Her appeal was heard on 19 April 1979 by E. D. Maynard III, hearing officer for the State Personnel Commission.

The hearing officer made twenty-nine Findings of Fact, a summary of which follows: Ms. Lachman was a former employee of the ESC who had worked as a records clerk in the Claims Division. At approximately 2:00 p.m. on 23 February 1978, Ms. Minda Bunn, Ms. Lachman's supervisor, asked Ms. Lachman whether she had begun working on some reports, the processing of which had been delayed due to problems with a computer. Ms. Lachman replied that she could not do this work because she felt ill.

Ms. Bunn then went to see Mr. Hugh Ogburn, Chief of the Benefits Division, who had informed Ms. Lachman in January that the reports needed to be processed as quickly as possible, about what she felt was Ms. Lachman's refusal to perform her work. She could not see Mr. Ogburn then, but did discuss the situation with Mr. Carl Light, Assistant to Mr. Ogburn. They both then talked to Mr. Ogburn, who suggested that Mr. Light have a meeting with Ms. Lachman and Ms. Bunn, at which time Ms. Bunn would again instruct Ms. Lachman to process the reports. Mr. Light then had Mr. Allen Marshburn find Ms. Lachman and bring her to a meeting in Mr. Light's office.

Present at this meeting were Ms. Lachman, Ms. Bunn, Mr. Light and Mr. Marshburn. When Ms. Lachman arrived at the meeting at approximately 2:30 p.m., Mr. Light asked her how she was. She replied that she did not feel well. Mr. Light said that

Mr. Ogburn wanted the reports by the end of the month, and he did not want Mr. Ogburn angry with him if they were not ready. Mr. Light said that he wanted Ms. Lachman to do the reports. She then told Mr. Light that she was feeling faint, dizzy and nauseous, and that work with the computer required by the reports would aggravate these symptoms. Mr. Light then stated that the reports had to be done and asked Ms. Lachman why she was at work if she were sick. Mr. Light suggested that if she were sick, she should take sick leave and go home. Ms. Lachman said that she could still do routine work and that as long as she could do some light work, she didn't feel it was necessary to go home. Mr. Light reiterated that he felt that if Ms. Lachman were sick, she should be at home. Ms. Lachman disagreed and said that she felt that she should stay at the office as long as she could do some work, and that she should stay, even if she couldn't process the wage reports. Mr. Light then said he was going to let Ms. Bunn tell Ms. Lachman what to do. Ms. Bunn told her she had to do the wage reports by hand if necessary. Ms. Lachman and Ms. Bunn then discussed this; Ms. Lachman told Ms. Bunn that because she was dizzy, disoriented and nauseous, she could not work with the computer. Mr. Light then told Ms. Lachman if she couldn't do the reports she would have to take sick leave. Ms. Lachman replied that she did not feel she should have to take sick leave in that she was able to do some work and was not contagious. Ms. Lachman told Mr. Light that she had already used the sick leave that she had accumulated in January and February of that year. Feeling (for whatever reason) that this conversation was leading to her dismissal, Ms. Lachman told Mr. Light that he could fire her if he wanted to, but that she was not able to do the requested work. Mr. Light responded that Ms. Lachman could either go to the computer and do the work or she could go home on sick leave.

Although no one but Ms. Lachman had mentioned her dismissal in this meeting, she took Mr. Light's last remark to mean that she was dismissed. Ms. Lachman then said that she would go home and stay. Mr. Light, thinking that she was resigning, told Ms. Lachman that if she was quitting he wanted a written statement to that effect; Ms. Lachman's response was that she didn't want to make a statement, that she had said all she had to say.

Ms. Lachman then went to her desk, removed her personal effects and left the building. This was at approximately 3:00 p.m. Ms. Lachman's usual quitting time was at 4:45 p.m. Ms. Bunn observed Ms. Lachman cleaning out her desk and leaving but did not question her about this.

At the conclusion of the meeting, Mr. Light did not believe Ms. Lachman was resigning; it was his impression, from similar past incidents, that she was leaving on sick leave, and would report the next day.

When Ms. Lachman left the meeting on 23 February 1978, she believed she had been dismissed. However, no one had told her this, and she was the only person to bring up the subject of dismissal in the meeting.

Ms. Lachman did not report to work the next day; neither did she call in to notify anyone that she would not report for work. She did not go to work because she believed that she had been dismissed, and therefore, that she was not expected to call in.

Ms. Lachman made a doctor's appointment the next day. That morning, before going to the doctor, she went to the ESC business office and turned in her weekly and monthly time sheets to Ms. Merle Martin. She did this in order to get her check for that month on her regular pay day. Ms. Lachman told Ms. Martin that she was handing in her time sheets because she had been terminated. Sometime later, the ESC Personnel Officer, Mr. James McGaughey, came by Ms. Martin's office. Ms. Martin mentioned that Ms. Lachman had come in and handed in her time sheets, and that these needed to be taken to Ms. Lachman's unit. Mr. McGaughey commented that it appeared Ms. Lachman had "abandoned" her job, and offered to take the sheets to the Benefits Division.

Mr. McGaughey took Ms. Lachman's time sheets to Mr. Light. Mr. Light then went to Mr. Ogburn and told him that it appeared that Ms. Lachman had quit. Mr. Light made this observation based upon Ms. Lachman's failure to report for work or to call in, and her turning in her time sheets. Mr. Ogburn asked Mr. Light to furnish him with a memorandum of the events which led up to the situation on 24 February 1978. Mr. Light gave Mr.

Ogburn a memorandum as requested later that day. In this memorandum, Mr. Light recommended that Ms. Lachman be dismissed. Sometime that afternoon, Mr. Ogburn sent Ms. Lachman the following letter dismissing her:

> Dear Ms. Lachman:
>
> On February 23, 1978, *you refused to accept a reasonable and proper assignment of work from, an authorized supervisor of this Agency. This action on your part is a direct act of insubordination.*
>
> Immediately *after refusing this assignment of work,* you removed your personal belongings from your desk and left the building at approximately 2:45 p.m.
>
> Since you failed to report for work or call in on February 24, 1978, we consider this action as an indication of your intention to abandon the job. We have, therefore, terminated you as of 4:45 p.m. on February 23, 1978.
>
> Sincerely,
>
> Hugh D. Ogburn

(Emphasis added.)

At no time did anyone in the Benefits Division attempt to contact Ms. Lachman or to ascertain the reason for her absence on 24 February 1978. Ms. Lachman did visit a doctor on 24 February 1978; he diagnosed her condition as bronchitis with "involvement of the inner ear." She had suffered from bronchitis periodically and as a result of this, she was not able to accumulate sick leave. Ms. Lachman's earlier bouts with bronchitis had depleted her earned sick leave for the first two months of 1978. This was the reason she had no earned sick leave on 23 February 1978. However, she did have sick leave for 1978 which could have been advanced to her to cover an absence.

Ms. Lachman appealed her dismissal through the ESC's departmental grievance procedure. Following final adverse agency decision, she appealed her dismissal to the State Personnel Commission, alleging lack of just cause for her dismissal.

Based on the above Findings of Fact, the hearing officer made the following five Conclusions of Law:

1. Under the authority of North Carolina General Statutes § 126-35 and 37, the State Personnel Commission has jurisdiction to hear and decide Petitioner's [Ms. Lachman] appeal.

2. Respondent [ESC] dismissed Ms. Lachman by letter on February 24, 1978. The letter of dismissal is clear on its face that Respondent dismissed Petitioner for 'abandoning' her employment. Although Ms. Lachman's alleged insubordination is mentioned in the letter of dismissal, that letter is so written that the only reasonable construction which can be made is that Petitioner was dismissed solely for 'abandoning' her employment.

3. Respondent, however, contends that Ms. Lachman, was also dismissed for insubordination. Even if all of Respondent's evidence which was offered on this point is accepted as true, Respondent has not carried its burden of proving an insubordinate act of Petitioner on February 23, 1978. Insubordination is defined in the State Personnel Policy Manual as '[R]efusal to accept a reasonable and proper assignment from an authorized supervisor.' *Employee Relations*, pages 5-6. Insubordination carries the clear implication that the refusal which is the basis of the offense is a willful refusal; that is, the employee was faced with a choice of performing or not performing a given order (without such outside considerations as broken equipment, ill health, unavailability of necessary materials, etc.) and willfully chose not to obey the reasonable order of an authorized supervisor. Respondent has not shown such a willful refusal in this case. At most, Respondent has shown that Petitioner was unable, but did not refuse, to perform the work requested. Being unable to perform a reasonable work order does not denote a refusal or insubordination. Therefore, even if Ms. Lachman had been dismissed for insubordination, which she clearly was not, Respondent did not carry the necessary burden of proof.

4. Respondent had the burden of proving Petitioner 'abandoned' her employment. Had Respondent not dismissed Ms. Lachman on this basis, it would have been possible for Respondent to treat Petitioner's actions as constituting a voluntary resignation without notice. If Ms. Lachman had

then appealed, Petitioner would have had the burden of proving that she did not resign, but had been dismissed instead. However, Respondent chose to dismiss Petitioner, and therefore, must carry the burden of proving that she abandoned her job.

5. This hearing officer is not familiar with the charge that an employee has 'abandoned' his employment. However, it may be assumed that an 'abandonment' is similar to a voluntary resignation. Respondent must prove Ms. Lachman left her employment with the intention not to return. Respondent has shown that Petitioner's actions on February 23, 1978 and February 24, 1978 gave rise to the inference that Ms. Lachman had quit her job. However, this is all that Respondent has shown. When Respondent chose to dismiss Petitioner for 'abandoning' her job, it took on the burden of proving just cause to dismiss Petitioner for this charge. North Carolina General Statutes § 126-35. Just cause requires more proof than an inference, or a conclusion. The burden of proof Respondent must meet is that the greater weight of the evidence must support Respondent's reason for dismissal. While the evidence of Ms. Lachman's actions supports Respondent's charge of job 'abandonment', Petitioner's actions also support her contention that her actions were motivated by her belief that she had been dismissed. It cannot be said that the greater weight of the evidence proves Respondent's charge of job 'abandonment'; the competent evidence gives equal support to the contentions of Respondent and Petitioner. In such a situation, Respondent has failed to carry the burden of proof to establish just cause.

Based on the twenty-nine Findings of Fact and five Conclusions of Law, the hearing officer recommended that the ESC reinstate Ms. Lachman to the same level position from which she had been dismissed, award her her net pecuniary loss, and reinstate all her benefits of employment such as annual and sick leave as if she had not been dismissed.

The ESC gave notice of appeal from this order, and oral arguments were heard on the matter by the full State Personnel Commission at its meeting of 17 August 1979. The Commission adopted the Findings of Fact and Conclusions of Law of the hear-

ing officer as its own and entered essentially the same order as recommended by the hearing officer, with the additional provision that the letter of dismissal serve as a first-level reprimand for Ms. Lachman's conduct of 23 February 1978.

Pursuant to Article 4 of Chapter 150A of the General Statutes, the Administrative Procedure Act, the ESC appealed from the decision of the full Commission to the Superior Court, Wake County. While that court found that the ESC had made numerous exceptions to the Findings of Fact and Conclusions of Law of the hearing officer, it ruled that the appeal presented two primary issues of law for resolution: (1) whether the exclusion of three exhibits offered into evidence at the hearing was error, and (2) whether the record as a whole discloses that the Conclusions of Law are supported by the Findings of Fact.

The court ruled adversely to the Employment Security Commission which then gave notice of appeal to the Court of Appeals. That court, in an opinion filed 2 June 1981, ruled that the State Personnel Commission had no jurisdiction to hear Ms. Lachman's appeal and reversed and remanded the case to the Superior Court with directions that it order the State Personnel Commission to dismiss her appeal. This Court allowed Ms. Lachman's petition for a writ of certiorari on 3 November 1981.

[1] The first question presented by this appeal is whether the State Personnel Commission had jurisdiction to hear Ms. Lachman's grievance appeal. We hold that it did. Therefore, the Court of Appeals erred in dismissing the appeal.

The Commission's jurisdiction was never challenged by either party in the proceedings below. The Court of Appeals ruled *ex mero motu* that the State Personnel Commission lacked jurisdiction because Ms. Lachman had not been continuously employed by the State for five years so as to come within the coverage of Chapter 126 of the General Statutes under which the appeal was brought. *See* G.S. § 126-5(d)(1).

Chapter 126 sets up a system of personnel administration for the State. G.S. § 126-5 defines the class of employees that are covered by the provisions of the chapter. Section 126-5(d)(1) provides:

> (d) Except as to the policies, rules and plans established by the Commission pursuant to G.S. 126-4(1), 126-4(2), 126-4(3), 126-4(4), 126-4(5), 126-4(6), 126-7, and except as to the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to:
>
> (1) An employee of the State of North Carolina who has not been continuously employed by the State of North Carolina for the immediate five preceding years.

As correctly pointed out by the Court of Appeals, none of the exceptions mentioned in Section (d) apply to the case *sub judice.*

Article 8 of Chapter 126 provides the grievance procedure for State employees when their grievances do not allege discrimination because of age, sex, race, color, national origin, religion, creed, physical disability, or political affiliation. G.S. § 126-34. G.S. § 126-39 provides:

> For the purposes of [Article 8], *except for positions subject to competitive service* and except for appeals brought under G.S. 126-16 and 126-25, the terms 'permanent State employee,' 'permanent employee,' 'State employee' or 'former State employee' as used in this Article shall mean a person who has been continuously employed by the State of North Carolina for five years at the time of the act, grievance, or employment practice complained of.

(Emphasis added.)

The Court of Appeals ruled that under this section and G.S. § 126-5(d)(1), Ms. Lachman had to be employed continuously by the State for the five years immediately preceding 24 February 1978 in order to avail herself of the grievance procedures established for State employees in Chapter 126.

Defendant Lachman correctly contends, and the Employment Security Commission conceded in oral argument, that the regulations promulgated under the Administrative Procedure Act make all ESC employees subject to competitive service. 1 N.C.A.C. 8C .0602(b)(1). Therefore, they are exempted from the five-year requirement and are covered by the grievance procedure established by Article 8 of Chapter 126. Indeed, G.S. § 126-39, *supra,* provides coverage for competitive service employees.

While it is true, as the ESC argues, that the record does not show affirmatively that Ms. Lachman was a competitive service employee, it does establish that she worked as a records clerk for the ESC. This Court takes judicial notice, pursuant to G.S. § 150A-64, that employees of the ESC are made subject to competitive service under Rule .0602(b)(1) of Title I of the North Carolina Administrative Code, Chapter 8, Subchapter C, as adopted by the State Personnel Commission, effective 1 February 1976. This Court also takes judicial notice, pursuant to G.S. § 8-4, of the federal statutory requirement of the establishment and maintenance of personnel standards on a merit basis in order for the ESC to qualify for federal funding. 42 U.S.C. § 503(a)(1) (1976); 29 U.S.C. § 49d(b) (1976). Our Legislature has accepted this requirement.

> The Employment Security Commission shall be charged with the duty . . . to do and perform all things necessary to secure to this State the benefits of [the federal act establishing the national employment system]. . . . The provisions of the said act of Congress, as amended, are hereby accepted by this State . . . and this State will observe and comply with the requirements thereof.

G.S. § 96-20.

There were sufficient facts before the hearing officer to establish the jurisdiction of the State Personnel Commission to hear Ms. Lachman's appeal. Contrary to the hearing officer's Conclusion No. 1, *supra*, however, the authority for its jurisdiction was under G.S. §§ 126-34 and 126-39 and not G.S. §§ 126-35 and 126-37.

Having thus determined that the State Personnel Commission had jurisdiction to hear Ms. Lachman's appeal, we must now determine whether the trial court correctly affirmed the decision of the Commission. The defendant contends that the trial court did not err in affirming that decision. On the other hand, the ESC argues that the court erred because, *inter alia*, the hearing officer erroneously (1) concluded that Ms. Lachman was fired *solely* for abandoning her job, (2) excluded certain exhibits and testimony offered into evidence by the ESC, and (3) qualified the definition of *insubordination*.

[2] The issue presented by the ESC's first contention is whether the conclusion that Ms. Lachman was fired solely for job abandonment is unsupported by substantial evidence in view of the entire record. G.S. § 150A-51(5). *See Overton v. Board of Education*, 304 N.C. 312, 283 S.E. 2d 495 (1981). In ruling on this issue, we must consider all of the evidence, both that which supports the Conclusion of the hearing officer and that which detracts from it. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). "The 'whole record' test does not allow the reviewing court to replace the [Commission'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*." 292 N.C. at 410, 233 S.E. 2d at 541.

We do not agree with the hearing officer's Conclusion that Ms. Lachman was dismissed solely for abandoning her employment (Conclusion No. 2, *supra*). Carl Light testified that he and Mr. Ogburn recommended that Ms. Lachman be dismissed based on her act of insubordination (refusing to either do the assigned work or take sick leave) and the apparent abandonment of her job. Moreover, contrary to the Conclusion of the hearing officer, we believe that the letter of dismissal, *supra*, clearly shows that the dismissal was for *both* insubordination and job abandonment.[2]

Ms. Lachman's contention that if insubordination had been the real reason she was fired, her superiors would not have waited until the next day to fire her is answered in the record by testimony indicating that since Ms. Lachman had walked out on a prior occasion and later called in to request leave, they did not know whether or not she would call in on this occasion. Conclusion No. 2 is not supported by the evidence in the record, and thus must be reversed. The only Conclusion that can be supported by the record is that Ms. Lachman was dismissed for *both* insubordination and job abandonment.[3]

[3] Secondly, the ESC contends that the hearing officer erred in excluding three exhibits and testimony pertinent thereto relevant

2. Since the hearing officer ruled that the ESC had not proved job abandonment, and this ruling was based on substantial evidence, we consider only the ground of insubordination.

3. See footnote 2.

to the issue of insubordination offered by the ESC. We first address the admissibility of Exhibit No. 1, a memorandum to Ms. Lachman from Minda Bunn dated 23 January 1978 which reads as follows:

> Attitude and Language Used in Presence of Accounting Department Personnel.
>
> This will confirm my recent instructions for you to avoid any further contacts with our tax auditors in the Accounting Department. I have been informed that the vulgar language used and attitude shown in the presence of our tax auditors was unacceptable.
>
> Upon the advice of Mr. Ogburn, you are to avoid any further contacts with our tax personnel whether in person or by telephone.
>
> I am requesting that a copy of this report be placed in your personnel folder.
>
> Copy to: Minda Bunn
> Mr. Ogburn
> Mr. McGaughey X

Ms. Bunn testified that after Ms. Lachman received this memorandum, she became less cooperative and did not do as much work as she had normally done prior to the memorandum.

The hearing officer ruled this evidence irrelevant and refused to consider it in reaching his decision. While the ESC does not contend that the excluded exhibit and testimony would prove that Ms. Lachman was guilty of insubordination on 23 February 1978, it argues that they tend to show that she had a "recent history of insolence, lack of cooperation with her supervisors, and a bad attitude generally." We agree that as evidence of her continuing insolent behavior toward her supervisor, the testimony and memorandum were relevant to her intentional insubordination on 23 February 1978 and should have been admitted and considered by the hearing officer. *See* 67 C.J.S. Officers § 133 (1978) (insubordination implies a general course of mutinous disrespectful or contumacious conduct).

The hearing officer also ruled that Exhibits Nos. 2 and 3 and the testimony relating to them were irrelevant. Exhibit No. 2 is

an "interoffice communication" dated 29 July 1977 from Minda Bunn to Carl Light concerning Ms. Lachman:

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTEROFFICE COMMUNICATION

DATE: July 29, 1977

TO: Carl V. Light, Assistant Chief of Benefits

FROM: Minda W. Bunn, Clerical Unit Supervisor (V) MB

SUBJECT: Bettie L. Lachman, Records Clerk (III), Pos. No. 13280

> This morning when the monthly checks were distributed and Bettie Lachman received the notice that she would not get an increment, she said, 'That damn bitch in yonder kept me from getting my f------ money, I'm' . . . . I then interrupted her and told her to watch her language. She told me, 'You had better watch yours.' I told her that 'You had better shut up.' Nothing further was said by either of us pertaining to the above conversation. She later laid the attached note of apology on my desk. This memo is for whatever action you deem necessary.
>
> 7-29-77 s/Mr. McGaughey – CVL

Exhibit No. 3 is the note from Ms. Lachman to Minda Bunn referred to in Exhibit No. 2:

> I'm sorry I Out- (Illegible) —*I appoligize*
>
> But I ain't never been more mad!! 'I get mean when you mess with my green' as Margaret says.
>
> Can I appeal this in anyway??

Ms. Bunn testified that on 29 July 1977, Ms. Lachman became angry with her and left the work unit, apparently because she did not get a pay raise. The exhibits were written pursuant to this incident. The ESC argues that "for essentially the same reasons" that the hearing officer should have considered Exhibit No. 1 and the testimony relative thereto, he should have considered this testimony and Exhibits 2 and 3. We do not agree.

Exhibit No. 1 and the testimony relating to it were relevant to the issue of insubordination because they showed a recent pattern of an insubordinate and uncooperative attitude on behalf of Ms. Lachman. These exhibits and this testimony relate only to one incident of anger on the part of Ms. Lachman because she failed to receive a pay increase some nineteen months before the act of insubordination at issue. They have no tendency to show Ms. Lachman's insubordination on 23 February 1978, and the hearing officer correctly refused to consider them. However, because of his erroneous refusal to consider Exhibit No. 1 and the testimony pertinent to it, a new hearing must be conducted in this matter. G.S. § 150A-51.

[4] Thirdly, the ESC argues that the hearing officer erred in qualifying the definition of *insubordination* as set out in the State Employee's Handbook, "Refusal to accept a reasonable and proper assignment from an authorized supervisor." (Conclusion No. 3, *supra*) After stating this definition, the hearing officer went on to conclude:

> Insubordination carries the clear implication that the refusal which is the basis of the offense is a willful refusal; that is, the employee was faced with a choice of performing or not performing a given order (without such outside considerations as broken equipment, ill health, unavailability of necessary materials, etc.) and willfully chose not to obey the reasonable order of an authorized supervisor.

While we agree that the refusal which is the basis of the offense is a willful refusal, *see* 44 C.J.S. Insubordination (1945); 67 C.J.S. Officers § 133; 76 Am. Jur. 2d Unemployment Compensation § 55 (1975), we do not agree that in order for the choice not to obey the authorized supervisor's reasonable order to be willful it must be made "without such outside considerations as broken equipment, ill health, unavailability of necessary materials, etc." These considerations are factors in determining whether the order was reasonable, not whether the choice was willful.

The decision of the State Personnel Commission is affected by errors of law (1) in the exclusion of evidence and (2) in the qualification of the definition of *insubordination.* In addition, the Commission's Conclusion that Ms. Lachman was fired *solely* for job abandonment is unsupported by substantial evidence in view

of the entire record. For these reasons there must be a new hearing. G.S. § 150A-51.

The panel below properly reversed the judgment of the trial court and remanded the cause, but for the wrong reason. The decision of the Court of Appeals is modified and the case remanded to that court for further remand to the Superior Court, Wake County, for the entry of an order requiring the State Personnel Commission to conduct, or cause to be conducted, a new hearing consistent with this opinion.

Modified and remanded.

SPURGEON W. SMITH, EMPLOYEE, PLAINTIFF v. AMERICAN & EFIRD MILLS, EMPLOYER, AND AETNA LIFE & CASUALTY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 160A81

(Filed 4 May 1982)

1. Master and Servant § 69.1— workers' compensation—permanent total disability—applicable statute

Application of the 1978 version of G.S. 97-29 to plaintiff's claim for permanent total disability did not constitute a retroactive application of substantive law in violation of Art. I, § 19 of the N.C. Constitution and Art. I, § 10 of the U.S. Constitution where all the evidence disclosed that, although plaintiff suffered a diminished capacity to earn money in 1970, he did not become disabled until 1978, and thus no right to recover for permanent total disability vested in plaintiff until after the enactment of the 1978 version of G.S. 97-29.

2. Master and Servant § 75— workers' compensation—partial disability—length of award of medical expenses

Under G.S. 97-59 as it existed in 1970, plaintiff was entitled to an award of medical expenses beginning on 1 January 1970 when the Industrial Commission found that his partial disability began and extending so long as the treatment provided "needed relief." Therefore, plaintiff was entitled to recover all medical expenses between 1 January 1970 and the date in 1978 when plaintiff was found to have become totally incapacitated and entitled to medical benefits under G.S. 97-29, and the Industrial Commission erred in limiting the award of medical expenses to the 300 weeks during which partial disability was paid.

Justice MEYER *dissenting.*

APPEAL by defendants, employer American & Efird Mills and insurance carrier Aetna Life & Casualty Insurance Company, from the decision of the North Carolina Court of Appeals (*Clark, J.*, with *Martin (Robert M.)* and *Arnold, JJ.*, concurring) reported at 51 N.C. App. 480, 277 S.E. 2d 83 (1981).

The Industrial Commission's award denying benefits to employee-claimant for permanent and total disability under G.S. 97-29 and limiting the recovery of medical expenses to 300 weeks was remanded by the Court of Appeals for findings consistent with the evidence that the employee was entitled to an award under G.S. 97-29 and to lifetime medical expenses under G.S. 97-29 dating from the date when the uncontradicted evidence indicated that he became permanently and totally incapacitated. This Court denied discretionary review on 6 October 1981. The defendants filed petition for rehearing, alleging that this Court had neglected to consider the far-reaching consequences of the decision of the Court of Appeals. Recognizing that this case does present a question of first impression in this State, we elected to entertain defendants' appeal and allowed defendants' petition for discretionary review on 15 December 1981.

The case presents no factual disputes. The claimant worked in the employer's cotton mill for some years prior to 1968 and had had some respiratory problems before that date. In 1968 he was forced to quit his job at the mill due to breathing difficulties. Although he obtained other sedentary employment, his average weekly wages began to decline in 1970 and continued to decline until 1973. Complainant had no earnings for the fourth quarter of 1973, nor for the years 1974, 1975, and 1976. He again had some earnings during each quarter of 1977 but has reported no earnings since the end of 1977.

Smith filed a claim for Workers' Compensation benefits on 8 June 1978. He was examined on 15 September 1978 and determined by Dr. Douglas Kelling to be permanently and totally disabled. The complainant was awarded compensation for 300 weeks dating from 1 January 1970 (the point in time when his average weekly wage shows its first decline) and $8,500 for permanent, irreversible injury to both lungs in an opinion and award filed by Deputy Commissioner Dianne C. Sellers on 4 January 1980. He was also awarded all medical expenses arising out of his occupational disease.

Defendants appealed from the opinion and award of the Deputy Commissioner to the full Commission. The Commission filed an opinion and award on 3 April 1980 by Commissioner Brown (Commissioner Stephenson, concurring; Commissioner Vance, dissenting) limiting the plaintiff's compensation to 300 weeks beginning 1 January 1970 and limiting the award of medical expenses to the same 300-week period.

Plaintiff appealed pursuant to G.S. 97-86.1 which permits an appeal of a portion of the Commission's award. Accordingly, the Commission ordered a lump sum payment of the partial disability compensation, defendants not having appealed that portion of the award. Thus, the only issues before the Court of Appeals were (1) whether the Industrial Commission erred in denying to plaintiff an award under G.S. 97-29 for permanent total disability and (2) whether the Commission erred in limiting plaintiff's recovery of medical expenses to 300 weeks.

The Court of Appeals dismissed plaintiff's appeal for failure to file within 30 days from the date of the full Commission's opinion and award; however, because of the significance of the issues in the appeal, the Court of Appeals issued a writ of certiorari under Appellate Rule 21(a) to review the issues presented by plaintiff. In an opinion by Judge Clark, the Court of Appeals remanded the case to the Industrial Commission for a finding in accordance with all the evidence that plaintiff was permanently and totally disabled in 1978 and for entry of an award of disability compensation under G.S. 97-29 as it existed in 1978 when plaintiff became permanently and totally disabled. The Court of Appeals also held that plaintiff was entitled to medical expenses under G.S. 97-29 for the remainder of plaintiff's life dating from the date of permanent and total disability. We granted discretionary review to review the decision of the Court of Appeals.

Hassell, Hudson & Lore, by R. James Lore, for plaintiff appellee.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by J. A. Gardner, III, for defendant-appellants.

BRANCH, Chief Justice.

At the threshold of this opinion, we emphasize that there was no appeal by defendants or plaintiff from the full Commis-

sion's award of permanent partial disability as provided for in G.S. 97-30. Therefore, this portion of the case is not before us, and that award remains in full force and effect.

We approve and adopt as our own the well-reasoned and well-documented decision of the unanimous panel of the Court of Appeals. However, we deem it necessary to consider and decide two points which were not considered in the decision of the Court of Appeals.

I

[1] The Court of Appeals failed to address the question of whether application of the 1978 version of G.S. 97-29 to the facts of the case before us constituted an unconstitutional retroactive application of substantive law.

Defendants argue that when plaintiff suffered "a diminished capacity to earn money" in 1970, his claim vested substantively and his employer was exposed to liability at that time. Defendants therefore contend that to apply the 1978 statute would interfere with vested rights and liabilities so as to contravene Article I, Section 16, of the North Carolina Constitution[1] and Article I, Section 10, of the United States Constitution. We do not agree.

It must be first borne in mind that there is nothing before this Court relating to plaintiff's entitlement under G.S. 97-30 to permanent partial disability compensation for the period 1970 to 1978. The sole question before us in deciding this assignment of error is whether plaintiff's claim for permanent total disability amounted to a retroactive application of the 1978 version of G.S. 97-29. (1973 N.C. Sess. Laws Ch. 1308, §§ 1, 2). In our opinion, *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979), is dispositive of this question and answers it adversely to defendants' contention. In *Wood* Chief Justice Sharp speaking for a unanimous Court (Justice Brock taking no part in the consideration or decision of the case) stated:

1. Defendants' argument is in reality based upon Article I, § 19 and not § 16 which is concerned solely with the *ex post facto* application of criminal statutes. We will consider this assignment of error as it relates to Article I, § 19 of our State Constitution.

> The proper question for consideration is not whether the amendment affects some imagined obligation of contract but rather whether it interferes with vested rights and liabilities. As we observed in *Booker v. Medical Center*, a statute is not unconstitutionally retroactive merely because it operates on facts which were in existence before its enactment. 297 N.C. at 467, 256 S.E. 2d at 195. *See in accord, Frisbie v. Sunshine Mining Co.*, 93 Idaho 169, 457 P. 2d 408 (1969); *Tennessee Insurance Guaranty Association v. Pack*, 517 S.W. 2d 526 (Tenn. 1974); *Sizemore v. State Workmen's Compensation Commissioner*, 219 S.E. 2d 912 (W.Va. 1975). Instead, a statute is impermissibly retrospective only when it interferes with rights which had vested or liabilities which had accrued prior to its passage. *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E. 2d 598 (1952); *Wilson v. Anderson*, 232 N.C. 212, 59 S.E. 2d 836 (1950); *B-C Remedy Co. v. Unemployment Compensation Commission*, 226 N.C. 52, 36 S.E. 2d 733 (1946).

Id. at 650, 256 S.E. 2d at 701.

All of the evidence in this record discloses that plaintiff did not become totally disabled until 1978. Thus, no right to recover for permanent total disability vested in plaintiff until after the enactment of the 1978 version of G.S. 97-29. No possible liability accrued to defendants as a result of plaintiff's permanent total disability until after the enactment and effective date of the 1973 revision of G.S. 97-29.

We therefore hold that application of the 1978 version of G.S. 97-29 to the facts in instant case did not constitute an unconstitutional application of substantive law.

II

[2] The other question which the Court of Appeals failed to address was whether the Industrial Commission erred in limiting its award of medical expenses in conjunction with the permanent partial award to 300 weeks.

The Commission determined that plaintiff's partial incapacity and entitlement for an award for medical expenses began in 1970. Therefore, consistent with the decision of the Court of Appeals, the award of medical expenses for the period of partial disability must be governed by the pertinent statutes in effect in the year

1970. The full Commission's award in instant case made no reference to the statute under which it made its award. In 1970 G.S. 97-25 and G.S. 97-59 each contained provisions applicable to an employee's entitlement to an award for medical expenses.

G.S. 97-25 is the more general of the two statutes and was first enacted as a part of the original North Carolina Workmen's[2] Compensation Act. 1929 N.C. Sess. Laws Ch. 120. The original act made no provisions for occupational diseases but applied only to injuries by accident. The original provisions of G.S. 97-25 limited allowable medical expenses to ten weeks for treatment "required to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability . . . ."

G.S. 97-59 was enacted in 1935 when the provisions of the Workers' Compensation Act were revised so as to extend coverage for victims of occupational diseases. In 1970 that statute specifically provided:

> In the event of disability from an occupational disease, the employer *shall* provide reasonable medical and/or other treatment for such time as in the judgment of the Industrial Commission will tend to lessen the period of disability *or* provide needed relief . . . . [Emphasis added.]

We now turn to the question of which of the statutes is applicable to instant facts.

G.S. 97-25 applies generally to awards of medical benefits under the Workers' Compensation Act. G.S. 97-59, the later enacted statute, applies specifically to awards of medical benefits in cases involving occupational disease.

> Where one statute deals with a subject in general terms and another statute deals with a part of the same subject in detail, the specific statute will be construed as controlling, unless it appears that the Legislature intended to make the general act controlling. This is especially so when the specific act is later in point of time.

2. In 1979 the official title of this Act was amended to change the word "Workmen's" to "Workers'." 1979 N.C. Sess. Laws Ch. 714, § 1. For the sake of consistency, references hereafter to the Act will employ the title as it presently reads.

National Food Stores v. Board of Alcoholic Control, 268 N.C. 624, 151 S.E. 2d 582 (1966).

We find nothing indicating that the Legislature did not intend that the specific latter statute control. We therefore hold that G.S. 97-59 is applicable to the facts of this case.

The latter specific statute, G.S. 97-59, differs from the former, G.S. 97-25, in that it states two grounds upon which the Commission *shall* extend medical benefits. These grounds are stated in the disjunctive so that if either is found to exist by the Commission, an award for medical benefits must be made. The ground pertinent to this appeal is a finding that the treatment would "tend to provide needed relief." The Commission in its finding of fact number six found "that medical treatment will be necessary for plaintiff's lifetime and will provide plaintiff with needed relief, though treatment will not reverse the damage to the lungs which has become permanent, but will only serve to prevent further damage."

This finding was supported by competent evidence and is therefore conclusive. *Inscoe v. DeRose Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977). Such a finding mandates an award of medical expenses as long as the treatment provides needed relief. Even so, the Commission limited its award of medical expenses to 300 weeks. We are unable to find anything in the Workers' Compensation Act which permits the Commission to limit the award of medical expenses under G.S. 97-59 to the period of time in which disability is paid. Upon finding that the treatment would provide needed relief, it was not necessary under G.S. 97-59 for the Commission to determine that such treatment would also lessen the period of disability.

We therefore hold that plaintiff was entitled to an award of medical expenses beginning in 1970 when the Commission found that his partial disability began and extending so long as the treatment provided "needed relief." Of course, when plaintiff became totally disabled in 1978, he at that time became entitled to medical benefits under the provisions of G.S. 97-29.

We note that G.S. 97-59 requires that "all such treatment shall be first authorized by the Industrial Commission after consulting with the Advisory Medical Commission." Obviously, strict

adherence to this proviso would result in an absurdity in this case by denying plaintiff medical expenses for treatment of his undiagnosed occupational disease because he failed to get prior approval for the treatments. Plaintiff had no reason to seek approval until his condition had been diagnosed as a compensable occupational disease.

In *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980), we find a similar situation. There we stated, "It is . . . clear that our Legislature never intended that a claimant for workers' compensation benefits would have to make a correct medical diagnosis of his own condition prior to notification by other medical authority of his disease in order to timely make his claim." Although *Taylor* was concerned with a claim for disability compensation rather than a claim for medical expenses, we believe that the same analysis obtains. The Commission may still consult with the Advisory Medical Committee as to the reasonableness of the cost of the treatment. We therefore hold that the requirement in G.S. 97-59 of prior approval of medical treatment applies only in cases where it is reasonably practicable to seek such prior approval. We note in passing that the present version of G.S. 97-59 omits the requirement of *prior* authorization and merely requires that medical bills be approved by the Commission. 1981 N.C. Sess. Laws Ch. 339.

In its opinion and award, the Industrical Commission's Conclusion of Law number three provides:

> 3. For reasonable medical and/or [sic] treatment, solely of such a nature as to tend to lessen plaintiff's period of disability or to provide plaintiff needed relief from his occupational disease *and incurred during the 300-week period beginning 1 January 1970*, employer is obligated to bear the cost thereof. [Emphasis supplied.]

For the reasons stated above, we hold that the 300-week limitation must be deleted from the opinion and award.

The decision of the Court of Appeals is modified and affirmed, and this cause is remanded to the Court of Appeals with direction that it be returned to the Industrial Commission for entry of award in accordance with the opinion of the Court of Appeals with the sole modification that the limitation contained in

Conclusion of Law number three be deleted so that the amended award will—subject to authorization by the Commission after consultation with the Advisory Medical Committee—allow plaintiff to recover all medical expenses incurred between 1 January 1970 and the date in 1978 when plaintiff is found by the Commission to have become totally incapacitated.

Modified and affirmed.

Justice MEYER dissenting.

I must respectfully dissent from the opinion of the majority. By stipulation of counsel, there is no issue on this appeal contesting the Findings of Fact or Conclusions of Law of the Industrial Commission that plaintiff suffers from an occupational disease. For that reason, no evidence relating to compensability was brought forward in the record—also by agreement of counsel. The defendants did not take exception to or make any cross assignments of error with regard to the Industrial Commission's finding adopting the consulting physician's opinion that plaintiff was totally and permanently disabled from byssinosis in 1978. And, as the majority opinion points out, there is no appeal concerning the award of permanent *partial* disability for the period 1970-1978 pursuant to G.S. § 97-30. While there are other matters which might, and in my opinion should, have been brought forward, this is a limited appeal restricted to (1) the matter of the award of benefits for permanent *total* disability for life under the provisions of G.S. § 97-29 as it existed in 1978 and (2) the award of lifetime medical benefits. I shall therefore limit my remarks to the matter of the retroactive aspect of the award with regard to those two issues. I believe that the award of lifetime permanent total disability benefits to Mr. Smith amounts to a retroactive application of the substantive law—the 1978 version of G.S. § 97-29. I also believe that, under the facts of this case, it is error to award the plaintiff medical expenses for life. I am convinced that neither result was intended by our Legislature.

This is not a situation in which a claimant has previously been determined to be partially disabled and has received, or is receiving, benefits at the time benefits are increased by the Legislature or at the time he becomes totally disabled. This claimant was determined to be disabled for the first time in 1978 at

which time he was found to be totally disabled. It was at this time that his *partial* permanent disability for the period 1970-1978 was determined. While I question such action, this determination was not brought forward on appeal and is not addressed in the majority opinion.

The limited appeal was apparently taken for the reason that while the claimant did not contest the findings and conclusions of the Full Commission relating to the award of benefits under the provisions of G.S. § 97-30 as it existed on 1 January 1970, he did contest the Opinion and Award of the Full Commission in failing to award permanent *partial* benefits under the provisions of G.S. § 97-29 as it existed in 1978 and for its failure to award lifetime medical benefits. The Court of Appeals, however, noted that evidence had been adduced in the case that the claimant became permanently and *totally* disabled in 1978 from byssinosis. The panel thereby concluded that the Full Commission had erred in failing to award benefits for permanent and *total* disability under the version of G.S. § 97-29 as it existed in 1978. The panel determined that the Full Commission was not restricted to that version of G.S. § 97-29 as it existed in 1970 when he first became disabled by reason of his occupational disease. The panel also concluded that the Commission had erred in failing to award lifetime medical benefits under G.S. § 97-29, again, as it existed in 1978, thereby avoiding a construction of G.S. § 97-*59* relating to medical benefits for occupational disease. The panel said that a consideration of benefits that might be awardable under G.S. § 97-*59* was not necessary in view of the provisions of G.S. § 97-29, although the claimant was suffering from an occupational disease.

This claimant was born in 1907. He worked in the textile industry from 1929 to 1951, a period of approximately 21 years. From 1951 to 1962, a period of approximately 11 years, the claimant farmed. He was again employed in the textile industry from 1962 until 1968. Thus, it had been approximately 10 years since he was employed in the textile industry when in 1978 he was diagnosed as being permanently totally disabled by reason of byssinosis.

This is a claim for an occupational disease under G.S. § 97-53(13). It should be emphasized that the pertinent Finding of Fact by the Full Commission with regard to the occupational

disease is couched in the language of the statute as it existed in 1970 and not in the language as it existed in 1978 when the determination was made. This Finding of Fact serves as a foundation for all of the other findings and conclusions and the award. In pertinent part, Finding of Fact No. 1 of the Opinion and Award of the Full Commission provides as follows:

> Byssinosis is a disease which is an infection or inflammation of an internal organ of the body due to exposure to cotton dust.

This finding is only consistent with the language of G.S. § 97-53(13) as it existed prior to the amendment effective 1 July 1971. 1971 Sess. Laws, c. 547, s. 1. Prior to 1 July 1971, G.S. § 97-53(13) provided as follows:

> The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this article:
>
> . . .
>
> (13) Infection or inflammation of the skin, eyes, or other external contact surfaces or oral or nasal cavaties or any other internal or external organ or organs of the body due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances.

Following 1 July 1971, G.S. § 97-53(13) as amended, provided as follows:

> The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article:
>
> . . .
>
> (13) Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

The foregoing Finding of Fact No. 1 is entirely adequate to serve as a foundation for an award under the pre-1 July 1971 language of the statute. I would point out, however, that there is

no finding of fact to support a ruling of compensability under the version of G.S. § 97-53(13) as it appears after the amendment of 1 July 1971. Nowhere is there a determination that the claimant's disease is "due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment."

I also point out that from the time of this claimant's partial permanent disability in January 1970 there has been no new injury by accident and no new disablement as a result of a subsequent aggravating exposure to cotton dust to warrant a different accrual date. It was not even alleged that a subsequent occupational exposure or subsequent injury accelerated or aggravated this claimant's condition. It is my view that all of this claimant's benefits should relate back to the original disablement in January 1970. This Court should not put its stamp of approval on an arbitrary finding of a new injury date, *i.e.*, the total disability occurring in 1978, based upon the changing condition of the employee.

In *Wood v. Stevens & Co.*, 297 N.C. 636, 644, 256 S.E. 2d 692, 697-98 (1979), this Court said:

> Under our Workmen's Compensation Act, injury resulting from occupational disease is compensable only when it leads to disablement. G.S. 97-52. Until that time, the employee has no cause of action and the employer has no liability. We hold therefore that the current version of G.S. 97-53(13) *applies to all claims for disablement in which the disability occurs after the statute's effective date, 1 July 1971.*
>
> This holding is consistent with a statutory scheme for occupational diseases as established by G.S. 97-52. . . . *The long-standing rule in both this and other jurisdictions is that the right to compensation in cases of accidental injury is governed by the law in effect at the time of injury.* (Citations omitted.) If disablement resulting from an occupational disease is treated as an injury by accident as required by G.S. 97-52, it follows that the employee's right to compensation in cases of occupational disease should be governed *by the law in effect at the time of disablement.* (Citations omitted) (Emphasis added.)

Wood stands for the proposition that the first disablement of any kind (occurring in this case in 1970) brings into play the law

in effect on that date and that all benefits flow and accrue based upon that disablement date.

G.S. § 97-29 as it existed on 1 January 1970 clearly provided that disability benefits would be paid for a maximum of 400 weeks "from the date of the injury." The 1973 amendment to that statute (1973 Session Laws, c. 1308) which eliminated the 400 weeks' cap and the maximum benefits' cap and added lifetime benefits for permanent total disability cases became effective 1 July 1975 and applied only to cases arising on and after 1 July 1975.

I believe that the General Assembly intended the result adopted and incorporated by the Full Commission in its award and that the Court of Appeals and the majority opinion of this Court misinterpret the legislative intent that Mr. Smith's claim should be governed completely and totally by the law in effect on 1 January 1970, the date of his initial disablement. The long legislative history of G.S. § 97-29 clearly establishes a legislative intent that the amendment be applied prospectively only. With one exception, every amendment to G.S. § 97-29 since its adoption has provided that the amendment "shall apply only to cases originating on and after" the effective date of the amendment. *See* 1963 Session Laws, c. 604, s. 9; 1967 Session Laws, c. 84, s. 10; 1969 Session Laws, c. 143, s. 9; 1971 Session Laws, c. 281, s. 7; 1973 Session Laws, c. 515, s. 9; 1973 Session Laws, c. 759, s. 8; 1973 Session Laws, c. 1103, s. 2; and 1973 Session Laws, c. 1308, s. 8. The only exception was the first amendment in 1957 which provided that the amendment applied "on and after July 1, 1957, and shall not apply to injuries occurring before said date." 1957 Session Laws, c. 1217, s. 3.

The wisdom of the Legislature in its intent to apply the amendment now under consideration only prospectively can perhaps be indicated by an example. Assume that a co-worker of this claimant who had worked at the same job and by the claimant's side during his entire employment history became permanently and totally disabled as of 1 January 1970. Assume also, as found by the Commission, that Mr. Smith was only partially disabled as of that same date. The co-worker would have been relegated to the provisions of G.S. § 97-29 as they existed on 1 January 1970 and would have been limited to 400 weeks of com-

pensation at a maximum compensation rate of $50.00 for his *total* disability. Mr. Smith, however, being then only partially disabled, has ultimately obtained benefits payable for his lifetime and in a far greater amount than the co-worker who was disabled permanently and totally for a period at least eight years longer than this claimant. Could the co-worker in 1978, or can he now, reopen his claim on the basis of change of condition and have his claim decided pursuant to the provisions of G.S. § 97-29 as it existed in 1978 or as it exists today? Could the thousands of persons who became only partially disabled in 1970 or prior thereto and whose benefits have been exhausted now apply for current benefits because their condition has changed to a permanent disability? What will the impact be on employers whose current workers' compensation coverage does not extend to these claimants who may have now been separated from their employment for perhaps ten years or more? I fear that the majority opinion will open a Pandora's box of claims never contemplated by the Legislature.

I vote to reverse the decision of the Court of Appeals and reinstate the Award of the Full Commission.

STATE OF NORTH CAROLINA v. MACK H. JONES

No. 3PA82

(Filed 4 May 1982)

1. Constitutional Law § 13; Counties § 5.1; Municipal Corporations § 30.4— county zoning ordinance—aesthetic consideration only—lawful exercise of police power

The trial court erred in quashing a warrant against defendant charging him with failure to erect a fence as required by a county ordinance to enclose his junkyard from an adjacent residential area. The ordinance, which promoted aesthetic values only, did not violate Article I, § 19 of the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution. The Court in finding the ordinance constitutional expressly overruled previous cases to the extent that they prohibited regulation based upon aesthetic considerations alone and adopted a test stating that the diminution in value of an individual's property should be balanced against the corresponding gain to the public from such regulation. The test focuses on the reasonableness of the regulation by determining whether the aesthetic purpose for which the regulation is reasonably related outweighs the burdens imposed on the private property owner by the regulation.

2. Counties § 5.1; Municipal Corporations § 30.3— zoning ordinance—not unconstitutionally vague

A zoning ordinance regulating junkyards was not unconstitutionally vague when read contextually as it apprised persons of ordinary intelligence, who desired to know the law and abide by it, what was required by it.

ON defendant's petition for discretionary review, pursuant to G.S. 7A-31, of the decision of the Court of Appeals (*Webb, J.*, with *Hedrick* and *Arnold, JJ.*, concurring), reported at 53 N.C. App. 466, 281 S.E. 2d 91 (1981), reversing and remanding the judgment entered by *Kirby, Judge*, at the 20 October 1980 Session of BUNCOMBE Superior Court.

Defendant was charged in a warrant with a violation of Buncombe County Ordinance 16401 in that he failed to erect a fence as required by the ordinance to enclose his junkyard from the adjacent residential area. Defendant moved to quash the warrant on the grounds that the ordinance upon which the warrant was based was unconstitutional. District Court Judge W. M. Styles quashed the warrant as being unconstitutional on 25 September 1980 and pursuant to the State's appeal Judge Kirby entered an order on 22 October 1980 finding the ordinance unconstitutional and granting the motion to quash. The State appealed to the Court of Appeals which reversed and remanded. In so holding the Court of Appeals expressed the opinion that the trend in the cases decided by this Court indicates that *State v. Brown*, 250 N.C. 54, 108 S.E. 2d 74 (1959), which invalidated G.S. 14-399 as being based on aesthetic considerations alone, no longer governs.

Buncombe County Ordinance No. 16401, after reciting its purposes and objectives and seventeen definitions, states in pertinent part:

> SECTION FOUR. PROHIBITIONS
>
> Except as hereinafter provided, it shall be unlawful after the effective date of this Ordinance for any person, firm or corporation, or other legal entity to operate or maintain in any unincorporated area of Buncombe County a junkyard or automobile graveyard within one hundred yards of the center line of any "public road" within one quarter mile of any "school" or within any residential area. For the purposes of this Ordinance, a junkyard or automobile graveyard shall be

within a residential area if there are twenty-five (25) or more housing units within a geographical area comprised of a one-fourth (1/4) mile wide strip contiguous and parallel to the external boundary lines of the tract of real property on which said automobile graveyard or junkyard is located.

SECTION FIVE. EXCEPTIONS

A. This Ordinance shall not apply to service stations, repair shops or garages.

B. Junkyards or automobile graveyards may be operated and/or maintained without restrictions if and providing that said junkyard or automobile graveyard shall be entirely surrounded by a fence, or by a wire fence and substantial vegetation of sufficient height and density as to prevent as nearly as is practical any contents of said junkyard from being visible from any public road or residence, taking into consideration the surrounding terrain. The fence or wire fence shall have at least one and not more than two gates for purposes of ingress and egress. The gates shall be closed and securely locked at all times, except during business hours.

In the event that an operator or maintainer of an automobile graveyard or junkyard prohibited herein chooses to surround said automobile graveyard or junkyard with a fence or a wire fence and substantial vegetation as hereinabove provided for, the Environmental Health Services Division of the Buncombe County Health Department shall have the discretion to determine whether or not the said fencing and/or vegetation is substantial and of sufficient height and density as to prevent as nearly as is practical any contents of said automobile junkyards or graveyards from being visible from any public road or residence, taking into consideration the surrounding terrain. The said Environmental Health Services Division shall be available to assist an operator or maintainer of an automobile graveyard or junkyard, upon request by the said operator or maintainor, in the formation of plans for said fencing and/or vegetation. The fence or wire fence and vegetation shall be maintained in good order and shall not be allowed to deteriorate.

Keith S. Snyder, Buncombe County Attorney, by Stanford K. Clontz, Assistant Buncombe County Attorney, for the State.

Penland and Barden, by Stephen L. Barden, III, and Talmage Penland, for defendant-appellant.

BRANCH, Chief Justice.

Defendant's petition for discretionary review, allowed by this Court on 14 January 1982, presents two questions for review. First, is the ordinance in question unconstitutionally vague, and second, does the ordinance in question violate the "due process" clause of the United States Constitution or the "law of the land" clause of the Constitution of North Carolina because it constitutes an exercise of the police power for aesthetic reasons alone? We will consider these questions in reverse order.

[1] Defendant contends that the ordinance in question violates Article I, § 19 of the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution. Article I, § 19 of our State Constitution states that:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.

The Fourteenth Amendment to the United States Constitution, § 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This Court initially considered the question of whether regulation based on aesthetic reasons alone was an unconstitutional exercise of the police powers by the State in requiring the screening from view of certain junkyards in *State v. Brown*, 250 N.C. 54, 108 S.E. 2d 74 (1959). We concluded there that the provi-

sions of G.S. 14-399 conflicted with the rights guaranteed the citizens of this State by Article I, sections 1 and 17 (presently section 19), of the Constitution of North Carolina, commonly referred to as the "law of the land" clause, and held G.S. 14-399 to be unconstitutional. *Brown* recognized that while

> [w]e are in sympathy with every legitimate effort to make our highways attractive and to keep them clean; even so, we know of no authority that vests our courts with the power to uphold a statute or regulation based purely on aesthetic grounds without any real or substantial relation to the public health, safety or morals, or the general welfare.

Id. at 59, 108 S.E. 2d at 78.

One year later the holding in *Brown* was reaffirmed in *Restaurant, Inc. v. Charlotte*, 252 N.C. 324, 113 S.E. 2d 422 (1960), wherein an injunction was affirmed prohibiting the enforcement of a Charlotte ordinance which prohibited the maintenance of business signs over sidewalks in a designated area of that city. This Court although acknowledging the presumptive validity of legislative acts stated that:

> Courts are properly hesitant to interfere with a legislative body when it purports to act under the police power, but the exercise of that power must rest on something more substantial than mere aesthetic considerations. If it appears that the ordinance is arbitrary, discriminatory, and based solely on aesthetic considerations, the court will not hesitate to declare the ordinance invalid.

Id. at 326, 113 S.E. 2d at 424.

Later in *Horton v. Gulledge*, 277 N.C. 353, 177 S.E. 2d 885, 43 A.L.R. 3d 905 (1970), Justice Lake reiterated the *Brown* holding in dictum in reversing an order of demolition of certain property in Greensboro pursuant to a city ordinance [Housing Code § 10-23(b)] requiring demolition of buildings which could not be brought up to existing Code standards for less than 60% of the value of the building. The *Horton* opinion recognized the United States Supreme Court's view in *Berman v. Parker*, 348 U.S. 26, 33, 99 L.Ed. 27, 38, 75 S.Ct. 98, 102-03 (1954), that "[i]t is within the power of the legislature to determine that the community should

be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled;" however, *Horton* noted that the United States Supreme Court's *Berman* decision construing the Fourteenth Amendment's Due Process Clause, while persuasive, did not control this Court's interpretation of the "law of the land" clause in our State Constitution.

In 1972 this Court again speaking through Justice Lake considered a criminal conviction based upon a zoning ordinance which *inter alia* required junkyard owners located in rural, general industrial districts in Forsyth County to erect solid six feet high fences at least fifty feet from the edge of any public road adjoining the yard. This Court noted there that such requirement bore "no substantial relation to the public health, morals or safety such as will sustain the requirement as a legitimate exercise of the police power of the State for any of these purposes." *State v. Vestal*, 281 N.C. 517, 523, 189 S.E. 2d 152, 157 (1972). However, the State did not contend in *Vestal* that aesthetic considerations alone would support an exercise of police power in such a regulatory manner. In acknowledging that the question presented by *State v. Brown, supra*, was not before this Court in *Vestal*, we stated that:

> [w]e express no opinion thereon [validity of such a requirement based upon aesthetic considerations alone], though we note the growing body of authority in other jurisdictions to the effect that the police power may be broad enough to include reasonable regulation of property use for aesthetic reasons only. [Citations omitted.]

Id. at 524, 189 S.E. 2d at 157.

Finally, this Court espoused a balancing test applicable in situations involving exercise of the police power in the preservation of historically significant structures in *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979). *A-S-P Associates* concerned a challenge of two Raleigh city ordinances creating a historic district in the Oakwood neighborhood and adopting architectural guidelines and design standards to be applied by a Historic District Commission with provision for civil and criminal penalties for property owners failing to comply with the ordinance. Although noting the *Vestal* acknowledgement of the growing body of authority in other jurisdictions recognizing

that the police power may be broad enough to include reasonable regulation of property for aesthetic reasons alone, we stated that we were not prepared to endorse such a broad concept of the scope of the police power, but we found no difficulty in holding that the police power encompasses the right to control the exterior appearance of private property when the object of such control was the preservation of the State's legacy of historically significant structures. We cited with approval A. Rathkopf, *The Law of Zoning and Planning* § 15.01, p. 15-4 (4th ed. 1975), that historic district zoning is not primarily concerned with aesthetics, but rather with preservation for educational, cultural, and economic values. Thus, the general welfare under the police power is served by such historical preservation ordinances through contributing to economic and social stability, preserving past noteworthy architectural techniques, and promoting tourism revenues. *A-S-P Associates*, 298 N.C. at 216-17, 258 S.E. 2d at 450. However, we were careful to note that such a use of the police power even where "other" considerations were involved could result in depreciation in value of an individual's property or restricting to a certain degree the right to develop it as he deems appropriate and for that reason the police power was not to be exercised with reckless abandon or its exercise approved blindly; to the contrary, we expressed the need to apply a test of reasonableness in such situations involving the "balancing of the diminution in value of an individual's property and the corresponding gain to the public." *Id.* at 218, 258 S.E. 2d at 451. The use of such a balancing test would preclude "carte blanche" approval of the exercise of the police power for any reason including aesthetics alone.

Since our recognition in *State v. Vestal*, *supra*, of the "growing body of authority" that "the police power may be broad enough to include reasonable regulation of property use for aesthetic reasons only," 281 N.C. at 524, 189 S.E. 2d at 157, there has been a continued erosion of the former majority rule. The former majority rule that aesthetic considerations alone could not support an exercise of police power is now the minority rule. According to one commentator, the balance shifted in 1975 with the result that by 1980 the alignment stood at sixteen jurisdictions (including the District of Columbia) authorizing regulation based

on aesthetics alone,[1] nine state jurisdictions, including North Carolina, prohibiting regulation based solely on aesthetics,[2] sixteen state jurisdictions where purely aesthetic regulation was an open question,[3] and ten state jurisdictions having no reported cases on aesthetic regulation.[4] Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 U.M.K.C. L. Rev. 125 (1980). Indeed by 1980, nine jurisdictions had joined the new majority position since 1972.[5] Our research indicates that since the publication of that law review article one of the "minority" jurisdictions prohibiting regulation based solely on aesthetics has now joined the "majority" jurisdictions authorizing regulation based on aesthetics alone. *State v. Smith*, 618 S.W. 2d 474 (Tenn. 1981).[6] A previously "silent" jurisdiction has now joined the state jurisdictions where regulation based solely on aesthetics is an open question. *Rockdale County v. Mitchell's Used Auto Parts, Inc.*, 243 Ga. 465, 254 S.E. 2d 846 (1979).

With the 1981 Tennessee decision, the new majority includes seventeen jurisdictions where regulation based exclusively upon aesthetics is permissible, while the minority rule is adhered to by eight jurisdictions, including our own.

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1. California, Colorado, Delaware, District of Columbia, Florida, Hawaii, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New York, Ohio, Oregon, Utah, and Wisconsin.

2. Illinois, Maryland, Nebraska, North Carolina, Rhode Island, Tennessee, Texas, Vermont, and Virginia.

3. Arkansas, Connecticut, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, New Hampshire, New Mexico, North Dakota, Pennsylvania, Washington, and West Virginia. According to the commentator this group of jurisdictions includes some with cases "authorizing regulation based partially upon aesthetic considerations, but have left open the issues of the validity of regulation supported by no other factors and thus based exclusively upon aesthetic considerations." Bufford, 48 U.M.K.C. L. Rev., *supra* at 127.

4. Alabama, Alaska, Arizona, Georgia, Idaho, Nevada, Oklahoma, South Carolina, South Dakota, and Wyoming, *Id.* at 130-31.

5. California (1979), Colorado (1978), Massachusetts (1975), Michigan (1975), Mississippi (1974), Montana (1977), New Jersey (1974), New York (1977), and Utah (1975). *See id.* at 131-44.

6. Thus, Tennessee became the tenth state jurisdiction to join that "growing body of authority" between 1972 and 1981.

Since 1972 four state jurisdictions have considered regulation of junkyards based solely on aesthetics and concluded that such regulation was valid. *National Used Cars, Inc. v. City of Kalamazoo*, 61 Mich. App. 520, 233 N.W. 2d 64 (1975); *State v. Bernhard*, 173 Mont. 464, 568 P. 2d 136 (1977); *State v. Smith, supra;* and *Buhler v. Stone*, 533 P. 2d 292 (Utah 1975).

Buhler v. Stone, supra, involved a county ordinance which prohibited the collection of, among other items, "junk, scrap metal . . . or . . . abandoned . . . vehicles" if such items were "unsightly and in public view." 533 P. 2d at 293. In response to plaintiff's attack upon the ordinance as not within the police powers and in holding the ordinance constitutional, the Utah Supreme Court answered that:

> It is true that the police power is generally stated to encompass regulation of matters pertaining to the health, morals, safety or welfare. But those are generic terms. The promotion of the general welfare does not rigidly limit governmental authority to a policy that would "scorn the rose and leave the cabbage triumphant." Surely among the factors which may be considered in the general welfare, is the taking of reasonable measures to minimize discordant, unsightly and offensive surroundings; and to preserve the beauty as well as the usefulness of the environment.

Id. at 294.

The Court of Appeals of Michigan held that a city ordinance requiring that junkyards be shielded from view may be upheld on aesthetic grounds alone in *National Used Cars, Inc. v. City of Kalamazoo, supra*. In noting that the plurality view in 1975 seemed to be that an ordinance based upon aesthetic consideration alone was invalid, the court remarked that:

> [i]t is our opinion that the plaintiff advocates an obsolete and refuted point of view which is based on an overly-restrictive perception of a City's police power.
>
> We are well aware of the traditional judicial reluctance to uphold legislation on aesthetic grounds alone. [Citing *Brown, supra*, in a footnote.] But we find persuasive the reasoning of the more recent decisions, which espouse the contrary and we believe more modern view.

61 Mich. App. at 523, 233 N.W. 2d at 66. That court concluded that "a community's desire to enhance the scenic beauty of its neighborhoods by keeping junkyards concealed from view is clearly a legitimate feature of the public welfare." *Id.* at 524, 233 N.W. 2d at 67. The Michigan court upheld a "very specific enactment" which required junkyards to be concealed from view by a solid fence eight feet high.

A state statute and the regulation promulgated thereunder providing that the license required when a person has four or more junk vehicles at a single location constituting a motor vehicle wrecking facility would not be granted unless the vehicles were shielded from public view was held to be constitutional in *State v. Bernhard, supra.* The Supreme Court of Montana noted that other jurisdictions had taken the view that aesthetic considerations alone may warrant the exercise of the police power regulating motor vehicle junkyards in holding that "a legislative purpose to preserve or enhance aesthetic values is a sufficient basis for the state's exercise of its police power . . . ." 173 Mont. at 468, 568 P. 2d at 138.

Most recently the Tennessee Supreme Court in *State v. Smith, supra,* repudiated its prior adherence to the traditional view that aesthetics alone could not support the exercise of the police power. *Smith* involved a conviction for violating a statute which prohibited the establishment of an automobile junkyard within a specified distance from a state highway and operating such a junkyard without a proper permit or license. This case implicitly overruled Tennessee's former adherence to the traditional view espoused in *City of Norris v. Bradford,* 204 Tenn. 319, 321 S.W. 2d 543 (1958), by stating that

> the views expressed in *City of Norris v. Bradford* . . . must be considered in the light of the facts of that case and that they cannot be literally applied to all of the myriad concerns and problems facing state and local governments at this time . . . . The rule stated in *City of Norris v. Bradford* . . . in our opinion, no longer represents the prevailing view on that subject.

618 S.W. 2d at 477.

The Tennessee court concluded that modern societal aesthetic considerations such as concern for environmental pro-

tection, control of pollution, and prevention of unsightliness may well constitute a legitimate basis for the exercise of the police power. We agree with the rationale expressed in *Smith* and the other decisions representing the new majority.

In light of our 1972 perception in *Vestal* that the trend was growing toward allowing such regulation, the continued shift such that the trend now represents the new majority, and our general agreement with the views expressed in the recent cases above cited, we expressly overrule our previous cases to the extent that they prohibited regulation based upon aesthetic considerations alone. We do not grant blanket approval of all regulatory schemes based upon aesthetic considerations. Rather, we adopt the test expressed in *A-S-P Associates* that the diminution in value of an individual's property should be balanced against the corresponding gain to the public from such regulation. Some of the factors which should be considered and weighed in applying such a balancing test include such private concerns such as whether the regulation results in confiscation of the most substantial part of the value of the property or deprives the property owner of the property's reasonable use, and such public concerns as the purpose of the regulation and the manner in achieving a permitted purpose. 1A. Rathkopf, *The Law of Zoning and Planning* § 4.02, at 4-3 (4th ed. 1982). Aesthetic regulation may provide corollary benefits to the general community such as protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community, and promotion of the comfort, happiness, and emotional stability of area residents. *See,* Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality,* 34 Vand. L. Rev. 603 (1981). Such corollary community benefits would be factors to be considered in balancing the public interests in regulation against the individual property owner's interest in the use of his property free from regulation. The test focuses on the reasonableness of the regulation by determining whether the aesthetic purpose to which the regulation is reasonably related outweighs the burdens imposed on the private property owner by the regulation. *Id.* at 649. *See e.g., Berg. Agency v. Township of Maplewood,* 163 N.J. Super. 542, 559, 395 A. 2d 261, 270 (1978). We therefore hold that reasonable regulation based on aesthetic considerations may constitute a valid basis for

the exercise of the police power depending on the facts and circumstances of each case. We feel compelled to caution the local legislative bodies charged with the responsibility for and the exercise of the police power in the promulgation of regulations based *solely* upon aesthetic considerations that this is a matter which should not be delegated by them to subordinate groups or organizations which are not authorized to exercise the police power by the General Assembly.

[2] Defendant-appellant also challenges the Buncombe County ordinance as being unconstitutionally vague. We think the Court of Appeals' opinion adequately addressed and answered defendant's contentions on this point. In addition, we note that statutory language must of necessity be somewhat general because of the impossibility of describing in minute detail each and every situation or circumstance that the statute or ordinance must encompass. An ordinance or statute must be considered as a whole, and its language should not be isolated in order to find fault with its descriptive character when the general sense and meaning of the statute can be determined from reading such language in proper context and giving the words ordinary meaning. *See Woodhouse v. Board of Commissioners*, 299 N.C. 211, 225-26, 261 S.E. 2d 882, 891 (1980); *State v. Fox*, 262 N.C. 193, 136 S.E. 2d 761 (1964). Statutory language should not be declared void for vagueness unless it is not susceptible to reasonable understanding and interpretation. *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966).

In our view the ordinance in question when read contextually apprises persons of ordinary intelligence, who desire to know the law and abide by it, what is required by it.

For the reasons here stated, we affirm the Court of Appeals' decision and hold that the ordinance in instant case does not violate Article I, § 19 of the Constitution of North Carolina or the Fourteenth Amendment to the United States Constitution, nor is the language of the ordinance unconstitutionally vague.

Affirmed.

STATE OF NORTH CAROLINA v. RICKY DALE BROCK

No. 47A81

(Filed 4 May 1982)

1. **Criminal Law § 165— necessity for objection to prosecutor's jury argument**

While the appellate court will review alleged improprieties in the prosecutor's jury argument in a capital case despite defendant's failure timely to object, the general rule that objection to the prosecutor's jury argument must be made prior to the verdict for the alleged impropriety to be reversible on appeal applies in a first degree murder case in which defendant received a sentence of life imprisonment.

2. **Criminal Law §§ 48, 102.10— defendant's post-arrest silence—purpose for which admissible**

In a first degree murder case in which defendant testified that he denied his guilt when confronted by his girlfriend at the time of his arrest and the State presented rebuttal evidence that defendant made no such denial but remained silent, the rebuttal evidence was properly admissible only for purposes of challenging defendant's earlier exculpatory statement, and although the prosecutor could not argue defendant's silence as substantive evidence of defendant's guilt, he was entitled to comment on this contradictory evidence in his final argument as a ground for disbelief of defendant's story.

3. **Criminal Law §§ 48, 102.6— argument about defendant's post-arrest silence—waiver of objection—absence of prejudice**

Defendant waived objection to two comments by the prosecutor in his jury argument concerning defendant's post-arrest silence by failing to object thereto at the trial. Another comment by the prosecutor about defendant's failure to deny his guilt when confronted by his girlfriend at the time of his arrest, to which defendant did object, was not so prejudicial as to deny defendant a fair trial. In any event, any prejudice to defendant by the prosecutor's comments about his post-arrest silence was negated by the court's instruction to the jury that defendant had a right to be and remain silent and that defendant's silence was not to be considered in any manner to be an admission of his guilt or as evidence of his guilt.

4. **Homicide § 25— first degree murder—instructions on proximate cause of death**

The trial court's instructions that in order for the jury to find defendant guilty of first degree murder on the basis of premeditation and deliberation the State must prove first "that the defendant intentionally and with malice hit *or* shot [deceased] with a deadly weapon" and second "that the hitting *and* shooting was a proximate cause of [deceased's] death" did not permit the jury to convict defendant of first degree murder without finding that his act or acts inflicted the fatal wounds. Rather, a reading of the entire charge to the jury shows that the jury could not have returned a verdict of guilty of first degree murder based on premeditation and deliberation without an express finding that defendant's act or acts were a proximate cause of deceased's death.

5. Criminal Law § 7.5— doctrine of duress—instruction not required

The common law doctrine of duress does not recognize any duress, even the threat of imminent death, as sufficient to excuse the intentional killing of an innocent human being and does not apply if defendant had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm. Therefore, defendant was not entitled to an instruction on duress in a prosecution for first degree murder where all the evidence tended to show that defendant was either the actual killer of the victim or that he assisted another in killing the victim and where the evidence also showed that defendant had a reasonable opportunity to run away from the building in which the killing occurred and avoid any further aid to the other person involved in the killing without undue exposure to death or serious bodily harm when he left the building to talk with the driver of a vehicle which had driven up outside the building.

6. Homicide § 24.1— presumptions of malice and unlawfulness—instructions not improper

The trial court's instructions in a first degree murder case did not create impermissible presumptions of malice and unlawfulness in light of the total absence of any evidence to rebut the existence of malice and unlawfulness.

APPEAL by defendant from judgment entered by *DeRamus, Judge*, at the 2 February 1981 Criminal Session of STANLY Superior Court.

Defendant was tried on bills of indictment charging him with (1) armed robbery and (2) murder. Bobby Clyde Gardner was the alleged victim of both offenses.[1]

Evidence presented by the state, including key testimony by Melvin Tracy Caudle, is summarized in pertinent part as follows:

Defendant asked Caudle to help him sell some counterfeit money to Gardner. On the evening of 12 November 1980 defendant, Caudle and Gardner went to defendant's garage. After arriving there, defendant began shooting Gardner and then beat him on his head with a hammer. Thereafter, defendant removed a Derringer and a roll of money from Gardner's pockets and shot him again. Gardner continued to live and defendant hit him several more times with the hammer. At this point, a vehicle drove up outside of the garage and defendant went out to speak to the driver, McMahon.

When defendant reentered the garage, he wrapped the victim's legs with tire chains and put the body in the back of a sta-

1. The jury returned a verdict of not guilty on the armed robbery charge.

tion wagon. Defendant told Caudle to clean up the garage while he disposed of the body. When defendant returned, he gave Caudle the weapons used in the murder and instructed Caudle to get rid of them. Caudle cooperated only because he was afraid defendant would kill him.

Caudle left the garage, went to his girlfriend's home, and told her what had happened. He then went to work and told his supervisor what had happened. Upon the advice of the supervisor, Caudle went to the sheriff and told his story. He showed the police where he had hidden the weapons. Gardner's body was found in a creek not far from the garage.

Evidence presented by defendant is summarized in pertinent part as follows:

When defendant arrived at the garage on the evening in question, he found Gardner lying on the floor with Caudle standing over him. Caudle shot at defendant, forced him to assist with loading the body and threatened to kill him if he told anyone. Caudle had told several people prior to the shooting that something big was going to happen in Norwood and that they would read about it. McMahon, the person who drove up and talked with defendant during the killing, testified that he noticed no blood on defendant, this testimony conflicting with Caudle's statement that defendant had blood all over him. Defendant attempted to offer into evidence the testimony of I. B. Nichols, a licensed polygraphist, who stated on voir dire that he had tested defendant and the results indicated that defendant was being completely truthful when he stated that he did not shoot Gardner but that Caudle did. The trial judge ruled this evidence inadmissible.

Other evidence pertinent to the questions raised on appeal will be alluded to in the opinion.

With respect to the murder charge, the court submitted the case to the jury on first-degree murder, second-degree murder, or not guilty. The jury returned a verdict finding defendant guilty of first-degree murder based on malice, premeditation and deliberation.[2]

2. The state's brief indicates that a hearing to determine punishment was conducted pursuant to G.S. 15A-2000 *et seq.* and that the jury recommended a sentence of life imprisonment.

From judgment imposing a life sentence, defendant appealed.

Attorney General Rufus L. Edmisten by Assistant Attorney General J. Michael Carpenter and Assoicate Attorney Daniel C. Higgins for the State.

Malcolm R. Hunter, Jr., Assistant Appellate Defender, for defendant.

BRITT, Justice.

All of defendant's assignments of error relate to the prosecutor's jury argument and the trial court's jury instructions. We find no merit in any of the assignments and leave undisturbed the judgment of the trial court.

Defendant contends first that the prosecutor violated his rights guaranteed by Article I, Section 23, of the state constitution, and the fifth and fourteenth amendments to the federal constitution "by arguing to the jury that evidence of defendant's post-arrest silence was evidence of his guilt of the crimes charged."

Defendant testified that while he was present at the murder scene, he was not the perpetrator and participated only because of coercion. On direct examination, he made no reference to any statement made at the time of his arrest. On cross examination defendant testified that on the date of the offense he was living with his girlfriend; that when the officers came to his apartment and informed him of the murder charges against him, his girlfriend hugged his neck and said, "You didn't do this, did you?"; that he replied "No."; and that he believed Officers Lowder, Almond and Covington were present at the time he made the answer to his girlfriend.

Also on cross examination defendant testified that at the time the officers came to his home and served the murder warrant on him, he told Sheriff McSwain that he did not commit the murder; and that he further told Mr. McSwain after he was brought to the courthouse that he did not do it.

On rebuttal, Deputy Sheriff Lowder was called as a witness by the state. He testified that he was one of the officers that went to the defendant's home for the purpose of serving the

murder warrant on him; that he read the allegations in the warrant to defendant; that defendant's girlfriend was present at the time; that immediately thereafter she said, "Ricky, tell me you didn't do it."; that she made this statement two or three times; and that defendant made no response to her.

At defendant's request, the trial court agreed to instruct the jury that defendant's post-arrest silence could not be considered as evidence of his guilt; and that the evidence of defendant's silence would be admitted only to contradict and impeach the testimony of defendant that he did not remain silent when arrested. The court instructed the prosecutor that he was not to argue to the jury or imply that defendant's silence was an admission of guilt, but that he could argue the discrepancy in defendant's testimony and Mr. Lowder's testimony for impeachment purposes.

Under this assignment of error, defendant complains about the following portions of the prosecutor's argument to the jury:

> You can't believe what this defendant said. He has changed his story several times—*didn't tell or wouldn't tell the story to start with.* (Emphasis added.) Rp 146.
>
> * * *
>
> First of all, let's go back before that, and look how the defendant reacted when he was arrested. This is for you to consider. He said that he responded to his girlfriend and said, no, he didn't do it. What did Roger Lowder say—he said he was right there—false testimony. Roger Lowder has no interest in the outcome of this case. Trying to get the truth. His own girlfriend—his own girlfriend—tell me you didn't do it—tell me you didn't do it. Has she testified? Think about it—think about it. Dwight Farmer—many days later—many days later. Then by this time he had his story, he thought, put together. . . . Rp. 180. And would you expect him to tell one bit of the truth—a man who acts like this—*a man who never told a story until many days or weeks later.* R pp 183-184.

It is well-settled in this jurisdiction that control of the arguments of counsel rests primarily in the discretion of the presiding judge. *State v. King,* 299 N.C. 707, 264 S.E. 2d 40 (1980).

State v. Thompson, 293 N.C. 713, 239 S.E. 2d 465 (1977). Ordinarily, objection to the prosecuting attorney's jury argument must be made prior to the verdict for the alleged impropriety to be reversible on appeal. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978); *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970). Failure to object waives the alleged error. *Id.*

[1] An exception to this rule is found in capital cases where, because of the severity of the death sentence, this court will review alleged improprieties in the prosecutor's jury argument despite defendant's failure to timely object. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). However, even in death cases the impropriety must be extreme for this court to find that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel failed to find prejudicial when he heard it. *Id.* In the case at bar, since defendant received a sentence of life imprisonment the general rule and not the exception applies.

[2] The record reveals that defendant had no objection to these remarks of the prosecutor when they were made at trial. He has thus waived any impropriety and will not be allowed to raise these objections for the first time on appeal.

One comment by the district attorney, of the same nature as the above arguments, did drawn an objection from defendant.

> The defendant gets arrested—doesn't deny to his girlfriend that he's guilty—does not deny it. He even knows she was trying to persuade him to say it isn't so—that's strong language, folks—strong evidence— . . . . R p 184.

Following this objection the court asked counsel to approach the bench. While the court did not rule on the objection, the prosecutor in resuming his summation changed his line of argument. Defense counsel did not request a curative instruction.

[2, 3] This court has consistently held that the prosecutor may argue to the jury the relevant law, facts in evidence and all reasonable inferences to be drawn therefrom. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). Defendant testified that he denied his guilt when confronted by his girlfriend at the time of his arrest. In

rebuttal, the state presented evidence that defendant made no such denial but in fact remained silent. The rebuttal evidence was properly admissible, but only for purposes of challenging defendant's earlier exculpatory statement. *See Doyle v. Ohio*, 426 U.S. 610 (1976). Although he could not argue defendant's silence as substantive evidence of defendant's guilt, the prosecutor was entitled to comment on this contradictory evidence in his final argument as grounds for disbelief of defendant's story. Reviewing the prosecutor's comment in context, we find that the argument was not so prejudicial as to deny defendant a fair trial. The prosecutor's argument was cut short by defendant's objection before it reached the level of reversible error. Failure of defense counsel to seek curative instructions indicates that he was satisfied that no prejudice had accrued at that point.

Finally, with regard to all the above portions of the prosecutor's closing argument now objected to by defendant, we note that any prejudice to defendant was negated by the court's thorough instructions to the jury that defendant had a right to be and remain silent and that defendant's silence was not to be considered in any manner to be an admission of his guilt or as evidence of his guilt.

The assignment of error is overruled.

In his second assignment of error, defendant takes exception to numerous other comments made by the prosecutor during his final argument. We find it unnecessary to set forth these remarks now excepted to on appeal as none were objected to at trial. Defendant has waived those alleged errors. Further, it is well-established that counsel is allowed wide latitude in arguing hotly contested cases. *State v. Johnson, supra; State v. Covington, supra.* The prosecuting attorney has the duty to use every legitimate means to bring about a just conviction and to make an earnest and vigorous presentation of the state's case. *State v. King, supra; State v. Monk, supra.* We perceive no abuse of discretion by the court in its control of counsel's closing arguments.

[4] Defendant's next assignment of error concerns the court's instructions on the elements of first-degree murder. He contends that the court committed reversible error by failing to explicitly

instruct the jury that they must find defendant's acts caused the victim's death in order to convict him of first-degree murder.

The portions of the charge excepted to required that in order for the jury to find defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation, the state must prove first "that the defendant intentionally and with malice hit *or* shot Bobby Clyde Gardner, Sr. with a deadly weapon" and second "that the hitting *and* shooting was a proximate cause of Gardner's death." (Emphasis added.)

Defendant's contention is based on conclusions he submits the jury could have drawn from the evidence presented. The state's evidence, through the testimony of Caudle, established defendant as the sole perpetrator of the murder. Defendant, on the other hand, testified that at gunpoint he assisted Caudle in disposing of the body and cleaning up the gore in the garage. He further testified that he never hit or shot Gardner. Defendant asserts that from this evidence the jury might have found that defendant participated in the crime to a greater degree than he admitted to and, that he, in fact, inflicted one or more of the wounds on Gardner. Should the jury have so found, he argues, then under the instruction referred to above the jury could have convicted him of first-degree murder without finding that his act or acts inflicted the fatal wounds. Defendant's argument is without merit.

A person is criminally responsible for a homicide only if his act caused or directly contributed to the death of the victim. *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979); *State v. Luther*, 285 N.C. 570, 206 S.E. 2d 238 (1974). The state must establish that the accused's act was a proximate cause of the death in order to obtain a conviction for murder. *State v. Minton*, 234 N.C. 716, 68 S.E. 2d 844 (1952).

A reading of the entire charge to the jury shows that the jury could not have returned a verdict of guilty of first-degree murder based on premeditation and deliberation without an express finding that defendant's act or acts were a proximate cause of Gardner's death.

Specifically, Judge DeRamus instructed

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about November 12, 1980, Ricky

> Dale Brock intentionally shot Bobby Clyde Gardner, Sr., with a .44 caliber revolver, a .22 caliber Derringer, or a .20 guage shotgun, or hit Gardner with a hammer or metal tool, and that such hammer or such metal tool was a deadly weapon, and that this or any combination of such shooting and hitting proximately caused Gardner's death, and that Ricky Dale Brock intended to kill Garnder and that he acted with malice after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first degree murder. R p 197.

We hold that this instruction was a correct and proper statement of the law on proximate cause. Clearly under the instructions given, the jury was required to find that defendant inflicted an injury or injuries on the victim and that such injury or injuries proximately resulted in death.

[5] By his fourth assignment of error, defendant contends that the court committed reversible error by failing to instruct the jury on the defense of duress.

It is the duty of the court to instruct the jury on all the substantive features of a case raised by the evidence, *State v. Ferrell*, 300 N.C. 157, 265 S.E. 2d 210 (1980); *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974); and all defenses arising from the evidence constitute substantive features of a case. *State v. Jones*, 300 N.C. 363, 266 S.E. 2d 586 (1980); *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769 (1961).

North Carolina recognizes the common law doctrine of duress as a defense to certain prosecutions. *See State v. Sherian*, 234 N.C. 30, 65 S.E. 2d 331 (1951); *State v. Kearns*, 27 N.C. App. 354, 219 S.E. 2d 228 (1975). In *Sherian*, defendants insisted that they had no part in committing the felonious assault; however, they admitted that they aided a person who committed the assault in their presence to escape and avoid arrest and punishment. They contended that they acted under compulsion and through fear of death or great bodily harm at the hands of the person who committed the assault. In view of that evidence, this court held that the trial court erred in not giving the jury specific instructions on the defense of duress or compulsion.

The common law rule does not, however, recognize any duress, even the threat of imminent death, as sufficient to excuse

the intentional killing of an innocent human being. Perkins, *Criminal Law*, p. 951 (2d ed. 1969). This principle was explicitly followed by this court in *State v. Powell*, 106 N.C. 722, 11 S.E. 525 (1890). In that case this court stated

> "And, therefore, though a man may be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder, for he ought rather to die himself than escape by the murder of an innocent."

106 N.C. at 726.

In *State v. Kearns, supra*, the Court of Appeals said:

> It is the general rule that in order to constitute a defense to a criminal charge *other than taking the life of an innocent person*, the coercion or duress must be present, imminent or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Furthermore, the doctrine of coercion cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm. Annot. 40 A.L.R. 2d 908 (1955). (Emphasis added.)

27 N.C. App. at 357.

In no view of the evidence in the case at hand was defendant entitled to an instruction on duress. If defendant was the actual killer of Garnder, as the jury found, clearly the doctrine does not apply. If defendant assisted Caudle in killing Gardner[3], clearly the doctrine does not apply. And, if defendant had a "reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm", he was not entitled to invoke the doctrine. Defendant testified:

> We heard Larry McMahon pulling around to the front of the building and heard him stop. Mr. Caudle said to go see what he wanted. Then Tracy started toward the door there

3. Defendant testified that when McMahon drove up outside the garage, Gardner was still alive, "moving and hollering or talking"; that "Tracy grabbed a piece of plastic and he had one leg and I had the other and we pulled Mr. Gardner behind the wash pit there."

and he stopped right about the side door there. He said for me to go see what Larry wanted. He told me if I said anything to Larry about what had happened that he would kill me and whoever was out there. I then walked to the door and *went outside*. I saw Larry's wife and his little girl, Tonya, with Larry. I told Larry that I thought Gene was with him. Larry asked me if I wanted Gene. I told him that I did not I just thought that Gene was with him. Then Larry asked me something about what I was doing out there and then he said that he would see me later. *I walked back in the door to the garage.*

Larry pulled on up a little bit further and stopped. Tracy told me that he had stopped again. That's when I went out the first bay door to my right and talked to Larry. He was still in his truck, and I went out there and he asked me if I needed any help. Larry was about ten or fifteen feet from the door at that time. The door was still open and cracked. I told Larry I believed that I did not need any help and that someone was there. I walked back in the door and went back over to the wash pit area. (Emphasis added.)

Thus it appears that defendant had a reasonable opportunity to run away from the building and avoid any further aid to Caudle without "undue exposure to death or serious bodily harm."

[6] By his last assignment of error, defendant contends that the court's instructions on malice and unlawfulness were improper because they created a mandatory conclusive presumption as to those elements and thus denied defendant his constitutional right to trial by jury.

The instruction objected to by defendant reads:

If the State proves beyond a reasonable doubt that the defendant intentionally killed Bobby Clyde Gardner, Sr., with a deadly weapon or intentionally inflicted a wound upon Gardner with a deadly weapon that proximately caused his death, the law implies first, that the killing was unlwful; and second, that it was done with malice.

Defendant argues that the instruction was erroneous because at no point in the charge was the jury told that the presumptions

of malice and unlawfulness could be rebutted. Defendant's argument has no merit in view of the contentions and evidence in this case.

The legal presumption set forth in the above instruction has been approved by this court on many occasions. *See State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981); *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).

Speaking for the court in *Hankerson*, *supra*, Justice Exum stated

> 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. (Citations.) Neither, by reason of *Mullaney*, is it unconstitutional to make the presumptions mandatory in the absence of contrary evidence. . . .

288 N.C. at 649.

Our review of the record shows that use of the presumption in the instant case in no way relieved the state of its burden of proving beyond a reasonable doubt the existence of every element of first-degree murder. The record is void of any lawful excuse for the killing of Gardner.[4] Defendant's testimony that Caudle alone committed all the acts in perpetration of the murder did not raise any issue of self-defense or heat of passion upon sudden provocation. Likewise, we rejected defendant's claim of a right to the defense of duress in the previous assignment of error.

4. Defendant's reliance on *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979), is completely misplaced. In that case defendant admitted killing the victim but contended that he did not do so purposely or knowingly and was, therefore, not guilty of deliberate homicide but of a lesser crime. In view of defendant's contention, and evidence presented in support thereof, the U.S. Supreme Court held that a jury instruction to the effect that the "law presumes that a person intends the ordinary consequences of his voluntary acts" violates the fourteenth amendment due process requirement that the state prove every element of a criminal offense beyond a reasonable doubt.

"The state is not required to prove malice and unlawfulness unless there is some evidence of their non-existence . . . ." *State v. Simpson, supra*, at 451; *State v. Hankerson, supra*, at 650. Further, "In the absence of *any* rebutting evidence, however, no issue is raised as to the non-existence of the elemental facts and the jury may be directed to find the elemental facts if it finds the basic facts to exist beyond a reasonable doubt." *State v. White*, 300 N.C. 494, 507, 268 S.E. 2d 481 (1980).

Considering the total absence of any evidence to rebut the existence of malice and unlawfulness, we hold that the instruction given did not create an impermissible presumption.

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

No error.

STATE OF NORTH CAROLINA v. STEPHEN J. MAHER

No. 11PA82

(Filed 4 May 1982)

Criminal Law § 91.4; Constitutional Law § 48— effective assistance of counsel— denial of continuance—inadequate time to prepare defense

The denial of defendant's motion for continuance violated his Sixth Amendment right to the effective assistance of counsel because his trial attorney did not have a reasonable time to prepare and present a defense where defendant's privately retained counsel who had prepared the case for trial withdrew as defendant's attorney four days prior to trial; the trial attorney was then retained by defendant and entered an appearance in the case through his assoicate on that same day; when the case was called for trial, the trial attorney stated to the court that he had been unable to prepare the case for trial due to the shortness of time and his involvement in another trial in a federal court; the attorney told the court that the only information he knew about the case had come from defendant's former attorney and involved a plea bargain arrangement, the terms of which he did not understand; and the attorney was then given fifteen minutes to confer with defendant and the trial then began.

Justice MITCHELL concurs in the result.

Justice BRITT dissenting.

Justices COPELAND and MEYER join in the dissenting opinion.

ON appeal from the decision of the Court of Appeals reported at 54 N.C. App. 639, 284 S.E. 2d 351 (1981), affirming judgments imposed by *Barefoot, Judge*, at the 24 November 1980 Criminal Session of Superior Court, CARTERET County.

By this appeal we consider whether the trial court's denial of defendant's motion to continue operated, under the facts of this case, to deprive defendant of his constitutional right to effective assistance of counsel.

Attorney General Rufus L. Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

Office of the Appellate Defender, by Appellate Defender Adam Stein and Ann B. Petersen, admitted pro hac vice, for the defendant-appellant.

CARLTON, Justice.

I.

Defendant was arrested in Raleigh on 27 July 1980 for the sale and delivery of the controlled substance methaqualone and for possession with intent to sell and deliver the controlled substance methaqualone. Counsel was appointed to represent defendant and his co-defendant, Laurence Edward Whittis, but in early August they retained private counsel, Daniel Work. Defendant agreed to waive venue on 12 August 1980 and the case was transferred to Carteret County on 26 August 1980.

Although defendant was originally indicted for possession with intent to sell and sale of methaqualone, subsequent laboratory tests indicated that the substance in the tablets allegedly sold by defendant was diazepam, also a controlled substance. On 17 November 1980 new indictments were returned which charged defendant with possession and sale of diazepam. These indictments were issued on 17 November 1980 and were served on defendant on 20 November 1980. On 19 November, Mr. Work appeared before the court and requested that he be allowed to withdraw as counsel for the defendant because of a conflict of interest. Judge DeRamus granted the motion to withdraw. On that same day, Allen King, an associate of Reginald Frazier, defendant's trial counsel, appeared before Judge DeRamus and in-

formed him that Frazier had been retained to represent defendant. At that time Work reportedly told the judge that he had the case ready for trial and that he would assist Frazier in preparing for trial. King was told by the prosecutor, George Beswick, on Thursday, 20 November, that that the case would be called for trial on Monday, 24 November. King advised the court that Frazier was involved in a rape trial in Camp Lejeune which was expected to last the rest of that week and part of the next. He moved for a continuance and the motion was denied.

The case was called for trial on 24 November 1980 and Frazier, appearing for defendant, moved for a continuance on the grounds of lack of time for adequate preparation and of his involvement in a trial in progress in federal court. He told Judge Barefoot that he had been unable to prepare the case and had not even talked with defendant. The judge denied the motion to continue, and Frazier moved to be permitted to withdraw. This motion was likewise denied. A colloquy among the court, the district attorney and Fraizer then ensued. Frazier advised the court, "I can say I am totally unprepared to render to this defendant competent, effective assistance of counsel." Judge Barefoot then advised Frazier, "I will give you 15 minutes to talk to him, but we will try him in 15 minutes." The court then recessed for fifteen minutes and the case proceeded to trial.

The jury returned verdicts of guilty of possession with intent to sell and deliver diazepam and of sale and delivery of diazepam. Defendant was sentenced to three to four years' imprisonment for possession and was given a consecutive sentence of three to four years' imprisonment for the sale and delivery.

Defendant appealed to the Court of Appeals. That court, in an opinion by Chief Judge Morris in which Judges Hedrick and Wells concurred, found no error. Defendant gave notice of appeal to this Court on the basis of a substantial constitutional question pursuant to G.S. 7A-30(1) and alternatively petitioned our discretionary reivew pursuant to G.S. 7A-31. The Attorney General moved to dismiss the appeal on the ground that no substantial constitutional question was presented. On 14 January 1982, we allowed defendant's petition for discretionary review and denied the Attorney General's motion to dismiss.

II.

The question dispositive of this appeal is this: Under the facts of this case, did the trial court's denial of defendant's motion for a continuance operate to deprive defendant of his constitutional right to effective assistance of counsel? To answer the issue so posited, we must determine whether, because of the refusal to allow a continuance, defendant's attorney had adequate time to investigate, prepare and present a defense. The issue is *not* as incorrectly assumed by the Court of Appeals, whether defendant actually suffered prejudice by virtue of defense counsel's performance at trial. We are here concerned with the relationship between defendant's sixth amendment guarantee of effective assistance of counsel of his own choosing and the implicit constitutional guarantee that an accused and his counsel shall have a reasonable time to investigate, prepare and present defendant's defense. We have previously addressed this bifocal constitutional guarantee in *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977), and find that decision controlling here.

Although a motion for a continuance is ordinarily addressed to the discretion of the trial judge and is reviewable only upon a showing of an abuse of discretion, when the motion is based on a constitutional right the ruling of the trial judge is reviewable on appeal as a question of law. *E.g., State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742. Defendant's motion for a continuance in this case was based on his constitutional right to effective assistance of counsel and, thus, is fully reviewable as a question of law.

Defendant's claim here is based not on his attorney's competency or performance at trial, but on the adequacy of the time given his attorney to prepare for trial. The record discloses the relevant circumstances to be these: Defendant's privately retained counsel, Daniel Work, who had prepared the case for trial, withdrew as defendant's attorney four days prior to trial. Frazier was retained by defendant and entered an appearance in the case through his associate, Allen King, on that same day. The court was informed that Frazier was then trying a case in federal court which was expected to last into the next week. On Monday, 24 November, Frazier appeared with defendant for the first time. He stated to the court that he had been unable to prepare the case for trial due to the shortness of time and his involvement in

another trial. Frazier told the court that the only information he knew about the case had come from Work and involved a plea bargain arrangement, the terms of which he did not understand. Frazier was given fifteen minutes to confer with defendant and the trial began.

As stated by Justice (now Chief Justice) Branch in *McFadden*,

> It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusers and witnesses against him that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case.

292 N.C. at 616, 234 S.E. 2d at 747. In *McFadden*, defendant had retained private counsel, Mr. Powell, who had investigated and prepared the case for trial. On the morning of the trial, Powell's associate, Mr. Parrish, appeared and informed the court that Powell was engaged in another trial. The court denied defendant's motion for a continuance and directed Parrish to represent defendant. In granting defendant a new trial, this Court stated:

> In instant case defendant, who was charged with a felony, met and talked with Mr. Parrish for the first time about ninety minutes before the case was called for trial. Mr. Parrish had practiced law for eighteen months and had previously tried only one jury case. He knew nothing about this case until he arrived in court. All of the preliminary hearings and preparations for trial had been handled exclusively by Mr. Powell. Defendant indicated to Mr. Parrish on the day of the trial that he wanted his retained counsel to represent him. Under these circumstances defendant was denied effective assistance of counsel because he and Mr. Parrish did not have a reasonable time in which to prepare and present a defense.

Id. Although the circumstances of this case are somewhat different from *McFadden* in that defendant here was in fact represented by the attorney he chose to represent him, the remaining factors are remarkably similar. The attorney who

represented the defendant at trial, both here and in *McFadden*, had not prepared the case, had not met with the defendant prior to the morning of trial, and was given little time in which to prepare a defense. Counsel in *McFadden* talked with the defendant for ninety minutes prior to the trial; counsel here was given fifteen minutes. Under these circumstances, where counsel is retained only four days prior to trial through no fault of defendant's, is concurrently involved in another trial, and is allowed only a few minutes to confer with his client prior to trial, failure of the trial court to grant a continuance denied defendant effective assistance of counsel.

The Court of Appeals rejected defendant's constitutional claim because he failed to show that the denial of his continuance motion resulted in prejudice. In support of this holding the court cited *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973), and *State v. Moses*, 272 N.C. 509, 158 S.E. 2d 617 (1968) (per curiam). These cases do indeed hold that defendant must prove both error and prejudice in the denial of his continuance motion in order to entitle him to a new trial. The prejudice which must be shown, according to the Court of Appeals' opinion, is that the trial was a "farce and mockery of justice."[1] *See State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974). In *Sneed* defendant claimed that his attorney was so incompetent as to render his assistance ineffective and, in order to show that he had been denied the right to counsel, he, of necessity, had to prove that the trial was a farce and mockery of justice. In other words, this defendant had to prove the prejudice, the farce and mockery, in order to prove the claim of ineffective assistance of counsel. In *Moses*, defendant made only a general constitutional challenge to the denial of his motion for continuance, and the *Robinson* facts indicated that defense counsel had had an adequate time to prepare for trial. Moreover, Robinson asked for the continuance on the ground that he wanted to be tried before a different judge and no need for additional time to prepare for trial was mentioned. Defendant here

1. For cases in which the standard of representation, "within the range of competence demanded of attorneys in criminal cases," has been applied, *see State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981); *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979). We are not confronted in this case with the question of what is the standard against which an attorney's performance in a criminal trial is to be measured, nor do we purport to decide that issue.

does not claim that his attorney was incompetent, but that the attorney was given inadequate time to prepare for trial. Once the inadequacy of time to prepare is shown, prejudice from the denial of his constitutional right is presumed under G.S. 15A-1443(b), and the burden falls on the State to show beyond a reasonable doubt that the error was harmless. The State has not done so here.

The Court of Appeals erred in addressing this appeal as though it involved the traditional claim of ineffective assistance of counsel by virtue of inadequate performance of counsel at trial. Unquestionably, prejudice to defendant resulting from counsel's performance at trial must be shown by defendant in that instance. Here, however, the questions are altogether different. Neither performance of counsel at trial nor any resulting prejudice to defendant are relevant. Under the authority of *McFadden*, a defendant's constitutional right to effective assistance of counsel implicitly guarantees defendant, as a matter of law, the right for him and his attorney to have adequate time to prepare a defense. In this instance, the error occurs before the trial even begins. Prejudice is presumed because no one can be certain how trial counsel might have been able to perform if he had had adequate time to perpare for trial. Thus, failure of the trial court to grant a motion to continue which is essential to allowing adequate time for trial preparation, unless the State can prove the absence of prejudice, operates to deny defendant his right to effective assistance of counsel.

In light of the foregoing, we wish to make it abundantly clear that we offer no opinion on Mr. Frazier's performance at trial or on the propriety of his alleged conflict with a trial in another court. The trial court made no findings of fact with respect to the latter and we are bound by the record before us. The record discloses that Mr. Frazier was retained four days prior to this defendant's trial (a Saturday and Sunday included) while he was appearing as counsel in a trial in another court and that he was allowed to consult with defendant for only fifteen minutes prior to the trial of a case with which he was unfamiliar.

Nor is this Court inadvertent to Mr. Frazier's reputation for utilizing delaying tactics in the trial courts in the past. Again, however, we are bound by the facts revealed in the record before us now. As noted in *McFadden*,

> The record does not disclose that [defendant] had in any way contributed to his counsel's absence. The fact that his counsel had accepted other employment which prevented his presence at the trial cannot be charged to defendant so as to deny him his constitutional right to counsel of his own choice. We find nothing in this record that indicates that defendant exercised his right to select counsel of his choice in a manner calculated to disrupt or obstruct the orderly progress of the court.

292 N.C. at 615, 234 S.E. 2d at 746-47.

So it is here. While this defendant did have the benefit of his chosen counsel at trial, he was clearly denied the right to adequate time for him and his counsel to prepare for trial. There is nothing in this record to indicate that defendant chose Mr. Frazier in order to obstruct the orderly progress of the court.

We also wish to reiterate Chief Justice Branch's admonition in *McFadden*:

> We wish to make it abundantly clear that we do not approve of tactics by counsel or client which tend to delay the trial of cases. . . . The judiciary possesses powers to regulate and discipline attorneys who deliberately or negligently impede the progress of our courts. Likewise an accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial. It might well be said that defendant's chosen counsel acted improvidently in that he did not consult the trial judge concerning a continuance, or in that . . . he did not take steps to prepare [an associate] for the trial of the case and consult defendant as to the possibility that his associate might proceed with the trial in the event that a continuance was not obtained. *However, any fault of counsel without defendant's concurrence cannot be imputed to defendant so as to preclude him from obtaining counsel of his choice.*

292 N.C. at 616, 234 S.E. 2d at 747 (emphasis added).

Defendant also contends that certain comments made by the district attorney during the closing argument amounted to an im-

permissible comment on his fifth amendment right to remain silent. Because these comments may not be repeated on retrial, we do not address this contention.

In summary, we find that the trial court's denial of defendant's motion for a continuance infringed upon defendant's constitutional right to effective assistance of counsel and that he is entitled to a new trial on both charges. The decision of the Court of Appeals is reversed and the cause is remanded to that court with instructions to remand to the Superior Court, Carteret County, for a new trial.

Reversed and remanded.

Justice MITCHELL concurs in the result.

Justice BRITT dissenting.

I respectfully dissent, and vote to affirm the decision of the Court of Appeals.

The majority awards defendant a new trial on the ground that his constitutional rights were violated when the trial court did not afford him and his counsel adequate time to prepare for trial. I do not think there are sufficient established facts in the record to justify this determination. In my view the majority opinion creates another stumbling block in bringing defendants to trial.

In *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977) this court said:

> It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusers and witnesses against him that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case. (Citations.)

292 N.C. at 616.

The burden is on defendant to show that he and his counsel were not afforded adequate time to prepare for trial. *State v.*

Sneed, 284 N.C. 606, 201 S.E. 2d 867 (1974). In my view, defendant has not carried that burden. The record indicates that he and Attorney King were notified one week prior to 24 November 1980 that the case would be called for trial on that date; that defendant's prior counsel, Attorney Work, had engaged in considerable discovery and investigation and at least four or five days prior to trial offered to provide defendant's new counsel with the results of his labors; that Attorney King made a motion for continuance on Thursday before the trial on Monday and the court denied the motion; and that the district attorney advised defendant himself on Thursday or Friday that the case would be called on Monday. In awarding a new trial the majority is assuming, among other things, that at no time between 19 November 1980 and 24 November 1980 did defense counsel have an opportunity to talk with defendant, confer with Attorney Work and otherwise prepare for trial.[1] There is nothing in the record showing that Attorney Frazier attempted to do any of these things or that defendant attempted to contact his attorney between Thursday and Monday. Although the record indicates that Attorney Frazier was engaged in the trial of a criminal matter at Camp Lejeune, the record does not disclose when he ceased working on that matter prior to 24 November.

The ground upon which the majority awards a new trial should be addressed in a motion for appropriate relief as provided by G.S. 15A-1415. Under that procedure the trial court could receive sworn testimony from Attorneys King and Frazier and defendant on the question of why they did not have adequate time to prepare for trial.

The majority relies strongly on the decision of this court in *State v. McFadden*, *supra*, in which this court granted the defendant a new trial for the reason that his counsel was not given adequate time to prepare for trial. The facts in that case are distinguishable from the facts of the case at hand.

In *McFadden*, the defendant had employed Attorney Powell to represent him. On the day of trial, Mr. Parrish, one of Mr.

1. It is true that a weekend is included in that period of time. I know of no statute, rule of court or canon of ethics that prevents an attorney from working on a weekend when he knows his client's case is set for trial on Monday.

Powell's junior associates, appeared before the trial judge and advised him that Mr. Powell was at that time engaged in a trial in the U.S. District Court; that Mr. Powell was the only person prepared to try the case; and that he (Mr. Parrish) knew nothing about the case. The record further reveals that Mr. Parrish had practiced law for only 18 months and had previously tried only one jury case. The trial judge denied the motion for continuance and directed Mr. Parrish to represent defendant.

In the case at hand, Attorney King, an associate of Attorney Frazier, was involved in the case for at least five days prior to trial. There is nothing in the record showing his experience in the trial of cases. On the day of trial, Attorney Frazier appeared and moved for a continuance on the ground that he was not prepared. His only explanation for not being prepared was that he had been engaged in the trial of a federal matter; he gave no further specifics. It will be noted that irrespective of the federal case, Attorney Frazier was in superior court on Monday and proceeded to represent defendant when required to do so.

I vote to affirm the Court of Appeals.

Justices COPELAND and MEYER join in this dissenting opinion.

STATE OF NORTH CAROLINA v. JERRY FRANCISCO BOOHER

No. 42A81

(Filed 4 May 1982)

Rape and Allied Offenses § 5— first degree sexual offense—insufficiency of evidence—encouraging and inducing defendant to commit crime

The evidence of a first degree sexual offense was insufficient to be submitted to the jury where the facts indicated the prosecuting witness actively encouraged and ultimately induced defendant to commit the crime. The evidence tended to show that defendant, a Marine Corps corporal, before the incident for which he was tried had attempted to persuade the prosecuting witness, a Marine Corps sergeant, to engage in consensual homosexual acts and the prosecuting witness had refused. The witness decided to arrange a tape-recorded encounter with defendant to document the facts that he was not a homosexual and was not, voluntarily at least, engaging in homosexual acts

with defendant. The prosecuting witness first invited defendant into his apartment, and a lengthy conversation ensued while both men were sitting on the prosecuting witness's loveseat, during which defendant made sexual overtures. The prosecuting witness's knife, which had been under the loveseat, was introduced into the conversation by the witness, who said to the defendant, "Are you going to kill me with that knife?" Later the prosecuting witness apparently *handed the knife* to the defendant or *sat it down next to him*, and defendant then took it from the coffee table and used it to force the prosecuting witness to engage in fellatio.

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

BEFORE *Judge Robert D. Rouse, Jr.*, presiding at the 22 September 1980 Session of ONSLOW Superior Court defendant was tried on an indictment charging him with a first degree sexual offense.[1] He was convicted of first degree sexual offense and sentenced to life imprisonment. He appeals.

Rufus L. Edmisten, Attorney General, by William W. Melvin, Deputy Attorney General, and William B. Ray, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Malcolm R. Hunter, Jr., Assistant Appellate Defender, for defendant appellant.

EXUM, Justice.

The question dispositive of this appeal is whether the evidence was sufficient to be submitted to the jury on the question of defendant's guilt of a first degree sexual offense. We conclude that it was not.

The state's evidence consisted almost entirely of the testimony of Timothy Moore. According to Moore, he first met defendant on 30 May 1980 at a "Welcome Aboard" meeting upon Moore's arrival at Camp Lejeune. At the time of trial Moore was a twenty-one-year-old sergeant in the Marine Corps with three years and two months' service in the Corps. During the Welcome

1. According to the record, the state offered defendant a plea bargain arrangement whereby in return for a plea of guilty to the offense of crime against nature, for which he was separately indicted, defendant would receive a three-to-five year sentence and the state would dismiss the charge of first degree sexual offense. Defendant declined the offer, and the state proceeded to trial only on the first degree sexual offense indictment.

Aboard meeting, defendant invited Moore out that evening to drink beer and shoot pool. Moore agreed, and the two spent the evening together. They both returned to defendant's home where defendant grabbed Moore and bit him on the neck. Upset, Moore left defendant's home on foot. Shortly thereafter, defendant approached Moore in defendant's vehicle and gave Moore a ride to Moore's vehicle. During the ride Moore expressed concern about the bite on his neck and wondered out loud what he would tell his wife. When Moore arrived home he explained to his wife what had happened with defendant.

On 1 July 1980, Moore saw Booher again on base and Booher apologized for what had happened earlier. On 16 July 1980, two days after Moore's wife had given birth to a child and was still hospitalized, defendant called Moore and invited him out. Upon defendant's assurance that "there would be no funny business," Moore agreed to go. They rode around, drank beer, smoked marijuana, got together with other friends of defendant and finally arrived at defendant's home. Defendant asked Moore to remove his clothes, and Moore refused. Defendant told Moore that if he didn't disrobe, defendant would report Moore to military officials as being a homosexual. Moore left, arriving at his home at approximately 1 a.m.

After Moore arrived home, defendant drove up. Moore turned on his tape recorder. Defendant came to the door and Moore invited him inside "for two reasons. Number one, I wanted documentation that I was not having an affair with him, and two, I just, you know, wanted to talk with him and maybe try to straighten things out a little bit. When he came in the tape recorder was playing."

A transcription of the tape-recorded conversation that ensued between Moore and defendant was offered into evidence. According to the transcription, much of what defendant said in response to Moore's statements was inaudible. In essence, the transcription shows that Moore invited defendant into his home by saying, "Let's rap man, let's talk. Hey, come here. I wanna see what I can do for ya, man. . . . I'd like to talk with ya, I'd like to talk with ya." Defendant replied, "You want to hurt me." Moore assured defendant that he did not want to hurt him but only wanted to talk. The two talked at length. The conversation dealt

with: defendant's concern that Moore was going to hurt him and Moore's protestations to the contrary; the prior encounters of the two men; homosexual relationships in general; defendant's expressions of affection for and attempts at physical contact with Moore and Moore's verbal protestations; the relationship between love and hate; and the introduction of a knife belonging to Moore. According to Moore, the conversation took place while the men "were sitting on . . . a small couch, called a loveseat." During it, defendant "was trying to slide his hands and arms . . . above my waist and on my shoulders."

The transcript shows that the first discussion regarding the knife proceeded as follows:

B I need you.

M But you can't have me.

B So?

M If you need me, kill me.

B (Inaudible)

M Jerry Booher, are you gonna kill me with that knife?

B Are you gonna give me what I want?

M Huh?

B Are you gonna give me what I want?

M No.

B Yes you are.

M I can't give you what you want, whether you're holding that knife or not.

B Yes you will.

M I can't and I won't.

B Yes you will.

M I can't and I won't.

B Yes you will.

M No I won't.

B You will.

M I won't.

B Yes you will.

M I can't and I won't. No, I can't give it to you.

B (Inaudible)

M I'm glad, man.

B (Inaudible)

M I'm glad you don't want it, what I'm saying is man—

B (Inaudible)

(Emphasis supplied.)

The knife, described by Moore as a twenty-first birthday present, later entered into the transcribed portions of the conversation as follows:

M Do you wanna die?

B Yes.

M No, you don't.

B You don't know how much.

M You want to die?

B You bet.

M If you want to die, man, this here was my 21st birthday present.

B Will you [obscenity omitted] do it or you don't.

M I'm not gonna do it, man. I'm not gonna kill nobody.

B Put it back. You're just [obscenity omitted], then, put it back.

M I like you, man.

B Well, put it back.

M But I don't love you.

B So?

M Can you understand?

B You love me or you'd kill me right now.

M No.

B And don't give me no [obscenity omitted].

M No.

B Yes, you do.

M You just can't go killing people.

B Yes, you love me.

M I can't kill—

B You love me.

M I don't love you.

B Yes, you do.

M No, I don't. I can't.

B Yes, you do.

M Okay, if I didn't love you, I'd kill you, right?

B That's right.

M No, that's [obscenity omitted).

Shortly thereafter the tape transcript ended and Moore's trial testimony continued. Moore said that when defendant entered the apartment the knife was underneath the loveseat where he and defendant were sitting and talking. Eventually the knife appeared "either on the big coffee table . . . in front of the loveseat or . . . directly underneath it." Moore said, "I either handed this knife to Mr. Booher or sat it down right next to him. I did that to show him that he didn't really mean what he said about wanting to die. . . . The knife that was used was my knife."

Moore then testified that defendant "reached over, picked up the knife off the coffee table and put it in my side and told me to drop my drawers. At this time we were still seated on the loveseat." Defendant then held the knife against Moore's arm. Moore said, "I really didn't think we was going to do it and he said that he would stick me with the knife, cut me, and so we stood up and he stood up right next to me and at that time, I

reached with my free hand and unsnapped my trousers. I let them fall about my knees and . . . took my underwear down and he pushed me back on the couch. The knife always remained right there. Well, it moved a little bit, but it always remained in my side. The pressure from the knife remained about the same. I was very afraid. After that he lowered his head to my penis and performed oral sex." Moore said this lasted for a couple of minutes, that he "did not have an orgasm or anything" and that defendant "raised his head and dropped the knife right there on the floor." Moore got up, dressed himself, and told the defendant to "get the hell out." Defendant refused to leave. Moore continued to insist that defendant leave; defendant remained adamant in his refusal to do so. Moore finally called the police.

According to officers who responded to the call, both Moore and defendant were engaged in a bitter verbal dispute when they arrived at Moore's home. The officers had difficulty ascertaining what had happened. Both parties were taken to the magistrate's office by a Jacksonville police officer, Walter Lamb. Lamb, despite the magistrate's request, wouldn't sign an arrest warrant. Instead, Lamb called his supervisor who agreed to assign a detective to the case.

Jacksonville detective William Whitehead arrived at the magistrate's office at approximately 3:45 a.m. on July 17 and talked with the magistrate, Moore and the defendant. Whitehead sent Lamb and Moore to pick up Moore's tape recorder. After listening to the tape, Whitehead placed defendant under arrest and later signed an arrest warrant charging defendant with a first degree sexual offense under G.S. 14-27.4.

Defendant, testifying on his own behalf, denied committing the crime charged against him. According to defendant Moore invited him to his home on the evening in question to celebrate the birth of Moore's baby. When defendant arrived Moore was nude, but later put on his underwear. Defendant said he never threatened Moore or forced him "to have sexual relations with me. . . . I couldn't do that kind of thing. He told me he wanted to be friends. I wanted to be friends and he wants to be friends." Defendant, a Marine Corps corporal with approximately eight years of service, testified, "[B]ut if I talk to him about something I don't want it to be going into nothing and he thinks his rank is

going to back him up. It's like a tug of war. I talk to him, he talks to me. He says he wants to be friends, you know. He said he wants me to talk to him. I wanted to talk to him too. I went to a psychiatrist on base. I tried to get out."

Because of the bizarre and unique facts of this case, we are satisfied the evidence is insufficient to support the verdict. Both a first and second degree sexual offense, insofar as they may be committed against an adult not physically or mentally handicapped, have as an essential element the lack of the victim's consent because they must be committed "by force and against the will" of the victim. G.S. 14-27.4(a)(2); G.S. 14-27.5(a)(1); *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981); *State v. Jones*, 304 N.C. 323, 283 S.E. 2d 483 (1981). In *Locklear*, we said the phrase "by force and against the will," as used in both the new rape statutes, G.S. 14-27.2 and 14-27.3, and the new sexual offense statutes, "means the same as it did at common law when it was used to describe some of the elements of rape." 304 N.C. at 539, 284 S.E. 2d at 503. The words "against her will" as used in the law of rape connote the victim's lack of consent. *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955).

No criminal offense which requires the victim's lack of consent may be committed upon a person who "arranges for a crime to be committed against himself, and aids, encourages or solicits the commission of it." *State v. Nelson*, 232 N.C. 602, 604, 61 S.E. 2d 626, 628 (1950). A more complete statement of the principle was given in *State v. Burnette*, 242 N.C. 164, 170-71, 87 S.E. 2d 191, 195-96 (1955), as follows:

> In certain crimes consent to the criminal act by the person injured eliminates an essential element of the offense, and is, therefore, a good defense. Where a person arranges for a crime to be committed against himself or his property and aids, encourages or solicits the commission thereof, such facts are a good defense to the accused. However, if a person knows a crime is contemplated against his person or property, he may wait passively and permit matters to go on, or create the conditions under which the crime against himself may be committed, for the purpose of apprehending the criminal without being held to have assented to the act. [Citations omitted.]

> In *People v. Hartford L. Ins. Co.*, [252 Ill. 398, 96 N.E. 1049 (1911)], the Illinois Supreme Court said: 'One cannot arrange for a crime to be committed against himself or his property, and aid, encourage, or solicit the commission of the crime (*Love v. People*, 160 Ill. 501, 32 L.R.A. 139, 43 N.E. 710 [1896]), but if he does not induce or advise the commission of the crime, and merely creates the condition under which an offense against the public may be committed, the rule does not apply (*People v. Smith*, 251 Ill. 185, 95 N.E. 1041 [1911]).'

Both *Nelson* and *Burnette* were sexual assault cases.

The principle was applied in *State v. Goffney*, 157 N.C. 624, 73 S.E. 162 (1911), in which the state's evidence showed that defendant was apprehended as he broke and entered a store owned by a Mr. Barnes. The state's evidence also showed that Barnes had instructed one of his employees to induce defendant, a former employee, to commit the offense. The Court held that a directed verdict of not guilty should have been entered, stating, *id.* at 626, 73 S.E. at 163:

> In the case at bar the owner himself gave permission for the defendant to enter, which destroyed the criminal feature and made the entry a lawful one.
>
> Upon the facts in evidence no crime was committed, because the entry was with the consent and at the instance of the owner of the property.

The principle was most recently applied in *State v. Boone*, 297 N.C. 652, 256 S.E. 2d 683 (1979), another felonious entry case.

The principle applies only to criminal acts where want of consent of the victim is an essential element. It is not the same as, and should not be confused with, the doctrine of entrapment. *See State v. Jackson*, 243 N.C. 216, 90 S.E. 2d 507 (1955); *State v. Burnette*, *supra*. Entrapment, as a defense to criminal conduct, applies to crimes whether or not want of consent is an element of the offense and arises out of actions of law enforcement authorities or their agents. *State v. Walker*, 295 N.C. 510, 246 S.E. 2d 748 (1978); *State v. Burnette*, *supra*.

When considered as a whole, Moore's testimony is to this effect: Defendant, a Marine Corps corporal, before the incident for

which he was tried, had attempted to persuade Moore, a Marine Corps sergeant, to engage in consensual homosexual acts. Moore refused. Moore, concerned that defendant might bring accusations that he was homosexual to military authorities, decided to arrange a tape-recorded encounter with defendant to document the fact that Moore was not a homosexual and was not, voluntarily at least, engaging in homosexual acts with defendant. It was thus important to Moore to demonstrate not only that defendant was the aggressor, but that Moore was an unwilling participant. To do this Moore first invited defendant into his apartment, saying among other things, "I want to see what I can do for ya, man." A lengthy conversation ensued while both men were sitting on Moore's loveseat, and during which defendant made sexual overtures. Moore's knife, which had been under the loveseat, was introduced into the conversation by Moore, who said, "Jerry Booher are you going to kill me with that knife?" Later, Moore again called defendant's attention to the knife in connection with their discussion about whether defendant wanted to die and whether Moore would kill him. At this point apparently Moore *handed the knife* to defendant or *sat it down next to him.* Defendant then, according to Moore, later took it from the coffee table and used it to force Moore to engage in fellatio.

The only reasonable conclusion to be drawn from this evidence is that Moore arranged for, aided, encouraged, and actually induced defendant to use the knife against him. We do not intend to suggest that Moore desired to have a sexual encounter with defendant under circumstances designed to give the appearance that he was forced. We accept as true Moore's statement that he did not desire such encounters. The principle governing the case remains the same. For, by all the state's evidence, Moore induced defendant to force Moore to engage in a homosexual act, not because Moore desired to participate in the act, but because he desired to document the fact that he was an unwilling participant. In essence, then, Moore consented to defendant's acts of force, which, in law, robs defendant's actions of those elements necessary for a conviction of a first or second degree sexual offense. In light of all the evidence we can give no weight to Moore's puny protestation, "I was very afraid."

This is not a case where the victim of a crime, knowing one is contemplated against his person or property, waits passively and

permits the crime to occur in order to apprehend the criminal. It is clear from the evidence that Moore had no intention of having defendant arrested for his acts. He sought only to document certain facts relative to their relationship. Moore determined to call the police only after defendant adamantly continued to remain on Moore's premises after Moore had asked him to leave. Further, Moore did not passively permit the crime against him to be committed. He actively encouraged and ultimately induced defendant to commit the crime.

We recognize that the precise point here decided was not argued on appeal. Defendant did move at trial for dismissal of all charges at the close of the state's evidence and again at the close of all the evidence because of evidentiary insufficiency. Both motions were denied. Defendant on appeal argues that the evidence was insufficient to convict him of a first degree sexual offense on the ground that there was insufficient evidence of the use of a deadly weapon. Nevertheless, when this Court firmly concludes, as it has here, that the evidence is insufficient to sustain a criminal conviction, even on a legal theory different from that argued, it will not hesitate to reverse the conviction, *sua sponte*, in order to "prevent manifest injustice to a party." N.C. R. App. P. 2. *See, e.g., State v. Samuels*, 298 N.C. 783, 787, 260 S.E. 2d 427, 430 (1979) (sufficiency of evidence reviewed but no reversal); *State v. Cox*, 281 N.C. 131, 187 S.E. 2d 785 (1972).

Defendant's conviction of a first degree sexual offense is, therefore,

Reversed.

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

In re Wharton

IN THE MATTER OF PHILLIP WHARTON, JUVENILE

No. 9PA82

(Filed 4 May 1982)

1. **Appeal and Error § 7; Infants § 21— juvenile court order—no right by county to appeal**

Guilford County did not have the right to appeal from an order entered by the district court in a juvenile delinquency proceeding requiring the Guilford County Department of Social Services and other county agencies to establish a group or foster home for the juvenile and others like him.

2. **Infants § 20; Contempt of Court § 3.2— juvenile proceeding—order requiring county to establish group home—invalidity—failure to comply not contempt of court**

The district court had no authority under G.S. 7A-646 and G.S. 7A-647 to order the Guilford County Department of Social Services, in conjunction with other agencies, to "implement the creation of a foster home to be found by the County" with appropriate staff wherein a juvenile determined incapable of standing trial and others like him might be "permanently domiciled for program treatment and delivery of services." Therefore, the director of the Guilford County Department of Social Services could not be held in contempt for failure to comply with the order.

ON discretionary review of decision of the Court of Appeals [54 N.C. App. 447, 283 S.E. 2d 528 (1981)] dismissing appeal from order entered on 3 November 1980 by *Pfaff, Judge*, in District Court, GUILFORD County.

This is a proceeding under the North Carolina Juvenile Code, Articles 41-54 of Chapter 7A of the General Statutes.

On 17 June 1980, M. T. Parker of the Greensboro Police Department filed a petition alleging that Phillip Wharton is 14 years of age; and that Phillip is a delinquent child as defined by G.S. 7A-278(2) in that on or about 17 June 1980 Phillip did unlawfully, wilfully and feloniously attempt to break and enter the residence of Gennie Mae Madkins, located at 1936 Perkins Street, Greensboro, North Carolina, with the intent to commit a felony therein, to wit: "murder, to kill Jackie Madkins." Attorney A. Frank Johns was appointed to represent Phillip.

On said date Phillip was living with his mother. He was taken into custody and placed in the Guilford County Detention Center where he was held until August. On several previous occa-

sions Phillip had been taken into custody and examined at various places including John Umstead Hospital. He had displayed aggressive, violent, psychotic and explosive tendencies toward females. He had been diagnosed as a child with adolescent psychosis and moderate mental retardation. His mother was unable to control him and she had sought help from the police and other authorities.

On 4 August 1980, Phillip's court appointed counsel filed a motion questioning the juvenile's competency to stand trial. The court ordered that Phillip be admitted to the forensic unit of Dorothea Dix Hospital for psychiatric evaluation. On 8 August 1980 the court ordered Dr. Allen Sherrow, a forensic psychiatrist, to conduct the evaluation. Dr. Sherrow submitted his report to the court on 14 August 1980. The following day the court found that Phillip lacked the capacity to stand trial and ruled that the matter be disposed of in accordance with G.S. 7A-647(3).

The court heard extensive testimony from Dr. Michael Petty, child psychiatrist at John Umstead's Intensive Diagnostic and Treatment Unit for Adolescents. Dr. Petty had been Phillip's attending psychiatrist during Phillip's previous admissions to that facility, in particular on 20 November 1979, 3 December 1979, and 3, 23 and 30 January 1980. The court also heard testimony from Jim Davis, director of the Guilford County Detention Center, and from Mrs. Nancy Stentz, Phillip's teacher at McIver School and the detention home.

As a result of the August hearing, the court ordered that a meeting be held with representatives of all involved Guilford County agencies attending. The court ordered that the results of the meeting be submitted to the court in one week. The court also ordered that an executive committee having final decision making authority at the meeting be established. That committee would be composed of the following persons: James DeGraphenreid, court counselor; Mrs. Nancy Stentz, teacher, Greensboro City Schools; Dr. Sherrow, child psychiatrist; and Mr. Johns, Phillip's attorney.

On 22 August 1980 the committee submitted a report to the court outlining the results of the meeting. After hearing further evidence, the court, on 27 August 1980 entered a dispositional order which made numerous findings of fact and conclusions of law. The order provided that Phillip would be placed in the Man-

dala Center in Winston-Salem for a period of not more than six weeks where he would receive medical, psychological, psychiatric, educational and other services necessary to meet his needs. The court then ordered the following:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Guilford County Department of Social Services shall in conjunction with the Mental Health, Mental Retardation and Substance Abuse Authority implement the creation of a foster home to be found by the County in which appropriate staff are placed and the juvenile and other juveniles like him could be permanently domiciled for program treatment and delivery of services. The agencies are to initiate a coordinated effort with the higher education facilities in the Greensboro community in order to pursue a source of staffing. Graduate or other special education students should be considered to be hired on an independent contracting basis in which they are allowed to reside in the foster home, receive room and board, and gain credit hours for directed individual studies and behavioral management in the home environment and supervision of said juvenile. The students should be under the supervision and guidance of the directors of the different college level programs and under the direction and supervision of the Department of Social Services through its regulations dealing with foster home parents and special retardation service programming.

On 17 October 1980, Attorney Johns, on behalf of Phillip, filed a motion alleging that the Department of Social Services "by and through its Director, Frank Wilson", and the Area Mental Health, Mental Retardation and Substance Abuse Authority "by and through its Director Daylon Greene", had failed to comply with the order of the court. The motion asked that said Greene and Wilson be ordered to show cause why they should not be adjudged in contempt of court.

On 17 October 1980 the court entered an order requiring Frank Wilson and Daylon Greene to appear on 23 October 1980 and show cause, if any they had, why they should not be "attached and punished for contempt for the wilful violation of the Order of this Court as set forth in the petition of the movant."

A hearing was held on the motion to show cause. At the hearing several witnesses, including Wilson and Greene, were called. The court and Phillip's attorney attempted through extensive questioning of Wilson to show that the foster home envisioned by the portion of the 27 August 1980 order quoted above had not been established primarily because of lack of effort on the part of Wilson. Wilson attempted to convince the court that although he had made a determined effort to establish the home, he had been unable to do so.

Following the hearing the court entered an order making findings of fact and adjudged that Daylon Greene was not in wilful contempt of court but that Frank Wilson was in contempt. The court provided that Wilson could purge himself of the finding of contempt by prompt payment of $500.00 "and the concerted and dedicated effort with complying with the Court's order regarding a group home or foster home for Phillip Wharton and other children like him."

Notice of appeal to the entry of the 23 October 1980 order was given orally in open court. Guilford County perfected an appeal to the Court of Appeals and its deputy county attorney filed a brief on behalf of the county. The Court of Appeals concluded that Guilford County did not have the right to appeal from the challenged orders and dismissed the appeal.[1]

Guilford County and its director of the Department of Social Services, Frank Wilson, petitioned this court for discretionary review of the decision of the Court of Appeals dismissing the appeal to that court. On 14 January 1982 we allowed the petition.

1. On 12 September 1980 Judge Pfaff also entered an order requiring Guilford County to pay all "reasonable costs and itemized fees of A. Frank Johns in this case not paid for by the Administrative Office of the Courts." He provided that the hourly rate for compensation would be $40 per hour. Guilford County appealed from that order and the Court of Appeals reversed it, holding that fees of assigned counsel for indigents, including indigent juveniles, shall be borne by the State. *See* G.S. 7A-452(b). This court has not been asked to review the decision of the Court of Appeals as it related to the 12 September 1980 order, therefore, the matter is not before the Supreme Court.

Margaret A. Dudley, Deputy Guilford County Attorney, for Guilford County and Guilford County Department of Social Services.

Booth, Harrington, Johns & Campbell, by A. Frank Johns, Attorney for Phillip Wharton, Juvenile.

BRITT, Justice.

I.

[1] First, we address the procedural aspects of this case. Relying on our decision in *In Re Brownlee*, 301 N.C. 532, 272 S.E. 2d 861 (1981), the Court of Appeals properly held that Guilford County had no right to appeal from the order dated 23 October 1980 and filed 3 November 1980. We reaffirm our decision in *Brownlee* with respect to a county's right to appeal from orders entered in a juvenile proceeding.

Nevertheless, as we said in *Brownlee*, this court is authorized to issue "any remedial writs necessary to give it general supervision and control over the proceedings of the other courts" of the state. North Carolina Constitution, Article IV, Section 12(1). We also said in *Brownlee* that

> Under exceptional circumstances this court will exercise power under this section of the constitution in order to consider questions which are not presented according to our rules or procedure; *State v.Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975); and this court will not hesitate to exercise its original supervisory authority when necessary to promote the expeditious administration of justice. *Brice v. Robertson House Moving, Wrecking and Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439 (1958); *Park Terrace, Inc. v. Phoenix Indemnity Co.*, 243 N.C. 595, 91 S.E. 2d 584 (1956).

301 N.C. at 548.

Due to the far reaching effect of Judge Pfaff's orders on Guilford County and the director of its Department of Social Services, we consider this case to be of sufficient importance for us to invoke our supervisory authority. We have therefore allowed Guilford County's petition for discretionary review. We now treat the papers filed in this court on behalf of Guilford County

and Frank Wilson as a petition for a writ of certiorari to review the orders of the trial court, and as a motion to bypass the Court of Appeals, and allow the petition and motion.

II.

[2] Before passing upon the validity of the 3 November 1980 order adjudging Frank Wilson, Director of the Department of Social Services for Guilford County, in contempt of court, we must consider the validity of the portion of the trial court's order entered 27 August 1980 upon which the 3 November 1980 order was predicated. In *In Re Smith*, 301 N.C. 621, 272 S.E. 2d 834 (1981), Justice Huskins, speaking for this court, said:

> Disobedience of an order made without, or in excess of, jurisdiction is not punishable as contempt. *State v. Black*, 232 N.C. 154, 59 S.E. 2d 621 (1950); *see also* 17 Am. Jur., 2d, Contempt, § 42, and cases cited in footnote 9; 17 C.J.S., Contempt § 14.

301 N.C. at 633.

The key provision of the 27 August 1980 order which is the basis for the trial court adjudging Mr. Wilson to be in contempt provides as follows:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Guilford County Department of Social Services shall in conjunction with the Mental Health, Mental Retardation and Substance Abuse Authority implement the creation of a foster home to be found by the County in which appropriate staff are placed and the juvenile and other juveniles like him could be permanently domiciled for program treatment and delivery of services.

We hold that the trial court exceeded its authority in entering the quoted provision of the 27 August 1980 order. Hence, the 3 November 1980 order adjudging Wilson in contempt of court is invalid and must be vacated.

In its dispositional order of 27 August 1980 the trial court found that the juvenile was incompetent to stand trial, and that G.S. 7A-646 and 647 provided for dispositional alternatives for a juvenile who had been found to be mentally ill or mentally re-

tarded and in need of medical, surgical, psychiatric, psychological or other treatment. It is clear that the court relied on those statutes for its authority to enter the order in question.

G.S. 7A-646 provides:

> The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction. If possible, the initial approach should involve working with the juvenile and his family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile. Thus, the judge should arrange for appropriate community-level services to be provided to the juvenile and his family in order to strengthen the home situation.
>
> In choosing among statutorily permissible dispositions for a delinquent juvenile, the judge shall select the least restrictive disposition both in terms of kind and duration, that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile. A juvenile should not be committed to training school or to any other institution if he can be helped through community-level resources.

G.S. 7A-647 provides:

> The following alternatives for disposition shall be available to any judge exercising jurisdiction, and the judge may combine any of the applicable alternatives when he finds such disposition to be in the best interest of the juvenile:
>
> (1) The judge may dismiss the case, or continue the case in order to allow the juvenile, parent, or others to take appropriate action.
>
> (2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:
>
> a. Require that he be supervised in his own home by the Department of Social Services in his coun-

ty, a court counselor or other personnel as may be available to the court, subject to conditions applicable to the parent or the juvenile as the judge may specify; or

b. Place him in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or

c. Place him in the custody of the Department of Social Services in the county of his residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of the Department of Social Services in the county where he is found so that agency may return the juvenile to the responsible authorities in his home state. Any department of social services in whose custody or physical custody a juvenile is placed shall have the authority to arrange for and provide medical care as needed for such juvenile.

(3) In any case, the judge may order that the juvenile be examined by a physician, psychiatrist, psychologist or other qualified expert as may be needed for the judge to determine the needs of the juvenile. If the judge finds the juvenile to be in need of medical, surgical, psychiatric, psychological or other treatment, he shall allow the parent or other responsible persons to arrange for care. If the parent declines or is unable to make necessary arrangements, the judge may order the needed treatment, surgery or care, and the judge may order the parent to pay the cost of such care pursuant to G.S. 7A-650. If the judge finds the parent is unable to pay the cost of care, the judge may charge the cost to the county. If the judge believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is mentally retarded the judge shall refer him to the area mental health, mental retardation, and substance abuse director or local mental health director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders pur-

> porting to commit a juvenile directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, mental retardation, and substance abuse director or local mental health director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet his needs. If institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent or guardian. If the parent, guardian, or custodian refuses to consent to a mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, mental retardation, and substance abuse health director, the signature and consent of the judge may be substituted for that purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by a judge and an area mental health, mental retardation, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of his treatment, the hospital shall submit to the judge a written report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question.

We find nothing in the quoted statutes which authorizes the district court to require a County Department of Social Services, either by itself or in conjunction with another agency, to "implement the creation of a foster home to be found by the County" with appropriate staff, wherein a juvenile and others like him might be "permanently domiciled for program treatment and delivery of services." In addition to the requirements placed on the Director of Social Services, the order also appears to require the county to "find" a suitable house in which the juvenile and the treatment staff could be "permanently domiciled." We find no authority for this section.

It is possible that the trial judge felt that the first sentence of G.S. 7A-646 provided him with the authority to enter the challenged portion of the order in question. This sentence provides that "[t]he purpose of disposition in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." We agree that this sentence affords the court considerable flexibility "to design an appropriate plan to meet the needs of the juvenile." However, we do not think this sentence authorizes the court, as it did in this case, to direct a county or any of its agencies to spend large sums of money in the acquisition of real estate, either by purchase or lease, in the equipping and furnishing of the property, and in employing personnel in order to carry out a plan that the court feels would be appropriate to meet the needs of a particular juvenile and others like him. Among other things, we can envision serious budgeting problems that counties and their agencies would encounter if the district courts had this authority.

We have also reviewed other statutes which might possibly provide the court with the authority it attempted to exercise in this instance. We are unable to find that authority. G.S. 7A-648 is entitled "Dispositional alternatives for delinquent or undisciplined juvenile" and G.S. 7A-649 is entitled "Dispositional alternatives for delinquent juvenile." Neither of these statutes vests the court with the authority in question.

While matters implied by the language of statutes must be given effect to the same extent as matters specifically expressed, *Iredell County Board of Education v. Dickson*, 235 N.C. 359, 70 S.E. 2d 14 (1952), the court may not, under the guise of judicial interpretation, interpolate provisions which are lacking. *Board of Education v. Wilson*, 215 N.C. 216, 1 S.E. 2d 544 (1939); 12 Strong's N.C. Index, 3d, Statutes, § 5.

We can appreicate the great problems district court judges are having in deciding what to do with certain juveniles. Judge Pfaff is to be commended for seeking cooperation with the Department of Social Services and other agencies in trying to bring into existence facilities and programs that would best serve the needs of Phillip and others like him. But there is a limit to what the court can do by fiat.

For the reasons stated, that part of the Court of Appeals' decision dismissing Guilford County's appeal from the order entered 3 November 1980 is vacated, and said order adjudging Frank Wilson in contempt of court and ordering him to pay a fine and do other things is

Reversed.

NANCY CAROL LOVE FORMERLY NANCY LOVE MILLS v. FRANK WILLIAM MOORE AND NATIONWIDE MUTUAL INSURANCE COMPANY

No. 158A81

(Filed 4 May 1982)

1. **Appeal and Error § 6.1— denial of motion to strike—premature appeal**

The denial of a motion to strike an order vacating a default judgment is interlocutory, does not affect a substantial right within the meaning of G.S. 1-277 and is not immediately appealable.

2. **Appeal and Error § 6.1; Rules of Civil Procedure § 12— challenges to sufficiency of service and process—premature appeal**

Unlike an adverse ruling on a motion to dismiss for lack of personal jurisdiction, Rule 12(b)(2), adverse rulings on challenges to the sufficiency of the service, Rule 12(b)(5), and the sufficiency of the process, Rule 12(b)(4), are not immediately appealable. G.S. 1-277(b).

3. **Appeal and Error § 40— writ of certiorari from Court of Appeals—failure to include in record**

Under Rule 9(b)(1)(ix) a record on appeal must contain a showing of the jurisdiction of the appellate court. Therefore, where the Court of Appeals granted a petition for a writ of certiorari, the order was not included in the Record on Appeal and both the Record and Court of Appeals decision indicated the case was before the Court of Appeals by virtue of a notice of appeal only, the writ of certiorari must be treated as if it had never been issued. A document stipulating a writ of certiorari had been filed with and allowed by the Court of Appeals which was filed with the numerous papers transmitted between the Appellate Courts and was not a part of the record proper was insufficient.

ON appeal of right of the decision of the Court of Appeals, one judge dissenting, reported at 54 N.C. App. 406, 283 S.E. 2d 801 (1981), affirming order of *Burroughs, Judge*, entered 9 January 1981 in Superior Court, MECKLENBURG County, denying defendant

Nationwide Mutual Insurance Company's motions to strike an earlier order vacating plaintiff's default judgment and to dismiss the action for lack of personal jurisdiction.

John D. Warren for plaintiff-appellee.

Kennedy, Covington, Lobdell & Hickman, by William C. Livingston, and Franklin V. Adams for defendant-appellant Nationwide Mutual Insurance Company.

CARLTON, Justice.

I.

The legal issues presented by this appeal can be understood only in the context of the unusual factual circumstances which surround this case.

On 30 October 1970 plaintiff was injured when her 1970 Cadillac automobile collided with a 1956 Chevrolet automobile driven by defendant Frank *Willard* Moore. Moore was insured by defendant Nationwide Mutual Insurance Company (Nationwide), and plaintiff's attorney began settlement negotiations with Nationwide. Efforts to settle proved futile and negotiations were ended without resolution of the claim in October of 1972. At no time during these negotiations was plaintiff or her attorney informed that Moore was insured as an assigned risk, nor were they told that Moore's name was erroneously written on the accident report as Frank *William* Moore. Frank *William* Moore was the name used by plaintiff to refer to Nationwide's insured during the settlement negotiations.

On 29 October 1973 plaintiff filed this action for personal injury and property damages arising from the 30 October 1970 accident and named Frank *William* Moore as the sole defendant. Plaintiff attempted without success to effect personal service on Moore and finally gave notice by publication. The notice referred to the defendant as Frank *William* Moore and gave the date and circumstances of the accident. No notice of the action was given Nationwide by either plaintiff or Moore.

No answer was filed and judgment was entered for plaintiff on 30 April 1975. Plaintiff obtained this judgment by presenting her proof before Judge Thornburg, who sat without a jury.

On 31 May 1977 plaintiff sought to enforce the 1975 judgment against Nationwide as Moore's automobile liability insurance carrier. Nationwide defended by claiming that the 1975 judgment was in essence a default judgment which was unenforceable against it because it had not received notice of the action as required by G.S. 20-279.21(f) (Cum. Supp. 1981). That statute prohibits the use, in an action against the insurer, of a default judgment against an assigned risk insured unless the insurer received notice of the action. On 4 March 1980 the Court of Appeals held that the 1975 judgment was a default judgment and that it was unenforceable against the insurer and affirmed the dismissal of the suit against Nationwide. 45 N.C. App. 444, 263 S.E. 2d 337, *cert. denied*, 300 N.C. 198, 269 S.E. 2d 617 (1980). On 25 July 1978, while the case was pending in the Court of Appeals, Moore died. Thereafter, on 10 June 1980, plaintiff successfully moved to vacate the 1975 judgment. It was also ordered that Nationwide be given the statutorily required notice so that it might file a defense or otherwise plead on behalf of its insured. Plaintiff gave the required notice and on 16 July 1980 Nationwide filed motions to intervene, to strike the order vacating the default judgment and to dismiss the action for lack of personal jurisdiction because of improper service on its insured. The trial court granted the motion to intervene but denied the other motions.

Defendant appealed the adverse rulings to the Court of Appeals. That court, in an opinion by Judge Arnold in which Judge Webb concurred, affirmed the trial court's rulings. Judge Vaughn dissented, reasoning that the facts of the case did not justify the relief requested by plaintiff under Rule 60(b)(6).

Defendant appeals to this Court as of right pursuant to G.S. 7A-30(2). This Court is of the opinion that defendant's appeal is premature; therefore, we vacate the decision of the Court of Appeals, dismiss the appeal and remand for the appropriate proceedings.

II.

The threshold question which should have been considered by the Court of Appeals, although not presented to that court, was whether an immediate appeal lies from the trial court's orders. If an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though

the question of appealability has not been raised by the parties themselves. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980); *Dickey v. Herbin*, 250 N.C. 321, 108 S.E. 2d 632 (1959); *Rogers v. Brantley*, 244 N.C. 744, 94 S.E. 2d 896 (1956) (per curiam). In our opinion, this appeal was premature and the case should first run its course in the trial court. Therefore, we neither consider nor address the questions discussed by the Court of Appeals.

Nationwide appeals from two rulings of the trial court: (1) the refusal to strike the order vacating the default judgment and (2) the denial of its motion to dismiss for lack of personal jurisdiction.

Both of these rulings are interlocutory in nature because neither disposes entirely of the cause of action as to all parties and both rulings leave matters for further action by the trial court in order to settle and determine the entire controversy. *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E. 2d 377, 381 (1950). As a general rule, interlocutory decrees are immediately appealable only when they affect a substantial right of the appellant and will work an injury to him if not corrected before an appeal from a final judgment. *Id.; see* G.S. § 1-277(a) (Cum. Supp. 1981). An interlocutory decree which does not affect a substantial right is reviewable only on appropriate exception upon an appeal from the final judgment in the cause. *Veazey v. City of Durham*, 231 N.C. at 362, 57 S.E. 2d at 382.

[1] We first consider whether the denial of a motion to strike an order vacating a default judgment affects a substantial right within the meaning of G.S. 1-277. An exception to an order denying a motion to strike an order vacating a default judgment is tantamount to an exception to the entry of the order vacating the default judgment. *Cf. Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978) (order setting aside summary judgment tantamount to denial of summary judgment). An order vacating a default judgment is interlocutory and not immediately appealable because "[n]o right of [defendant] will be lost by delaying [its] appeal until after final judgment . . . ." *Bailey v. Gooding*, 301 N.C. at 210, 270 S.E. 2d at 434. Under the authority of *Bailey*, we hold that defendant's attempted appeal from the setting aside of the default judgment was premature and that it must be dismissed.

[2] That issue, however, is not dispositive of this appeal; defendant also appealed from the trial court's adverse ruling on its motion to dismiss for lack of personal jurisdiction, Rule 12(b)(2), and for insufficiency of service of process, Rule 12(b)(5). Such rulings do not put an end to the action and are unquestionably interlocutory. 2A J. Moore and J. Lucas, *Moore's Federal Practice* ¶ 12.14, at 2338 (2d ed. 1981); C. Wright and A. Miller, *Federal Practice and Procedure* § 1351 (1969). Nor can these rulings be said to "affect a substantial right": defendant's objections to the court's jurisdiction have been preserved and can be fully reviewed on appeal from a final judgment. The delay in hearing the appeal of these rulings will not " 'work injury to appellant if not corrected before appeal from the final judgment,' " *Cole v. Farmers Bank & Trust Co.*, 221 N.C. 249, 251, 20 S.E. 2d 54, 55 (1942) (quoting *Leak v. Covington*, 95 N.C. 193 (1886)); *accord, Veazey v. City of Durham*, 231 N.C. 357, 57 S.E. 2d 377.

G.S. 1-277(b) provides for "the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of defendant." Here, defendant characterized its Rule 12 motion as one to dismiss for lack of personal jurisdiction. Nothing else appearing, it would seem that G.S. 1-277(b) provides the authority for defendant's appeal.

The true character of defendant's motion, however, is not one attacking personal jurisdiction as contemplated by Rule 12(b)(2). Defendant's motion, although denominated as one challenging the court's jurisdiction over the person of Frank Willard Moore, in reality challenges the sufficiency of the service as contemplated by Rule 12(b)(5) and the sufficiency of the process as contemplated by Rule 12(b)(4). Specifically, Nationwide contended that use of the incorrect middle name in the published notice made the process itself insufficient and that service by publication was unconstitutional under the peculiar facts of this case and, thus, was defective. Again, these challenges are encompassed by Rule 12(b)(4) and Rule 12(b)(5), respectively. A challenge to the court's jurisdiction over the person, Rule 12(b)(2), concerns whether the court has power, *assuming it is properly invoked*, to require the defendant to come into court to adjudicate the claim, a test which has come to be known as "minimum contacts." Challenges to sufficiency of process and service do not concern the state's fundamental power to bring a defendant before its courts for trial; instead

they concern the means by which a court gives notice to the defendant and asserts jurisdiction over him. C. Wright & A. Miller, *supra*, § 1353. G.S. 1-277(b) applies to the state's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint. This is not a mere technical distinction; it has far-reaching substantive effect. If the court has no personal jurisdiction over the defendant, it has no right to require the defendant to come into court. A trial court determination concerning such an important fundamental question is made immediately appealable by G.S. 1-277(b). However, if the court has the jurisdictional power to require that the party defend and the challenge is merely to the process of service used to bring the party before the court, G.S. 1-277(b) does not apply.

Whether this distinction among these grounds should be recognized under G.S. 1-277(b) has never before been addressed by this Court. That statute speaks in terms of jurisdiction over the *person* or *property* of the defendant. The reference to the defendant's property indicates, we think, that the Legislature had in mind jurisdiction *in rem* or *quasi in rem*, theoretical bases for the existence of jurisdiction. Thus, it appears that the statute is concerned with the appealability of an adverse ruling on the court's power to require the defendant to defend the claim. Under our reading of the statute itself, defendant here is not entitled to an immediate appeal.

There are other reasons for so limiting G.S. 1-277(b). The rule forbidding interlocutory appeals is designed to promote judicial economy by eliminating the unnecessary delay and expense of repeated fragmentary appeals and by preserving the entire case for determination in a single appeal from a final judgment. *E.g.*, *Harrell v. Harrell*, 253 N.C. 758, 117 S.E. 2d 728 (1961); *City of Raleigh v. Edwards*, 234 N.C. 528, 67 S.E. 2d 669 (1951). Additionally, appellate courts are almost always better able to decide the legal issues when they have before them a fully developed record. *See Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338. Given these reasons for the rule that interlocutory orders are not appealable, this Court should construe the exceptions to the general rule of non-appealability narrowly.

Construing the exception under G.S. 1-277(b) as applying only to cases involving the court's authority to require the defendant to come into court—whether that authority arises from jurisdiction *in personam, quasi in rem* or *in rem*—will allow immediate appeals concerning only "minimum contacts" questions and will leave for appeals from final judgment the questions of technical error involving service and process. In the former, the issue is whether the courts of this state have *any* right to force the defendant to a trial; in the latter, the authority to bring the defendant into court is unquestioned, the issue being whether there is any technical error in the attempt of the plaintiff to invoke that jurisdiction. Allowing an immediate appeal only for "minimum contacts" jurisdictional questions precludes premature appeals to the appellate courts about issues of technical defects which can be fully and adequately considered on an appeal from final judgment, while ensuring that parties who have less than "minimum contacts" with this state will never be forced to trial against their wishes. Because this interpretation promotes judicial economy and protects the constitutional rights of foreign defendants, we believe that it is the most reasonable interpretation of G.S. 1-277(b) and hold that the right of immediate appeal of an adverse ruling as to jurisdiction over the person, under that statute, is limited to rulings on "minimum contacts" questions, the subject matter of Rule 12(b)(2). We recognize that the Court of Appeals has construed G.S. 1-277(b) as applying to adverse rulings on service and process, see *Kahan v. Longiotti*, 45 N.C. App. 367, 263 S.E. 2d 345, *cert. denied*, 300 N.C. 374, 267 S.E. 2d 675 (1980); *Smith v. American Radiator & Standard Sanitary Corp.*, 38 N.C. App. 457, 248 S.E. 2d 462, *cert. denied*, 296 N.C. 586, 254 S.E. 2d 33 (1978); *Van Buren v. Glasco*, 27 N.C. App. 1, 217 S.E. 2d 579 (1975), and to the extent that these decisions are inconsistent with our interpretation, they are hereby overruled.

Defendant here challenged the sufficiency of the process itself and the sufficiency of the service to give notice. These objections fall within the ambit of Rule 12(b)(4) and Rule 12(b)(5), respectively. Because defendant made no claim that its insured had no "minimum contacts" with this state, (indeed, it appears that it could not make such a claim) the trial court's ruling is not one concerning its jurisdiction over the person and is interlocutory and not immediately appealable.

Finding as we have that the rulings from which defendant seeks to appeal are interlocutory and that there exists no statutory right to an immediate appeal, we must dismiss the appeal as premature even though the issue of appealability was not raised by the parties.

The Court of Appeals, therefore, erred by not dismissing the appeal *ex mero motu*. The cause must be returned to the trial court for trial on the merits. Any procedural matters about the issues which defendant attempted to raise in this purported appeal may later be considered on appeal of this cause in its entirety should the matter again be brought before the appellate division.

The decision of the Court of Appeals is vacated and this cause is remanded to it with instructions that it enter an order dismissing the appeal.

Vacated and remanded.[1]

[3] 1. Within the twenty-day period for certification of this opinion under Rule 32(b) of the Rules of Appellate Procedure, counsel for defendant Nationwide contacted the clerk of this Court to advise that a writ of certiorari had been granted by the Court of Appeals prior to its hearing of the appeal. We immediately withdrew our opinion in order to address this concern. Our search of the numerous papers transmitted by the clerk of the Court of Appeals to the clerk of this Court has uncovered a document signed by the parties which stipulated that defendant filed a petition for a writ of certiorari on 28 January 1981 and that the Court of Appeals allowed the petition by order dated 18 February 1981. However, this order was not included in the Record on Appeal filed with this Court or with the Record on Appeal filed with the Court of Appeals, nor was the actual order transmitted to this Court. No motion for addendum to the Record was made. It is incumbent upon counsel for appellant to ensure that all matters necessary for proper disposition of an appeal are included in the Record on Appeal. *E.g., Mooneyham v. Mooneyham*, 249 N.C. 641, 107 S.E. 2d 66 (1959). Rule 9(b)(1)(ix) requires that the record on appeal contain a showing of the jurisdiction of the appellate court. All that appears in the Record before us is the notice of appeal given by defendant on 9 January 1981 from the trial court to the Court of Appeals. The Record includes a stipulation that the Record is composed of all the materials to which the stipulation is attached, none of which mentions the issuance of a writ of certiorari by the Court of Appeals. In short, there is absolutely nothing in the record proper to indicate to us that the matter was before the Court of Appeals by virtue of any action other than a notice of appeal. The issuance of a writ of certiorari was not mentioned in *any* brief by either party, both here and in the Court of Appeals, nor was that fact mentioned on oral argument before this Court. Counsel has simply failed to present this appeal in any posture other than that addressed by our opinion, namely, an appeal of right.

Moreover, it is particularly significant to note that both the Court of Appeals' majority and dissent treated this appeal as an ordinary appeal from the trial court. The majority opinion states, "From denial of those motions, defendant appeals." The dissent states, "The order from which defendant *appeals* should be reversed." (Emphasis added.)

Since counsel presented the matter to us as an appeal and since the Court of Appeals addressed the case as an appeal, our opinion above remains unchanged. For the reasons heretofore given, this Court cannot take notice of the hidden writ of certiorari and must treat this appeal as though the writ had never been issued.

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

BARRINGTON v. EMPLOYMENT SECURITY COMMISSION

No. 110P82.

Case below: 55 N.C. App. 638.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 May 1982.

BENTON v. DANIEL CONSTRUCTION

No. 139P82.

Case below: 56 N.C. App. 256.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 May 1982.

CARVER v. CARVER

No. 142P82.

Case below: 55 N.C. App. 716.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982.

CLIFTON v. CLIFTON

No. 182P82.

Case below: 56 N.C. App. 257.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982.

DuBOSE v. GASTONIA MUTUAL SAVINGS AND LOAN

No. 71P82.

Case below: 55 N.C. App. 574.

Appeal by plaintiff dismissed 4 May 1982. Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 May 1982.

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

FRADY v. GROVES THREAD

No. 154PA82.

Case below: 56 N.C. App. 61.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 4 May 1982.

GUTHRIE v. STATE PORTS AUTHORITY

No. 97PA82.

Case below: 56 N.C. App. 68.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 May 1982.

HUMANE SOCIETY OF BEAUFORT COUNTY v. TILLETT

No. 73PA82.

Case below: 55 N.C. App. 482.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982.

IN RE EXECUTION SALE OF BURGESS

No. 70P82.

Case below: 55 N.C. App. 581.

Petition by trustees for discretionary review under G.S. 7A-31 denied 4 May 1982. Motion of trustees to dismiss pursuant to G.S. 1A-1, Rule 12(b)(2), (4), (5) and (6) is denied 4 May 1982. Motion of Mathis to dismiss appeal is allowed 4 May 1982. Motion of Burgess to dismiss appeal is allowed 4 May 1982.

IN RE HOUSING AUTHORITY v. MONTGOMERY

No. 75P82.

Case below: 55 N.C. App. 422.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982.

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

JONES v. NEW HANOVER HOSPITAL

No. 104P82.

Case below: 55 N.C. App. 545.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 May 1982.

MEBANE v. BOARD OF MEDICAL EXAMINERS

No. 43P82.

Case below: 55 N.C. App. 455.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 May 1982. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 4 May 1982.

MOORE v. CRUMPTON

No. 76PA82.

Case below: 55 N.C. App. 398.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 May 1982.

RIDINGS v. RIDINGS

No. 77P82.

Case below: 55 N.C. App. 630.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 May 1982.

ROBERTS v. WAKE FOREST UNIVERSITY

No. 47P82.

Case below: 55 N.C. App. 430.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 May 1982.

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

SIMMONS v. QUICK STOP FOOD MART

No. 144PA82.

Case below: 56 N.C. App. 105.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 May 1982.

SIMONS v. GEORGIADE

No. 158P82.

Case below: 55 N.C. App. 483.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 May 1982.

STANLEY v. RETIREMENT AND HEALTH BENEFITS DIVISION

No. 106P82.

Case below: 55 N.C. App. 588.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982.

STATE v. ANDREWS

No. 157P82.

Case below: 56 N.C. App. 91.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 May 1982.

STATE v. BAGLEY

No. 147P82.

Case below: 55 N.C. App. 132.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 May 1982.

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

STATE v. BLACK

No. 180P82.

Case below: 56 N.C. App. 467.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 April 1982.

STATE v. BOST

No. 103P82.

Case below: 55 N.C. App. 612.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982.

STATE v. BOWEN

No. 188P82.

Case below: 56 N.C. App. 210.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 May 1982.

STATE v. BROOKS & MERCER

No. 137P82.

Case below: 56 N.C. App. 256.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 4 May 1982.

STATE v. BUTNER

No. 203P82.

Case below: 56 N.C. App. 642.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982.

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

STATE v. CHERRY

No. 102P82.

Case below: 55 N.C. App. 603.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982.

STATE v. EVANS

No. 155P82.

Case below: 56 N.C. App. 256.

Petition by defendant for discretionary review under G.S. 7A-31 denied 22 April 1982.

STATE v. HAIR

No. 42P82.

Case below: 55 N.C. App. 267.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 May 1982.

STATE v. HOWZER

No. 78P82.

Case below: 55 N.C. App. 268.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 May 1982.

STATE v. LOCKLEAR

No. 161P82.

Case below: 55 N.C. App. 734.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 May 1982.

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

STATE v. PEREZ

No. 12P82.

Case below: 55 N.C. App. 92.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982.

STATE v. POLLOCK

No. 217P82.

Case below: 56 N.C. App. 257.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 May 1982.

STATE v. QUILLIAMS

No. 98P82.

Case below: 55 N.C. App. 349.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 May 1982.

STATE v. RANKIN

No. 129P82.

Case below: 55 N.C. App. 478.

Peittion by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 May 1982.

STATE v. REYNOLDS

No. 85P82.

Case below: 56 N.C. App. 257.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982.

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

STATE v. SIMMONS

No. 168P82.

Case below: 56 N.C. App. 34.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982. Motion of Attorney General to dismiss appeal for lack of significant public interest allowed 4 May 1982.

STATE v. THOMAS

No. 136.

Case below: 52 N.C. App. 186.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 12 May 1982.

STATE v. THORNTON

No. 150P82.

Case below: 55 N.C. App. 133.

Peittion by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 May 1982.

STATE v. TODD

No. 143P82.

Case below: 56 N.C. App. 116.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982.

STATE v. WILHITE & RANKIN

No. 171P82.

Case below: 56 N.C. App. 467.

Petition by defendant Whilhite for discretionary review under G.S. 7A-31 denied 4 May 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 May 1982.

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

STATE v. WHITAKER

No. 105PA82.

Case below: 55 N.C. App. 666.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 4 May 1982.

STATE v. WOODS

No. 192P82.

Case below: 56 N.C. App. 193.

Petition by defendant Moore for writ of certiorari to North Carolina Court of Appeals denied 4 May 1982.

STATE v. WOODY

No. 187P82.

Case below: 56 N.C. App. 467.

Petition by defendant for discretionary review under G.S. 7A-31 denied 22 April 1982.

SUPERSCOPE, INC. v. KINCAID

No. 227P82.

Case below: 56 N.C. App. 673.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 May 1982.

WALTERS v. WALTERS

No. 30PA82.

Case below: 54 N.C. App. 545.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 May 1982.

CHARLES W. HILLIARD, EMPLOYEE, PLAINTIFF v. APEX CABINET COMPANY, EMPLOYER, DEFENDANT; AMERICAN MUTUAL LIABILITY COMPANY, CARRIER, DEFENDANT

No. 8PA82

(Filed 4 May 1982)

Master and Servant § 94.1— workers' compensation—inadequate findings by Commission

In a workers' compensation action, the Industrial Commission failed to make specific findings of fact as to the crucial questions necessary to support a conclusion as to whether plaintiff had suffered any disability as defined by G.S. 97-2(9). It was plaintiff's burden to persuade the Commission not only that he obtained no other employment but that he was *unable* to obtain other employment. There was uncontradicted medical testimony which established that plaintiff was physically capable of working in employment free from wood dust, paints, lacquer fumes and glue fumes, but plaintiff testified that he was unable to obtain other employment without a diminution in wages because of his age, lack of education and inexperience, and also testified that he had "not gone out to seek any other jobs." This conflicting testimony raised an issue of fact requiring a finding by the Commission.

Justice EXUM concurring.

Justice MEYER dissenting.

Justice COPELAND joins in this dissenting opinion.

ON discretionary review, G.S. 7A-31, from the decision of the Court of Appeals, 54 N.C. App. 173,--- S.E. 2d --- (1981), affirming an Opinion and Award of the Industrial Commission denying plaintiff Charles W. Hilliard workers' compensation disability benefits.

Plaintiff Charles Hilliard worked for Apex Cabinet Company for twenty-three years. His work as a finish carpenter necessitated exposure to paint and glue fumes and to wood dust. Plaintiff developed symptoms including headaches, dizziness, shortness of breath, occasional bloody lumps in the throat or sinuses, and nosebleeds. He left his employment with the Cabinet Company in 1977.

At the hearing before the Industrial Commission, plaintiff testified that he was forced to quit his job because the symptoms he reported were caused by the dust and fumes in the air at the cabinet shop. He said he had since then worked part time doing

"small carpentry work." He testified that he could not get any other kind of work but also stated that he had "not gone out to seek any other jobs."

Dr. Herbert Seiker testified that plaintiff had developed a sensitivity syndrome to the fumes and dust in the air in the cabinet shop. He recommended that plaintiff not work in such an environment but stated that "Mr. Hilliard could work in environments which do not contain excessive amounts of fumes, chemicals and dust."

Defendant offered as exhibits four Industrial Commission forms wherein two different physicians (Drs. Baggett and Pierson) described their treatment of plaintiff. The doctors described the condition they treated as epistaxis (the clinical term for nosebleed). No mention was made of any of plaintiff's other symptoms. In the forms the doctors indicated that after treatment of plaintiff's nosebleed he could go back to work.

The Deputy Commissioner who heard the case found plaintiff to have an occupational disease called "respiratory symptoms." The Deputy Commissioner further found as a fact that "plaintiff does not have any permanent disability as a result of the injury giving rise hereto" and denied plaintiff compensation for disability. The full Commission adopted as its own the Opinion and Award of the Deputy Commissioner.

The Court of Appeals (Becton, J., with Martin and Martin, JJ., concurring) affirmed on the ground that plaintiff had failed to show that his diminution of wages was due to the occupational disease.

Jeff Erick Essen and Grover C. McCain, Jr., for plaintiff-appellant.

Teague, Campbell, Conely & Dennis, by C. Woodrow Teague and George W. Dennis, III, for defendants-appellees.

BRANCH, Chief Justice.

Plaintiff assigns error to the finding of fact of the Deputy Commissioner, affirmed by the full Industrial Commission and the Court of Appeals, to the effect that plaintiff "does not have any permanent disability as a result of the injury giving rise hereto." He argues that the determination of whether a disability exists is

a conclusion of law and that said conclusion must be based upon findings of fact supported by competent evidence. We agree.

The necessary factual basis for a determination of disability is set out in G.S. 97-2(9).

> Disability.—The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

We are of the opinion that in order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury. *See Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971). In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree. *Hall v. Chevrolet Co.*, 263 N.C. 569, 575, 139 S.E. 2d 857, 861 (1965).

In passing upon issues of fact, the Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. The Commission may accept or reject the testimony of a witness solely on the basis of whether it believes the witness or not. *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951). The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there be evidence to support a contrary finding. *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963); *Conner v. Rubber Co.*, 244 N.C. 516, 94 S.E. 2d 486 (1956). However, the Commission's legal conclusions are reviewable by the appellate courts. *Jackson v. Highway Commission*, 272 N.C. 697, 158 S.E. 2d 865 (1968). It is equally well settled that when the findings are insufficient to determine the rights of the parties, the court may remand to the Industrial Commission for additional findings. *Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649 (1969); *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439 (1958).

In instant case it was plaintiff's burden to persuade the Commission not only that he had obtained no other employment but that he was *unable* to obtain other employment.

A plaintiff must adduce, in cases where he is physically able to work, evidence that he is unsuited for employment due to characteristics peculiar to him. *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978).

In *Little* plaintiff suffered an injury to her spinal cord which according to medical testimony rendered her incapable of returning to her former employment as a laborer. Plaintiff, a fifty-year-old obese woman with an eighth grade education, was prevented from offering her own testimony as to total disability by the hearing officer's statement that such testimony was unnecessary. Noting that "if other pre-existing conditions such as an employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the incapacity which he or she suffers, and not for the degree of disability which would be suffered by someone with superior education or work experience or who is younger or in better health," the court remanded for the purpose of affording the plaintiff an opportunity to present evidence relevant to her capacity to work and earn wages. *Id.* at 532, 246 S.E. 2d at 746.

Instant case differs from *Little* in that the record does not disclose that the Commission limited plaintiff in his testimony concerning his capacity to work and earn wages. Here the uncontradicted medical testimony establishes that plaintiff was physically capable of working in employment free from wood dust, paints and lacquer fumes and glue fumes. In this connection plaintiff testified that he was unable to obtain other employment without a diminution in wages because of his age, lack of education and inexperience. He also testified that he had "not gone out to seek any other jobs." This conflicting testimony raised an issue of fact requiring a finding by the Commission. In making that finding, the Commission was free to accept or reject all or any part of plaintiff's testimony. *Anderson v. Motor Co., supra.*

The Industrial Commission failed to make specific findings of fact as to the crucial questions necessary to support a conclusion as to whether plaintiff had suffered any disability as defined by G.S. 97-2(9). *Guest v. Iron and Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1955). This Court is therefore unable to determine whether adequate basis exists, either in fact or law, for the Commission's

award. This cause is remanded to the Court of Appeals with direction that it be remanded to the Industrial Commission for proceedings consistent with this opinion.

Reversed and remanded.

Justice EXUM concurring.

Although concurring in the majority's decision to reverse the Court of Appeals and to remand this case to the Industrial Commission, I would remand it with instructions that if the Commission believes the evidence claimant has offered, it should make an award that would compensate him for the diminution in his earning capacity to which all the evidence shows him entitled.

I agree with the majority that the Commission's so-called finding of fact that "[p]laintiff does not have any permanent disability as a result of the injury" is a conclusion of law fully reviewable by this Court. My view, however, is that this conclusion is not only unsupported by other findings of the Commission, but that all the evidence shows claimant to have suffered a diminution in earning capacity as a result of an occupational disease. If this evidence is believed, he is entitled to be compensated. I disagree with the majority's view that there is a conflict in the evidence which needs resolution by the Commission.

Dr. Sieker testified without contradiction that claimant had developed a "sensitivity" to dust, glue fumes, and paint fumes due to his long exposure to these things as a cabinet maker. These things were irritants to claimant's respiratory system and caused him to suffer nasal congestion, nosebleeds, headaches and shortness of breath. Dr. Sieker recommended that claimant not return to his work environment, but his opinion was that claimant could work in other environments that are free "of fumes, chemicals and dust."

Claimant testified, again without contradiction, that he had worked all of his adult life as either a farmer or a carpenter and was not qualified because of lack of education and training to do anything else. He said:

> Q. Have you tried to do any other kind of work other than carpentry work that does not take you around a glue or paint

> and lacquer fumes or wood dust? Do you know any other kind of work?
>
> A. No, I haven't been, but the reason, I don't have any education and therefore I can't, and then my age I can't get no other type of work that will, that I can do other than carpentry work.
>
> Q. Have you looked for other types of work?
>
> A. Well, yes I have. And I just can't find anything that I can do other than carpentry work.
>
> In my adult life, I have not done any work except for farming and carpentry.
>
> . . .
>
> I have been offered other jobs, but they were all in cabinet work like the work that I'm not able to do. I have not gone out to seek any other jobs. I have not attempted to get a job doing carpentry work building houses because I'm not educated enough, and even a part-time carpenter, which I have tried, has to be around the painters, varnishers and a lot of sawing.

I do not interpret this testimony to mean that claimant has not looked for jobs other than carpentry work. Indeed, claimant said he had looked for such jobs and couldn't find "anything that I can do other than carpentry work." He then said that he had been offered other work making cabinets which he was not able to do. His statement then was, "I have not gone out to seek any other jobs." Clearly when placed in context this statement means that claimant has not looked for other cabinet making jobs, for obvious reasons. He then says he has not looked for home building work and explains why. Claimant also testified that in order to somehow support himself he opened up his own cabinet shop as a sole proprietor so that he could work at will as he was able. He said, "When I develop these problems during the performance of my carpentry work, I just have to quit work until I get better. But I usually try to work when I'm able to." Claimant's last year's salary (1977) at Apex Cabinet Company was $14,820. As sole proprietor in 1978 he earned $7,114.43 and in 1979, $5,679.79.

The Commission has concluded that claimant has an occupational disease which conclusion is fully supported, if not mandated, by the evidence. In light of this conclusion, it is difficult to see what else plaintiff could do to prove that he has had a diminution in earning capacity as the result of an occupational disease. The evidence mandates this conclusion unless, of course, the Commission simply disbelieves it, a position which it does not seem to have taken. Rather, it seems to have taken, erroneously, the position that the evidence, even if believed, does not as a matter of law show that plaintiff's diminution in earning capacity is compensable.

This is not a case where a claimant has sat back and done nothing to find other suitable work. This claimant has, by all the evidence, done the best he could, given the existence of his occupational disease, to minimize his loss. He should not be penalized because he has chosen to work as much as he is able in a sole proprietorship doing the only work which, according to all the evidence, he is qualified by education and training to do.

Justice MEYER dissenting.

I must respectfully dissent. At the outset, I must say that I fully concur with the position of the majority that in order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment; (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment; and (3) that this individual's incapacity to earn was caused by plaintiff's injury. Based upon these findings, the Commission may make a conclusion of law that the claimant is "disabled" within the meaning of the Workers' Compensation Act. Recognition by the hearing officers and the Commission of the necessity of such findings and based thereon an appropriate conclusion of law as to whether a claimant is disabled or not disabled would avoid needless and wasteful appellate review based upon allegations of inadequate and inappropriate findings and conclusions of law.

While recognizing that problem in the judgment and award in the case before us, I am compelled to say that I believe this Court should have proceeded to determine whether there is suffi-

cient evidence in the record to support the finding of fact of the Deputy Commissioner, affirmed by the full Industrial Commission and the Court of Appeals, to the effect that plaintiff "does not have any permanent disability . . . ." The majority opinion fails to observe the principle of law that the findings of the Commission are *conclusive* on appeal when supported by competent evidence even though there is evidence to support a contrary finding. The evidence here overwhelmingly supports the finding that the plaintiff does not have any permanent disability. Mr. Hilliard was examined by three doctors. Two of the doctors found only nosebleeds and made no mention of any other symptoms. When the claimant saw Dr. Baggett on 25 July 1977, he was certified to return to work that day and had no permanent disability. He saw Dr. Sieker on 13 November 1978 and he had no symptoms at that time. Dr. Sieker was of the opinion that the glue fumes, paint fumes and wood dust were irritating to Mr. Hilliard's respiratory system and would produce the symptoms of which Mr. Hilliard complained. Dr. Sieker determined that Hilliard should not return to work in that environment. Dr. Sieker's conclusion, however, which fully supports the Commission's finding that Mr. Hilliard had no permanent disability, is as follows:

> I found no evidence of permanent damage to Mr. Hilliard, and did not consider him to be disabled from other types of work in a pollutant-free environment.

On cross-examination, Dr. Sieker further testified in pertinent part:

> In my medical reports I found that Mr. Hilliard presented symptoms aggravated by occupational exposure, with no evidence of permanent damage. . . .
>
> As stated in my letter dated August 3, 1979, to Mr. McCain, I felt that Mr. Hilliard could work in environments which do not contain excessive amounts of fumes, chemicals and dust . . . .

Not only is there more than adequate evidence to support the Deputy Commissioner's finding of no permanent disability, there is in my opinion insufficient evidence to support the Deputy Commissioner's finding of an occupational disease. The "disease" found by the Deputy Commissioner was "respiratory symptoms."

The description "respiratory symptoms" or "sensitivity syndrome" or words to that effect are the only terms used by the medical witness to describe Mr. Hilliard's condition. Symptoms are nothing more than manifestations of an underlying causation. "Respiratory symptoms" is nothing but a term describing manifestations—manifestations which accompany any number of ordinary diseases of life such as emphysema, bronchitis, pneumonia, etc. "Sensitivity syndrome" is likewise used to describe the manifestations of exposure to such items as grass, household dust, detergents, and other agents which may not be even remotely related to conditions of the work place.

In my view, the Commission must address the question of whether "respiratory symptoms" is a compensable disease under our Workers' Compensation Act. Since the claimant's "disease" is not one of those specifically enumerated in G.S. § 97-53, in order to be compensable, it must fall within subsection (13) which specifically requires the presence of a "disease" and excludes "all ordinary diseases of life." This section of the Act is meant to compensate for occupational *diseases.* If there is an identifiable "disease" which causes this claimant's respiratory symptoms, that is another matter. Here there have been findings only of symptoms or sensitivity. The evidence before us suggests that the claimant suffers no permanent damage and that his "respiratory symptoms" are triggered not by disease but by agents peculiar to his work place. The medical evidence clearly suggests that a work place free of wood-glue fumes, paint fumes and wood dust would not trigger claimant's symptoms.

I do not find the case of *Little v. Food Service,* 295 N.C. 527, 246 S.E. 2d 743 (1978), apposite here. In that case, this Court found to be error the trial judge's refusal to allow Mrs. Little to testify on her own behalf to the effect that she was unsuited for employment due to characteristics peculiar to herself. Here no question has been raised concerning the right of the claimant to testify in this regard. Indeed, in the case before us the claimant in fact testified that:

> I have been offered other jobs, but they were all in cabinet work like the work that I'm not able to do. I have not gone out to seek any other jobs. I have not attempted to get a job doing carpentry work building houses because I'm not

educated enough, and even a part-time carpenter, which I have tried, has to be around the painters, varnishers and a lot of sawing.

I am not familiar with the construction of homes but have seen houses framed. It is true that framing houses does not include painting until it comes to the finishing, which is what I've always done. I have not tried to do any construction work like from the start of a house, because I do not feel that I would be dependable because of my condition.

This was precisely the type of testimony that Mrs. Little was not permitted to give and which was the sole reason for the remand in *Little.*

Even the majority recognizes that the uncontradicted medical testimony establishes that plaintiff was physically capable of working in employment free from wood dust, paint and lacquer fumes and glue fumes. Because of the peculiar circumstances of this case, I do not believe that the claimant, on his testimony alone, can establish that he is "disabled." The "disablement" here must be supported by medical testimony. The claimant's condition here is not an *objective* condition discernible by visual observation of the Deputy Commissioner; it is a *subjective* condition which can be determined with reasonable certainty only by a medical expert. *See Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753 (1965); *Huskins v. Feldspar Corp.,* 241 N.C. 128, 84 S.E. 2d 645 (1954); *Singleton v. Mica Co.,* 235 N.C. 315, 69 S.E. 2d 707 (1952).

For these reasons I would vote to affirm the decision of the Court of Appeals.

Justice COPELAND joins in this dissenting opinion.

Green v. Duke Power Co.

ANDREA D. GREEN, BY HER GUARDIAN AD LITEM, KENNETH R. DOWNS, AND HENRY FRANK GREEN, PLAINTIFFS v. DUKE POWER COMPANY, A NORTH CAROLINA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF v. HENRY THOMAS EANES AND HOUSING AUTHORITY OF THE CITY OF CHARLOTTE, NORTH CAROLINA, THIRD-PARTY DEFENDANTS

No. 78A81

(Filed 4 May 1982)

1. **Appeal and Error § 6.2— summary judgment in favor of third party defendants—no right of defendant to immediate appeal**

In an action to recover for injuries received by a five-year-old child when she touched an allegedly exposed portion of a ground level transformer owned and maintained by defendant power company on land owned and occupied by third party defendants wherein defendant power company sought contribution from the third party defendants, defendant power company did not have a substantial right to have its claim for contribution determined in the same proceeding in which its liability to plaintiffs is determined and thus had no right of immediate appeal from the entry of summary judgments in favor of third party defendants where the issue in the action for contribution is whether third party defendants violated a duty of care to plaintiffs; the issue in the principal case is whether defendant power company independently violated a separate and unrelated duty of care to plaintiffs; plaintiffs advanced no allegations of joint or concurring negligence; and whether third party defendants are liable to plaintiffs is therefore in no way dependent upon the resolution of the issue of defendant power company's liability to plaintiffs.

2. **Negligence § 51— transformer maintained by power company—injury to child—owner and occupant of land not liable under attractive nuisance doctrine**

The owner and occupant of land were not liable under the attractive nuisance doctrine for injuries received by the five-year-old plaintiff when she touched an exposed electrified portion of a ground level transformer owned and maintained by a power company on their land, even if they knew of the dangerous condition of the transformer, where the transformer was placed on the land by the power company pursuant to a valid easement; the power company expressly bound itself in the instrument granting the easement to maintain the transformer in a proper manner; the power company had the sole duty to keep safe the transformer; and neither the owner nor the occupant of the property on which the transformer was located had the right to deny access to the transformer or to remedy the dangerous condition of the device. Even if sound public policy would require the imposition of a duty upon the owner and occupant to take steps reasonably calculated to prevent injury from the transformer, that duty was met when the occupant warned plaintiff to stay away from the transformer because she might get hurt.

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

APPEAL by third party plaintiff Duke Power Company from the decision of the Court of Appeals (*Wells, J.*, with *Arnold* and *Martin (R.M.), JJ.*, concurring) dismissing Duke's appeal from summary judgments entered by *Burroughs, J.*, at the 11 February 1980 Schedule B Session of MECKLENBURG Superior Court (in favor of third party defendant Housing Authority of the City of Charlotte) and at the 18 February 1980 Administrative Session of MECKLENBURG Superior Court (in favor of third party defendant Henry Thomas Eanes). The case was argued in the Supreme Court as No. 78, Fall Term 1981.

Plaintiffs Green brought this action to recover from Duke Power for injuries received when plaintiff Andrea Green, then aged five years, touched an allegedly exposed electrified portion of a ground-level pad-mounted transformer owned and maintained by Duke on land owned by the Housing Authority and leased by Henry Thomas Eanes. Plaintiffs contend that Duke was negligent in failing to keep the box locked. Duke denied any knowledge that the box was unlocked.

During discovery Henry Thomas Eanes, whose residence was located upon the same lot upon which Duke maintained its transformer pursuant to an easement from Housing Authority, was deposed concerning his knowledge of the events surrounding the injuries to Andrea Green. Eanes testified on deposition that he had known that the transformer was unlocked for some time prior to the injury. He testified that on several occasions both he and his wife had found children playing on the transformer and had chased them away, explaining that it was a dangerous place to play. He further testified that he had twice telephoned Duke, notifying the person who answered the telephone on behalf of Duke that the transformer was open, that children were playing on it, and that he feared the children would be hurt. He stated that on both occasions he was assured that Duke would send someone out to the property to attend to the matter. He also testified that he had telephoned the Housing Authority to inform it of the dangerous condition of the transformer.

Duke thereupon filed a third party complaint alleging that Eanes knew and Housing Authority either knew or should have known of the hazardous condition of the transformer. Duke sought contribution from Eanes and Housing Authority based

upon their alleged joint liability for failing "to take any action to secure or otherwise lock said transformer box prior to the time of the accident."

After further discovery, during which Duke denied having any record of the alleged telephone calls from Eanes, both third party defendants moved for summary judgments. Third party plaintiff, Duke Power Company, appealed the entry of summary judgments in favor of both third party defendants.

These judgments did not contain a certification pursuant to G.S. 1A-1, Rule 54(b), that there was "no just reason for delay" and the trial court refused to stay the trial of the principal case pending Duke's appeal on its third party claim. A three-member panel of the North Carolina Court of Appeals, however, granted a writ of supersedeas, N.C. Rules App. Proc., Rule 23, to stay the trial pending the appeal. After considering the records, the briefs of the parties, and oral arguments, a different panel of the Court of Appeals filed an opinion, reported at 50 N.C. App. 646, 274 S.E. 2d 889 (1981), deciding that Duke had no right of immediate appeal and unanimously holding that the appeal be dismissed and the supersedeas dissolved.

We granted discretionary review under G.S. 7A-31 to consider the propriety of the Court of Appeals' dismissal of Duke's action.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William I. Ward, W. Edward Poe, Jr., William E. Poe, and Irvin W. Hankins, III, for Duke Power Company.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Hatcher Kincheloe, for appellee Eanes.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews, for Housing Authority of the City of Charlotte.

BRANCH, Chief Justice.

I

[1] The first issue before this Court is whether the Court of Appeals erred in dismissing appellant Duke Power's appeal of the summary judgment granted in favor of third party defendants

Eanes and Housing Authority. For the reasons stated below, we find no error.

Appellant's sole ground of appeal is the contention that the granting of third party defendants' motions for summary judgment affected a substantial right. Both G.S. 1-277 and G.S. 7A-27 (d) provide for immediate appeal of a judicial order or determination that affects a substantial right. Duke insists that it had a substantial right to have its claim for contribution from Eanes and Housing Authority determined in the same proceeding in which Duke's liability to Green is determined. *Cf. Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976).

As we noted in *Bailey v. Gooding*, 301 N.C. 205, 210, 270 S.E. 2d 431, 434 (1980), "[t]he 'substantial right' test for appealability is more easily stated than applied." *See also Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 343 (1978). One writer, in seeking to formulate a rule based on our decisions in these cases, has concluded:

> The right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal, while the right to avoid the possibility of two trials on the same issues can be such a substantial right.

Survey of Developments in N.C. Law, 1978, 57 N.C.L. Rev. 827, 907-08 (1979); *quoted with approval in*, W. Shuford, N.C. Civil Practice & Procedure § 54-5 (2nd Ed. 1981). We adhere to our earlier statement that "[i]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal was sought is entered." *Waters v. Personnel, Inc.*, 294 N.C. at 208, 240 S.E. 2d at 343. However, we are of the opinion that the above statement constitutes, as the author suggests, only "a general proposition tnat in many circumstances should be helpful in analyzing the substantial right issue." *Survey, supra*, 57 N.C.L. Rev. at 907.

In instant case, the issue in the action for contribution is whether Eanes and Housing Authority violated a duty of care to plaintiff Green. The issue in the principal case is whether Duke independently violated a separate and unrelated duty of care to plaintiff. Plaintiff has advanced no allegations of joint or concur-

ring negligence. Thus, whether third party defendants are liable to plaintiff Green is in no way dependent upon the resolution of the issue of Duke's liability to Green. The resolution of these ultimate issues does not depend upon similar factual issues or similar proof.

We hold that no substantial right would be lost by Duke's inability to take an immediate appeal from the summary judgment against it. If Duke were to win in the principal action, Duke would have no right to appeal. G.S. 1-271 (only an aggrieved party may appeal). If Duke were to lose, its exception to the entry of summary judgment would fully and adequately preserve its right to thereafter seek contribution.

Under other circumstances third party defendants might be free at a subsequent trial to deny Duke's liability to plaintiffs Green, leaving the jury in the contribution trial free to find that Duke was not liable to plaintiffs Green despite a finding by a different jury in the principal case that Duke was liable. Such might be the case, for example, if third party defendants had never been brought into the principal action, or if, upon being impleaded, they had asserted as a defense to Duke's third party complaint that Duke was not liable in negligence to plaintiffs Green. We are faced with neither of these situations herein. The answers in instant case have already been filed. Both third party defendants alleged in their answers that "the active and primary negligence of Duke Power Company is pleaded in bar of Duke Power Company's claim for contribution from this defendant." Neither asserted in the alternative that Duke was not liable to plaintiffs Green for negligence. A party will ordinarily be bound by his pleadings. *Watson v. Clutts*, 262 N.C. 153, 136 S.E. 2d 617 (1964); *Davis v. Rigsby*, 261 N.C. 684, 136 S.E. 2d 33 (1964). We are aware, of course, that leave to amend the pleading "shall be freely given when justice so requires," G.S. 1A-1, Rule 15; however, third party defendants herein have failed to assert this defense and have voluntarily foregone their opportunity in the principal action to disprove Duke's liability. The interests of justice in instant case would preclude the granting of leave to amend the pleadings to include this new defense at this late date. Thus, although Duke could be forced to undergo a full trial on the issue of its liability to Green followed by a full trial on the issue of Eanes' and Housing Authority's liability to Green, under the cir-

cumstances of the case there are no overlapping issues so as to justify an immediate appeal of an interlocutory order.

The avoidance of one trial is not ordinarily a substantial right. *Bailey v. Gooding*, 301 N.C. at 210, 270 S.E. 2d at 434; *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 492, 251 S.E. 2d 443, 447-48 (1979); *Waters v. Personnel, Inc.*, 294 N.C. at 208, 240 S.E. 2d at 344. *See also Survey, supra*, 57 N.C.L. Rev. at 907. We agree that "the right to avoid the possibility of two trials *on the same issues* can be . . . a substantial right." *Survey*, 57 N.C.L. Rev. at 908. (Emphasis added.) Such is not the case here. The possible second trial in instant case would not involve *the same issues* and therefore would not warrant immediate appeal. Ordinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue. This not being the case before us, we hold the Court of Appeals' dismissal of Duke's appeal was without error.

II

[2] All parties to this appeal have requested that we consider the merits of the case, pointing to the fact that this matter has been in the courts since 1978.

In order to expedite the administration of justice, we elect, pursuant to our supervisory authority and the provisions of G.S. 7A-31, to review the decision of the trial judge granting summary judgment in favor of third party defendants Eanes and Housing Authority. *See Consumers Power v. Power Co.*, 285 N.C. 434, 439, 206 S.E. 2d 178, 182 (1974).

G.S. 1B-1(a) provides that "where two or more persons become jointly or severally liable in tort for the same injury . . . there is a right of contribution among them." Appellant Duke Power Company claims contribution upon appellees' alleged liability to plaintiffs Green under the so-called attractive nuisance doctrine. *See Walker v. Sprinkle*, 267 N.C. 626, 148 S.E. 2d 631 (1966); *Brannon v. Sprinkle*, 207 N.C. 398, 177 S.E. 114 (1934).

The rule governing liability in this case is aptly stated in the leading case of *Briscoe v. Lighting and Power Co.*, 148 N.C. 396, 411, 62 S.E. 600, 606 (1908), wherein this Court stated:

> It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This we think sound in principle and humane policy. We have no disposition to deny it or to place unreasonable restrictions upon it. We think that the law is sustained upon the theory that the infant who enters upon premises, having no legal right to do so, either by permission, invitation or license or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or prevision; that is, whether under all of the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury.

Appellant Duke relies on the deposition statement of third party defendant Eanes that he knew of the dangerous condition of the transformer and that he had informed third party defendant Housing Authority of the transformer's condition to argue that the owner (Housing Authority) and the occupier (Eanes) of land may be held liable for the injuries to young Green. Duke cites several cases which have held landowners liable under the attractive nuisance doctrine for injuries to children resulting from dangerous conditions on the landowner's property, known to the owner but which he neither created nor maintained. We believe these cases are distinguishable in that, while the defendants therein did not create or maintain the dangerous conditions on their land, they "knowingly suffered [the dangerous conditions] to continue." *Benton v. Montague*, 253 N.C. 695, 704, 117 S.E. 2d 771, 777 (1961). Such is not the case before us.

Appellant Duke Power Company cites two New Jersey cases for the proposition that:

> If an artificial condition exists upon the land, of which the landowner or occupier has knowledge, and which reasonable men may recognize as having propensities for causing an

> unreasonable risk of harm to infant trespassers, then it makes no difference whether the condition was created by third persons or by the defendant himself.

Simmel v. New Jersey Coop. Co., 28 N.J. 1, 10, 143 A. 2d 521, 526 (1958); *see also Lorusso v. De Carlo*, 48 N.J. Super. 112, 136 A. 2d 900 (1957). The *Simmel* court made clear, however, that the actual knowledge of a landowner of the existence on his property of a dangerous condition created by a third party was significant because it indicated "toleration or sufferance of, or acquiescence in, the acts of others . . . . " 28 N.J. at 11, 143 A. 2d at 526. Both of these New Jersey cases involved fires set on a landowner's property by third persons. Infant trespassers were injured in both fires. We believe the courts in those cases reasoned properly in deciding in each that the landowner, if he had actual knowledge of the fire, should have extinguished it, and failure to do so indicated a "toleration or sufferance of, or acquiescence in" the existence of the dangerous condition on his property. These cases are distinguishable in that defendants therein appear to have been free to extinguish the fires. There was no indication in either case that the third party who set the fire had any right or authority to maintain a fire on the defendant's property absent defendant's (express or implied) approval. Duke's legal right by easement to maintain a transformer on third party defendant's property removes this case from the fact situation faced in *Simmel* and *Lorusso*.

The case of *Haddad v. First National Stores, Inc.*, 109 R.I. 59, 280 A. 2d 93 (1971), is also distinguishable. That case centered upon the injury to a child playing with a shopping cart left on a supermarket parking lot. Certainly the store would have been within its rights to have removed its carts from its own lot. Third party defendants in instant case were not free to remove the transformer from their property under the terms of Duke's easement.

We believe that the dispositive issue in this case is not whether Housing Authority and Eanes knew of the dangerous condition of the transformer, but whether they can be said to have "suffered it to continue," *Benton v. Montague*, 253 N.C. at 704, 117 S.E. 2d at 777, *i.e.*, tolerated or acquiesced in it. *Cf. Simmel v. New Jersey Coop. Co.*, 28 N.J. at 11, 143 A. 2d at 526. We think not.

In instant case, neither the owner nor the occupier of the property on which the transformer was located had the right to deny access to the transformer or to remedy the dangerous condition of the device. The transformer was the sole property of appellant Duke Power. It was placed on the premises pursuant to a valid easement the terms of which granted to Duke "the right, privilege and easement . . . to construct, maintain and operate [thereon] . . . transformers . . . together with the right at all times to enter said premises . . . . " Any interference or tampering with Duke's transformer would clearly encroach upon the rights granted to Duke by the easement. Likewise, locking or fencing the transformer would impair Duke's access to it and would be inconsistent with the terms of the easement. It was not reasonably practical for the owner of the realty, Housing Authority, or the occupier, Eanes, to prevent access to the transformer or to render it harmless.

This view is in accord with the general rule that "[i]t is not only the right but the duty of the owner of an easement to keep it in repair; the owner of the servient tenement is under no duty to maintain or repair it, in the absence of an agreement therefor.", 25 Am. Jur. 2d *Easements and Licenses* § 85 (1966), and cases cited therein; *see also Rose v. Peters*, 59 Cal. App. 2d 833, 139 P. 2d 983 (1943); *Nixon v. Welch*, 238 Iowa 34, 24 N.W. 2d 476 (1946). Another rule follows from the first; viz. "If the character of the easement is such that a failure to keep it in repair will result in injury to the servient estate or to third persons, the owner of the easement will be liable in damages for the injury so caused." 28 C.J.S. *Easements* § 94 c (1941) and cases cited therein; *see also Richardson v. Kier*, 34 Cal. 63, 91 Am. Dec. 681 (1867); *Wells v. North East Coal Co.*, 274 Ky. 268, 118 S.W. 2d 555 (1938); *Swingler v. Robinson*, 321 S.W. 2d 29 (Mo. App. 1959).

This Court in the past has recognized that the owner of the easement is the party to be charged with its maintenance. *Richardson v. Jennings*, 184 N.C. 559, 114 S.E. 821 (1922). We hold that Duke Power Company had the *sole* duty to keep safe the transformer which was Duke's sole property. Duke had expressly bound itself to "maintain [the transformer] . . . in a proper manner" in the instrument granting to Duke the easement and pursuant to which the transformer had been erected. We are of the opinion that the knowledge of third party defendants is irrelevant

to the question of their liability where, as here, the third party defendants had no control over the transformer. In so doing we follow the well-reasoned holding of the Hawaii Supreme Court that in such cases "it is the control and not the ownership which determines the liability." *Levy v. Kimball*, 50 Haw. 497, 499, 443 P. 2d 142, 144 (1968). *Accord Benton v. Montague*, 253 N.C. at 703, 117 S.E. 2d at 777, *quoting* 2 Harper & James, The Law of Torts § 27.19 at 1526 (1956) ("It is not enough . . . to show that the third person's conduct foreseeably and unreasonably jeopardized plaintiff. Plaintiff must also show that the occupier . . . *had a reasonable opportunity to prevent or control such conduct.*") (Emphasis added.)

Since the duty was Duke's, the only obligation to act was Duke's, and the only possible liability in this case is Duke's alone. The granting of summary judgment for third party defendants, Eanes and Housing Authority, was proper.

Third party defendants clearly had no duty to Duke to apprise it of its potential liability for the dangerous condition of its transformer. Neither does it follow that such notification would have *necessarily* resulted in Duke's discharging of its duty to plaintiff to render the transformer safe, although it may be said that such notification would be reasonably calculated to prevent the injury.

Even assuming *arguendo*, however, that sound public policy would require the imposition of a duty upon third party defendants to take steps reasonably calculated to prevent injury, we are of the opinion that the materials before the trial court on the motion for summary judgment forecast uncontroverted evidence that such an effort was made. The deposition of third party defendant Henry Thomas Eanes was offered by third party plaintiff Duke as a basis for the denial of the motion for summary judgment. Eanes' testimony was that he had seen plaintiff Angela Green playing with other children on the unlocked transformer and had told them to stay away from it because someone would get hurt. He testified that they heeded his warning and left. "I told that little Angela . . . one time and I never did see Angela get back on there until she got hurt." Duke offered no materials that would impeach or contradict Eanes' testimony on this point.

This Court has held that summary judgment may be entered on the basis of testimonial evidence of an interested party (1) when there are only latent doubts as to the witness's credibility (i.e., doubts stemming from the witness's status as an interested party); (2) when the opposing party has failed to present materials in opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate. *Kidd v. Early*, 289 N.C. 343, 370, 371, 222 S.E. 2d 392, 410, 411 (1976). Applying the above rule to instant case, if Duke's success in its third party action depended upon its proof at trial that third party defendants violated a duty to take steps reasonably calculated to prevent injury, then the uncontradicted deposition testimony that Eanes warned Angela Green to stay away from the transformer established the lack of a genuine issue as to that material fact. G.S. 1A-1, Rule 56(c); *Kidd v. Early, supra.* Whether in addition to warning Angela to stay away from the box, Eanes also called Duke to notify it of the condition of the transformer is thus rendered immaterial. We are of the opinion that, as a matter of law, by warning Angela he took action reasonably calculated to prevent her injury. This uncontradicted evidence establishes the discharge of any minimal duty that could fairly be imposed upon these defendants.

The decision of the Court of Appeals dismissing Duke's appeal was proper. On the merits of this case, we affirm the trial judge's granting of summary judgment for the third party defendants, Eanes and Housing Authority.

Affirmed.

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

STATE OF NORTH CAROLINA v. HOWARD BLACK

No. 172A81

(Filed 4 May 1982)

1. **Criminal Law § 87.1— prosecutor leading State's witness—no reversable error**

The trial judge did not abuse its discretion in allowing the prosecutor to attempt to clarify one of the State's witness's answers. The witness was a semi-invalid stroke victim who had difficulty in comprehending and responding to questions.

2. **Criminal Law § 90— impeaching own witness under guise of corroborative evidence—curative instructions by judge**

Where the trial court repeatedly refused to allow the district attorney to introduce a prior inconsistent statement of one of its witnesses, the trial court cured any error arising from the district attorney's ill-advised attempts to impeach his own witness by introducing contradictory or inconsistent statements of the witness under the guise of corroborative evidence.

3. **Criminal Law § 66.10— pretrial identification procedure—waiver of right to object**

Where defendant failed to object to evidence of the victims' pretrial identification of the defendant, did not request a *voir dire* hearing, and allowed evidence of the victims' identification of the defendant as the perpetrator to be admitted into evidence without objections during the trial, the defendant could not maintain before an appellate court that his rights were prejudiced at trial.

Justice EXUM dissenting.

APPEAL by the defendant from *Judge Charles T. Kivett,* presiding at the 14 September 1981 Criminal Session of FORSYTH Superior Court.

The defendant was charged in bills of indictment, proper in form, with first-degree sexual offense and kidnapping. He entered pleas of not guilty and was tried before a jury which found him guilty as charged. From the judgments sentencing him concurrently to life imprisonment and imprisonment for 25 years to life, the defendant appeals to this Court as of right pursuant to G.S. 7A-27.

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

Zachary T. Bynum, III and David V. Liner, Attorneys for defendant-appellant.

MITCHELL, Justice.

In this appeal, the defendant contends that the trial court erroneously allowed the district attorney to cross-examine and impeach a State's witness and erroneously admitted incompetent evidence. For the reasons enunciated herein, we hold that the defendant had a fair trial free from prejudicial error.

On the evening of 16 April 1981, Artemus Peterson, then eight years old, and his brother Monte Peterson, seven years old, were approached by a man as they walked down a street near their home in Winston-Salem. The man asked if they knew where someone named Ronnie lived. Acting pursuant to standing instructions from their mother, the boys feigned ignorance although they in fact knew where Ronnie lived.

The man grabbed the boys by the napes of their necks and threw them into the front seat of his 1970 Impala. He drove them to a house and parked in the driveway. They remained in the car, playing pattycake, while he went inside. When he returned, he drove by a convenience store and bought some red wine and a bag of Cheese Doodles. He finally took them to Winston Lake Park, parked and told them the car was out of gas.

He tried to make them drink the wine, but they repeatedly spit it out without swallowing. Monte eventually went to sleep in the back seat of the car, and the man took Artemus into some woods near the lake. After getting a drink of water, Artemus went to sleep on a park bench. When he awakened, his pants and underpants were off and his shirt was pulled up.

The man, naked from the waist down, approached the boy and according to Artemus, he "made me suck his weenie." The man later attempted anal sex and hit the victim in the crotch with his fist.

Meanwhile, Officer J. A. Berry of the Winston-Salem Police Department discovered the Impala in the parking area. He awakened Monte, learned his identity, and took him home.

After warning Artemus to keep quiet or the KKK would throw him in the lake, the man drove him to a street corner near his home. Artemus arrived home shortly after the police took Monte there. The boys then related the evening's events.

The police ascertained an address by means of the license plate number of the Impala. Upon their arrival at the address, the door was answered by the defendant, Howard Black. When the defendant told them he was the only one who used the car, the officers asked him to come to police headquarters.

After the defendant was advised of his constitutional rights and he signed a rights waiver form, officers confronted him with the boys' story. He denied any involvement. When the officers asked him to submit to having his photograph placed in a lineup with other photographs, he refused and instead demanded an immediate confrontation with his accusers. The boys were in fact brought to the police station and identified the defendant as the perpetrator.

[1] The defendant first assigns that the trial court erroneously allowed the district attorney to lead one of the State's witnesses. In questioning Steve Jones about the defendant Howard Black, the following exchange took place:

Q. (Mr. Tisdale) Does he walk with a limp?

A. Walk with a what?

Q. A limp.

A. I walk with a limp?

Q. Yes.

A. Yeah, walk with a stick.

Q. No, I'm talking about Howard Black.

A. No, not to my memory.

Q. Do you know whether he was ever in an automobile accident?

A. No, I do not. I do not.

Q. Does he walk with a limp?

MR. LINER: Objection. He has already asked that.

THE COURT: Objection overruled. Go ahead and answer the question.

EXCEPTION NO. 2

Q. (Mr. Tisdale) Does he walk with a limp?

A. Nope.

Q. You're under oath now, Mr. Black — I mean, Mr. Jones.

MR. LINER: Your Honor, I object. This is his witness. This is not a cross examination.

THE COURT: Well, go ahead and answer the question. The objection is overruled.

EXCEPTION NO. 3

Q. (Mr. Tisdale) Does he walk with a limp?

A. Nope.

The defendant did not object to the original question "Does he walk with a limp?" Therefore, he waived any objection to the evidence as admitted and to the form of the question as propounded. His later attempt to object to the repetition of the question was of no avail. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980).

Even had there been a timely objection, the trial court did not commit reversible error in allowing the examination as conducted. The examination of witnesses and the form of questions permitted are matters within the discretion of the trial court. *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972). Absent an abuse, the exercise of such discretion will not be disturbed on appeal. *State v. Willis*, 281 N.C. 558, 189 S.E. 2d 190 (1972). In its discretion, the trial court may in certain circumstances allow a prosecutor to ask a State's witness leading questions. These include situations where the witness "has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or where . . . the mode questioning is best calculated to elicit the truth." *State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 236 (1974).

Mr. Jones was a semi-invalid stroke victim. From the outset of his testimony, he quite obviously had difficulty in comprehending and responding to questions. For example:

MR. TISDALE: Mr. Steve Jones. Is Mr. Jones in the courtroom? Mr. Jones, come up, please. You might want to come this way, Mr. Jones. You'll have a little more room. Mr. Jones, will you be sworn, please? Will you be sworn on the Bible?

THE COURT: Raise your right hand, please. Let someone hold your cane there, sir. Thank you. You can raise your right hand. Put your hand up.

WHEREUPON, the witness, *STEVE JONES*, first being duly sworn by the Court, on his oath testified as follows:

[4:03 o'clock p.m.]

THE COURT: Can you get up here all right, Mr. Jones. You have some steps to come up. Can you get up there all right?

THE WITNESS: I think so.

DIRECT EXAMINATION By Mr. Tisdale to STEVE JONES:

Q. Would you tell us your name, please?

A. Beg pardon?

Q. Would you state your name, please.

A. State your name?

Q. What's your name?

A. Steve Jones.

With respect to whether the defendant walked with a limp, Mr. Jones apparently misunderstood the original question. The district attorney had to explain that the question referred to the defendant and not to the witness himself. Mr. Jones' answer did not immediately follow the question and, apparently in an attempt to clarify the answer, the prosecutor repeated the question. Although Mr. Jones responded immediately to this second question, the defendant interposed a second objection and the trial judge ruled "Well, go ahead and answer the question. The objection is overruled." This led to the question being answered a third time. In consideration of the witness's demonstrated difficulty as a result of age and infirmity to respond to questions, the trial judge did not abuse his discretion in allowing the prosecutor to attempt to clarify the witness's answers.

Moreover, even had the prosecutor improperly examined his own witness, any error attributable thereto was harmless. The district attorney apparently intended to elicit testimony that the defendant Howard Black walked with a limp. Yet there was no unambiguous evidence that the perpetrator walked with a limp. The victim testified that his manner of gait was "linky." Such testimony from a nine year old witness was likely as mystifying to the jury as it is to an appellate court. There is no indication from the record what the victim meant.

Finally, any possible error was cured by the witness's consistent testimony that the defendant did not walk with a limp. The admission of this testimony therefore inured to the defendant's favor. In a similar situation this Court ruled that there was "little evidence of prejudice to defendant since the witness seemed to get the better of this exchange." *State v. Peplinski*, 290 N.C. 236, 250, 225 S.E. 2d 568, 576 (1976). The manner of examination of the witness Steve Jones by the district attorney thus did not constitute reversible error.

[2] The defendant next contends that the trial court erroneously allowed the district attorney to impeach the State's own witness by introduction of a prior inconsistent statement. The witness Steve Jones testified that the defendant did not leave home on the night in question. The prosecution then called Officer J. D. Brown of the Winston-Salem Police Department:

> THE COURT: All right, it is my understanding that you are preparing to elicit testimony for the purpose of corroborating an earlier witness for the State, Steve Jones.
>
> MR. TISDALE: Yes, sir.
>
> THE COURT: Now, ladies and gentlemen, I instruct you that you may consider what this officer relates with respect to what Steve Jones told him solely for the purpose of corroborating what the witness, Steve Jones, himself had to say when he was on the witness stand earlier, if you find that it does, in fact, corroborate or tend to substantiate what he had to say; if not, you will disregard it. Keep that in mind. Thank you.
>
> Q. (Mr. Tisdale) Officer Brown, you say you talked to Steve Jones?

A. Yes, sir.

Q. And that was the same gentleman who testified yesterday?

A. Yes, sir, it was.

* * *

Q. And what, if anything, did he tell you?

A. I went back to his residence sometime about daylight the following morning and talked to him. And he said that — I asked him had Mr. Black been there all night or what he could tell me about the car. He said Mr. Black left about seven-thirty the night before and went out to Joe's Fine Foods Store, which is approximately a quarter of a mile up the street from where they live. And he said he was gone about thirty minutes, and he came back in, and then sometime later on in the night he went back out again.

MR. LINER: Objection, Your Honor.

THE COURT: Well, disregard it if it doesn't corroborate, members of the jury. Go ahead.

Q. (Mr. Tisdale) Go ahead.

A. Said after he went out the second time that he, Mr. Jones, had laid down across the bed —

MR. LINER: — Objection again to continuing this.

THE COURT: All right, disregard it if it doesn't corroborate. Go ahead.

THE WITNESS: And he said he didn't know what time he came back in, but he hadn't been in but just a short time when we came to the house —

MR. LINER: — Objection again, Your Honor. Move to strike.

EXCEPTION NO. 4

THE COURT: Do not refer further to any alleged statement of Jones with respect to the defendant's having gone out again. Do not further refer to that. Go ahead now.

MR. TISDALE: No further questions.

THE COURT: Disregard that, members of the jury.

The rule that the State may not impeach its own witness has long been the law in North Carolina. *State v. Moore*, 300 N.C. 694, 268 S.E. 2d 196 (1980); *State v. Taylor*, 88 N.C. 694 (1883). A prosecutor may not circumvent this standard, as was attempted here, by introducing contradictory or inconsistent statements of the witness under the guise of corroborative evidence. *State v. Tinsley*, 283 N.C. 564, 196 S.E. 2d 746 (1973). Although violation of this rule by the actual introduction of incompetent evidence may result in serious consequences, the abortive actions of the district attorney in the instant case fall short of conduct which would mandate reversal of this defendant's conviction.

In *State v. Peplinski*, 290 N.C. 236, 225 S.E. 2d 568 (1976), the district attorney attempted to discredit the State's witness through cross-examination regarding a prior inconsistent statement. The witness consistently refused to acknowledge any prior statement as to what he would testify at trial, and insisted that he had promised only to tell the truth. This court noted that the prosecutor's "ill-advised attempts to impeach his own witness" were unsuccessful, and ruled that "[a]ny prejudice arising from this portion of the district attorney's examination was cured by the able trial judge's prompt rulings and curative instructions." *Id.* at 250, 225 S.E. 2d at 576.

Peplinski controls the case at bar. Both cases involved not a violation of a rule of evidence, but merely an unsuccessful attempt to do so. The trial court in the instant case repeatedly refused to allow the district attorney to introduce a prior inconsistent statement. Since the testimony by Officer Brown was in the guise of corroborative evidence, the trial court initially instructed the jury to consider the officer's testimony only to the extent it tended to corroborate or substantiate Steve Jones' testimony. Each time defense counsel objected to testimony as contradictory, the trial court instructed the jury to disregard it if it failed to corroborate. When the defense attorney moved to strike, the trial court directed the district attorney to desist from the line of questioning regarding the defendant's absence from his home on the night in question. The trial court finally instructed, "Disregard that, members of the jury." The trial court's refusal to allow the jury to consider evidence which was not corroborative

a fortiori excluded evidence that the defendant was absent from his home on the night in question. The final instruction directed the jury to disregard the entire line of questioning. "[W]here objectionable evidence is withdrawn and the jury instructed not to consider it no error is committed because under our system of trial by jury we assume that jurors are people of character and sufficient intelligence to fully understand and comply with the court's instructions and they are presumed to have done so." *State v. Siler*, 292 N.C. 543, 553, 234 S.E. 2d 733, 740 (1977); *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974), *modified*, 428 U.S. 903, 49 L.Ed. 2d 1207, 96 S.Ct. 3205 (1976). As in *Peplinski*, prompt action by the trial court cured any error arising from the district attorney's ill-advised attempts to impeach his own witness.

[3] The defendant finally assigns as error the admission of evidence of the victim's pretrial identification of the defendant. After the defendant arrived at police headquarters, he was apprised of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). He told police officers that he understood his rights and he did not want a lawyer present. He also signed a constitutional rights waiver form acknowledging these statements. When the officers asked if he would submit to a photographic lineup, he refused and instead demanded an immediate confrontation with the victims. The victims were in fact brought to the station and identified the defendant as the perpetrator.

Defense counsel initially failed to object to evidence of the victims' pretrial identification of the defendant. "A defendant cannot challenge an in-court identification without at least a timely general objection." *State v. Brady*, 299 N.C. 547, 557, 264 S.E. 2d 66, 72 (1980). Neither did the defense request a *voir dire* hearing. *See State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972). Moreover, on four other occasions during the trial, evidence of the victims' identification of the defendant as the perpetrator was admitted without objection. "It is the well-established rule that when evidence is admitted over objection but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost." *State v. Little*, 278 N.C. 484, 490, 180 S.E. 2d 17, 21 (1971).

Upon such abundant evidence of waiver, the defendant cannot maintain before an appellate court that his rights were prejudiced at trial. We therefore have no occasion to determine whether the defendant was subjected to an unconstitutional identification process or whether he waived his interest in the form and manner of such an identification process by his spontaneous demand for an immediate confrontation with his accusers.

Our review of the record impels the conclusion that the defendant has had a fair trial free of prejudicial error.

No error.

Justice EXUM dissenting.

I cannot agree with the majority's conclusion that the state tried but failed to elicit inadmissible testimony from its witness Brown. As the majority correctly concludes, it was improper for the state to offer Brown's testimony as "corroborative" of its witness Jones when in fact Brown's testimony contradicted what Jones had said on the stand. Jones, testifying for the state, said that on the day these crimes were allegedly committed, defendant lived with him. Jones said during the "first part of the night" (the crimes were allegedly committed at approximately 6 p.m.) he and defendant were drinking beer at defendant's house. Jones said defendant "didn't go out that night, not to my knowing." Jones said later in the evening he went to sleep and that "I was asleep if he [defendant] did go out." Brown, however, testified that Jones, prior to trial, had told him that defendant had left Jones' home at "about 7:30" on the evening in question. The majority concedes that Brown's testimony should not have been admitted but finds no error because it says the state's effort to elicit Brown's testimony was "aborted."

In my view the state quite successfully proffered Brown's inadmissible testimony. After Brown testified to Jones' prior inconsistent statement, defense counsel promptly objected. (There was no cause to object to the question, "And what, if anything, did he tell you?", because the state represented that Brown's testimony would be corroborative of, not inconsistent with, Jones'.) Technically, of course, defendant should have moved to strike; but under these circumstances the trial judge should have, in

response to the objection, instructed the jury to disregard Brown's answer because the answer was obviously, as a matter of law, inadmissible. Yet the trial judge left the question of its admissibility to the jury, telling it to "disregard [it] if it doesn't corroborate." The admissibility of the testimony was for the judge, not the jury.

Finally, defendant's counsel moved to strike the incompetent testimony. Clearly at this point the judge should have allowed the motion and told the jury in no uncertain terms to disregard the testimony. Instead, the judge admonished the state not to continue the line of questioning. Its purpose by this time accomplished, the state had no need to continue and so indicated by saying, "No further questions." The court then replied, "Disregard that, members of the jury."

One wonders, as I am sure the jury must have wondered, what the judge meant by "that." It could have meant, so far as the jury knew, Mr. Tisdale's last statement, or the last statement made by the trial judge. It clearly did not constitute a granting of defendant's motion to strike, nor a direction to the jury not to consider Brown's incompetent testimony.

Believing that a reasonable possibility exists that if this testimony had not been admitted, "a different result would have been reached at the trial," G.S. 15A-1443(a), I am constrained to vote for a new trial.

Adcock v. Perry

RUBY P. ADCOCK AND HUSBAND, HENRY CARLTON ADCOCK; ELSIE CHRISTINE P. HANAVAN AND HUSBAND, JOHN F. HANAVAN; ANNIE BELLE C. PERRY, WIDOW; NANCY P. JACOBS AND HUSBAND, CLAUDE JACOBS, JR.; AND JOHN THOMAS PERRY, DIVORCED v. JAMES T. PERRY AND WIFE, HATTIE MAE H. PERRY; WILLIAM LYON WHITFIELD AND WIFE, BEATRICE B. WHITFIELD; JACK P. WHITFIELD, UNMARRIED; DONALD WAYNE WHITFIELD AND WIFE, JOHNNIE T. WHITFIELD; AND JEAN H. BARBEE AND HUSBAND, HOWARD J. BARBEE

No. 133A81

(Filed 4 May 1982)

Wills § 34.1— intent to devise life estate

Testator intended to devise his wife a life estate in his real property, coupled with a limited power to dispose of the property to meet her personal needs, where one item of the will devised testator's real property to his wife and gave her "the right to sell or mortgage any part of the . . . property hereby devised and bequeathed to her in order to provide funds with which to defray her own necessary personal expenses, but she is not given the power to sell, dispose of or mortgage any part of said property for the purpose of aiding or assisting any of her children or any of the members of her family," and another item of the will provided that, after the death of testator's wife, "I give, bequeath and devise all of my property remaining to my four children, share and share alike."

Justice MITCHELL dissenting.

ON discretionary review of the decision of the Court of Appeals [52 N.C. App. 724, 279 S.E. 2d 871 (1981)] affirming the judgment of *Farmer, J.*, entered 14 May 1980 in GRANVILLE Superior Court.

This appeal involves title to real property. The action arose when petitioners instituted a special proceeding asking that two tracts of land located in Dutchville Township, Granville County, be sold for partition. Petitioners contend they hold as tenants in common with respondents; they claim their interest under the will of W. T. Perry. Respondents Barbee and James T. Perry and wife, Hattie Mae Perry, filed answers admitting the allegations of the petition and requested that the land be sold and the proceeds distributed among the parties.

Respondents Whitfield filed an answer in which they denied that they hold the property as tenants in common with petitioners and the other respondents; they allege that they obtained their interest under the will of Annie S. Perry, wife of W. T.

Perry, and that title to the property vested in them to the exclusion of all others.

W. T. Perry died testate on 24 May 1946. His last will and testament provides as follows:

> I, W. T. Perry, of the County and State aforesaid, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament in words and figures as follows, to wit:
>
> Item 1
>
> I direct my executrix, hereinafter named, to pay my funeral expenses, my debts and the costs and charges of administering and settling my estate from and out of the first money coming into her hands belonging to my said estate, and should it be necessary for my executrix to raise any money for said purposes by a sale of any part or all of my personal property I hereby authorize and empower my said executrix to make either public or private sale, as she may deem best, of any part or all of my said personal property.
>
> Item 2
>
> All of the balance and residue of my property, real and personal which I may own at the time of my death, I give, bequeath and devise unto my beloved wife, Annie Perry, and I do hereby give, grant and extend to the said Annie Perry the right to sell or mortgage any part of the real and personal property hereby devised and bequeathed to her in order to provide funds with which to defray her own necessary personal expenses, but she is not given the power to sell, dispose of or mortgage any part of said property for the purpose of aiding or assisting any of her children or any of the members of her family.
>
> Item 3
>
> After the death of my said wife, I give, bequeath and devise all of my property remaining to my four children, share and share alike, provided that Graham Perry, one of my children, between now and the date of my death conveys to me that tract of land in Dutchville Township, Granville

County, containing 16 acres, more or less, conveyed to the said Graham Perry by L. C. Sadler and others by deed of record in the Office of the Register of Deeds of Granville County in Book 89, at page 429, and should the said Graham Perry fail, and, or refuse to convey said tract of land to me before my death, then the said Graham Perry is to receive no part or share in my estate, and the share or part, to which he otherwise would be entitled to receive or take hereunder, is given and devised to my other three children, share and share alike.

Item 4

The children hereinabove in item three referred to shall include and apply to the child or children of any of my own children that may be dead at the time of my death, and my grand-children shall have and receive the shares to which the parent or parents of such grand-children would be entitled, if living.

Item 5

I hereby nominate, constitute and appoint my said wife, Annie Perry, executrix of this my last will and testament, and I hereby direct that she be permitted to qualify and to enter upon and to discharge the duties hereby imposed upon her without being required to give bond.

W. T. Perry's wife, Annie S. Perry, died testate on 15 February 1979.

Petitioners contend that they and respondents are the remaindermen, or heirs of deceased remaindermen, after the life of Annie S. Perry under W. T. Perry's will. Petitioners argue that the will devises a life estate to Annie S. Perry with a limited power to dispose of the estate for her own personal and necessary expenses during her lifetime; and that the will then devises a vested remainder to W. T. Perry's four children subject to certain provisions relating to Graham Perry.

Respondents Whitfield contend that W. T. Perry devised fee simple title in the two tracts of land to his wife, Annie S. Perry, and that they hold sole title under her will. In her will Annie S. Perry devised and bequeathed all property "of which I died

seized and possessed" to her daughter, Sudie Whitfield and her daughter's husband, R. L. Whitfield. The beneficiaries both predeceased Annie S. Perry. Sudie Whitfield and her husband, however, were survived by three children, respondents William Lyon Whitfield, Zack P. Whitfield and Donald Wayne Whitfield. Respondents aver that by virtue of the anti-lapse statute, G.S. 31-42, a fee simple title to the two tracts of land vested in them to the exclusion of the other petitioners and respondents.

The cause came for hearing before Judge Farmer on 9 April 1980. After the hearing, the court made findings of fact and concluded as a matter of law that under W. T. Perry's will, Annie S. Perry was devised fee simple title in the two parcels of land and that respondents Whitfield, as surviving heirs of the devisees under Annie S. Perry's will, took fee simple title to the land.

The Court of Appeals, in an opinion written by Chief Judge Morris and concurred in by Judge Martin (Robert M.) and Judge Whichard, affirmed the judgment of the trial court. Petitioners and respondents Perry petitioned this court for discretionary review pursuant to G.S. 7A-31. The petition was allowed on 6 October 1981.

Currin & Currin by Hugh M. Currin and Hugh M. Currin, Jr., attorneys for petitioner-appellants Ruby P. Adcock and husband Henry Carlton Adcock, and Elsie Christine P. Hanavan and husband, John F. Hanavan.

Royster, Royster & Cross by S. S. Royster, attorney for petitioner-appellants Annie Belle C. Perry, widow, Nancy P. Jacobs and husband, Claude Jacobs, Jr. and John Thomas Perry, divorced.

Edmundson & Catherwood by R. Gene Edmundson, attorney for respondent-appellants James T. Perry and wife, Hattie Mae H. Perry.

Watkins, Finch & Hopper by William L. Hopper, attorney for respondent-appellees William Lyon Whitfield and wife, Beatrice B. Whitfield, Zack P. Whitfield, unmarried, Donald Wayne Whitfield and wife, Johnnie T. Whitfield.

BRITT, Justice.

As was stipulated by the parties at trial, the sole issue for determination by this court is whether Annie S. Perry was devised the fee simple title to the real property in question under the last will and testament of W. T. Perry. The trial court and the Court of Appeals answered the issue in the affirmative. We disagree with that answer.

There are several basic rules that are applicable to the interpretation of wills. The most basic rule of will construction is that "the intent of the testator is the polar star that must guide the courts in the interpretation of a will." *Wing v. Wachovia Bank & Trust Co.*, 301 N.C. 456, 272 S.E. 2d 90 (1980); *Coppedge v. Coppedge*, 234 N.C. 173, 66 S.E. 2d 777 (1951). A second cardinal principle is to give effect to the general intent of the testator as that intent appears from a consideration of the entire instrument, *Wilson v. Church*, 284 N.C. 284, 200 S.E. 2d 769 (1973). A third rule is that the intent of the testator must be ascertained from a consideration of the will as a whole and not merely from consideration of specific items or phrases of the will taken in isolation. *Clark v. Connor*, 253 N.C. 515, 117 S.E. 2d 465 (1960).

The Court of Appeals, in affirming the judgment of the trial court, concluded that W. T. Perry intended to devise his wife fee simple title to his property. In arriving at this conclusion, the Court of Appeals recognized that there are two provisions of the will inconsistent with this interpretation. The first of these is the language in Item 2 limiting the general devise immediately preceding it. That provision provides:

> I do hereby give, grant and extend to the said Annie Perry the right to sell or mortgage any part of the real and personal property hereby devised and bequeathed to her in order to provide funds with which to defray her own necessary personal expenses, but she is not given the power to sell, dispose of or mortgage any part of said property for the purpose of aiding or assisting any of her children or any of the members of her family.

The Court of Appeals held that this language was precatory and did not limit the absolute devise in any manner. The second inconsistent provision is Item 3 of the will providing: "After the death

of my said wife, I give, bequeath and devise all of my property remaining to my four children, share and share alike . . . ." The Court of Appeals found Item 3 void as repugnant to the absolute title first given. *Carroll v. Herring*, 180 N.C. 369.

We disagree with the decision of the Court of Appeals and hold that W. T. Perry clearly intended to devise his wife a life estate only, coupled with a limited power to dispose of the property to meet her personal needs.

In trying to ascertain the intent of the testator, the will is to be considered in its entirety so as to harmonize, if possible, provisions which would otherwise be inconsistent. *Joyner v. Duncan*, 299 N.C. 565, 264 S.E. 2d 76 (1980); *Olive v. Biggs*, 276 N.C. 445, 173 S.E. 2d 301 (1970). A phrase should not be given a significance which clearly conflicts with the evident intent of the testator as gathered from the four corners of the will and the court will adopt that construction which will uphold the will in all its parts if such course is consistent with the established rules of law and the intention of the testator. *Joyner v. Duncan, supra; Johnson v. Salsbury*, 232 N.C. 432, 61 S.E. 2d 327 (1950).

W. T. Perry's testamentary scheme becomes apparent from a reading of the whole will. While it is clear that he sought to provide his wife with assets she could tap for her support during her lifetime, there were express limitations put on her use of the property devised. While W. T. Perry wanted to ensure his wife's ability to meet her own necessary personal expenses, these assets were not to be used to provide assistance to her children or family. They would inherit what remained after his wife's death. All of the words used by the testator are imperative. None of the language can be considered precatory. The construction of W. T. Perry's will as a devise of a life estate is further buttressed by Items 3 and 4 which specifically designate the remaindermen and the distribution of their shares should they not survive the life tenant.

The interpretation given W. T. Perry's will by the Court of Appeals creates sharp conflict between several provisions in the will. Indeed, it results in a majority of the will's provisions being either void as repugnant to the presumed absolute devise or mere expressions of the testator's desire, not mandatory language.

We think that the intent of the testator, as gathered from the four corners of the will, was to devise his wife a life estate. This finding of intent also provides for a harmonious blending of all the provisions of the will. When construed as the devise of a life estate, with the power to sell in order to meet personal needs of the wife, none of the provisions are irreconcilable. Effect is given to each clause, phrase and word. Each string can give its sound. *Morris v. Morris*, 246 N.C. 314, 98 S.E. 2d 298 (1957).

Respondents argue that in North Carolina a devise is presumed to be in fee simple and that the law favors a vesting of a fee simple absolute estate in any situation where such an interpretation is reasonable. N.C. G.S. 31-38.[1] The presumption created by G.S. 31-38, however, by its own terms, may be overcome by a showing that the will plainly intended to convey an estate of less dignity. Consistent with our holding above that the testator's clear intent was to devise to his wife a life estate, we find that the presumption created by G.S. 31-38 of the devise of a fee has been fully rebutted.

Respondents also argue that the rule of construction set forth in *Carroll v. Herring, supra*, and *Hambright v. Carroll*, 204 N.C. 496, 168 S.E. 817 (1933), should control the disposition of this case. The rule states:

> Where real estate is given absolutely to one person with a gift-over to another of such portion as may remain undisposed of by the first taker at his death, the gift-over is void as repugnant to the absolute property first given; and it is also established law that where an estate is given to a person generally or indefinitely with a power of disposition, or to him, his heirs and assigns forever, it carries a fee, and any limitation over or qualifying expression of less import is void for repugnancy. The only exception to such a rule is where the testator gives to the first taker an estate for life only, by certain and express terms. . . .

1. *Devise presumed to be in fee.*—When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity.

Hambright v. Carroll, supra, at 498. Respondents' argument is without merit. All rules of construction must yield to the paramount intent of the testator as gathered from the four corners of the will. *Quickel v. Quickel,* 261 N.C. 696, 136 S.E. 2d 52 (1964); *Taylor v. Taylor,* 228 N.C. 275, 45 S.E. 2d 368 (1947).

The decision of the Court of Appeals is reversed and this cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Justice MITCHELL dissenting.

I respectfully dissent from the majority opinion for the reasons given by Chief Judge Morris in her opinion for a unanimous panel of the Court of Appeals. 52 N.C. App. 724, 279 S.E. 2d 871 (1981).

I have no quarrel with the rules of law set forth in the well-written opinion of the majority. Like the majority, I am fully aware that the most basic rule of testamentary construction is that the intent of the testator is the polar star that must guide the courts in the interpretation of a will. But where there is room for doubt as to the intent of the testator, both the legislature and our own prior cases require that a devise be held and construed to be a devise in fee simple absolute. G.S. 31-38; *Basnight v. Dill,* 256 N.C. 474, 124 S.E. 2d 159 (1962); *Clark v. Connor,* 253 N.C. 515, 117 S.E. 2d 465 (1960).

In the present case, I would find at the very least that there is doubt as to the meaning of the testator. The fact that a Superior Court Judge and three judges of the Court of Appeals have held contrary to the holding of the majority tends, in my view, to be at least some indication that the testator did not in plain and express words show an intent to convey to his wife an estate of less dignity than an estate in fee simple. There being some doubt as to what the testator intended, I would not attempt to draft the will for him but, instead, would affirm the Court of Appeals.

DEALERS SPECIALTIES, INC., PLAINTIFF v. NEIGHBORHOOD HOUSING SERVICES, INC., DEFENDANT AND THIRD PARTY PLAINTIFF v. LONNIE AUTRY, THIRD PARTY DEFENDANT

No. 143A81

(Filed 4 May 1982)

1. **Appeal and Error § 24.1— broadside exception—ineffectual**

Where the trial judge made a total of eleven findings of fact, and the only exception to the findings appeared after the tenth finding and attempted to object to all of the "above findings," under Appellate Rule 10(b)(2) defendant's single exception constituted a "broadside exception" and was ineffectual.

2. **Contracts § 12.1— independent rather than conditional obligations in contract**

Where the court found, in an action for the cost of materials, that the parties had agreed "plaintiff would be protected (1) by the defendant's issuing only a two-party check to the third-party defendant, payable to the third-party defendant and the plaintiff, *and* (2) that the third-party defendant would be required to present lien waivers from all subcontractors and material suppliers *before making his final draw from the defendant,*" *the portion of the finding* following the conjunction "and" was in addition to and independent of the requirement for a joint check.

3. **Rules of Civil Procedure § 41— motion to dismiss under Rule 41(b)—light in which judge must view evidence**

The Court of Appeals incorrectly stated that in ruling upon a motion for involuntary dismissal at the close of plaintiff's evidence pursuant to Rule 41(b) the evidence must be viewed in the light most favorable to plaintiff, since in a court case the trial judge has the power under Rule 41(b) to adjudicate the case on the merits at the conclusion of the plaintiff's evidence and is not obligated to consider plaintiff's evidence in a light most favorable to the plaintiff as he would do in a jury case.

APPEAL by defendant as a matter of right, G.S. 7A-30(2), from a decision of the Court of Appeals, 54 N.C. App. 46, 283 S.E. 2d 155 (1981) (opinion by *Arnold, J.*, with *Vaughn, J.*, concurring and *Becton, J.*, dissenting). The Court of Appeals affirmed the judgment of *Judge Rice*, at the 25 August 1980 Session of District Court, NEW HANOVER County, granting judgment for plaintiff in the amount of $533.

Plaintiff, Dealers Specialties, Inc., was engaged in the business of selling building supplies. Defendant, Housing Services, was organized for the purpose of making housing rehabilitation loans to residents in an area of Wilmington. Defendant made a

loan to the owners of a home in the area who in turn hired third-party defendant Autry to make the repairs for which the loan had been secured.

Based on the evidence at trial, Judge Rice found *inter alia* the following facts:

> 1. On or about September 26, 1978, the third-party defendant approached the plaintiff seeking to purchase building materials, on credit, to be used on a job for one Mr. Penny.
>
> 2. The plaintiff's president and general manager, Harry Rimel, declined to extend credit to the third-party defendant since he knew the latter, and did not believe him to be credit worthy.
>
> 3. On or about September 29, 1978, Mr. Rimel received a telephone call from a man who identified himself as Ron Conrady, Assistant Director of the Defendant NEIGHBORHOOD HOUSING SERVICES, INC. Mr. Conrady informed Mr. Rimel that the Defendant was financing the Penny job and asked the plaintiff to extend credit to the third-party defendant. Mr. Conrady told Mr. Rimel that the plaintiff would be protected by the defendant's issuing only a two-party check to the third-party defendant, payable to the third-party defendant and the plaintiff, and that the third-party defendant would be required to present lien waivers from all subcontractors and material suppliers before making his final draw from the Defendant.
>
> * * *
>
> 6. Thereafter, plaintiff extended credit to the third-party defendant for materials purchased in the sum of FIVE HUNDRED THIRTY THREE AND No/100 DOLLARS ($533.00).
>
> 7. When the checks were issued to the third-party defendant, the plaintiff was not included as a joint payee.
>
> 8. Ron Conrady was, at all times pertinent hereto, the employee, servant, and agent of the defendant, and had apparent authority to contractually bind the defendant to issue only a two-party check to the third-party defendant and the

plaintiff as joint payees, and to, further, require lien waivers before issuing the third-party defendant's final draw.

* * *

10. Said promise was a direct and unconditional promise to pay for goods furnished to the third-party defendant, was made prior to delivery of the goods, and said goods were actually delivered.

11. The plaintiff has never been paid by the defendant, the third-party defendant, or anyone else for said materials.

No appearances by plaintiff.

Ernest B. Fullwood for defendant.

BRANCH, Chief Justice.

We are of the opinion that the majority in the Court of Appeals reached the correct result and except as hereinafter modified we affirm the decision of the Court of Appeals and adopt the reasoning and legal principles enunciated in that decision as our own.

I

We first consider Judge Becton's dissent which in effect concluded that the agreement between plaintiff and defendant constituted only a conditional promise to pay and was conditioned on Autry's unfulfilled obligation to complete the project.

[1] The trial judge made a total of eleven findings of fact, and the only exception to the findings appear in the record following finding of fact number ten as follows:

EXCEPTION (to all of the above findings of fact) No. 18

Our Appellate Rule 10(b)(2) requires in part that "[a] separate exception . . . be set out to the making . . . of each finding of fact or conclusion of law which is to be assigned as error." Defendant's single exception to ten of the court's findings of fact constituted a "broadside exception" which this Court has consistently held to be ineffectual. *Hicks v. Russell*, 256 N.C. 34, 123 S.E. 2d 214 (1961); *Logan v. Sprinkle*, 256 N.C. 41, 123 S.E. 2d 209 (1961). Defendant thus has taken no valid exception to the findings of

fact and consequently, the court's findings of fact are presumed to be supported by competent evidence, and are binding on appeal. *Keeter v. Lake Lure*, 264 N.C. 252, 257, 141 S.E. 2d 634, 638 (1965); *Insurance Co. v. Trucking Co.*, 256 N.C. 721, 725, 125 S.E. 2d 25, 28 (1962).

[2] We are of the opinion that in the state of this record the judgment for plaintiff could be entered without further consideration since these findings support the trial judge's conclusions and the conclusions in turn support his judgment entered. However, we elect to consider finding of fact number three which appears to us to be the crucial finding upon which Judge Becton's dissent was founded. That finding states:

> 3. On or about September 29, 1978, Mr. Rimel received a telephone call from a man who identified himself as Ron Conrady, Assistant Director of the Defendant NEIGHBORHOOD HOUSING SERVICES, INC. Mr. Conrady informed Mr. Rimel that the Defendant was financing the Penny job and asked the plaintiff to extend credit to the third-party defendant. Mr. Conrady told Mr. Rimel that the plaintiff would be protected (1) by the defendant's issuing only a two-party check to the third-party defendant, payable to the third-party defendant and the plaintiff, *and* (2) that the third-party defendant would be required to present lien waivers from all subcontractors and material suppliers before making his final draw from the Defendant. [Emphasis and numbering added.]

Admittedly, there are two possible interpretations as to the intent of the parties as reflected in the above finding. However, we think that the more reasonable one is that adopted by the majority in the Court of Appeals. Our consideration of this finding leads us to conclude that it contains two independent provisions. The first portion of the parties' agreement as set out in this finding states that any check issued to Autry by defendant as a progress payment must be a two-party check to Autry and plaintiff. This procedure would have effectively protected defendant, the homeowner, and plaintiff. In our opinion, the portion of the finding following the conjunction "and" was in addition to and independent of the requirement for joint checks. This latter portion of the finding, "that the third party defendant would be required to present lien waivers from all subcontractors and material sup-

pliers before making his final draw from defendant," obviously is conditioned on Autry's satisfactorily completing the project so as to receive final payment. The reference to the "final draw" is limited to the second part of the agreement or finding and does not affect the first portion which requires joint progress checks. There is no mention of two-party checks in relation to the final draw and furnishing of lien waivers. This is properly so for when Autry furnished lien waivers from all subcontractors and material suppliers he would have been entitled to a check in his individual name for whatever funds might have been due him at the final draw.

Under our interpretation of this finding, which in our opinion reflects the agreement, a breach of that agreement occurred when plaintiff was not included as a joint payee in the progress payments made by defendant to Autry.

II

[3] Although not dispositive of this appeal, we would be remiss if we failed to consider a statement appearing in the majority decision of the Court of Appeals to the effect that upon a motion to dismiss under G.S. 1A-1, Rule 41(b), the trial judge must view the evidence in the light most favorable to plaintiff. This statement in the majority opinion of the Court of Appeals was purely gratuitous since the trial judge properly elected not to rule on defendant's motion at the close of plaintiff's evidence.

Our research reveals that there is some conflict and confusion as to the standard which the judge must apply in testing the sufficiency of the evidence, if he elects to so do, when ruling upon a motion to dismiss under Rule 41(b).

The pertinent portion of Rule 41(b) provides:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court *as trier of the facts* may then determine them and render judgment *against the plaintiff* or may decline to render any judgment

until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

In *Bryant v. Kelly*, 10 N.C. App. 208, 213, 178 S.E. 2d 113, 116 (1970), *rev'd on other grounds*, 279 N.C. 123, 181 S.E. 2d 438 (1971), Judge Parker writing for a unanimous panel of the Court of Appeals considered the function of a trial judge when he sits without a jury and rules upon a motion for an involuntary dismissal under Rule 41(b). He there stated:

> In a nonjury case, in which all issues of fact are in any event to be determined by the judge, the function of the judge on a motion to dismiss under Rule 41(b) is to evaluate the evidence *without any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence* on a similar motion for a directed verdict in a jury case. (See cases cited in 2B, Barron and Holtzoff, Federal Practice and Procedure, § 919, interpreting the cognate Federal Rules.) [Emphasis added.]

Thereafter another panel of the Court of Appeals in *Rogers v. City of Asheville*, 14 N.C. App. 514, 188 S.E. 2d 656 (1972), quoted the above language from *Bryant* but then concluded, "Our study of the evidence viewed in the light most favorable to plaintiff leads us to the conclusion that there was not sufficient evidence of negligence on the part of defendant to establish a right to relief." *Id.* at 517, 188 S.E. 2d at 658. In *Sanders v. Walker*, 39 N.C. App. 355, 250 S.E. 2d 84 (1979), the Court of Appeals again considering a motion for involuntary dismissal under Rule 41(b) made the following statement:

> A motion to dismiss under G.S. 1A-1, Rule 41(b) raises the question of whether any findings could be made from the evidence to support a recovery. *Gibbs v. Heavlin*, 22 N.C. App. 482, 206 S.E. 2d 814 (1974); 11 Strong's N.C. Index 3d, Rules of Civil Procedure § 41. In ruling on the motion the evidence must be viewed in the light most favorable to the plaintiff. *Rogers v. City of Asheville*, 14 N.C. App. 514, 188 S.E. 2d 656 (1972).

Id. at 357, 250 S.E. 2d at 85.

We are of the opinion that the correct rule was set forth in *Bryant v. Kelly, supra.* Our conclusion is buttressed by other authorities and treatises.

In his 1970 Pocket Part revisal of 1 McIntosh, North Carolina Practice and Procedure (2d ed. 1956), Dean Dickson Phillips takes a similar view of the duty of the trial judge when a motion to dismiss is made under Rule 41(b). We quote therefrom.

> In a non-jury case, there is no good reason to provide for challenges to the sufficiency of evidence to go to the trier of fact, since the judge who must rule on such a challenge is also the trier of fact. The anomaly of such challenges is most obvious at the conclusion of all the evidence. It is only slightly less so at the conclusion of plaintiff's evidence. But it may be helpful after plaintiff has rested to have a procedure whereby the judge can give judgment against plaintiff on the basis of facts actually then determined, and not merely on the basis that the evidence considered most favorably is insufficient as a matter of law. Such a determination properly made avoids, just as would a dismissal for legal insufficiency and with less chance of reversal on appeal, the needless expense and time required to put on defendant's evidence. Rule 41(b) provides such a procedure in the form of the motion for involuntary dismissal. This permits a defendant to move for dismissal at the conclusion of plaintiff's evidence and the court thereupon to determine the facts and render judgment against the plaintiff.

5 Moore's Federal Practice, ¶ 41.13.3, considers the Federal Rule 41(b), which is substantially the same as ours. In this treatise we find the following statement:

> Thus in a court case the trial judge has the power under Rule 41(b) to adjudicate the case on the merits at the conclusion of the plaintiff's evidence; and is not obliged to consider plaintiff's evidence in a light most favorable to plaintiff as he would have to do in a jury case.

Id. at 188. *Accord, Emerson Electric Co. v. Farmer,* 427 F. 2d 1082 (5th Cir. 1970); *Ellis v. Carter,* 328 F. 2d 573 (9th Cir. 1964); *Allred v. Sasser,* 170 F. 2d 233 (7th Cir. 1948). *See also,* Wright & Miller, Federal Practice and Procedure: Civil § 2371 (1971);

Sizemore, *General Scope and Philosophy of the New Rules*, 5 Wake Forest L. Rev. 1, 36 (1969).

When a motion to dismiss pursuant to 41(b) is made, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given to their testimony. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968); *Hodges v. Hodges*, 257 N.C. 774, 127 S.E. 2d 567 (1962). Rule 41(b) provides that the trial judge must find facts for the purposes of review; however, he need not act at the close of plaintiff's evidence, but he should, except in the clearest cases, defer judgment until the close of all evidence. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973).

The Court of Appeals incorrectly stated that in ruling upon a motion for involuntary dismissal at the close of plaintiff's evidence pursuant to Rule 41(b) the evidence must be viewed in the light most favorable to plaintiff. We again emphasize that this error was not decisive of this appeal but that our consideration of this statement of the law was for the purpose of clarifying and correcting confusion that apparently has existed in previous decisions.

The decision of the Court of Appeals is

Modified and affirmed.

IN THE MATTER OF THE CUSTODY OF JOHN CHARLES PEAL, JR. and STACY BRIAN PEAL

No. 168A81

(Filed 4 May 1982)

Divorce and Alimony § 25.9— modification of child custody—showing of changed circumstances

The trial court's conclusion that there had been a substantial change in circumstances so as to justify a change of custody of a nine-year-old boy from his mother to his father was supported by the court's findings that the child was only five years old at the time custody was awarded to the mother and expressed no preference for custody; the father had custody of the child's older brother; at the time of the original custody award, the court would have

awarded custody of both children to the father if the child in question had not been so young then; the motion for change of custody was filed by the father at the request of the child itself because of the child's desire to live with his brother; and the welfare of both children did not favor a split in their custody between the mother and the father.

APPEAL by the petitioner (father) pursuant to G.S. 7A-30 (2) from the decision of the Court of Appeals (*Judge Wells*, with *Chief Judge Morris* concurring, and *Judge Clark* dissenting), reported at 54 N.C. App. 564, 284 S.E. 2d 347 (1981). The Court of Appeals reversed the order of the trial court (*Wood, Chief Judge*), entered *nunc pro tunc* on 6 October 1980 at the Civil Session of District Court, COLUMBUS County, which had removed custody of the minor child, Stacy Brian Peal, from the respondent (mother).

The pertinent facts are as follows. The petitioner, John C. Peal, and the respondent, Nell R. Peal, are the parents of two minor children, John, Jr. and Stacy. Petitioner and respondent are both school teachers residing in Columbus County.[1] After twelve years of marriage, the parties entered into a separation agreement on 20 December 1976. That agreement provided that both children were to remain in the care and custody of their mother, with their father paying reasonable support and receiving visitation privileges. The parties' custody and support arrangement was acknowledged and adopted in a consent order entered by Chief District Judge Grady on 21 December 1976. At that time, John, Jr. was nine years old, and Stacy was five years old.

A custody problem arose the very next year when John, Jr. refused to return to his mother's residence due to his strong desire to live with his father. The mother consequently filed a motion in district court seeking the return of John, Jr. to her custody. The father filed an answer in which he requested a transfer of his elder son's custody to himself based upon a change of circumstances. The matter was heard by Judge Wood. On 29 July 1977, Judge Wood granted the father's motion and awarded the primary custody of John, Jr. to him. In that order, Judge Wood found as a fact that both parents were "fit and proper persons" to care for the minor children, but he concluded as a matter

1. Hereinafter, we shall refer to the petitioner and the respondent as "father" and "mother," respectively.

of law that it was in the children's best interests for the father to have custody of John, Jr. and the mother to retain custody of the younger child, Stacy. Six months later, on 20 January 1978, the mother was granted an absolute divorce from the father upon the ground of one year's separation. No mention of either child's custody was made in the divorce judgment.

In July 1980, the father filed a motion in district court seeking the primary custody of his younger son, Stacy, due to a change in circumstances. The mother filed an answer denying any such change with respect to Stacy and additionally requested the return of John, Jr. to her custody. Again, the matter was heard by Judge Wood (who was now Chief District Judge of the Thirteenth Judicial District). Judge Wood subsequently concluded, as a matter of law, that there had been "a material change in circumstances" concerning Stacy and that it would "best promote the interest and welfare" of *both* children for their father to have primary custody of them. Those legal conclusions were based in large part upon the following findings of fact:

> 1. That an Order was heretofore entered in this matter signed by the undersigned Judge dated July 29, 1977, at which time the primary care, custody and control of John Charles Peal, Jr. was awarded to John Charles Peal and the primary care, custody and control of Stacy Brian was awarded to Nell R. Peal.
>
> 2. That at the time of the hearing on July 29, 1977, the Court was of the opinion that the custody of both of the minor children should be placed with the father, John Charles Peal, and that the custody should not be split, and, but for the tender age of Stacy Brian Peal who was then five years of age, the Court would have placed both children with the said John Charles Peal, but in view of the age of the said Stacy Brian Peal, his custody at that time was placed with the said Nell R. Peal.
>
> 3. That at the prior hearing of this action, the minor child, Stacy Brian Peal, did not testify nor express any desire to the Court concerning his preference for custody and residence.

4. That this Motion in the Cause in this matter filed by John Charles Peal was filed by the said John Charles Peal at the express request of the child Stacy Brian Peal who told his father that he wanted to live with him on a permanent basis and he wanted to live with his brother and he desired that his father file this Motion.

5. That in July of 1977 the said Stacy Brian Peal was five years of age and at the time of this hearing he is nine years of age. That the said Stacy Brian Peal does not have a preference as to with whom he desires to live but he has a strong desire to live with his brother, John Charles Peal, Jr. That the said child John Charles Peal, Jr. has a strong desire to live with his father, John Charles Peal and with his brother, Stacy Brian Peal.

6. That the Petitioner, John Charles Peal, has a close relationship with both of the minor children and expends a great deal of time and effort playing, teaching and engaging in water sports with the two minor boys at his home at Lake Waccamaw, N.C.

7. That the two minor children have a close relationship but the only significant time that the children now spend together is on weekend visitation.

8. That the said Stacy Brian Peal, at the time of the prior Order was not in school and since the date Order [sic] in 1977 has attended the first and second grades at the Cerro Gordo Elementary School and has attended the third grade and is now attending the fourth grade at the Chadbourn Elementary School. That John Charles Peal, Jr. also attends the Chadbourn School. That the said Stacy Brian Peal is usually left alone after school for approximately thirty to forty-five minutes from the time he gets out of school until his mother gets home from her teaching job at the Cerro Gordo School.

9. That the said Nell R. Peal has left the child, Stacy Brian Peal, with her mother when she is out of town and the mother has on at least one occasion disciplined the child by slapping him in the face.

10. That the said Nell R. Peal advised Stacy Brian Peal that the FBI from Fayetteville would come with fire in their eyes to get him unless he told the Court he wanted to live with her.

. . . .

13. That the said John Charles Peal, Jr., is an above-average student in school and the said Stacy Brian Peal is an average student. That it is in the best interest of both of the children that they live in the same household with each other, and both the said Nell R. Peal and the said John Charles Peal are fit and proper persons to have the care, custody and control of the said children. [Record at 103-05.][2]

Although Judge Wood's order deprived her of the custody of either child, the mother was nonetheless awarded therein substantial visitation rights, which included the right to have both children in her home for three months of every year in addition to weekend, holiday and birthday visitations throughout the year.

The mother excepted to the entry of this order and filed an appeal in the Court of Appeals. That court, in an opinion by Judge Wells, reversed the district court's order on the basis that its findings of fact did not support its essential conclusion of law that there had been a material change in circumstances affecting the welfare and best interest of the younger child which required a transfer of his custody to the father. The father now appeals from the decision of the Court of Appeals. No question is raised regarding the custody of the elder child, John, Jr.

Williamson, Walton & Williamson, by Benton H. Walton III, for the petitioner-appellant, John C. Peal.

Britt and Britt, by William S. Britt and E. M. Britt, for the respondent-appellee, Nell R. Peal.

2. The Court of Appeals failed to include findings 2, 6 and 13, *supra*, in its recitation of Judge Wood's findings of fact in the 1980 custody order. *See* 54 N.C. App. at 566-67, 284 S.E. 2d at 349. We have omitted only findings of fact 11 and 12 in that order because we agree with the Court of Appeals that they were not relevant to the issue of Stacy's general welfare. *See* 54 N.C. App. at 567, 568, 284 S.E. 2d at 349, 350.

COPELAND, Justice.

The sole issue for our review is whether Judge Wood abused his discretion in concluding that a change in the custody of Stacy Brian Peal was legally warranted in 1980. We hold that the able and experienced district judge did not exceed the bounds of his discretion in this regard and therefore reverse the decision of the Court of Appeals. In so doing, we affirm the sound reasoning expounded by Judge Clark in his dissent at the Court of Appeals. *See* 54 N.C. App. at 569-70, 284 S.E. 2d at 350-51.

Unfortunately, child custody disputes are often hotly-contested, bitter affairs in which the innocent children in issue suffer as confused and unwilling pawns. The totality of the matters which the trial judge must evaluate in such cases is not susceptible of a complete accounting on the printed page of a record on appeal. *See Wilson v. Wilson*, 269 N.C. 676, 678, 153 S.E. 2d 349, 351 (1967). Consequently, our Court has repeatedly held that the presiding judge, who has the unique opportunity of seeing and hearing the parties, witnesses and evidence at trial, is vested with *broad* discretion in cases concerning the custody of children. *See, e.g., Hamlin v. Hamlin*, 302 N.C. 478, 276 S.E. 2d 381 (1981); *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974). This discretion is expressly recognized in G.S. 50-13.2(a) which provides that the custody of a child shall be awarded to the person, agency, organization or institution who "will, *in the opinion of the judge*, best promote the interest and welfare of the child." (Emphases added.) Thus, under our law, the trial judge is entrusted with the delicate and difficult task of choosing an environment which will, in his judgment, best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties. *Blackley v. Blackley, supra.* In making this weighty choice, the judge may properly consider the preference or wishes of a child of suitable age and discretion. *Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E. 2d 73 (1966); *James v. Pretlow*, 242 N.C. 102, 86 S.E. 2d 759 (1955); *see* 3 Lee, N.C. Family Law § 224 (4th ed. 1981); 27B C.J.S. Divorce § 309(3) (1959). However, as indicated in G.S. 50-13.2, *supra*, the "paramount consideration" and "polar star," which have long governed and guided the discretion of our trial judges in such matters, are the welfare and needs of *the child*, not the persons seeking his or her custody, and even parental love must yield to the promotion of those higher in-

terests. *See Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967); *Griffin v. Griffin*, 237 N.C. 404, 75 S.E. 2d 133 (1953); *Story v. Story*, 221 N.C. 114, 19 S.E. 2d 136 (1942); *In Re Lewis*, 88 N.C. 31 (1883). Applying these principles to the case at bar, it is clear that Judge Wood did not abuse his discretion in ordering what he considered to be best for Stacy Peal in 1980.

The 1977 custody decree was, of course, subject to future modification by further orders of the district court upon a showing of changed circumstances which materially affected the welfare of the children. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E. 2d 871 (1963); *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E. 2d 857 (1962). As recognized by the Court of Appeals' majority, Judge Wood's findings of fact at the subsequent hearing held in 1980, *supra*, were amply supported by competent evidence and thus were conclusive on appeal. 54 N.C. App. at 567, 284 S.E. 2d at 349; *see Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976); *Thomas v. Thomas, supra.* Contrary to the Court of Appeals' opinion, we believe that those factual findings speak for themselves and, on their face, were entirely sufficient to authorize a conclusion by the trial judge that a substantial change in circumstances bearing upon Stacy's welfare had occurred since the entry of his prior order in 1977 which, in his opinion, required a transfer of custody to the father in the promotion of the child's overall best interests. We are especially pursuaded by findings 1, 2, 3, 4, 5, 7, and 13, *supra*, that Judge Wood properly reached that legal conclusion.

Judge Wood presided over the custody actions involving the children of these parties in 1977 and 1980. He was thoroughly acquainted with the whole situation and was therefore well qualified to determine what the best interests of both children required. It is important to note that the fitness of either parent was not in serious question here—both parents were equally capable of providing their minor children with suitable care, training and affection. The heart of the matter was quite simply, as Judge Wood found, that the welfare of the *children* did not favor a split in their custody between the mother and the father. The boys had a close relationship and needed to live in the same household in order to spend significant time together. Because of this, Judge Wood made it plain in the 1980 order that he would have awarded *both* children *to the father in 1977*, instead of just

John, Jr., if Stacy had not been so young then. In light of that, Stacy's increased age at the time of the 1980 hearing, which was instituted by the father at the request of the child himself, certainly constituted a material change in circumstances. The 1980 custody hearing was also significantly different in that Stacy testified in court and informed Judge Wood directly about his strong desire to live with his brother.

In conclusion, we hold that Judge Wood's 1980 custody order was legally sound in view of the facts he found, and our review discloses no compelling basis for disturbing that order. Moreover, as Stacy has been living at his father's residence since the order's entry more than one and a half years ago, it would seem most harsh and cruel to uproot the child and separate him from his brother again.

The decision of the Court of Appeals is reversed, and the 6 October 1980 Order of the Columbus County District Court shall be reinstated. This cause is remanded to the Court of Appeals for further proceedings not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. BOBBY ALSTON

STATE OF NORTH CAROLINA v. JOSEPH ALSTON

No. 137A81

(Filed 4 May 1982)

Robbery §§ 4.3, 5.4— armed robbery case—necessity for instruction on common law robbery

Testimony by robbery victims that they were of the opinion that the weapon used in the robbery was a firearm and that it appeared to be a .22 rifle and by an accomplice who wielded the weapon during the robbery that the weapon was a "Remington pellet rifle" was sufficient to support a jury finding that the lives of the victims were endangered by use of the weapon so as to permit the jury to consider the possible verdict of guilty of robbery with a firearm or other dangerous weapon. However, further testimony by the accomplice that the weapon was "a BB rifle" constituted affirmative evidence that the lives of the victims were not endangered or threatened by use of the

weapon and required the submission of an issue as to the lesser included offense of common law robbery.

APPEAL by the defendants from *Washington, Judge,* presiding at the 3 November 1980 Criminal Session of the High Point Division of GUILFORD Superior Court.

Each defendant was tried upon an indictment proper in form and found guilty by a jury of robbery with firearms or other dangerous weapons in violation of G.S. 14-87. By judgments signed on 6 November 1980 and filed the following day, each defendant was separately sentenced to a term of imprisonment of not less than twelve nor more than fifteen years. Neither defendant filed a timely record on appeal with the Court of Appeals. On 18 September 1981 the Court of Appeals granted a petition for certiorari by the defendant, Bobby Alston. On 6 October 1981 this Court granted a petition for certiorari by the defendant Joseph Alston. On 12 January 1982 this Court granted the State's motions for discretionary review of the case of Bobby Alston and consolidation of that case for review with the case of Joseph Alston.

Rufus L. Edmisten, Attorney General, by W. Dale Talbert, Assistant Attorney General (Joseph Alston), and Thomas J. Ziko, Associate Attorney (Bobby Alston), for the State.

Marquis D. Street, P.A., Attorney for defendant-appellant Bobby Alston.

Richard W. Forrester, Attorney for defendant-appellant Joseph Alston.

MITCHELL, Justice.

The defendants in this consolidated appeal assigned as error the failure of the trial court to instruct the jury with regard to the lesser included offense of common law robbery and to allow them to consider a verdict on that offense as well as the initial charge of robbery with firearms or other dangerous weapons. We conclude that the trial court erred in failing to submit the lesser included offense to the jury and that the defendants must receive a new trial.

The State offered evidence at trial tending to show that Bobby Alston, Joseph Alston and James Robinson entered a Convenient Food Mart in Guilford County on 17 February 1980. Robinson carried a rifle which had been given to him by the defendants. All three men were masked when they entered the store. They had the attendants put the money from the cash register into a bag held by Joseph Alston. Robinson continued to point the rifle in the direction of the attendants during this time. Bobby Alston acted as a lookout at the door to the store. Having taken $380 in cash, the defendants and Robinson fled the scene in a car driven by an unknown person.

In support of their assignment of error, the defendants contend that the evidence conflicted as to whether the rifle used in the robbery was in fact a firearm or dangerous weapon and that the conflicting evidence on this point required the trial court to submit the lesser included offense of common law robbery to the jury for their consideration in addition to the greater offense of robbery with firearms or other dangerous weapons. The attendants who were present in the store at the time of the robbery testified that they saw the alleged weapon and were of the opinion that it was a firearm. One attendant, Robert Flynn, specifically testified that the rifle appeared to be a .22 rifle. He stated that he had observed the weapon for several minutes during the robbery. In his opinion it was not a BB gun or a pellet rifle. Such statements by victims of a robbery do not require that the trial court allow the jury to consider a verdict on the lesser included offense of common law robbery.

In *State v. Thompson*, 297 N.C. 285, 289, 254 S.E. 2d 526, 528 (1979), we stated that:

> 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. (Emphasis added.)

The State having offered evidence that the robbery in *Thompson* was accomplished by the use or threatened use of what appeared to the victims to be a firearm, their statements on cross-examination that they could not positively testify that the instru-

ment was a firearm or a dangerous weapon were not of sufficient probative value to constitute evidence that the instrument used was other than a firearm or dangerous weapon. Therefore, this lack of certainty exhibited by the witnesses on cross-examination did not require submission of the lesser included offense of common law robbery to the jury.

In the present case, however, evidence also was introduced tending to show affirmatively that the rifle in question was not a dangerous weapon within the contemplation of G.S. 14-87. The State's witness, James Robinson, who actually wielded the rifle during the robbery testified at one point that, "The gun was a rifle, a Remington pellet rifle." On cross-examination, however, Robinson affirmatively stated, "Right, I had a BB gun. It was a rifle, yeah. Right, it was a BB rifle." This testimony by the State's witness was not a mere failure to testify positively that the instrument used was in fact a firearm or dangerous weapon. Quite the contrary, the witness positively identified the instrument he held in his hand during the commission of the robbery. At one point he positively identified the instrument as a Remington pellet rifle and at another point he positively identified the weapon as a BB rifle. Therefore, we must examine these two positive but inconsistent statements by the State's witness to determine whether either constituted affirmative evidence that the instrument used in the robbery was not a firearm or other dangerous weapon.

We have previously indicated by way of *obiter dictum* in a case involving allegations of civil negligence, that a BB rifle is a dangerous instrumentality to be handled with commensurate care for purposes of civil liability. *Fox v. Army Store*, 215 N.C. 187, 1 S.E. 2d 550 (1939). That precedent is of little assistance to us, however, in the present case. In determining whether evidence of the use of a particular instrument constitutes evidence of use of "any firearms or other dangerous weapon, implement or means" within the prohibition of G.S. 14-87, the determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened. *State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971). Employing this test, we determine that the testimony by Robinson that the rifle he used during the robbery was a Remington pellet gun was sufficient to support a jury finding that the lives of the victims here

in fact were endangered or threatened by his possession, use or threatened use of the rifle. The testimony of Robinson, on the other hand, that the rifle was a BB rifle constituted affirmative evidence to the contrary and indicated that the victims' lives were not endangered or threatened in fact by his possession, use or threatened use of the rifle. This latter statement by Robinson was affirmative testimony tending to prove the absence of an element of the offense charged and required the submission of the case to the jury on the lesser included offense of common law robbery as well as the greater offense of robbery with firearms or other dangerous weapons. *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971), *cert. denied*, 409 U.S. 948, 34 L.Ed. 2d 218, 93 S.Ct. 293 (1972). *Cf. State v. Thompson*, 297 N.C. 285, 254 S.E. 2d 526 (1979) (no instruction on common law robbery required in the absence of affirmative evidence of the nonexistence of an element of the offense charged).

We hold that the trial court correctly permitted the jury to consider a possible verdict of guilty of robbery with firearms or other dangerous weapons but erred by failing to submit also the lesser included offense of common law robbery for the jury's consideration.

For the reasons stated, the judgment of the Superior Court of Guilford County is vacated and the case remanded to the end that there may be a

New trial.

STATE OF NORTH CAROLINA v. FREDRICK JONES HOWARD

No. 66A81

(Filed 4 May 1982)

Criminal Law § 122.1— additional instructions after retirement of jury—complete instructions not necessary

When the trial court has once instructed the jury in such manner as to declare and explain adequately the law arising on the evidence, there is no requirement that complete instructions be given again each time the jury returns to ask a specific question. Therefore, when the jury returned to the courtroom during its deliberations and requested that the court define first

degree murder, second degree murder and voluntary manslaughter, it was not necessary for the court to include a discussion of the principles of premeditation, deliberation, heat of passion and excessive force in responding to the request.

APPEAL by the defendant from *Cornelius, Judge*, presiding at the 19 January 1981 Criminal Session of MECKLENBURG Superior Court. Judgment was entered 24 January 1981.

The defendant was charged in a bill of indictment, proper in form, with first-degree murder. He entered a plea of not guilty and was tried before a jury which found him guilty as charged. From the judgment sentencing him to imprisonment for life, the defendant appeals to this Court as of right pursuant to G.S. 7A-27.

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

Keith M. Stroud, Attorney for defendant-appellant.

MITCHELL, Justice.

The defendant challenges the sufficiency of the trial court's instructions to the jury on the elements of various degrees of murder and manslaughter. We conclude that the instructions were sufficient and that there was no prejudicial error in the trial of the defendant.

Given the nature of the contentions of the defendant on this appeal, an extensive statement of the evidence presented by the State and the defendant is not necessary.

The State introduced evidence tending to show that the defendant and Marcus Lamar Proctor were together drinking beer in a residence in Mecklenburg County at approximately 6:00 a.m. on 27 July 1980. The defendant and Proctor went to sleep at about this time. Proctor later left the house. The defendant then asked one of the individuals present if he had seen Proctor put a gun in the defendant's face. Proctor later returned to the house and was seen cleaning his fingernails with a long knife. He tapped the defendant on the shoulder and said he wanted to talk to him. Proctor and the defendant went outside with several other people. Once outside the house, the defendant and one Arthur

Graham pulled out guns and began to fire at Marcus Proctor. Numerous shots were fired and the defendant and Graham reloaded and continued firing. Marcus Proctor stumbled into the house spitting up blood as he went through a hallway. He was later found dead of a gunshot wound to the chest.

By way of cross-examination, the defendant offered evidence tending to show that Marcus Proctor had held a gun to the defendant's head earlier in the day. Marcus Proctor returned to the house later with a long knife in his hand and told the defendant he wanted to talk to him outside. An argument ensued and Marcus Proctor was shot. The defendant also elicited testimony to the effect that Marcus Proctor was a user of drugs and a violent person.

The defendant contends that the trial court in its instructions to the jury failed to declare and explain the law arising on the evidence as required by G.S. 15A-1232. At the close of all the evidence and after arguments of counsel the trial court fully instructed the jury on the evidence introduced and the law arising from the evidence. The jury retired to deliberate and later returned to the courtroom and requested that the court define first-degree murder, second-degree murder and voluntary manslaughter. The following exchange then took place:

> THE COURT: Members of the Jury, first degree murder is the unlawful killing of a human being with malice, with premeditation and deliberation. Second degree murder is the unlawful killing of a human being with malice, without premeditation and deliberation. Voluntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation. Does that answer your question?
>
> FOREMAN: Yes, Your Honor.

The defendant contends that the trial court should have included a discussion of the principles of premeditation, deliberation, heat of passion, self-defense, excessive force and a general discussion of other principles of law when responding to this question by the jury. We find this contention without merit.

In determining the propriety of the trial court's instructions to the jury, we must consider the instruction in their entirety and

not in detached fragments. *State v. Wright*, 302 N.C. 122, 273 S.E. 2d 699 (1981). The previously quoted response to the question of the jury was correct and accurate in every respect. Further, when the answer to the jury's question is read contextually with the other instructions given the jury by the trial court, it is apparent that the trial court fully declared and explained the law arising on the evidence. When the trial court has once instructed the jury in such manner as to declare and explain adequately the law arising on the evidence, there is no requirement that complete instructions be given again each time the jury returns to ask a specific question. In such instances, the trial court properly may answer the question asked without resorting to repetition of all of the instructions previously given.

The defendant brought forward two additional contentions on appeal. They were abandoned in the defendant's brief and in oral argument before us and, therefore, are not discussed in this opinion.

We find that the defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA V. DANIEL WAYNE CHRISTMAS

No. 136A81

(Filed 4 May 1982)

ON discretionary review pursuant to G.S. 7A-31 to review an opinion of the Court of Appeals, 52 N.C. App. 186, 278 S.E. 2d 535 (1981) (*Martin, Robert M., J.*, with *Clark* and *Martin, Harry C., JJ.*, concurring).

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

J. Samuel Williams for defendant-appellant.

PER CURIAM.

Defendants Daniel Wayne Christmas, Charles Edsol Thomas, Jr., and Mark Ashley King were convicted of first-degree burglary. We allowed defendant Christmas's petition for discretionary review for the limited purpose of reviewing the question of "whether the trial court erred in failing to grant defendant's Motion for Discovery of the statement of Ned Diggs, Jr., who was originally a co-defendant."

G.S. 15A-903(b) provides:

> Upon motion of a defendant, the court must order the prosecutor:
>
> (1) To permit the defendant to inspect and copy or photograph any written or recorded statements *of a codefendant* which the State intends to offer in evidence at their joint trial; and
>
> (2) To divulge, in written or recorded form, the substance of any oral statement made *by a codefendant* which the State intends to offer in evidence at their joint trial. (Emphasis added.)

On 14 March 1980 defendant's counsel forwarded a letter to the Assistant District Attorney pursuant to G.S. 15A-902 requesting divulgence of the substance of any oral statements made by the defendant or any codefendant which the State intended to use or offer in evidence at trial.

An Assistant District Attorney filed a response on 25 March 1980 which stated "there are no statements of codefendants which the State intends to introduce in the joint trial." On the same date the charges against Diggs were dismissed.

Defendant Christmas formally moved for discovery on 3 April 1980 pursuant to G.S. 15A-903, specifically requesting the substance of any oral statement made by a codefendant which the State intended to use or offer at trial.

The Court of Appeals found no error in this assignment of error reasoning that Diggs was not a codefendant on 3 April 1980, the date on which the formal motion for discovery was filed, and that the State is not required to produce statements made by witnesses or prospective witnesses who are not codefendants.

After a careful examination of the record and after considering the reasoning of the Court of Appeals and the oral arguments of counsel, we conclude that defendant's petition for discretionary review was improvidently allowed. Therefore, the order allowing discretionary review is hereby vacated.

Discretionary review improvidently allowed.

STATE OF NORTH CAROLINA v. LARRY DARNELL WILLIAMS

No. 70A81

(Filed 2 June 1982)

1. **Constitutional Law § 63; Jury § 7.12— excusal of jurors for capital punishment views**

Defendant was not denied his constitutional rights to due process or to trial by jury by the excusal for cause of three veniremen because of their responses to "death qualification" questions where the record shows that the potential jurors each expressed sufficient refusal to follow the law of capital punishment, should it become applicable in the case, to justify their excusal for cause. The fact that one prospective juror's negative responses were phrased as "I'm not sure I could" or "I'm not positive I could" did not equivocate her refusal to follow the law as given by the judge to such an extent as to make the challenge for cause of such juror improper.

2. **Jury § 7.11— remarks by trial court—burden of death disqualification not placed on defense**

The trial court's remarks to defense counsel during the voir dire examination of prospective jurors that "if you want to try to rehabilitate a juror, you're going to do it. . . . Now, I gave you an opportunity to ask any questions you wanted to ask," did not indicate that the trial court was placing the burden of "death disqualification" on the defense but was merely an admonishment of defense counsel about his duty of effective representation.

3. **Grand Jury § 3; Jury § 5.2— failure to show discriminatory selection of grand and petit jurors**

The trial court properly denied defendant's motion to dismiss the indictment and to strike the venire of petit jurors on the ground that the grand and petit venires were discriminatorily selected and failed to represent a cross-section of the community where the State and defendant stipulated that names on the grand and petit jury lists were selected from voter registration lists and the property tax lists for the county in accordance with provisions of G.S. Ch. 9 and that there was no evidence of any intentional discrimination upon the grounds of race in preparing these lists, and where defendant's counsel did not investigate other sources from which information as to the racial computation of the master jury panel could be determined.

4. Constitutional Law § 31— denial of state-funded statistician

The trial court did not err in denying defendant's motion that the court order the State to provide funds to hire a statistician to assist defendant in his challenge to the array of the grand jury and the composition of the petit jury venire where defendant made no showing of a reasonable likelihood that the appointment of a statistician would materially assist him in the preparation or presentation of his contentions.

5. Constitutional Law § 45— no right to act as co-counsel in trial

The trial court did not err in denying defendant's motion to allow him to participate as co-counsel in his trial and to participate in the voir dire hearing.

6. Criminal Law § 135.3; Jury § 7.11— death qualification of jury prior to guilt phase—same jury for penalty phase—constitutionality

The procedure set out in G.S. 15A-2000(a)(2) for death qualifying a jury prior to the guilt phase and the requirement of the statute that the same jury hear both the guilt and penalty phases of the trial are constitutional.

7. Constitutional Law § 74; Criminal Law § 48— evidence of defendant's request for attorney—right to remain silent—right to counsel

An officer's testimony that, during in-custody interrogation after defendant had waived his *Miranda* rights, defendant stated that he didn't rob or kill anybody and he wanted to talk to a lawyer and that there was no more questioning after defendant's request for a lawyer did not violate defendant's right to remain silent and his right to counsel since there was no specific incriminating accusation leveled at the defendant at the time he asserted his rights which defendant, by his silence, might be said to have admitted, and the State did not use defendant's request for an attorney to infer guilt.

8. Criminal Law § 102.8— jury argument—comment on failure to testify—curative instructions

The prosecutor's arguments concerning lack of cross-examination or rebuttal evidence to contradict the State's case did not constitute an improper comment upon defendant's failure to testify. Any impropriety in the prosecutor's argument that the jury had "neither heard by cross-examination or direct evidence on behalf of Mr. Williams that he was not there" was cured when the court immediately sustained defense counsel's objection and instructed the jurors that they should "not consider any reference about Mr. Williams refuting anything," and the court later instructed the jury that defendant's decision not to testify created no presumption against him and was not to influence their decision in any way.

9. Criminal Law § 117.3— instruction on grant of immunity not required—charge reduction for testimony properly before jury

In this prosecution for first degree murder, two accomplices who testified for the State under an agreement that they would plead guilty to accessory after the fact to the murder and receive ten-year sentences to run concurrently with ten-year sentences already imposed for accessory after the fact to a second murder were not granted immunity in this case so as to require the trial court to inform the jury of their immunity pursuant to G.S. 15A-1052. In

any event, the fact that the two witnesses had made arrangements for charge reductions in exchange for their testimony was clearly before the jury where one witness was cross-examined concerning his arrangement, the State stipulated as to the arrangement with the second witness, defense counsel in his argument to the jury repeatedly reminded the jury of the plea bargains by both witnesses, the State also reminded the jury of the agreements during closing arguments, and the trial court instructed the jury about the plea arrangements during the charge on the duty of the jury to scrutinize the testimony of accomplices.

10. Criminal Law § 135.4— two felony murders—use of one as aggravating circumstance in trial of other—double jeopardy

Where the State used a Gaston County robbery-murder of a service station attendant as an aggravating circumstance in the punishment phase of a Cabarrus County trial for the robbery-murder of a convenience store employee pursuant to G.S. 15A-2000(e)(11), the principle of double jeopardy did not preclude (1) the use of the robbery-murder of the convenience store employee in Cabarrus County as an aggravating circumstance in the trial of defendant for the robbery-murder of the service station attendant in Gaston County and (2) the trial of defendant in Gaston County for the robbery-murder of the service station attendant.

11. Criminal Law § 135.4— sentencing hearing—inadmissibility of evidence of propriety of death penalty

Evidence offered by defendant regarding the lack of any deterrent effect of the death penalty, the rehabilitative nature of people who have committed even heinous crimes, and the manner of execution in North Carolina was irrelevant and properly excluded in a sentencing hearing in a first degree murder prosecution.

12. Constitutional Law § 36; Homicide § 31— felony murder—death sentence not cruel and unusual punishment

Imposition of the death penalty for a felony murder did not constitute cruel and unusual punishment.

13. Criminal Law § 90— no impeachment by State of own witness

The State was not permitted to impeach its own witness during the sentencing phase of a robbery-murder trial when it elicited testimony concerning prior inconsistent statements given by the witness to an SBI agent where defendant had attempted to impeach the witness's testimony by proof of prior inconsistent statements to the SBI agent, and the purpose of the testimony was to corroborate the witness's testimony during the guilt phase that he had changed his story about the robbery-murder several times.

14. Criminal Law § 62— reference to polygraphist—absence of prejudice

Defendant was not prejudiced by an SBI agent's reference on one occasion to an officer as a "polygraphist" since the jury cannot be deemed to have inferred that a polygraph examination was conducted from the one isolated use of the word "polygraphist."

15. Criminal Law § 135.4— aggravating circumstance—course of conduct including other crimes—constitutionality—sufficiency of evidence

As used in the aggravating circumstance set forth in G.S. 15A-2000(e)(11), that the murder was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons, the term "course of conduct" is not unconstitutionally vague or indefinite. Furthermore, the evidence was sufficient to permit the jury to find the existence of such aggravating circumstance beyond a reasonable doubt where it tended to show that, after committing the robbery-murder of a service station attendant for which he was on trial, defendant went to a nearby town and committed a robbery-murder of a convenience store employee.

16. Criminal Law § 135.4— first degree murder—sentencing hearing—mitigating circumstances—plea bargain between State and accomplices

Evidence of a plea bargain and sentencing agreement between the State and two of defendant's accomplices was irrelevant and properly excluded from the jury's consideration as a specific mitigating circumstance in a sentencing hearing in a first degree murder case, since such evidence had no bearing on defendant's character, record or the nature of his participation in the offense.

17. Criminal Law § 135.4— first degree murder—sentencing hearing—mitigating circumstances—use of alcohol by defendant

Evidence that defendant drank some alcohol on the evening of a robbery-murder did not require the trial court to submit to the jury the impaired capacity mitigating circumstance set forth in G.S. 15A-2000(f)(6) where there was no expert psychiatric or other evidence to show that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Nor was the trial court required to submit the fact that defendant drank some alcohol for the jury's consideration as a general mitigating circumstance.

18. Criminal Law § 135.4— capital case—sentencing hearing—mitigating circumstances—burden of proof

The trial court in a first degree murder prosecution did not err in placing the burden on defendant to prove the mitigating circumstances by a preponderance of the evidence and in failing to require the State to prove the absence of the existence of mitigating circumstances beyond a reasonable doubt.

19. Criminal Law § 135.4— capital case—aggravating and mitigating circumstances—duty of jury to recommend death sentence

In a prosecution for first degree murder, it was not error for the prosecutor to argue and the court to instruct the jury that it would be their *duty* to recommend that defendant be sentenced to death if they found beyond a reasonable doubt that the submitted aggravating circumstance existed, that it was substantially sufficient to call for the imposition of the death penalty, and that it outweighed any mitigating circumstance or circumstances found.

20. Criminal Law § 135.4; Homicide § 31.1.– death penalty for first degree murder not excessive and disproportionate

Where the evidence showed that defendant deliberately sought out two lone employees of business establishments in relatively isolated areas during the early morning hours when no one was around, robbed them at gunpoint, and then shot them to death at very close range with a shotgun before fleeing with the money, the sentence of death imposed upon defendant for the first of those murders was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Justice EXUM dissenting as to sentence.

ON appeal by defendant as a matter of right from the judgment of *Snepp, Judge*, entered at the 18 May 1980 Criminal Session of Superior Court, GASTON County. The defendant was charged in an indictment, proper in form, with the murder of Eric Joines. Defendant pled not guilty, and trial began on 2 June 1980. The jury found the defendant guilty of first-degree murder under the felony murder rule and recommended the sentence of death.[1] From the conviction of murder and the judgment of death imposed thereon, the defendant appealed.

Rufus L. Edmisten, Attorney General by Thomas F. Moffitt, Assistant Attorney General, and Elizabeth C. Bunting, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, and Ann B. Petersen and James R. Glover, Office of the Appellate Defender, for Defendant-Appellant.

MEYER, Justice.

This appeal presents forty-seven assignments of error for our review. No meaningful summary statement of the numerous issues presented by these assignments is possible. We have

1. The defendant was also found guilty of armed robbery but the judgment of conviction on that charge was arrested. Although not brought forward in the defendant's brief, we note that the indictment purportedly charging him with armed robbery failed to so do because it did not identify the defendant; instead it named Linda Massey as the person charged with armed robbery. *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954); *State v. Finch*, 218 N.C. 511, 11 S.E. 2d 547 (1940); *State v. McCollum*, 181 N.C. 584, 107 S.E. 309 (1921); *State v. Phelps*, 65 N.C. 450 (1871). This failure has no effect on the murder conviction, however, because when the State prosecutes a defendant for first-degree murder under the felony-murder rule, the solicitor need not secure a separate indictment for the underlying felony. *State v. Carey*, 288 N.C. 254, 218 S.E. 2d 387 (1975).

grouped the assignments essentially as they are in the defendant's brief. Our conclusion is that there was no error in the proceedings below, and the judgment and sentence of death is affirmed.

The evidence at trial showed that during the dark hours of 2-3 June 1979, Eric Joines was working the third shift at Station Number 5 of Service Distributors on Highway 321 North in Gastonia. His duties were selling gas and oil and collecting money. Sidney Sivvoy Kirksey testified that he had seen Mr. Joines after dark at Service Distributors on 2 June, and had telephoned him at the station later from Belmont and heard voices in the background. Herbert William Frye testified that sometime during the early morning hours of 3 June he and Mack Wright stopped at the station to get some gas and found Mr. Joines lying on his stomach in a puddle of blood with part of the back of his head blown away. The police were summoned to the scene and when Officer Wilson of the Gastonia City Police arrived a few minutes later, at about 4:18 a.m., Mr. Joines was still alive, coughing and gagging. Dr. Sivalingam Siva, an expert in neurosurgery, saw Mr. Joines in the emergency room at Gastonia Memorial Hospital. He testified that in his opinion, the wound in the right side of Mr. Joines' neck was caused by a shotgun blast, possibly from a very close range and that the victim died from lack of oxygen to the brain caused by the gunshot wound.

The testimony of two accomplices, cousins of each other, Linda Massey and Darryl Brawley, established that on the evening of 2 June the defendant, the two witnesses, and another male, not positively identified, were together in Charlotte traveling in a car belonging to Robert Brown, another cousin of Linda Massey. The defendant and Brown had traded cars earlier in the day. The defendant had a .20-gauge sawed-off shotgun with him in the car.

During the course of the evening, the group was drinking alcohol, smoking marijuana, and taking Valium. They traveled onto Interstate 85 and left Charlotte. They later got off the interstate at an exit and passed the service station where Eric Joines worked. They came back up the road to the station and stopped there, apparently "casing" the service station. They then traveled down the road in the opposite direction and once again returned to the service station. The unidentified fourth person

and the defendant, with shotgun in hand, went into the booth where Mr. Joines worked and robbed him. The defendant then shot him and they got back into the car with the money from the cash register they had put in a bag.

The defendant chose not to present any evidence during the guilt-innocence phase of the trial. The jury returned a verdict of guilty of first-degree murder under the felony murder rule.

At the sentencing phase, the State presented evidence of only one aggravating circumstance, that the murder of Eric Joines was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons. G.S. § 15A-2000(e)(11). The evidence showed that after the Joines killing in Gastonia, the defendant and the other three occupants of the car proceeded to Concord and there stopped at a Seven-Eleven convenience store. The defendant and the unidentified male entered the store and the defendant returned to the car, got his shotgun and went back into the store where he fatally shot the clerk, Mrs. Susan Verle Pierce. The two then robbed the store of $67.00 in cash.[2]

The defendant presented evidence that he had cooperated with his attorney in a personal injury action, had voluntarily admitted himself to a drug treatment center, had been gainfully employed and was a good worker, had financially assisted his family members and was a loving family member. He also presented evidence tending to impeach the testimony of Darryl Brawley.

The judge submitted, and the jury found, the existence of the one aggravating circumstance. The judge submitted ten mitigating circumstances and the jury found the existence of seven of them:

A. The defendant has no significant history of prior criminal activity.

Answer: Yes

2. For futher details of this robbery-murder, see *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981)—hereinafter "Williams (I)."

B. The defendant's age at the time of this murder (24 years).

Answer: Yes

C. The defendant was gainfully employed at the time of the murder for which he has been convicted, was a good worker, and had been gainfully employed since he was a teenager.

Answer: Yes

D. The defendant demonstrated a determination to overcome his problems and to try to lead a better life by voluntarily submitting himself for treatment for drug problems in October, 1975 and January and February, 1976.

Answer: Yes

E. Defendants IQ of 69 is a mitigating circumstance.

Answer: No

F. Defendant's conduct in a normal business manner with Attorney Karl Adkins as to a personal injury case is a mitigating circumstance.

Answer: No

G. The defendant has a good character and reputation.

Answer: Yes

H. The defendant is considerate and loving to his mother and sisters.

Answer: Yes

I. The defendant is a considerate and loving father.

Answer: Yes

J. Any other circumstance or circumstances arising from the evidence which you deem to have mitigating value.

Answer: No

The jury found beyond a reasonable doubt that the aggravating circumstance outweighed the mitigating circumstances and recommended that the defendant be sentenced to death. Judgment was entered pursuant to this recommendation.

I. PRETRIAL MOTIONS AND JURY SELECTION

[1] The defendant assigns as error (Assignments Nos. 21 and 22) the trial court's excusal for cause of the three veniremen, Robertson, Melton, and Williams. The defendant argues that these three potential jurors were improperly excused for cause and thus the defendant was deprived of his life without due process of law and his right to trial by jury.

This argument concerns the trial court's excusal for cause during *voir dire* of the three veniremen because of their responses to the *Witherspoon v. Illinois*[3] "death qualification" questions.

> The applicable constitutional standard permits the excuse of a potential juror for cause if it is established that he 'would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case . . . .' *Witherspoon v. Illinois*, 391 U.S. 510, 522 at n. 21, 88 S.Ct. 1770, 1777, 20 L.Ed. 2d 776, 785 (1968); *see State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed. 2d 796 (1980).

State v. Pinch, 306 N.C. 1, --- S.E. 2d --- (1982). The defendant contends that the three jurors excused for cause on this basis did not unequivocally state that they were so unalterably opposed to the death penalty that they would be unwilling to vote in favor of the death sentence no matter how aggravated the facts and circumstances turned out to be. The record reveals that this contention is without merit, for considering contextually their responses to the questions propounded, the potential jurors expressed sufficient refusal to follow the law of capital punishment, should it become applicable to the case, to justify their excusal for cause. *State v. Pinch*, 306 N.C. 1, --- S.E. 2d ---; *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980).

The record reveals that Frances Williams unequivocally stated that she would not impose the death penalty:

EXAMINATION By the Court:

. . . .

3. 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968).

Q. All right. Now, if you answered each of those yes—that you found beyond a reasonable doubt there were aggravating circumstances, you found beyond a reasonable doubt that they were sufficiently substantial to call for the imposition of the death penalty, and you also found that the aggravating circumstances beyond a reasonable doubt outweighed the mitigating circumstances, would you then vote to impose the death penalty?

A. I just don't feel like I could impose the death penalty.

Q. Not even if you were satisfied beyond a reasonable doubt of those things?

A. No I feel life imprisonment.

MR. CLONINGER: Could I ask her one more question?

COURT: (Nods his head.)

EXAMINATION By Mr. Cloninger:

Q. Mrs. Williams, you understand that unless you were convinced beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to require the death penalty you would not be required to recommend a sentence of death?

A. Um-hum.

Q. All right. Knowing that, again I ask you could you not follow the law that His Honor gives you and apply it and make your own determination based on the law His Honor gives you and the evidence that you'll hear at the sentencing hearing?

A. Well, I understand that, you know, I have to take the evidence into consideration, and I realize that the law with the death penalty—I understand that that is one of the penalties, but I just don't feel the death penalty is right. That's just—

Q. Yes, ma'am. I understand that. I understand your feelings. Do you understand that you would not be required under the law to make a recommendation of the sentence of death unless you yourself were personally satisfied beyond a

reasonable doubt that the aggravating circumstances that the State alleged were sufficiently substantial to justify in your mind a recommendation of a death sentence? Do you understand that?

A. Right. I have to feel that it's—that—that the evidence is all there and that in my mind I feel like that that's—that's what you are trying to tell me, right?

Q. What I'm trying to tell you, I guess, is you understand that you are not required to make a recommendation of a sentence of death unless you are satisfied beyond a reasonable doubt that the aggravating circumstances are so bad—are so substantially—are so sufficiently substantial to require in your mind the imposition of the death sentence? If you are not convinced beyond a reasonable doubt of that in your mind, you are not required to make a recommendation of death. Now, again I ask you could you not do that?

A. I could in my mind think and decide, yes, how I felt.

COURT: Well, Mrs. Williams, if you were satisfied of all those things beyond a reasonable doubt, then would you invoke to impose the death penalty?

A. I just don't feel like that I could.

The same is true of Mrs. Robertson:

EXAMINATION By the Court:

. . . .

Q. If you serve as a juror in this case, could and would you if called upon to do so make a sentence recommendation of life imprisonment or death in accordance with the law of North Carolina as that will be explained to you by the court, or would you be unable to do so regardless of the law and the facts and circumstances and evidence because of your conscientious beliefs as to the proper punishment for first-degree murder?

A. I believe I would be unable to.

Q. You feel that in spite—you could not follow the law—that if—even though the State has satisfied you beyond a

reasonable doubt of the things it is required to so satisfy you under the law that you could not return a recommendation of punishment of death because of your beliefs about that?

A. I believe I could not.

. . . .

EXAMINATION By Mr. Cloninger:

Q. Do you feel if you were selected as a juror that you could consider the death penalty if it became necessary to consider it, that you could discuss it with other jurors, that you could discuss the law, and you could discuss the evidence in the case? You could consider it, couldn't you?

A. I could discuss the evidence, yes. I'm not too sure about discussing the death penalty.

Q. Well, you could discuss it with other jurors, couldn't you?

DISTRICT ATTORNEY: OBJECTION to arguing with the witness.

COURT: Go ahead.

Q. Do you feel like you could discuss it?

A. I'm not sure.

Q. All right, and I ask you—there are some circumstances—some aggravating circumstances which are so serious, so severe that you could consider the death penalty as an appropriate sentence and consider recommending it, couldn't you?

A. No.

Q. Under no circumstances?

A. I don't believe so.

The record concerning Mrs. Melton consists of the following questions by the Court and her answers thereto:

EXAMINATION By the Court:

. . . .

Q. Now, if you serve as a juror in this case, could and would you if called upon to do so make a sentence recommendation

of life imprisonment or death in accordance with the law as it will be explained to you by the court, or would you be unable to do so regardless of the law and the facts and circumstances revealed by the evidence because of some conscientious belief as to the proper punishment for first-degree murder; that is, that you conscientiously feel that it should in all cases be life in prison or you feel in all cases it should be the death penalty?

A. Your Honor, I'm not sure I could say that someone else had to die. I'm not sure I could do that.

Q. Well, it's—this is something we have to determine at this state—whether you if you serve as a juror could follow the law of North Carolina and if you are satisfied beyond a reasonable doubt of those things which the law requires you to be satisfied you could then return a recommendation of the death penalty.

A. I'm not positive I could do that. I've never been called on to do that, and I'm not sure that I could live with my conscience.

Q. Well, do you have conscientious beliefs about the death penalty—religious beliefs about it?

A. Yes.

Q. And you do not feel that you could follow the instructions of the court if you were satisfied beyond a reasonable doubt of the things of which you must be satisfied. If those conclusions would call for the death penalty, you don't feel you could make such a recommendation?

A. I'm not sure that I could.

The fact that her negative responses were phrased as "I'm not sure I could" or "I'm not positive I could" does not equivocate her refusal to follow the law as given by the judge to such an extent as to make the challenge for cause improper. *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803. It is apparent that Mrs. Melton was "irrevocably committed before the trial [began], to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Davis v. Georgia*, 429 U.S. 122, 50 L.Ed. 2d 339, 97 S.Ct. 399 (1976).

[2] The defendant argues in connection with his Assignments 21 and 22 that the judge suggested that the defendant was obligated to examine the potential jurors about their death penalty feelings. This contention presents a misinterpretation of the judge's remarks. The exchange upon which the contention is based is as follows:

> [By the Court:]
>
> Q. Do you wish to ask her any questions?
>
> DISTRICT ATTORNEY: The State would challenge her for cause.
>
> MR. CLONINGER: We don't—I don't wish to ask her any questions, Your Honor.
>
> COURT: All right. The challenge for cause is allowed. Thank you, Mrs. Melton. I'm going to ask you to go up to Courtroom B. Judge Kirby will know whether he needs you for any other case. Okay. Thank you.
>
> MR. CLONINGER: Could we for the record enter an objection to the exclusion of that juror, Mrs. Melton?
>
> COURT: Now, gentlemen, I'm not going to—if you want to try to rehabilitate a juror, you're going to do it. I'm not going to play games. Now, I gave you an opportunity to ask any questions you wanted to ask. What's the next juror's name?

There is no indication that the judge was placing the burden of "death disqualification" on the defense. The judge was merely admonishing defense counsel of his duty of effective representation. By further questioning, the defense possibly could have shown that the potential juror did not actually mean to say that he or she could not return a recommendation of death no matter what the circumstances.

The defendant was not denied his constitutional rights to due process of law or trial by jury by the excusal of these jurors for cause. *State v. Pinch*, --- N.C. ---, --- S.E. 2d ---; *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803; *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed. 2d 796 (1980). Assignments of Error Nos. 21 and 22 are overruled.

[3] The defendant assigns as error (Assignments Nos. 1, 2 and 3) the trial court's failure to dismiss the indictment and to strike the venire of petit jurors on the ground that the grand and petit venires were discriminatorily selected and failed to represent a cross-section of the community. He further assigns as error the trial court's denial of defendant's motion that the court order the State of North Carolina to provide funds to hire a statistician to assist the defendant in his challenge to the array of the grand jury and the composition of the petit jury venire.

In ruling on these motions, the court found that it had been stipulated between the State and the defendant that the compilation of the master jury panel list for Gaston County, from which the members of the grand jury returning the indictments in this case were drawn, and the master panel, from which the venire of the trial jurors had been drawn for the trial in this case, were selected in accordance with the provisions of Chapter 9 of the General Statutes of North Carolina, i.e. from the voter registration lists and the property tax lists for the county. The State and the defendant also stipulated that there was no evidence of any intentional discrimination upon the grounds of race in preparing these lists. The court concluded therefore as a matter of law that the procedure followed was in conformity with the Constitution of the United States and the Constitution of North Carolina. Defendant's counsel did not investigate other sources from which information as to the racial computation of the master jury panel might be determined. Based on these factors, the judge properly denied the defendant's motions to dismiss the indictment. *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972).

[4] The trial court also properly denied the defendant's motion for a State-funded statistician. Our cases have established the rule that an expert assistant, in this case a statistician, must be provided "only upon a showing by the defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that the defendant will not receive a fair trial." *State v. Gray*, 292 N.C. 270, 279, 233 S.E. 2d 905, 911 (1977); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976).

The defendant also argued that it was error for the trial court to deny his motion for a court-appointed expert to aid him

in his challenge to the jury compositions in his appeal to this Court of his Cabarrus County murder conviction. *State v. Williams* (I), 304 N.C. 394, 284 S.E. 2d 437 (1981). There, this Court pointed out that the defendant had made no showing of a reasonable likelihood that the appointment of a statistician would have materially assisted him in the preparation or presentation of his contentions and thus overruled the assignment of error. The defendant concedes that he made no stronger showing of a reasonable likelihood that a statistician would be of material assistance in this case than he did in the Cabarrus County case, but asks the court to reconsider its rulings on this issue. We reaffirm our prior rulings, and Assignments of Error Nos. 1, 2 and 3 are overruled.

[5] In Assignment of Error No. 15, the defendant contends that the court erred in denying his motions to allow him to participate as co-counsel in the trial and to participate in *voir dire*. This same argument also was rejected in *Williams* (I). We reaffirm our ruling there:

> Although a criminal defendant cannot be required to accept the services of court-appointed counsel, (citations omitted) we have previously said that a criminal defendant cannot represent himself and, at the same time, accept the services of court-appointed counsel. *State v. House*, 295 N.C. 189, 244 S.E. 2d 654 (1978), answered this very question as follows:
>
> > It is well settled that a defendant in a criminal action has a right to represent himself at the trial and cannot be required to accept the services of court-appointed counsel. (Citations omitted.) It is, however, equally well settled that '[a] party has the right to appear *in propria persona* or by counsel, but this right is alternative,' so that 'one has no right to appear both by himself and by counsel.' (Citations omitted.) Thus, while the defendant elected to retain the services of the court-appointed counsel, the court did not err in holding that the interrogation of prospective jurors and of witnesses must be done through his counsel.
>
> *Id.* at 204, 244 S.E. 2d at 662.

> The Court's decision in *House* clearly answers the question posed by this assignment of error adversely to defendant's contention.

Williams (I) at 407, 284 S.E. 2d at 446.

This assignment of error is overruled.

[6] The defendant next argues that (Assignments of Error Nos. 7, 16, 17, 18, 19, 20, and 41):

> [T]he procedure set out in G.S. § 15A-2000(a)(2) for death qualifying a jury prior to the guilt phase and requiring the same jury to hear both the guilt phase of the trial and the penalty phase of the trial is unconstitutional. It is the defendant's contention that "death qualifying" the jury prior to the guilt phase results in a guilt prone jury; thereby depriving the defendant of his right to a fair trial, a fair sentencing hearing and freedom from cruel and unusual punishment, all guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In addition, the defendant contends that the process of 'death qualifying' the jury and excluding for cause those jurors who express opposition to the death penalty deprives the defendant of his rights to equal protection of the laws, a jury chosen from a cross-section of the community and due process of law, all guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

As acknowledged by the defendant, this Court has decided these issues against the defendant, and the assignments of error upon which this argument is made are without merit. *State v. Pinch* 306 N.C. 1, --- S.E. 2d ---; *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803.

II. GUILT—INNOCENCE PHASE

[7] Under Assignments of Error Nos. 33 and 34, the defendant argues that the admission of Officer Rivelle's testimony to the effect that defendant chose to exercise his right to remain silent and waived his right to counsel deprived the defendant of his right to remain silent, his right to counsel, and his right to due process of law.

Officer Rivelle testified in pertinent part as follows:

DIRECT EXAMINATION By District Attorney:

I know the defendant, Larry Darnell Williams. I talked to him on or about June 11, 1979. I advised him of his rights as to self-incrimination. His rights were advised to him—his constitutional rights. He appeared to understand those rights. After I read him his rights, I told him I wanted to talk to him about a robbery and a shooting that happened in Gastonia on June 3, 1979, in the early morning hours.

Q. Now, what, if anything, did Mr. Williams say to you when you made that statement to him?

MR. CLONINGER: OBJECTION.

COURT: OBJECTION OVERRULED.

He stated that he didn't know anything about any robbery or homicide. That he didn't do capital crimes. When I asked him whether he was in Gastonia the 3rd of June, in the early morning hours, he told me that he'd been in Charlotte at that time with Linda Massey and a fourteen year old boy and they were smoking reefers and drinking wine.

Q. And what else was said—did you say to him or did he say to you after that?

A. He said he didn't rob or kill anybody and that he wanted to talk to a lawyer.

Q. And what, if anything did you do when he requested the presence of a lawyer?

A. There was no more questioning.

Defendant contends that the admission of the answers to the last two questions violated his right to remain silent and his right to counsel, citing the rules of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), and *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976).

Doyle concerns the use of defendant's silence after *Miranda* warnings for impeachment purposes. The testimony given here was during the State's case-in-chief. Thus, the thrust of the de-

fendant's argument is based on a paragraph from footnote number 37 of the *Miranda* opinion:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecutor may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

This Court has often recognized that it is impermissible to use the accused's silence in the face of an accusation to imply guilt. *See State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975); *State v. Caster*, 285 N.C. 286, 204 S.E. 2d 848 (1974). However, that rules does not apply here. When informed of the topic which the police officer wanted to discuss, the defendant chose not to remain silent. He emphatically denied his guilt, and when finished with his denial, said he wanted to talk to a lawyer; thus the officer, as required by *Miranda*, did not question him further. There was no specific incriminating accusation leveled at the defendant at the time he asserted his rights which defendant, by his silence, might be said to have admitted. *See State v. Love*, 296 N.C. 194, 250 S.E. 2d 220 (1978). Compare *State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132, wherein, after the officer advised the defendant that he had a warrant for his arrest for the killing of Mr. and Mrs. Hice and asked him why he killed them, defendant immediately asserted his right to remain silent.

It is apparent from the reading of this testimony that the State did not use the defendant's request for an attorney to infer guilt. The trial court conducted a *voir dire* hearing and concluded that the defendant had been fully advised of his *Miranda* rights and had knowingly and intelligently waived them and voluntarily made the statements to which the officer testified. Thus, they were admissible against him at trial. These assignments of error are overruled.

[8] In Assignments of Error Nos. 36 and 49, defendant argues that he was prejudiced by the prosecutor's improper comments on his failure to testify or offer evidence to contradict the State's evidence; that the court's instructions did not cure the error; and that the court erred further in denying defendant's motion for appropriate relief on this basis.

The prosecution is privileged, when appropriate, to argue that the State's evidence is uncontradicted, and such argument may not be held improper as a comment upon the defendant's failure to testify. *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, *cert. denied*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed. 2d 301 (1976). Any contradictions existing could have been shown by the testimony of others or by cross-examination of the State's witnesses themselves. Thus the prosecutor's arguments concerning lack of cross-examination or rebuttal evidence to contradict the State's case are not improper.

When the prosecutor argued that the jury had "neither heard by cross-examination or direct evidence on behalf of Mr. Williams that he was not there," the court immediately sustained defense counsel's objection and instructed the jurors that they would "not consider any reference about Mr. Williams refuting anything." The court later instructed the jury that defendant's decision not to testify created no presumption against him and was not to influence their decision in any way.

Ordinarily a prosecutor's reference to the failure of the defendant to testify or to offer evidence in his defense is cured by the trial court's promptly instructing the jury not to consider it. *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970); *State v. Lindsay*, 278 N.C. 293, 179 S.E. 2d 364 (1971). The defendant's Memorandum of Additional Authority cites *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975), for the premise that a curative instruction by the judge does not always cure highly improper statements made by a prosecutor during closing arguments or improper cross-examination by a prosecutor. While we agree with this premise, we point out that the improper comment in this case does not compare with the highly improper cross-examination and comments by the prosecutor in *Britt*. The court's instructions in this case cured any error in the prosecutor's comments.

Further, defense counsel did not object at trial to all of the comments which are assigned as error. Unless the improper argument was so prejudicial that no instruction by the court could have removed it from the minds of the jury had an objection been seasonably made, an objection to the argument must be made before the verdict in order to preserve the error. *State v. Coffey*, 289 N.C. 431, 222 S.E. 2d 217 (1976).

Assignments of Error Nos. 36 and 49 are overruled.

[9] The defendant assigns as error (Assignments Nos. 25, 37, 38, 68, and 69) the trial court's failure to instruct the jury completely concerning the plea bargains of Linda Massey and Darryl Brawley. The defendant contends that since these witnesses' plea agreements provided that their ten-year sentences for accessory after the fact to the murder of Eric Joines would run concurrently with the ten-year sentences for accessory after the fact to the Concord murder, their effect was to provide a grant of immunity in this case and thus the judge should have informed the jury of their immunity pursuant to G.S. § 15A-1052.[4] This contention is without merit.

Neither Linda Massey nor Darryl Brawley were granted immunity in this case. Their agreement was to plead guilty to accessory after the fact to the murder of Eric Joines for a sentence of ten years to run concurrently with their sentences in the Concord murder.

The applicable statute here is G.S. § 15A-1054:

> *Charge reductions or sentence concessions in consideration of truthful testimony.* — (a) Whether or not a grant of immunity is conferred under this Article, a prosecutor, when

4. § 15A-1052. *Grant of immunity in court proceedings.* — (a) When the testimony or other information is to be presented to a court of the trial division of the General Court of Justice, the order to the witness to testify or produce other information must be issued by a superior court judge, upon application of the district attorney:

(1) Be in writing and filed with the permanent records of the case; or

(2) If orally made in open court, recorded and transcribed and made a part of the permanent records of the case.

(b) The application may be made whenever, in the judgment of the district attorney, the witness has asserted or is likely to assert his privilege against self-incrimination and his testimony or other information is or will be necessary to the public interest. Before making application to the judge, the district attorney must inform the Attorney General, or a deputy or assistant attorney general designated by him, of the circumstances and his intent to make an application.

(c) In a jury trial the judge must inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity. During the charge to the jury, the judge must instruct the jury as in the case of interested witnesses.

the interest of justice requires, may exercise his discretion not to try any suspect for offenses believed to have been committed within the judicial district, to agree to charge reductions, or to agree to recommend sentence concessions, upon the understanding or agreement that the suspect will provide truthful testimony in one or more criminal proceedings.

(b) Recommendations as to sentence concessions must be made to the trial judge by the prosecutor in accordance with the provisions of Article 58 of this Chapter, Procedure Relating to Guilty Pleas in Superior Court.

(c) When a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the Court must grant a recess.

This statute, unlike G.S. § 15A-1052, contains no requirement that the judge inform the jury of any agreement concerning charge reduction or sentence consideration.

The defense had the right and the opportunity both to cross-examine the witnesses about their arrangements and to argue to the jury with respect to the impact of the arrangements upon their credibility. *See* G.S. § 15A-1055. Indeed Mr. Brawley was cross-examined concerning his arrangement (Record at 124), and defense counsel in his argument to the jury repeatedly reminded the jury of both the witnesses' bargains:

[T]he two individuals that have accused the defendant in this case, as I argued and contended to you before, are the two most interested people in the outcome of this case, next to the defendant over here. The two people who have gained the most from this trial.

. . . We told you that the heart of this case rested in the testimony of the accomplices, and throughout this trial, I con-

sider it to be one of the most amazing things I've ever seen that we have not heard or seen, to my way of thinking, one shred of evidence—not one shred of evidence that supports or lends credibility to these two people—the two people I've told you under the law fall in the category of the most untrustworthy kind of witnesses you can offer, and that is what is known as accomplices—an accomplice's testimony, and I will go into that later.

. . . .

. . . [Linda Massey and Darryl Brawley] are currently charged with armed robbery and murder although they are going to be permitted to plead to something much less.

. . . .

. . . [T]he more severe the penalty, the more likely, I argue and contend to you, that accomplice testimony is liable to be false.

It is human nature of the basest form for people to try to shun responsibility for criminal and immoral acts on other people. It is a natural tendency in all of us, and how much more natural and how much more probable when the false testimony or the testimony which we argue and contend to you is false is given by people who face a possible death sentence or possibly two life sentences and who in exchange for their testimony are able to receive a maximum sentence of ten years and I argue and contend to you that in at least one case, the possibility of release much sooner than that—much sooner.

. . . .

Mrs. Massey has gotten the best of both worlds, ladies and gentlemen. She got her deal from the State on the one hand, and she didn't have to directly accuse anybody of anything. The difference between Brawley and Massey, I think, is that Brawley really enjoys what he's doing up there, and Mrs. Massey doesn't. The one thing that they have in common is that both of them were facing death or two life sentences, and now, they are facing a maximum of ten years. Her testimony is preposterous—absolutely preposterous.

. . . .

. . . [Darryl Brawley] has been given the deal of a lifetime, as I've pointed out to you.

In addition, the State entered into evidence the following stipulation:

> That Linda Massey was charged in Gaston County with murder in the first degree and armed robbery and that the State of North Carolina agreed with Linda Massey that in exchange for her truthful testimony that the State would allow her to plead guilty to accessory after the fact of murder and that she receive a sentence of ten years and that this sentence would run concurrent with any other sentence that she might now be serving.

During closing arguments, the State too reminded the jury of the agreements made with Massey and Brawley. Moreover, during the guilt determination phase, the judge instructed the jury that:

> Each of these witnesses has testified under an agreement with the prosecutor for a charge reduction in exchange for that witness' testimony. I instruct you that if you find that either of these witnesses testified in whole or in part for this reason it is your duty to scrutinize that witness' testimony with great care and caution in deciding whether or not to believe him. If after doing so you believe the testimony in whole or in part, you should then treat what you believe the same as any other believable evidence.
>
> And there is evidence which tends to show that these witnesses may have been accomplices in the commission of the crimes charged in these cases. An accomplice may actually take part in acts necessary to accomplish a crime or may help or encourage another in a crime either before or during its commission. An accomplice is considered by the law to have an interest in the outcome of the case.
>
> If you find that either of these witnesses was an accomplice, you should examine every part of that witness' testimony with the greatest care and caution. If after doing so you believe the witness' testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

Later, during the sentencing phase, he again instructed the jury concerning the witnesses' arrangements.

The fact that these witnesses had made arrangements for charge reductions in exchange for their testimony was clearly before the jury. Assignments of Error Nos. 25, 37, 38, 68, and 69 are overruled.

III. SENTENCING

[10] In Assignments of Error Nos. 35, 40, 47, and 48, the defendant argues that the judgment and sentence for the felony murder of Eric Joines deprived him of his right to be free from double jeopardy, violated the rules of *res judicata* and collateral estoppel, constituted an unlawful multiple use of aggravating circumstances, and amounted to cruel and unusual punishment. Thus, the defendant contends that the trial court erred in denying his motions to dismiss the charges against him and to strike the aggravating circumstance of the Concord robbery-murder, in denying his motion for a directed verdict of life imprisonment at the end of the State's case and instead sentencing him to death, and in precluding the defendant from presenting certain evidence which he sought to introduce at the sentencing phase of the trial.

The trial judge submitted to the sentencing jury in this case the aggravating circumstance that the murder of Eric Joines was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person, i.e., the robbery-murder of Susan Verle Pierce in Concord.[5] The jury found the existence of this circumstance, found that it was sufficiently substantial to call for imposition of the death penalty, found that it outweighed the seven mitigating factors they found, and recommended the death penalty. Prior to this trial, the defendant had been convicted of the murder of Mrs. Pierce in Cabarrus County. The murder of Eric Joines was found by the sentencing jury in the Concord robbery-murder case in Cabarrus County as an aggravating circumstance and the defendant received a death sentence for the Cabarrus County murder.[6]

5. *See State v. Williams* (I), 304 N.C. 394, 284 S.E. 2d 437.

6. We note that the death sentence has been overturned. See Footnote 2.

The defendant argues that the use of the Gaston County Joines murder as an aggravating circumstance in the punishment phase of the Cabarrus County Pierce murder trial (1) precludes the use of the Pierce murder as an aggravating circumstance in the Joines murder trial and (2) precludes even trying the defendant in Gaston County for the Joines murder. We do not agree. This same argument was advanced and rejected by this Court in *State v. Pinch*, 306 N.C. 1, 31, --- S.E. 2d ---, --- (1982):[7]

> [T]he principle of double jeopardy has not evolved, as defendant argues, to the point that it prevents the prosecution from relying, at the sentencing phase of a capital case, upon a related course of criminal conduct by the defendant as an aggravating factor to enhance the punishment of defendant for another distinct offense, and this is so, irrespective of whether the defendant was also convicted of another capital charge arising out of that very same course of criminal conduct and subjected to separate punishment therefor.

The principle of double jeopardy likewise does not preclude the *trial* of the defendant for the other capital crime. The defendant was not convicted of nor punished for the murder of Joines in the prior trial. The defendant has been convicted and sentenced only once for the murder of Joines and will only once be punished therefor. There exists no prohibition for his trial for the murder of Eric Joines, nor the use of the other murder for which he stands convicted as an aggravating circumstance.

[11] Further, the defendant argues that the court erred in excluding as irrelevant evidence offered by the defendant regarding the lack of any deterrent effect of the imposition of the death penalty, the rehabilitative nature of people who have committed even heinous crimes, and the manner of execution in North Carolina. This contention is without merit, as such evidence is irrelevant. *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551. Assignments Nos. 35, 40, 47 and 48 are overruled.

7. In *Pinch* the two murders occurred one immediately following the other at the same location and were joined for trial. Here, the two murders occurred in separate incidents, separate counties, and were separated in time by approximately three hours. While there are these differences, here, as in *Pinch*, the two murders occurred in the same course of conduct.

[12] In Assignments of Error Nos. 58, 72, 73, 80 and 83, the defendant argues that his sentence of death for felony murder in this case is an excessive and disproportionate penalty constituting cruel and unusual punishment; thus the trial court should have directed a verdict of life imprisonment, declared the death penalty statute unconstitutional, instructed the jury that the death sentence could be imposed only if it found that the defendant personally committed the acts causing death and intended to cause death, and refused to enter a judgment of death.

The constitutionality of our death penalty statute has been repeatedly upheld. *See*, for example, *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981); *State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333 (1976); *State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975); *State v. Woodson*, 287 N.C. 578, 215 S.E. 2d 607 (1975), *reversed on other grounds*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976). The specific contention that the imposition of the death penalty for felony murder constitutes cruel and unusual punishment has also been rejected by this Court. *State v. Peplinski*, 290 N.C. 236, 225 S.E. 2d 568 (1975), *cert. denied*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed. 2d 301 (1976). This Court has repeatedly upheld the death penalty in felony murder cases. *State v. Williams* (I), 304 N.C. 394, 284 S.E. 2d 437; *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761; and *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788.

Just as the Legislature acts within its constitutional power in defining first-degree murder to include felony murder, it is also within its constitutional power to determine that first-degree murder, including felony murder, may be punished by death, providing that the death penalty statute itself is constitutional. *See State v. Wall*, 304 N.C. 609, 286 S.E. 2d 68 (1982). We do not find that the death penalty imposed below amounts to cruel and unusual punishment. These assignments of error are overruled.

[13] The defendant assigns as error (Assignment No. 50) the court's permitting the prosecutor on cross-examination of S.B.I. Agent B. M. Lee during the sentencing phase to elicit testimony concerning Darryl Brawley's prior inconsistent statements given to Agent Lee. The defendant argues that by this testimony, the State was permitted to impeach its own witness, Darryl Brawley. This is not the case. Darryl Brawley admitted on defendant's

cross-examination in the guilt-innocence phase of the trial that he had changed his story about the robbery-murder several times. During the sentencing phase of the trial, in an attempt to impeach the testimony of Brawley, the defendant called S.B.I. Agent B. M. Lee as a witness. Agent Lee testified that he had a series of interviews with Brawley. The defense questioned him only about the first interview, which was inconsistent with Brawley's trial testimony. The State's cross-examination of Agent Lee elicited the contents of his other interviews of Brawley which corroborated Brawley's testimony that he kept changing his story. Thus, the rule against the State impeaching its own witness has no application here. There was no error in the State's eliciting testimony corroborating Brawley's earlier testimony after the defendant's attempt to impeach his credibility. *See State v. Carter*, 293 N.C. 532, 238 S.E. 2d 493 (1977). Assignment of Error No. 50 is overruled.

[14] The defendant assigns as error (Assignment No. 51) the trial judge's overruling of his objection to certain testimony of Agent Lee during the sentencing proceedings and the court's refusal to permit him to make known the nature of his objection out of the presence of the jury. The defendant contends that the witness Lee's reference to "Polygraphist Mike Humberg" when being cross-examined about Brawley's prior statement was a deliberate attempt to convey to the jury the impression that the statement given by Brawley on 11 June implicating the defendant was confirmed by a polygraph examination. This contention is without merit; it is based on mere speculation. Furthermore, the jury cannot be deemed to have inferred that a polygraph examination was conducted from the one isolated use of the word *polygraphist.* Throughout the rest of his testimony, Agent Lee referred to Mike Humberg as *Mr.* Humberg or *Officer* Humberg. No mention of any polygraph examination was ever made. Counsel may approach the bench only with the judge's permission. Rule 12, North Carolina General Rules of Practice for Superior and District Courts. The court gave counsel ample opportunity to state the basis for his objection, but he failed to do so. Although the objection was overruled, Mr. Humberg was not referred to as "polygraphist" again. There exists no reversible error here. The assignment of error is overruled.

[15] The defendant argues that it was error (Assignments Nos. 45, 79, 85, and 86) for the judge to enter the judgment of death because the death penalty statute, and specifically G.S. § 15A-2000(e)(11), is unconstitutionally vague and because there was insufficient evidence to find beyond a reasonable doubt the existence of the aggravating circumstance submitted in this case.

In the sentencing phase, the State relied on a single aggravating circumstance, that provided in G.S. § 15A-2000(e)(11):

> The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

The defendant argues that the term "course of conduct" is vague and indefinite, and that for some of its possible meanings, the Joines killing and the Pierce killing were not part of the same course of conduct.[8] We do not agree.

> Sentencing standards are by necessity somewhat general. While they must be particular enough to afford fair warning to a defendant of the probable penalty which would attach upon a finding of guilt, they must also be general enough to allow the courts to respond to the various mutations of conduct which society has judged to warrant the application of the criminal sanction. *See Gregg v. Georgia*, 428 U.S. at 194-195, 49 L.Ed. 2d at 886-887, 96 S.Ct. at 2935. While the questions which these sentencing standards require juries to answer are difficult, they do not require the jury to do substantially more than is ordinarily required of a fact-finder in any lawsuit. *See Proffitt v. Florida*, 428 U.S. at 257-258, 49 L.Ed. 2d at 926, 96 S.Ct. at 2969. The issues which are posed to a jury at the sentencing phase of North Carolina's bifurcated proceeding have a common sense core of meaning. Jurors who are sitting in a criminal trial ought to

8. The defendant also argues that this aggravating circumstance requires that the defendant had committed other crimes of violence against another person or persons in the course of conduct in order for this aggravating circumstance to be submitted to the jury. He argues that since here there was only a single additional crime, the aggravating circumstance should not have been submitted. We note that there were two additional crimes committed in this course of conduct, armed robbery and murder.

be capable of understanding them and applying them when they are given appropriate instructions by the trial court judge. *See Jurek v. Texas*, 428 U.S. at 279, 49 L.Ed. 2d at 939, 96 S.Ct. at 2959 (White, J., concurring).

State v. Barfield, 298 N.C. 306, 353, 259 S.E. 2d 510, 543 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed. 2d 1137, *rehearing denied*, 448 U.S. 918, 101 S.Ct. 41, 65 L.Ed. 2d 1181 (1980), ---- U.S. ----, 102 S.Ct. 693, 70 L.Ed. 2d 261 (1981). We are not persuaded that the term "course of conduct" is unconstitutionally vague or without definition. This Court has rejected such arguments before. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510. The trial judge instructed the jury concerning the aggravating factor as follows:

> Now, ladies and gentlemen, the murder of Eric Joines by the defendant was part of such a course of conduct if it and other crimes of violence were parts of a pattern of intentional acts directed toward the perpetration of such crimes of violence which establishes that there existed in the mind of the defendant a plan, scheme, or design involving both the murder of Eric Joines and other crimes of violence.
>
> In order for you to answer this issue yes, the State must satisfy you beyond a reasonable doubt of these things:
>
> First, that the defendant himself or acting in concert with another person took or attempted to take money from the person or presence of Mrs. Pearce at the Seven-Eleven store.
>
> As I instructed you at the end of the first phase of this trial, it is not necessary for a person himself to do all the acts required to constitute a crime in order for him to be guilty of that offense. If two or more persons act together with a common purpose to commit a crime, each is held responsible for the acts of the other.
>
> Secondly, the State must satisfy you beyond a reasonable doubt that the defendant himself or acting in concert with another person carried away the money or attempted to do so.

Third, that Mrs. Pearce did not voluntarily consent to the taking and carrying away of the property.

Fourth, that at the time of the taking or of the attempt to take the property the defendant himself intended to deprive Mrs. Pearce of its use permanently.

Fifth, that the defendant knew that he was not entitled to take the property.

Sixth, that the defendant himself or acting in concert with another person had a firearm in his possession at the time the property was taken or attempted to be taken.

Seven, that the defendant himself or acting in concert with some other person obtained or attempted to obtain the property by endangering or threatening the life of Mrs. Pearce with the firearm.

Eight, that while committing or attempting to commit such robbery the defendant himself of acting in concert with some other person shot Mrs. Pearce with a firearm.

Nine, that the shooting was a proximate cause of Mrs. Pearce's death.

A proximate cause is a cause without which her death would not have occurred.

Ten, that the robbery and killing of Mrs. Pearce were part of a pattern or plan of the same or similar type intentional acts as those involved in the murder of Eric Joines.

Eleven, that there existed in the mind of the defendant a plan, scheme, or design involving the robbery and killing of Eric Joines and the robbery and killing of Mrs. Pearce.

The defendant's behavior clearly comes within the conduct intended by the Legislature to be covered. Assignments numbered 45, 79, 85 and 86 are overruled.

[16] In Assignments of Error Nos. 60 and 78, defendant argues that the court erred in refusing to submit to the jury as a specified mitigating circumstance the fact that two accomplices received a plea bargain whereby the maximum punishment for their involvement would be limited to ten years in prison. While

recognizing that the Court has rejected the same contention in *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981), the defendant requests that we reconsider our holding there. We reaffirm that holding. The fact that the defendant's accomplices received a lesser sentence is not an extenuating circumstance. It does not reduce the moral culpability of the killing nor make it less deserving of the penalty of death than other first-degree murders. *See State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788. The accomplices' punishment is not an aspect of the defendant's character or record nor a mitigating circumstance of the particular offense. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978). It bears no relevance to these factors, and thus there was no error in the judge's refusal to submit it to the jury. Moreover, the fact of the accomplices' bargains were before the jury, and had they deemed it a mitigating circumstance, they could have so considered it under the catch-all "any other circumstance . . . ." G.S. § 15A-2000(f)(9). These assignments are overruled.

[17] In Assignment of Error No. 59, the defendant argues that the court erred in refusing to submit to the jury the defendant's use of alcohol on the night of the crime as a mitigating circumstance. There was no expert psychiatric or other evidence introduced to show that his capacity to appreciate the criminality of his conduct was impaired by alcohol, and therefore the trial court was correct in not submitting the mitigating factor in G.S. § 15A-2000(f)(6).[9] Yet, defendant contends that the fact that he drank some alcohol on the evening of the crime should have been submitted for the jury's consideration as a general mitigating circumstance. We do not agree. We do not believe that the Legislature intended the mere ingestion of alcohol to be a mitigating circumstance. "If this were true, every murderer, conceivably, would consume strong drink before taking his victim's life." *State v. Goodman*, 298 N.C. 1, 32, 257 S.E. 2d 569, 589 (1979). There was no contention that the defendant was intoxicated nor that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. This assignment must be overruled.

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

[18] In Assignments of Error Nos. 74 and 75, the defendant argues that placing the burden on him to prove the mitigating circumstances by a preponderance of the evidence and failing to require the State to prove the absence of the existence of mitigating circumstances beyond a reasonable doubt is error. While recognizing that this Court has decided this issue against him, the defendant requests that we reconsider our position. We reaffirm our position and these assignments are overruled. *State v. Pinch*, 306 N.C. 1, --- S.E. 2d ---; *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510; *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979).

In Assignments of Error Nos. 81 and 82, defendant requests that we re-examine our prior rulings concerning the constitutionality of the death penalty and vacate the sentence imposed in this case on the grounds that the death penalty is applied in a discretionary and discriminatory manner. We adhere to our prior rulings, and these assignments of error are overruled. *State v. Williams* (I), 304 N.C. 394, 284 S.E. 2d 437; *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510.

[19] In Assignments of Error Nos. 63, 70, and 71,[10] the defendant argues, as did the defendant in *State v. Pinch*, that it was error for the prosecutor to argue and the court to instruct the jury that if they found beyond a reasonable doubt that the aggravating circumstance existed, that it was substantially sufficient to call for the imposition of the death penalty, and that it outweighed any mitigating circumstance or circumstances found, then it would be their *duty* to recommend that the defendant be sentenced to death. We note that the court also instructed that if the jury did not find beyond a reasonable doubt any one or more of these, it would be their duty to recommend life imprisonment. As this Court pointed out in *Pinch*, this argument by the prosecutor and this instruction by the court are entirely proper. The defendant argues that it withdraws from the jury its final option to recom-

10. Assignment of Error No. 71 is that the court failed to instruct the jury that the State had the burden of proving beyond a reasonable doubt that the aggravating circumstance substantially outweighed the mitigating circumstances to such an extent as to call for the death penalty. This argument was not advanced in the brief and is therefore deemed abandoned. We note, however, that the judge did so instruct the jury.

mend life imprisonment notwithstanding its earlier findings. As we stated in *Pinch*:

> The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. 15A-2000(c). The jury may not arbitrarily or capriciously *impose or reject* a sentence of death. Instead, the jury may only exercise guided discretion *in making the underlying findings* required for a recommendation of the death penalty within the 'carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused.' *State v. Johnson*, 298 N.C. 47, 63, 257 S.E. 2d 597, 610 (1979); *see State v. Barfield*, 298 N.C. 306, 349-52, 259 S.E. 2d 510, 541-43 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed. 2d 1137 (1980).

State v. Pinch, 306 N.C. 1, 33, --- S.E. 2d ---, --- (emphases original).

The defendant argues that even if the jury fails to find sufficient mitigating circumstance(s) which outweigh the aggravating circumstance(s) found, it may still, in its discretion, impose a sentence of life imprisonment. We find no authority for that position in G.S. § 15A-2000(e) or elsewhere. In several cases the jury has indeed done just that and returned a recommendation of life imprisonment. *State v. Taylor* (I), 298 N.C. 405, 259 S.E. 2d 502 (1979); *State v. King*, 301 N.C. 186, 270 S.E. 2d 98 (1980). While this was error, it was error favorable to the defendant from which the State could not appeal.

In two other cases wherein the jury found that the aggravating circumstances outweighed the mitigating circumstances but did not recommend a sentence, a life sentence was entered by the trial judge as G.S. § 15A-2000(b) requires him to do. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980); *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981), on rehearing in Superior Court, Columbus County (Case No. 79CRS1943).

G.S. § 15A-2000(b) requires the jury to deliberate and render a sentence recommendation "based upon" two considerations: (1) whether sufficient aggravating circumstances exist and (2) whether sufficient mitigating circumstances exist which outweigh

the aggravating circumstances found. The statute specifically requires that the jury sentence recommendation be "*based on these considerations*"—not unbridled discretion. G.S. § 15A-2000(b)(3). This specific mandate is clear—it requires no interpretation.

The trial judge correctly instructed the jury on this point. Indeed, to instruct the jury otherwise would permit it to disregard the procedure established by the Legislature and impose the sentence of death with unbridled discretion contrary to the dictates of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972), and its successor cases. *See State v. Pinch*, 306 N.C. 1, --- S.E. 2d ---; *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569. These assignments are overruled.

[20] Finally, the defendant argues that the infliction of the death penalty upon him would be an excessive and disproportionate penalty. This Court is required to review the sentence of death to determine whether it is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." G.S. § 15A-2000(d)(2). We do not agree that the imposition of the death penalty in this case would amount to excessive or disproportionate punishment. The facts of this case show that the defendant deliberately sought out not one, but two lone employees of business establishments in relatively isolated areas during the early morning hours when no one was around, robbed them at gunpoint, and then shot them to death at very close range with a shotgun before fleeing with the money. This was a brutal murder. We cannot say that the sentence of death imposed here is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *See State v. Pinch*, 306 N.C. 1, --- S.E. 2d ---; *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761; *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981); *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788; *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, --- U.S. ---, 102 S.Ct. 431, 70 L.Ed. 2d 240 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510.

We have carefully examined defendant's other assignments of error not specifically treated herein. We find them to be without merit and they are overruled.

The record clearly supports the jury's guilty verdict and its finding of the aggravating circumstance upon which the sentenc-

ing court based its sentence of death. There is no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; nor is the sentence of death excessive or disproportionate. The defendant's conviction and the sentence imposed must be affirmed.

No error.

Justice EXUM dissenting as to sentence.

For the reasons stated in Part I of my dissenting opinion in *State v. Pinch*, 306 N.C. 1, 38, 292 S.E. 2d 203, 230 (1982), I believe it was prejudicial error for the trial judge to instruct the jury that it had a duty to recommend the death sentence if it answered certain issues favorably to the state.

For the reasons stated in Part II of my dissenting opinion in *State v. Pinch, supra*, I conclude that prospective juror Melton was improperly excused for cause in violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

Therefore I vote to vacate the death sentence and to remand for a new sentencing hearing. I concur in the majority's conclusion that no prejudicial error occurred in the guilt phase of the case.

STATE OF NORTH CAROLINA v. KERMIT SMITH, JR.

No. 124A81

(Filed 2 June 1982)

1. Criminal Law § 98.2; Jury § 6— denial of motion for individual voir dire and sequestration of jurors—discretionary motions—proper opportunity to be heard

The trial judge did not abuse his discretion in denying defendant's written motions requesting individual sequestration of the jurors during voir dire, and sequestration of the jury and the State's witnesses during the trial pursuant to G.S. 15A-1214(j), G.S. 15A-1225, and G.S. 15A-1236(b). Nor did the record support defendant's contention that he was prevented from speaking in support of the written motions.

2. Robbery § 4.2— common law robbery—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of common law robbery where the evidence tended to show that defendant went to a college intending to steal money from students and that he took money from a victim as he threatened her with what appeared to be a deadly weapon soon after he kidnapped her and two companions and where the evidence tended to support a conclusion that defendant stole money from the victim before he raped and killed her at another spot.

3. Criminal Law § 114.2— no expression of opinion in statement of evidence or contentions

The trial court accurately stated defendant's contentions and fairly stressed the contentions of the State and defendant in his final instructions to the jury even though the statement of defendant's contentions seemed sparse or brief in comparison to those presented in the State's behalf since defendant did not offer independent evidence at the guilt phase, did not substantively negate the weight of the State's circumstantial evidence, and did not specifically request further elaboration by the trial court upon any point of contention in the case.

4. Criminal Law § 114.2; Homicide § 25.2— instructions regarding cause or provocation to kill

A statement in the course of the court's instructions to the jury that there was no evidence of "any just cause or legal provocation to kill" in the case was neither erroneous nor prejudicial since the contested statement was merely a legal recognition, correctly made upon the record, that the State's evidence had not disclosed the presence of just cause or adequate provocation to excuse the killing and that the defendant had not fulfilled his burden of going forward with or producing any such evidence either. Further, there was no indication that the jury was misled or confused by the trial court's remark. G.S. 15A-1222.

5. Criminal Law § 135.4— sentencing phase—failure to give peremptory instruction about defendant's mental impairment proper

The trial court did not err in failing to give a peremptory instruction about the defendant's impairment under G.S. 15A-2000(f)(6) where ample evidence was introduced at the guilt phase of the trial which authorized a reasonable inference and conclusion by the jury that defendant had the capacity to appreciate the character of his conduct and the ability to conform it to legal requirements when he murdered the victim, despite the contrary opinions of the psychiatrists.

6. Criminal Law § 135.4— sentencing phase—duty to recommend sentence of death

The trial judge correctly informed the jury that it had a duty to recommend the sentence of death if it made the three findings necessary to support such a sentence under G.S. 15A-2000(c).

7. Criminal Law § 135.4— sentencing phase—failure to instruct on possibility of inability to agree on punishment proper

The trial court properly failed to instruct the jury that the court would impose a life sentence if the jury could not unanimously agree on a recommendation of punishment since it is improper for the jury to consider what may or may not happen in the event it cannot reach a unanimous sentencing verdict.

8. Criminal Law § 135.4— sentencing phase—trial court's inability to set aside recommendation of death

The trial judge has no authority to set aside the jury's recommendation of death upon its own motion after the jury has made the necessary findings to support imposition of the death penalty under G.S. 15A-2000(c).

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

Justice EXUM dissenting as to sentence.

ON appeal by defendant as a matter of right from the judgment of *Fountain, Judge*, entered at the 27 April 1981 Criminal Session of HALIFAX Superior Court, imposing the sentence of death upon the conviction of first degree murder. Defendant's motion to bypass the Court of Appeals for review of his additional convictions of second degree rape and common law robbery was allowed on 7 October 1981.

Defendant was charged in indictments, proper in form, with the first degree murder, first degree rape and armed robbery of Whelette Collins. The charges were consolidated for trial over defendant's objection. The jury subsequently found defendant guilty of first degree murder, second degree rape and common law robbery. The trial court ordered the imposition of the death penalty for the murder conviction in accordance with the jury's recommendation. The trial court also sentenced defendant to consecutive prison terms of forty years and ten years for his convictions of rape and robbery, respectively.

The State's evidence tended to show the following. Three black girls, Whelette Collins (the victim), Dawn Killen and Yolanda Woods, were students and cheerleaders at Wesleyan College in Rocky Mount, North Carolina in December 1980. During the early evening hours of 3 December 1980, the girls cheered at a basketball game held in the college gymnasium. After the game was over, the girls left the gym and walked to Whelette Collins' automobile which was parked at a nearby campus lot. It was ap-

proximately 7:30 p.m. [The girls were still wearing their cheerleading uniforms.] The girls had just gotten into the car and were preparing to depart when the defendant, a young white male, suddenly appeared at a window and asked for a ride to the highway. They told this stranger that they were not going in the direction of the highway and refused his request. Defendant thereupon brandished what appeared to be a pistol and demanded entrance into the vehicle.[1] He then got into the car, in the back seat behind the driver. He told the girls that he was an escaped convict and needed a lift to his getaway car. He also told them that they were simply "at the wrong place at the wrong time." Whelette Collins then proceeded to drive where defendant directed, as he continued to hold the gun in his hand.

The group eventually reached and stopped at the place where defendant's automobile was parked in some woods not far from campus. [They had been driving around for a while in what seemed to be circles.] Defendant took the key to the Collins' car and asked the girls if they had any money. Dawn Killen and Yolanda Woods replied that they did not have their handbags with them. Whelette Collins said she had "a little bit." Defendant ordered the girls to get out of the car. Dawn and Yolanda got down on the ground and began to pray. While they were doing so, they overheard a discussion between defendant and Whelette about the money. Defendant asked Whelette, "is that all?" because she only had $7.00. Defendant then took the key to Whelette's car and told the girls to go to the other car. He explained that he was going to drive them to another location, about forty miles away, so he could have "plenty of time to get away" before the police were notified. Defendant made Dawn and Yolanda get into the trunk of his car and, because there was not enough room for her there, told Whelette to lie face down on the back seat.

Defendant then drove the girls to a quarry pit in a heavily wooded area adjacent to the Roanoke River in Halifax County

1. It was later discovered (and shown at trial) that this pistol could not fire a bullet and was not, therefore, a deadly weapon in reality. It was a blank .22 or "toy" pistol, similar to that used to start races, with mud in its barrel. The pistol's true character was not, of course, immediately apparent in the dark or to one unfamiliar with firearms.

near Weldon, North Carolina. They arrived at this place at approximately 9:30 p.m.

Defendant told the girls that they would have to wait in this deserted spot with him until "his friend" came with another car at 12:00 or 1:00. The girls were uncomfortable because it was extremely cold that night (below freezing). They were also very frightened because defendant kept telling them that "his friend" would kill them if he discovered that defendant "had taken all these people hostage." Defendant also warned the girls that he might have to hurt them if they did not listen to him.

During the course of the evening, defendant forced Dawn and Yolanda to get back into the trunk of his car and shut it. He said he was going to show Whelette the way back to the highway. The girls in the trunk could hear defendant talking to Whelette. He was telling her that she was "very pretty," that he "couldn't tell whether she was black or white or Italian because she was very fair" and that "if they had met under different circumstances they might be friends or something like that." The girls in the trunk then heard a scuffle and a frightened scream. Whelette yelled out and started running away. Defendant slammed the keys down on top of the trunk and said to its helpless occupants, "I'll be right back." Shortly thereafter, the two girls thought they heard the sounds of gunshots.

About an hour and a half later, Dawn and Yolanda heard someone crying. Whelette knocked on the trunk and asked her friends how they were. They said they were fine and asked Whelette if *she* "was all right." Whelette replied, "no, she wasn't all right." Whelette was still crying, and her friends "could hear the pain and everything in her voice." Whelette asked defendant, "why had he done this to her." He said, "you don't understand my motivation." Whelette then told defendant that she was cold and asked him to get a blanket out of the trunk for her. Defendant refused and told her that the other girls needed the blanket to keep warm. Whelette complained, however, that "they have their clothes on and they have coats and I don't and I'm cold." Defendant merely responded, "your friends would get upset if they saw you standing here without any clothes on." He then snickered and said to her, with a sadistic tone in his voice, "I can put you out of your misery." A while later, he told Whelette that they would go back to where he had thrown her clothes.

For over an hour, Dawn and Yolanda heard nothing but "dreaded silence." Defendant subsequently returned to the car and opened the trunk. He was alone. The girls inquired as to Whelette's whereabouts. Defendant told them that she had stopped at the quarry to use the bathroom. They called for her but received no reply. Defendant suggested that *one* of them go with him to look for Whelette. Dawn and Yolanda refused to do so unless both went, and they stayed in the trunk.

About twenty minutes later, defendant permitted the girls to get out of the trunk. He was "shaking." He told the girls that:

> None of this would have happened if [they] had had some checkbook or some money with [them], because he was cold and his family didn't have any money and didn't have any heat and he wanted—he really needed money, so thinking that he would realize it was around Christmas time, most college students have money to go home.

At this point, Dawn and Yolanda told defendant that they had money back in Rocky Mount. Defendant agreed to take them there to get it. The girls got in the car again, and defendant began to drive away. He did not, however, drive in the direction of the highway; instead, he drove them even deeper into the woods. When defendant stopped the car again, Yolanda and Dawn attacked him with a straight pin and a lug wrench which they had concealed on their persons during their sojourn in the trunk. [During the struggle, the girls noticed that defendant was wet, particularly his pants.] Defendant told the girls that he was going to kill them. Yolanda, however, wrestled the gun from defendant's grasp and unsuccessfully tried to shoot him with it (see note 1, *supra*). The girls then ran away and hid in some nearby underbrush until daylight. [It was then 4:30 a.m. on 4 December 1980.] As they waited there, they heard a splash as defendant threw "something into the water." The girls did not see or hear their companion Whelette during this time.

At about 7:00 a.m., Dawn and Yolanda began to make their way out of the woods. When they reached the interstate highway, they flagged down a vehicle and told its driver their horrible story. Law enforcement officials were soon contacted (by 9:00 a.m.). The girls gave the officers the gun they had taken from defendant and described the place where they had been re-

strained throughout the night. The Sheriff of Halifax County, William Clarence Bailey, arranged for the girls to be transported to the area of a gravel pit on the Roanoke River with which he was familiar. The scene of the crimes was subsequently located.

Defendant was attempting to leave the area when the officers and witnesses arrived. He was bloody, his clothes were wet, water was running off of his hair, and he was barefoot. Dawn and Yolanda identified him as their assailant on the spot, and he was quickly apprehended and arrested.

As soon as defendant was in custody, police officers began searching the woods for Whelette Collins. Many items of evidence were found, including the victim's clothes, defendant's wet and bloody underwear, and two cement blocks with blood, hair and skin on them. The nude body of Whelette Collins was recovered from a shallow pond. Her feet were jammed into a cement block. An autopsy was performed very soon thereafter which revealed the following. Live sperm were in the deceased's vaginal area, there were numerous lacerations and bruises about her face and body, and several of her ribs were fractured. The victim's skull was severely fractured in several places due to the force of blunt trauma to her head. There were also scratches and scrapes on the back of the body which indicated that it had been dragged on the ground. It was determined that Whelette Collins died as a result of the head injuries she had received and not from drowning. [There was no water in her lungs.]

Defendant was also searched by police officers shortly after his arrest. Seven dollars in currency and a ring were retrieved from his person. The ring belonged to Whelette Collins. No money was found in her clothing. Defendant was properly advised by the officers not to make any statement at that time. Despite these admonitions, however, defendant told them that: "it won't even a real gun anyway. I was just trying to scare the girls. . . . I think she was dead before I threw her in the pond anyway."

Defendant offered no evidence at the guilt phase of his trial.

The State did not offer additional evidence at the sentencing hearing held pursuant to G.S. 15A-2000. However, four witnesses testified in defendant's behalf, including his father and two psychiatrists. In sum, the testimony of these witnesses tended to

show the following. Defendant was twenty-three years old, physically healthy, legally sane and very intelligent. However, defendant had "antisocial personality," a disorder in which "the moral and acted principles of the mind are strongly perverted or depraved, the power of self-government is lost or greatly impaired and the individual is bound to be incapable . . . of conducting himself with decency and propriety in the business of life." Because he was small in stature, defendant felt inferior, inadequate and mistreated. He had difficulty getting along with other people and did not have normal social relationships. He was maladjusted, did not respect the rights of others and often behaved as if he was trying to "get back at the world." He could not keep a job and had attempted suicide once. He had also been to prison for stealing and was homosexually assaulted and harassed there. Defendant had many sexual problems, which included aggressive fantasies, peeping and cross-dressing (impersonating a female), and he was "extremely sensitive" to rejection by women. Both psychiatrists stated that, in their opinions, defendant was under the influence of an emotional disturbance at the time of the murder and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was also impaired.

Other relevant facts shall be related in the opinion.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Donald W. Stephens, for the State.

Dwight L. Cranford for the defendant-appellant.

COPELAND, Justice.

Defendant contends that various errors require either a new trial upon all of the charges or a new sentencing hearing. We disagree and affirm defendant's convictions and the sentences of death and imprisonment imposed upon him for the brutal murder, rape and robbery of Whelette Collins.

GUILT PHASE: I-IV

I.

[1] Prior to trial, defendant filed written motions requesting individual voir dire and sequestration of the jurors during voir dire

and sequestration of the jury and the State's witnesses during the trial pursuant to G.S. 15A-1214(j), --- 1225, --- 1236(b). Judge Fountain denied these motions on the day of trial. In his brief, defendant concedes that these matters were addressed to the sound discretion of the presiding judge and that this record fails to disclose prejudicial error or an abuse of discretion in the judge's rulings.[2] We agree. *See, e.g., State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980); *State v. Johnson* (I), 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed. 2d 1137 (1980).

Defendant nonetheless complains that the judge should have permitted oral argument by counsel before he ruled upon the motions. This complaint is neither well-founded nor timely. There is nothing in the record which suggests that Judge Fountain, either by word or deed, intended to prevent defense counsel from speaking in support of the written motions. To the contrary, the record generally shows that counsel did not have anything to say beyond that which was already fully stated in the motions themselves and elected not to utilize his opportunity to be heard.[3] If, however, as defendant now contends, vigorous oral argument upon these matters was truly desired, it would have been quite simple and most prudent to have informed the trial court of it by means of an express request to be heard. Defendant, however, stood silently by and did not object to the manner in which the court conducted its proceedings upon the discretionary motions. In these circumstances, defendant has waived whatever objection he may have had, and his belated complaint may not be "heard" on appeal. In any event, we seriously doubt that a mere refusal by the trial court to receive supportive oral argument would, in and of itself, demonstrate substantive, reversible error in the

2. Defendant does not challenge the jury which was subsequently empanelled to try him or contend that there was collusion among the witnesses who testified against him.

3. Indeed, defendant has not apprised this Court of what else could have or would have been said in furtherance of the motions if the necessary opportunity, which he alleges was denied by the trial court, had instead been affirmatively provided to him and his counsel.

denials of discretionary motions under G.S. 15A-1214, --- 1225, --- 1236.[4] The assignment of error is overruled.

II.

[2] Defendant was indicted for armed robbery. Upon his motion, however, the trial court reduced this charge to common law robbery at the conclusion of the State's evidence. Defendant assigns error to the trial court's subsequent failure to set aside the jury's verdict of guilty of the lesser offense upon the ground that the State's evidence was also insufficient to show his commission of that crime.

Common law robbery is the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear. *State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971); *State v. Lawrence*, 262 N.C. 162, 136 S.E. 2d 595 (1964). Defendant maintains that, although there was evidence to support an inference that he unlawfully took $7.00 and a ring belonging to Whelette Collins, there was absolutely no evidence to support a conclusion that he stole these items from her while she was alive through the use of force or fear. The record plainly refutes this contention.

All of the State's evidence, both direct and circumstantial, must be viewed in the light most favorable to the State with every reasonable intendment being made in its favor. *See State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981); *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684, *cert. denied*, 439 U.S. 830, 99 S.Ct. 107, 58 L.Ed. 2d 124 (1978). The pertinent evidence in this respect has been set forth in the lengthy recital of the evidence at the beginning of this opinion, and easy reference can be made thereto. It suffices to say here that the State's evidence was certainly substantial enough to convince a rational trier of fact that defendant, who had gone to the college intending to steal money from students, took money from Whelette Collins as he threatened her with what appeared to be a deadly weapon, soon after he kidnapped her and her two companions, at the nearby spot where he

4. We note that, although fundamental fairness would seem to require it, at least when a proper and timely request therefor is made, none of these statutes specifically mandates the receipt and consideration of oral arguments prior to the entry of final rulings by the trial court.

transferred the girls to his own car. This was long before he finally raped and killed her at the distant, deserted rock quarry. That being so, the instant case is clearly distinguishable from *State v. Powell*, 299 N.C. 95, 102, 261 S.E. 2d 114, 119 (1980), where our Court held that a charge of armed robbery should have been dismissed because the evidence only indicated that the defendant had committed larceny by taking certain objects "as an afterthought once the victim had died." In contrast, the evidence before us now tends to show that defendant robbed the victim of what little money she had while she was with her companions and still very much alive and afraid. Consequently, we uphold defendant's conviction of common law robbery.

III.

[3] Defendant argues that the trial judge did not fully state his "numerous" contentions concerning the charges against him and unfairly gave greater stress to the contentions of the State in his final instructions to the jury. The argument is without merit.

To start with, defendant waived any objection to the manner or length of the judge's statements of the contentions of either side by failing to make an appropriate challenge at trial before the jury retired. *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). However, even if defendant had properly preserved such an exception for our review, we would not find prejudicial error upon this record.

This is not a case in which the trial court utterly failed to state *any* of the defendant's contentions after reciting those of the State. *See, e.g., State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978). Rather, Judge Fountain generally referred to defendant's contentions throughout his charge to the jury, as follows:

> He contends . . . from the evidence offered, that you should not be satisfied from that evidence and beyond a reasonable doubt that he is guilty of anything or that, if you find him guilty of anything, that you should find him guilty of only the least aggravating offense with which he is charged. But, actually, he contends, members of the jury, by his plea of not guilty, that he is innocent; that the State has failed to prove his guilt and that, under all the circumstances, you should acquit him of all charges.

. . . .

. . . Of course, the defendant contends that you should have a reasonable doubt that he killed her. He contends that you should acquit him of the charge of murder in the first degree.

. . . .

. . . If he did not take any money from her, he could not be guilty of common-law robbery. . . .

As to that, the defendant contends that there is no evidence sufficient to justify you finding that he took any money from her or that, if he did, it resulted from violence or putting her in fear. . . . He contends that it didn't happen and that he did not put her in fear. Record at 63, 66 and 68.

It is true that defendant's contentions, as stated by the trial court, *supra*, seem sparse or brief in comparison to those presented in the State's behalf. However, the requirement that equal stress must be given to the contentions of both sides does not mean that the respective statements thereof must also be of corresponding lengths, consuming similar amounts of time. *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978); *State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962); *State v. Sparrow*, 244 N.C. 81, 92 S.E. 2d 448 (1956). In the case at bar, defendant did not offer independent evidence at the guilt phase, he only elicited minor evidence upon cross-examination which tended to detract from, and not substantively negate, the weight of the State's circumstantial evidence, and he did not specifically request further elaboration by the trial court upon any point of contention in the case. Under these circumstances, the record as a whole convinces us that Judge Fountain adequately and fairly *summarized* defendant's essential contentions. *See State v. Spicer*, 299 N.C. 309, 261 S.E. 2d 893 (1980); *see also State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980).

IV.

[4] In the course of its instructions upon the premeditation and deliberation elements of first degree murder, the trial court told the jury that there was no evidence of "any just cause or legal provocation to kill" in the case. Defendant believes that the trial

court thereby violated G.S. 15A-1222 which prohibits the expression of an opinion upon any question of fact to be decided by the jury. We hold that the isolated comment was not erroneous or prejudicial.

First, we do not believe that Judge Fountain's reference to the *complete absence* of certain evidence constituted an impermissible opinion upon a controverted fact. Rather, the contested statement was merely a legal recognition, correctly made upon the record, that the State's evidence had not disclosed the presence of just cause or adequate provocation to excuse the killing and that the defendant had not fulfilled his burden of going forward with or producing any such evidence either. *Cf. State v. Boone*, 299 N.C. 681, 263 S.E. 2d 758 (1980); *State v. Tate*, 294 N.C. 189, 239 S.E. 2d 821 (1978); *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 307 (1976). Two analogous decisions of this Court are instructive and implicitly supportive of the conclusion we reach here: *State v. Byrd*, 121 N.C. 684, 28 S.E. 353 (1897), and *State v. Capps*, 134 N.C. 622, 46 S.E. 730 (1904). In *Byrd*, the Court held that in the absence of "any evidence, even a scintilla, tending to show self-defense. . . . it was proper for the court to instruct the jury that there was no such evidence." 121 N.C. at 685, 28 S.E. at 353. In *Capps*, the Court also stated that "whether there is any evidence . . . to rebut the implied malice [in a killing] is a question of law." 134 N.C. at 628, 46 S.E. at 732. In a similar vein, we are also persuaded that it is not error for the trial court simply to inform the jury as to whether or not *specific* evidence relevant to justification or mitigation has been *introduced* in a homicide prosecution. This is determined as a matter of law, not of fact. Such an instruction does not therefore invade or interfere with the exclusive province of the jury to decide and weigh the facts *presented*, and, in reality, it amounts to little more than a "summary" of the pertinent evidence upon a particular aspect of the case.

Secondly, there is no indication that Judge Fountain's statement wrongfully or absolutely withdrew from the jury's consideration any circumstances which might have tended to negate premeditation, deliberation or malice in the charged killing, or that it improperly removed from the State the burden of proving the existence of those elements beyond a reasonable doubt. *See*

Record at 65-68. Simply put, there is no reason to believe that the jury was misled or confused by the trial court's remark; thus, we can perceive no ascertainable prejudice to defendant in any event.

PENALTY PHASE: V-VIII

V.

[5] At the sentencing hearing, two psychiatrists stated opinions that defendant suffered from the emotional disturbance of antisocial personality, and, as a result, his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired at the time of the murder. The trial court accordingly submitted to the jury, *inter alia*, the corresponding factors of G.S. 15A-2000(f)(2) and (6) in mitigation of defendant's crime. The jury subsequently found that defendant had committed the murder under the influence of a mental or emotional disturbance, G.S. 15A-2000(f)(2); however, it did not find that defendant's capacity was also impaired at the time, G.S. 15A-2000(f)(6).

Defendant contends that the trial court erred by failing to give a requested peremptory instruction concerning the impairment of his capacity in light of the "uncontradicted" expert opinions, *supra*, and by not explaining more fully or clearly the legal nature of that mitigating circumstance.[5]

Our analysis of defendant's contentions about the trial court's instructions regarding the mitigating circumstance of G.S. 15A-2000(f)(6) is governed by the standards set forth in our previous decision in *State v. Johnson* (I), 298 N.C. 47, 257 S.E. 2d 597 (1979). In *Johnson (I)*, the Court held that, although the defendant has the burden of proving the existence of a mitigating circumstance, upon a proper request "[w]here . . . all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance," but that such "[a] peremptory instruction is inappropriate when there is conflicting

5. At the outset, we note that the trial court also denied defendant's request for a peremptory instruction upon the mitigating circumstance of a mental or emotional disturbance. However, defendant did not assign error to this denial since it obviously did not "impair" the jury's ability to make a finding favorable to him upon the issue.

evidence on [that] issue." 298 N.C. at 76-77, 257 S.E. 2d at 618. The trial court did not err in failing to give a peremptory instruction about the defendant's impairment under G.S. 15A-2000(f)(6) in *Johnson (I)* because there was lay testimony in the case which supported a finding contrary to that advanced by an expert who testified in defendant's behalf upon the issue. However, this Court was compelled to order a new sentencing hearing in *Johnson (I)* upon another ground: the trial court's inadequate treatment of the impairment issue in its substantive instructions to the jury. On this point, Justice Exum, speaking for the Court, said the following:

> The trial court should have explained the difference between defendant's capacity to know right from wrong which defendant conceded he possessed, and the *impairment* of his capacity to appreciate the criminality of his conduct from which his evidence indicated and he contends he suffered. While defendant might have known that his conduct was wrong, he might not have been able to appreciate, *i.e.*, to fully comprehend, or be fully sensible, of its wrongfulness. Further while his capacity to so appreciate the wrongfulness of his conduct might not have been totally obliterated, it might have been impaired, *i.e.*, lessened or diminished. The trial court should also have more carefully explained that even if there was no impairment of defendant's capacity to appreciate the criminality of his conduct, the jury should nevertheless find the existence of this mitigating factor if it believed that defendant's capacity to conform his conduct to the law, *i.e.*, his capacity to refrain from illegal conduct, was impaired. Again, this does not mean that defendant must wholly lack all capacity to conform. It means only that such capacity as he might otherwise have had in the absence of his mental defect is lessened or diminished because of the defect.

298 N.C. at 69-70, 257 S.E. 2d at 614; *see also State v. Johnson* (II), 298 N.C. 355, 373-75, 259 S.E. 2d 752, 763-65 (1979). Applying these principles to the case at bar, we hold that Judge Fountain's instructions upon G.S. 15A-2000(f)(6) were consistent with the evidence and sufficient under the law.

Ample evidence was introduced at the guilt phase of the trial which authorized a reasonable inference and conclusion by the

jury that defendant had the capacity to appreciate the character of his conduct and the ability to conform it to legal requirements when he murdered Whelette Collins, despite the contrary opinions of the psychiatrists. For example, the testimony of Dawn Killen and Yolanda Woods, the surviving girls who were restrained by the defendant for over nine hours on the night in question, generally tended to show that, from the very beginning to its tragic end, defendant executed a deliberate and carefully thought-out plan to fulfill certain criminal intents and satisfy his perverted lust, that he quickly recognized and adjusted to any new obstacles or barriers to his desired goals as such appeared, and that he was constantly aware of the legal implications of his various actions. In particular, these girls testified that, at several critical junctures in the evening's events, defendant calmly contemplated what he should do next and took special precautions against the possibility of being apprehended by the police, including the removal of his fingerprints from the victim's car, the transport of the girls to a secluded spot, and the evaluation of whether they had been able to see enough in the dark to identify him or his car. Record at 10, 11, 13 and 37. The additional facts demonstrated by the State concerning defendant's callous remark to the victim, after the rape, that he could put her out of her misery and his later attempt to conceal her body by "anchoring" it with a cinder block in the pond also conflicted with the psychiatrists' *after-the-fact* opinions that defendant was legally unaware of and lacked control over his actions as he effected a sordid scheme culminating in murder. We shall not belabor this further. In sum, there was plenary other evidence in the record which sufficiently, if not equally, suggested that defendant was in complete control of his faculties when he committed the capital crime, comparing it against the expert evidence showing the presence of a legal impairment, and it was the jury's duty to decide what to believe. As *all* of the evidence did not therefore support the existence of the mitigating circumstance of G.S. 15A-2000(f)(6), the trial court correctly refused to give defendant's requested peremptory instruction upon it. *State v. Johnson* (I), *supra.*

Judge Fountain also competently explained the difference between legal insanity totally excusing a crime and legal impairment merely mitigating the punishment for a crime and properly

emphasized that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law only had to be "lessened or reduced" in order for this mitigating circumstance to exist. The able judge additionally reminded the jury that defendant was relying upon "the evidence of the doctors" and "his history of psychiatric problems" to establish his diminished or impaired capacity at the time of the murder. Record at 93-94. As a whole, these instructions complied fully with the essential dictates of *Johnson (I) and (II), supra,* as to the required extent and substance of a charge upon G.S. 15A-2000(f)(6). *See also* N.C.P.I.—Crim. § 150.10, at 30-33 (1980).

VI.

[6] The form of the sentencing issues submitted to the jury and their answers thereto were as follows:

ISSUE NO. ONE:

Do you unanimously find from the evidence beyond a reasonable doubt that one or more of the following aggravating circumstances existed at the time of the commission of the murder?

ANSWER: Yes.

1. Was the murder committed while the defendant was engaged in the commission of or attempt to commit rape of the deceased?

ANSWER: Yes.

2. Was the murder committed while the defendant was engaged in the commission of or attempt to commit robbery of the deceased?

ANSWER: Yes.

3. Was the murder committed while the defendant was engaged in the commission of or attempt to commit kidnapping of the deceased?

ANSWER: Yes.

4. Was the murder especially heinous, atrocious or cruel?

ANSWER: Yes.

ISSUE NO. TWO:

Do you find that one or more of the following mitigating circumstances exist?

1. The murder was committed while the defendant was under the influence of mental or emotional disturbance.

ANSWER: Yes.

2. At the time of the murder, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

ANSWER: No.

3. The age of the defendant at the time of the crime.

ANSWER: No.

4. That the defendant has no significant history of prior criminal activity.

ANSWER: No.

5. Are there any other circumstances arising from the evidence which you, the jury, deem to have mitigating value?

ANSWER: No.

ISSUE NO. THREE:

Do you unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

ANSWER: Yes.

ISSUE NO. FOUR:

Do you unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

ANSWER: Yes.

Record at 100-01.

The trial court twice instructed the jury that it should proceed to issue four only after answering issues one and three affirmatively and, then if it also answered that final issue affirmatively, that it would have the "duty" to return a verdict of death against the defendant. Record at 96-99. Defendant argues that the trial court thereby erroneously impeded "a truly individualized assessment of the propriety of the death penalty" by the jury in contravention of the provisions of G.S. 15A-2000.

We upheld an identical instruction in *State v. Pinch*, also decided this date. We held there that the trial court had correctly advised the jury "that it had a duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under G.S. 15A-2000(c)." [Issues one, three and four, *supra*, correspond to these necessary statutory findings.] Among other things, the Court reasoned that:

> The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. 15A-2000(c). The jury may not arbitrarily or capriciously *impose or reject* a sentence of death. Instead, the jury may only exercise guided discretion *in making the underlying findings* required for a recommendation of the death penalty within the "carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused."

306 N.C. 1, ---, 292 S.E. 2d 203, 227 (1982) (citations omitted). We believe that this reasoning applies with even greater force in the instant case since Judge Fountain carefully explained to the jury that it should exercise its full and considered discretion *in deciding issue four, supra*:

> That is for you to determine depending upon how you find from the case, from the issues you've answered. It is not something you would answer according to whim or caprice or guesswork, but you would weigh all the circumstances that you have found, if any, to be aggravating, those that you've found to be mitigating, and determine whether you find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial; that is, sufficiently important to call for the im-

position of the death penalty. If the State has satisfied you from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty, you would answer that, Yes; otherwise, you would answer it, No. Record at 96-97.

It was only after this clear direction, which comports with the procedure contemplated in G.S. 15A-2000(b), that Judge Fountain further told the jury that it had a duty to recommend capital punishment upon its affirmative answer to issue four.

We hold that *Pinch, supra,* constitutes sound and binding authority and is indistinguishable from the case at hand; consequently, we must overrule defendant's assignment of error. *Accord State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243 (1982); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979); N.C.P.I.—Crim. § 150.10 (1980).

VII.

[7] Defendant contends that the trial court should have instructed the jury that the court would impose a life sentence if the jury could not unanimously agree on a recommendation of punishment. This contention is meritless. Our Court has previously decided that it is improper for the jury to consider what may or may not happen in the event it cannot reach a unanimous sentencing verdict. *State v. Hutchins*, 303 N.C. 321, 353, 279 S.E. 2d 788, 807 (1981); *State v. Johnson* (II), 298 N.C. 355, 369-70, 259 S.E. 2d 752, 761-62 (1979). We shall take this opportunity, however, to state our agreement with the observation made by the Virginia Supreme Court, in a case cited to us in the State's brief, that such an instruction would be tantamount to "an open invitation for the jury to avoid its responsibility and to disagree." *Justus v. Commonwealth*, 220 Va. 971, 979, 266 S.E. 2d 87, 92 (1980); *accord Houston v. State*, 593 S.W. 2d 267, 278 (Tenn. 1980).

VIII.

[8] Defendant finally makes a sweeping assertion, based upon all of his prior contentions, that the trial court should have set aside the jury's recommendation of death upon its own motion. Judge Fountain had no authority to do so after the jury had made the necessary findings to support imposition of the death penalty

under G.S. 15A-2000(c). Our Court has previously stated that the trial court does not have "the power to overturn a death sentence" and that the lower court is "obligated to enter judgments consistent with the jury's unanimous recommendation that defendant be sentenced to death." *State v. Hutchins*, 303 N.C. 321, 356, 279 S.E. 2d 788, 809 (1981); *State v. Johnson* (II), 298 N.C. 355, 371, 259 S.E. 2d 752, 762 (1979).

IX.

Pursuant to the mandate of G.S. 15A-2000(d), this Court accords the greatest diligence and care in the review of a capital case. We have fully considered all of defendant's assignments of error in the record on appeal. We are convinced that defendant's trial and sentencing hearing upon the charged offenses were fairly conducted without the commission of prejudicial error.

The judgment of death was lawfully imposed. The evidence supported the submission of the aggravating circumstances of G.S. 15A-2000(e)(5), upon the separate theories of the rape, robbery and kidnapping of the deceased, and 15A-2000(e)(9), that the murder was especially heinous, atrocious or cruel. We find no indication in the record that the death penalty was recommended by the jury under the influence of passion or prejudice. Finally, we hold that the sentence of death for the intentional, deliberate and senseless murder of Whelette Collins was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *See, e.g., State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243 (1982); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981). Defendant's criminal acts were certainly as reprehensible as those committed by the defendants in *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, --- U.S. ---, --- S.Ct. ---, 72 L.Ed. 2d 155 (1982), and *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 63 L.Ed. 2d 220 (1981). The State's evidence revealed that the nineteen year old victim suffered agonizing and humiliating torture at the merciless hands of the defendant who kidnapped her, raped her, cruelly mocked her as she stood naked in the cold and finally beat her to death in a wanton, brutal manner using a cinder block. Mere words are insufficient vehicles to describe the tragic horror of what happened to this poor girl and not even

capital punishment can fully repay the price of her inexplicable and needless suffering.

We find no error in the guilt or penalty phases of defendant's trial.

No error.

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

Justice EXUM dissenting as to sentence.

For the reasons stated in Part I of my dissent in *State v. Pinch*, 306 N.C. 1, 38, 292 S.E. 2d 203, 230 (1982), I disagree with the majority's conclusion in Part VI of its opinion. In my view it was prejudicial error for the trial judge to instruct the jury that it had a duty to recommend the death sentence if it answered certain issues favorably to the state. My vote, therefore, is to vacate the judgment imposing the death sentence and remand for a new sentencing hearing.

I concur in the majority's conclusion that there is no error in the guilt phase of the case.

STATE OF NORTH CAROLINA v. JOHN FINTON STEVENS

No. 103A81

(Filed 2 June 1982)

1. **Criminal Law § 181.3— motion for appropriate relief—judicial review of findings**

In reviewing an order entered on a motion for appropriate relief, the findings of fact made by the trial court are binding upon the appellate court if they are supported by evidence, even though the evidence is conflicting and defendant gave testimony to the contrary. G.S. 15A-1415(b)(3) and G.S. 15A-1420(c)(5).

2. **Constitutional Law § 48; Criminal Law § 23.3— guilty plea not result of ineffective assistance of counsel**

The evidence presented at a hearing on a motion for appropriate relief supported the trial court's findings of fact, including a finding that defendant's attorney "did not advise [defendant] that he was guilty of armed robbery

merely because he was at the scene with the other participants, but that his advice to the [defendant] to plead guilty was based upon the statements of all co-defendants, the statement of [defendant] himself, and [the attorney's] conversations with the Investigating Officers Byrd and Conerly," and the findings supported the trial court's conclusion that defendant's plea of guilty to armed robbery was knowingly and understandingly made and was not the product of ineffective assistance of counsel.

Justice EXUM dissenting.

Justices CARLTON and MITCHELL join in this dissent.

ON certiorari to review order of *Lee, Judge,* entered 24 March 1981 denying defendant's motion for appropriate relief. The motion was heard at the 12 January 1981 Criminal Session of CUMBERLAND Superior Court.

The proceedings in this case, as garnered from the record on appeal and the findings of fact of Judge Lee to which there are no exceptions, are summarized as follows:

In a warrant issued on 5 September 1977 defendant was charged with the offense of armed robbery. He appeared before the district court and waived his right to court appointed counsel. Thereafter, defendant and his privately retained attorney, Stephen H. Nimocks, filed a written waiver of probable cause hearing in the district court. On 10 October 1977 defendant and his attorney waived the finding and return into court of a bill of indictment and agreed that the case would be tried upon an information filed by Assistant District Attorney Randy S. Gregory. The information alleged that on or about 5 September 1977 defendant, by means of a knife whereby the life of Curtis R. Hammond was endangered and threatened, forcibly took from said Hammond $10.00 in United States currency, a billfold, a checkbook issued by First Citizens Bank & Trust Co. to Hammond, three keys and a fingernail clip, in violation of G.S. 14-87.

In addition to defendant there were three codefendants in this case, they being Michael Len Hopple, Richard Lee Johnson, Jr. and Frank Bralick. All defendants except Bralick, and Hammond gave statements to the investigating officers, Detective Bob Conerly and Detective Billy Byrd. Attorney Nimocks conferred with defendant and with said investigating officers, and went over the statements of the codefendants and the victim with defendant.

On or about 14 September 1977, in response to a call from defendant, Attorney Nimocks went to the Cumberland County Law Enforcement Center and conferred with defendant about the charges in this case and also about two other armed robbery charges against defendant. All of the codefendants wanted to testify for the state and the state did not enter into any plea arrangement with defendant.

Bond in all three cases against defendant was initially set at $35,000.00. On 19 September 1977 an application for a writ of habeas corpus, signed by defendant and by Attorney Nimocks' law partner, was filed. The application prayed that defendant be released to his unit at Fort Bragg on an unsecured appearance bond. The application came on for hearing on 21 September 1977 before Judge Braswell and was treated by him as a motion for bond reduction. At the conclusion of the hearing Judge Braswell set bond at $10,000 in this case and $2,000 in the other two cases.

On the morning of 10 October 1977 defendant appeared in court with his attorney, Mr. Nimocks. Judge Giles R. Clark was presiding over the court and Randy Gregory, Assistant District Attorney, was present representing the state; the courtroom clerk was Mrs. Linda Nichols (Kerik), Assistant Clerk of the court. On behalf of defendant Attorney Nimocks tendered a plea of guilty to the charge set forth in the information. A transcript of plea was prepared and Judge Clark personally examined defendant with regard to the questions appearing on the transcript. Defendant raised questions with respect to questions nine and ten[1] and would not sign the transcript. Thereupon, Judge Clark would not sign the transcript and ordered that it and the plea be stricken.

On the afternoon of 10 October 1977, defendant and his attorney, together with Mr. Gregory for the state, appeared before Judge Clark and defendant, through his attorney, again tendered to the court a plea of guilty. Judge Clark examined defendant with regard to the questions appearing on the transcript of plea. Being satisfied with the answers given by defendant, and defendant having signed the transcript in the presence of Mrs. Nichols,

1. Question 9 is: Do you now plead guilty?
Question 10 is: Are you in fact guilty?

Judge Clark continued prayer for judgment until 14 October 1977 so that the state could present oral testimony.

On 14 October 1977 Detectives Byrd and Conerly, together with the victim, Curtis Hammond, testified for the state and through their testimony the state presented a factual basis for the plea of guilty. After hearing the evidence presented by the state, defendant requested that prayer for judgment be continued until 31 October 1977 so that he might present evidence.

Thereafter a further hearing was conducted by Judge Clark at which defendant presented testimony. On 4 November 1977 defendant and his attorney, Mr. Nimocks, appeared before Judge Clark. Once again a transcript of plea was taken by Judge Clark. At that time defendant was personally examined by Judge Clark and again on that date defendant signed the transcript of plea and swore to the transcript in the presence of Mrs. Nichols, the Assistant Clerk of Superior Court. Thereupon, judgment was entered by Judge Clark sentencing defendant to prison for not less than 10 nor more than 15 years. Commitment was issued on the judgment.[2]

On 10 October 1977 and on 4 November 1977 Judge Clark questioned defendant personally as to each and every question appearing on the transcript of plea form. On 4 November 1977 Judge Clark questioned defendant extensively and asked many questions of him that were not included on the transcript of plea form. Prior to the entries of the judgment and commitment, Judge Clark satisfied himself that there was a factual basis for the entry of the plea of guilty, that defendant was satisfied with his counsel, that the plea of guilty was the informed choice of defendant and was made freely, voluntarily and understandingly; that no promises with regard to sentencing were made to defendant; and that defendant understood that he had a right to plead not guilty and demand a trial by jury. Subsequent to 4 November 1977 the other two armed robbery charges against defendant were voluntarily dismissed by Mr. Gregory, the Assistant District Attorney.

2. Defendant's brief discloses that in April 1980 he was released on parole; and that he is currently serving his parole in Washington, Illinois where he is gainfully employed.

On or about 17 November 1977 defendant wrote a handwritten letter to Mr. Nimocks from Central Prison in Raleigh in which defendant discussed paying the balance of Mr. Nimocks' fee and his desire to take a welding course while in prison.

On 11 October 1979 defendant, through his present attorneys, filed a motion for appropriate relief pursuant to G.S. 15A-1415. In the motion defendant asked that the court vacate the judgment and commitment entered in this case as well as any guilty plea that defendant may have entered; and that defendant be granted a new trial on the armed robbery charge. In the motion defendant alleged that any guilty plea by him was obtained in violation of his rights under the constitution of the United States and the constitution of the State of North Carolina, and in violation of G.S. 15A-1022, 1026, for the reasons that (1) defendant is in fact innocent of the armed robbery charge and there was no factual basis for a plea of guilty to that charge; (2) the court did not address defendant personally and provide him the information to make the determination required by G.S. 15A-1022; (3) that no verbatim record of the proceedings at which defendant may have entered a plea of guilty was preserved; (4) that any guilty plea that defendant may have entered was involuntary in that he relied on representations that his attorney made to him that if he did plead guilty he would be released from custody and allowed to return to Fort Bragg to continue his tour of duty with the United States Army; and (5) that defendant was denied effective assistance of counsel.

On 10 December 1979, following a hearing, Judge Preston entered an order making findings of fact and conclusions of law and denied the motion for appropriate relief. Thereafter defendant petitioned the Court of Appeals for a writ of certiorari to review the order of Judge Preston. That petition was denied on 20 March 1980. Thereupon defendant petitioned this court for a writ of certiorari. On 15 August 1980 we allowed the petition and remanded the cause to Cumberland Superior Court for an evidentiary hearing.

The evidentiary hearing on the motion was conducted by Judge Lee. At the hearing, defendant testified as a witness for himself and presented seven other witnesses including two police officers from his home state of Illinois, Assistant District At-

torney Gregory and Judge Clark. Defendant attempted to establish the following:

He is a native of Illinois. Before joining the U.S. Army and being assigned to Fort Bragg he served as an informer for the police in his hometown. After his assignment to Fort Bragg, he did some work as an undercover agent for police officers in Fayetteville, Cumberland County and Fort Bragg. On the occasion of the alleged armed robbery he went riding with the codefendants for the purpose of learning from whom they purchased drugs. While riding with them, they picked up Hammond who was hitchhiking. When the driver of the car stopped on a dirt road in a rural area, defendant went over to a ditch to urinate. As he returned to the car, he observed that the codefendants had Hammond on the ground and were removing things from his person. When defendant attempted to stop them, one of the codefendants threatened him with a knife. The codefendants drove off in the automobile and left defendant with Hammond. A little while later they returned. Defendant then reentered the car and rode with the codefendants to Fayetteville where they were stopped by police and arrested.

Defendant stated that while he admitted to Mr. Nimocks that he was present at the time of the robbery, he insisted that he was not a participant; that he was trying to help the victim; that Mr. Nimocks insisted that he plead guilty; that he agreed to plead guilty only after Mr. Nimocks told him that he had arranged with Judge Clark for defendant to be placed on probation and returned to his unit at Fort Bragg; and that his attorney coerced him into pleading guilty.

The Illinois police officers testified that defendant had a good reputation in his hometown and that he had worked with them on various cases before entering the Army. They also corroborated defendant, at least in part, as to representations made to him by Mr. Nimocks prior to the trial.

At the hearing the state presented seven witnesses including Detective Byrd, Mrs. Kerik (the Assistant Clerk), and Mr. Nimocks. The state also introduced the written statements that defendant, codefendants Hopple and Johnson, and the victim gave to police very soon after the robbery.

In his statement Hopple said that he was 19 and a native of Illinois; that he was living (in Fayetteville) at the same house where defendant was living; that defendant was his friend; that defendant was a participant in the robbery; and that it was he (Hopple) who attempted to prevent the robbery and help the victim.

Johnson, 17, stated that he was the driver of the car; that defendant was riding with him in the front seat while all of the others were in the backseat or rear part of the car; that someone in the backseat grabbed the victim; that they all got out of the car; and that defendant at that point drew a knife on the victim and demanded his money.

The victim, 19, stated that when the car stopped on the rural road, one of the men who had been sitting behind the rear seat "grabbed me by my throat and held a knife in front of my throat"; that at the same time, the man in the front passenger seat (identified above as defendant) turned around with a hunting-type knife in his hand, jumped out of the car and "told me to get out . . . "; and that it was one of the men riding in the backseat who told the others "to leave me alone."

Mr. Nimocks testified, among other things, that prior to being employed in this case he had represented defendant in a DUI case; that either before or just after he first conferred with defendant regarding this case, he conferred with Detectives Byrd and Conerly and read the statements they had taken from defendant, the codefendants and the victim; that defendant was also concerned about the other two charges of armed robbery; that he conferred with defendant on more than one occasion; that defendant agreed to plead guilty in this case; and that he was employed by defendant to enter a plea of guilty.

Following the hearing during the week of 12 January 1981, Judge Lee took defendant's motion for appropriate relief under advisement. On 24 March 1981 he entered an order in which he made 36 findings of fact, 5 conclusions of law and denied the motion. Pertinent findings of fact and conclusions of law to which defendant excepted will be set out hereinafter in the opinion.

Defendant petitioned the Court of Appeals for a writ of certiorari to review Judge Lee's order. Upon denial of the motion by

that court, defendant petitioned this court for a writ of certiorari. We allowed the petition on 17 August 1981.

Attorney General Rufus L. Edmisten, by Associate Attorney Blackwell M. Brogden, Jr., for the state.

Bisbee & Nagan, by John H. Bisbee (pro hac vice)[3], *and Barry Nakell for defendant-appellant.*

BRITT, Justice.

Although defendant has listed 27 assignments of error based on 23 exceptions, he states that the sole question presented is whether his guilty plea was "unintelligent, unknowing, involuntary, and the result of ineffective assistance of counsel." All of his exceptions relate to certain findings of fact and the conclusions of law made by Judge Lee.

[1] First, we consider the law governing this appeal. G.S. 15A-1415 lists the grounds for appropriate relief which may be asserted by a defendant after verdict and without limitation as to time. Clearly, defendant bases his motion on G.S. 15A-1415(b)(3), contending that his "conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina." G.S. 15A-1420 sets out the procedure on motions for appropriate relief and subsection (c)(5) provides

> If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

Prior to 1 July 1978, the effective date of Chapter 711 of the 1977 Session Laws which includes the enactments now codified as G.S. 15A-1415 and 1420, the relief which defendant seeks in this cause would have been by virtue of former G.S. 15-217 *et seq.*[4], often referred to as the North Carolina postconviction hearing act. In reviewing orders entered pursuant to that act, this court held that the findings of fact of the trial judge were binding upon

3. Mr. Bisbee is licensed to practice law in the State of Illinois but not in North Carolina. By appropriate orders he has been authorized to represent defendant in the courts of this state in this case. Mr. Nakell is a member of the North Carolina Bar.

4. Repealed by Chapter 711, 1977 Session Laws.

the petitioner if they were supported by evidence. *See Branch v. State*, 269 N.C. 642, 153 S.E. 2d 343 (1967); *State v. Graves*, 251 N.C. 550, 112 S.E. 2d 85 (1960); and *Miller v. State*, 237 N.C. 29, 74 S.E. 2d 513, *cert. denied*, 345 U.S. 930 (1953).

We now apply the same test in reviewing findings of fact made by the trial court pursuant to hearings on motions for appropriate relief. This test is applicable even though the evidence is conflicting, *see State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971), and notwithstanding defendant's testimony at the hearing to the contrary, *see State v. Bullock*, 268 N.C. 560, 151 S.E. 2d 9 (1966).

Our inquiry therefore, is to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.

I.

[2] After considering each of defendant's exceptions to the findings of fact, and the evidence presented at the hearing, we conclude that there is no merit in any of them. We will address the exceptions *seriatim*.

Exception No. 1 is to that part of finding (7) in which the trial court found that Attorney Nimocks conferred with Randy Gregory, Assistant District Attorney, who was assigned to prosecute this case, and that defendant was advised by Nimocks of his right to plead not guilty and to have a jury trial. This finding is supported by Nimocks' testimony at the hearing (T p 261) and Nimocks' affidavit (R pp 48-49).

Exception No. 2 is to that part of finding (8) that Nimocks was employed by defendant for the purpose of entering pleas of guilty to the armed robbery charges in this case and in the two other armed robbery cases for a fee of $1,500.00; and that Nimocks advised that they should seek to enter a plea of guilty to one count of armed robbery, offer defendant as a state's witness, and seek to have the other two counts against him dismissed. This finding is supported by Nimocks' testimony (T pp 251-354, particularly pages 254, 259, 261 and 263).

Exception No. 3 is to that part of finding (10) indicated with brackets as follows:

(10) That an Application for Writ of Habeas Corpus was filed herein on September 19, 1977, signed by the petitioner and by John Taylor, law partner of Stephen H. Nimocks. [That in said document the Petitioner, John Finton Stevens, alleged that he had made a confession to Officers Byrd and Conerly, that he desired to plead guilty to one count of armed robbery, that he desired to testify truthfully for the State in all three cases, that he understood that he could be sentenced to life imprisonment on a plea of guilty to one count of armed robbery and that he fully understood that the State would no doubt seek a lengthy active sentence, and that notwithstanding all of that he still desired to plead guilty.]

This finding is supported by the following paragraphs from defendant's signed application for a writ of habeas corpus (R pp 7-8):

That your petitioner has volunteered and desires to testify in behalf of the State of North Carolina and that he will truthfully testify in behalf of the State as to all facts and matters surrounding the charges which have been brought against him;

That petitioner has made a confession to Officers Conerly and Byrd and that said confession was made truthfully and voluntarily without any threat or promise of reward to your petitioner;

That your petitioner is informed and knows that the maximum sentence he can receive from his plea of guilty to one count of armed robbery is life imprisonment and that your petitioner is informed and believes that the District Attorney for the Twelfth Judicial District of the State of North Carolina would in all probability now argue that he would serve a lengthy active sentence and that in spite of this it is his desire still to plead guilty and to testify in behalf of the state; . . . .

Exception No. 4 is to that part of finding (12) indicated with brackets as follows:

(12) That Petitioner appeared in this Court with his attorney, Stephen H. Nimocks, on October 10, 1977, before the Honorable Giles R. Clark, Judge Presiding, in the morning session of that court. That Randy Gregory, Assistant District Attorney, was present representing the State and that the Courtroom Clerk was Mrs. Linda Nichols, now Mrs. Linda Kerik, Assistant Clerk of Superior Court. [That Petitioner appeared for the purpose of entering a plea of guilty to the charges in this case, and that a plea of guilty was tendered to the Court by Petitioner through his counsel. That Transcript of Plea was taken and that Judge Clark examined the Petitioner personally with regard to the questions appearing on the Transcript of Plea. That Petitioner would not sign that transcript, that Judge Clark would not sign that transcript, and because of questions raised by the Petitioner as to questions nine and ten on the transcript] Judge Clark ordered that that plea and that transcript be stricken and that Mrs. Nichols wrote or caused to written across the face of said transcript the word "Stricken."

This finding is supported by the testimony of defendant (T pp 33-34); Mrs. Kerik, an assistant clerk of superior court who had been present (T pp 240-242); Randy Gregory (T p 114); and Nimocks (T pp 265-268). *See also* First Transcript of Plea, October 10, 1977 (R p 14).

Exception No. 4 is to that part of finding (13) indicated with brackets as follows:

(13) [That later on the same day, October 10, 1977, in the afternoon session, Petitioner and his attorney, Mr. Stephen H. Nimocks, and Mr. Gregory for the State appeared before Judge Clark again and tendered to the Court a plea of guilty. That Judge Clark personally examined Petitioner with regard to the questions appearing on the Transcript of Plea. That the Petitioner stated to Judge Clark that he was, in fact, guilty and that at no time during that session did he state to Judge Clark that he was not guilty. That this transcript was signed by Petitioner and sworn to by Petitioner in the presence of Mrs. Linda Nichols, but that it was not signed by Judge Clark.]

This finding is supported by the transcript of plea itself (R p 16) and the testimony of Mrs. Kerik (T pp 241-243).

Exception No. 6 is to that part of finding (15) "that evidence was presented by the Petitioner on October 31, 1977, and thereafter that prayer for judgment was continued until later in that session, to wit, until November 4, 1977." This finding is supported by the "Judgment or other Disposition" entered by Judge Clark on 31 October 1977 (R p 37).

Exception No. 7 is to that part of finding (20) "that in that letter Petitioner did not express any dissatisfaction with the legal services he had received from Nimocks." Finding of fact (20) relates to a letter which defendant allegedly wrote Nimocks from prison on or about 17 November 1977. This letter was introduced into evidence as state's exhibit 4 and fully supports the finding.

Exception No. 8 is to all of finding (21) which is as follows:

> (21) That the statements of Petitioner and the co-defendants, Hopple and Johnson, and the statement of the victim, Curtis Hammonds when all taken together create at least a reasonable inference that if anyone attempted to help the victim, Hammonds, it was Michael Len Hopple and not the Petitioner. That all of these statements when taken together and Nimocks' conversations with the Investigating Officers, Byrd and Conerly, give Stephen H. Nimocks a reasonable basis on which to advise the Petitioner that he should, in fact, plead guilty.

This finding is supported by the statements which defendant, the codefendants and the victim gave the police very soon after the robbery (defendant's exhibit 1, state's exhibits 1, 2 and 3) and the testimony of Nimocks and Billy Byrd (T pp 256, 225-227).

Exceptions Nos. 9 and 10 are to findings (22) and (23) which are:

> (22) That at no time did Stephen H. Nimocks or anyone else advise Petitioner that if he entered a plea of guilty he would be put on probation or that he would probably be put on probation, and that at no time did Stephen H. Nimocks or anyone else advise Petitioner that if he entered a plea of guilty he would be allowed to return to his unit at Fort Bragg.
>
> (23) That Petitioner's own statement to the officers indicated that he was the individual in the right front

passengers seat of the automobile and that the victim, Curtis Hammond's statement to the officers indicated that the man in the right front passenger seat pulled a knife and participated actively in the robbery. That the statement given by Curtis Hammond does not exculpate Petitioner as alleged in the Motion for Appropriate Relief.

These findings are supported by the affidavit (R pp 48-50) and testimony of Nimocks (T p 266) and the statement of defendant (defendant's exhibit 1) and the statement of Curtis Hammond, the victim (state's exhibit 3).

Exception No. 11 is to finding (26) "that neither Stephen H. Nimocks nor anyone else made any promises to the Petitioner or threatened him in any way to cause him to enter the plea of guilty in this case." This finding is supported by the affidavits (R pp 48-54) and testimony of Nimocks and Gregory (T pp 268, 130-131).

Exception No. 12 is to finding (27) which is as follows:

(27) That he entered the plea of guilty both on the afternoon of October 10, 1977 and on November 4, 1977, of his own free will, voluntarily, knowingly and understanding what he was doing. And that neither Stephen H. Nimocks nor anyone else told the Petitioner to give false answers to the Court in order to have the Court accept his plea in this case.

This finding is supported by the second transcript of plea (R p 16), the third transcript of plea (R p 19), the affidavits (R pp 48, 50) of Nimocks and Gregory, the testimony of Nimocks (T pp 268-269), the testimony of Gregory (T pp 130-131), the testimony of Mrs. Kerik (T pp 239-247) and the testimony of Judge Clark (T pp 206-219).

Exception No. 13 is to finding (28) "that the Petitioner was satisfied with his counsel, Stephen H. Nimocks both on the afternoon of October 10, 1977 and on November 4, 1977." This finding is supported by defendant's sworn answers on question 4 of each of the two transcripts (R pp 16, 19).

Exceptions Nos. 14 and 15 are to findings (29) and (30) "that Stephen H. Nimocks did not coerce or attempt to coerce the Petitioner into pleading guilty", and "that Petitioner at no time indicated to Stephen H. Nimocks that he desired in fact to plead

not guilty and to exercise his right to a trial by jury." These findings are supported by the second and third transcripts of plea (R pp 16, 19), the testimony of Nimocks (T p 268), the affidavit of Nimocks (R p 48), the testimony of defendant (T pp 61-93) and the second and third transcripts of plea (R pp 16, 19).

Exception No. 16 is to finding (31) which is as follows:

> (31) That Stephen H. Nimocks did not advise Petitioner that he was guilty of armed robbery merely because he was at the scene with the other participants, but that his advice to the Petitioner to plead guilty was based upon the statements of all co-defendants, the statement of Petitioner himself, and Nimocks' conversations with the Investigating Officers Byrd and Conerly.

This finding is supported by the statements of defendant, the codefendants and the victim given to police soon after the robbery (defendant's exhibit 1, state's exhibits 1, 2 and 3), the testimony of Nimocks (T pp 252-256) and the testimony of Deputy Sheriff Byrd (T pp 220-227).

Exception No. 17 is to finding (35) which is that Nimocks and defendant agreed that defendant would plead guilty to one count of armed robbery and that the fee of $1,500.00 agreed upon by defendant and Nimocks was based upon a plea of guilty. This finding is supported by the affidavit of Nimocks (R p 48), the testimony of Nimocks (T p 254) and the testimony of defendant (T pp 22-23).

Exception No. 18 is to that part of finding (36) which is "that the Judgment and Commitment entered by Judge Clark on November 4, 1977 was based upon the plea of guilty entered by the Petitioner on November 4, 1977 although the Petitioner had on the afternoon of October 10, 1977 entered a plea of guilty freely, voluntarily, and knowingly understanding what he was doing." This finding is supported by the second transcript of plea (R p 16) and the third transcript of plea (R p 19).

While the evidence presented to Judge Lee was conflicting, and defendant gave testimony contrary to that given by Attorney Nimocks, the findings of fact are fully supported by the evidence and must be upheld on appeal. *Branch v. State, supra; State v. Blackmon, supra;* and *State v. Bullock, supra.*

II.

Defendant's remaining exceptions Nos. 19, 20, 21, 22 and 23 relate to Judge Lee's conclusions of law which are as follows:

(1) That the decision of Stephen H. Nimocks, Attorney at Law, to advise the Petitioner to plead guilty and to in fact enter a plea of guilty on his behalf was a decision in which Petitioner concurred at the time the plea was tendered to the Court on the afternoon of October 10, 1977, and again on November 4, 1977, and this decision on the part of Stephen H. Nimocks was an informed professional deliberation and judgment, and it was not based on neglect or ignorance.

(2) That Stephen H. Nimocks' representation of and advice to this Petitioner was substantially above the range of competence demanded of attorneys in criminal cases.

(3) That Petitioner was not denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

(4) That the guilty plea tendered to the Court by the Petitioner on the afternoon of October 10, 1977, and again on November 4, 1977, which was finally accepted and ordered filed by the Honorable Giles R. Clark on November 4, 1977, was entered by the Petitioner voluntarily, of his own free will, understandingly, without any promises or threats being made to him by Stephen H. Nimocks or by anyone else, and that there was a factual basis for the acceptance of said plea by the Court, and that no one advised Petitioner to give false answers to Judge Clark in order to have him accept the plea in the case and that Petitioner did not in fact give false answers to the Court in order to have judge Clark accept the plea in the case.

(5) That the Petitioner is not entitled to relief for the failure of the State to preserve a verbatim transcript of the proceedings on October 10, 1977, October 14, 1977, and on October 31, 1977, for the reason that there are sufficient witnesses who recall the events of those dates to enable the Court to make findings of material fact.

Our inquiry now is whether the findings of fact support the conclusions of law. We hold that they do. While we will not take the conclusions of law *seriatim* and specify the particular findings of fact which support them, we will comment on those which defendant appears to criticize specifically.

The court's conclusion that the decision on the part of Nimocks to advise defendant to plead guilty "was an informed professional deliberation and judgment, and it was not based on neglect or ignorance" is fully supported by the findings.

Defendant did not except to finding (32) in which the court found that Nimocks was graduated from the Wake Forest Law School in 1951, that he had been engaged continuously since that time in the general practice of law in Fayetteville, and that the larger part of his practice had been criminal law.

The court further found that it was only after Nimocks had conferred with defendant, talked with the investigating officers, read the statements which defendant, his codefendants and the victim gave to the police soon after their arrest, and talked with other people, that he advised defendant to plead guilty. Clearly Nimocks was justified in concluding that although defendant was contending that he did not participate in the robbery and tried to help the victim, it would be difficult, if not impossible, to persuade a jury to believe that contention in the face of contrary testimony by the victim himself and defendant's friend Hopple, one of the codefendants.

With respect to conclusions of law (2) and (3), defendant argues that the test of effective assistance of counsel is "that assistance within the range of competence demanded of attorneys in criminal cases", citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *McMann v. Richardson*, 397 U.S. 759 (1970); *Marzullo v. Maryland*, 561 F. 2d 540 (4th Cir. 1977). It is clear that Judge Lee applied this test and we think the findings of fact justify the application. As to conclusion of law (4), the findings of fact more than support it.

Conclusion of law (5) is in response to defendant's contention set out in his motion for appropriate relief "that no verbatim record of the proceedings at which defendant may have entered a plea of guilty was preserved." G.S. 15A-1026 provides:

> A verbatim record of the proceedings at which the defendant enters a plea of guilty or no contest and of any preliminary consideration of a plea arrangement by the judge pursuant to G.S. 15A-1021(c) must be made and preserved. This record must include the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the prosecutor, and any responses. If the plea arrangement has been reduced to writing, it must be made a part of the record; otherwise the judge must require that the terms of the arrangement be stated for the record and that the assent of the defendant, his counsel, and the prosecutor be recorded.

While the trial court did not strictly comply with the quoted statute in making and preserving a verbatim record of the proceedings at which defendant pled guilty, we agree with Judge Lee's conclusion that defendant is not entitled to relief because of this omission. In addition to witnesses being able to recall the events in question, and the availability of the written transcripts of plea, Judge Clark made and preserved copious notes which aided him in refreshing his recollection.

III.

As indicated above, defendant groups his 27 assignments of error, based on 23 exceptions, under one contention that his guilty plea "was unintelligent, unknowing, involuntary and the result of ineffective assistance of counsel." With very little specificity as to which findings of fact are not supported by the evidence, and which conclusions of law are not supported by the findings, the gist of defendant's argument is that Judge Lee saw fit to find facts based on evidence other than testimony given by defendant and certain of his witnesses.

We have before us in this case rulings from two of our ablest trial judges. Judge Clark has served with distinction as the resident judge of the Thirteenth District since February of 1975. Prior to that time he served more than six years as a judge of the district court. The record in this case clearly discloses that he did not accept defendant's plea of guilty until after he was thoroughly convinced, following at least three hearings, that defendant was satisfied with his counsel and that the guilty plea was the informed choice of defendant and was made freely, voluntarily and understandingly.

Judge Lee has served ably as a resident judge of the Fourteenth District since January of 1975. Prior to that time he served as a district court judge for nine years. The record in this case indicates that he patiently conducted the hearing on defendant's motion for appropriate relief during the week of 12 January 1981; that he took the matter under advisement until 24 March 1981; and that he then, after having the benefit of the transcript of the hearing, made his findings of fact, conclusions of law and denied defendant's motion.

We conclude that the findings of fact are supported by the evidence, that the conclusions of law are supported by the findings of fact, and that the order denying defendant's motion for appropriate relief is supported by the findings of fact and the conclusions of law.

Affirmed.

Justice EXUM dissenting.

I disagree with the majority's conclusion that Judge Lee's finding No. 31 is supported by the evidence. This finding is crucial to conclusion No. 1 that Mr. Nimocks' advice to defendant to plead guilty was "the result of informed professional deliberation and judgment, and . . . not based on neglect or ignorance" and to conclusion No. 3 that defendant was not denied effective assistance of counsel. Finding No. 31 is:

> (31) That Stephen H. Nimocks did not advise Petitioner that he was guilty of armed robbery merely because he was at the scene with the other participants, but that his advice to the Petitioner to plead guilty was based upon the statements of all co-defendants, the statement of Petitioner himself, and Nimocks' conversations with the Investigating Officers Byrd and Conerly.

The majority asserts that this finding is supported by the statements of defendant's companions, the robbery victim, and the testimony of Mr. Nimocks and Officer Byrd. Neither the cited evidence nor any other in the record supports this finding; in fact, all of the evidence is contrary to the finding. On the basis of the uncontradicted evidence, most of which comes from the testimony

of Mr. Nimocks himself, defendant is entitled to the relief he seeks.

As the majority correctly notes, defendant at all times contended to Mr. Nimocks that he did not participate in the robbery and actually tried to help the victim. Defendant said he was merely present at the scene of the robbery. It is undisputed in this record that this has been defendant's consistent and unaltered position since he first gave a statement to investigating detectives, Bob Conerly and Billy Byrd. His first statement was made on 11 September 1977, several days after his arrest on the charge of robbing Hammond. According to this statement, offered as defendant's Exhibit 1, defendant was riding with his companions Hopple, Johnson, and Bralick, when they picked up Hammond, a hitchhiker. After riding around awhile, Johnson drove the car into some woods and stopped. Defendant got out of the car "and went to the bathroom." When defendant turned around, his companions were robbing Hammond. Defendant asked them to leave Hammond alone. They refused, continued to rob Hammond and then left in the car, abandoning defendant and Hammond. Subsequently, his companions returned to pick defendant up. Shortly after the incident and before they could return home, defendant and his companions were arrested for the robbery.

According to Mr. Nimocks' own testimony, the following transpired with regard to his representation of defendant: He first visited defendant in jail on 14 September 1977. The purpose of this first visit was to determine whether Nimocks would represent defendant, what defendant's plea would be, and Mr. Nimocks' fee. (T p 253) Mr. Nimocks was not sure whether at that time he had seen defendant's statement to Detectives Conerly and Byrd. (T p 253) He did see a copy of this statement shortly after his first conversation with defendant in the jail. (T p 253) But it was at this first conversation that it was determined that defendant would enter a plea of guilty and Mr. Nimocks' fee for entering the plea would be $1500. (T p 254) Mr. Nimocks stated that what defendant said about his participation in the robbery at this first conversation in the jail was consistent with defendant's statement earlier given to Officers Byrd and Conerly. (T p 341) Mr. Nimocks then advised defendant that he was "technically guilty and that he should plead guilty." (T p 331) This advice, according to Nimocks, "was based on what [defendant] told me his participa-

tion was in the crime, primarily." (T p 331) On 16 September, in an effort to get defendant's bond reduced, Mr. Nimocks prepared an application for writ of habeas corpus (T p 263).[1] The application, which was primarily directed at getting defendant's bond reduced, recited:

> *That your petitioner is advised by self-retained counsel that he is technically guilty of one count of armed robbery and that it is his desire to enter a plea of guilty thereto;*
>
> That your petitioner has volunteered and desires to testify in behalf of the State of North Carolina and that he will truthfully testify in behalf of the State as to all facts and matters surrounding the charges which have been brought against him;
>
> That petitioner has made a confession to Officers Conerly and Byrd and that said confession was made truthfully and voluntarily without any threat or promise of reward to your petitioner . . . . [Emphases supplied.]

At the hearing on defendant's application for habeas corpus conducted on 19 September 1977, Mr. Nimocks examined Detectives Byrd and Conerly. Detective Byrd testified that he felt defendant had told the truth in his 11 September 1977 statement and that defendant's statement had helped in the solution of other crimes that had not then been solved. (Habeas Corpus Proceeding, p 18; T p 342) Detective Conerly testified that defendant had stated "[t]hat he was merely a passenger in the vehicle, didn't have any idea what was going down, that he had attempted to dissuade the others from doing any harm to Mr. Hammond." (Habeas Corpus Proceeding, p 35) Detective Conerly also testified that defendant's statement regarding defendant's own involvement in the crime "was completely truthful" but "did leave out some information which involved a codefendant and a former hometown friend of his." (Habeas Corpus Proceeding, pp 38-39)

It is clear from the above undisputed facts that Mr. Nimocks gave defendant unsound legal advice based upon Mr. Nimocks' erroneous understanding of the law. Under defendant's version of

1. The record clearly shows that Mr. Nimocks was the author of the application, T p 317, although his partner actually signed it.

the incident, corroborated by defendant's pretrial statement to Detectives Byrd and Conerly, Nimocks' own conversations with these officers, and his examination of them at the habeas corpus proceeding, defendant was not guilty of the crime charged. He was merely present when the crime occurred. Mere presence at the scene of a crime does not make one guilty of that crime, technically or otherwise. *See State v. Haywood*, 295 N.C. 709, 717-18, 249 S.E. 2d 429, 434 (1978); *State v. Aycoth and Shadrick*, 272 N.C. 48, 157 S.E. 2d 655 (1967). Yet Mr. Nimocks advised defendant that he was "technically guilty" of robbery even under his own version of the incident. There is no better documentation of Mr. Nimocks' erroneous conclusion than the application for habeas corpus which he prepared and which states that defendant had "made a confession to Officers Conerly and Byrd." In fact and in law, defendant, contrary to Mr. Nimocks' opinion, had made no confession; he had made an exculpatory statement.

Although under defendant's version of the incident defendant was not guilty, as far as Mr. Nimocks had advised him defendant *had no defense to the charge.* Under either the state's version or his own, he was, according to his lawyer, guilty. A guilty plea made under this kind of legal advice is not knowingly and understandingly made. It is also the product of ineffective assistance of counsel.

Judge Lee's finding No. 31 that Mr. Nimocks "did not advise [defendant] that he was guilty of armed robbery merely because he was at the scene with the other participants" is simply not supported by the evidence. All of the evidence, including that of Mr. Nimocks, is that Mr. Nimocks gave precisely that advice. This advice vitiates defendant's plea.

It is true that sometime before defendant entered his plea of guilty, Mr. Nimocks looked at the pretrial statements made by Hopple, Johnson and Hammond, the victim, all of which inculpated defendant in the robbery. Consideration of these statements might have caused an attorney to advise defendant to plead guilty, even if the attorney recognized that defendant's own version of the incident constituted a good defense. The seriousness of the offense with which defendant was charged, as well as the credibility (if indeed it was credible) of potential testimony against him, may have made a guilty plea the most pru-

dent alternative. But any plea of guilty must be based on "the informed choice of the defendant" and "freely, voluntarily, and understandingly" given.[2] Here, according to Mr. Nimocks' own testimony, defendant's plea was based on erroneous legal advice that even under his own version of the events he was technically guilty of armed robbery. The plea, then, was not the result of an informed choice to forego any defense defendant had to obtain potential benefits from pleading guilty. Nor was Mr. Nimocks' advice to plead guilty "based upon the statements of all codefendants, the statement of Petitioner himself, and Nimocks' conversations with the Investigating Officers Byrd and Conerly."[3] Mr. Nimocks' counsel that defendant should plead guilty was, by his own testimony, the product of his erroneous assessment of the legal significance of defendant's own statement, not a careful weighing of defendant's statement against the statements of others.

Since finding No. 31, which is crucial to Judge Lee's ultimate conclusions of law, is not supported by and is contrary to all of the evidence in the case, and since all of the evidence demonstrates that defendant's plea could not have been knowingly and understandingly made and was the product of ineffective assistance of counsel, my vote is to vacate the plea and remand the matter to Cumberland Superior Court for trial.

Justices CARLTON and MITCHELL join in this dissent.

2. Judge Clark found that defendant's plea was "the informed choice of the defendant" and was "made freely, voluntarily, and understandingly." Judge Clark carefully questioned defendant before making this finding and accepting defendant's plea. But defendant, unschooled in the law, was acting on Mr. Nimocks' erroneous explanation of the applicable law. In answering Judge Clark's questions defendant could not have known the advice he had been given was incorrect. Likewise, Judge Clark could not have known that defendant's answers were tainted by such advice.

3. That the inculpatory statements of defendant's companions and the victim are in the record is no evidence in itself that Mr. Nimocks' advice to defendant to plead guilty was based on them.

STATE OF NORTH CAROLINA v. TRACY THOMAS PECK

No. 12PA82

(Filed 2 June 1982)

Searches and Seizures § 33— seizure of evidence from automobile passenger— plain view rule not negated by officer's actions

A highway patrolman lawfully seized a plastic bag containing MDA from defendant's person under the "plain view" doctrine where the patrolman was called to the scene at night to assist in the roadside arrest of the driver of a car in which defendant was a passenger; in checking the stopped vehicle and defendant, its passenger, the patrolman observed that defendant had red eyes, dilated pupils and mucus on the corner of his mouth and that defendant appeared cotton-mouthed; defendant told the patrolman that he felt sick; after the patrolman asked defendant whether he had drugs on him or in the vehicle, defendant leaned back and thrust his hand down into the front of his pants, whereupon the patrolman instinctively grabbed defendant's hand and jerked it out of his pants; the patrolman could then see the corner of the plastic bag sticking out of defendant's pants where his hand had been and seized the bag; and the patrolman did not know what the defendant was reaching for in his pants, since the patrolman's reaction to defendant's furtive movement in seizing defendant's arm was reasonable as a self-protective measure, and the officer's conduct did not negate any of the four elements of the plain view doctrine.

Justice MITCHELL concurring.

Justice EXUM dissenting.

BY failure to timely file notice of appeal with this Court within the time allowed by the Rules of Appellate Procedure, defendant lost his right of appeal from a decision of a divided panel of the Court of Appeals. 54 N.C. App. 302, 283 S.E. 2d 383 (1981). We allowed certiorari on 14 January 1982. The Court of Appeals affirmed the judgment of *Lewis, J.* entered on 7 October 1980 in Superior Court, JACKSON County, upon defendant's plea of guilty to possession of a Schedule I controlled substance following denial of his motion to suppress evidence of a small plastic bag containing a white powdery substance seized from defendant's person. The item was seized by a highway patrolman who had been called to the scene by a security guard on the Western Carolina University campus to assist in the arrest of the driver of the car in which defendant was a passenger. Upon defendant's plea of guilty, he was sentenced to five years with execution suspended for five years and defendant was placed on probation.

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the State.

Thomas W. Jones, attorney for Defendant Appellant.

MEYER, Justice.

The defendant Peck entered a plea of guilty to the charge of possession of a controlled substance but preserved his appeal from the denial of his motion to suppress the evidence of the seizure of the plastic bag from his person. G.S. § 15A-979(b) provides a right of appeal from a plea of guilty following denial of a motion to suppress. Defendant contends that the Court of Appeals erred in affirming the trial judge's denial of his motion to suppress because, he contends, the evidence reveals that the item sought to be suppressed was the fruit of an unlawful search and seizure. We cannot agree. We have carefully reviewed the opinion of the majority of the panel below and the briefs and authorities relating to defendant's contentions. We conclude that the result reached by the Court of Appeals, its reasoning, and the legal principles enunciated by it are correct, and we adopt that opinion as our own.

We find *Sibron v. New York*[1] cited in the dissent to be clearly distinguishable. Sibron was convicted of the unlawful possession of heroin. He moved before trial to suppress the heroin seized from his person by the arresting officer, Brooklyn Patrolman Anthony Martin. After the trial court denied his motion, Sibron pled guilty to the charge, preserving his right to appeal the evidentiary ruling. At the hearing on the motion to suppress, Officer Martin testified that while he was patrolling his beat in uniform on March 9, 1965, he observed Sibron "continually from the hours of 4:00 p.m. to 12:00, midnight . . . in the vicinity of 742 Broadway." He stated that during this period of time he saw Sibron in conversation with six or eight persons whom he (Patrolman Martin) knew from past experience to be narcotics addicts. The officer testified that he did not overhear any of these conversations, and that he did not see anything pass between Sibron and any of the others. Late in the evening Sibron entered a restaurant. Patrolman Martin saw Sibron speak with three

1. 392 U.S. 40, 20 L.Ed. 2d 917 (1968).

more known addicts inside the restaurant. Once again, nothing was overheard and nothing was seen to pass between Sibron and the addicts. Sibron sat down and ordered pie and coffee, and, as he was eating, Patrolman Martin approached him and told him to come outside. Once outside, the officer said to Sibron, "You know what I am after." According to the officer, Sibron "mumbled something and reached into his pocket." Simultaneously, Patrolman Martin thrust his hand into the same pocket, discovering several glassine envelopes, which, it turned out, contained heroin.

The prosecutor's theory at the hearing was that Patrolman Martin had probable cause to believe that Sibron was in possession of narcotics because he had seen him conversing with a number of known addicts over an eight-hour period. In the absence of any knowledge on Patrolman Martin's part concerning the nature of the intercourse between Sibron and the addicts, however, the trial court was inclined to grant the motion to suppress. As the judge stated, "All he knows about the unknown men: They are narcotics addicts. They might have been talking about the World Series. They might have been talking about prize fights." The prosecutor, however, reminded the judge that Sibron had admitted on the stand, in Patrolman Martin's absence, that he had been talking to the addicts about narcotics. Thereupon, the trial judge changed his mind and ruled that the officer had probable cause for an arrest.

Patrolman Martin did *not* urge that when Sibron put his hand in his pocket, he feared that he was going for a weapon and acted in self-defense.

In *Sibron* the District Attorney confessed error and although the Supreme Court acknowledges that "Confessions of error are, of course, entitled to and given great weight," it found that the confession of error did not relieve the Court of the performance of the judicial function and proceeded to decide the case on the merits. The Court, with regard to the confession of error said:

> The prosecution has quite properly abandoned the notion that there was probable cause to arrest Sibron for any crime at the time Patrolman Martin accosted him in the restaurant, took him outside and searched him. The officer was not acquainted with Sibron and had no information concerning him.

> He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. It must be emphasized that Patrolman Martin was completely ignorant regarding the content of these conversations, and that he saw nothing pass between Sibron and the addicts. So far as he knew, they might indeed 'have been talking about the World Series.' The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.

392 U.S. at 62, 20 L.Ed. 2d at 934.

The Court concluded that Patrolman Martin's search of Sibron was unreasonable, that the evidence of the heroin seized was inadmissible, and, since the officer lacked probable cause for Sibron's arrest, the search could not be justified as incident to a lawful arrest.

In the case before us, the facts may be summarized as follows: On 23 March 1980, at approximately 8:00 p.m., Jess Shelton, a security officer at Western Carolina University, stopped a vehicle which he observed with tires squealing and dust flying. He stopped the vehicle to check the reason for the way it was being driven. He called North Carolina Highway Patrol Officer Cruzan for assistance because he (Shelton) was the only officer on duty at the time and he had orders not to leave the campus except in an emergency. By the time Patrolman Cruzan arrived, Officer Shelton had the driver of the vehicle, a Mr. Parker, in his vehicle. Upon arrival, Patrolman Cruzan asked Shelton if he had checked the passenger in the car. Upon being informed that he had not done so but that it looked like the passenger was intoxicated, Patrolman Cruzan approached the Parker vehicle and observed Mr. Peck inside the car on the passenger side. Officer Shelton testified that he went up to the Parker vehicle right behind Patrolman Cruzan, and that Patrolman Cruzan said to him, "Help me get him out of here." Officer Shelton testified that he (Shelton) thought that Peck had a gun although he did not see one. Officer Shelton further testified that he thought Peck had a gun when he (Shelton) got hold of him, and it was at that time that Patrolman Cruzan got a plastic bag from

Peck. Shelton did not hear all of the conversation between Patrolman Cruzan and Peck.

Patrolman Cruzan testified in effect that when he arrived Officer Shelton had the driver, Parker, under arrest for operating the vehicle without a license as his license had been previously revoked. Being informed that the passenger in the vehicle had not been checked, Patrolman Cruzan went to the passenger side of the Parker vehicle, opened the door, and started to talk to Peck who stated, "I'm feeling sick." Patrolman Cruzan told him to step out of the car if he was going to throw up, to which Peck replied, "I'm not going to throw up, I just don't feel good." Patrolman Cruzan then squatted down beside Peck. He observed the faint odor of an alcoholic beverage and saw that Peck's pupils were dilated, that his eyes were red, that his mouth had mucus on the corner of it and that he was "kind of cotton mouthed." Patrolman Cruzan said to Peck, "Son, do you have dope in here or on you?" At that time, Peck leaned back and stuck his left hand down in the front of his pants. When he did that Patrolman Cruzan grabbed his hand and jerked it out of his pants. For the first time, Cruzan could see in plain view the corner of a plastic bag sticking out of the defendant's pants where his hand had been. Patrolman Cruzan and Officer Shelton got Peck out of the vehicle. Cruzan held Peck's hands behind his back and reached around in front of Peck and pulled the plastic bag out of Peck's pants. The bag contained a white powdery substance later identified as the controlled substance methylenedioxyamphetamine (MDA). Officer Cruzan testified that he did not know when he saw Peck reach into his pants what was in his pants. He advised Peck of his constitutional rights and proceeded to search the rest of the vehicle. Cruzan testified on cross-examination, as narrated in the record before us, "that he had no reason to believe that the Defendant was going for a weapon."

There are certain similarities between this case and *Sibron*: (1) In both cases the defendant entered a plea of guilty but preserved his appeal on the denial of his motion to suppress the evidence of the drugs seized, (2) Highway Patrolman Cruzan's question to Peck as to whether he had any drugs is similar to Patrolman Martin's statement to Sibron that "You know what I am after," (3) drugs were taken from the person of both Peck and Sibron, and (4) at least ostensibly, neither officer's actions

resulted from a self-protective search for weapons. *Sibron* is otherwise completely dissimilar.

Sibron involved a situation in which the police officer without just cause accosted the defendant in a public restaurant and brought him outside onto the public street where the "search" was conducted for no other purpose than an attempt to find drugs. In the incident before us in this case there was a roadside arrest of the driver of a vehicle in the night-time. In checking the stopped vehicle and its passenger, Patrolman Cruzan observed that the passenger, defendant Peck, had red eyes, dilated pupils and mucus on the corner of his mouth; he appeared cotton-mouthed and said he felt sick. After Cruzan's investigatory question concerning whether Peck had drugs on him or in the vehicle, Peck leaned back and thrust his hand into his pants. In what appears to have been an instinctive reflex reaction, Cruzan grabbed his arm. Clearly, Patrolman Cruzan's reaction to Peck's furtive movement in seizing Peck's arm was reasonable as a self-protective measure.

We would no doubt have little difficulty in finding grounds for a protective search had Patrolman Cruzan been able to articulate for instance that there was a bulge in the defendant's pants or shirt which he believed to be a gun. Here the defendant's pants could certainly have concealed a knife, razor, or similar small but dangerous weapon. The point is, when a subject makes a furtive gesture or suspicious movement as here, the officer more often than not reacts instinctively to protect himself and others without reasoning as to whether there is an "articulable reason" or "founded suspicion." Perhaps the officer can articulate his reasons after the fact and upon reflection and perhaps he cannot. Perhaps he can later articulate nothing more than a common-sense instinct or conclusion about human behavior gained from experience. We must constantly remind ourselves that we examine the circumstances "after the fact" with much consideration and with hindsight in the calm and safety of a courtroom.

> 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. See Raphael, 'Stop and Frisk' in a Nutshell: Some Last Editorial Thrusts and Parries Before It All Becomes History, 20 Ala. L. Rev. 294 (1968). The lack of such 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.' *People v. Rivera*, 14 N.Y. 2d 441, 252 N.Y.S. 2d 458, 201 N.E. 2d 32 (1964), and authorities cited. *See also, United States v. Vita*, 294 F. 2d 524 (2d cir. 1961); Cook, Detention and the Fourth Amendment, 23 Ala. L. Rev. 387 (1970-71); LaFave, 'Street Encounters' and the Constitution: Terry, Sibron, Peters and Beyond, 67 Mich. L. Rev. 40 (1968). Since the common law, unless abrogated or repealed by statute, is in full force and effect in this State, G.S. 4-1, the absence of statutory authority to stop and frisk does not render these common law practices illegal in our State.

Nor does the Federal Constitution prohibit them when they are reasonably employed. In *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968), the Court held, among other things, that 'the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal liberty. * * * [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.'

> The Court then recognized that it is not always unreasonable to seize a person and subject him to a limited search for weapons where there is no probable cause for an arrest, stating: '[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him.' *Terry v. Ohio, supra.*
>
> Thus, if the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot, he may temporarily detain the suspect. If, after the detention, his personal observations confirm his apprehension that criminal activity may be afoot and indicate that the person may be armed, he may then frisk him as a matter of self-protection. *Terry v. Ohio, supra. See Adams v. Williams,* 407 U.S. 143, 32 L.Ed. 2d 612, 92 S.Ct. 1921 (1972).

State v. Streeter, 283 N.C. 203, 209-10, 195 S.E. 2d 502, 506-07 (1973).

It does not matter that subjectively Cruzan had no reason to believe that Peck had a gun. "[T]he scope of the Fourth Amendment is not determined by the subjective conclusion of the law enforcement officer." *United States v. Clark,* 559 F. 2d 420 (5th Cir. 1977), *cert. denied,* 434 U.S. 969, 98 S.Ct. 516, 54 L.Ed. 2d 457 (1977), *quoting United States v. Resnick,* 455 F. 2d 1127 (5th Cir. 1972). The officer's subjective opinion is not material. Nor are the courts bound by an officer's mistaken legal conclusion as to the existence or non-existence of probable cause or *reasonable* grounds for his actions. The search or seizure is valid when the objective facts known to the officer meet the standard required. *See Scott v. United States,* 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed. 2d 168, *reh'g denied,* 438 U.S. 908, 98 S.Ct. 3127, 57 L.Ed. 2d 1150

(1978); *United States v. Bugarin-Casas*, 484 F. 2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136, 94 S.Ct. 881, 38 L.Ed. 2d 762 (1974); *Klingler v. United States*, 409 F. 2d 299 (8th Cir. 1969), *cert. denied*, 396 U.S. 859, 90 S.Ct. 127, 24 L.Ed. 2d 110 (1969); *State v. Vaughn*, 12 Ariz. App. 442, 471 P. 2d 744 (1970); *People v. Baird*, 172 Colo. 112, 470 P. 2d 20 (1970), *citing Sirimarco v. United States*, 315 F. 2d 699 (10th Cir. 1963), *cert. denied*, 374 U.S. 807, 83 S.Ct. 1696, 10 L.Ed. 2d 1032 (1963); *State v. Vanzant*, 14 Wash. App. 679, 544 P. 2d 786 (1975). *See generally* 1 W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment §§ 1.2(g), 3.2(b) (1978).

Cruzan testified that he did not know what Peck was reaching for in his pants. The test of "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger" is clearly met on the facts before us. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed. 2d 889, 909 (1968). We are here concerned with whether the conduct of Officer Cruzan negated any of the four elements of the plain view doctrine upon which this case was determined by the trial court and the Court of Appeals. We agree with the Court of Appeals that the four elements of the plain view doctrine as enunciated by the Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971), were present. First, Patrolman Cruzan had legal justification to be at the place and in the position he was when he saw the evidence in plain view. Second, the discovery of the evidence was inadvertent as it was discovered incident to removal of the defendant's hand from his pants and clearly was not the result of a deliberate search. Third, the evidence was immediately apparent and its discovery under the circumstances clearly would warrant a man of reasonable caution in believing that the defendant was in the possession of drugs and was hiding evidence which would incriminate him. Fourth, Patrolman Cruzan's observation of the defendant's condition and the sight of part of the plastic bag which contained the white powdery substance was such as to give a reasonable man the belief that there was evidence of criminal activity present, to-wit, the possession of drugs.

The Court of Appeals affirmed the defendant's conviction and held that the trial court correctly denied defendant's motion to

suppress, reasoning that the plain view doctrine was applicable and all elements were present. We agree.

The decision of the Court of Appeals is

Affirmed.

Justice MITCHELL concurring.

I completely concur in both the reasoning and the result reached by the majority. I would, however, rest this Court's action in affirming the Court of Appeals upon an additional basis.

This case presents a situation in which certain facts are undisputed. A law enforcement officer, acting upon probable cause, stopped the vehicle in which the defendant was a passenger. After stopping the vehicle, the officer lawfully took the driver into custody and placed him in a law enforcement vehicle. Patrolman Cruzan, who was assisting the arresting officer, approached the defendant who had remained seated in the automobile. When the defendant thrust his hand inside the front of his pants in the manner described in the majority opinion, Patrolman Cruzan found the plastic bag on the defendant's person.

I am of the opinion that the Supreme Court of the United States has clearly indicated that *Sibron v. New York*, 392 U.S. 40, 20 L.Ed. 2d 917, 88 S.Ct. 1889 (1968) is not controlling authority in cases involving searches of the occupants of automobiles. In *New York v. Belton*, 453 U.S. 454, 69 L.Ed. 2d 768, 101 S.Ct. 2860 (1981), the Supreme Court clearly indicated that a police officer who has effected a lawful custodial arrest of a driver of a vehicle may, contemporaneous with that arrest, conduct a search of the passenger compartment of the vehicle extending to the contents of containers found therein. I believe the Supreme Court wisely attempted to establish a brightline rule which could be followed by law enforcement officers without the necessity of having police attorneys or constitutional scholars present to assist them in the search. Under the authority of *Belton*, Patrolman Cruzan clearly could have conducted a thorough search of any containers or clothing located in the passenger compartment of the automobile *including those belonging to passengers* such as the defendant. To

hold that *Belton* would not also authorize at least a "frisk" or "pat down" of a passenger in the same automobile would seem to me to create an anomaly in the law of search and seizure and draw the sort of fine distinction far more useful to students in a classroom than to law enforcement officers conducting searches of automobiles on our public streets at night. I do not find *Sibron* controlling or even very relevant to the decision of the case at hand.

In *United States v. DiRe*, 332 U.S. 581, 92 L.Ed. 210, 68 S.Ct. 222 (1948) the Supreme Court indicated that authority to conduct a warrantless search of an automobile does not automatically give rise to authority to search an occupant of the automobile. I do not believe, however, that *DiRe* should be considered controlling in the present case. It is important to note that *DiRe* involved a full search and was decided well before the "stop and frisk" principle of *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968) and the "search of the area within an arrestee's immediate control" doctrine of *Chimel v. California*, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969) were enunciated by the Supreme Court. In my view, the principles articulated in *Terry* and *Chimel* now converge with the holding in *Belton* to require a second brightline rule authorizing law enforcement officers to "pat down" or "frisk" the passengers in an automobile[1] when they have lawfully stopped the automobile and lawfully arrested the driver. *United States v. Wiga*, 662 F. 2d 1325 (9th Cir. 1981); *United States v. Poms*, 484 F. 2d 919 (4th Cir. 1973) (per curiam); *United States v. Berryhill*, 445 F. 2d 1189 (9th Cir. 1971); *see also Ybarra v. Illinois*, 444 U.S. 85, 98, 62 L.Ed. 2d 238, 250, 100 S.Ct. 338, 346 (1979) (Rehnquist, J., dissenting). *Contra United States v. Simmons*, 567 F. 2d 314 (7th Cir. 1977).

Further, this authority to "pat down" or "frisk" the passengers is not, in my view, based upon a requirement that the law enforcement officer involved have a belief, reasonable or otherwise, that the passenger is armed or possesses contraband. Instead, I believe that we can and should legitimately take judicial notice in fashioning such a rule that there is a substantial potential threat to the lives of our law enforcement officers by passengers of automobiles in all cases in which officers are re-

1. The case before us does not involve a common carrier.

quired in the exercise of their duties to stop such automobiles and arrest the drivers. For me, a proper balancing of the competing interests to be considered in Fourth Amendment analysis compels the conclusion that a "pat down" or "frisk" is a justifiable and reasonable intrusion into the privacy of a passenger in an automobile under such circumstances. More particularly under the facts of the present case, Patrolman Cruzan, being possessed of the authority to "pat down" or "frisk" a passenger such as the defendant, was certainly within his authority to grab the defendant's wrist and hand and pull them from inside the front of the defendant's pants where the defendant had thrust them while Cruzan was questioning him.

I believe that a brightline rule such as I have outlined is absolutely required lest we encourage our law enforcement officers to ignore the law of search and seizure or unnecessarily endanger their lives in cases such as this. I strongly fear that their healthy instincts for survival will require them to adopt one approach or the other in similar cases if we fail to adopt such a rule.

It is appropriate here to point out that the officers of our North Carolina Highway Patrol do not ordinarily have the assistance of other officers immediately available as did Patrolman Cruzan in the present case. Instead, these patrolmen almost always perform their duties alone, frequently in the more remote areas of our large and primarily rural State. When they are required in the performance of their lawful duties to stop automobiles, it is more often than not the case that no other law enforcement officers are close enough to them to render assistance in any reasonable period of time. Although I recognize that these facts are not compelling when establishing a general rule of law, they are the facts with which these officers are required to live every day and night of the year.

As one court has correctly observed, "It is inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance." *United States v. Berryhill*, 445 F. 2d at 1193.

I would affirm the opinion of the Court of Appeals finding no error in the trial of the defendant on the basis of the rule I have

outlined previously herein as well as for the reasons set forth by the majority.

Justice EXUM dissenting.

Try as I might, I am simply unable to concur in the majority's attempt to distinguish *Sibron v. New York*, 392 U.S. 40 (1968). The majority recognizes that Patrolman Cruzan had no subjective belief that a protective search of defendant was necessary. The majority states, however, that "[t]he officer's subjective opinion is not material. . . . The search or seizure is valid when the objective facts known to the officer meet the standard required." None of the cases it cites for this proposition deal with the *Terry*-type situation in which the officer is conducting a limited frisk to protect himself or others. These cases deal generally with situations where (1) an officer was of the opinion that no probable cause existed when, in law, there was probable cause; (2) an officer's action was supportable on a legal theory different from that proffered by him; or (3) there was no probable cause at the time the officer determined to act, but thereafter and before the officer's action probable cause developed. Thus these cases stand for the proposition that the court will not be bound by an officer's erroneous legal theory when other legal theories will support his actions.

Here Officer Cruzan declared, not as a matter of law, but as a matter of fact, that he had "no reason to believe that Defendant was going for a weapon." The Court is bound by this declaration of the officer's best professional *factual* determination. It may not go behind this determination to justify Officer Cruzan's actions on the basis of what, upon the objective, articulable circumstances, he, or some other reasonable officer, *might* have thought. The requirement of objective, articulable circumstances in a *Terry*-type, protective seizure is designed to be a limitation on, not a substitute for, the officer's subjective determination of what the circumstances required. The Court should thus rely on the professional expertise of the individual officer and allow him to make the initial determination of the necessity for a protective frisk. It should then *review* his action, in light of the objective facts and constitutional standards.

Because of the similarity of objective facts and the constitutional question involved in *Sibron* to the instant case, I believe

Sibron controls this case. Therefore, Patrolman Cruzan's grabbing defendant's hand and jerking it out of his pants, under circumstances which gave Cruzan "no reason to believe that the Defendant was going for a weapon," constituted an illegal seizure. The illegal seizure caused the packet containing the MDA to come into Cruzan's view. Thus the first requisite for application of the plain view doctrine, *i.e.*, that the officer was in a legally justifiable position when he observed the drugs, was not met. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

Chief Justice BRANCH and Justice CARLTON join in this dissenting opinion.

STATE OF NORTH CAROLINA v. McKINNLEY JUNIOR CALLOWAY

No. 165A81

(Filed 2 June 1982)

1. Homicide § 25.2— premeditation and deliberation—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss where there was plenary and substantial evidence which would permit the jury to draw reasonable inferences that defendant acted with premeditation and deliberation when he shot and killed his wife.

2. Criminal Law § 86.2— examination of defendant concerning prior convictions proper

The trial judge did not abuse his discretion by permitting the district attorney to cross-examine defendant about prior convictions where all the questions directed to the defendant were all related to convictions and specific acts and where the record failed to reveal that the district attorney acted on lack of information or that he acted in bad faith in so cross-examining.

3. Criminal Law § 128.2; Jury § 6.4— "death qualification" of juror—comment by district attorney

Where a juror made a statement that "I don't believe in just going out and killing people" while the district attorney was trying to "death qualify" the prospective juror during the *voir dire* and the district attorney replied, "Yes ma'am. That's what this trial is all about," there was nothing in the dialogue which would require the trial judge to declare a mistrial on his own motion.

4. Homicide § 17.2— evidence of prior abuse of victim by defendant properly admitted—restoring witness's credibility

Where defense counsel sought to impeach a State's witness by cross-examining him concerning the witness's shooting of defendant, the door was

opened for the witness to testify as to the reason for his actions so as to restore his credibility, and testimony by the witness of prior maltreatment by defendant of his wife, the victim, was competent.

5. **Homicide § 20.1—photographs of victim and scene of crime properly admitted**

The trial court properly admitted a series of eleven photographs, nine of which showed the scene of the crime and two of which depicted the victim's wound, to illustrate the testimony of witnesses. Defendant's argument that the photographs were irrelevant since the cause of death was uncontroverted was without merit.

6. **Criminal Law § 95.1— denial of motion to strike answer—harmless error**

Where a witness testified that he had heard defendant say he was going to kill someone "three weeks before this—before he murdered his wife," the trial court erred in denying defendant's motion to strike the portion of the witness's answer, "before he murdered his wife." However, when compared with the overwhelming evidence of defendant's guilt, and when examined in the context of the witness's testimony, the error was found to be harmless.

APPEAL by defendant from *Lamm, J.*, at the 7 July 1981 Criminal Session of WILKES Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the first-degree murder of his wife, Willa Wilborne Calloway.

The State offered evidence tending to show that defendant and his wife were separated and that she lived in the home of her father which was located a short distance from the home formerly occupied by her and defendant. On 11 January 1981 at approximately 2:30 p.m., defendant came to the residence of Willa's father, parked his automobile, and blew the horn. Willa asked her brother, Lawrence, to go with her to the automobile to give her husband a gift from their children. After Willa delivered the gift, defendant asked to speak to her alone and she refused. He then asked her to let the children come out to talk to him, but she declined to do so because the children were suffering with colds. Defendant repeated his request that she get into the car several times, and upon her repeated refusals, he finally told her to go back to the house. As Willa and her brother started across the road, defendant said to Willa, "I'm going to kill you." Lawrence turned and saw defendant stick a shotgun out the window, aim it at Willa, and pull the trigger. The victim was about five feet from the end of the gun barrel when the blast struck her in the back of the neck. Defendant drove away at a high rate of speed and was observed to look back as he reached a curve in the road.

Police officers were called to the scene and found the victim's body lying in the highway with her head pointed toward her father's dwelling and located about one foot from the edge of the road.

There was medical testimony to the effect that the victim died as a result of a gunshot wound in the back of her neck, and in the opinion of the expert witness, the shot was fired from about three and one-half feet away. The State also offered evidence tending to show that there had been a long history of marital difficulties between defendant and his wife, and that defendant had physically abused her on several occasions. On one occasion about six months prior to the shooting, he had held a butcher knife to his wife's throat and threatened to kill her.

Defendant testified and stated that on 11 December 1981 he had been drinking "white" liquor from 7:00 a.m. to 2:00 p.m. when he called his wife, who told him that she would send the children out to see him if he came to her father's home. Defendant stated that he normally carried his shotgun in the car, and on the day preceding the shooting, he had used it to shoot at a squirrel's nest. He did not recall reloading the single shot shotgun after firing at the nest. He further testified that when he arrived at his father-in-law's house on the day of the shooting, his wife refused to let him see his children because he had been drinking. She also told him that she was going to court and fix it so he would not be able to see the children at all. When his wife started to walk away, he reached into the back seat, obtained his shotgun, and pointed it at her in an attempt "to aggravate her." He pulled the hammer back thinking it was unloaded and "the gun went off." He fled because he was frightened.

Defendant also offered the testimony of James Redman, who testified that he saw defendant drinking "white" liquor on the morning before the shooting.

In rebuttal the State offered Officer Walsh, who testified that he apprehended defendant at about 4:10 p.m. on 11 December 1981 and at that time defendant walked and talked in a normal manner. He did not detect the odor of alcohol about defendant's person.

The jury returned a verdict of guilty of first-degree murder. Defendant appealed from a judgment imposing a sentence of life imprisonment.*

Rufus L. Edmisten, Attorney General, by Ralf F. Haskell, for the State.

Cecil Lee Porter for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant first assigns as error the trial judge's denial of his motion for directed verdicts made at the close of the State's evidence and at the close of all the evidence. He argues that there was not sufficient evidence of premeditation and deliberation to carry the case to the jury on the charge of first-degree murder.

When defendant elected to offer evidence after the denial of his motion to dismiss at the close of the State's evidence, he waived his motion to dismiss at the close of the State's evidence. We therefore only consider his motion to dismiss made at the close of all the evidence. G.S. 15-173; *State v. Jones*, 296 N.C. 75, 248 S.E. 2d 858 (1978).

In considering this assignment of error, we apply the familiar rule that upon a motion for nonsuit or dismissal all the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from it. *State v. Snead*, 295 N.C. 615, 247 S.E. 2d 893 (1978); 4 Strong's N.C. Index 3d, Criminal Law § 106 (1976). When so considered, if there is substantial evidence to support a finding that the offense has been committed and the defendant was the perpetrator of the offense, the motion for nonsuit should be denied. *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978).

* The State announced at the beginning of the sentencing hearing that based upon its review of the evidence there was no evidence of any aggravating circumstances as enumerated in G.S. 15A-2000(e). The trial court concurred in the State's evaluation of the evidence and pronounced a minimum/maximum term of life imprisonment. Since the State failed to produce evidence of an aggravating circumstance in either the guilt determination phase or the sentencing phase, the trial court properly imposed a life imprisonment sentence without the intervention of the jury at the sentencing phase of the trial. *See State v. Johnson*, 298 N.C. 47, 79-80, 257 S.E. 2d 597, 620 (1979).

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Thomas, supra; State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 47 (1976).

Since all of the evidence in this case shows that defendant intentionally shot deceased with a deadly weapon thereby proximately causing her death, we are here only concerned with whether the evidence was sufficient to permit, but not require, a jury to find that defendant acted with premeditation and deliberation.

Premeditation may be defined as thought beforehand for some length of time no matter how short. *State v. Corn*, 303 N.C. 293, 278 S.E. 2d 221 (1981); *State v. Thomas, supra; State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974).

Deliberation means an intention to kill executed by the defendant in a "cool state of blood" in furtherance of a "fixed design to gratify a feeling of revenge or, to accomplish some unlawful purpose." *State v. Corn, supra; State v. Thomas, supra; State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970); *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, 96 A.L.R. 2d 1422, *cert. denied*, 368 U.S. 851, 7 L.Ed. 2d 49, 82 S.Ct. 85 (1961).

Premeditation and deliberation must ordinarily be proved by circumstantial evidence. Among the circumstances to be considered are: (1) want of provocation on the part of the deceased, (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by defendant, (4) ill will or previous difficulty between the parties, and (5) evidence that the killing was done in a brutal manner. *State v. Potter*, 295 N.C. 126, 130-31, 244 S.E. 2d 397, 401 (1978); *State v. Thomas, supra; State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972).

Here the evidence, when considered in the light most favorable to the State, discloses a minimum of provocation on the part of the deceased. She was in the act of delivering a gift to defendant from their children and explained that the children could not come out to see him because of illness. After refusing to enter the automobile, she was told to go back to the house. As she turned to go to the house, she was shot in the back at close

range. Defendant came to the place where the victim lived armed with a shotgun, and after stating that he was going to kill her fired a shotgun at close range. There was substantial evidence of previous difficulty between the parties including previous separations, physical assaults on the victim by the defendant, and the threatened use of a deadly weapon upon the person of the victim by the defendant. We hold that there was plenary and substantial evidence which would permit the jury to draw reasonable inferences that defendant acted with premeditation and deliberation when he shot and killed his wife. The trial court properly denied defendant's motion to dismiss.

[2] Defendant next contends that the trial court erred by permitting the district attorney to examine him, over his objection, concerning prior convictions.

Defendant testified in his own behalf, and on cross-examination the district attorney asked him a series of questions concerning previous *convictions*.

It is well settled in this jurisdiction that when a defendant testifies in a criminal case he may be cross-examined concerning *convictions* of prior unrelated criminal offenses. He may also be impeached by cross-examination concerning prior specific criminal acts or specific reprehensible conduct. However, such cross-examination must be based upon information, and the questions must be asked in good faith. *State v. Williams*, 303 N.C. 142, 277 S.E. 2d 434 (1981); *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980); *State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631, *cert. denied*, 449 U.S. 960, 66 L.Ed. 2d 227, 101 S.Ct. 372 (1980). It is equally well settled that a defendant may *not* be impeached on cross-examination by questions relative to whether he has been *arrested*, *accused*, or *indicted* for prior unrelated criminal offenses. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971).

> 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.

State v. Foster, 293 N.C. 674, 239 S.E. 2d 449 (1977). *Accord State v. Clark*, 300 N.C. 116, 265 S.E. 2d 204 (1980).

In *State v. Clark*, *supra*, this Court considered the question of whether a district attorney acted in bad faith in conducting his cross-examination. In that case, defendant contended that the district attorney had before him an F.B.I. report showing that defendant had been charged but not convicted of homicide at the time he cross-examined the defendant concerning this particular matter. In finding no error, this Court stated:

> [T]he record does not support his contention that the District Attorney acted in bad faith. The FBI report was not made a part of the record, and defendant failed to request a *voir dire* to determine whether the District Attorney acted in good faith. We have held that when the record contains no evidence regarding whether a District Attorney acted in good faith in inquiring into a defendant's prior criminal offenses or reprehensible conduct, the court's ruling permitting the question to be asked will be presumed to be correct. *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978). Furthermore, any possible prejudice to defendant was negated by the fact that he was given the opportunity to explain that he had not been convicted of homicide. *State v. McLean*, *supra*. We find no merit in this assignment of error.

State v. Clark, 300 N.C. at 125, 265 S.E. 2d at 210.

In instant case, the questions directed to the defendant were all related to convictions and specific acts. During this portion of defendant's cross-examination, he answered the questions regarding prior convictions in varying degrees which ranged from admitting or denying to volunteering information about charges, acquittals, and compromises. At no place in this record do we find anything which discloses that the district attorney acted on lack of information or that he acted in bad faith in cross-examining. Thus, there is not a scintilla of evidence to show that the trial judge abused his discretion by permitting the district attorney to cross-examine defendant about prior convictions.

This assignment of error is overruled.

[3] Defendant argues that the trial judge erred by not declaring a mistrial on his own motion when during the *voir dire* of prospective jurors while the district attorney was trying to "death qualify" a prospective juror the juror made the statement,

"I don't believe in just going out and killing people," and the district attorney in reply stated, "Yes ma'am. That's what this trial is all about." Defendant contends that the comment of the district attorney caused the jurors to form an opinion concerning defendant's guilt before any evidence was presented. We do not agree.

Whether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial judge, *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977), and a mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law. *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978).

In instant case, it would seem that the most reasonable interpretation of the exchange between the district attorney and the prospective juror would be that the prospective juror meant to convey the fact that she believed in capital punishment only when the evidence justified its imposition and that the district attorney merely rejoined that this was the purpose of the trial. Apparently the exchange had little actual impact on defense counsel since he failed to move for a mistrial. We find nothing in this dialogue between the district attorney and the prospective juror which would require the trial judge to declare mistrial on his own motion.

[4] Defendant assigns as error the admission of certain testimony relating to prior abuse of the victim by defendant.

Bill Wilborne, the father of the victim, testified as a State's witness. On cross-examination, defense counsel questioned the witness concerning his attitude toward defendant and elicited from the witness an admission that he had shot defendant on a date prior to the death of witness's daughter. On redirect the following exchange took place:

> Q. All right, Mr. Wilborn [sic], tell the jury why you shot him.
>
> A. He had—she had taken out papers—I had some papers taken out that he wasn't even supposed to be on the premises, and—

Q. What do you mean—not supposed to be on what premises?

A. On my premises.

Q. Why was he not supposed to be on your premises?

MR. PORTER: Objection.

MR. ASHBURN: He brought it up, Your Honor.

COURT: Overruled.

EXCEPTION NO. 23

Q. Go ahead, sir.

A. He was not supposed to be on my premises at all, because first of all he didn't know how to act. And the next thing, he was abusing his wife—whatever you call abusing—other words, wasn't getting along—and I had to keep her there for her protection at that time, yes. And then he was wanting to get to her there, where she was then.

And so I taken out those papers to keep him off of my premises and he was going to overrule the papers—

Q. What kind of papers?

A. The kind that you take out that you tell people when you don't want them on your premises.

Q. All right, sir.

A. And so he came, anyway.

Initially, we note that it is well settled that after a witness has been cross-examined the party calling him may reexamine the witness so as to clarify the new matter elicited on cross-examination. 1 Stansbury's North Carolina Evidence, *Witnesses* § 36 (Brandis rev. 1973). Thus, when defense counsel sought to impeach the witness by cross-examining him concerning the shooting of defendant, the door was opened for the witness to testify as to the reason for his actions so as to restore his credibility. This evidence of prior maltreatment by defendant of his wife was competent. Its weight was for the jury. *State v. Kincaid*, 183 N.C. 709, 110 S.E. 612 (1922). Such evidence bears on the intent, malice, motive, and premeditation and deliberation on the

part of defendant. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969). Further, this record discloses that after Mr. Wilborne testified, evidence that defendant had threatened his wife with a knife and had on more than one occasion physically assaulted her was admitted into evidence without objection. Defendant thereby lost the benefit of his objection. 1 Stansbury's North Carolina Evidence, *Witnesses* § 30 (Brandis rev. 1973), and cases there cited.

For reasons stated, this assignment of error is overruled.

[5] By his assignment of error number five, defendant contends that the trial judge erred by admitting into evidence ten photographs. He argues that the number of photographs were excessive, unnecessarily cumulative, and prejudicial. Actually, eleven photographs were admitted into evidence. Nine photographs showed the scene of the crime, and two photographs depicted the victim's wounds. It is defendant's position that the two photographs showing the victim's wounds were unduly inflammatory and prejudicial since the cause of death was undisputed.

In North Carolina photographs are admissible to illustrate the testimony of witnesses and their admission for that purpose with proper limiting instructions is not error. *State v. Horton*, 299 N.C. 690, 263 S.E. 2d 745 (1980); *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979). The fact that a photograph may depict a horrible and gruesome scene does not render it inadmissible into evidence when properly authenticated as a correct portrayal of conditions observed and related by a witness who uses the photograph to illustrate his testimony. *State v. Temple*, 302 N.C. 1, 273 S.E. 2d 273 (1981); *State v. Horton, supra; 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).

Defendant relies heavily upon *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963), and *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969). These cases are distinguishable from instant case.

In *Foust* the State offered into evidence ten color photographs showing the death wound to the victim's chin. This Court, finding other errors, granted a new trial and noted, "Under the circumstances here it seems that there was an ex-

cessive use of these ten photographs by the State." 258 N.C. at 460, 128 S.E. 2d at 894.

In *Mercer* the State introduced three photographs of the body of a five year old victim at the funeral home. The child's lifeless body was shown with projecting probes which indicated the point of entry, the course, and point of exit of the bullet that caused his death.

In the case before us for decision, there were only two photographs of the victim's body. One of the photographs showed the face of the victim and was relevant for proper identification by the testifying witnesses, and the other photograph showed the back of the neck of the victim and was used by the witnesses in testifying to their observations and the cause of death. The remaining photographs were merely pictures of the scene and were in no way gruesome or inflammatory. There is no merit in defendant's argument that these photographs of the scene had no probative value and were therefore prejudicial. Each photograph was taken from a different angle and was used to show the position of the body, and the distance to a curve in the road from which the evidence tended to show that defendant looked back before continuing his flight. These photographs were important to show the distance from which the gun was fired and defendant's actions after the shooting. They tended to bear upon the question of intent, premeditation, and deliberation.

Defendant's argument that the photographs were irrelevant since the cause of death was uncontroverted is without merit. We recently addressed a similar contention in *State v. Elkerson*, 304 N.C. 658, 285 S.E. 2d 784 (1982). We there stated:

> We have held that a stipulation as to the cause of death does not preclude the State from proving all essential elements of its case. (Citations omitted.) It is also established by our case law that in a homicide prosecution photographs showing the condition of the body when found, its location when found, and the surrounding scene at the time the body was found are not rendered incompetent by the portrayal of the gruesome events which the witness testifies they accurately portray. (Citations omitted.)

Id. at 665, 285 S.E. 2d at 789. *Cf. State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

We therefore hold that under the circumstances of this case, the trial judge correctly admitted the challenged photographs into evidence.

[6] Finally, defendant assigns as error the denial of his motion to strike a portion of a witness's answer to a question asked him on cross-examination by defense counsel.

Don Lee Little, a State's witness, was cross-examined by defense counsel concerning when he had heard defendant say that "I'm going to kill me somebody." Defense counsel asked: "Don, when do you say this happened," to which the witness replied, "Three weeks before this -- before he murdered his wife." Defendant contends that the trial court erred in denying his motion to strike the portion of Little's answer, "before he murdered his wife," in that this portion of the answer constituted an expression of an improper opinion as to the ultimate issue the jury was to decide.

It seems clear from a reading of the subsequent answers of the same witness that he used the term "murdered" in the lay sense to mean "killed."

We are of the opinion that the trial judge should have allowed the motion to strike. However, we are convinced from an examination of this witness's testimony and the context in which the answer was elicited that the failure of the trial judge to grant defendant's motion to strike and the admission of this evidence had little impact upon the jury. When compared with the overwhelming evidence of defendant's guilt, we do not believe that there is a reasonable possibility that the admission of this evidence might have contributed to defendant's conviction. *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972). We therefore hold that the trial judge's ruling in refusing to strike this evidence was harmless error.

We have carefully examined this entire record and find no error warranting that the verdict returned and the judgment imposed be disturbed.

No error.

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

APPEAL OF WILLETT

No. 249PA82.

Case below: 56 N.C. App. 584.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 12 May 1982.

ARRINGTON v. BRAD RAGAN, INC.

No. 183P82.

Case below: 56 N.C. App. 416.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1982.

BAUGH v. WOODARD

No. 186P82.

Case below: 56 N.C. App. 180.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 June 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 June 1982.

BUIE v. DANIEL INTERNATIONAL

No. 202P82.

Case below: 56 N.C. App. 445.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 June 1982.

COTHRAN v. EVANS

No. 211P82.

Case below: 56 N.C. App. 431.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 June 1982.

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

IN RE APPEAL OF BROWN

No. 205P82.

Case below: 56 N.C. App. 629.

Petition by petitioners for writ of certiorari to North Carolina Court of Appeals denied 2 June 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 June 1982.

IN RE ODOM

No. 178P82.

Case below: 56 N.C. App. 412.

Petition by F. L. Odom, Jr. for writ of certiorari to North Carolina Court of Appeals denied 2 June 1982.

PIE IN THE SKY v. BOARD OF ALCOHOLIC CONTROL

No. 107P82.

Case below: 55 N.C. App. 655.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 June 1982. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 2 June 1982.

ROBINSON v. ROBINSON

No. 185P82.

Case below: 56 N.C. App. 258.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 June 1982.

STATE v. BAILEY

No. 250PA82.

Case below: 56 N.C. App. 642.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 12 May 1982.

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

STATE v. BROWN

No. 208P82.

Case below: 56 N.C. App. 323.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 June 1982.

STATE v. CARTER

No. 179P82.

Case below: 56 N.C. App. 435.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1982.

STATE v. COPELAND

No. 267P82.

Case below: 56 N.C. App. 467.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 2 June 1982.

STATE v. ELAM

No. 218P82.

Case below: 56 N.C. App. 590.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1982.

STATE v. HALL

No. 360P82.

Case below: 57 N.C. App. 544.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1982.

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

STATE v. HARRIS

No. 221P82.

Case below: 47 N.C. App. 121.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 2 June 1982.

STATE v. HUDSON

No. 189P82.

Case below: 56 N.C. App. 172.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1982.

STATE v. JONES

No. 214P82.

Case below: 56 N.C. App. 259.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 June 1982.

STATE v. MELVIN

No. 241P82.

Case below: 53 N.C. App. 421.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 2 June 1982.

STATE v. MORROW

No. 393P82.

Case below: 57 N.C. App. 709.

Notice of appeal by defendant dismissed and petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1982.

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

STATE v. NEELEY

No. 259PA82.

Case below: 57 N.C. App. 211.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 2 June 1982.

STATE v. PINNIX

No. 201P82.

Case below: 56 N.C. App. 643.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 2 June 1982.

STATE v. POPLIN

No. 215P82.

Case below: 56 N.C. App. 304.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 June 1982.

STATE v. RIDDLE

No. 264P82.

Case below: 56 N.C. App. 701.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 May 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 May 1982.

STATE v. ROBERTSON

No. 293P82.

Case below: 57 N.C. App. 294.

Notice of appeal by defendant dismissed and petition by defendant for discretionary review under G.S. 7A-31 denied 28 May 1982.

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

STATE v. SMITH

No. 352P82.

Case below: 57 N.C. App. 372.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 July 1982.

STATE v. WILLIAMS

No. 345P82.

Case below: 57 N.C. App. 372.

Petition by defendant for discretionary review under G.S. 7A-31 denied 22 June 1982.

APPENDIXES

ADVISORY OPINION

AMENDMENT TO NORTH CAROLINA
RULES OF APPELLATE PROCEDURE

AMENDMENT TO NORTH CAROLINA
SUPREME COURT LIBRARY RULES

APPENDIX

ADVISORY OPINION IN RE SEPARATION OF POWERS

1. **Constitutional Law § 5— budget item transfers—joint legislative committee—separation of powers**

G.S. 153-23(b), which purports to give the Joint Legislative Committee on Governmental Operations power to control major line item budget transfers proposed to be made by the Governor as Administrator of the Budget, exceeds the power given to the legislative branch by Art. II, § 1 of the N.C. Constitution, constitutes an encroachment upon the responsibility imposed on the Governor by Art. III, § 5(3) to administer the budget, and violates the principle of separation of governmental powers declared by Art. I, § 6.

2. **Constitutional Law §§ 5, 7— federal block grants—joint legislative committee—delegation of legislative power—separation of powers**

If the General Assembly has the authority to determine whether the State or its agencies will accept federal block grants and how accepted funds will be spent, statutes purporting to vest such powers in a joint legislative committee when the General Assembly is not in session, G.S. 120-84.1 through G.S. 120-84.5, constitute an unlawful delegation of legislative power, violate the separation of powers provision of Art. I, § 6 of the N.C. Constitution, and encroach upon the power of the Governor under Art. III, § 5(3) to administer the budget.

21 January 1982

Hon. Joseph Branch
Chief Justice
Hon. J. Frank Huskins
Hon. J. William Copeland
Hon. James G. Exum, Jr.
Hon. David M. Britt
Hon. J. Phil Carlton
Hon. Louis B. Meyer
Associate Justices
Of the Supreme Court of North Carolina
Raleigh, North Carolina 27611

My dear Sirs:

Especially in the light of your recent decision in *State ex rel. Wallace v. Bone*, 304 N.C. 591, 286 S.E. 2d 79 (1982), questions of great public importance have arisen in connection with the mandate of our Constitution that the powers of the three branches of State government "shall be forever separate and distinct from each other." In accordance with established practice, we are writing to request your advisory opinion on these questions.

Advisory Opinion In re Separation of Powers

The questions involve the constitutionality of two statutes enacted by the General Assembly, on October 10, 1981, as parts of Chapter 1127 of the 1981 Session Laws. One of the statutes relates to State budget transfers, and the other relates to Federal block grant funds. Outlined below are the provisions of those statutes, the pertinent provisions of our State Constitution, and the questions on which we seek your opinion.

A. The Statutes Involved

(a) State Budget Transfers

Since its enactment in 1929, G.S. 143-23 has provided as follows:

"All appropriations now or hereafter made for the maintenance of the various departments, institutions and other spending agencies of the State, are for the purposes and/or objects enumerated in the itemized requirements of such departments, institutions and other spending agencies submitted to the General Assembly by the Director of the Budget and the Advisory Budget Commission, and/or as amended by the General Assembly. Transfers or changes as between objects and items in the budget of any department, institution or other spending agency, may be made at the request in writing of the head of such department, institution or other spending agency by the Director of the Budget."

Consistent with Section 5(3) of Article III of the N.C. Constitution, the Governor is ex officio Director of the Budget. G.S. 143-2.

By Section 82 of Chapter 1127 of the 1981 Session Laws, the General Assembly enacted the following amendment to the statute quoted above:

"G.S. 143-23 is amended by designating the present language as subsection (a) and by adding a new subsection (b) to read:

'(b) Notwithstanding subsection (a), no requested transfer or change from a program line item may be made if the total amount transferred from that line item during the fiscal year would be more than ten percent

(10%) of the amount appropriated for that program line item for that fiscal year, unless the Joint Legislative Commission on Governmental Operations has given its prior approval for that transfer. This restriction applies to all State departments with a total General Fund appropriation of at least fifty million dollars ($50,000,000). All other departments shall apply the ten percent (10%) limitation to the summary by object line items. No transfers or changes, regardless of amount, from salary funds may be made without the prior approval of the Joint Legislative Commission on Governmental Operations. The Commission must take action within 40 days of receiving a request for approval from the Office of State Budget and Management. Transfers or changes within the Medicaid program are exempt from this subsection.' "

The Joint Legislative Commission on Governmental Operations was established by Chapter 490 of the 1975 Session Laws to provide for "the continuing review of operations of State government," and it is comprised of the President of the Senate, the Speaker of the House, and twelve other members of the General Assembly. G.S. 120-71 through 120-79.

Thus, the new G.S. 143-23(b), as enacted by Section 82 of Chapter 1127 of the 1981 Session Laws, purports to give to a fourteen-member commission of legislators power over budget transfers (of the specified magnitude) proposed to be made by the Governor in his role as Director of the Budget.

(b) Federal Block Grant Funds

In 1978, the General Assembly enacted G.S. 143-16.1 which provides as follows:

"All federal funds shall be expended and reported in accordance with provisions of the Executive Budget Act. Proposed budgets recommended to the General Assembly by the Governor and Advisory Budget Commission shall include all appropriate information concerning the federal expenditures in State agencies, departments and institutions."

Advisory Opinion In re Separation of Powers

Subsequent to enactment of Chapter 859, Sessions Laws of 1981, the fiscal 1981-83 current operations budget, Congress passed and President Reagan signed into law, on August 13, 1981, P.L. 97-35, the Omnibus Budget Reconciliation Act of 1981, making major changes in the organization of federal programs and making large sums of money available to the state in the form of block grants.

Then, on October 10, 1981, in an attempt to exercise its perceived budgetary duties for the remainder of the biennium while not in Session, the General Assembly enacted, as Section 62 of Chapter 1127 of the 1981 Session Laws, the following special provision:

> "Notwithstanding G.S. 143-16.1, all federal block grant funds received by the State between August 31, 1981, and July 1, 1983, shall be received by the General Assembly. This section is effective October 1, 1981."

By Section 63 of Chapter 1127 of the 1981 Session Laws, the General Assembly added Sections 120-80 through 120-84 to the General Statutes. These new statutes establish a Joint Legislative Committee to Review Federal Block Grant Funds (G.S. 120-80), which is comprised of twelve members of the General Assembly (G.S. 120-81), has organizational rules prescribed by statute (G.S. 120-82), and is empowered to review all aspects of the acceptance and use of federal block grant funds and to make recommendations to the General Assembly for legislation relating to federal block grant funds (G.S. 120-83). The most significant of these new statutes is G.S. 120-84, which provides as follows:

> "(a) After federal block grant funds have been accepted by the General Assembly, the Director of the Budget shall propose administration and use of those funds. All proposals shall be submitted to the Committee, or to the General Assembly if it is in session, for its prior approval.
>
> "(b) None of the following actions with regard to State use of federal block grant funds may be taken without the prior approval of the Committee or of the General Assembly if it is in session:

(1) acceptance of federal block grants,

(2) determination of pro rata reduction procedures and amounts for State programs,

(3) determination of distribution formulas,

(4) transfer of funds between block grants,

(5) intradepartmental transfer of block grant funds,

(6) encumbrance of anticipated block grant funds,

(7) adoption of departmental rules relating to federal block grant funds,

(8) contracting between State departments involving block grant funds, and

(9) any other final action affecting acceptance or use of federal block grant funds.

The Committee shall take action within 40 days of receiving a request for approval from the Office of State Budget and Management."

Thus, the new G.S. 120-84, as enacted by Section 63 of Chapter 1127 of the 1981 Session Laws, purports to give to a twelve-member committee of legislators (when the General Assembly is not in session) power over action proposed to be taken by the Governor with respect to the administration and use of Federal block grant funds.

B. The Pertinent Constitutional Provisions

Section 6 of Article I of the N.C. Constitution provides as follows:

"The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other."

Consistent with this mandated separation of powers, the Constitution provides, in Section 1 of Article II, that

"The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives."

and, in Section I of Article III, that

"The executive power of the State shall be vested in the Governor."

Additionally, the Constitution provides, in Section 5(3) of Article III, that

"The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor."

C. The Questions Presented

The questions on which we request your advisory opinion are as follows:

1. Is G.S. 143-23(b), as enacted by Section 82 of Chapter 1127 of the 1981 Session Laws, consistent with, or contrary to, in whole or in part, the pertinent provisions of the N.C. Constitution?

2. Is G.S. 120-84, as enacted by Section 63 of Chapter 1127 of the 1981 Session Laws, consistent with, or contrary to, in whole or in part, the pertinent provisions of the N.C. Constitution?

The Attorney General has advised the Governor of his opinion that these two statutes are probably unconstitutional. (A copy of his Memorandum of Law is attached.) However, the Attorney General has informed the Governor that there is no North Carolina precedent on these precise points and, therefore, has advised that this request be made for your advisory opinion.

Your opinion on these important constitutional questions will be greatly appreciated.

Sincerely,
James B. Hunt, Jr.
James C. Green
Liston B. Ramsey

Enclosure

Advisory Opinion In re Separation of Powers

16 February 1982

Hon. James B. Hunt, Jr.
Governor of North Carolina
Hon. James C. Green
Lieutenant Governor of North Carolina
and President of the Senate
Hon. Liston B. Ramsey
Speaker of the North Carolina House
of Representatives

Your communication of 21 January 1982 presents the following questions:

1. Is G.S. 143-23(b), as enacted by Section 82 of Chapter 1127 of the 1981 Session Laws, consistent with, or contrary to, in whole or in part, the pertinent provisions of the N.C. Constitution?

2. Is G.S. 120-84, as enacted by Section 63 of Chapter 1127 of the 1981 Session Laws, consistent with, or contrary to, in whole or in part, the pertinent provisions of the N.C. Constitution?

In answering these questions we will review briefly the pertinent provisions of the Constitution. We will then discuss each of the statutes in question in light of the constitutional provisions.

I.

The first section of our Constitution pertinent to our inquiry is Section 6 of Article I which provides:

> *Separation of powers.* The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

This section is commonly referred to as the "separation of powers" provision of our Constitution. In the recent cases of *State of North Carolina ex rel. Wallace et al. v. Bone et al.* and *Barkalow et al. v. Harrington et al.* (joint opinion filed 12 January 1982) we discussed the history and meaning of the separation of powers doctrine. For the sake of brevity we will not restate all that we said in that opinion. It suffices to say that the principle of

separation of powers was clearly in the minds of the framers of our Constitution; and that the people of North Carolina, by specifically including a separation of powers provision in the original Constitution adopted in 1776, and readopting the provision in 1868 and 1970, are firmly and explicitly committed to the principle.

After declaring the principle of separation of powers in Article I, our Constitution then provides in Article II, Section 1, that "the legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." Article III, Section 1, provides that "the executive power of the State shall be vested in the Governor." Article IV, Section 1, vests all judicial power in the judicial branch of our government. It is clear that the framers of our Constitution followed the instructions given to them that our government "shall be divided into three branches distinct from each other, viz:

> The power of making laws
> The power of executing laws and
> The power of Judging."[1]

Section 5 of Article III specifies certain constitutional duties of the Governor. Among these duties is that specified by Section 5(3) which provides in pertinent part as follows:

> *Budget.* The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. *The budget as enacted by the General Assembly shall be administered by the Governor.* (Emphasis added.)

In *Wallace et al. v. Bone et al., supra,* after reviewing the history of the separation of powers provisions of our State Constitution, and after reviewing decisions from numerous sister states, we concluded that Section 6 of Chapter 1158 of the 1979 Session Laws which provided for the appointment of two members of the House of Representatives and two members of the Senate to the Environmental Management Commission

1. *The Colonial Records of North Carolina,* Saunders, Vol. X, 870a, 870b.

violated Section 6 of Article I of the Constitution. This is so because "the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government which is to make laws."

II.

We now consider the question presented with respect to Section 82 of Chapter 1127 of the 1981 Session Laws [G.S. 143-23(b)].

Since its enactment in 1929, G.S. 143-23 has provided:

> All appropriations now or hereafter made for the maintenance of the various departments, institutions and other spending agencies of the State, are for the purposes and/or objects enumerated in the itemized requirements of such departments, institutions and other spending agencies submitted to the General Assembly by the Director of the Budget and the Advisory Budget Commission, and/or as amended by the General Assembly. Transfers or changes as between objects and items in the budget of any department, institution or other spending agency, may be made at the request in writing of the head of such department, institution or other spending agency by the Director of the Budget.

By Section 82 of Chapter 1127 of the 1981 Session Laws, the General Assembly enacted the following amendment to the statute quoted above:

> G.S. 143-23 is amended by designating the present language as subsection (a) and by adding a new subsection (b) to read:
>
> (b) Notwithstanding subsection (a), no requested transfer or change from a program line item may be made if the total amount transferred from that line item during the fiscal year would be more than ten percent (10%) of the amount appropriated for that program line item for that fiscal year, unless the Joint Legislative Commission on Governmental Operations has given its prior approval for that transfer. This restriction applies to all State departments with a total General Fund appropriation of at least fifty million dollars ($50,000,000). All other departments shall apply the ten percent (10%) limitation to the summary by object line items. No

transfers or changes, regardless of amount, from salary funds may be made without the prior approval of the Joint Legislative Commission on Governmental Operations. The Commission must take action within 40 days of receiving a request for approval from the Office of State Budget and Management. Transfers or changes within the Medicaid program are exempt from this subsection.

Consistent with Section 5(3) of Article III of the Constitution, which provides that the Governor *shall administer* the budget, G.S. 143-2 designates the Governor as *ex officio* Director of the Budget.

The Joint Legislative Commission on Governmental Operations was established by Chapter 490 of the 1975 Session Laws to provide, among other things, for "the continuing review of operations of State government", and it is composed of the President of the Senate, the Speaker of the House of Representatives and twelve other members of the House and Senate. G.S. 120-71 through 120-79.

Obviously, the intended effect of G.S. 143-23(b), above quoted, is to give to a 13-member commission composed of 12 members of the House and Senate, and the President of the Senate who is usually the Lieutenant Governor, power to control major budget transfers proposed to be made by the Governor in his constitutional role as administrator of the budget.

Our Constitution mandates a three-step process with respect to the State's budget. (1) Article III, Section 5(3) directs that the "Governor shall prepare and recommend to the General Assembly a comprehensive budget . . . for the ensuing fiscal period." (2) Article II vests in the General Assembly the power to enact a budget [one recommended by the Governor or one of its own making]. (3) After the General Assembly *enacts* a budget, Article III, Section 5(3) then provides that the Governor shall administer the budget "as enacted by the General Assembly."

In our opinion the power that G.S. 143-23(b) purports to vest in certain members of the legislative branch of our government exceeds that given to the legislative branch by Article II of the Constitution. The statute also constitutes an encroachment upon the duty and responsibility imposed upon the Governor by Article

III, Section 5(3), and, thereby violates the principle of separation of governmental powers.

III.

We next consider the question presented with respect to Section 63 of Chapter 1127 of the 1981 Session Laws [codified as G.S. 120-84].

The 1978 General Assembly enacted G.S. 143-16.1 which provides:

> All federal funds shall be expanded and reported in accordance with provisions of the Executive Budget Act. Proposed budgets recommended to the General Assembly by the Governor and Advisory Budget Commission shall include all appropriate information concerning the federal expenditures in State agencies, departments and institutions.

After the enactment of the current operations budget for fiscal 1981-83 by the 1981 General Assembly, Congress passed, and the President signed into law on 13 August 1981, P.L. 97-35, the Omnibus Budget Reconciliation Act of 1981, which made major changes in the organization of federal programs and made large sums of money available to the states in the form of block grants.

On 10 October 1981 the General Assembly enacted as Section 62 of Chapter 1127 of the 1981 Session Laws the following special provisions:

> Notwithstanding G.S. 143-16.1, all federal block grant funds received by the State between August 31, 1981, and July 1, 1983, shall be received by the General Assembly. This section is effective October 1, 1981.

By Section 63 of Chapter 1127 of the 1981 Session Laws, the General Assembly added Sections 120-84.1 through 120-84.5 to the General Statutes. These new statutes establish a Joint Legislative Committee to Review Federal Block Grant Funds (G.S. 120-84.1). This Committee is composed of six members of the House of Representatives and six members of the Senate (G.S. 120-84.2), has organizational rules prescribed by statute (G.S. 120-84.3), and is empowered to review all aspects of the acceptance and use of federal block grant funds and to make recommen-

dations to the General Assembly for legislation relating to federal block grant funds (G.S. 120-84.4). The most significant of these new statutes is G.S. 120-84.5, which provides as follows:

> (a) After federal block grant funds have been accepted by the General Assembly, the Director of the Budget shall propose administration and use of those funds. All proposals shall be submitted to the Committee, or to the General Assembly if it is in session, for its prior approval.
>
> (b) None of the following actions with regard to State use of federal block grant funds may be taken without the prior approval of the Committee or of the General Assembly if it is in session:
>
> (1) acceptance of federal block grants,
>
> (2) determination of pro rata reduction procedures and amounts for State programs,
>
> (3) determination of distribution formulas,
>
> (4) transfer of funds between block grants,
>
> (5) intradepartmental transfer of block grant funds,
>
> (6) encumbrance of anticipated block grant funds,
>
> (7) adoption of departmental rules relating to federal block grant funds,
>
> (8) contracting between State departments involving block grant funds, and
>
> (9) any other final action affecting acceptance or use of federal block grant funds.
>
> The Committee shall take action within 40 days of receiving a request for approval from the Office of State Budget and Management.

Thus, the new G.S. 120-84, as enacted by Section 63 of Chapter 1127 of the 1980 Session Laws, purports to give to a 12-member committee of legislators (when the General Assembly is not in session) power over action proposed to be taken by the Governor with respect to the administration and use of federal block grant funds.

Advisory Opinion In re Separation of Powers

While we are not asked for an opinion on the validity of Section 62 of Chapter 1127 of the 1981 Session Laws quoted above, we question the validity of any statute which provides that funds accruing to the State or any of its agencies "shall be received by the General Assembly." Although the Constitution gives the General Assembly broad power to raise revenue and make appropriations, we find nothing in the Constitution that authorizes the legislative branch actually to *receive* funds. Article V, Section 7, provides:

> No money shall be drawn from the State Treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually.

The inquiry presented relates to federal block grants under the Omnibus Reconciliation Act of 1981[2] and actually presents two questions: (1) Does the *General Assembly* have the authority to determine if the State or its agencies will accept the grants in question and, if accepted, the authority to determine how the funds will be spent? (2) May the General Assembly delegate to a legislative committee the power to determine if the grants will be accepted, and, if accepted, how they will be spent?

We decline to answer question (1) just posed. The briefs and materials submitted to us contain very little, if any, information about the grants, their purposes, for whom they are intended, and the conditions placed on them by Congress. Our independent research discloses that the Omnibus Budget Reconciliation Act of 1981 contains 575 pages and that its numerous sections refer to other federal enactments that are amended by it. The legislature neither being in session nor purporting presently to act, we do not perceive any exigent need to address this part of the inquiry and to engage now in the lengthy research that would be necessary to answer it. If our opinion on this question is deemed urgently needed, we will consider a further request, provided it is accompanied by in-depth information and briefs with respect to the grants being considered.

2. G.S. 120-84.1 provides that "for purposes of this Act, 'block grant' means a block grant under the Omnibus Budget Reconciliation Act of 1981."

With regard to part (2) of the inquiry, *if* the General Assembly has the authority to determine whether the State or its agencies will accept the grants in question, and, if accepted, the authority to determine how the funds will be spent, it is our considered opinion that the General Assembly may not delegate to a legislative committee the power to make those decisions.

In several of the instances set forth in G.S. 120-84.5 the committee would be exercising legislative functions. In those instances there would be an unlawful delegation of legislative power. In the other instances the committee would be exercising authority that is executive or administrative in character. In those instances there would be a violation of the separation of powers provisions of the Constitution and an encroachment upon the constitutional power of the Governor. As stated above, our Constitution vests in the General Assembly the power to *enact* a budget—to appropriate funds—, but after that is done, Article III, Section 5(3) explicitly provides that "the Governor shall administer the budget as enacted by the General Assembly."

IV.

In sum, it is the opinion of the undersigned Chief Justice and Associate Justices:

1. That Section 82 of Chapter 1127 of the 1981 Session Laws [codified as Section 143-23(b) in the 1981 Cumulative Supplement to Volume 3C of the General Statutes] violates Section 6 of Article I and Section 5(3) of Article III of our State Constitution; and

2. That those parts of Section 63 of Chapter 1127 of the 1981 Session Laws [codified as Sections 120-84.1 through 120-84.5 in the 1981 Supplement to the 1981 Replacement Volume 3B of the General Statutes] which purport to vest a legislative committee with certain powers over federal block grants when the General Assembly is not in session constitute an unconstitutional delega-

tion of legislative power, and also violate Section 6 of Article I and Section 5(3) of Article III of our State Constitution.

Respectfully,

Joseph Branch
Chief Justice

J. William Copeland
Associate Justice

J. G. Exum, Jr.
Associate Justice

David M. Britt
Associate Justice

J. Phil Carlton
Associate Justice

Louis B. Meyer
Associate Justice

Burley B. Mitchell, Jr.
Associate Justice

AMENDMENT TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 4 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, 685, is hereby amended by the addition of a new subdivision to be designated "(d)" and to read as follows:

> (d) *To Which Appellate Court Addressed.* An appeal of right from a judgment of a superior court by any person who has been sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other criminal cases such appeals shall be filed in the Court of Appeals.

Adopted by the Court in Conference this 13th day of July, 1982, to become effective upon adoption. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

MITCHELL, J.
For the Court

AMENDMENT TO NORTH CAROLINA SUPREME COURT LIBRARY RULES

Pursuant to Section 7A-13(d) of the General Statutes of North Carolina, the following amendment to the Supreme Court Library Rules as promulgated December 20, 1967 (275 N.C. 729), and amended November 28, 1972 (281 N.C. 772), April 14, 1975 (286 N.C. 731), and July 24, 1980 (299 N.C. 745), has been approved by the Library Committee and hereby is promulgated:

Section 1. Rule 5 is amended to read as follows:

Use After Hours.—Only members and employees of the Supreme Court and the Court of Appeals may enter the Library or use the material or facilities of the Library when the Library is not open for public use.

Section 2. This amendment shall become effective September 1, 1982.

This the 19th day of July, 1982.

Frances H. Hall
Librarian

APPROVED:

James G. Exum, Jr.
Chairman, For the Library Committee

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

The standard of judicial review of an order of the Utilities Commission in a rate case increasing a power company's accumulated depreciation account as an offset to an adjustment by the power company to depreciation expense was whether the order was affected by error of law, and the standard of review of the decision fixing the power company's rate of return on common equity was whether the decision was arbitrary or capricious or unsupported by competent, material and substantial evidence in view of the entire record. *Utilities Commission v. Duke Power Co.*, 1.

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court and Matters Necessary to Determination of Appeal

Pursuant to App. R. 16(a), where defendant presented the statute of limitations question to the Court of Appeals, it was also entitled to present that question to the Supreme Court upon plaintiff's appeal. *Tyson v. N.C.N.B.*, 136.

§ 6.1. Form of Decision as Affecting Appealability

The denial of a motion to strike an order vacating a default judgment is interlocutory, does not affect a substantial right within the meaning of G.S. 1-277 and is not immediately appealable. *Love v. Moore*, 575.

Unlike an adverse ruling on a motion to dismiss for lack of personal jurisdiction, adverse rulings on challenges to the sufficiency of the service and the sufficiency of the process are not immediately appealable. *Ibid.*

§ 6.2. Premature Appeals

Defendant power company did not have a substantial right to have its claim against third party defendants for contribution determined in the same proceeding in which its liability to plaintiffs is determined and thus had no right of immediate appeal from the entry of summary judgments in favor of third party defendants. *Green v. Duke Power Co.*, 603.

§ 7. Parties Who May Appeal

Guilford County did not have the right to appeal from an order entered by the district court in a juvenile delinquency proceeding requiring county agencies to establish a group or foster home for the juvenile and others like him. *In re Wharton*, 565.

§ 24.1. Form of Exceptions and Assignments of Error

Where the trial judge made a total of eleven findings of fact, and the only exception to the findings appeared after the tenth finding and attempted to object to all of the "above findings," under Appellate Rule 10(b)(2), defendant's single exception constituted a "broadside exception" and was ineffectual. *Dealers Specialties, Inc. v. Housing Services*, 633.

§ 40. Necessary Parts of Record Proper

Where the Court of Appeals granted a petition for a writ of certiorari, the order was not included in the Record on Appeal and both the Record and Court of Appeals decision indicated the case was before the Court of Appeals by virtue of a notice of appeal only, the writ of certiorari must be treated as if it had never been issued. *Love v. Moore*, 575.

APPEAL AND ERROR — Continued

§ 62.2. Granting of Partial New Trial

The trial court could properly set aside the jury's verdict on the issue of damages and grant a partial new trial on the issue of damages only without altering the verdict as to liability. *Housing, Inc. v. Weaver*, 428.

ARSON

§ 1. Nature and Elements of the Offense

The common law arson requirement that the dwelling burned be that of "another" is satisfied by a showing that some other person or persons, together with defendant, were joint occupants of the same dwelling unit. *S. v. Shaw*, 327.

§ 4.1. Cases Where Evidence Was Sufficient

Evidence that the wallpaper in a dwelling has been burned substantiates the charring element of arson. *S. v. Oxendine*, 126.

The evidence in an arson case was sufficient for the jury to find that defendant actually burned or charred the structure of an inhabited dwelling. *Ibid.*

§ 5. Instructions

The trial court in an arson case was not required to instruct the jury upon the lesser included offense of attempted arson. *S. v. Oxendine*, 126; *S. v. Shaw*, 327.

The trial court in an arson case was not required ex mero motu to instruct the jury that the mere scorching or discoloration of a portion of a building is not arson or that the burning of personal property within the dwelling is not arson. *S. v. Oxendine*, 126.

ASSAULT AND BATTERY

§ 8. Defense of Self

The model jury instruction as worded entitling those of the feminine gender to an instruction to the jury on self-defense from sexual assault should be modified wherever necessary to allow a male defendant to present such a defense to the jury. *S. v. Hunter*, 106.

§ 14.3. Sufficiency of Evidence of Assault with Deadly Weapon with Intent to Kill or Inflicting Serious Bodily Injury

The evidence was sufficient to support defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious injury on the theory that defendant aided and abetted the trigger man who actually shot the victim. *S. v. Hall*, 77.

§ 15.1. Instructions on Assault with Deadly Weapon

Where, in a homicide case, an attempted sexual assault was not a separate substantial feature of a case, but was merely one aspect of an assault with a deadly weapon, the judge was not required to instruct the jury on it. *S. v. Hunter*, 106.

§ 16.1. Submission of Lesser Offenses Not Required

The trial court correctly refused to instruct the jury on the lesser included offense of assault with a deadly weapon inflicting serious injury. *S. v. Hall*, 77.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

A written statement of a State's witness who was charged with the same murder as defendant was not discoverable by defendant under provisions of G.S. 15A-903(b)(2) requiring the disclosure of statements of a codefendant where the witness was not a codefendant being jointly tried with defendant. *S. v. Lake*, 143.

BURGLARY AND UNLAWFUL BREAKINGS

§ 1. Definitions

A storage room from which defendant stole a motorcycle was "appurtenant" to the victim's main dwelling and was thus a part of the victim's "dwelling house" within the purview of the first degree burglary statute. *S. v. Green*, 463.

§ 5.11. Sufficiency of Evidence of Breaking or Entering and Rape

The evidence in a first degree burglary case was insufficient to permit the jury to infer that defendant broke into the victim's house with the intent to commit the felony of rape therein as charged in the indictment. *S. v. Dawkins*, 289.

§ 6.3. Instructions on Felony Attempted or Committed During Burglary

Defendant was not denied his constitutional right to a unanimous verdict in a first degree burglary trial by the court's instruction that defendant must have intended "to commit rape and/or first degree sexual offense" at the time of the breaking and entering. *S. v. Jordan*, 274.

COLLEGES AND UNIVERSITIES

§ 2. Government and Control of Private Institutions

The Board of Governors of the University of North Carolina is not authorized by G.S. 116-15 to regulate through a licensing procedure teaching in North Carolina by Nova University. *Nova University v. The Board of Governors*, 156.

COMPROMISE AND SETTLEMENT

§ 6. Admissibility of Evidence

The trial court erred in failing to allow defendant wife to prove that a consent order was an integral part of a property settlement by introducing a letter written by plaintiff's attorney to defendant's attorney, prior to entry of the consent order, offering a settlement. *Rowe v. Rowe*, 177.

CONSTITUTIONAL LAW

§ 13. Police Power; Safety, Sanitation and Health

A county ordinance which promoted aesthetic values only did not violate Article I, § 19 of the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution. *S. v. Jones*, 520.

§ 30. Discovery

The trial court did not abuse its discretion in denying defendant's motion for a mistrial for the district attorney's failure to disclose the pretrial identification procedure during discovery. *S. v. Dukes*, 387.

CONSTITUTIONAL LAW — Continued

§ 31. Affording the Accused the Basic Essentials for Defense

The constitutional and statutory rights of an indigent defendant charged with armed robbery were not violated by the court's denial of his pretrial motion for funds to hire an investigator to locate and interview witnesses. *S. v. Poole*, 308.

The trial court did not err in denying defendant's motion that the court order the State to provide funds to hire a statistician to assist defendant in his challenge to the array of the grand jury and the composition of the petit jury. *S. v. Williams*, 656.

§ 32. Right to Fair and Public Trial

Where a witness for the State acts as a custodian or officer in charge of the jury in a criminal case, prejudice is conclusively presumed. *S. v. Mettrick*, 383.

§ 45. Right to Appear Pro Se

Trial court properly denied defendant's motion to allow him to participate as co-counsel in his trial and in a voir dire hearing. *S. v. Williams*, 656.

§ 46. Removal or Withdrawal of Appointed Counsel

The trial court in an armed robbery case adequately inquired into the reasons for defendant's dissatisfaction with his court-appointed attorney and properly concluded that no conflict existed between defendant and his attorney which would render the attorney's representation ineffective. *S. v. Poole*, 308.

§ 48. Effective Assistance of Counsel

The denial of defendant's motion for continuance violated his Sixth Amendment right to the effective assistance of counsel because his trial attorney did not have a reasonable time to prepare and present a defense. *S. v. Maher*, 544.

The evidence supported the trial court's determination that defendant's plea of guilty to armed robbery was knowingly and understandingly made and was not the product of ineffective assistance of counsel. *S. v. Stevens*, 712.

§ 58. Number of Jurors; Unanimous Verdict

Defendant was not denied his constitutional right to a unanimous verdict in a first degree burglary trial by the court's instruction that defendant must have intended "to commit rape and/or first degree sexual offense" at the time of the breaking and entering. *S. v. Jordan*, 274.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

Defendant was not denied his constitutional rights to due process or to trial by jury by the excusal for cause of three veniremen because of their responses to "death qualification" questions. *S. v. Williams*, 656.

§ 74. Self-Incrimination; Generally

An officer's testimony that, during in-custody interrogation, defendant stated that he didn't rob or kill anybody and wanted to talk to a lawyer and that there was no more questioning after defendant's request for a lawyer did not violate defendant's right to remain silent and his right to counsel. *S. v. Williams*, 656.

CONTEMPT OF COURT

§ 3.2. Acts Not Constituting Civil Contempt

The director of the Guilford County Department of Social Services could not be held in contempt for failure to comply with an invalid order requiring the establishment of a foster home. *In re Wharton*, 565.

CONTRACTS

§ 3. Definiteness and Certainty of Agreement

The trial court properly concluded that a letter from defendant to plaintiff relating to joint development and construction of low-income housing units was a mere agreement to agree and not an enforceable contract and that a threatened breach of its terms would not constitute economic duress. *Housing, Inc. v. Weaver*, 428.

§ 12.1. Construction of Unambiguous Agreements

Where the court found, in an action for the cost of materials, that the parties had agreed "plaintiff would be protected (1) by the defendant's issuing only a two-party check to the third-party defendant, payable to the third-party defendant and the plaintiff, *and* (2) that the third-party defendant would be required to present lien waivers from all subcontractors and material suppliers before making his final draw from the defendant," the portion of the finding following the conjunction "and" was in addition to and independent of the requirement for a joint check. *Dealers Specialties, Inc. v. Housing Services*, 633.

COUNTIES

§ 5.1. Validity of Zoning Ordinances

A county ordinance which promoted aesthetic values only did not violate Article I, § 19 of the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution. *S. v. Jones*, 520.

A zoning ordinance regulating junkyards was not unconstitutionally vague. *Ibid.*

CRIMINAL LAW

§ 7.5. Compulsion

Defendant was not entitled to an instruction on duress in a prosecution for first degree murder. *S. v. Brock*, 532.

§ 14. Jurisdiction; Commission of the Offense within the State

The State could constitutionally assert jurisdiction over a defendant who committed the crime of accessory before the fact to a murder committed in this State when the procuring of another to commit the murder took place in Virginia. *S. v. Darroch*, 196.

The question of whether the theory relied on by the State supported jurisdiction was a matter of law for the court. *Ibid.*

§ 23.3. Requirement that Plea be Voluntary and Made with Understanding

The evidence supported the trial court's determination that defendant's plea of guilty to armed robbery was knowingly and understandingly made and was not the product of ineffective assistance of counsel. *S. v. Stevens*, 712.

§ 26.5. Double Jeopardy; Same Offense; Particular Cases Where Same Acts or Transaction Violate Different Statutes

Double jeopardy considerations do not prohibit punishment of the same person for the offenses of larceny and possession of the property which was the subject of the larceny. *S. v. Perry*, 225.

CRIMINAL LAW — Continued

§ 34.4. Admissibility of Evidence of Other Offenses

The trial court did not err in admitting evidence of other offenses which variously tended to prove defendant's motive, intent and design in committing a murder. *S. v. Hunt*, 238.

§ 34.5. Admissibility of Evidence of Other Offenses to Show Identity of Defendant

In a prosecution for kidnapping, first-degree sexual offense and attempted first-degree rape, the trial court did not err in allowing evidence of a separate offense of attempted rape where the principal issue in the case was the identity of the defendant as the perpetrator of the crimes charged. *S. v. Leggett*, 213.

§ 42.4. Identification of Object and Connection with Crime; Weapons

There was no error in the admission of a pocketknife and a .25 caliber pistol since both items were properly and positively identified by witnesses at trial. *S. v. Hunt*, 238.

§ 46.1. Competency of Evidence of Defendant's Flight

The trial court did not err in admitting evidence of defendant's flight. *S. v. Mash*, 285.

§ 48. Silence of Defendant as Implied Admission; Silence Competent

Defendant waived objection to two comments by the prosecutor in his jury argument concerning defendant's post-arrest silence by failing to object thereto at the trial, and another comment by the prosecutor about defendant's failure to deny his guilt when confronted by his girlfriend at the time of his arrest, to which defendant did object, was not so prejudicial as to deny defendant a fair trial. *S. v. Brock*, 532.

An officer's testimony that, during in-custody interrogation, defendant stated that he didn't rob or kill anybody and wanted to talk to a lawyer and that there was no more questioning after defendant's request for a lawyer did not violate defendant's right to remain silent and his right to counsel. *S. v. Williams*, 656.

§ 53.1. Medical Expert Testimony as to Cause and Circumstances of Death

The trial court did not err in allowing a doctor to render an opinion about suicides committed by slashing wrists. *S. v. Hunt*, 238.

A doctor did not state an opinion upon the "ultimate" issue concerning the commission of a homicide or a suicide. *Ibid.*

§ 62. Lie Detector Tests

Defendant was not prejudiced by an SBI agent's reference on one occasion to an officer as a "polygraphist." *S. v. Williams*, 656.

§ 66.1. Identification of Defendant; Competency of Witness; Opportunity for Observation

The evidence did not support a finding by the trial court that a witness "was unable to recognize the face of the individual to the point of making an identification of the face," and the cause must be remanded where the trial court's order suppressing the witness's identification testimony was based upon such finding. *S. v. Turner*, 356.

The evidence showed that a witness had a reasonable possibility of observation of the defendant sufficient to permit his in-court identification testimony. *Ibid.*

CRIMINAL LAW — Continued

§ 66.5. Right to Counsel at Lineup

There was no error in the trial court allowing testimony concerning the victim's identification of defendant during a pretrial lineup. *S. v. Leggett*, 213.

§ 66.8. Identification of Defendant; Taking of Photographs

The trial court did not err in allowing testimony and other evidence concerning a photographic identification of the defendant by the victim. *S. v. Leggett*, 213.

§ 66.10. Confrontation, Other than Formal Lineup, at Police Station or Jail

Where defendant failed to object to evidence of the victims' pretrial identification of the defendant, did not request a voir dire hearing, and allowed evidence of the victims' identification of the defendant as the perpetrator to be admitted into evidence without objection during the trial, the defendant could not maintain before an appellate court that his rights were prejudiced at trial. *S. v. Black*, 614.

§ 66.11. Identification of Defendant; Confrontation at Scene of Crime or Arrest

Evidence of a witness's pretrial identification of defendant at a one-man showup was sufficiently reliable to be admissible despite any suggestiveness of the procedure, although the witness's observation of defendant was brief and made under poor lighting conditions. *S. v. Turner*, 356.

§ 68. Other Evidence of Identity

An expert on hair identification and comparison was properly permitted to testify that a pubic hair found on the body of a rape victim had the same microscopic characteristics as pubic hair taken from defendant. *S. v. Green*, 463.

An expert in odontology and bite mark identification was properly permitted to state his opinion that a bite mark on a rape victim's arm was made by defendant based on his comparison of a photograph of the bite mark and impressions which he made of defendant's teeth. *Ibid.*

§ 73.2. Statements Not Within Hearsay Rule

In a prosecution for first degree sexual offense, the hearsay rule did not require the exclusion of cross-examination of the prosecutrix about an incident in which a man purportedly made a sexual advance toward her in a neighborhood store, but the exclusion of such testimony was not prejudicial in this case. *S. v. Edwards*, 378.

§ 75. Admissibility of Confession in General; Tests of Voluntariness

In a prosecution for first degree murder, there was ample competent evidence to support the trial judge's findings of fact and conclusion that defendant's statement to police was freely, understandingly and voluntarily made. *S. v. Hunter*, 106.

§ 75.1. Admissibility of Confession; Delay in Arraignment

As there was no causal relationship demonstrated between delay in taking defendant before a judicial officer and defendant's confession, the delay did not render the confession inadmissible into evidence. *S. v. Hunter*, 106.

§ 75.7. Requirement that Defendant Be Warned of Constitutional Rights; When Warning Is Required; What Constitutes Custodial Interrogation

In a prosecution for first degree murder, Miranda's commandment that questioning cease when a suspect indicates he intends to exercise his Fifth Amendment privilege did not apply where defendant was not taken into custody or otherwise deprived of his freedom of action in any significant way until after he had confessed to the murder in question. *S. v. Davis*, 400.

CRIMINAL LAW — Continued

§ 75.10. Waiver of Constitutional Rights Generally

The evidence supported a determination by the trial court that defendant knowingly waived his constitutional rights at an in-custody interrogation and voluntarily made a subsequent statement to law officers. *S. v. Oxendine*, 126.

§ 76.5. Voir Dire Hearing; Findings of Fact Generally

A finding that defendant understood his rights when he waived them was sufficient to support a legal conclusion that defendant knowingly and intelligently executed those waivers, and an express factual finding as to the extent and level of defendant's education or intelligence was not required. *S. v. Fox*, 280.

§ 76.10. Review of Trial Court's Determination

When there is an objection to the admission of a confession or a motion to suppress a confession, counsel must specifically state to the court before voir dire evidence is received the basis for his motion to suppress or for his objection to the admission of the evidence. *S. v. Hunter*, 106.

The appellate court will not entertain a theory of attack upon the admissibility of defendant's confession which is different from that specifically advanced by defense counsel at trial. *S. v. Oxendine*, 126.

Where defendant failed to include in the record on appeal the substance of the testimony presented to and heard by the trial judge at a suppression hearing, the Supreme Court must presume that the trial court's factual findings concerning defendant's confessions were supported by competent evidence. *S. v. Fox*, 280.

§ 80. Books, Records and Other Writings

The trial court properly admitted into evidence the diary of the deceased victim in a murder case. *S. v. Davis*, 400.

§ 80.1. Books, Records and Other Writings; Foundation; Authentication

Trial court did not commit prejudicial error in failing to suppress the victim's identification of a letter as one she received from an unknown person a year prior to the offenses charged when the court later ruled that the letter itself was inadmissible because it had not been connected to defendant. *S. v. Jordan*, 274.

§ 82.2. Physician-Patient Privilege

The statutorily created physician-patient privilege is limited to those authorized to practice medicine or surgery and does not apply to optometrists. *S. v. Shaw*, 327.

§ 84. Evidence Obtained by Unlawful Means

Evidence of a juvenile's fingerprints which were taken pursuant to an order based on information obtained independently of an earlier unlawful fingerprinting was properly admissible and not tainted under the "fruit of the poisonous tree" doctrine. *In re Stedman*, 92.

§ 86.2. Impeachment of Defendant; Prior Convictions

The trial judge did not abuse his discretion by permitting the district attorney to cross-examine defendant about prior convictions. *S. v. Calloway*, 747.

§ 87.1. Leading Questions

The trial judge did not abuse its discretion in allowing the prosecutor to attempt to clarify one of the State's witness's answers. *S. v. Black*, 614.

CRIMINAL LAW — Continued

§ 89.3. Corroboration of Witnesses; Generally; Consistent Statements

A nurse properly corroborated testimony that the prosecutrix told her she had been raped although the prosecutrix did not testify that she had talked to the nurse. *S. v. Green*, 463.

§ 89.7. Impeachment of Witnesses; Mental Capacity of Witness

A trial judge does not have the discretionary power to compel an unwilling witness to submit to a psychiatric examination. *S. v. Clontz*, 116.

§ 91.4. Continuance to Obtain New Counsel

Trial court did not err in the denial of a continuance to a defendant who was represented by court-appointed counsel so that defendant could obtain counsel of his own choosing where the court properly concluded that defendant was in no financial position to employ counsel. *S. v. Poole*, 308.

The denial of defendant's motion for continuance violated his Sixth Amendment right to the effective assistance of counsel because his trial attorney did not have a reasonable time to prepare and present a defense. *S. v. Maher*, 544.

§ 92.5. Severance

The trial court did not abuse its discretion in the denial of defendant's motion for severance from a joint murder trial with a codefendant although the testimony of defendant and the codefendant was conflicting upon material facts and their defenses were antagonistic. *S. v. Lake*, 143.

§ 93. Order of Proof

Trial court did not abuse its discretion in refusing to permit defendant to depart from the order of proof and introduce evidence during cross-examination of the State's witnesses. *S. v. Jordan*, 274.

§ 98.2. Sequestration of Witnesses

The trial judge did not abuse his discretion in denying defendant's written motions requesting individual sequestration of the jurors during voir dire and sequestration of the jury and the State's witnesses during the trial. *S. v. Smith*, 691.

§ 101.4. Custody of Jury

Where a witness for the State acts as a custodian or officer in charge of the jury in a criminal case, prejudice is conclusively presumed. *S. v. Mettrick*, 383.

§ 102.3. Argument of District Attorney; Objection to and Cure of Impropriety

Any error in the district attorney's improper jury argument which attempted to discredit two defense witnesses by asserting facts which were not included in the evidence was rendered harmless by the court's curative instructions. *S. v. Lake*, 143.

§ 102.6. Particular Conduct and Comments in Argument to Jury

There was no error or impropriety in a district attorney's argument concerning the credibility of the State's chief witness. *S. v. Hunt*, 238.

§ 102.7. Defense Counsel's Comment on Character and Credibility of Witnesses

Where the defense counsel in his argument to the jury attacked the credibility of the law enforcement officers testifying, the prosecutor was justified in responding. *S. v. Davis*, 400.

CRIMINAL LAW — Continued

§ 102.8. District Attorney's Comment on Defendant's Failure to Testify

The prosecutor's jury argument that defendant had not produced any alibi witnesses did not constitute an impermissible comment on defendant's failure to testify. *S. v. Jordan*, 274.

The prosecutor's arguments concerning lack of cross-examination or rebuttal evidence to contradict the State's case did not constitute an improper comment upon defendant's failure to testify, and any impropriety in the prosecutor's argument that the jury had not heard by cross-examination or direct evidence on behalf of defendant that "he was not there" was cured by the court's instructions. *S. v. Williams*, 656.

§ 102.10. District Attorney's Comment on Defendant's Credibility; Reference to Prior Criminal Conduct

In a murder case in which defendant testified that he denied his guilt when confronted by his girlfriend at the time of his arrest and the State presented rebuttal evidence that defendant made no such denial, the prosecutor could not argue defendant's silence as substantive evidence of defendant's guilt but was entitled to comment on this contradictory evidence in his final argument as a ground for disbelief of defendant's story. *S. v. Brock*, 532.

§ 111.1. Particular Miscellaneous Instructions

The trial court did not violate statutes prohibiting reading the indictment to the jury when it drew information from the bills of indictment to the extent necessary to identify the defendant and explain the charges against him. *S. v. Leggett*, 213.

The trial court did not err in failing to give defendant's tendered instruction concerning a rape victim's observation and identification of defendant. *S. v. Green*, 463.

§ 114.2. Charge to Jury; No Expression of Opinion in Statement of Evidence or Contentions

The trial court accurately stated defendant's contentions and fairly stressed the contentions of the State and defendant in his final instructions to the jury. *S. v. Smith*, 691.

A statement in the course of the court's instructions to the jury that there was no evidence of "any just cause or legal provocation to kill" in the case was neither erroneous nor prejudicial. *Ibid.*

§ 114.3. No Expression of Opinion in Instructions

The trial judge did not express an opinion when he referred to "the taker, that is, the defendant" while defining armed robbery. *S. v. Poole*, 308.

§ 115. Instructions on Lesser Degrees of Crime

A crime of "less degree" under G.S. 15-170 is not exclusively one which carries a less severe punishment than the crime formally charged in the indictment. *S. v. Young*, 391.

§ 117.3. Charge on Credibility of State's Witnesses

Two accomplices who testified for the State under a plea bargain agreement were not granted immunity so as to require the trial court to inform the jury of their immunity pursuant to G.S. 15A-1052. *S. v. Williams*, 656.

CRIMINAL LAW — Continued

§ 122.1. Jury's Request for Additional Instructions

When the jury returned to the courtroom during its deliberations and requested that the court define first degree murder, second degree murder and voluntary manslaughter, it was not necessary for the court to include a discussion of premeditation, deliberation, heat of passion and excessive force in responding to the request. *S. v. Howard*, 651.

§ 126. Unanimity of Verdict

Defendant's right to an unanimous verdict was not denied because a portion of the jurors could have found defendant guilty of robbery related to money in the victim's pocket and another portion could have found him guilty of the robbery related to the property of the service station where the victim worked. *S. v. Hall*, 77.

Defendant was not denied his constitutional right to a unanimous verdict in a first degree burglary trial by the court's instruction that defendant must have intended "to commit rape and/or first degree sexual offense" at the time of the breaking and entering. *S. v. Jordan*, 274.

§ 128.2. Particular Grounds for Mistrial

The trial court in a first degree murder case did not err in the denial of defendant's motion for mistrial made on the ground that a defense witness was questioned on the night before trial by two police detectives at the police department. *S. v. Lake*, 143.

There was nothing in the dialogue between a juror and the district attorney when he was trying to "death qualify" the prospective juror which would require the trial judge to declare a mistrial on his own motion. *S. v. Calloway*, 747.

§ 134.2. Procedure for Imposition of Sentence; Presence of Defendant

G.S. 15A-1334(b) did not require the trial court specifically to inquire if the defendant wished to speak prior to sentencing. *S. v. Poole*, 308.

§ 135.3. Exclusion of Veniremen Opposed to Death Penalty

Statutory requirement that the same jury hear both the guilt and penalty phases of a first degree murder trial is constitutional. *S. v. Williams*, 656.

§ 135.4. Judgment and Sentence in Cases Under G.S. 15A-2000

The procedure set out in G.S. 15A-2000(a)(2) for death qualifying a jury prior to the guilt phase of a trial and requiring the same jury to hear both the guilt phase of the trial and the penalty phase of the trial is constitutional. *S. v. Davis*, 400.

The principle of double jeopardy did not prohibit the trial court from submitting each of two killings as an aggravating circumstance for the other under the "course of conduct" provision of G.S. 15A-2000(e)(11). *S. v. Williams*, 656.

Evidence regarding the lack of any deterrent effect of the death penalty, the rehabilitative nature of people who have committed serious crimes, and the manner of execution in North Carolina was irrelevant and properly excluded in a sentencing hearing. *Ibid.*

The "course of conduct" aggravating circumstance of G.S. 15A-2000(e)(11) is not unconstitutionally vague or indefinite. *Ibid.*

Evidence of a plea bargain and sentencing agreement between the State and two of defendant's accomplices was properly excluded from the jury's consideration as a specific mitigating circumstance in a first degree murder sentencing hearing. *Ibid.*

CRIMINAL LAW — Continued

Evidence that defendant drank some alcohol on the evening of a robbery-murder did not require the court to submit to the jury the impaired capacity mitigating circumstance. *Ibid.*

Trial court in a first degree murder prosecution properly placed the burden on defendant to prove the mitigating circumstances by a preponderance of the evidence. *Ibid.*

Trial court properly instructed that it would be the duty of the jury to recommend the death penalty if the jury found beyond a reasonable doubt that the submitted aggravating circumstance existed, that it was substantially sufficient to call for the death penalty, and that it outweighed any mitigating circumstances found. *Ibid.*

The trial court did not err in failing to give a peremptory instruction about the defendant's impairment under G.S. 15A-2000(f)(6). *S. v. Smith*, 691.

The trial judge correctly informed the jury that it had a duty to recommend the sentence of death if it made the three findings necessary to support such a sentence under G.S. 15A-2000(c). *Ibid.*

The trial court properly failed to instruct the jury that the court would impose a life sentence if the jury could not unanimously agree on a recommendation of punishment. *Ibid.*

The trial judge has no authority to set aside the jury's recommendation of death upon its own motion after the jury has made the necessary findings to support imposition of the death penalty. *Ibid.*

§ 148.1. Judgments Appealable; Judgments and Orders Before or During Trial

Defendant had no right to an immediate appeal from the trial court's order denying his pretrial motion to suppress identification testimony. *S. v. Turner*, 356.

§ 149. Right of State to Appeal

In order for the State to appeal a pretrial order allowing a motion to suppress evidence, the prosecutor's certificate stating that the appeal is not taken for the purpose of delay and that the evidence is essential to the case is timely filed if it is filed prior to the certification of the record on appeal to the appellate division. *S. v. Turner*, 356.

§ 165. Exceptions and Assignments of Error to Argument of District Attorney

The general rule that objection to the prosecutor's jury argument must be made prior to the verdict for the alleged impropriety to be reversible on appeal applies in a first degree murder case in which defendant received a sentence of life imprisonment. *S. v. Brock*, 532.

DIVORCE AND ALIMONY

§ 17.3. Amount of Alimony Upon Divorce from Bed and Board

In an action concerning the amount of alimony to be awarded, the trial court's findings of fact were inadequate to support its conclusion under G.S. 1A-1, Rule 52(a). To the extent that Eudy v. Eudy, 288 N.C. 71 (1975) indicates that Rule 52(a) does not apply to actions involving the amount of alimony, it is overruled. *Quick v. Quick*, 446.

§ 19. Modification of Alimony Decree Generally

In an action in which plaintiff filed a motion seeking modification of a consent order so as to terminate or reduce his alimony obligation, the trial court erred in

DIVORCE AND ALIMONY — Continued

failing to allow defendant to introduce evidence of negotiations between the parties in an effort to show that the consent order and property settlement were reciprocal agreements. *Rowe v. Rowe*, 177.

§ 19.4. Modification of Alimony Decree; Sufficiency of Showing Changed Circumstances

Evidence that defendant changed her financial holdings from a passive investment to an investment actually producing income was sufficient to warrant modification of an alimony decree. *Rowe v. Rowe*, 177.

§ 19.5. Modification of Alimony Order; Effect of Separation Agreements and Consent Decrees

Generally, public policy requires that a consent order be modifiable in spite of a proviso that G.S. 50-16.9, dealing with modification of alimony orders, would not apply; however, an exception exists where support payments are not alimony within the meaning of the statute and the payments and other provisions for a property division between the parties constitute reciprocal consideration for each other. *Rowe v. Rowe*, 177.

The trial court erred in failing to allow defendant wife to prove that a consent order was an integral part of a property settlement by introducing a letter written by plaintiff's attorney to defendant's attorney, prior to entry of the consent order, offering a settlement. *Ibid.*

§ 20.3. Alimony; Attorney's Fees and Costs

Where defendant was clearly able to defray the expenses of litigation concerning modification of an alimony award, defendant was correctly denied an award of attorney fees. *Rowe v. Rowe*, 177.

§ 25.9. Modification of Custody Order; Evidence of Changed Circumstances Sufficient

The trial court's findings supported its conclusion that there had been a substantial change in circumstances so as to justify a change of custody of a nine-year-old boy from his mother to his father. *In re Peal*, 640.

DURESS

§ 1. Generally

The trial court properly concluded that a letter from defendant to plaintiff relating to joint development and construction of low-income housing units was a mere agreement to agree and not an enforceable contract and that a threatened breach of its terms would not constitute economic duress. *Housing, Inc. v. Weaver*, 428.

EASEMENTS

§ 8.4. Access Easements

Summary judgment was properly entered for defendants in an action to recover damages for the decline in market value of plaintiff's lot allegedly caused by defendants' construction of a driveway over an access easement shared by the parties as tenants in common. *Lowe v. Bradford*, 366.

ELECTRICITY

§ 3. Rates

The Utilities Commission had authority to reduce a power company's rate base by increasing its accumulated depreciation account as an offset to a pro forma adjustment by the power company to depreciation expense. *Utilities Commission v. Duke Power Co.*, 1.

The Utilities Commission may reject the uncontradicted testimony of a power company's expert witnesses as to the fair rate of return on the company's common equity, and it is not required as a matter of law to state in its order its reasons for rejecting such testimony. *Ibid.*

The Utilities Commission's determination that 14.1% was a fair rate of return on common equity for a power company was supported by the evidence. *Ibid.*

EVIDENCE

§ 32. Parol or Extrinsic Evidence Affecting Writings

In an action in which plaintiff filed a motion seeking modification of a consent order so as to terminate or reduce his alimony obligation, the trial court erred in failing to allow defendant to introduce evidence of negotiations between the parties in an effort to show that the consent order and property settlement were reciprocal agreements. *Rowe v. Rowe*, 177.

EXECUTORS AND ADMINISTRATORS

§ 39. Actions against Personal Representative in General

Where plaintiff alleged that defendant breached certain fiduciary duties as executor of her husband's estate and as trustee of two testamentary trusts by failing to exercise reasonable care in marshaling the assets of the estate, plaintiff's action was essentially grounded in contract and was subject to the three year limitation of G.S. 1-52(1). *Tyson v. N.C.N.B.*, 136.

GRAND JURY

§ 3. Challenge to Composition of Grand Jury

Trial court properly denied defendant's motion to dismiss the indictment and to strike the venire of petit jurors on the ground that the grand and petit venires were discriminatorily selected and failed to represent a cross-section of the community. *S. v. Williams*, 656.

HOMICIDE

§ 17.2. Evidence of Threats

Where defense counsel sought to impeach a State's witness by cross-examining him concerning the witness's shooting of defendant, the door was opened for the witness to testify as to the reason for his actions so as to restore his credibility, and testimony by the witness of prior maltreatment by defendant of his wife, the victim, was competent. *S. v. Calloway*, 747.

§ 20.1. Real and Demonstrative Evidence, Photographs

The trial court properly admitted a series of eleven photographs which depicted the victim's wound in a prosecution for first degree murder. *S. v. Calloway*, 747.

HOMICIDE — Continued

§ 24.1. Instructions on Presumptions Arising from Use of Deadly Weapon

The trial court's instructions concerning presumptions arising from the use of a deadly weapon did not deny the defendant the right to a trial by jury. *S. v. Davis*, 400.

The trial court's instructions in a first degree murder case did not create impermissible presumptions of malice and unlawfulness in light of the absence of any evidence to rebut the existence of malice and unlawfulness. *S. v. Brock*, 532.

§ 25. Instructions on First Degree Murder Generally

The trial court's instructions did not permit the jury to return a verdict of guilty of first degree murder based on premeditation and deliberation without an express finding that defendant's acts were a proximate cause of deceased's death. *S. v. Brock*, 532.

§ 25.2. First Degree Murder, Premeditation and Deliberation

A statement in the course of the court's instructions to the jury that there was no evidence of "any just cause or legal provocation to kill" in the case was neither erroneous nor prejudicial. *S. v. Smith*, 691.

The trial court properly denied defendant's motion to dismiss where there was plenary and substantial evidence which would permit the jury to draw reasonable inferences that defendant acted with premeditation and deliberation when he shot and killed his wife. *S. v. Calloway*, 747.

§ 30.1. Submission of Guilt of Second Degree Murder Where Homicide Committed in Perpetration of Felony

The trial court properly failed to instruct on the offense of felony murder in the second degree as this jurisdiction does not recognize such an offense. *S. v. Davis*, 400.

HUSBAND AND WIFE

§ 14. Estate by Entireties in General; Creation of Estate

In all cases to which the Equitable Distribution of Marital Property Act, G.S. 50-20, is not applicable, the rule shall be that, where a spouse furnishing the consideration causes property to be conveyed to the other spouse, a presumption of gift arises. *Mims v. Mims*, 41.

It was error to grant summary judgment for defendant wife where plaintiff presented evidence indicating that he might, at trial, be able to (1) rebut the presumption that he made a gift to defendant of an entirety interest in real property, and (2) make out a prima facie case for a resulting trust in his favor. *Ibid.*

Where both husband and wife understood that a deed to property would be made to both parties as husband and wife both before and at the time of closing, and the only mistake supported by the evidence was husband's erroneous understanding of N.C. law governing deeds, the court could not reform the deed on the ground of mutual mistake. *Ibid.*

INDICTMENT AND WARRANT

§ 5. Validity of Proceedings Before Grand Jury as Affected by Irregularities in Endorsement and Return of Bill of Indictment

Trial court properly denied defendant's motion to quash the bill of indictment because a witness who appeared before the grand jury was indicated with a checkmark and not with an "X." *S. v. Dukes*, 387.

INFANTS

§ 11. Jurisdiction under Juvenile Court Statutes

For purposes of determining jurisdiction, the age of the juvenile at the time of the alleged offenses governs, and once the district court obtains jurisdiction over a juvenile, that jurisdiction continues until terminated by order of the court or until the juvenile reaches his eighteenth birthday. *In re Stedman*, 92.

§ 18. Juvenile Delinquency Hearing; Admissibility and Sufficiency of Evidence

Where a juvenile was charged with kidnapping, armed robbery, first degree rape and felonious assault, two nontestimonial identification orders issued pursuant to G.S. 15A-502(c) and G.S. 7A-596 were in all respects lawful and valid. *In re Stedman*, 92.

Evidence of a juvenile's fingerprints which were taken pursuant to an order based on information obtained independently of an earlier unlawful fingerprinting was properly admissible and not tainted under the "fruit of the poisonous tree" doctrine. *Ibid.*

§ 20. Juvenile Delinquent; Judgments and Orders; Dispositional Alternatives

The district court had no authority to order agencies of Guilford County to establish a foster home with appropriate staff wherein a juvenile found incapable of standing trial and others like him might be permanently domiciled for program treatment. *In re Wharton*, 565.

§ 21. Juvenile Delinquent; Appellate Review

Guilford County did not have the right to appeal from an order entered by the district court in a juvenile delinquency proceeding requiring county agencies to establish a group or foster home for the juvenile and others like him. *In re Wharton*, 565.

INSURANCE

§ 3.1. Nature and Elements of Policy; Validity as Affected by Statute Concerning Insurance

A provision in a marine insurance policy providing that the insured must commence its suit against the insurance company "within the twelve months next following the date of the physical loss or damage out of which such claim arose," conflicts with the provision of G.S. § 58-31 which provides a suit or action may be commenced within one year after the cause of action accrues. *F & D Company v. Aetna Insurance Co.*, 256.

JUDGES

§ 5. Disqualification of Judges

The trial court in an armed robbery case did not err in refusing to recuse itself upon motion of the defendant or in failing to have the motion to recuse considered by another judge. *S. v. Poole*, 308.

JURY

§ 5.2. Discrimination and Exclusion

Trial court properly denied defendant's motion to dismiss the indictment and to strike the venire of petit jurors on the ground that the grand and petit venires were discriminatorily selected and failed to represent a cross-section of the community. *S. v. Williams*, 656.

JURY — Continued

§ 6. Voir Dire Examination; Practice and Procedure

The trial judge did not abuse his discretion in denying defendant's written motions requesting individual sequestration of the jurors during voir dire and sequestration of the jury and the State's witnesses during the trial. *S. v. Smith*, 691.

§ 6.4. Voir Dire Examination; Questions as to Belief in Capital Punishment

There was nothing in the dialogue between a juror and the district attorney when he was trying to "death qualify" the prospective juror which would require the trial judge to declare a mistrial on his own motion. *S. v. Calloway*, 747.

§ 7.11. Challenges for Cause; Scruples Against, or Belief In, Capital Punishment

Trial court's remark to defense counsel during the voir dire examination of prospective jurors that "if you want to try to rehabilitate a juror, you're going to do it" did not place the burden of "death disqualification" on the defense. *S. v. Williams*, 656.

Statutory requirement that the same jury hear both the guilt and penalty phases of a first degree murder trial is constitutional. *Ibid.*

§ 7.12. What Constitutes Disqualifying Scruples or Beliefs in Capital Punishment

Defendant was not denied his constitutional rights to due process or to trial by jury by the excusal for cause of three veniremen because of their responses to "death qualification" questions. *S. v. Williams*, 656.

KIDNAPPING

§ 1. Definitions; Elements of Offense

An indictment which failed to specify that the kidnapping with which defendant was charged was without the victim's consent was not fatally defective. *S. v. Hall*, 77.

§ 1.2. Sufficiency of Evidence

There was not a fatal variance between indictment and proof where the defendant was charged in the indictment with asportation of the victim to facilitate the commission of the felony of armed robbery and where the evidence tended to show the kidnapping was also for the purpose of facilitating flight. *S. v. Hall*, 77.

LARCENY

§ 1. Definition; Elements of the Crime Generally

While a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses. *S. v. Perry*, 225.

§ 4. Warrant and Indictment

A defendant charged with common law robbery may be convicted of the "lesser included" offense of larceny from the person. *S. v. Young*, 391.

§ 7.1. Sufficiency of Evidence; Proof of Intent

The State's evidence was sufficient to support a jury finding that defendant took a motorcycle in order to provide a means of escape after committing a rape and that he intended to keep the motorcycle permanently. *S. v. Green*, 463.

LARCENY — Continued

§ 7.2. Sufficiency of Evidence; Identity of Property Stolen

Allegation and proof that a stolen motorcycle was in a named person's custody and possession was sufficient to support a charge of larceny of the motorcycle. *S. v. Green*, 463.

§ 9. Verdict

Absent a finding by the jury that the property stolen exceeded the amount set forth in G.S. 14-72(a), it is improper for the trial judge to accept a verdict of guilty of felonious larceny where the jury has failed to find defendant guilty of the felonious breaking or entering pursuant to which the larceny occurred. *S. v. Perry*, 225.

LIMITATION OF ACTIONS

§ 4.3. Accrual of Cause of Action for Breach of Contract in General

Where plaintiff alleged that defendant breached certain fiduciary duties as executor of her husband's estate and as trustee of two testamentary trusts by failing to exercise reasonable care in marshaling the assets of the estate, plaintiff's action was essentially grounded in contract and was subject to the three-year limitation of G.S. 1-52(1). *Tyson v. N.C.N.B.*, 136.

MASTER AND SERVANT

§ 69.1. Workers' Compensation; Meaning of Incapacity and Disability

Application of the 1978 version of G.S. 97-29 to plaintiff's claim for permanent total disability was not an unconstitutional retroactive application of substantive law where plaintiff did not become totally disabled until 1978. *Smith v. American & Efird Mills*, 507.

§ 75. Workers' Compensation; Medical and Hospital Expenses

Under G.S. 97-59 as it existed in 1970, plaintiff was entitled to an award of medical expenses beginning on 1 January 1970 when his partial disability began and extending so long as the treatment provided "needed relief," and the Industrial Commission erred in limiting the award of medical expenses to the 300 weeks during which partial disability was paid. *Smith v. American & Efird Mills*, 507.

§ 94.1. Findings of Commission; Specific Instances Where Findings Are Incomplete

In a workers' compensation action, the Industrial Commission failed to make specific findings of fact as to the crucial questions necessary to support a conclusion as to whether plaintiff had suffered any disability. *Hilliard v. Apex Cabinet Co.*, 593.

§ 108.1. Unemployment Compensation; Effect of Misconduct

In an action concerning unemployment compensation benefits, the evidence was sufficient to permit the Commission to find that claimant's unexcused absence because she "just couldn't find child care" was for good cause and did not constitute "misconduct." *Intercraft Industries Corp. v. Morrison*, 373.

MUNICIPAL CORPORATIONS

§ 4.4. Powers in the Area of Public Utilities and Services

A town could properly increase water and sewer charges to pay for a new waste water treatment plant prior to the time the plant began operation. *Town of Spring Hope v. Bissette*, 248.

§ 30.3. Validity of Zoning Ordinances Generally

A zoning ordinance regulating junkyards was not unconstitutionally vague. *S. v. Jones*, 520.

NEGLIGENCE

§ 51. Attractive Nuisances and Injury to Children

The owner and occupant of land were not liable under the attractive nuisance doctrine for injuries received by the five-year-old plaintiff when she touched an exposed electrified portion of a ground level transformer owned and maintained by a power company on their land. *Green v. Duke Power Co.*, 603.

PHYSICIANS AND SURGEONS

§ 11.1. Malpractice Generally; Duty and Liability of Physician

The trial court erred in instructing the jury in a malpractice case to consider the remoteness of the risks of paralysis resulting from arteriogram procedures and to determine whether relating such a risk was required under the standard of medical practice in the professions of neurology and neuroradiology. *McPherson v. Ellis*, 266.

§ 17.1. Malpractice; Sufficiency of Evidence of Failure to Inform Patient of Risks or Side Effects of Treatment

The trial court erred in instructing the jury that it could find that the responsibility of informing the plaintiff of the risks of an arteriogram was solely that of one doctor. *McPherson v. Ellis*, 266.

The trial court in an informed consent case properly instructed the jury that it should consider what the patient's decision would have been had she been properly informed of the risks of paralysis in arteriogram procedures. *Ibid.*

QUASI CONTRACTS AND RESTITUTION

§ 1.2. Unjust Enrichment

In an action in which plaintiff alleged his wife, defendant, was unjustly enriched by improvements he made upon defendant's home at the time the parties were married, the trial court correctly submitted the following issue to the jury: "Did the defendant agree with the plaintiff to share in the ownership of the real property?" *Wright v. Wright*, 345.

RAPE AND ALLIED OFFENSES

§ 3. Indictment

An indictment was sufficient to charge the crime of first degree sexual offense although it did not specify which "sexual act" was committed. *S. v. Edwards*, 378.

RAPE AND ALLIED OFFENSES — Continued

§ 4. Relevancy and Competency of Evidence

An expert on hair identification and comparison was properly permitted to testify that a pubic hair found on the body of a rape victim had the same microscopic characteristics as pubic hair taken from defendant. *S. v. Green*, 463.

An expert in odontology and bite mark identification was properly permitted to state his opinion that a bite mark on a rape victim's arm was made by defendant based on his comparison of a photograph of the bite mark and impressions which he made of defendant's teeth. *Ibid.*

§ 4.1. Evidence of Improper Acts, Solicitations and Threats

In a prosecution for first degree sexual offense, the hearsay rule did not require the exclusion of cross-examination of the prosecutrix about an incident in which a man purportedly made a sexual advance toward her in a neighborhood store, but the exclusion of such testimony was not prejudicial in this case. *S. v. Edwards*, 378.

§ 5. Sufficiency of Evidence

The evidence of a first degree sexual offense was insufficient to be submitted to the jury where the facts indicated that the prosecuting witness actively encouraged and ultimately induced defendant to commit the crime. *S. v. Booher*, 554.

§ 6.1. Lesser Degrees of the Crime

In a prosecution for first degree rape under the statute requiring infliction of serious personal injury upon the victim, the evidence would not permit a jury finding that the victim did not suffer serious personal injury so as to require the court to submit the lesser included offense of second degree rape. *S. v. Green*, 463.

RECEIVING STOLEN GOODS

§ 1. Generally; Nature and Elements of the Offense

While a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses. *S. v. Perry*, 225.

ROBBERY

§ 2. Indictment

Defendant's right to an unanimous verdict was not denied because a portion of the jurors could have found defendant guilty of robbery related to money in the victim's pocket and another portion could have found him guilty of the robbery related to the property of the service station where the victim worked. *S. v. Hall*, 77.

§ 4.2. Common Law Robbery; Evidence Sufficient

The evidence was sufficient to support defendant's conviction of common law robbery. *S. v. Smith*, 691.

§ 4.3. Armed Robbery; Evidence Sufficient

Testimony that a weapon used in a robbery appeared to be a .22 rifle and was a "Remington pellet rifle" was sufficient to support submission of robbery with a firearm or other dangerous weapon, but further testimony that the weapon was "a BB rifle" also required submission of common law robbery. *S. v. Alston*, 647.

RULES OF CIVIL PROCEDURE

§ 12. Defenses and Objections

Unlike an adverse ruling on a motion to dismiss for lack of personal jurisdiction, adverse rulings on challenges to the sufficiency of the service and the sufficiency of the process are not immediately appealable. *Love v. Moore*, 575.

§ 41. Dismissal of Actions

In a court case the trial judge has the power under Rule 41(b) to adjudicate the case on the merits at the conclusion of the plaintiff's evidence and is not obligated to consider plaintiff's evidence in a light most favorable to the plaintiff as he would do in a jury case. *Dealers Specialties, Inc. v. Housing Services*, 633.

§ 52.1. Findings by the Court Generally; Particular Cases

In an action concerning the amount of alimony to be awarded, the trial court's findings of fact were inadequate to support its conclusion under G.S. 1A-1, Rule 52(a). To the extent that Eudy v. Eudy, 288 N.C. 71 (1975) indicates that Rule 52(a) does not apply to actions involving the amount of alimony, it is overruled. *Quick v. Quick*, 446.

§ 56.4. Summary Judgment; Necessity for and Sufficiency of Supporting Material; Opposing Party

A party may not prevail against a motion for summary judgment through reliance on conclusory allegations unsupported by facts. *Lowe v. Bradford*, 366.

§ 59. New Trials; Amendment of Judgments

A trial court may alter or amend a judgment pursuant to Rule 59 and may enter judgment n.o.v. pursuant to Rule 50 after the adjournment of the term during which the judgment was entered. *Housing, Inc. v. Weaver*, 428.

A trial judge's discretionary order pursuant to G.S. 1A-1, Rule 59 for or against a new trial upon any ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown. *Worthington v. Bynum*, 478.

SEARCHES AND SEIZURES

§ 33. Items Which May Be Searched for and Seized; Plain View Rule

An officer lawfully seized a plastic bag containing MDA from an automobile passenger under the "plain view" doctrine after the officer instinctively grabbed defendant's hand when defendant thrust the hand down into the front of his pants and the officer could see the corner of the plastic bag sticking out of defendant's pants where his hand had been. *S. v. Peck*, 734.

STATE

§ 12. State Employees

An employee of the Employment Security Commission was a competitive service employee and thus was not required to have been continuously employed by the State for five years in order to avail herself of the grievance procedures established for State employees by G.S. Ch. 126. *Employment Security Commission v. Lachman*, 492.

The evidence showed that an employee of the Employment Security Commission was dismissed for both insubordination and job abandonment, and the State Personnel Commission erred in concluding that she was fired solely for job abandonment. *Ibid.*

WORD AND PHRASE INDEX

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